

IBA ICC MOOT COURT COMPETITION IN THE ENGLISH LANGUAGE

VICTIMS' COUNSEL

Team Number: 83

Year: 2022

Total Word Count: 9,984



Original: **English**

Date: 8 March 2022

THE APPEALS CHAMBER

**Case before the International Criminal Court (ICC):
Prosecutor v. Agon Megor of Ibbin**

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

TABLE OF CONTENTS

TABLE OF CONTENTS.....	3
LIST OF ABBREVIATIONS	6
INDEX OF AUTHORITIES	9
Cases.....	9
International Criminal Court	9
International Court of Justice	14
International Criminal Tribunal for the former Yugoslavia.....	14
International Criminal Tribunal for Rwanda	15
International Tribunal for the Law of the Sea.....	16
Special Court for Sierra Leone	16
International Organisations Documents	16
International Criminal Court	16
United Nations Documents	17
Others	17
Articles	17
Books.....	20
Treaties and Conventions.....	22
Miscellaneous	23
International Criminal Court Moot Court Competition.....	23
State Declarations.....	23

Others	24
STATEMENT OF FACTS.....	27
ISSUES	29
SUMMARY OF ARGUMENTS	30
WRITTEN ARGUMENTS	32
I. The PTC Erred in deciding that a Single CLRV is Sufficient Representation	32
[A] The different Victim Groups Have Conflicting Interests	32
[B] Appointing Three CLRVs does Not unduly Hinder an Efficient Trial as required by Rule 90(2) RPE	33
II. The PTC Erred in Denying the Prosecution’s Request for Confirmation of Charges Pertaining to the Defendant	34
[A] The Charged Acts Constitute Crimes Under the Statute	34
(i) In the View of the Adult Pirates, the Charged Acts do Not Constitute War Crimes as the Non-International Armed Conflict Threshold is Not Met	34
(ii) If the Non-International Armed Conflict Threshold was Met, the Charged Acts would constitute War Crimes under Article 8(2)(e)(i) and (iv) RS	37
(a)The Drone Attacks were Intentionally Directed Against Civilians violating Article 8(2)(e)(i) RS	37
i. The Juvenile Pirates Remained Civilians	37
ii. The Human Shields Remained Civilians.....	38
iii. The Drone Attacks were Intentionally Directed Against the Civilians.....	38
(b)The Drone Attacks were Intentionally Directed Against Civilian Objects violating Article 8(2)(e)(iv) RS	40
(iii) The Charged Acts Constitute Crimes against Humanity under Article 7(1)(a),(b) and (k) RS	41
(a)The Contextual Elements of Article 7(1) RS are Fulfilled	41
i. The Drone’s Deployment Constitutes a Widespread and Systematic Attack	42
ii. The Attack was Directed Against any Civilian Population pursuant to a State Policy	
43	
(b)The Charged Acts Qualify as Murder under Article 7(1)(a) RS and Extermination	

under Article 7(1)(b) RS.....	44
(c) The Charged Acts Qualify as ‘Other Inhumane Acts’ under Article 7(1)(k) RS.....	44
i. The Drone Attacks Constitute Extrajudicial Killings Violating the Right to a Fair Trial.....	45
ii. The Drone Attacks involve Means and Methods of Warfare of a nature to cause Superfluous Injury or Unnecessary Suffering	46
(d) The Mental Element is Fulfilled.....	47
[B] The Defendant is Liable under Article 25(3)(c) RS	48
(i) The Material Elements for Aiding and Abetting are Met	48
(ii) The Mental Elements for Aiding and Abetting are Fulfilled	49
(a) The Defendant Acted with the Purpose to Facilitate	49
(b) The Defendant had Intent regarding the Principal’s Crime and his Own Act	50
[C] The Gravity Threshold of Article 17(1)(d) RS is Met.....	50
(i) The Quantitative Criterion is Fulfilled.....	51
(ii) The Qualitative Criterion is Fulfilled.....	52
[D] The Evidentiary Threshold under Article 61(7) RS is Met.....	53
(i) The Presented Evidence is of Probative Value	53
(a) The UN-Report is of Probative Value	54
(b) The Newspaper Article is of Probative Value	54
(ii) The Presented Evidence establishes Substantial Grounds to Believe that Megor Committed the Crimes charged	55
[E] The Court has Jurisdiction to Prosecute the Defendant.....	56
(i) The Court has Temporal Jurisdiction pursuant to Article 11(2) RS.....	56
(ii) The Court has Personal Jurisdiction pursuant to Article 12(2)(b) RS.....	58
(iii) The Principle of Non-Retroactivity is Not Violated	58
SUBMISSIONS.....	60

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
aka	also known as
AP I/Additional Protocol	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	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
COPE	Committee on Publication Ethics
CUP	Cambridge University Press
Doc.	Document
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ed.	Editor
edn.	edition
eds.	editors
EoC	Elements of Crimes
EP	European Parliament

et al.	<i>et alia</i> (and others)
fn.	Footnote
HRW	Human Rights Watch
IBA	International Bar Association
<i>Ibid.</i>	<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 Law Reports
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
ILM	International Legal Materials
LRV	Legal Representative of Victims
mn.	margin number
Mr	Mister
no.	number
OTP	Office of the Prosecutor
OUP	Oxford University Press
pp.	pages
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
RS/the Statute	Rome Statute of the International Criminal Court

Security Force	Quarth Homeland Security Force Members
Sic	sic erat scriptum
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
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
USD	United States of America dollar
v.	<i>versus</i> (against)
vol.	volume

INDEX OF AUTHORITIES

CASES

INTERNATIONAL CRIMINAL COURT

1. *Prosecutor v. Bahar Idriss Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09-243-Red (08.02.2010) [***Abu Garda Charges***]
2. *Prosecutor v. Omar Hassan Ahamad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3 (04.03.2009) [***Al Bashir Warrant***]
3. *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense') ICC-01/12-01/18-601-Red (19.02.2020) [***Al Hassan Gravity Appeal***]
4. *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Decision on the Admissibility Challenge raised by the Defence for Insufficient Gravity of the Case) ICC-01/12-01/18-459-tENG (27.09.2019) [***Al Hassan Gravity***]
5. *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Public redacted Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi) ICC-01/12-01/15-84-Red (24.03.2016) [***Al Mahdi Charges***]
6. *Prosecutor v. Charles Blé Goudé* (Decision on the confirmation of charges against Charles Blé Goudé) ICC-02/11-02/11-186 (11.12.2014) [***Blé Goudé Charges***]
7. *Prosecutor v. Charles Blé Goudé* (Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity) ICC-02/11-02/11-185 (12.11.2014) [***Blé Goudé Gravity***]
8. *Prosecutor v. Charles Blé Goudé* (Prosecution's Response to the Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute) ICC-02/11-02/11-181 (20.10.2014) [***Blé Goudé Response***]
9. *Prosecutor v. Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute)

(21.03.2016) [**Bemba Judgment**]

10. *Prosecutor v. Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor) ICC-01/05-01/08-424 (15.06.2009) [**Bemba Charges**]
11. *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/13-2275-Red (08.03.2018) [**Bemba et al. Appeal**]
12. *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Public Redacted Version of Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19.10.2016) [**Bemba et al. Judgment**]
13. *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/05-01/13-749 (11.11.2014) [**Bemba et al. Charges**]
14. *Prosecutor v. Laurent Gbagbo* (Decision on the confirmation of charges against Laurent Gbagbo) ICC-02/11-01/11-656-Red (12.06.2014) [**Gbagbo Charges**]
15. *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* (Decision on the Prosecution Application under Article 58(7) of the Statute) ICC-02/05-01/07-1-Corr (27.04.2007) [**Harun/Abd-Al-Rahman Warrant**]
16. *Prosecutor v. Germain Katanga* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (07.03.2014) [**Katanga Judgment**]
17. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Prosecutor’s Bar Table Motions) ICC-01/04-01/07-2635 (17.12.2010) [**Katanga/Ngudjolo Motions Decision**]
18. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts) ICC-01/04-01/07-2289-Corr-Red (27.08.2010)

[Katanga/Ngudjolo Witness Testimony]

19. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Order on the organisation of common legal representation of victims) ICC-01/04-01/07-1328 (22.07.2009)
[Katanga/Ngudjolo Victims]
20. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) ICC-01/04-01/07-717 (30.09.2008) **[Katanga/Ngudjolo Charges]**
21. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12) ICC-01/04-01/07-412 (18.04.2008) **[Katanga/Ngudjolo Witness Admissibility]**
22. *Prosecutor v. Thomas Lubanga Dyilo* (Public redacted document Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (01.12.2014)
[Lubanga Appeal]
23. *Prosecutor v. Thomas Lubanga Dyilo* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/04-01/06-2901 (10.07.2012) **[Lubanga Sentence]**
24. *Prosecutor v. Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14.03.2012) **[Lubanga Judgment]**
25. *Prosecutor v. Thomas Lubanga Dyilo* (Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry) ICC-01/04-01/06-2800 (30.08.2011) **[Lubanga Legal Assistance]**
26. *Prosecutor v. Thomas Lubanga Dyilo* (Corrigendum to Decision on the admissibility of four documents) ICC-01/04-01/06-1399-Corr (20.01.2011) **[Lubanga Document Admissibility]**
27. *Prosecutor v. Thomas Lubanga Dyilo* (Redacted version of "Decision on 'indirect victims'") ICC-01/04-01/06-1813 (08.04.2009) **[Lubanga Victims]**
28. *Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) ICC-01/04-01/06-1432 (11.07.2008) **[Lubanga Victims' Appeal]**
29. *Prosecutor v. Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06-803-tEN (29.01.2007) **[Lubanga Charges]**

30. *Prosecutor v. Callixte Mbarushimana* (Public Redacted version Decision on the confirmation of charges) ICC-01/04-01/10-465-Red (16.12.2011) [***Mbarushimana Charges***]
31. *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11-382-Red (26.01.2012) [***Muthaura et al. Charges***]
32. *Prosecutor v. Mathieu Ngudjolo Chui* (Appeal Judgment) ICC-01/04-02/12-271-Corr (07.04.2015) [***Ngudjolo Appeal***]
33. *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (Decision on common legal representation) ICC-02/05-03/09-337 (25.05.2012) [***Nourain/Jamus Victims***]
34. *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (Corrigendum of the ‘Decision on the Confirmation of Charges’) ICC-02/05-03/09-121-Corr-Red (07.03.2011) [***Nourain/Jamus Charges***]
35. *Prosecutor v. Bosco Ntaganda* (Judgment) ICC-01/04-02/06-2359 (08.07.2019) [***Ntaganda Judgment***]
36. *Prosecutor v. Bosco Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06-309 (09.06.2014) [***Ntaganda Charges***]
37. *Prosecutor v. Bosco Ntaganda* (Decision Concerning the Organisation of Common Legal Representation of Victims) ICC-01/04-02/06-160 (02.12.2013) [***Ntaganda Victims***]
38. *Prosecutor v. Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15-1762-Red (04.02.2021) [***Ongwen Judgment***]
39. *Prosecutor v. Dominic Ongwen* (Observations on the organisation of victim’ legal representation) ICC-02/04-01/15-455 (06.06.2016) [***Ongwen Victims***]
40. *Prosecutor v. Dominic Ongwen* (Public redacted With public annex: List of participating victims Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23.03.2016) [***Ongwen Charges***]
41. *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (Decision on Prosecution Request for Admission of Prior Recorded Testimony) ICC-01/09-01/11-1938-Red-Corr (19.08.2015)

[Ruto/Sang Testimony]

42. *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses) ICC-01/09-01/11-1866-Red (21.05.2015) **[Ruto/Sang Request Testimony]**
43. *Prosecutor v. Mahamat Said Abdel Kani* (Confirmation of Charges) ICC-01/14-01/21-218-Red (09.12.2021) **[Said Charges]**
44. *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (Decision on the Legal Representation of Victims) ICC-01/14-01/18-205 (23.05.2019) **[Yekatom/Ngaïssona Victims]**
45. *Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-33 (12.04.2019) **[Afghanistan Authorisation]**
46. *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar) ICC-01/19-27 (14.11.2019) **[Bangladesh/Myanmar Authorisation]**
47. *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Request for authorisation of an investigation) ICC-01/19-7 (04.07.2019) **[Bangladesh/Myanmar Authorisation Request]**
48. *Situation in the Republic of Côte d'Ivoire* (Corrigendum to 'Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire') ICC-02/11-14-Corr (15.11.2011) **[Côte d'Ivoire Authorisation]**
49. *Situation in the Democratic Republic of the Congo* (Decision on the Prosecutor's Application for Warrants of Arrest, Article 58) ICC-01/04-520-Anx2 (10.02.2006) **[DRC Warrants]**
50. *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr (31.03.2010) **[Kenya Authorisation]**
51. *Situation in the Republic of the Philippines* (Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute) ICC-01/21-12

(15.09.2021) [**Philippines Authorisation**]

52. *Situation in the Republic of the Philippines* (Public redacted version of ‘Request for authorisation of an investigation pursuant to article 15(3)’, 24 May 2021, ICC-01/21-7-SECRET-Exp) ICC-01/21-7-Red (14.06.2021) [**Philippines Request**]

INTERNATIONAL COURT OF JUSTICE

53. *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3 [**North Sea Continental Shelf Cases Judgment**]
54. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Rep 1996 (08.07.1996) [**Nuclear Weapons Advisory Opinion**]

