

ICC MOOT COURT COMPETITION IN THE ENGLISH LANGUAGE

THE OFFICE OF THE PROSECUTOR

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THE APPEALS CHAMBER

SITUATION RELATING TO CRIMES AGAINST HUMANITY IN WESTEROS

**The Office of the Prosecutor's Submission in the
Appeal from the Pre-Trial Chamber's Decision on Confirmation of Charges
against Defendant McGregor Klegane of Northeros**

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LIST OF ABBREVIATIONS

AC	Appeals Chamber
ACHR	American Convention on Human Rights
ACtJHR	African Court of Justice and Human Rights
CAH(s)	Crime(s) Against Humanity
CEO	Chief Executive Officer
CoE	Council of Europe
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FPLC	Patriotic Force for the Liberation of the Congo
GDP	Gross Domestic Product
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCSt	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILO	International Labor Organization
NGO	Non-Governmental Organization
NMT	Nuremberg Military Tribunal
Nuremberg Charter	Charter of the International Military Tribunal
OTP	Office of the Prosecutor, International Criminal Court
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence, International Criminal Court
RTLM	Radio Télévision Libre des Mille Collines
S.S.	Schutzstaffel
STL	Special Tribunal for Lebanon
TC	Trial Chamber
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNHRC	United Nations Human Rights Committee

US	United States
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WWII	World War II

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STATEMENT OF FACTS

I. The Defendant and His Seafood Corporate Group

The Defendant, McGregor Klegane, is a Northeros citizen and CEO of the multinational company Giant Finger, Inc., which solely owns Little Fingers, Inc. (¶¶3, 4.9, 5). He had the ultimate authority over Little Fingers and its corporate actions (¶5).

II. The Southeros Migrant Laborers and the Westeros Shrimp Industry

The victims are nationals of Southeros, a developing country with one of the lowest per capita GDP's in the world at \$1,000 (US) (¶2). It has been in economic depression since 2013, leaving many jobless (¶4.5).

Over 10,000 desperate unemployed Southeros laborers have been recruited to the shrimp industry of Westeros (¶¶2, 4.5). They entered a standardized "employment contract," (¶4.6) which provided for transportation, travel and work permits, sheltering and food, but also encumbered them with a "debt" (¶4.6). They were promptly sent to rustic camps in isolated rural locations (¶4.5), with their passports and identification documents confiscated (¶4.6). There, they were made to peel shrimp for 80 hours every week for 3 years, during which 80% of their wage were retained to settle the debt with 10% interest(¶4.6).

Little Fingers purchased about 60% of Westeros's shrimp at comparatively low prices due to the cheap labor, and thereby realized significantly higher profit margins upon re-sale (¶4.8). Despite knowledge of the exploitative labor practices, Klegane never instructed Little Fingers to suspend its extensive purchases (¶¶4.9, 5).

III. The Westeros and Northeros Proceedings

The victims filed suit in the Westeros District Court, which found Little Fingers guilty of human trafficking and ordered compensation. The company promptly declared insolvency and its officers fled the country (¶3).

Northeros then charged Klegane with two human trafficking-related crimes and, a little over two months later, he appeared before Northeros District Court Judge Nefarious (¶5). After referencing the Westeros judgment, Nefarious dismissed the case given Northeros lacked (extra)territorial jurisdiction for the domestic trafficking count and subject matter jurisdiction as the acts did not constitute CAH per the Northeros ICC Implementation Act. Klegane was therefore "acquitted" in what was referred to as a "trial." (¶5). It was reported that Klegane contributed millions to the former Northeros President's campaign, who thereafter appointed Judge Nefarious to the bench.

IV. Procedural History

On 15 September 2017, PTC VI, by majority, dismissed Klegane's jurisdictional challenges and confirmed the charge against him (pp.3, 6-7). This is Klegane's appeal from that decision.

ISSUES

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

SUMMARY OF ARGUMENTS

ISSUE 1

1. PTC VI's determination that the trafficking of Southeros laborers qualifies as a distinct CAH under Art.7(1)(k) should be upheld.
2. First, the exploitative recruitment of the Southeros laborers constitutes "recruitment trafficking," a global human trafficking phenomenon impliedly recognized by the language of the Palermo Protocol. When read together with abundant empirical evidence, the text of the Palermo Protocol can be understood to bifurcate human trafficking into the categories of "enslavement trafficking" and "recruitment trafficking." This case falls under the rubric of recruitment trafficking as the Southeros laborers were abused owing to their economic vulnerability and lured into exploitative contracts resulting in their unfair treatment working at the Westeros shrimp-sheds.
3. Second, trafficking here satisfies the gravity threshold of Art.7(1)(k). Recruitment trafficking, as a global phenomenon, has created a worldwide displaced persons crisis. Victims, including the Southeros laborers, not only suffer physical and mental harm, but also return to torn families after being dislocated for prolonged periods.
4. Third, Art.7(1)(c)'s origins and drafting history show that enslavement under the Statute only subsumes enslavement trafficking, not recruitment trafficking, warranting a separate charge under Art.7(1)(k).

