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Case before the International Criminal Court (ICC):

Prosecutor v. Agon Megor of Ibbin

**The Defence Counsel's Submission in the Appeal from the Pre-Trial
Chamber's Decision on Confirmation of Charges against
Defendant Agon Megor of Ibbin**

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LIST OF ABBREVIATIONS

a.o.	amongst others
aka	also known as
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
AP II / Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
cf.	<i>confer</i> (compare)
CLRv	Common Legal Representative of Victims
CUP	Cambridge University Press
diss.	dissenting
Doc.	Document
DRC	Democratic Republic of the Congo
ed.	editor
edn.	edition
eds.	editors
e.g.	<i>exempli gratia</i> (for example)
EoC	Elements of Crimes
et al.	<i>et alii/et aliae</i> (and others)
fn.	footnote
GC	Geneva Convention
IBA	International Bar Association
ibid.	<i>ibidem</i> (in the same place)

ICC / Court	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ Rep	International Court of Justice Reports
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
mn.	margin number
Mr	Mister
NATO	North Atlantic Treaty Organization
no.	number
OPCV	The Office of Public Counsels for Victims
OTP	Office of the Prosecutor
OUP	Oxford University Press
p.	page
pp.	pages
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
RPG	rocket-propelled grenade
RS / the Statute	Rome Statute of the International Criminal Court
SCSL	Special Court for Sierra Leone
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCRC	United Nations Convention on the Rights of the Child
UNTS	United Nations Treaty Series
v.	<i>versus</i> (against)

VCLT

Vienna Convention on the Law of Treaties

vol.

volume

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STATEMENT OF FACTS

A. Factual background

1. The case concerns the island-State Quarth with two million inhabitants and the Republic of Ibbin. While Quarth is not a party to the Statute, it entered into force for Ibbin on 1 August 2020. Both States are parties to the Geneva Conventions and their Additional Protocols as well as to the UNCLOS, the ICCPR and the UNCRC.
2. The Defendant Colonel Agon Megor (Megor) is an Ibbin national. He functions as Ibbin's National Security Advisor and head of the National Security Council.
3. For the past three years, Quarth has been attacked by the Tyvosh pirates. The pirates include 350 juveniles. They carried out powerful attacks, hijacking civilian vessels and killing and kidnapping Quarth citizens, which had fatal consequences for Quarth's trade, tourism industry and economy.
4. Quarth's Homeland Security Force has been reacting to the attacks since January 2019. It was 'no match' for the heavily armed pirates. Ibbin allegedly supplied sophisticated drones in July 2020, after Colonel Reena Valyeron (Valyeron) had requested Megor's help in combatting the national security threat the Tyvosh pirates posed. Quarth Homeland Security Force members (Security Force) deployed the drones in an isolated week of attacks against the pirates starting on 8 October 2020.
5. The nighttime-raids supposedly resulted in the deaths of nearly 1,000 people – all 700 pirates, including juveniles, and 300 civilians. Details about four alleged incidents in northern Quarth have been specified in an UN-Report.

B. Presented Evidence

6. The Prosecutor only presented two pieces of evidence. Firstly, a report of the UN High Commissioner for Human Rights (UN-Report), dated 14 November 2020, which describes the situation in Quarth, including the alleged October raids. Secondly, an article in the *Quarth News and Observer* by Rogor Costane (Costane), dated 13 October 2020. Costane reported an encounter he had with Valyeron, the commander of the Quarth Homeland Security Force, on 12 October 2020 in a Pub. Valyeron told Costane about a conversation between her and Megor in April 2020 concerning the Security Force's intention to combat the Tyvosh pirates. Valyeron resigned from Quarth's government in December 2020 and has not been seen since.

7. On 15 January 2021, another article was published in the *Quarth News and Observer* by the paper's Associate Editor, reporting about Costane's 13 October 2020 retraction of his article. Costane clarified that he cannot guarantee the article's accuracy since it was a misunderstanding and an exaggeration caused by alcohol consumption and a vivid imagination. Later, Costane purchased a Porsche paying in cash. However, allegations of bribery have to date not been confirmed in the newspaper's internal inquiry.

C. Proceedings before the PTC

8. On 16 January 2021, Ibbin declined to cooperate with the ICC.
9. On 1 February 2021, the Prosecutor requested confirmation of the charges against Megor for aiding, abetting or otherwise assisting the commission of war crimes in a non-international armed conflict and crimes against humanity in Quarth under Article 8(2)(e)(i) and (iv) RS, Article 7(1)(a), (b) and (k) RS, Article 12(2)(b) RS, and Article 25(3)(c) RS.
10. In February 2021, the Court's Registry appointed a Common Legal Representative of Victims (CLR.V) to represent the interests of the pirates', juvenile pirates' and civilians' families. On 28 February 2021, the CLR.V filed a motion for appointing a separate CLR.V.
11. On 15 September 2021, the PTC denied the Prosecution's motion to confirm the charges against Megor and the appointment of a separate CLR.V. Leave for appeal has been granted to the Prosecution and the matter is now pending before the Appeals Chamber.

ISSUES

-I-

Whether the Pre-Trial Chamber erred in denying the Prosecution's request for confirmation of charges pertaining to the Defendant, Agon Megor?

-II-

Whether the Pre-Trial Chamber erred in deciding that a single Victims' Representative was sufficient to represent families of killed adult pirates as well as the families of child pirates, hostages, and innocent bystanders who were also killed in the counter-piracy operations?

SUMMARY OF ARGUMENTS

-I-

The PTC Correctly Denied the Prosecution's Request for Confirmation of Charges pertaining to the Defendant.

- A. *Firstly*, the alleged acts neither amount to war crimes under Article 8(2)(e)(i) RS nor under Article 8(2)(e)(iv) RS. The alleged drone attacks were solely intentionally directed against the Tyvosh pirates, a legitimate military target in a non-international armed conflict. The attacked buildings were military objectives. Additionally, the alleged acts do not qualify as crimes against humanity under Article 7(1)(a), (b) or (k) RS. They were not committed as part of a widespread or systematic attack directed against a civilian population. In any case, murder under Article 7(1)(a) RS would be justified and the requirements of extermination under Article 7(1)(b) RS and 'other inhumane acts' under Article 7(1)(k) RS are not fulfilled.
- B. *Secondly*, the Defendant is not liable under Article 25(3)(c) RS as he neither acted with the purpose to facilitate nor with intent regarding the principal's crime.
- C. *Thirdly*, the case is not of sufficient gravity to be admissible under Article 17(1)(d) RS.
- D. *Fourthly*, the evidentiary threshold pursuant to Article 61(7) RS is not fulfilled as both, the newspaper article by Costane and the UN-Report, are of low probative value.
- E. *Fifthly*, the Court lacks temporal and personal jurisdiction under Articles 11(2) and 12(2)(b) RS as, at the time the Defendant allegedly delivered the drones, his national State Ibbin was not yet party to the Statute. Even if jurisdiction was established, the Court could not exercise it due to the principle of non-retroactivity.

-II-

The PTC Correctly Decided that a Single Victim's Representative is Sufficient.

A single CLRV is sufficient. The victims do not have conflicting interests and appointing several CLRVs would harm the trial's efficiency.

WRITTEN ARGUMENTS

I. THE PTC CORRECTLY DENIED THE PROSECUTION'S REQUEST FOR CONFIRMATION OF CHARGES PERTAINING TO THE DEFENDANT

[A] THE ALLEGED ACTS DO NOT CONSTITUTE WAR CRIMES OR CRIMES AGAINST HUMANITY UNDER ARTICLE 8 RS OR ARTICLE 7 RS

1. The alleged acts neither constitute war crimes under Article 8 RS [(i)] nor crimes against humanity under Article 7 RS [(ii)].

(i) The Alleged Acts Neither Constitute War Crimes under Article 8(2)(e)(i) RS Nor under Article 8(2)(e)(iv) RS

2. The alleged acts neither amount to war crimes under Article 8(2)(e)(i) RS nor under Article 8(2)(e)(iv) RS. As there was a non-international armed conflict, the pirates were legitimate targets [(a)]. The drone attacks are not criminal under Article 8(2)(e)(i) RS [(b)] or Article 8(2)(e)(iv) RS [(c)].

(a) The Pirates were Legitimate Targets as there was a Non-International Armed Conflict

3. Precondition for the attacks to constitute a war crime according to Article 8 RS is the existence of an international or non-international armed conflict. The situation between Quarth and the Tyvosh pirates amounts to a non-international armed conflict, in which the pirates were legitimate targets.

4. Pursuant to Article 8(2)(f) RS, a non-international armed conflict exists when protracted armed violence between governmental authorities and organised armed groups occurs within a State.¹ Accordingly, in distinction to situations of internal disturbances or tensions, an armed conflict requires a sufficient degree of organisation of the non-State parties to the conflict and armed violence of a certain intensity.² In a non-international armed conflict, members of an organised armed group are legitimate military targets.³

5. Firstly, the pirates constituted an organised armed group. Indicators for the organisational structure of a group are the extent to which military equipment is available, the group's ability to plan military operations and put them into effect, carrying arms openly, and the extent,

¹ Definition of a non-international armed conflict introduced in *Tadić* Interlocutory Appeal [70].