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

55. *Prosecutor v. Zlatko Aleksovski* (Decision on Prosecutor’s Appeal on admissibility of evidence) IT-95-14/1 (16.02.1999) [**Aleksovski Evidence**]
56. *Prosecutor v. Vidoje Blagojević and Dragan Jokić* (Judgement) IT-02-60-T (17.01.2005) [**Blagojević/Jokić Judgement**]
57. *Prosecutor v. Tihomir Blaškić* (Judgement) IT-95-14-T (03.03.2000) [**Blaškić Judgement**]
58. *Prosecutor v. Radoslav Brđanin* (Judgement) IT-99-36-T (01.09.2004) [**Brđanin Judgement**]
59. *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka ‘PAVO’), Hazim Delić and Esad Landžo (aka ‘ZENGA’)* (Judgement) IT-96-21-A (20.02.2001) [**Delalić et al. Appeal**]
60. *Prosecutor v. Zejnil Delalić, Zdravko Mucić, also known as ‘Pavo’, Hazim Delić and Esad Landžo, also known as ‘Zenga’ (Čelebići Case)* (Judgement) IT-96-21-T (16.11.1998) [**Delalić et al. Judgement**]
61. *Prosecutor v. Radislav Krstić* (Judgement) IT-98-33-T (02.08.2001) [**Krstić Judgement**]
62. *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (Appeal Judgement) IT-96-23 (12.06.2002) [**Kunarac et al. Appeal**]
63. *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan*

Papić and Vladimir Šantić, also known as 'Vlado' (Judgement) IT-95-16-T (14.01.2000)
[Kupreškić et al. Judgement]

64. *Prosecutor v. Milan Lukić and Sredoje Lukić* (Judgement) IT-98-32/1-A (04.12.2012)
[Lukić/Lukić Appeal]

65. *Prosecutor v. Tharcisse Muvunyi* (Judgement and Sentence) ICTR-2000-55A-T (12.09.2006)
[Muvunyi Judgement]

66. *Prosecutor v. Mladen Naletilić, aka 'TUTA' and Vinko Martinović, aka 'STELA'* (Judgement)
IT-98-34-T (31.03.2003) **[Naletilić/Martinović Judgement]**

67. *Prosecutor v. Momčilo Perišić* (Judgement) IT-04-81-A (28.02.2013) **[Perišić Appeal]**

68. *Prosecutor v. Milomir Stakić* (Judgement) IT-97-24-T (31.07.2003) **[Stakić Judgement]**

69. *Prosecutor v. Pavle Strugar* (Judgement) IT-01-42-T (31.01.2005) **[Strugar Judgement]**

70. *Prosecutor v. Duško Tadić* (Judgement) IT-94-1-A (15.07.1999) **[Tadić Appeal]**

71. *Prosecutor v. Duško Tadić* (Opinion and Judgment) IT-94-1-T (07.05.1997) **[Tadić Judgment]**

72. *Prosecutor v. Duško Tadić* (Decision on Defence Motion on Hearsay) IT-94-01-T (05.08.1996)
[Tadić Hearsay]

73. *Prosecutor v. Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on
Jurisdiction) IT-94-1-A (02.10.1995) **[Tadić Interlocutory Appeal]**

74. *Prosecutor v. Mitar Vasiljević* (Judgment) IT-98-32-T (29.11.2002) **[Vasiljević Judgment]**

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

75. *Prosecutor v. Ignace Bagilishema* (Judgement) ICTR-95-1A-T (07.06.2001)
[Bagilishema Judgement]

76. *Prosecutor v. Sylvestre Gacumbitsi* (Judgement) ICTR-2001-64-T (17.06.2004)
[Gacumbitsi Judgement]

77. *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Judgement) ICTR-95-1-T (21.05.1999)
[Kayishema/Ruzindana Judgement]

78. *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (Judgement) ICTR-99-52-A (28.11.2007) [**Nahimana et al. Appeal**]
79. *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (Judgement and Sentence) ICTR-99-52-T (03.12.2003) [**Nahimana et al. Judgement**]
80. *Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Élie Ndayambaje* (Judgement) ICTR-98-42-A (14.12.2015) [**Nyiramasuhuko et al. Appeal**]
81. *Prosecutor v. Vincent Rutaganira* (Judgement and Sentence) ICTR-95-1C-T (14.03.2005) [**Rutaganira Judgement**]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

82. *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v. Guinea)* (Judgment) (1999) 38 ILM 1323-1442 [**M/V 'Saiga' (No. 2) Judgment**]

SPECIAL COURT FOR SIERRA LEONE

83. *Prosecutor v. Moinina Fofana and Allieu Kondewa* (Appeal Judgment) SCSL-04-14-A (28.05.2008) [**Fofana/Kondewa Appeal**]

INTERNATIONAL ORGANISATIONS DOCUMENTS

INTERNATIONAL CRIMINAL COURT

84. Elements of Crime, ICC-PIDS-LT-03-002/11_Eng (ICC 2011) [**EoC**]
85. Office of the Prosecutor 'Policy Paper on case selection and prioritisation' (15.09.2016) [**Policy Paper (2016)**]
86. Office of the Prosecutor, 'Policy Paper on Preliminary Examinations' (ICC-OTP 2013) (November 2013) [**Policy Paper (2013)**]
87. Rules of Procedure and Evidence, ICC-PIOS-LT-03-004/19_Eng (ICC 2019) [**RPE**]

UNITED NATIONS DOCUMENTS

88. ILC Draft Code of Crimes against the Peace and Security of Mankind (1996), *Yearbook of The International Law Commission*, vol. 2, no. 2, A/CN.4/SER.A/1996/Add.1 [ILC Draft Code (1996)]
89. United Nations Security Council, Statement by the President of the Security Council, UN Doc. S/PRST/2021/15 (09.08.2021) [UN Doc. S/PRST/2021/15 (2021)]
90. United Nations Security Council, Resolution 2500 (2019), S/RES/2500 (2019) (04.12.2019) [UN Doc. S/RES/2500 (2019)]
91. United Nations Security Council, Resolution 1970 (2011), S/RES/1970 (2011) (26.02.2011) [UN Doc. S/RES/1970 (2011)]
92. United Nations Security Council, Resolution 1593 (2005), S/RES/1593 (2005) (31.03.2005) [UN Doc. S/RES/1593 (2005)]

OTHERS

93. Directorate-General for External Policies of the Union, ‘Human Rights Implications of the Usage of Drones and unmanned Robots in warfare’, EXPO/B/DROI/2012/12 (2013) [EP (2013)]
94. Human Rights Committee, Communication No. 263/1987, M. Gonzalez del Río v. Peru (Views adopted on 28.10.1992), in UN Doc. GAOR, A/48/40 (vol. II) [Human Rights Committee (1992)]
95. European Union Naval Force, Somalia – Operation ATLANTA < <https://eunavfor.eu/mission/> > accessed 07 March 2022 [Operation ATLANTA]

ARTICLES

96. Stéphanie Bouchié de Belle ‘Chained to cannons or wearing targets on their T-Shirts: human shields in international humanitarian law’ (2008) *International Review of the Red Cross*, vol. 90, no. 872, pp. 883-906 [Bouchié de Belle (2008)]
97. Jessica Lynn Corsi, ‘Drone Deaths Violate Human Rights: The Applicability of the ICCPR to

- Civilian Deaths Caused by Drones’ (2017) *International Human Rights Law Review*, vol. 6, pp. 205-241 [**Corsi (2017)**]
98. Zsuzsanna Deen-Racsmany, ‘The Nationality of the Offender and the Jurisdiction of the International Criminal Court’ (2001) *American Journal of International Law*, vol. 95, no. 3, pp. 606-623 [**Deen-Racsmany (2001)**]
 99. Talita de Souza Dias ‘The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations’ (2018) *Journal of International Criminal Justice*, vol. 16, no. 1, pp. 65-89 [**Dias (2018)**]
 100. Chile Eboe-Osuji, ‘Crimes against Humanity: Directing Attacks Against a Civilian Population’ (2008) *African Journal of Legal Studies*, vol. 2, no. 2, pp. 118-129 [**Eboe-Osuji (2008)**]
 101. Barbara Goy, ‘Individual Criminal Responsibility before the International Criminal Court: A Comparison with the Ad Hoc Tribunals’ (2012) *International Criminal Law Review*, vol. 12, no. 1, pp. 1-70 [**Goy (2012)**]
 102. Douglas Guilfoyle ‘The laws of war and the fight against Somali piracy?: combatants or criminals’ (2010) *Melbourne Journal of International Law*, vol. 11, no. 1, pp. 141-153 [**Guilfoyle (2010)**]
 103. Melissa A. Jamison ‘Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children’ (2005) *University of California, Davis Journal of Juvenile Law & Policy*, vol. 9, no. 1, pp. 127-170 [**Jamison (2005)**]
 104. Robert Kolb/Fumiko Nakashima ‘The notion of “acts harmful to the enemy” under international humanitarian law’ (2019) *International Review of the Red Cross*, vol. 101, no. 912, pp. 1171-1199 [**Kolb/Nakashima (2019)**]
 105. Eugene Kontorovich ‘When gravity fails: Israeli Settlements and Admissibility at the ICC’ (2014) *Israel Law Review*, vol. 47, no. 3, pp. 379-399 [**Kontorovich (2014)**]
 106. Joanna Nicholson, ‘Is Targeting Naked Child Soldiers a War Crime?’ (2016) *International Criminal Law Review*, vol. 16, no. 1, pp. 134-157 [**Nicholson (2016)**]
 107. Steven R. Obert ‘Using force on land to suppress piracy on sea: The legal landscape of a largely untapped strategy’ (2014) *Duke Journal of Comparative & International Law*, vol. 25, no. 2,

pp. 197-236 [**Obert (2014)**]

108. Mariana Pena and Gaelle Caryon, 'Is the ICC Making the Most of Victim Participation?' (2013) *International Journal of Transnational Justice*, vol. 7, no. 3, pp. 518-535 [**Pena/Caryon (2013)**]
109. Fausto Pocar 'To What Extent is Protocol I Customary International Law?' (2002) *International Law Studies*, vol. 78, pp. 337-351 [**Pocar (2002)**]
110. Alexandre Andrade Sampaio/Matthew McEvoy, 'Little Weapons of War: Reasons for and Consequences of Treating Child Soldiers as Victims' (2016) *Netherlands International Law Review*, vol. 63, pp. 51-73 [**Sampaio/McEvoy (2016)**]
111. Michael N. Schmitt, 'Drone Attacks under the Jus ad Bellum And Jus in Bello: Clearing the 'Fog of Law'' (2010) *Yearbook of International Humanitarian Law*, vol. 13, pp. 311-326 [**Schmitt (2010)**]
112. Michael N. Schmitt 'Human shields in International Humanitarian Law' (2009) *Columbia Journal of Transnational Law*, vol. 47, pp. 292-338 [**Schmitt (2009)**]
113. Vivek Sehrawat 'Legal Status of Drones under LOAC and International Law' (2017) *Penn State Journal of Law & International Affairs*, vol. 5, no. 1, pp. 164-206 [**Sehrawat (2017)**]
114. Milena Sterio 'International Law in Crisis: Piracy Off the Coast of Somalia' (2011) *Case Western Reserve Journal of International Law*, vol. 44, no. 1, pp. 291-301 [**Sterio (2011)**]
115. Tullio Treves 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) *European Journal of International Law*, vol. 20, no. 2, pp. 399-414 [**Treves (2009)**]
116. Alexander Wills, 'Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court' (2014) *Journal of International Criminal Justice*, vol. 12, no. 3, pp. 407-435 [**Wills (2014)**]
117. Sebastian Wuschka 'The Use of Drones in Current Conflicts – A Legal Issue or a Political Problem?' (2011) *Goettingen Journal of International Law*, vol. 3, no. 3, pp. 891-905 [**Wuschka (2011)**]
118. Andreas Zimmermann, 'Palestine and the International Criminal Court Quo Vadis?' (2013) *Journal of International Criminal Justice*, vol. 11, no 2, pp. 303-329 [**Zimmermann (2013)**]

BOOKS

119. Kai Ambos (ed.), *Rome Statute of the International Criminal Court Article by Article Commentary* (4th edn., Beck Nomos Hart 2022)
- Kai Ambos, ‘Article 7’ [**Ambos in Ambos (2022)**]
 - Carsten Stahn, ‘Article 7’ [**Stahn in Ambos (2022)**]
 - Roberta Arnold, ‘Article 8’ [**Arnold in Ambos (2022)**]
 - Rod Rastan/Mohamed Badar, ‘Article 11’ [**Rastan/Badar in Ambos (2022)**]
 - Bruce Broomhall, ‘Article 22’ [**Broomhall in Ambos (2022)**]
 - Matt Halling, ‘Article 24’ [**Halling in Ambos (2022)**]
120. Kai Ambos, *Treatise on International Criminal Law, Volume II* (OUP 2014) [**Ambos (2014)**]
121. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn., Martinus Nijhoff 2012) [**Bassiouni (2012)**]
122. Antonio Cassese, Paola Gaeta, John R.W.D Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary Volume I* (1st edn., OUP 2002)
- Albin Eser, ‘Individual Criminal Responsibility’, pp. 768-822 [**Eser in Cassese (2002)**]
123. Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn. Oxford 2008) [**Fleck (2013)**]
- Stefan Oeter, ‘Method and Means of Combat’, pp. 115-230 [**Oeter in Fleck (2013)**]
124. Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2009) [**Gallant (2009)**]
125. Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) [**Guilfoyle (2009)**]
126. Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules* (International Committee of the Red Cross, CUP 2005) [**ICRC (2005)**]
- Rule 4, pp. 14-17 [**ICRC (2005) Rule 4**]