ISSUE 2

5. PTC VI was correct in treating Little Fingers as an unindicted co-perpetrator with Klegane under Art.25(3)(a).
6. First, international criminal courts have consistently used like provisions to name "persons" as unindicted co-perpetrators. As the interpretation of the term "persons," understood in its ordinary meaning and in domestic and international law, includes legal persons, Little Fingers can accordingly be named as an unindicted co-perpetrator under the provision.
7. Second, this reading of Art.25(3)(a) is unaffected by Art.25(1). As evidenced by its ordinary meaning and drafting history, Art.25(1) limits only jurisdiction. This is reinforced by the accepted international criminal practice where individuals beyond the court's jurisdictional reach (deceased persons and child soldiers) are named, and their conduct considered, in prosecuting

indicted defendants. As Little Fingers is not indicted, its naming is not limited by Art.25(1).

8. Third, the naming of Little Fingers is consistent with fundamental policy considerations. It accords with international law's significant trend toward acknowledging corporate responsibility for atrocities. Moreover, the ICC's object/purpose are furthered as naming culpable corporations helps combat longstanding impunity. Finally, such naming allows indicted corporate officers to be accurately informed of their charges, satisfying ICC indictment rules.

ISSUE 3

9. PTC VI correctly held that the Art.20 *Ne Bis* principle does not apply in the current case.
10. First, the Northeros Court did not assert jurisdiction over Klegane's case; accordingly *Ne Bis* was not even triggered as a threshold matter.
11. Second, even had jurisdiction been asserted, the proceeding before Judge Nefarious did not amount to a "trial" within the meaning of Art.20(3). The court session was evidently only an initial hearing, a pre-trial procedure routinely incorporated into the criminal systems of due process-respecting democracies. Moreover, the hearing was not a "merits" adjudication and thus insufficient to trigger *Ne Bis* protection. Finally, Nefarious's labelling of the hearing as a "trial" that led to an "acquittal" is not determinative or binding on the ICC's independent *Ne Bis* assessment.
12. Third, per well-established international/domestic law practice, errors of law preclude *Ne Bis*'s operation. Therefore, the Northeros Court's decision, based on an erroneous interpretation of Art.7(1)(k), is incapable of triggering Art.20(3) *Ne Bis*.
13. Fourth, and in any event, this case falls under the Art.20(3)(b) impartiality exception. Considering Klegane's wealth, power and influence in the relatively small country of Northeros, the current case reeks of Northeros bias as Klegane made substantial monetary contributions to the former Northeros president who appointed presiding judge Nefarious. The questionable labeling of the 7 May hearing as a "trial" bolsters this conclusion.

WRITTEN ARGUMENTS

1. On the applicable standard of review, “[t]he Appeals Chamber has repeatedly held that its review is corrective in nature and not *de novo*.”¹ Even if PTC VI has committed an error of law, “the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.”²

I. Trafficking on These Facts Qualifies as Art.7(1)(k) “Other Inhumane Acts.”

2. PTC VI determined that the “exploitative practice” in the Westeros shrimp sheds constitutes “the crime of human trafficking,” which qualifies as “a unique form of CAH” under Art.7(1)(k).³ This should be upheld for three reasons. First, the facts constitute the global phenomenon of “recruitment trafficking.”⁴ Second, the recruitment trafficking inflicted great suffering upon the Southeros laborers, and further formed part of a worldwide crisis, satisfying 7(1)(k)’s gravity threshold. Third, recruitment trafficking here cannot be subsumed under Art.7(1)(c), which concerns the separate phenomenon of “enslavement trafficking.”

A. The Facts Constitute the Distinct Phenomenon of “Recruitment Trafficking.”

3. PTC VI correctly held that the “exploitative practice” of luring vulnerable Southeros laborers to Westeros constituted trafficking. First, Art.3(a) Palermo Protocol impliedly recognizes that trafficking contains two general categories – “recruitment trafficking” and “enslavement trafficking.” Second, empirical data evidences that recruitment trafficking is a well-known and widespread phenomenon distinct from enslavement trafficking. Third, the conduct here constitutes recruitment trafficking.