² *Ntaganda* Judgment [703]; *Bemba* Judgment [137]; *Katanga* Judgment [1186-1187]; *Lubanga* Judgment [534-538].

³ Article 8(2)(e)(i) RS; Geiß/Zimmermann in Ambos (2022) [935].

seriousness, and intensity of military involvement.⁴ However, the elements of responsible command and territorial control⁵ were rejected by the Statute's drafters⁶ and there is no foundation in international humanitarian law that a political intention is needed⁷. Therefore, the organisational element solely depends on a sufficient degree of organisation to be able to carry out protracted armed violence,⁸ assessed in a *de facto* approach to warfare⁹. While pirates may commonly be regarded as ordinary criminals¹⁰ and counter-piracy operations as 'anti-piracy law enforcement'¹¹, the organisational criterion has to be assessed on a case-by-case basis¹². Over three years, the pirates carried out powerful attacks, hijacking 17 Quarth-bound vessels, and killed and kidnapped Quarth citizens.¹³ Moreover, they forcibly recruited about 350 juveniles.¹⁴ The Security Force was 'no match' for the heavily armed pirates, who operated from land and sea and whose activities had fatal consequences on Quarth's trade, economy and tourism industry.¹⁵ Thus, as the pirates were *de facto* able to carry out protracted armed violence, their description as 'loosely organized' in the UN-Report is not detrimental¹⁶. Consequently, the pirates constituted an organised armed group.

6. Secondly, the armed violence exercised was sufficiently intense to meet the threshold of a non-international armed conflict. Relevant indicators for the intensity are the seriousness and frequency of the attacks, the type and number of armed forces and weapons deployed, as well as the effects on the civilian population, including the extent of destruction and the number of

⁴ *Ntaganda* Judgment [704]; *Bemba* Judgment [134]; *Katanga* Judgment [1185-1186]; *Lubanga* Judgment [536-537].

⁵ Elements set out in Article 1(1) AP II.

⁶ *Ntaganda* Judgment [717]; *Katanga* Judgment [1186]; *Lubanga* Judgment [536]; *Bemba* Charges [236].

⁷ *Limaj et al.* Judgement [170]; Obert (2014) 221; Vité (2009) 78.

⁸ *Katanga* Judgment [1186]; *Lubanga* Judgment [536].

⁹ Cf. Peterke (2012) 4-5.

¹⁰ Guilfoyle (2010) 142-143; Kontorovich (2009).

¹¹ Latest resolution UN Doc. S/RES/2500 (2019) Preamble. Accord Guilfoyle (2010) 142-147; Marauhn in Koutrakos/Skordas (2014) 68, 74; Obert (2014) 224 fn. 154; Olson in Koutrakos/Skordas (2014) 192; Sterio (2011) 295; Treves (2009) 412.

¹² *Rutaganda* Judgement [93]. Accord *Karadžić* Judgement [441]; *Limaj et al.* Judgement [90].

¹³ *UN-Report* [2].

¹⁴ *Ibid.*

¹⁵ *Ibid.* [2, 3].

¹⁶ *Ibid.* [2].

deaths.¹⁷ However, neither a massive loss of life nor a sustained military operation is required.¹⁸ The pirates were heavily armed with machine guns, mortars, RPGs, and shipboard missiles.¹⁹ Their hijackings and killings over a three-year period destroyed Quarth's tourism industry and disrupted its trade and economy.²⁰ Consequently, due to the combination of sustained attacks, the use of dangerous weapons and the harmful impact on Quarth, the intensity threshold is reached.

7. Overall, as the alleged acts were committed in the context of a non-international armed conflict, the pirates were legitimate targets.

(b) Article 8(2)(e)(i) RS is Not Applicable as the attacks were Not Intentionally Directed against an Illegitimate Object

8. Article 8(2)(e)(i) RS requires that the perpetrator directed an attack against a civilian population as such or individual civilians not taking direct part in hostilities, intending them to be the object of the attack.²¹ The pirates cannot be considered civilians [i.]. Yet, all attacks were solely intentionally directed against the pirates [ii.].

i. The Pirates were Legitimate Targets as they were No Civilians

9. While not defined in the Statute,²² the Court referred to 'civilians' as 'persons who are not members of State armed forces or organised armed groups of a party to the conflict'²³. Juveniles cannot be treated differently. The enhanced protection of juveniles²⁴ does not change their classification as legitimate military targets when they are members of an organised armed group²⁵. Even if one considered their membership insufficient, at least the juveniles' direct participation would turn them into legitimate targets. 'Direct participation' in hostilities leads to

¹⁷ *Ntaganda* Judgment [716]; *Bemba* Judgment [137]; *Katanga* Judgment [1187]; *Lubanga* Judgment [538].

¹⁸ *Lubanga* Judgment [536].

¹⁹ *UN-Report* [3].

²⁰ *Ibid.* [2].

²¹ Article 8(2)(e)(i) EoC.

²² *Bemba* Charges [78].

²³ *Ntaganda* Judgment [883, 921].

²⁴ E.g. Articles 8(2)(b)(xxvi), 8(2)(e)(vii) RS; Article 24 ICCPR; Article 38 UNCRC.

²⁵ Jungfleisch (2020) 266; Provost (2018) 50. Diss. only *Ntaganda* Charges [78] which was not confirmed in *Ntaganda* Appeal [59-61, 69].

a temporary loss of civilian status.²⁶ The term is neither defined in customary law, namely by a general and consistent State practice accompanied by *opinio iuris*,²⁷ nor in treaty law.²⁸ It has to be proven on a case-by-case basis and is generally interpreted widely.²⁹ ‘Direct participation’ in hostilities is assessed irrespective of a person’s age.³⁰ Thus, as juveniles still pose a threat,³¹ they turn into legitimate targets when directly participating in hostilities,³² even if forcibly recruited³³.

10. The Tyvosh pirates constituted an organised armed group (*mn. 5*), hence were no civilians and, therefore, legitimate targets. Additionally, the lack of distinction between acts of adults and juveniles, the high number of juvenile pirates among them (50 %), and the nature of the juvenile pirates as ‘the most vicious of all’³⁴, suggests that the juveniles directly participated. Thus, even if one required a higher threshold regarding juveniles, all pirates would not be civilians but legitimate targets.

ii. The Pirates were the Sole Intended Object of the attacks

11. All attacks were only intentionally directed against the pirates. Directing an attack against a group means selecting it as the intended target and deciding on the attack.³⁵ Where legitimate military objectives and civilians are simultaneously attacked, it must be proven that the perpetrator intended the civilian population to be the principal target.³⁶ Otherwise, the civilian casualties are incidental loss of life or injury, the excessive causation of which is only criminalised in international armed conflicts under Article 8(2)(b)(iv) RS. Violations of the principle of proportionality and indiscriminate attacks were considered in the draft of Additional

²⁶ Common Article 3 GCs, applicable by virtue of Article 21(1)(b) RS (cf. deGuzman in Ambos (2022) [26]; Schabas (2016) 524); *Mbarushimana* Charges [148]; *Tadić* Judgment [615].

²⁷ *Military and Paramilitary Activities in and against Nicaragua* [207]; *North Sea Continental Shelf* Cases [77].

²⁸ *Abu Garda* Charges [80].

²⁹ *Ongwen* Judgment [1108-1109]; *Lubanga* Appeal [335].

³⁰ Jungfleisch (2020) 264; Pack (2016) 186.

³¹ NATO Child soldiers [2.1, 2.3].

³² *Ntaganda* Charges [79]; Nicholson (2016) 134.

³³ Pack (2016) 186.

³⁴ *Costane* [3].

³⁵ Cf. *Ntaganda* Judgment [744].

³⁶ *Katanga* Judgment [802].

Protocol II,³⁷ but no prohibitions were adopted³⁸. Thus, both are not punishable in non-international armed conflicts.³⁹ Further, an opponent's unlawful employment of human shields cannot render the other party liable for an attack directed against lawful targets.⁴⁰

12. Article 8(2)(e)(i)(3) EoC prescribes as a mental element that the perpetrator intended the civilian population as such or individual civilians to be the object of the attack, which is a repetition of Article 30(2)(a) RS⁴¹. According to Article 30(2)(a) RS, a person has intent, in relation to conduct, when meaning to engage in the conduct. This requires a purpose-based intent to the extent that the perpetrator wilfully directed the attack against civilians.⁴²
13. Since the attack on the pirates' mother ship on 9 October 2020 caused the deaths of about 90 pirates⁴³ but no civilians, only the remaining three incidents need to be considered.
14. In the 8 October 2020 attack on the Harbortown warehouse, used by the pirates as a supply centre,⁴⁴ the Security Force intended to destroy the pirates' supplies. The civilian deaths only resulted from the proximity of their houses to the warehouse. Although civilian casualties were possible, there are no substantial reasons to believe that the Security Force used the drones with the aim of targeting civilians.
15. The Watertown elementary school was attacked on 10 October 2020 with the objective of causing the death of the hostage-guarding pirates.⁴⁵ Inflicting the hostages' deaths was not accompanied by a corresponding will but constitutes legitimate collateral damage. While the Security Force's awareness of the presence of hostages in the school has not been proven, conducting an attack knowing that civilians will be killed is not equivalent to killing them intentionally.
16. Regarding the attack of 11 October 2020 on the Harbortown Hospital, causing the death of the

³⁷ Draft APs (1973) 40.