- Rule 8, pp. 29-32 [**ICRC (2005) Rule 8**]
 - Rule 28, pp. 91-97 [**ICRC (2005) Rule 28**]
 - Rule 70, pp. 237-244 [**ICRC (2005) Rule 70**]
127. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, Martinus Nijhoff Publishers 1987)
- Sylvie-S. Junod ‘Article 52 AP I’ [**Junod ‘Article 52 AP I’ in ICRC (1987)**]
 - Sylvie-S. Junod ‘Article 11(2) AP II’ [**Junod ‘Article 11(2) AP II’ in ICRC (1987)**]
128. Panos Koutrakos and Achilles Skordas (eds.), *The Law and Practice of Piracy at Sea* (Hart Publishing 2014)
- Thilo Marauhn, ‘Counter-piracy Operations and the Limits of International Humanitarian Law’, pp. 67-77 [**Marauhn in Koutrakos/Skordas (2014)**]
 - Peter M Olson, ‘Countering Piracy off the Coast of Somalia: A NATO Perspective’, pp. 183-194 [**Olson in Koutrakos/Skordas (2014)**]
129. Roy S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publisher 2001)
- Bitti Gilbert and Håkan Friman, ‘Victims and Witnesses’, pp. 456-474 [**Bitti/Friman in Lee (2001)**]
130. David Petrusek, *Ends and Means: Human Rights Approaches to Armed Groups* (International Council on Human Rights Policy 2000) [**Petrusek (2000)**]
131. Christoph Safferling and Gurgun Petrossian, *Victims Before the International Criminal Court: Definition, Participation, Reparation* (Springer 2021) [**Safferling/Petrossian (2021)**]
132. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., OUP 2016) [**Schabas (2016)**]
133. William A. Schabas, *An Introduction to the International Criminal Court* (4th edn., CUP 2011) [**Schabas (2011)**]

134. Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2019) [Stahn (2019)]
135. Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015)
- Rod Rastan ‘Jurisdiction’, pp. 141-178 [Rastan in Stahn (2015)]
136. Carsten Stahn/Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Brill 2009)
- Gilbert Bitti, ‘Article 21 of the Statute of the ICC and the treatment of sources of law in the jurisprudence of the ICC’, pp. 285-304 [Bitti in Stahn/Sluiter (2009)]
 - Volker Nerlich, ‘The status of ICTY and ICTR precedent in proceedings before the ICC’, pp. 305-325 [Nerlich in Stahn/Sluiter (2009)]

TREATIES AND CONVENTIONS

137. African Charter on Human and Peoples’ Rights (adopted 27.06.1981, entered into force 21.10.1986) 1520 UNTS 217 [ACHPR]
138. American Convention on Human Rights (adopted 22.11.1969, entered into force 18.07.1978) 1144 UNTS 123 [ACHR]
139. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 08.06.1977, entered into force 07.12.1979) 1125 UNTS 3 [AP I]
140. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 08.06.1977, entered into force 07.12.1978) 1125 UNTS 609 [AP II]
141. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 04.11.1950, entered into force 03.09.1953) 213 UNTS 221 [ECHR]
142. International Covenant on Civil and Political Rights (adopted 16.12.1966, entered into force 23.03.1976) 999 UNTS 171 [ICCPR]
143. Rome Statute of the International Criminal Court (adopted 17.07.1998, entered into force

01.07.2002) 2187 UNTS 3 [RS]

144. Universal Declaration of Human Rights (ratified 10.12.1948) UNGA-Res. 217 A (III) [UDHR]
145. United Nations Convention on the Law of the Sea (adopted 10.12.1982, entered into force 16.11.1994) 1833 UNTS 397 [UNCLOS]
146. United Nations Convention on the Rights of the Child (adopted 20.11.1989, entered into force 02.09.1990) 1577 UNTS 3 [UNCRC]

MISCELLANEOUS

INTERNATIONAL CRIMINAL COURT MOOT COURT COMPETITION

147. Map of Quarth [Map]
148. Rogor Costane, 'Tyvosh pirates extinguished', Quarth News and Observer (2020) [Costane]
149. Report of the UN High Commissioner for Human Rights on the situation in Quarth, dated 14 November 2020 [UN-Report]

STATE DECLARATIONS

150. Declaration of Côte d'Ivoire of 18 April 2003, <www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf> accessed 07 March 2022 [Côte d'Ivoire (2003)]
151. Declaration of Palestine of 31 December 2014, <www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf> accessed 07 March 2022 [Palestine (2014)]
152. Declaration of Ukraine of 8 September 2015, <www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf> accessed 07 March 2022 [Ukraine (2015)]
153. Declaration of Ukraine of 17 April 2014, <www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf> accessed 07 March 2022 [Ukraine (2014)]

OTHERS

154. Roger Armbrust, 'Ferencz Condemns Drone Attacks: "A Crime Against Humanity"' (2012) <www.clydefitchreport.com/2012/06/ferencz-condemns-drone-attacks-a-crime-against-humanity/> accessed 07 March 2022 [**Armbrust (2012)**]
155. Claude Bruderlein, 'The Role of Non-state Actors in Building Human Security: The case of armed groups in intra-state wars' (2000) Centre for Humanitarian Dialogue <www.files.ethz.ch/isn/7284/doc_7302_290_en.pdf> accessed 07 March 2022 [**Bruderlein (2000)**]
156. Laurent Colassis, cited by Ludovic Monnerat, 'Le problème des boucliers humains volontaires dans les opérations contemporaines' (Check Point 2003) <www.checkpoint-online.ch/CheckPoint/Monde/Mon0047-ProblemeBoucliersHumains.html> accessed 07 March 2022 [**Colassis cited by Monnerat (2003)**]
157. COPE's Retraction guidelines <<https://publicationethics.org/node/19896>> accessed 07 March 2022 [**COPE's Retraction Guidelines**]
158. Amer Fakhoury, 'Drones in the Light of Public International Law' (2014) <www.researchgate.net/publication/305843785_Drones_in_the_Light_of_Public_International_Law/link/5bdd409a92851c6b27a2a993/download> accessed 07 March 2022 [**Fakhoury (2014)**]
159. Sarah Finnin and Nema Milaninia, 'Putting "Purpose" in Context' (*Blog of James G. Stewart*, 07.12.2014) <<http://jamesgstewart.com/putting-purpose-in-context/>> accessed 07 March 2022 [**Finnin/Milaninia (2014)**]
160. Max P. Glaser 'Humanitarian engagement with non-state armed actors: the parameters of negotiated access', Humanitarian Practice Network, no. 51 (2005) <<https://odihpn.org/wp-content/uploads/2005/06/networkpaper051.pdf>> accessed 07 March 2022 [**Glaser (2005)**]
161. Neve Gordon/Nicola Perugini, 'Military Attacks on "Hospital shields": The Law itself is Partly to Blame' (2016) <www.justsecurity.org/33712/military-attacks-hospitals-shields-law-partly-blame/> accessed 07 March 2022 [**Gordon/Perugini (2016)**]
162. 1935 Harvard Draft Convention, 'Harvard Draft Convention on Jurisdiction with Respect to Crime', American Journal of International Law, vol. 29, issue s1: Supplement, pp. 439-442

(1935) [1935 Harvard Draft Convention]

163. Kevin Jon Heller, ‘Don’t Blame IHL for Attacks on “Hospital Shields”’ (2016) <<http://opiniojuris.org/2016/10/21/dont-blame-ihl-for-attacks-on-hospitals/>> accessed 07 March 2022 [**Heller (2016)**]
164. Human Rights Watch, ‘Human Rights Watch Briefing Paper: International Humanitarian Law issues in a potential war in Iraq’ (2003) <www.hrw.org/sites/default/files/reports/Iraq%20IHL%20formatted.pdf> accessed 07 March 2022 [Human Rights Watch (2003)] [**HRW (2003)**]
165. Dennis Lemmens/Fleur de Boer, ‘The Protection of Schools under International Humanitarian Law’ (2019) <https://puc.overheid.nl/mrt/doc/PUC_286172_11/1/> accessed 07 March 2022 [**Lemmens/de Boer (2019)**]
166. Sven Peterke, ‘Regulating “Drug Wars” and Other Gray Zone Conflicts: Formal and Functional Approaches’ Humanitarian Action in Situations Other Than War, Discussion Paper 2 (2012) <www.hpcrresearch.org/sites/default/files/publications/Svens%20Paper.pdf> accessed 07 March 2022 [**Peterke (2012)**]
167. Rishi Sehgal and Nikunj Baheti, ‘Does “Purpose” Under Article 25(3)(c) Have any Purpose? Analysis of the Mens Rea Standard for Accessorial Liability in the Rome Statute’ (International Law Blog, 03.10.2019) <<https://internationallaw.blog/2019/10/03/does-purpose-under-article-253c-have-any-purpose-analysis-of-the-mens-rea-standard-for-accessorial-liability-in-the-rome-statute/>> accessed 07 March 2022 [**Sehgal/Baheti (2019)**]
168. Anki Sjöberg ‘Armed Non-State Actors and Landmines Volume III: Towards a Holistic Approach to Armed Non-State Actors?’ (Program for the Study of International Organization(s), 2007) Geneva Call <www.genevacall.org/wp-content/uploads/2019/02/psio.pdf> accessed 07 March 2022 [**Sjöberg (2007)**]
169. ‘Seychelles Coastguard Vessel Rescues Fishermen from Somali Pirates’ (France24 Online, 29.03.2010) <www.france24.com/en/20100329-seychelles-coastguard-vessel-rescues-fisherman-somali-pirates-indian-ocean-piracy> accessed 07 March 2022 [**Somali Pirates (2010)**]
170. James G. Stewart, ‘An Important New Orthodoxy Complicity In The ICC Statute?’ (*Blog of*

James G. Stewart, 21.01.2015) <<http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/>> accessed 07 March 2022 [**Stewart (2015)**]

171. UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2004) [**UK Ministry of Defence (2004)**]
172. Thomas Weigend, 'How to Interpret Complicity in the ICC Statute' (*Blog of James G. Stewart*, 15.12.2014) <<http://jamesgstewart.com/how-to-intepret-complicity-in-the-icc-statute/>> accessed 07 March 2022 [**Weigend (2014)**]

STATEMENT OF FACTS

A. Factual Background

1. The case concerns the developing island-State Quarth 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, the 'loosely organized' Tyvosh pirates launched sporadic attacks, hijacking 17 Quarth-bound civilian cargo vessels, killing passengers and crew members and kidnapping others. Once Quarth fishermen, they turned to the vocation of piracy. About half of the 700 Tyvosh pirates were forcibly enlisted juveniles. Quarth only possessed a lightly armed coast guard and police contingent, the Quarth Homeland Security Force. During a 20-months period, dozens of Quarth Homeland Security Force members (Security Force) were killed in 'skirmishes' with the pirates.

B. Drone Attacks against the Tyvosh pirates

4. While negotiating about the establishment of an Ibbin military base in Quarth, Colonel Reena Valyeron (Valyeron), commander of the Quarth Homeland Security Force, requested Megor's help in utterly destroying the Tyvosh pirates, including the juveniles. The juvenile pirates were considered the most vicious of all. Megor suggested using newly developed experimental drones. He warned Valyeron about the drones' imprecision, resulting in many casualties, which she did not mind.
5. Subsequently, in July 2020, Megor secretly provided the world's most powerful and sophisticated hunter-killer drones, a mobile launch and control base, armour-piercing missiles and remote training. The Security Force then deployed the drones in October 2020 as part of Quarth's counter-piracy operations, extinguishing the 700 pirates and killing 300 non-pirate civilians. Four nighttime raids are particularly noteworthy for the high number of casualties. During the raids, juvenile pirates, hostages and human shields were killed. Further, an

elementary school and a hospital were destroyed.

C. Evidence

6. The facts are based on two pieces of evidence. Firstly, a report of the UN High Commissioner for Human Rights (UN-Report), dated 14 November 2020, describing the conflict in Quarth, including the October raids. The UN-Report is based on eyewitnesses' accounts and morgue records. Secondly, an article in the *Quarth News and Observer* by Roger Costane (Costane), dated 13 October 2020. Costane's article recounts his conversation with Valyeron on 12 October 2020 about Megor's provision of the drones.
7. On 15 January 2021, an article appeared in the *Quarth News and Observer* reporting about the retraction of Costane's article one day before. Costane retracted his article of 13 October 2020 due to a misunderstanding, vivid imagination and exaggeration. The article points out that the retraction coincidentally occurred right after the investigation's initiation and that Costane, who has no other means than a modest journalist salary, was later seen buying a Porsche 911 for USD 92,000 in cash. Costane was suspended from the paper due to an internal inquiry as to whether he was bribed to retract the article.