1. The Palermo Protocol Impliedly Bifurcates Trafficking into Enslavement Trafficking and Recruitment Trafficking.

4. The language of Art.3(a) of the widely-ratified Palermo Protocol, which has attained customary international law status,⁵ divides trafficking into “enslavement trafficking” and “recruitment trafficking.”⁶ Art.3(a) can be read to describe “enslavement trafficking” as the “transfer,

¹ *Mbarushimana Confirmation Appeal Judgment*, ¶15.

² *Id.*

³ Moot Problem (“Problem”), p.7.

⁴ Prosecution does not contend “recruitment trafficking” and “enslavement trafficking” are terms already in use, they are only used for clarity.

⁵ Brusca, *Palermo Protocol*, p.15.

⁶ Palermo Protocol, supplementing the Convention against Transnational Organized Crime.

harboring or receipt of persons, by means of the *threat or use of force or other forms of coercion, of abduction...* for the purpose of exploitation.”⁷ This type of trafficking is marked by “brute force,” “violence” and “threats.”⁸ Victims are forcibly taken,⁹ and typically lose physical freedom at end destinations, often being locked up indefinitely.¹⁰

5. The second category, “recruitment trafficking,” is defined by the “recruitment, transportation...of persons, by means of...fraud, of deception, of the abuse of power or of a position of vulnerability...for the purpose of exploitation.”¹¹ Victims of recruitment trafficking are “impelled to accept being exploited” because of a “state of hardship” and are often deceived.¹² Victims are thus *lured*, rather than *forcibly taken* as with enslavement trafficking, into exploitation via deceit or an abuse of their vulnerability. Additionally, recruitment trafficking victims are not physically confined under guard, and their exploitation typically lasts for a definite period.¹³
6. Here, the Westeros shrimp industry’s employment practice constitutes “recruitment trafficking,” as the victims were lured from Southeros, by abusing their economic vulnerability, into exploitation in Westeros. They were not kept under armed guard and exploited for a definite period of three years. This is further elaborated in §A.3. below.

2. Empirical Research Supports this Bifurcation.

7. Consistent with the above, for example, an ILO research project discloses that women trafficked to the “sex work” sector in the Middle East were commonly “abducted outright” and “locked in isolated villas...under constant surveillance.”¹⁴ They were subjected to “[b]eatings, rape and isolation [as] typical means used by perpetrators to maintain control.”¹⁵ Another study on sex

⁷ *Id.*, Art.3(a) (emphasis added) (the remaining part of the definition – “or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation” – references enslavement trafficking in children).

⁸ Gallagher, *Human Trafficking*, p.31.

⁹ *Id.*

¹⁰ See §A.2.

¹¹ Palermo Protocol, Art.3(a).

¹² Gallagher, *Human Trafficking*, pp.31-32.

¹³ See §A.2.

¹⁴ Harroff-Tavel, *Human Trafficking in the Middle East*, pp.70, 94.

¹⁵ *Id.*, p.92.

trafficking in San Diego echoes that the female victims reported experiencing “violence at the hands of their ‘pimp’ or trafficker.”¹⁶ Furthermore, in the notorious “Dutroux Case,” a “long distance prostitution trafficking network” was reported as involving “child abductions” and the “import of girls from Slovakia.”¹⁷ This pattern is thus consistent with the features of enslavement trafficking and is predominantly identified with women and children’s trafficking for sexual exploitation.

8. In contrast, patterns consistent with recruitment trafficking are principally identified with the “domestic work” and “construction” sectors, where victims “voluntarily” became migrant laborers.¹⁸ The ILO reports that such victims are often lured because of “limited work opportunities and high unemployment rates in their countries.” “Agents” often imposed “excessive and unauthorized” fees knowing that victims were “under pressure from their families to remit badly needed money home.”¹⁹ These victims typically would then be stripped of communication devices and personal documents, including “passports and...residency cards,” such that leaving was exceedingly impractical even without physical confinement.²⁰ Similarly, Amnesty International remarked that 90% of its documented trafficking of Nepali migrant workers involved “some form of deception” or “false promises” regarding salaries.²¹ Similar induced “indebtedness” and confiscation of personal documents were noted.²² Victims could return to Nepal only after repaying “loans” out of their supposed wages, which in most cases left them effectively unpaid for their labor.²³
9. In conclusion, victims of trafficking worldwide have tended to be either lured into exploitation with departure obstacles but not held under guard (recruitment trafficking), or forcibly taken and indefinitely detained (enslavement trafficking).

¹⁶ Sex Trafficking in San Diego Report, p.14, see also fn.8.

¹⁷ Punch, *Police Misconduct and System Failure*, pp.176-180; Frenkiel, Dutroux.

¹⁸ *Id.*, p.101.

¹⁹ *Id.*, p.104.

²⁰ *Id.*, p.58.