³⁸ Indiscriminate attacks: CDDH/SR.52 (1977) 134; Proportionality: CDDH/215/Rev.1 (1975) 321.

³⁹ Cf. Ambos (2014) 175-177. Diss. regarding indiscriminate attacks only *Katanga* Judgment [802].

⁴⁰ Corn (2020) 145-152.

⁴¹ *Katanga* Judgment [806]. Accord Ambos (2014) 175.

⁴² Cf. Articles 8(2)(e)(i)(3), 8(2)(e)(iv)(3) EoC; Ambos (2014) 175. See also *Katanga/Ngudjolo* Charges [271] regarding Article 8(2)(b)(i) RS referring to *dolus directus of the first degree*.

⁴³ *UN-Report* [5.2].

⁴⁴ *Ibid.* [5.1].

⁴⁵ *Ibid.* [5.3]; *Costane* [3].

staff and patients used as human shields⁴⁶ was not the Security Force's intention but a side effect of targeting the pirates to ultimately end the conflict.

17. Therefore, the sole intended target of all attacks were the pirates, hence legitimate targets. Consequently, Article 8(2)(e)(i) RS is not applicable as the attacks were not intentionally directed against an illegitimate object.

(c) Article 8(2)(e)(iv) RS is Not Applicable as the Hospital and the School were Military Objectives

18. Furthermore, Article 8(2)(e)(iv) RS is not applicable. Amongst others, Article 8(2)(e)(iv) RS incriminates intentionally directing attacks against buildings dedicated to education and hospitals, provided they are not military objectives. Pursuant to Article 52(2) AP I, an object becomes a military objective, if, by its 'nature, location, purpose or use', it effectively contributes to military action and if its total or partial destruction, capture or neutralisation confers a definite military advantage on the attacker. 'Use' refers to the current function of the object.⁴⁷ This definition is established as customary law also applicable in non-international armed conflicts,⁴⁸ hence relevant by virtue of Article 21(1)(b) RS.
19. The Watertown elementary school, in its use as a detention centre for abducted hostages,⁴⁹ was a legitimate military objective. While the Court previously refrained from considering a school as a military objective, this was based on the lack of evidence of its use by the opposing party related to the armed conflict.⁵⁰ Presently, the pirates used the school to detain 50 hostages and carry out ransom demands⁵¹ but not for educational purposes. Therefore, the building no longer functioned as a school but contributed to military action. Additionally, reducing the pirates' overall number provided Quarth with a definite military advantage. Consequently, the school turned into a military objective, hence lost its protection under Article 8(2)(e)(iv) RS.
20. Moreover, the Harbortown Hospital exceptionally constituted a military objective. Article 11(2) AP II entitles medical units to special protection unless used to commit hostile acts outside their humanitarian function. The provision is established as customary law also

⁴⁶ *UN-Report* [5.4].

⁴⁷ ICRC (2011) Part I, Chapter 9, Conduct of hostilities, II.4.

⁴⁸ ICRC (2005) Rule 8, 30-31.

⁴⁹ *UN-Report* [5.3].

⁵⁰ *Ntaganda Charges* [71].

⁵¹ *UN-Report* [5.3].

applicable in non-international armed conflicts.⁵² ‘Hostile acts’ are acts which objectively harm the adversary,⁵³ such as using a military object as shelter for able-bodied combatants⁵⁴. Employing human shields is prohibited under international humanitarian law⁵⁵ and, at least, causes mental harm to the victims. Moreover, the opponent’s unlawful employment of human shields does not prevent an objective from being a legitimate military target.⁵⁶ The remaining pirates took shelter in the hospital using the staff and patients as human shields.⁵⁷ Thus, they used the hospital for harmful acts outside its humanitarian function. Consequently, the Harbortown Hospital exceptionally constituted a military objective.

21. Furthermore, the second sentence of Article 11(2) AP II is not violated. Pursuant to this provision, protection ceases only after a warning remained unheeded, setting, whenever appropriate, a reasonable time-limit. In some cases, the warning requirement may be waived, for instance owing to overriding military necessity.⁵⁸ When the hospital was attacked, the raids had already lasted three days, establishing a situation of constant alert. Had the Security Force set a time-limit, the pirates could have hidden elsewhere. This would have caused the conflict to continue, risking more collateral casualties. Given the primacy of military necessity, acting without additional warning was appropriate. Therefore, the hospital exceptionally qualified as a military objective.
22. Consequently, Article 8(2)(e)(iv) RS is not applicable as the school and the hospital were lawful targets.
23. Overall, the alleged acts neither constitute war crimes under Article 8(2)(e)(i) RS nor under Article 8(2)(e)(iv) RS.

(ii) The Alleged Acts do Not Constitute Crimes against Humanity under Article 7(1)(a), (b) or (k) RS

24. The alleged acts do not amount to crimes against humanity under Article 7(1)(a), (b) or (k) RS. The contextual requirements of Article 7 RS are not fulfilled [(a)]. In any case, the alleged acts

⁵² ICRC (2005) Rule 28, 97.

⁵³ Junod in ICRC (1987) [4721].

⁵⁴ Breitegger in ICRC (2016) [1842]; Ambos (2014) 150.

⁵⁵ Cf. Article 28 GC IV; Article 51(7) AP I.

⁵⁶ Melzer (2008) 346. Cf. Oeter in Fleck (2013) 176-177.

⁵⁷ *UN-Report* [5.4].

⁵⁸ Breitegger in ICRC (2016) [1848, 1851].

cannot be prosecuted under Article 7(1)(a), (b) or (k) RS [(b)].

(a) The Contextual Requirements of Article 7 RS are Not Fulfilled

25. Article 7(1) RS contextually requires the conduct to be committed as part of a widespread or systematic attack directed against any civilian population.
26. The raids were not widespread. An attack is widespread if conducted on a large scale.⁵⁹ Large-scale means that it is massive, frequent, carried out collectively with considerable seriousness and directed against multiple victims.⁶⁰ The assessment is neither exclusively quantitative nor geographical, but based on individual facts.⁶¹ The Court found an attack to be widespread where it affected ‘hundreds of thousands of individuals’⁶², took place in a large geographical area⁶³ and extended over several months⁶⁴. A few hundred civilian casualties were only considered widespread,⁶⁵ when the attacks were spread over a ‘large geographical area’⁶⁶. The present attacks were confined to Quarth’s northern territory⁶⁷ and caused merely about 300 civilian deaths.⁶⁸ They were part of Quarth’s specific counter-piracy operations. However, as the raids were neither geographically nor quantitatively large-scale, they were not widespread.
27. The raids were also not systematic. Systematic refers to the organised, non-random nature of violent acts, evidenced by regular repetition of similar criminal conduct.⁶⁹ Isolated acts are excluded under Article 7(1) RS.⁷⁰ The Court previously classified an attack as systematic where it lasted for well over five years and the committed acts significantly followed a similar pattern.⁷¹

⁵⁹ *Bemba Charges* [83]; *Katanga/Ngudjolo Charges* [394]; *Al Bashir Warrant* [81].

⁶⁰ *Kenya Authorisation* [95]; *Bemba Charges* [83].

⁶¹ *Kenya Authorisation* [95].

⁶² *Al Bashir Warrant* [84].

⁶³ *Ntaganda Charges* [22, 24]; *Bemba Charges* [117]; *Al Bashir Warrant* [84].

⁶⁴ *Ntaganda Charges* [24]; *Gbagbo Charges* [224].

⁶⁵ 357 casualties, *Bemba Charges* [108].

⁶⁶ *Ibid.* [117].

⁶⁷ *Costane* [1]; *Map*.

⁶⁸ *UN-Report* [5].

⁶⁹ *Ongwen Judgment* [2679]; *Ntaganda Judgment* [692-693]; *Katanga Judgment* [1113, 1123]; *Al Bashir Warrant* [81]; *Harun/Abd-Al-Rahman Warrant* [62].

⁷⁰ *Côte d’Ivoire Authorisation* [89]; Schabas (2016) 166-167.

⁷¹ *Al Bashir Warrant* [85].