D. Procedural History

8. On 1 February 2021, the Prosecutor requested confirmation of 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.
9. In February 2021, pursuant to Rule 90 RPE, the Court's Registry appointed a Common Legal Representative of Victims (CLRV) to represent the interests of the pirates', juvenile pirates' and non-pirate civilians' families. On 28 February 2021, the CLRV filed a motion for appointing a separate CLRV to represent the families of the juvenile pirates and of the non-pirate victims of the drone attacks, while this Counsel would continue to represent the families of the adult pirate victims.
10. On 15 September 2021, the PTC denied the Prosecution's motion to confirm the charges against Megor and the appointment of a separate CLRV. 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 deciding that a single Victim's 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?

-II-

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

SUMMARY OF ARGUMENTS

-I-

The PTC Erred in Deciding that a Single Victim's Representative is Sufficient.

- A. *Firstly*, the families of the adult pirates, the juvenile pirates and the non-pirate civilians have conflicting interests.
- B. *Secondly*, the appointment of separate CLRVs does not unduly hinder an efficient trial.

-II-

The PTC Erred in Denying the Prosecution's Request for Confirmation of Charges Pertaining to the Defendant.

- A. *Firstly*, the charged acts qualify as crimes against humanity under Article 7(1)(a),(b) and (k) RS. The drone attacks were committed as part of a widespread and systematic attack directed against a civilian population. The charged acts fulfil the elements of murder, extermination, and other inhumane acts. The use of means and methods of warfare of a nature to cause superfluous injury and unnecessary suffering as well as extrajudicial killings can be prosecuted under Article 7(1)(k) RS. Besides, in the view of the adult pirates, the conflict between Quarth and the Tyvosh Pirates does not amount to a non-international armed conflict. If found otherwise, the charged acts constitute war crimes under Article 8(2)(e)(i) and (iv) RS. The Security Force intentionally directed their attacks against civilians, including the hostages, the human shields, and the juvenile pirates. Further, the attacks were intentionally directed against a hospital and a school, which remained civilian objects.
- B. *Secondly*, the Defendant is liable for aiding and abetting the charged crimes under Article 25(3)(c) RS as the material and mental elements are met.
- C. *Thirdly*, the case is of sufficient gravity to be admissible under Article 17(1)(d) RS.
- D. *Fourthly*, the evidentiary threshold pursuant to Article 61(7) RS is met as both, the UN-Report and the newspaper article by Costane, are of probative value.
- E. *Fifthly*, the Court has temporal and personal jurisdiction under Articles 11(2) and 12(2)(b) RS. The Defendant's national State Ibbin was party to the Statute at the relevant time for triggering jurisdiction over an assistant's act, namely when the principal's act occurred. Further, the Court's

exercise of jurisdiction does not violate the principle of non-retroactivity.

WRITTEN ARGUMENTS

I. THE PTC ERRED IN DECIDING THAT A SINGLE CLRV IS SUFFICIENT REPRESENTATION

1. A single CLRV is not sufficient to represent the families of killed adult pirates, juvenile pirates and non-pirate civilians. Pursuant to Rule 85(a) RPE, ‘victims’ means natural persons who have suffered harm as a result of the commission of any crime within the Court’s jurisdiction. Victim participation is based on Article 68(3) RS,¹ according to which the LRV shall ensure the consideration of the victims’ views and concerns. Thereby, victims’ representation must be meaningful instead of symbolic.² When there are numerous victims, Rule 90(2) RPE requires a CLRV to ensure the trial’s effectiveness. However, according to Rule 90(4) RPE, when choosing CLRVs, the Chamber has to ensure that the victims’ distinct interests are represented and conflicting interests are avoided. Conflicting interests exist between the families of adult pirates, juvenile pirates, and non-pirate civilians [A]. Besides, appointing several CLRVs does not unduly hinder an efficient trial [B].

[A] THE DIFFERENT VICTIM GROUPS HAVE CONFLICTING INTERESTS

2. Conflicting interests exist where the victims’ situation or specificity is so different that their interests are irreconcilable.³ Indicators for conflicting interests under Article 68(1) RS are ethnicity, age, gender, the type of crimes or specificities of the victims’ experiences.⁴ Accordingly, especially children’s distinct interests need to be considered.⁵ The Court regularly separates child soldiers from other victims, reasoning that, due to their involvement in the attacks, it is doubtful whether a single CLRV could fairly represent their potentially ‘manifestly opposed’ interests.⁶ The possibility of clearly dividing victims further indicates conflicting

¹ Safferling/Petrosian (2021) 188.

² *Katanga/Ngudjolo* Victims [10(b)].

³ *Ongwen* Victims [44]; *Nourain/Jamus* Victims [42].

⁴ Cf. *Katanga/Ngudjolo* Victims [12(b)].

⁵ Bitti/Friman in Lee (2001) 464.

⁶ *Yekatom/Ngaïssona* Victims [9, 14]; *Ntaganda* Victims [10]; *Katanga/Ngudjolo* Victims [5-6].

interests.⁷

3. The families of non-pirate civilians and pirates have conflicting interests. While the pirates attacked civilian vessels and people, the non-pirate civilians were not involved in the tensions leading up to the October raids.⁸ Thus, both experienced the raids completely differently. Furthermore, the non-pirate civilians and pirates are divided by clan-affiliation.⁹ Therefore, the families of non-pirate civilians and pirates have conflicting interests.
4. Further, the families of juvenile and adult pirates have conflicting interests. The adult pirates forcibly enlisted most of the juvenile pirates into their ranks.¹⁰ Hence, they can be seen as perpetrators by the juveniles. Moreover, as the juvenile pirates are under 15 years old,¹¹ the age difference indicates conflicting interests. Thus, the families of juvenile and adult pirates have conflicting interests.
5. Accordingly, the families of the adult pirates, the juvenile pirates and the non-pirate civilians have conflicting interests, further underlined by the possibility to easily divide them into three different groups. This suggests the appointment of three different CLRVs.
6. In any case, the families of the adult pirates need to be separated from the other victims' families. As will be elaborated, all are victims of crimes against humanity but only the non-pirate civilians and juvenile pirates can be considered victims regarding war crimes. This results in contradictory legal arguments (*Case [12]*). Consequently, the Court has to appoint at least two different CLRVs.
7. Overall, as the conflicting interests prevent a meaningful representation of the different victims' interests, their rights contained in Article 68(3) RS are harmed by appointing only one CLRV.

[B] APPOINTING THREE CLRVS DOES NOT UNDULY HINDER AN EFFICIENT TRIAL AS REQUIRED BY RULE 90(2) RPE

8. Only two additional CLRVs would not make the proceedings significantly less efficient. While

⁷ Cf. *Ongwen Victims* [44]; *Katanga/Ngudjolo Victims* [12(d)].

⁸ Cf. *UN-Report* [2].

⁹ *Ibid.*

¹⁰ *Costane* [8]; *UN-Report* [2].

¹¹ *Ibid.*

not every small difference in interests requires the appointment of different CLRVs,¹² presently, the conflicting interests are so severe that three different CLRVs are necessary to represent the victims meaningfully. Furthermore, to ensure the victims' essential role in seeking truth, they need to be able to trust the LRV to consider their point of view.¹³ Thus, the different victim perspectives can better contribute to an efficient truth-finding process if they are presented separately. Therefore, appointing three CLRVs does not unduly hinder an efficient trial.

9. Overall, the PTC erred in deciding that one CLRV is sufficient to represent the families of adult pirates, juvenile pirates and non-pirate civilians. In light of the conflicting interests, this Counsel seeks to continue representing the families of the adult pirates, while separate CLRVs should represent the families of the juvenile pirates and the non-pirate civilians. Nevertheless, the CLRV still offers its opinion on all legal issues, as it currently represents all different victim groups and the Court asked for a complete statement.

II. THE PTC ERRED IN DENYING THE PROSECUTION'S REQUEST FOR CONFIRMATION OF CHARGES PERTAINING TO THE DEFENDANT

[A] THE CHARGED ACTS CONSTITUTE CRIMES UNDER THE STATUTE

10. In the adult pirates' view, the drone attacks do not constitute war crimes under Article 8 RS as the non-international armed conflict threshold is not met [(i)]. However, if the non-international armed conflict threshold was met, the charged acts would constitute war crimes under Article 8(2)(e)(i) and (iv) RS [(ii)]. In any case, the actions constitute crimes against humanity under Article 7(1)(a),(b) and (k) RS [(iii)].

(i) In the View of the Adult Pirates, the Charged Acts do Not Constitute War Crimes as the Non-International Armed Conflict Threshold is Not Met

11. In the adult pirates' view, the nighttime drone attacks do not constitute war crimes under Article 8(2)(e)(i)(iv) RS as the armed conflict threshold of Article 8(2)(f) RS is not met.
12. According to Article 8(2)(f) RS, a non-international armed conflict requires a protracted armed conflict between governmental authorities and organised armed groups that is not a situation of internal disturbances or tensions.¹⁴ The existence of an armed conflict is assessed by the intensity

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

¹³ Cf. *Pena/Caryon* (2013) 532-533.

¹⁴ Definition of a non-international armed conflict introduced in *Tadić* Interlocutory Appeal [70].

of the armed violence and the degree of organisation of non-governmental groups.¹⁵ Labelling State operations as ‘war’ is only metaphorical¹⁶ since modern international law relies on a *de facto* approach to warfare.¹⁷

13. Firstly, the situation does not amount to the required intensity. The intensity is assessed by factors such as the seriousness and frequency of the attacks and the territorial spread.¹⁸ In Somalia, pirates detained up to 32 vessels simultaneously¹⁹ and jeopardised trade and fishing between the Somali shore and the Seychelles²⁰. Still, given this intensity, counter-piracy operations in Somalia are not being conducted as part of an armed conflict but as ‘anti-piracy law enforcement’²¹. Contrarily, the Tyvosh pirates only hijacked 17 civilian vessels over a three-year-period.²² The 20-month period of sporadic tensions between the pirates and the Security Force only amounted to ‘skirmishes’.²³ The pirates’ weakening impact on Quarth’s economy²⁴ must be seen in relation to Quarth’s developing status (*Facts [I]*) and pre-existing weakness caused by its former ‘war on drugs’²⁵. As the pirates’ attacks were mainly conducted in the high seas and waters off Quarth’s coast and the Security Force’s raids were confined to the northern part of the country,²⁶ the territorial spread is insignificant. Consequently, the intensity element is not fulfilled.
14. Secondly, the Tyvosh pirates were no organised armed group. Presently, the decisive factors are

¹⁵ *Ntaganda* Judgment [702]; *Bemba* Judgment [137]; *Katanga* Judgment [1187]; *Lubanga* Judgment [534].

¹⁶ Cf. Corsi (2017) 212.

¹⁷ Ambos (2014) [123]. Cf. Peterke (2012) 4-5.

¹⁸ *Ntaganda* Judgment [716]; *Bemba* Judgment [137]; *Katanga* Judgment [1187]; *Lubanga* Judgment [538].

¹⁹ Operation ATLANTA.

²⁰ Somali Pirates (2010).

²¹ Latest resolution UN Doc. S/RES/2500 (2019) Preamble; Guilfoyle (2010) 142–147; Marauhn in Koutrakos/Skordas (2014) 68, 74; Olson in Koutrakos/Skordas (2014) 192; Obert (2014) 224 fn.154; Sterio (2011) 295; Treves (2009) 412.

²² *UN-Report* [2].

²³ *Ibid.* [3].

²⁴ *Ibid.* [2].

²⁵ *Ibid.* [1].

²⁶ *Costane* [1]; *Map*; *UN-Report* [2].

a responsible command structure,²⁷ military ability to carry out large-scale or coordinated operations,²⁸ and involvement in the conflict for political purposes²⁹. Responsible command requires a military superior-subordinate relationship.³⁰ There is no indicator for a ‘military superior’ responsible for its subordinates. Instead, the Tyvosh pirates were loosely organised and consisted of 50% juveniles.³¹ Further, the pirates only possessed one warehouse used as a supply centre and temporarily used a school as a detention centre.³² Their sporadic attacks were limited to private vessels because their focus lied upon the ‘lucrative vocation’ of receiving ransom for personal gain.³³ Overall, the pirates were not able to carry out large-scale or coordinated attacks. Consequently, the organisational element is not met either.

15. Therefore, instead of an armed conflict, the sporadic ‘skirmishes’ in Quarth constitute internal disturbances and tensions under Article 8(2)(f) RS. This is in line with the UNCLOS, to which Quarth and Ibbin are members (*Facts [1]*). The UNCLOS provides the legal framework governing the use of force against pirates.³⁴ Article 105 UNCLOS expressly allows seizures of pirate ships. Thereby, instead of a right to ‘shoot to kill’, the use of force must be avoided as far as possible and, when unavoidable, not exceed the reasonable and necessary.³⁵ Considerations of humanity must apply.³⁶
16. Overall, the conflict does not amount to a non-international armed conflict. Although being criminals, the pirates remained civilians and are therefore protected under peacetime human rights law. Consequently, Article 8 RS is inapplicable.

²⁷ Element set out in Article 1(1) AP II.

²⁸ *Ntaganda* Judgment [704]; *Bemba* Judgment [134]; *Katanga* Judgment [1185-1186]; *Lubanga* Judgment [536-537].

²⁹ Bruderlein (2000) 8-9; Glaser (2005) 8; Guilfoyle (2010) 149; Petrusek (2000) 5; Sjöberg (2007) 3-4.

³⁰ ICRC (2005) Rule 4, 15–17; Guilfoyle (2010) 145; UK Ministry of Defence (2004) 4.3.