However, presently, the alleged acts only occurred within an isolated week and, each time, a different type of building or vessel was targeted.⁷² Deploying drones at night does not suffice to prove a recurrent *modus operandi* and cannot be considered ‘regular’. Thus, the raids were not systematic either.

28. Further, the raids did not constitute an attack directed against any civilian population. Article 7(2)(a) RS defines such an attack as a course of conduct involving multiple acts against any civilian population, pursuant to or in furtherance of a corresponding State or organisational policy. As ‘population’ refers to multiple persons sharing any common distinguishing attributes,⁷³ attacking a limited and randomly selected group of individuals is insufficient.⁷⁴ ‘Civilian population’ under Article 7 RS comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants.⁷⁵ ‘Directed against’ presupposes that the civilian population is the attack’s primary object.⁷⁶ All attacks were directed exclusively against the pirates pursuant to a policy to end piracy in Quarth (*mn. 13-17*). The pirates constituted an organised armed group (*mn. 5*), hence no civilians. The few civilian casualties comprised of randomly affected individuals, who died because of their incidental proximity to the attacked pirates. Consequently, the raids were not directed against a civilian population. Overall, the contextual requirements of Article 7 RS are not fulfilled.

(b) In any case, the Alleged Acts do Not Fulfil Article 7(1)(a), (b) or (k) RS

29. Even if there was a widespread or systematic attack against a civilian population, the alleged acts do not fulfil Article 7(1)(a), (b) or (k) RS. Murder under Article 7(1)(a) RS would be justified [i.]. Furthermore, the specific element of extermination under Article 7(1)(b) RS [ii.] and the requirements for ‘other inhumane acts’ under Article 7(1)(k) RS [iii.] are not met.

i. Murder under Article 7(1)(a) RS would be Justified

30. All deaths were caused by the drone attacks, wherefore the alleged acts are covered by the material element of murder under Article 7(1)(a) RS in accordance with Article 7(1)(a)(1)(fn. 7) EoC. However, even if the pirates constituted civilians, their deaths

⁷² UN-Report [4,5].

⁷³ Muthaura et al. Charges [110]. Accord Bemba Charges [76]; Katanga Judgment [1003].

⁷⁴ Kenya Authorisation [81]; Bemba Charges [77].

⁷⁵ Bemba Charges [78]; Katanga/Ngudjolo Charges [399].

⁷⁶ Ongwen Judgment [2675]; Ntaganda Judgment [668]; Bemba Judgment [154]; Katanga Judgment [1004-1005]; Kenya Authorisation [82]; Bemba Charges [76, 97-98].

would be justified. In that case, the UNCLOS, to which Quarth and Ibbin are members (*Facts* [1]), would provide the legal framework governing counter piracy-operations⁷⁷. Then, the use of force against pirates would be permitted if reasonable and necessary.⁷⁸ Additionally, under Article 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,⁷⁹ applicable by virtue of Articles 31(3), 21(1)(b) RS, lethal killings of selected individuals in self-defence generally constitute a legally permitted law enforcement method. Thus, in light of the threat the pirates posed to Quarth,⁸⁰ causing their death would be reasonable and necessary, hence justified even if they were civilians. Therefore, the alleged acts cannot be prosecuted as murder under Article 7(1)(a) RS.

ii. The specific element of Extermination under Article 7(1)(b) RS is Not Met

31. Lacking the specific element of extermination, the alleged acts cannot be prosecuted under Article 7(1)(b) RS. According to Article 7(2)(b) RS and Article 7(1)(b)(1), (2) EoC, ‘extermination’ requires a mass killing of part of a civilian population. Civilians must be killed as part of a collective group rather than in their individual capacity.⁸¹ In distinction to murder, extermination is characterised by large-scale killings.⁸² While it can generally be met regarding only a relatively small number of people, the act’s aim must still be to eradicate an entire population.⁸³ Presently, the 700 deceased pirates were members of an organised armed group (*mn.* 5) instead of a civilian population. In any case, the Tyvosh clan still consists of 9,300 members.⁸⁴ Regarding Quarth, only 300 of 2 million inhabitants (*Facts* [1]) died.⁸⁵ Their deaths resulted from their individual proximity to the pirates, not from their membership to a collective group. Therefore, the acts do not amount to mass killings of members of a civilian population. Consequently, the specific element of extermination under Article 7(1)(b) RS is not met.

⁷⁷ Articles 100-107 UNCLOS. Cf. UN Doc. S/PRST/2021/15 (2021); UN Doc. S/RES/2500 (2019) Preamble; Guilfoyle (2010) 150; Olson in Koutrakos/Skordas (2014)191-192.

⁷⁸ *M/V “Saiga” (No. 2)* Judgment [153].

⁷⁹ UN Doc. A/CONF.144/28/Rev.1 (1991) Article 9.

⁸⁰ Cf. *UN-Report* [2,3].

⁸¹ *Lukić/Lukić* Appeal [338].

⁸² *Al Bashir* Warrant [96]; Stahn in Ambos (2022) [44].

⁸³ *Krstić* Judgement [501].

⁸⁴ Cf. *UN-Report* [2,3].

⁸⁵ *Ibid.* [5].

iii. *The Requirements for 'Other Inhumane Acts' under Article 7(1)(k) RS are Not Met*

32. The alleged acts do not constitute 'other inhumane acts' under Article 7(1)(k) RS either as they are covered by the material elements of murder under Article 7(1)(a) RS. An act fulfilling the material elements of murder cannot be charged simultaneously under Article 7(1)(k) RS as *other inhumane acts*.⁸⁶ 'Other inhumane acts' are intended to cover other crimes against humanity, which were not specified at the time the Statute was drafted.⁸⁷ Thus, there must be a substantially different element, one that requires proof of a fact not required for the others,⁸⁸ distinguishing the 'other inhumane act' from a listed crime.⁸⁹ The residual clause of Article 7(1)(k) RS must be interpreted conservatively and not used to uncritically expand the scope of crimes against humanity.⁹⁰
33. There is no substantially different element. Article 30 RS provides a general mental element for all crimes of the Statute⁹¹ and Article 7(1)(k) RS contains no special mental element. Thus, it does not differ substantially from the mental element of the crimes listed in Article 7(1)(a-j) RS, excluding persecution. Therefore, the material element must be substantially different. However, the alleged acts are covered by the material elements of murder (*mn. 30*). The method or means of execution are not sufficient to qualify a conduct as a *substantially* different crime under Article 7 (1)(k) RS. Therefore, it lacks a substantially different material or mental element.
34. Furthermore, Article 7(1)(k) RS cannot be misused to criminalise conduct, such as the employment of material and methods of warfare under Article 8(b)(xx) RS, which is prohibited in international armed conflicts but exempt from punishment in non-international armed conflicts. Firstly, this would undermine the explicit distinction between international and non-international conflicts in the Statute.⁹² Secondly, punishing war crimes as 'other inhumane acts', possibly also in absence of an armed conflict,⁹³ would blur the line between the distinct crimes under Articles 7 and 8 RS. Both would unduly expand the scope of crimes against

⁸⁶ *Katanga/Ngudjolo Charges* [461].

⁸⁷ Cf. *Muthaura et al. Charges* [269]; *Katanga/Ngudjolo Charges* [452].

⁸⁸ *Čelebići Appeal* [412].

⁸⁹ Haenen (2013) 813-814.

⁹⁰ *Muthaura et al. Charges* [269].

⁹¹ Badar/Porro in Klamberg (2017) [304]; Clark (2001) 300-301.

⁹² Regarding the distinction Schabas (2016) 229; Ambos (2014) 119.

⁹³ Cf. Schabas (2016) 168.

humanity.

35. Thus, the alleged acts cannot constitute ‘other inhumane acts’ under Article 7(1)(k) RS.
36. Consequently, the raids do not constitute crimes against humanity under Article 7(1)(a), (b) or (k) RS.
37. Overall, the PTC correctly concluded that the alleged acts neither constitute war crimes under Article 8 RS nor crimes against humanity under Article 7 RS.

[B] THE DEFENDANT IS NOT LIABLE UNDER ARTICLE 25(3)(C) RS

38. The Defendant is not liable for aiding and abetting the charged crimes, as he does not fulfil the required *mens rea* of Article 25(3)(c) RS. He neither acted with the purpose to facilitate [(i)] nor with intent regarding the principal’s crime [(ii)].

(i) The Defendant did Not Act with the Purpose to Facilitate pursuant to Article 25(3)(c) RS

39. Article 25(3)(c) RS requires that the perpetrator acts with the *purpose* to facilitate, exceeding the mental element of Article 30 RS.⁹⁴ This higher subjective threshold relates to the accessory’s facilitation, not the principal’s crime.⁹⁵ The accessory must act with the aim of facilitating the principal’s crime,⁹⁶ thus wishing that his assistance facilitates the commission of the crime⁹⁷. Therefore, mere knowledge is insufficient.⁹⁸ Knowing that a circumstance exists or that a consequence will occur is not equivalent to intending or wishing such.⁹⁹ Consequently, indifference marks the dividing line between purpose and knowledge.¹⁰⁰
40. Megor’s main objective as a high-ranking official regarding Ibbin’s national security was to *continue negotiating* about a military basis, which Valyeron promised in return for his help in Quarth’s counter-piracy operations¹⁰¹. Therefore, delivering the drones was sufficient to fulfil

⁹⁴ *Bemba et al.* Judgment [97]; Goy (2012) 63.