³¹ *UN-Report* [2].

³² *Ibid.* [5.2, 5.3].

³³ *Ibid.* [2].

³⁴ 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.

³⁵ *M/V ‘Saiga’ (No. 2)* Judgment [155] with further references. Accord Guilfoyle (2009) 277-293; Treves (2009) 412-414.

³⁶ *Ibid.*

(ii) If the Non-International Armed Conflict Threshold was Met, the Charged Acts would constitute War Crimes under Article 8(2)(e)(i) and (iv) RS

17. As the CLRV currently also represents the families of the deceased juvenile pirates and non-pirate civilians, this Counsel still considers that, if there was an armed conflict, the drone attacks would qualify as war crimes under Article 8(2)(e)(i) RS [(a)] and Article 8(2)(e)(iv) RS [(b)].

(a) The Drone Attacks were Intentionally Directed Against Civilians violating Article 8(2)(e)(i) RS

18. Article 8(2)(e)(i) RS incriminates intentionally directing attacks against civilians unless they directly participate in the hostilities. ‘Civilians’ are persons who are not members of State armed forces or organised armed groups.³⁷ Hostages are civilians.³⁸ Assuming there was an armed conflict, the adult pirates would constitute an organised armed group, thus legitimate military targets. The victims killed on 8 and 10 October 2020, namely the people lodging near the warehouse and the hostages,³⁹ were civilians. Moreover, the juvenile pirates [i.] and the people used as human shields [ii.] remained civilians. All civilians were intentionally targeted [iii.].

i. The Juvenile Pirates Remained Civilians

19. The juvenile pirates did not lose their civilian status by being part of an armed group. Children are especially protected in armed conflicts,⁴⁰ for instance under Article 24 ICCPR and Article 38 UNCRC. These are applicable treaties under Article 21(1)(b) RS,⁴¹ to which Quarth and Ibbin are parties (*Facts [1]*). Additionally, Article 8(2)(e)(vii) RS, which must be considered when assessing juveniles’ participation in hostilities,⁴² prohibits the recruitment or use of children under the age of 15 in non-international armed conflicts. It would contradict the very rationale underlying child protection if children lost this protection solely by joining an armed group, whether due to coercion or other circumstances.⁴³ The only exception conceivable is that

³⁷ *Ntaganda* Judgment [883, 921]; *Katanga* Judgment [801].

³⁸ Cf. Arnold in Ambos (2022) [730].

³⁹ *UN-Report* [5.1, 5.3].

⁴⁰ *Ntaganda* Charges [78].

⁴¹ Regarding UNCRC *Lubanga* Appeal [277]. Regarding ICCPR *Lubanga* Legal Assistance [41].

⁴² *Ntaganda* Charges [78].

⁴³ *Ibid.*; Jamison (2005) 153; Nicholson (2016) 134, 155; Sampaio/McEvoy (2016) 56; Stahn (2019) 82.

the juvenile itself attacks in the moment of the hostility.⁴⁴ There is no indicator that the juvenile pirates, all under the age of 15, actively engaged in the hostilities at the time of the attacks, which killed them. Additionally, they did not participate voluntarily in the hostilities, as they were mostly forcibly enlisted into the pirate ranks⁴⁵. Consequently, the juvenile pirates remained civilians.

ii. The Human Shields Remained Civilians

20. Civilians used as human shields do not lose their civilian status as they cannot be considered as directly participating in the hostilities.⁴⁶ They do not pose a direct and immediate risk but rather a passive protection and legal obstacle.⁴⁷ As the persons killed in the 11 October 2020 attack were used as human shields by the pirates,⁴⁸ they cannot be considered as directly participating. Thus, they remained civilians.

iii. The Drone Attacks were Intentionally Directed Against the Civilians

21. Directing an attack against a group means selecting it as the intended target and deciding on the attack.⁴⁹ The civilian population does not need to be the sole target.⁵⁰ Targeting civilians in addition to a military objective is sufficient⁵¹ and could not even be counterbalanced by military necessity.⁵² Further, in non-international armed conflicts, indiscriminate attacks can amount to directing an attack against civilians, especially when the extent of damage caused to civilians suggests that the perpetrator meant to target civilians.⁵³ Pursuant to Article 51(4)(c) AP I, indiscriminate attacks are those employing methods or means of combat, whose effects cannot be limited, as required by this protocol, thus are of a nature to strike military objectives and

⁴⁴ Nicholson (2016) 134.

⁴⁵ *UN-Report* [2].

⁴⁶ Bouchié de Belle (2008) 892; Colassis cited by Monnerat (2003); HRW (2003) 3; Schmitt (2009) 324.

⁴⁷ Bouchié de Belle (2008) 894, 986; HRW (2003) 3.

⁴⁸ *UN-Report* [5.4].

⁴⁹ *Ntaganda Judgment* [744].

⁵⁰ *Mbarushimana Charges* [142].

⁵¹ *Katanga Judgment* [802]; *Mbarushimana Charges* [142]; *Katanga/Ngudjolo Charges* [273].

⁵² *Katanga Judgment* [800].

⁵³ *Ibid.* [802].

civilians or civilian objects without distinction. Article 51(4)(c) AP I also applies in non-international armed conflicts as customary law⁵⁴ under Article 21(1)(b) RS, namely general and consistent State practice accompanied by *opinio iuris*⁵⁵. Therefore, drone attacks are only lawful if their effects can be limited to military objectives.⁵⁶

22. 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 repeats Article 30(2)(a) RS⁵⁷. According to Article 30(2)(a) RS, a person has intent in relation to conduct, when meaning to engage in the conduct. This mental element can be inferred from the means and methods used and the number and status of the victims.⁵⁸
23. During the 8 October 2020 attack on the Harbortown warehouse, 250 people, including non-pirate civilians lodging nearby and pirates, were killed.⁵⁹ In the 9 October 2020 attack against the pirate ‘mother ship’, more than 50% of the killed pirates were juveniles.⁶⁰ Further, in the attack on the Watertown elementary school on 10 October 2020, the non-pirate civilians taken hostage were killed.⁶¹ Moreover, in the 11 October 2020 attack on the Harbortown hospital, not only about 100 pirates but also 50 medical staff and patients used as human shields were killed.⁶² Overall, in addition to 350 adult pirates, 650 civilians, namely 300 non-pirate civilians and 350 juvenile pirates (*mn.19*), died during the October raids.⁶³ Thus, the drones’ effects were not limited to military objects and caused such damage to civilians that their use constitutes an indiscriminate attack. The Security Force carried out the attacks despite knowing about these effects,⁶⁴ hence acted intentionally. Further, as the Security Force wanted to extinguish all

⁵⁴ *Ibid.* [802 fn.1846]: ‘Additional Protocol II [sic], article 51(4)’.

⁵⁵ *North Sea Continental Shelf Cases* Judgment [77].

⁵⁶ Sehrawat (2017) 185.

⁵⁷ *Katanga* Judgment [806]. Accord Ambos (2014) 175.

⁵⁸ *Katanga* Judgment [807, 878].

⁵⁹ *UN-Report* [5.1].

⁶⁰ *Ibid.* [5.2].

⁶¹ *Ibid.* [5.3].

⁶² *Ibid.* [5.4].

⁶³ *Ibid.* [5].

⁶⁴ *Costane* [4, 5].

pirates, but particularly the juvenile pirates, who were considered ‘the most vicious of all’,⁶⁵ they meant to direct their attacks against the 350 civilian juvenile pirates. Consequently, due to their indiscriminate effect, the drone attacks were intentionally directed against civilians.

24. Overall, the drone attacks were intentionally directed against civilians, thereby violating Article 8(2)(e)(i) RS.

(b) The Drone Attacks were Intentionally Directed Against Civilian Objects violating Article 8(2)(e)(iv) RS

25. Article 8(2)(e)(iv) RS incriminates attacking certain civilian buildings such as schools or hospitals unless they are 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. This definition is established as customary law also applicable in non-international armed conflicts.⁶⁶ The assessment must consider the civilians’ safety.⁶⁷ ‘Effective contribution’ excludes objects that only have a ‘war-sustaining effect’, such as economical support.⁶⁸

26. The Harbortown Hospital remained a civilian object. Article 11(2) AP II entitles medical units to special protection unless used to commit hostile acts outside their humanitarian function. Quarth and Ibbin are members to the Additional Protocol II (*Facts [1]*). Article 11(2) AP II is established as customary law also applicable in non-international armed conflicts⁶⁹. This special protection only ceases after a warning remained unheeded, setting, whenever appropriate, a reasonable time-limit. ‘Hostile acts’ are acts which objectively harm *the adversary*.⁷⁰ Using hospitals as shields does not qualify as a hostile act because this would diminish the high protection afforded to hospitals.⁷¹ The remaining pirates took shelter in the attacked Harbortown

⁶⁵ *Ibid.* [3].

⁶⁶ *Strugar* Judgement [224]; *Tadić* Interlocutory Appeal [108-127]; ICRC (2005) Rule 8, 30-31; Lemmens/de Boer (2019).

⁶⁷ Junod ‘Article 52 AP I’ in ICRC (1987) [2024].

⁶⁸ Ambos (2014) [151]; Oeter in Fleck (2008) 185.

⁶⁹ ICRC (2005) Rule 28, 97.

⁷⁰ Junod ‘Article 11(2) AP II’ in ICRC (1987) [4719-4724]; Kolb/Nakashima (2019) 1179.

⁷¹ Gordon/Perugini (2016); Heller (2016).

Hospital.⁷² They did not harm the Security Force but only intended to protect themselves from the drone attacks. There is no indicator for a previous warning. Consequently, the hospital remained a civilian object.

27. The Watertown elementary school also remained a civilian object. It had only recently been appropriated by the pirates for temporal use as detention centre while awaiting ransom payments.⁷³ Thus, the school merely had an economical ‘war-sustaining effect’. Compared to the civilian casualties and the utter destruction of the school, the military advantage of killing dozens of pirates was rather small. Thus, the school kept its civilian status.
28. The Security Force also acted intentionally. Article 8(2)(e)(iv) EoC requires that the perpetrator intentionally directed the attack against civilian objects being aware of their civilian character, in accordance with Article 30(2)(a) RS. The Security Force aimed to destroy the hospital and school to fight the pirates.⁷⁴ They were aware of the buildings’ nature as school and hospital. Thus, civilian buildings were intentionally targeted.
29. Consequently, the drone attacks were intentionally directed against civilian objects, thereby violating Article 8(2)(e)(iv) RS.
30. Overall, if there was an armed conflict, the drone attacks would qualify as war crimes under Article 8(2)(e)(i) and (iv) RS.

(iii) The Charged Acts Constitute Crimes against Humanity under Article 7(1)(a),(b) and (k) RS

31. The contextual elements of Article 7(1) RS are established [(a)]. The charged acts qualify as murder and extermination [(b)], and ‘other inhumane acts’ [(c)]. The Security Force acted with the required mental element [(d)].

(a) The Contextual Elements of Article 7(1) RS are Fulfilled

32. The contextual elements of crimes against humanity are fulfilled since the charged acts constitute a widespread and systematic attack [i.] directed against any civilian population pursuant to a State policy [ii.].

⁷² UN-Report [5.4].

⁷³ *Ibid.* [5.3].

⁷⁴ *Costane* [3].

i. *The Drone's Deployment Constitutes a Widespread and Systematic Attack*

33. While Article 7(1) RS requires an attack, which is either widespread or systematic,⁷⁵ both requirements are presently fulfilled.
34. 'Widespread' connotes the large-scale nature of the attack,⁷⁶ meaning it is massive, frequent, carried out collectively and directed against multiple victims⁷⁷. This evaluation is neither strictly quantitative nor geographical but rather based on individual facts.⁷⁸ In *Bemba*, 357 civilians sufficed.⁷⁹ Presently, in a week of several nighttime raids, 1,000 civilians, including 350 juveniles and 300 non-pirate civilians, were killed, thus extinguishing all pirates.⁸⁰ An elementary school and a hospital were 'utterly destroyed'.⁸¹ Hence, the attacks were large-scale, thus widespread.
35. 'Systematic' refers to the organised, non-random nature of violent acts, evidenced by regular repetition of similar criminal conduct.⁸² A State or organisational policy evidences a systematic attack.⁸³ All attacks were conducted at night using drones, launched by the Security Force and targeted against pirate-occupied objectives.⁸⁴ The raids were planned and prepared from July to October 2020 as part of Quarth's counter-piracy operations.⁸⁵ Thus, the attacks were systematic.
36. Consequently, the raids were widespread and systematic.

⁷⁵ *Bemba* Charges [82]; *Katanga/Ngudjolo* Charges [412].

⁷⁶ *Bemba* Charges [83]; *Katanga/Ngudjolo* Charges [394]; *Al Bashir* Warrant [81].

⁷⁷ *Kenya* Authorisation [95]; *Bemba* Charges [83].

⁷⁸ *Gbagbo* Charges [222]; *Kenya* Authorisation [95]; *Bemba* Charges [83].

⁷⁹ *Bemba* Charges [108].

⁸⁰ *Costane* [8]; *UN-Report* [2, 5].