⁹⁵ *Bemba et al.* Judgment [97]. Accord Ambos (2014) 166.

⁹⁶ *Bemba et al.* Judgment [97].

⁹⁷ Eser Individual in Cassese et al. (2002) 801. Accord Goy (2012) 63.

⁹⁸ *Bemba et al.* Judgment [97]; *Mbarushimana* Charges [274]; Ambos in Ambos (2022) [34]; Eser Individual in Cassese et al. (2002) 801; Goy (2012) 63; Olásolo/Rojo in Stahn (2015) 585.

⁹⁹ Knoops (2017) 36.

¹⁰⁰ Stewart (2015).

¹⁰¹ *Costane* [2].

Valyeron's request. Although Megor knew about the planned attacks, they were indifferent to him. He only wished for the delivery of the drones. However, there are no substantial reasons to believe that Megor intended their actual deployment. Therefore, the Defendant did not act with the purpose to facilitate the principal's crime.

(ii) *The Defendant did Not Act with Intent regarding the Principal's Crime*

41. In line with Article 30 RS, the accessory must act with intent regarding the principal's crime.¹⁰² Article 30(2)(b) RS requires the accessory to be aware that the principal's crime will occur in the ordinary course of events.
42. The Defendant was not aware of the commission of a crime. He was subject to a mistake of legal element, excluding his criminal responsibility according to Article 32(2) RS. A *mistake of legal element* is a mistake concerning the definition of a crime's legal element, which excludes knowledge regarding that element.¹⁰³ The second sentence of Article 32(2) RS rules that a *mistake of law*, which negates a crime's mental element, excludes criminal responsibility. A mistake of legal element amounts to a mistake of law as referred to in the second sentence of Article 32(2) RS.¹⁰⁴ Firstly, as Article 32(2) RS distinguishes between irrelevant mistakes and mistakes excluding the mental element, the text of Article 32(2) RS implies that the Statute recognises mistakes of legal elements.¹⁰⁵ Secondly, Article 32 RS is based on traditional common law,¹⁰⁶ under which *mens rea* is excluded when the mistake concerns the definition of a legal element.¹⁰⁷ Consequently, a mistake of legal element excludes criminal responsibility pursuant to Article 32(2) RS.
43. If the Court considered that the attacks were intentionally directed against civilians, Megor would have erred about the civilians' legal characterisation. As Valyeron, in her function as commander of the Quarth Homeland Security Force, asked for Megor's help in defeating the unscrupulous pirates,¹⁰⁸ he could assume the pirates were legitimate military targets. He further

¹⁰² *Bemba et al.* Judgment [98].

¹⁰³ Heller (2008) 419, 423. Accord Werle (2005) 446.

¹⁰⁴ Cf. Heller (2008) 419, 424.

¹⁰⁵ Cf. *ibid.* 426.

¹⁰⁶ Ambos (1999) [29]. Accord Eser Mental in Cassese et al. (2002) 896.

¹⁰⁷ Heller (2008) 419, 428. Accord Simons (1999) 465-466.

¹⁰⁸ *Costane* [2, 3].

knew that the Security Force intended to solely attack pirates.¹⁰⁹ Thus, he could assume that the weapons' imprecision would only cause civilian casualties to the extent of collateral damage. The Defendant was not mistaken about *whether* collateral damage is punishable. Instead, he was mistaken about *when* civilian casualties exceed collateral damage. Thus, he erred about the legal element of intentionally directing attacks against civilians under Article 8(2)(e)(i) RS and Article 7(1) RS.

44. Additionally, if the Court considered the targeted buildings as illegitimate objectives, the Defendant would have erred about their legal characterisation. Due to his knowledge about the pirates' presence in the buildings,¹¹⁰ Megor could assume they had turned into military objects. He was not mistaken about *whether* the school and hospital are generally protected under Article 8(2)(e)(iv) RS. Instead, he erred about *when* military objects turn into civilian objects. Thus, he was mistaken about the legal element of what is defined as a military object under Article 8(2)(e)(iv) RS, Article 52(2) AP I.
45. Therefore, both mistakes of legal element exclude the Defendant's criminal responsibility under Article 32(2) RS. Consequently, while the Defendant acted with intent regarding his own act, he did not act with intent regarding the principal's crime.
46. Overall, the Defendant is not liable under Article 25(3)(c) RS.

[C] THE GRAVITY REQUIREMENT OF ARTICLE 17(1)(D) RS IS NOT MET

47. Due to insufficient gravity, the case is inadmissible pursuant to Article 17(1)(d) RS. The gravity assessment of a case considers the person and conduct constituting the subject of the proceedings.¹¹¹ The gravity threshold is a key tool for ensuring the Court's effectiveness in maximising crime prevention.¹¹²
48. Both, quantitative and qualitative elements, are relevant for the Court's gravity assessment.¹¹³ While the quantitative dimension deals with the scale of the crimes, the qualitative dimension considers factors such as nature and manner of commission of the alleged crimes, their impact,

¹⁰⁹ *Ibid.* [2].

¹¹⁰ *Ibid.* [3].

¹¹¹ *Gaddafi* Admissibility Appeal [61]; *Ruto et al.* Admissibility Appeal [40].

¹¹² *Lubanga* Warrant [48, 60].

¹¹³ *Al Hassan* Gravity Appeal [92]; *Kenya* Authorisation [62]; *Abu Garda* Charges [31].

and the role and degree of participation of the accused.¹¹⁴ All relevant factors considered as a whole, not individually, have to meet the gravity threshold.¹¹⁵

49. The case neither meets the quantitative [(i)] nor the qualitative criteria [(ii)].

(i) The Quantitative Criterion is Not Fulfilled

50. The scale of the drone attacks is insufficient to meet the quantitative criterion. Factors for assessing the scale are the number of victims¹¹⁶, the extent of damage caused, and the geographical or temporal spread.¹¹⁷

51. Pursuant to Rule 85(a) RPE, ‘victims’ are natural persons who have suffered harm due to the commission of any crime within the Court’s jurisdiction. This includes direct victims, whose harm results from the commission of a crime, and indirect victims, suffering harm due to their relationship with a direct victim.¹¹⁸ If there was a crime, it would not be committed against the 700 lawfully attacked pirates. Thus, they cannot count as direct victims and their relatives cannot qualify as indirect victims. If the Court disagrees that the 300 civilian casualties are lawful collateral damage, solely these could be counted towards the scale.

52. Nevertheless, 300 victims would not satisfy the quantitative criterion. In *Bangladesh/Myanmar* with up to 10,000 deaths,¹¹⁹ the Court additionally considered 600,000 forced displacements for concluding that the scale is of sufficient gravity.¹²⁰ In *Kenya* with up to 200 deaths, displacements of over 10,000 people, several hundred brutal injuries and sexual violence were additionally considered.¹²¹ In the extraordinary case of *Abu Garda*, 12 killings and 8 attempted killings were regarded as sufficient.¹²² However, the attacks were directed against *peacekeeping*

¹¹⁴ A.o. *Al Hassan* Gravity Appeal [92]; *Afghanistan* Authorisation [81-83].

¹¹⁵ *Blé Goudé* Gravity [19].

¹¹⁶ *Al Hassan* Gravity Appeal [92]; *Kenya* Authorisation [62].

¹¹⁷ ICC-OTP (2013) [62].

¹¹⁸ *Lubanga* Indirect Victims [44]; *Lubanga* Victims Appeal [32].

¹¹⁹ *Bangladesh/Myanmar* Authorisation Request [89, 283].

¹²⁰ *Bangladesh/Myanmar* Authorisation [118].

¹²¹ *Muthaura et al.* Charges [49-50].

¹²² *Abu Garda* Charges [21, 34].

*personnel*¹²³, hence were of exceptional serious gravity¹²⁴.

53. The raids in Quarth merely lasted one week¹²⁵ and caused maximally 300 countable deaths (*mn. 51*). The charges are confined to property destruction and killings but do not involve extraordinary circumstances such as attacks on peacekeeping personnel. While the Defence regrets the loss of life and injury, it has to be acknowledged that the number of victims reached relatively limited proportions compared to previous cases and that the temporal spread is low. Additionally, the attacks only occurred within the northern territory of Quarth,¹²⁶ hence geographically limited. As the Statute's Preamble confines the Court's mandate to the most serious crimes to ensure their effective prosecution, it has to be concluded that the scale of the present case is of insufficient gravity.

(ii) *The Qualitative Criteria are Not Fulfilled*

54. The nature, manner of commission and impact of the crimes as well as the Defendant's role in their commission are not sufficiently grave.

55. Firstly, the alleged crimes are not sufficiently grave in nature. As all cases within the Court's jurisdiction are inherently serious,¹²⁷ the relevant conduct must present additional features rendering it especially grave¹²⁸. The Court considered killings to be particularly grave when they entailed torture or inhumane treatment.¹²⁹ Megor provided drones for lawful counter-piracy operations, which entailed unavoidable killings and destructions. This does not imply elements of particular gravity. Considering this sufficiently grave would undermine the intended function of the gravity threshold as an *additional* safeguard¹³⁰. Therefore, the provision of the drones is not sufficiently grave in nature.

56. Secondly, the manner of commission is not sufficiently grave. Relevant factors are *inter alia* the

¹²³ *Ibid.* [21].

¹²⁴ ILC Draft Code (1996) Commentary to Article 19 [2].

¹²⁵ *UN-Report* [4, 5].

¹²⁶ *Costane* [1]; *Map*.

¹²⁷ Cf. RS, Preamble; *DRC Warrant* [72].

¹²⁸ *Kenya Authorisation* [56]; *Abu Garda Charges* [30]; *Lubanga Warrant* [41, 45].

¹²⁹ *Comoros Investigation* [30].

¹³⁰ *Kenya Authorisation* [56].

means employed to execute the crime,¹³¹ the extent to which the crimes were systematic or large-scale¹³² or otherwise resulted from the abuse of official capacity,¹³³ and elements of particular cruelty such as beheading or publicly shooting victims¹³⁴. Target-related drones need to be differentiated from prohibited indiscriminate weapons, which cannot be directed against a specific objective¹³⁵. The drone attacks were confined to selected, pirate-occupied targets¹³⁶ and did not result from a deliberate plan to attack civilians or with particular cruelty. Employing sophisticated drones at night¹³⁷ contributed to ending the conflict quickly and effectively and, thus, to avoiding further casualties. All attacks were carried out in exercise, not in abuse, of official capacity. Overall, the manner of commission is not sufficiently grave.

57. Thirdly, the impact of the alleged acts is not sufficiently grave. The impact considers *inter alia* the sufferings endured by victims, the terror subsequently instilled, and the damage inflicted on affected communities.¹³⁸ The raids caused the death of 300 of Quarth's 2 million inhabitants (*Facts* [1]).¹³⁹ Only a single hospital and school were affected.¹⁴⁰ Considering the overall population, Quarth assumingly had multiple hospitals and schools. The attacks did hence not endanger medical care or education, let alone the existence of an entire generation. Contrarily, the Security Force combated a national security threat.¹⁴¹ Thus, the impact of the alleged crimes is not sufficiently grave.

58. Fourthly, the Defendant's role in the commission of the alleged crimes is insufficient. The Court focuses on those who bear the greatest responsibility for the crimes committed.¹⁴² The conduct

¹³¹ *Ibid.* [62].

¹³² Cf. *Afghanistan* Authorisation [23]; *Lubanga* Warrant [46].

¹³³ ICC-OTP (2013) [64].

¹³⁴ Cf. *Al Werfalli* Second Warrant [31-32]; *Muthaura et al.* Charges [49].

¹³⁵ Cf. ICRC (2005) Rule 71, 247-248.

¹³⁶ *UN-Report* [5].

¹³⁷ *Ibid.* [4, 5].

¹³⁸ ICC-OTP (2013) [65].

¹³⁹ *UN-Report* [5].

¹⁴⁰ *Ibid.* [5.3, 5.4].

¹⁴¹ Cf. *ibid.* [2, 3].

¹⁴² *Bangladesh/Myanmar* Authorisation Request [279]; *Kenya* Authorisation [60]; *Lubanga* Warrant [50-63]; ICC-OTP (2014) [139]; ICC-OTP (2013) [66].

of *secondary* perpetrators may meet the gravity threshold, given they played a key role.¹⁴³ After the alleged handover of the drones, the Defendant lost control over the weapons. Had the Defendant denied Valyeron's request for supporting Quarth's counter-piracy operations, it is likely that Valyeron would have turned elsewhere. It seems that the Defendant's prosecution is rooted in the impossibility of prosecuting the principal offenders, as they are Quarth nationals,¹⁴⁴ a non-party State (*Facts* [1]). However, this must not be the reason for prosecuting the Defendant, who did not play a key role in the commission of the alleged attacks. In any case, as a determination must be reached based on a holistic consideration, even if the Defendant made a substantial contribution to the alleged crimes, this alone would not suffice.

59. Overall, the alleged acts were neither quantitatively nor qualitatively of sufficient gravity to meet the threshold of Article 17(1)(d) RS. While the Defence regrets the fatalities, the case needs to be declared inadmissible.

[D] THE EVIDENTIARY THRESHOLD PURSUANT TO ARTICLE 61(7) RS IS NOT FULFILLED

60. The evidentiary threshold applicable during the confirmation of charges is not fulfilled. Article 61(7) RS requires sufficient evidence to establish substantial grounds to believe that the person committed the crimes charged. 'Substantial grounds' means that the Prosecutor must offer concrete and tangible proof supporting the specific allegations.¹⁴⁵ After evaluating all evidence, the Chamber must be satisfied that the allegations are sufficiently strong to justify committing the accused to trial.¹⁴⁶ The confirmation of charges cannot solely be based on indirect evidence.¹⁴⁷

61. To ascertain the evidence's contribution to reaching the evidentiary threshold, the probative value must be determined.¹⁴⁸ Key factors for assessing the probative value of documentary evidence are reliability and credibility.¹⁴⁹

62. The presented evidence, namely the newspaper article [i] and the UN-Report [ii], is insufficient

¹⁴³ Cf., e.g., *Blé Goudé Gravity* [41].

¹⁴⁴ *UN-Report* [4].

¹⁴⁵ *Lubanga Charges* [39]; *Katanga/Ngudjolo Charges* [65]; *Bemba Charges* [29]; *Abu Garda Charges* [37]; *Mbarushimana Charges* [40]; *Ruto et al. Charges* [40].

¹⁴⁶ *Lubanga Charges* [39]; de Beco (2007) 476.

¹⁴⁷ *Muthaura et al. Charges* [86]; *Bemba Charges* [51].

¹⁴⁸ *Katanga/Ngudjolo Motions Decision* [13].

¹⁴⁹ Cf. *Ruto et al. Charges* [68]; *Muthaura et al. Charges* [81]; *Afghanistan Authorisation* [46,64].

to meet the evidentiary threshold.

(i) The Newspaper Article by Costane is of Low Probative Value

63. The article is of low probative value as it is neither reliable nor credible. The article's retraction further lowers its probative value.
64. The article is not reliable. Reliability refers to the accuracy of evidence.¹⁵⁰ Newspaper articles, which are indirect evidence,¹⁵¹ rather introduce the context of a conflict than constitute evidence required to meet the evidentiary threshold.¹⁵² Exceptionally, a newspaper article is of probative value when provided by an expert¹⁵³ within his area of expertise¹⁵⁴. An expert is a person who has specialised knowledge, skill or training,¹⁵⁵ thus satisfying the Chamber of the journalist's objectivity and professionalism¹⁵⁶. Costane published an article about Valyeron's conversation with the Defendant, which he labelled a 'story' and a 'tale for the ages',¹⁵⁷ implying that he tried to sensationalise rather than state facts. Furthermore, there are no indicators that Costane is an expert in the field of counter-piracy operations and weaponry. Costane declared that the article is a misunderstanding and an exaggeration caused by alcohol consumption and a vivid imagination (*Facts* [7]). Since Costane wrote the article overnight based on a conversation in a pub,¹⁵⁸ it is unclear whether he properly researched and evaluated the information. This is further underlined by the inconsistencies between his article and the UN-Report regarding the number of abducted juveniles¹⁵⁹. Additionally, studies show that people can recall a maximum of 6 % of the conversation's gist after 3-4 days and the memory for the gist is better than the memory for details.¹⁶⁰ Thus, it is unlikely that Valyeron could recount the 4-month-old conversation with

¹⁵⁰ *Kunarac et al.* Acquittal [7].

¹⁵¹ *Muthaura et al.* Charges [82]; *Bemba* Charges [47].

¹⁵² *Gbagbo* Adjournment [35].

¹⁵³ Gaynor in Sluiter et al. (2013) 1067.

¹⁵⁴ *Perišić* Expert [8].

¹⁵⁵ *Ibid.* [7]; *Galić* Experts [2]; *Popović et al.* Appeal [375].

¹⁵⁶ Gaynor in Sluiter et al. (2013) 1067.

¹⁵⁷ *Costane* [1].

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.* [8]; *UN-Report* [2].