⁸¹ *UN-Report* [5.3, 5.4]

⁸² *Ongwen* Judgment [2679]; *Ntaganda* Judgment [692]; *Gbagbo* Charges [222]; *Katanga* Judgment [1113, 1123]; *Kenya* Authorisation [95]; *Bemba* Charges [83]; *Al Bashir* Warrant [81]; *Harun/Abd-Al-Rahman* Warrant [62].

⁸³ *Harun/Abd-Al-Rahman* Warrant [62].

⁸⁴ *UN-Report* [5].

⁸⁵ *Costane* [7].

ii. *The Attack was Directed Against any Civilian Population pursuant to a State Policy*

37. ‘Civilian population’ under Article 7 RS comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants.⁸⁶ ‘Population’ refers to a collective as opposed to individual civilians.⁸⁷ ‘Any’ indicates that the group does not need to be defined by similar distinguishing features.⁸⁸ Due to the humanitarian purpose of crimes against humanity, ‘civilian’ must be interpreted differently than under Article 8 RS,⁸⁹ considering their specific situation rather than their status⁹⁰. The presence of non-civilian individuals does not deprive a population of its civilian character.⁹¹
38. ‘Directed against’ presupposes that the civilian population is the attack’s primary object.⁹² The means and methods used and, the crimes’ nature and the requirements of international humanitarian law, including the duty to take precautionary measures,⁹³ must be considered.⁹⁴ Besides, the purpose of the attack and its primary target are not necessarily equivalent.⁹⁵
39. In peacetime, alongside the juveniles and the non-pirate civilians, the adult pirates were civilians as they were not members of an organised armed group (*mn.14*). Similarly, even in wartime, the pirates must be considered civilians under Article 7 RS as they did not actively engage in the conflict in the moment of the attacks. Particularly, the juveniles remained civilians due to their special protection (*mn.19*). Therefore, all 1,000 civilians constitute a civilian population. While the attack’s purpose was to extinguish the pirates pursuant to Quarth’s State policy,⁹⁶ the non-pirate civilians were simultaneously targeted by using imprecise weapons (*mn.23*). There are no

⁸⁶ *Bemba* Charges [78]; *Katanga/Ngudjolo* Charges [399].

⁸⁷ *Ntaganda* Judgment [667]; *Bemba* Judgment [152]; *Kenya* Authorisation [81].

⁸⁸ *Ntaganda* Judgment [667]; *Bemba* Charges [76]; *Katanga/Ngudjolo* Charges [399].

⁸⁹ *Ambos in Ambos* (2022) [26].

⁹⁰ *Blaškić* Judgment [214]. Accord *Muvunyi* Judgment [513]; *Bagilishema* Judgement [79]; *Kupreškić et al.* Judgment [547-549].

⁹¹ *Ntaganda* Judgment [668]; *Bemba* Judgment [153].

⁹² *Ongwen* Judgment [2675]; *Ntaganda* Judgment [668]; *Bemba* Judgment [154]; *Katanga* Judgment [1105].

⁹³ Codified in Article 57(1) AP I.

⁹⁴ *Ntaganda* Judgment [668]; *Kunarac et al.* Appeal [91].

⁹⁵ *Fofana/Kondewa* Appeal [300]. Accord *Eboe-Osuji* (2008) 121.

⁹⁶ *Costane* [4]; *UN-Report* [4].

indicators that precautionary measures were taken to protect the civilians. Thus, the attacks were directed against any civilian population pursuant to a State policy.

40. Consequently, all contextual elements are fulfilled.

(b) The Charged Acts Qualify as Murder under Article 7(1)(a) RS and Extermination under Article 7(1)(b) RS

41. All 1,000 deaths were caused by the drone attacks, wherefore the acts are covered by the material elements of murder under Article 7(1)(a) RS in accordance with Article 7(1)(a)(1)(fn.7) EoC.

42. Furthermore, killing the pirates qualifies as extermination. According to Article 7(2)(b) RS and Article 7(1)(b)(1),(2) EoC, extermination requires an element of mass destruction. However, killing only part of the civilian population suffices.⁹⁷ Extermination can be committed against a relatively small population as large-scale does not suggest a strict numerical approach.⁹⁸ As the focus is not on the number of victims but on the aim to eliminate a targeted population,⁹⁹ even 60 killings may be sufficiently large-scale.¹⁰⁰ Further indicators are the circumstances surrounding the deaths, the manner of the killings,¹⁰¹ and the degree of organisation.¹⁰²

43. The drone attacks extinguished all 700 Tyvosh pirates.¹⁰³ As shown by Quarth's plan to 'utterly destroy the pirates' and the deployment of drones killing multiple people at once,¹⁰⁴ the raids were aimed against the pirates as a collective group rather than as specific individuals. Therefore, the attacks constituted a mass killing of part of a civilian population, hence extermination under Article 7(1)(b) RS.

(c) The Charged Acts Qualify as 'Other Inhumane Acts' under Article 7(1)(k) RS

44. Under Article 7(1)(k) RS, Article 7(1)(k)(2) EoC, 'other inhumane acts' are of similar character

⁹⁷ Ambos (2014) 185.

⁹⁸ *Lukić/Lukić* Appeal [538]. Cf. *Vasiljević* Judgment [227 fn.587]; *Stakić* Judgement [640]; *Blagojević/Jokić* Judgement [573]; *Brđanin* Judgement [391]; *Gacumbitsi* Judgement [309]; *Rutaganira* Judgement [49]; *Bagilishema* Judgement [87].

⁹⁹ *Kayishema/Ruzindana* Judgement [145]; Stahn in Ambos (2022) [213].

¹⁰⁰ *Lukić/Lukić* Appeal [544].

¹⁰¹ *Ibid.* [338].

¹⁰² *Krstić* Judgement [501].

¹⁰³ *UN-Report* [5].

¹⁰⁴ *Costane* [5]; *UN-Report* [5].

to the acts referred to in Article 7(1) RS and intentionally cause great suffering or serious injury to body or physical health. ‘Other inhumane acts’ are defined as serious violations of customary international law and international human rights law.¹⁰⁵ Prosecution under Article 7(1)(k) RS requires at least one materially distinct element not adequately reflected under Article 7(1)(a)-(j) RS,¹⁰⁶ namely one requiring proof of a fact not required for the others.¹⁰⁷ Presently, extrajudicial killings [i.] and the use of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering [ii.] constitute other inhumane acts under Article 7(1)(k) RS.

i. The Drone Attacks Constitute Extrajudicial Killings Violating the Right to a Fair Trial

45. The extrajudicial killings of civilians under peacetime law constitute ‘other inhumane acts’ pursuant to Article 7(1)(k) RS. The right to a fair trial in criminal proceedings is entrenched in Article 14 ICCPR and numerous human rights agreements¹⁰⁸, relevant pursuant to Article 21(3) RS. This right is ‘*an absolute right that may suffer no exception*’.¹⁰⁹ Extrajudicial killings are willful killings of criminals without a fair trial due to the authorities’ inability of capturing them.¹¹⁰ Article 7(1)(e) RS prohibits imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law. Thus, extrajudicial killings have a similar character to the acts referred to in Article 7(1) RS but contain the distinct material element of the right to a fair trial, which is not adequately reflected in Article 7(1)(a)-(j) RS.
46. The Security Force was incapable of capturing the pirates and thus decided to kill them.¹¹¹ There was no prior trial in which the pirates could have legally defended themselves. Thus, the drone attacks constitute extrajudicial killings, which violates the right to a fair trial and caused great suffering. Consequently, the extrajudicial killings constitute ‘other inhumane acts’.

¹⁰⁵ *Katanga/Ngudjolo* Charges [448].

¹⁰⁶ Stahn in Ambos (2022) [192].

¹⁰⁷ *Delalić et al.* Appeal [412].

¹⁰⁸ Cf. Article 10 UDHR; Article 7(1) ACHPR; Article 8(1) ACHR; Article 6(1) ECHR.

¹⁰⁹ Human Rights Committee (1992) 20, 5.2.

¹¹⁰ Cf. *Philippines* Authorisation [91]; *Philippines* Request [3]; Bassiouni (2012) 204; Fakhoury (2014) 56.

¹¹¹ *Costane* [8]; *UN-Report* [3, 4].

ii. *The Drone Attacks involve Means and Methods of Warfare of a nature to cause Superfluous Injury or Unnecessary Suffering*

47. Certain types of attacks, such as forbidden means and methods of warfare under Article 35(2) AP I, are also prohibited under Article 7(1)(k) RS.¹¹² Article 35(2) AP I constitutes customary law¹¹³ applicable to non-international armed conflicts since the prohibitions was considered in the draft of Additional Protocol II and only not included following the aim of a simplified text, not due to any objections to the rule.¹¹⁴ Further, acts which are inhumane and consequently proscribed in international wars, cannot be humane and admissible in civil strife.¹¹⁵ The other crimes in Article 7 RS do not consider the means and methods used to carry out the attacks, hence it contains a materially distinct element. Consequently, the prohibition of this element is covered by Article 7(1)(k) RS.

48. The drones, carrying armour-piercing missiles,¹¹⁶ constitute means and methods of warfare, which are of a nature to cause superfluous injury and unnecessary suffering. ‘Means of warfare’ relate to weapons, while ‘methods of warfare’ connote the tactics, techniques, and procedures by which hostilities are conducted.¹¹⁷ When pursuing a legitimate military objective, causing ‘unnecessary suffering or superfluous injury’ means inflicting more harm than unavoidable.¹¹⁸ Exterminating the enemy is not a legitimate objective.¹¹⁹ While drones themselves may be considered a lawful weapon contributing to minimise harm,¹²⁰ the way drones are used can be unlawful¹²¹. Presently, although labelled as ‘sophisticated’, the drones are imprecise weapons so powerful that they can destroy an entire city block.¹²² The drones were not able to minimise harm as the attacks resulted in hundreds of victims, burning to death and being smashed by

¹¹² Cf. Armbrust (2012).

¹¹³ *Tadić* Interlocutory Appeal [119]; ICRC (2005) Rule 70, 237-241; Pocar (2002) 344.

¹¹⁴ ICRC (2005) Rule 70, 237, 239.

¹¹⁵ *Tadić* Interlocutory Appeal [119]. Accord ICRC (2005) Rule 70, 240.

¹¹⁶ *Costane* [4].

¹¹⁷ Sehwat (2017) 183.

¹¹⁸ *Nuclear Weapons* Advisory Opinion [78]. Accord ICRC (2005) Rule 70, 241.

¹¹⁹ EP (2013) 26.

¹²⁰ Schmitt (2010) 313; Sehwat (2017) 184; Wuschka (2011) 896.

¹²¹ Sehwat (2017) 184; Wuschka (2011) 896.

¹²² *Costane* [4].

collapsing buildings, as well as the destruction of most of the Harbortown wharf area.¹²³ Furthermore, their stealth technology and infrared targeting enabled malicious nighttime attacks, which could not be perceived easily.¹²⁴ Thus, the drone attacks caused superfluous injury and unnecessary suffering. Consequently, the attacks' tactics and techniques constitute forbidden means and methods of warfare of similar character to the other acts referred to in Article 7(1) RS.

49. Overall, the violations of the right to a fair trial and the prohibition of the use of forbidden material and warfare and constitute other inhumane acts under Article 7(1)(k) RS.

(d) The Mental Element is Fulfilled

50. Pursuant to Article 7(1) RS and Article 7(Introduction)(2) EoC, the perpetrator must have been aware that a widespread or systematic attack directed against a civilian population is taking place and that his action is part of the attack. The Security Force launched the drone attacks against the pirates and non-pirate civilians in awareness and as part of Quarth's counter-piracy operation.¹²⁵ Thus, the Security Force acted in knowledge of the attack.

51. Further, the mental elements of Article 30(2)(a) and (b) RS regarding murder, extermination, and other inhumane acts are fulfilled. Pursuant to Article 30(2)(b) RS, the perpetrator must at least be aware that a consequence will occur in the ordinary course of events. The Security Force meant to deploy the drones to 'utterly destroy the pirates'.¹²⁶ They were aware of the drones' imprecision, thus the harm and casualties they would cause.¹²⁷ Furthermore, they knowingly killed the pirates without a fair trial.¹²⁸ Thus, they acted intentionally, fulfilling the mental element.

52. Consequently, the drone attacks constitute crimes against humanity under Article 7(1)(a),(b) and (k) RS.

53. Overall, if contrary to this Counsel's view, the armed conflict threshold is found to be met, the charged acts would constitute war crimes under Article 8(2)(e)(i) and (iv) RS. In any case, the

¹²³ *UN-Report* [5].

¹²⁴ *Costane* [4].

¹²⁵ *UN-Report* [4].

¹²⁶ *Costane* [5].

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* [4, 5]; *UN-Report* [5].

acts constitute crimes against humanity under Article 7(1)(a),(b) and (k) RS.

[B] THE DEFENDANT IS LIABLE UNDER ARTICLE 25(3)(C) RS

54. The Defendant fulfils the material [(i)] and mental [(ii)] elements for aiding and abetting the charged crimes pursuant to Article 25(3)(c) RS.

(i) The Material Elements for Aiding and Abetting are Met

55. Aiding and abetting is a mode of accessorial liability,¹²⁹ depending on the commission of a principal's crime¹³⁰. However, the principal does not need to be identified, charged, or convicted.¹³¹

56. Contrary to the *ad hoc* tribunals' higher threshold,¹³² the requirement of a substantial and direct contribution cannot be inferred from the Statute.¹³³ The elevated mental requirement, namely the purpose to facilitate, excludes any insufficient form of contribution.¹³⁴ While Article 2(3)(d) ILC Draft Code (1996) required the assistance to be direct and substantial, this was not adopted in the corresponding Article 25(3)(c) RS.¹³⁵ It suffices that the assistance had a mere effect on the crime's commission¹³⁶ by furthering, advancing or facilitating it¹³⁷.

57. Megor provided drones, a mobile launch and control base, remote training and armour-piercing missiles used for the attacks.¹³⁸ Thus, his assistance had a facilitating effect.

58. Even if the 'substantial' and 'direct' criteria were applicable, they would be met. 'Substantial'

¹²⁹ *Bemba et al.* Appeal [1324-1325]; *Katanga* Judgment [1383].

¹³⁰ *Bemba et al.* Judgment [84]; *Katanga* Judgment [1385].

¹³¹ *Bemba et al.* Judgment [84]; *Lubanga* Appeal [467].

¹³² *Tadić* Judgment [688-692]; *Delalić et al.* Judgement [325-329]; *Naletilić/Martinović* Judgment [63]; *Tadić* Interlocutory Appeal [229]; *Brđanin* Judgment [271]; *Fofana/Kondewa* Appeal [73].

¹³³ *Bemba et al.* Judgment [93]; *Al Mahdi* Charges [26]; *Ongwen* Charges [43].

¹³⁴ *Bemba et al.* Judgment [94-95].

¹³⁵ *Ibid.* [93].

¹³⁶ *Ibid.* [90]; *Ongwen* Charges [43]; *Blé Goudé* Charges [167]; *Bemba et al.* Charges [35].

¹³⁷ *Bemba et al.* Judgment [94].

¹³⁸ *Costane* [6].

does not require a causal link.¹³⁹ However, if the accessory's conduct is causal for the principal's crime, it is substantial.¹⁴⁰ A contribution is direct if specifically directed towards certain crimes.¹⁴¹ Weapon deliveries are direct, when the accessory supplies the weapons used for the crimes, knowing that they will be used for unlawful killings.¹⁴² As the Security Force was insufficiently armed,¹⁴³ the attacks could not have occurred without the drones Megor delivered. Therefore, the Defendant's contribution is causal, hence substantial. Further, Megor knew that the Security Force intended to eradicate the pirates, including juveniles, attack schools and hospitals and use an imprecise weapon causing numerous casualties.¹⁴⁴ Thus, he knew that the provided drones would be used for unlawful killings. Hence, Megor's contribution is direct.

59. Overall, the material elements of Article 25(3)(c) RS are met.

(ii) The Mental Elements for Aiding and Abetting are Fulfilled

60. The Defendant acted with the purpose to facilitate [(a)] and had intent regarding the principal's acts as well as his own act [(b)].

(a) The Defendant Acted with the Purpose to Facilitate

61. Under Article 25(3)(c) RS the accessory must act with the purpose of facilitating the main crime's commission. The purpose element only refers to the act of facilitation, not the main crime.¹⁴⁵ The accessory neither needs intent regarding the success, nor the consequences of the main crime.¹⁴⁶ Wishing that his assistance facilitates the main crime is sufficient.¹⁴⁷ The purpose element can be derived from the accessory's certain knowledge about the facilitating effect of his assistance on the crime.¹⁴⁸

¹³⁹ *Nyiramasuhuko et al.* Appeal [2083].

¹⁴⁰ Cf. *Tadić* Judgment [688].

¹⁴¹ *Tadić* Appeal [229]. Accord *Perišić* Appeal [27].

¹⁴² *Tadić* Judgment [680].

¹⁴³ *UN-Report* [3].

¹⁴⁴ *Costane* [2, 3, 5].

¹⁴⁵ *Bemba et al.* Judgment [97].

¹⁴⁶ Eser in Cassese (2002) [801]; Goy (2012) 63; Sehgal/Baheti (2019); Stewart (2015); Weigend (2014).

¹⁴⁷ *Ibid.*

¹⁴⁸ Finnin/Milaninia (2014); Stewart (2015).

62. As Valyeron turned to Megor for help,¹⁴⁹ he was aware that the Security Force would not have been able to attack the pirates without the drones. Megor's help in extinguishing the Tyvosh pirates was a condition for continuing the negotiations about an Ibbin military base.¹⁵⁰ Thus, as it was essential for Megor that his act would facilitate the Security Force's operation, he wished for the facilitating effect. To ensure the facilitating character of his act, he not only provided the drones but also additional equipment and training.¹⁵¹ Consequently, he acted with the purpose to facilitate.

(b) The Defendant had Intent regarding the Principal's Crime and his Own Act

63. In line with Article 30(2)(a),(b) RS, the accessory must act with intent regarding the principal's act and his own.¹⁵² Pursuant to Article 30(2)(b) RS, he must at least be aware that the principal's act will occur in the ordinary course of events.¹⁵³ Awareness of the crime's essential elements including the principal's necessary mental elements suffices.¹⁵⁴

64. Megor was aware of all circumstances establishing crimes against humanity and possible war crimes and the main perpetrator's intent (*mn.58*). Once they would receive the drones, there was no reason to doubt the commission of the crimes in the ordinary course of events. Thus, he had intent regarding the principal's crime. Further, Megor meant to deliver the drones,¹⁵⁵ hence acted with intent regarding his own act.

65. Consequently, the mental requirements for Article 25(3)(c) RS are met.

66. Overall, Megor is liable for aiding and abetting under Article 25(3)(c) RS.

[C]THE GRAVITY THRESHOLD OF ARTICLE 17(1)(D) RS IS MET

67. Due to sufficient gravity, the case is admissible pursuant to Article 17(1)(d) RS. The gravity

¹⁴⁹ *Costane* [2].

¹⁵⁰ *UN-Report* [2].

¹⁵¹ *Costane* [6].

¹⁵² Cf. *Bemba et al.* Judgment [98]; Goy (2012) 63.

¹⁵³ Cf. *Bemba et al.* Judgment [98].

¹⁵⁴ *Ibid.*; *Naletilić/Martinović* Judgment [63].

¹⁵⁵ *Costane* [4].

threshold is an additional criterion for admissibility.¹⁵⁶ However, the negative wording of Article 17(1)(d) RS suggests that crimes within the Court's jurisdiction are generally of sufficient gravity.¹⁵⁷ Both, quantitative and qualitative elements, are relevant for the Court's gravity assessment.¹⁵⁸ 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 and their impact.¹⁵⁹ Additionally, the aggravating circumstances of Rule 145(1)(c),(2)(b) RPE may be used as guidance.¹⁶⁰ All relevant factors considered as a whole, rather than individually, have to meet the gravity threshold.¹⁶¹ The case meets the quantitative [(i)] and qualitative criteria [(ii)].

(i) *The Quantitative Criterion is Fulfilled*

68. Key factor for assessing the scale is the number of victims.¹⁶² Victims under Rule 85(a) RS include direct victims, whose harm results from the commission of a crime, and indirect victims, suffering harm due to their relationship with a direct victim.¹⁶³ While in *Blé Goudé* already less than 700 direct victims, including 184 deaths, were considered sufficient,¹⁶⁴ in *Abu Garda* and *Nourain/Jamus* only 20 victims sufficed.¹⁶⁵ Presently, all deceased suffered physical harm, hence count as direct victims. As the Court has not yet conclusively determined whether the pirates were lawfully targeted, they count as victims in the gravity assessment. Thus, the total number of direct victims amounts to 1,000.¹⁶⁶ Additionally, their families endured emotional harm, hence count as indirect victims. Therefore, with more than 1,000 direct victims plus their

¹⁵⁶ *DRC Warrants* [42].

¹⁵⁷ *Al Hassan Gravity Appeal* [55].

¹⁵⁸ *Ibid.* [31]; *Bangladesh/Myanmar Authorisation* [279]; *Blé Goudé Gravity* [11]; *Kenya Authorisation* [62, 188]; *Abu Garda Charges* [31].

¹⁵⁹ Cf. *Al Hassan Gravity Appeal* [92]; *Afghanistan Authorisation* [81-83]; *Blé Goudé Gravity* [11]; *Muthaura et al. Charges* [50]; *Côte d'Ivoire Authorisation* [204]; *Kenya Authorisation* [62].

¹⁶⁰ *Al Hassan Gravity* [48]; *Blé Goudé Gravity* [12]; *Blé Goudé Response* [16]; *Kenya Authorisation* [62].

¹⁶¹ *Blé Goudé Gravity* [19]; *Blé Goudé Response* [25].

¹⁶² *Al Hassan Gravity Appeal* [92]; *Kenya Authorisation* [62].

¹⁶³ *Lubanga Victims* [44]; *Lubanga Victims' Appeal* [32].

¹⁶⁴ *Blé Goudé Gravity* [21(i)-22].

¹⁶⁵ *Nourain/Jamus Charges* [2, 27-28]; *Abu Garda Charges* [34].

¹⁶⁶ *Costane* [8]; *UN-Report* [5].

families, the scale of the crimes is grave. Consequently, the quantitative criterion is met.

(ii) *The Qualitative Criterion is Fulfilled*

69. Firstly, the nature of the crimes is grave. Crimes are *inter alia* serious in nature if they involve murder.¹⁶⁷ Additionally, due to juveniles' special protection (*mn.19*), their killing heightens the grave nature¹⁶⁸. The committed crimes involve murder (*mn.41*). Further, the victims include 350 juvenile pirates.¹⁶⁹ Thus, the crimes are of grave nature.
70. Secondly, the manner of commission is grave. Relevant factors are the means employed to execute the crimes,¹⁷⁰ elements of particular cruelty such as burning victims alive,¹⁷¹ the degree of participation,¹⁷² the abuse of an official capacity,¹⁷³ the vulnerability of the victims and the motive to destroy the group¹⁷⁴. Using the drones caused superfluous injury to the victims (*mn.48*) and constituted particular cruelty as it resulted in victims burning to death.¹⁷⁵ Since the commission of the attacks fully depended on the provision of the drones (*mn.57*), as supplier, Megor played a key role. Furthermore, as a high-ranking official regarding Ibbin's National Security (*Facts [2]*), he abused his official capacity when providing the drones. Their stealth technology and infrared targeting¹⁷⁶ enabled malicious nighttime attacks, hence, according to Rule 145(2)(b)(iii) RPE, attacks against particularly defenceless victims. Moreover, the drone attacks were launched intending to 'utterly destroy the pirates'.¹⁷⁷ Therefore, the manner of commission is grave.
71. Thirdly, the impact of the crimes is grave. Factors are the harm and suffering inflicted on the

¹⁶⁷ Kontorovich (2014) 388.

¹⁶⁸ *Bangladesh/Myanmar Authorisation* [286]. Cf. Policy Paper (2016) [39]; Policy Paper (2013) [63].

¹⁶⁹ *UN-Report* [5].

¹⁷⁰ *Kenya Authorisation* [62].

¹⁷¹ *Bangladesh/Myanmar Authorisation Request* [285]; *Blé Goudé Response* [40]; *Muthaura et al. Charges* [49].

¹⁷² Policy Paper (2013) [64].

¹⁷³ Rule 145(2)(b)(ii) RPE. Accord *Lubanga Sentence* [51].

¹⁷⁴ Policy Paper (2016) [40]; Policy Paper (2013) [64].

¹⁷⁵ *UN-Report* [5].

¹⁷⁶ *Costane* [4].

¹⁷⁷ *Ibid.* [5].

victims, their families and the entire community.¹⁷⁸ The Tyvosh pirates were ultimately extinguished.¹⁷⁹ Additionally, two specially protected civilian buildings (*mn.26,27*), the Watertown elementary school and the Harbortown Hospital, were utterly destroyed.¹⁸⁰ Thus, the crimes' impact is grave.

72. Consequently, the qualitative criterion is also met.

73. Overall, the case is sufficiently grave and therefore admissible under Article 17(1)(d) RS.

[D] THE EVIDENTIARY THRESHOLD UNDER ARTICLE 61(7) RS IS MET

74. Further, pursuant to Article 61(7) RS, substantial grounds to believe that the accused committed the crimes charged need to be established. To ascertain the evidence's contribution to reaching the evidentiary threshold, the probative value has to be determined.¹⁸¹ A piece of evidence does not individually have to suffice to meet the threshold since all evidence must be assessed as a whole.¹⁸² The presented evidence is of probative value [(i)] and establishes substantial grounds to believe that Megor committed the crimes charged [(ii)].

(i) The Presented Evidence is of Probative Value

75. Reliability is a key factor for assessing probative value.¹⁸³ Indicia for the reliability of documentary evidence are its provenance, its author, their role in the relevant events,¹⁸⁴ and whether the evidence was given voluntarily, truthful and trustworthy.¹⁸⁵ However, it is not the PTC's task to conclusively determine the probative value.¹⁸⁶ Documentary evidence cannot be

¹⁷⁸ *Bangladesh/Myanmar* Authorisation [287]; *Kenya* Authorisation [62].

¹⁷⁹ *Costane* [8]; *UN-Report* [5].

¹⁸⁰ *UN-Report* [5.3, 5.4].

¹⁸¹ *Katanga/Ngudjolo* Motions Decision [16].

¹⁸² Cf. *Lubanga* Charges [39].

¹⁸³ *Katanga/Ngudjolo* Motions Decision [16]; *Katanga/Ngudjolo* Witness Testimony [13].