¹⁶⁰ Brown-Schmidt/Benjamin (2018) 189; Ross/Sicolly (1979); Samp/Humphreys (2007) 561.

Megor¹⁶¹ correctly, let alone any details. Therefore, it is highly likely that the article is not accurate. Overall, considering these numerous doubts, the article is not reliable.

65. Further, the evidence is not credible since it only encompasses uncorroborated double-hearsay. Evidence is credible when there is reason to believe the evidence.¹⁶² Hearsay evidence contains second-hand information,¹⁶³ while double-hearsay is hearsay of multiple degrees¹⁶⁴. Double-hearsay has no probative value as its reliability cannot be confirmed.¹⁶⁵ In his article, Costane recounted Valyeron's conversation with the Defendant from April 2020,¹⁶⁶ which is double-hearsay. Valyeron has not been seen since resigning in December (*Facts* [6]). Thus, although the hearsay's source is known, the Court cannot assess its trustworthiness and reliability. As the UN-Report has not confirmed the article's statements regarding Megor's involvement,¹⁶⁷ they remain uncorroborated. Therefore, the article is not credible.

66. The retraction of the newspaper article on 15 January 2021 (*Facts* [7]) further lowers its probative value. The article's retraction is credible as the original article was based on a misunderstanding and exaggeration caused by Costane's alcohol consumption and his vivid imagination (*Facts* [7]). The general suggestion of bribery does not impair the retraction's credibility. General allegations do not raise any significant doubts regarding a witness' credibility¹⁶⁸ as this would equal a finding of guilt in the absence of evidence¹⁶⁹. The Court requires concrete support for the suggestion of any illicit or dishonest motive¹⁷⁰ underlying a witnesses' behaviour.¹⁷¹ Although Costane is no witness, these criteria should be used to determine the presence of illicit or dishonest motives. Assuming that Costane was bribed to disavow his article due to his purchase of a Porsche paid in cash (*Facts* [7]) correlates to jumping

¹⁶¹ *Costane* [2].

¹⁶² *Kumarac et al. Acquittal* [7]; 'credible' in Merriam-Webster (2022). Cf. *Afghanistan Authorisation* [38].

¹⁶³ *Stahn* (2019) 285.

¹⁶⁴ *Mbarushimana Charges* [49]; *Naletilić/Martinović Judgement* [414, 416]; *Kordić/Čerkez Judgement* [534]; *Kupreškić et al. Judgement* [507].

¹⁶⁵ *Ibid.*

¹⁶⁶ *Costane* [2-6].

¹⁶⁷ Cf. *UN-Report* [4].

¹⁶⁸ *Bemba Judgment* [311].

¹⁶⁹ *Taylor Appeal* [196].

¹⁷⁰ *Bemba Judgment* [310].

¹⁷¹ *Bemba Judgment* [311].

to conclusions. The newspaper agency's internal inquiry failed to produce specific results concerning a bribe of Costane (*Facts* [7]), nor is there evidence establishing a link between Costane and Megor or Quarth's Government. Thus, there is no concrete support for bribery impairing the retraction's credibility. Consequently, the retraction further lowers the article's probative value.

67. Overall, the newspaper article is of low probative value.

(ii) *The UN-Report is of Low Probative Value*

68. The UN-Report is of low probative value as it contains neither credible nor reliable incriminating evidence. Generally, indirect evidence, such as UN-Reports,¹⁷² is attributed with a lower probative value than direct evidence¹⁷³. UN-Reports typically present a historical record of events or influence policymakers, rather than make a case at trial.¹⁷⁴

69. The UN-Report is not reliable concerning Megor's involvement in the alleged drone attacks. The Prosecutor must establish a link between the accused and the crime.¹⁷⁵ The presented UN-Report only states that the drones have 'reportedly been supplied by the Republic of Ibbin'¹⁷⁶ but it does not name Megor as the supplier. Thus, this sole sentence does not establish any link between Megor and the alleged drone attacks. Therefore, the UN-Report is not reliable regarding the Defendant's involvement.

70. Furthermore, the only sentence possibly incriminating the Defendant is not credible as it constitutes anonymous hearsay evidence. Anonymous hearsay evidence means that insufficient information is available concerning the original source of a statement.¹⁷⁷ Presently, the source of the relevant statement has not been identified.¹⁷⁸ Thus, the Chamber is unable to assess the trustworthiness as well as the probative value of the source.¹⁷⁹ Therefore, the UN-Report does not contain credible incriminating evidence.

¹⁷² *Ruto et al. Charges* [69]; *Muthaura et al. Charges* [82]; *Bemba Charges* [47].

¹⁷³ *Ruto et al. Charges* [74]; *Muthaura et al. Charges* [86]; *Bemba Charges* [51].

¹⁷⁴ Stahn (2019) 338. Cf. *Gbagbo Adjournment* [35].

¹⁷⁵ Cf. *Bemba Charges* [133].

¹⁷⁶ *UN-Report* [4].

¹⁷⁷ *Gbagbo Adjournment* [28]; *Ntaganda Dissent* [2].

¹⁷⁸ *UN-Report* [4].

¹⁷⁹ Cf. *Gbagbo Adjournment* [29].

71. Consequently, two pieces of evidence with low probative value, which do not complement each other, cannot offer concrete and tangible proof supporting the allegations against the Defendant. Additionally, only relying on indirect evidence is insufficient to confirm charges. Overall, the evidence fails to establish substantial grounds to believe that the Defendant committed the alleged crimes.

[E] THE COURT LACKS JURISDICTION

72. The Court cannot prosecute the alleged crimes of the Defendant since it lacks temporal [(i)] and personal jurisdiction [(ii)] under Articles 11(2), 12(2)(b) RS. Even if jurisdiction was established, the Court could not exercise it due to the principle of non-retroactivity [(iii)].

(i) The Court Lacks Temporal Jurisdiction pursuant to Article 11(2) RS

73. Pursuant to Article 11(2) RS, for States acceding to the Statute, the Court's jurisdiction is limited to crimes committed after the Statute's entry into force for that State.

74. According to Article 126(2) RS, the Statute entered into force for Ibbin on 1 August 2020 (*Facts* [1]). Therefore, the Court cannot exercise jurisdiction over crimes committed prior to 1 August 2020. While the principal deployed the drones in October 2020, the Defendant allegedly delivered them in July 2020.¹⁸⁰ The relevant act for triggering temporal jurisdiction is the accessory's act [(a)]. Additionally, the jurisdiction cannot be stretched by the principle of continuing crimes [(b)].

(a) The Relevant Time is the date of commission of Megor's Act

75. Temporal jurisdiction over an accomplice's act under Article 25(3)(c) RS solely depends on the date of commission of the accomplice's act. The Statute contains no general provision regarding *when* a crime is committed. Thus, to determine the relevant time for aiding and abetting a principal's crime, Article 25(3)(c) RS must be interpreted governed by the principles of treaty interpretation set out in the VCLT¹⁸¹. The VCLT is an applicable treaty by virtue of Article 21(1)(b) RS.¹⁸² Pursuant to Article 31(1) VCLT, the treaty's context and purpose must be considered. The punishable cause of aiding and abetting is the accessory's contribution to the

¹⁸⁰ *UN-Report* [4]; *Costane* [6].

¹⁸¹ Especially Articles 31, 32 VCLT. Cf. *Bemba Charges* [361]; *DRC Appeal* [33].

¹⁸² *DeGuzman in Ambos* (2022) [26]; *Schabas* (2016) 520.

principal's crime.¹⁸³ Furthermore, although a crime may include conduct and consequences,¹⁸⁴ accomplice liability is not composed of 'conduct' and 'consequence' *stricto sensu*¹⁸⁵. Conduct refers to an act or a behaviour.¹⁸⁶ A consequence is a result which is causally linked to the preceding conduct.¹⁸⁷ However, an accomplice's contribution does not need to be causal for the principal's act.¹⁸⁸ Thus, as there is not always a causally linked principal's act, focusing on this would lead to legal uncertainty. Therefore, in the context of aiding and abetting, only the time of the accessory's act is decisive for triggering the Court's jurisdiction. As the Defendant acted in July 2020,¹⁸⁹ the alleged crimes were committed prior to the entry into force of the Statute for Ibbin on 1 August 2020.

(b) The principle of Continuing Crimes is Not Applicable

76. Aiding and abetting is not of a continuing nature. Therefore, jurisdiction cannot be stretched by a comparison to the principle of continuing crimes. Continuing crimes refer to ongoing, repeated criminal activity.¹⁹⁰ As this principle stretches the conduct, jurisdiction can be established throughout the entire timespan of the conduct. The Court classified the conscription and enlistment of children as a continuing crime.¹⁹¹ This is an ongoing criminal activity where all criminal elements are repeatedly fulfilled until the child turns 15.¹⁹² However, the provision of drones occurred only once and was completed upon delivery in July 2020 (*mn.* 75) rather than culminating when the drones were used in October. Thus, the elements of aiding and abetting are not repeatedly fulfilled and hence cannot be compared to a continuing crime.
77. Even if aiding and abetting was considered to be of continuing nature, the Court can only exercise jurisdiction over continuing crimes when all criminal elements are fulfilled after the

¹⁸³ ILC Draft Code (1996) Article 2 [11]; Ambos in Ambos (2022) [25].