¹⁸⁴ *Ntaganda* Judgment [57].

¹⁸⁵ *Lubanga* Document Admissibility [28] citing *Aleksovski* Evidence [15]; *Tadić* Hearsay [16].

¹⁸⁶ *Said* Charges [39].

considered as having a lower probative value¹⁸⁷ and the Court may rely on hearsay evidence¹⁸⁸.

76. The UN-Report [(a)] and Costane's newspaper article [(b)] are of probative value.

(a) The UN-Report is of Probative Value

77. UN-Reports are generally reliable,¹⁸⁹ especially when signed by an identified representative¹⁹⁰. The report was published by the UN High Commissioner for Human Rights (*Facts [6]*), thus is reliable. Additionally, the UN-Report contains no inconsistencies. It is based on eyewitnesses' accounts and morgue records,¹⁹¹ proving that the report is sufficiently substantiated and that there are witnesses who could testify in trial. Therefore, the UN-Report is of probative value.

(b) The Newspaper Article is of Probative Value

78. The newspaper article is reliable. It was published by Costane in the *Quarth News and Observer*, based on his conversation with Valyeron, commander of the Quarth Homeland Security Force.¹⁹² Costane was not directly involved in the attacks, which could have affected his neutrality. Furthermore, the article contains classified information an external person could not have possessed, such as negotiations over a future military base in Quarth.¹⁹³ There are no indicators that the *Quarth News and Observer* is a dubious newspaper publishing untrustworthy reports. Thus, the newspaper article is reliable.

79. Besides, Costane's retraction of the article on 14 January 2021 (*Facts [7]*) does not significantly lower its probative value. When assessing the retraction of evidence, its plausibility, circumstances and reasons are relevant.¹⁹⁴ Articles may be retracted, when clear evidence for the article's unreliability is presented, for instance that it resulted from fabrication.¹⁹⁵ Furthermore,

¹⁸⁷ Cf. *Lubanga Charges* [128].

¹⁸⁸ *Ntaganda Judgment* [67]; *Bemba et al. Appeal* [874]; *Ngudjolo Appeal* [226].

¹⁸⁹ *Afghanistan Authorisation* [47]; *Katanga/Ngudjolo Motions Decision* [29].

¹⁹⁰ *Katanga/Ngudjolo Motions Decision* [24].

¹⁹¹ *UN-Report* [5].

¹⁹² *Costane* [1].

¹⁹³ *Ibid.* [2].

¹⁹⁴ Cf. *Katanga Judgment* [164-167].

¹⁹⁵ COPE's Retraction guidelines.

proceedings may not be hindered by retractions due to bribery as their integrity must be protected.¹⁹⁶ Parties may not benefit from the commission of crimes under Article 70 RS.¹⁹⁷ Costane has not presented any evidence but only claimed that the article was based on a misunderstanding, exaggeration and vivid imagination (*Facts [7]*). However, the article contained detailed and secret information, reaffirmed in the UN-Report. Moreover, there are strong indicators that Costane was bribed to retract his article. The retraction ‘coincidentally’ occurred right after the investigation’s initiation and Costane was later seen buying a Porsche 911 for USD 92,000 in cash (*Facts [7]*). Purchasing such an expensive car in cash with his modest journalist salary (*Facts [7]*) strongly suggests bribery. Moreover, Costane was suspended from the paper pending an internal inquiry concerning bribery (*Facts [7]*). Therefore, the article’s retraction does not significantly lower the probative value.

80. Overall, the newspaper article is of probative value.

81. Consequently, both pieces of evidence are of probative value.

(ii) The Presented Evidence establishes Substantial Grounds to Believe that Megor Committed the Crimes charged

82. For ‘substantial grounds to believe’, the Chamber must be satisfied that the allegations are sufficiently strong to commit the accused to trial after evaluating all evidence.¹⁹⁸ The sole purpose of the confirmation hearing is to protect the accused against abusive and unfounded accusations¹⁹⁹ and not to constitute a ‘Mini-Trial’²⁰⁰.

83. All essential elements of the crimes are sufficiently proven by the presented evidence. The newspaper article proves Megor’s provision of the drones, his knowledge about the drones’ imprecision and that he warned Valyeron about the high number of casualties to be expected.²⁰¹ The UN-Report proves the previous situation and that the drone attacks resulted in the victims’ deaths and in the school’s and hospital’s destruction.²⁰² It further reiterates that the drones were

¹⁹⁶ *Ruto/Sang* Testimony [60].

¹⁹⁷ *Ruto/Sang* Request Testimony [47].

¹⁹⁸ *Said* Charges [35]; *Gbagbo* Charges [17]; *Lubanga* Charges [39].

¹⁹⁹ *Katanga/Ngudjolo* Charges [63]; Schabas (2011) 288.

²⁰⁰ *Abu Garda* Charges [39]; *Katanga/Ngudjolo* Charges [64]; *Katanga/Ngudjolo* Witness Admissibility [4].

²⁰¹ *Costane* [5].

²⁰² *UN-Report* [2-3, 5].

provided by Ibbin.²⁰³ Consequently, the presented evidence provides substantial grounds to believe that Megor committed the crimes charged.

84. Overall, the evidentiary threshold pursuant to Article 61(7) RS is fulfilled.

[E] THE COURT HAS JURISDICTION TO PROSECUTE THE DEFENDANT

85. The Court has temporal [(i)] and personal [(ii)] jurisdiction to prosecute Megor under Articles 11(2) and 12(2)(b) RS. The Court's exercise of jurisdiction in this matter does not violate the principle of non-retroactivity [(iii)].

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

86. Under 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. The Statute entered into force for Ibbin on 1 August 2020 (*Facts [1]*). While the Defendant's assistance – the provision of the drones – occurred in July 2020, the principal's crimes – the drone attacks – occurred in October 2020.²⁰⁴ The relevant act for triggering jurisdiction is the principal's act.

87. The Statute contains no general provision determining *when* a crime is committed. Article 7(1)(i)(fn.24) EoC only contains a special rule for the crime of enforced disappearance, requiring that all elements occur after the Statute's entry into force. As there would be no need for separate regulation if this special rule would be generally applicable, it is doubtful whether it applies to other crimes²⁰⁵. Thus, it is a matter of construction whether it suffices for the Court's jurisdiction that only *parts of* the conduct entailing liability were committed after the Statute's entry into force for a State.

88. The treatment of accessorial liability should be guided by that of continuous crimes. Continuous crimes imply an ongoing criminal activity.²⁰⁶ It seems that the Court's jurisdiction extends over the entire timespan of the conduct.²⁰⁷ For instance, *Ongwen* was convicted for crimes that began

²⁰³ *Ibid* [4].

²⁰⁴ *Costane* [6]; *UN-Report* [5].

²⁰⁵ *Rastan in Stahn* (2015) 171.

²⁰⁶ *Nahimana et al. Appeal* [721].

²⁰⁷ *Bangladesh/Myanmar Authorisation* [132]. Cf. *Nahimana et al. Judgement* [104]; *Halling in Ambos* (2022) [32]; *Rastan/Badar in Ambos* (2022) [25-26, 28]. Regarding the definition of continuing crimes *Lubanga Judgment* [618]; *Rastan/Badar in Ambos* (2022) [16].

before the Statute's entry into force but continued thereafter.²⁰⁸ This interpretation is underlined by ICTR jurisprudence, which may be considered when interpreting substantive questions not addressed in the Statute under Article 21(1)(b) RS²⁰⁹. Based on the definition of incitement as a crime continuing in time and culminating in the commission of the incited act, an inciting act prior to the Statute's entry into force for a State was considered as falling within the Tribunal's jurisdiction.²¹⁰ These findings were only overruled as incitement is punishable regardless of the incited act's commission, hence not continuing in time.²¹¹

89. Unlike incitement, criminal responsibility for the assisting act is *contingent* on the existence of a principal's act.²¹² The assisting act remains in effect until the principal's crime is committed.²¹³ Further, for ordering crimes under Article 25(3)(b) RS, accomplices are criminally responsible provided the order remained in effect after the entry into force and crimes continued to be committed as a consequence thereof.²¹⁴ This reasoning is also applicable to the other modes of liability, such as Article 25(3)(c) RS.²¹⁵ Therefore, regarding temporal jurisdiction, complicity should be treated similarly to continuing crimes for the period in between the assistance and the principal's act.²¹⁶ Overall, the Court may exercise jurisdiction over assisting acts committed prior to the Statute's entry into force for a State, when the principal's act is committed thereafter.
90. The Court's jurisdiction over Megor's provision of the drones depends on the time of their use by the Security Force in October 2020. This was after the Statute's entry into force for Ibbin on 1 August 2020.
91. Consequently, the Court has temporal jurisdiction pursuant to Article 11(2) RS.

²⁰⁸ *Ongwen* Judgment, see especially crimes against P-0099 and P-0101 [205]. Accord Halling in Ambos (2022) [32].

²⁰⁹ *Lubanga* Charges [205-11, 233, 287]; Bitti in Stahn/Sluiter (2009) 299; Nerlich in Stahn/Sluiter (2009) 305-325.

²¹⁰ *Nahimana et al.* Judgement [102, 104].

²¹¹ *Nahimana et al.* Appeal [720].

²¹² *Bemba* Judgment [84]; *Katanga* Judgment [1385]; *Lubanga* Judgment [998].

²¹³ Cf. Rastan/Badar in Ambos (2022) [25].

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ Cf. *ibid.*

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

92. Personal jurisdiction requires the accused to be a national of a State party at the time of his prosecution or the crime's commission.²¹⁷ Megor is a national of Ibbin, which was a State party in February 2021, when his prosecution started (*Facts [8]*), but in any case, when the crimes were committed in October 2020 (*mn.86,90*). Consequently, personal jurisdiction is established.

(iii) The Principle of Non-Retroactivity is Not Violated

93. According to Articles 22(1), 24(1) RS, criminal responsibility may not be attached retroactively to conduct which occurred prior to the Statute's entry into force.²¹⁸ This principle of non-retroactivity ensures that perpetrators have fair notice of the consequences of committing a crime.²¹⁹

94. Articles 22(1), 24(1) RS refer to 1 July 2002. The crimes contained in the Statute are at least punishable since 1 July 2002.²²⁰ Thus, when exercising jurisdiction over crimes committed before the Statute's entry into force *for a State* but after 1 July 2002, the Court exercises jurisdiction over crimes which were already criminal under international law.²²¹ This does not violate the principle of non-retroactivity.²²² Additionally, if Articles 22(1), 24(1) RS referred to the Statute's entry into force *for a State*, retroactive acceptance of the Court's jurisdiction under Article 12(3) RS and retroactive Security Council referrals pursuant to Article 13(b) RS would be prevented.²²³ The Court's practice confirms the possibility of a retroactive effect of jurisdiction.²²⁴ Articles 22(1), 24(1) RS are only concerned with non-retroactivity as a general principle and not a jurisdictional pre-requisite.²²⁵ This is further underlined by the lack of a

²¹⁷ Article 5 1935 Harvard Draft Convention; Deen-Racsmany (2001) 615; Rastan in Stahn (2015) 155-157.

²¹⁸ Cf. Halling in Ambos (2022) [1]; Dias (2018) 65-66; Zimmermann (2013) 311.

²¹⁹ Broomhall in Ambos (2022) [9-13]; Halling in Ambos (2022) [1]; Dias (2018) 65-66.

²²⁰ Cf. Article 126(1) RS; RS, 2.

²²¹ Cf. Wills (2014) 419.

²²² Cf. Article 7(2) ECHR; Article 15(2) ICCPR; Gallant (2009) 371, 394.

²²³ Wills (2014) 419.

²²⁴ Amongst others Ukraine (2015) referred to events since 20.02.2014 and Ukraine (2014) referred to events from 21.11.2013 to 22.02.2014; Palestine (2014) referred to events since 13.06.2014; Côte d'Ivoire (2003) referred to events since 19.09.2002; UN Doc. S/RES/1970 (2011) referred to events since 15.02.2011; UN Doc. S/RES/1593 (2005) referred to events since 01.07.2002.

²²⁵ Halling in Ambos (2022) [25].

provision analogous to Article 11(2) RS in Articles 22(1), 24(1) RS.²²⁶ Therefore, the temporal references in Articles 22(1), 24(1) RS only refer to the Statutes general entry into force under Article 11(1) RS on 1 July 2002, not to the Statute's entry into force *for a State*.²²⁷

95. The Defendant's crime occurred after 1 July 2002 (*mn.88,89*). Consequently, the principle of non-retroactivity reflected in Articles 22(1), 24(1) RS is not violated.
96. Overall, the Court has jurisdiction under Articles 11(2), 12(2)(b) RS.
97. In conclusion, the PTC erred in denying the Prosecution's request for confirmation of charges pertaining to the Defendant.

²²⁶ Cf. *ibid.*

²²⁷ Wills (2014) 419, 420. Accord Halling in Ambos (2022) [22]; Schabas (2016) 556.

SUBMISSIONS

Having presented all arguments, the Victims' Counsel respectfully requests the Appeals Chamber to

1. **Reverse** the Impugned Decision;
2. **Appoint** two additional CLRVs, and
3. **Confirm** the charges of crimes against humanity pertaining to the Defendant.

Respectfully submitted,

VICTIMS' COUNSEL

On behalf of the victims