¹⁸⁴ Cf. Articles 12(2), 30 RS; General Introduction (2),(7)(a) EoC.

¹⁸⁵ Cf. Girgis (2013) 466.

¹⁸⁶ 'Conduct' in Merriam-Webster (2022).

¹⁸⁷ 'Consequence' in Merriam-Webster (2022); 'consequence' in Oxford Learner's Dictionary (2022).

¹⁸⁸ *Kvočka et al.* Judgement [255]; *Furundžija* Judgement [233].

¹⁸⁹ *UN-Report* [4]; *Costane* [6].

¹⁹⁰ *Nahimana et al.* Appeal [721]; Gallus (2017) [5.08]; Jöbstl (2018) 360; Nissel (2004) 661.

¹⁹¹ *Lubanga* Judgment [618].

¹⁹² Cf. *Ibid.*

entry into force.¹⁹³ While the principle of continuing crimes was discussed during the Statute's drafting,¹⁹⁴ no general provision was implemented in the final version¹⁹⁵. However, Article 7(1)(i)(fn. 24) EoC explicitly excludes jurisdiction over the continuing crime of enforced disappearance if not all criminal elements occurred after the Statute's entry into force.¹⁹⁶ According to Article 31(2) VCLT, the interpretation of a treaty must primarily be carried out based on its text. As the Statute does not contain differing provisions, Article 7(1)(i)(fn. 24) EoC is of general applicability to all crimes under the Statute¹⁹⁷. Since the act of the Defendant occurred only prior to the entry into force on 1 August 2020 (*mn.* 75), at least not all criminal elements are fulfilled afterwards. Therefore, even under the principle of continuing crimes, the Court could not exercise jurisdiction.

78. Overall, the Court does not have temporal jurisdiction pursuant to Article 11(2) RS.

(ii) The Court Lacks Personal Jurisdiction pursuant to Article 12(2)(b) RS

79. Personal jurisdiction under Article 12(2)(b) RS requires the accused to be a national of a State party. As the time of the accessory's act is also decisive for personal jurisdiction,¹⁹⁸ the accessory's State party nationality must be given at the time of his act. Megor is a national of Ibbin (*Facts* [2]), which only acceded to the Statute after he acted (*mn.* 74). Therefore, the Court lacks personal jurisdiction.

(iii) In any case, the Court could Not Exercise Jurisdiction due to the Principle of Non-Retroactivity

80. Even if jurisdiction was established, it could not be extended retroactively to a date prior to 1 August 2020 since the Statute cannot be applied retroactively. According to Articles 22(1), 24(1) RS, criminal liability may not be retroactively attached to conduct which occurred prior to the Statute's entry into force.¹⁹⁹ The drafting histories of Articles 11, 22 and 24 RS are closely intertwined, hence they should be read together.²⁰⁰

¹⁹³ Cf. Article 7(1)(i)(fn. 24) EoC; *Nahimana et al.* Appeal [724]; Schabas (2011) 74.

¹⁹⁴ UN Doc. A/CONF.183/C.1/L.65/Rev.1 (1998), Article 22 fn. 4.

¹⁹⁵ Rastan/Badar in Ambos (2022) [21]; Jöbstl (2018) 360; Schabas (2011) 75.

¹⁹⁶ Rastan/Badar in Ambos (2022) [21]; van den Herik/Braga da Silva in Ambos (2022) [278].

¹⁹⁷ Rastan/Badar in Ambos (2022) [21].

¹⁹⁸ Rastan in Stahn (2015) 155, 157.

¹⁹⁹ Wagner in Bogdandy/Wolfrum (2003) 491; Zimmermann (2013) 311.

²⁰⁰ Rastan/Badar in Ambos (2022) [2-3].

Therefore, as Article 11 RS specifies the starting date for exercising temporal jurisdiction, Articles 22, 24 RS include the prohibition of exercising jurisdiction prior to that date.²⁰¹ The wording of Articles 22, 24 RS suggests that the conduct and the prohibition of that conduct for the acting person must exist simultaneously.²⁰² Thus, Articles 22(1), 24(1) RS refer to the Statute's entry into force for the specific State. Exceptionally, under Article 12(3) RS, jurisdiction may be *conferred upon the Court* retroactively through a declaration.²⁰³ Further exceptions would have to be explicitly stated pursuant to Article 28 VCLT regarding the non-retroactivity of treaties.²⁰⁴ Ibbin specifically declined any cooperation with the Court (*Facts* [8]), hence did not retroactively confer jurisdiction upon the Court. Additionally, since Megor's alleged conduct took place prior to 1 August 2020, the conduct and the prohibition of that conduct for him did not exist simultaneously. Therefore, as the Statute does not have retroactive force, the Court cannot exercise jurisdiction over the Defendant's alleged act.

81. Overall, the Court lacks jurisdiction over Megor's alleged act under Articles 11(2), 12(2)(b) RS.

82. In conclusion, the PTC did not err in denying the Prosecution's request for confirmation of charges pertaining to the Defendant.

II. THE PTC CORRECTLY DECIDED THAT A SINGLE VICTIMS' REPRESENTATIVE IS SUFFICIENT

83. Appointing one CLRV is sufficient. When there are numerous victims, Rule 90(2) RPE requires a CLRV to ensure the effectiveness of the trial. According to Rule 90(4) RPE, when choosing CLRVs, the Chamber has to take reasonable steps to avoid conflicting interests. Conflicting interests exist where the victims' interests are irreconcilable.²⁰⁵ Even in cases of conflicting interests, Article 68(3) RS rules that victims' participation is limited by a fair trial and the accused's rights, namely the right to be tried without undue delay and to have adequate time and facilities for the preparation of the defence.²⁰⁶ Further, victim's participation cannot impose too heavy a burden upon the Defence.²⁰⁷ A CLRV ensures that all victims' views and concerns are

²⁰¹ *Ibid.*

²⁰² Broomhall in Ambos (2022) [33].

²⁰³ Schabas (2011) 72.

²⁰⁴ Zimmermann (2013) 317.

²⁰⁵ *Ongwen* Victims [44]; *Nourain/Jamus* Victims [42].

²⁰⁶ *Ruto/Sang* Victims [15]; *Muthaura/Kenyatta* Victims [14].

²⁰⁷ *Katanga/Ngudjolo* Victims [10(c)].

presented in a balanced manner and repetitive submissions are avoided.²⁰⁸ Partial differences can be united by a single CLRV.²⁰⁹ Appointing a CLRV is appropriate when the victims suffered from the same attack²¹⁰ and the same crimes are involved²¹¹.

84. No conflicting interests exist between the adult pirates, juvenile pirates and civilians. All victims died during the drone attacks in October 2020.²¹² All families want those responsible to be held accountable, irrespective of the families' relation to each other. Especially the pirates cannot be separated as a clear distinction between the juvenile and adult pirates' involvement is not possible. Moreover, during the three-year conflict between Quarth and the pirates, juveniles might have turned into adults. All in all, there might be partial but no irreconcilable differences. Consequently, there are no conflicting interests.
85. Furthermore, appointing three different CLRVs would endanger an effective and fair trial and, thereby, the Defendant's rights. Although age may be a factor for appointing CLRVs according to Article 68(1) RS, not every age difference can result in different CLRVs²¹³ as this would hinder the effectiveness of the trial. Presently, no age-related crimes were charged. At least regarding issues such as evidence, liability and jurisdiction, three CLRVs would cause repetitive submissions. Therefore, the trial would be unnecessarily stretched if three CLRVs participated. This would unduly endanger the effectiveness of the trial and violate our Defendant's right to a fair trial.
86. In conclusion, the Chamber did not err in deciding that a single CLRV is sufficient.

²⁰⁸ *Abd-Al-Rahman Victims* [6]; *Katanga/Ngudjolo Victims* [10(b)].

²⁰⁹ ICC-OPCV-MLR (2011) 108.

²¹⁰ *Kony et al. Victims I* [80]; *Kony et al. Victims II* [192]; ICC-OPCV-MLR (2011) 105.

²¹¹ *Kony et al. Victims II* [192].

²¹² *UN-Report* [5].

²¹³ *Katanga/Ngudjolo Victims* [12(b), 13].

SUBMISSIONS

Having presented all arguments, the Defence respectfully requests the Appeals Chamber to

1. **Uphold** the Decision, and
2. **Reaffirm**
 - a. the denial of the Prosecution's motion to confirm charges, and
 - b. the denial of a separate CLRV.

Respectfully submitted,

COUNSEL FOR THE DEFENCE

On behalf of Agon Megor of Ibbin