²¹ *Turning People into Profits*, p.52.

²² *Id.*, pp.52, 66.

²³ *Id.*, see, e.g., pp.19, 27, 29, 33.

3. The Luring of the Vulnerable Southeros Laborers to the Westeros Shrimp Sheds Constitutes Recruitment Trafficking.

10. To elaborate “recruitment trafficking’s definition, first, “recruitment” has been interpreted by the CoE and UN to mean the procurement of an individual’s “commitment or engagement.”²⁴ Second, they note that “vulnerability” can arise from an individual’s “family-related, social or economic” situation.²⁵ Furthermore, the Protocol’s *travaux* confirm that an “abuse” of such vulnerability arises where the individual has no “acceptable alternative.”²⁶ Third, the Prototoc does not define “exploitation” so its “ordinary meaning” is to be applied pursuant to VCLT Art. 31’s well-established treaty interpretation rules. Consistent across multiple dictionaries, “exploitation” means any action of “treating someone unfairly” for one’s own “benefit” or “advantage.”²⁷
11. Here, the Westeros shrimp industry’s recruitment and treatment of the Southeros laborers satisfy all these elements. First, the Southeros laborers’ economic vulnerability was manifest. Due to the “depression of cobalt prices” hitting an already fragile developing Southeros economy that relied heavily on cobalt exports, these “unskilled” workers faced “high levels of unemployment.”²⁸
12. Second, this led to the laborers having no acceptable alternative for earning a livelihood. Thus, they were preyed upon and lured into “employment contract[s]” with the Westeros shrimp-peeling operators.²⁹
13. Third, the Southeros laborers faced harsh working conditions – they were worked 80 hours a week, almost twice the number prescribed by internationally recognized standards.³⁰ They were kept in “rustic camps” and stripped of their “passports and identification documents” with “eighty percent of [their] wages” retained until they paid off their “debts” at the expiration of the three-

²⁴ Caplan, *CoE/UN Study*, p.78 (referring to the general definition of trafficking contained in Art.3(a) Palermo Protocol).

²⁵ Explanatory Report on the Convention on Action against Trafficking in Human Beings, ¶83 (the Convention reproduces the definition contained in Art.3(a) Palermo Protocol).

²⁶ *Travaux* of the Convention against Transnational Organized Crime, p.347.

²⁷ Cambridge Dictionary; Oxford Dictionaries; Palermo Protocol, Art.3(a) (only provides a non-exhaustive list of what “[e]xploitation shall include, at a minimum”).

²⁸ *Id.*

²⁹ *Id.*, pp.3-4.

³⁰ Under the Hours of Work (Industry) Convention, of which all 3 states are members: 48 hours per week for adult, 40 hours per week for minors (note that some of the Southeros laborers are just above 13).

year contract.³¹ Therefore, similar to the Nepali migrant workers, the Southeros laborers might not be detained but faced extreme difficulty in leaving.³² Such cheap labor allowed the Westeros shrimp operators, and more so Klegane’s Little Fingers, to benefit significantly, by giving the latter “comparative advantage” in the international market and a markedly higher “profit margin.”³³ Therefore, the Southeros laborers were “exploited” and clear victims of recruitment trafficking as impliedly categorized in the Palermo Protocol.

B. The Recruitment Trafficking Here Created a Massive Displaced Persons Crisis That Satisfies the Gravity Threshold of Art.7(1)(k).

14. Art.7(1)(k) proscribes “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health,” where “character” means “nature and gravity.”³⁴ The ECCC in *Chea and Samphan*, whose approach was considered by the PTC in *Ongwen*,³⁵ provided factors relevant to assessing this gravity threshold, including the act’s “nature” and “context,” the “personal circumstances of the victim” and the “impact of the act upon the victim.”³⁶
15. In this regard, the global devastation created by recruitment trafficking has been well-recognized. Based on ILO global human trafficking data, it is estimated that 8 million people were victims of recruitment trafficking.³⁷ Seafood trafficking victims’ grave suffering has also been well-recounted. In Thai seafood processing factories, trafficking victims were reported to have been subjected to “severe forms of exploitation,” having to peel “18-20 kg of shrimp per day” under “filthy conditions.”³⁸ They faced “wage deductions” for working “too slowly.”³⁹ Victims also had to pay for their own “basic safety equipment, housing, even food and medicine,” rendering

³¹ *Id.*, p.4.

³² *Id.*

³³ *Id.*, p.5.

³⁴ Elements of Crimes, Art.7(1)(k), fn.30.

³⁵ *Ongwen Confirmation Decision*, ¶90.

³⁶ *Case 002/01 Judgment*, ¶438.

³⁷ Global Estimates of Modern Slavery, pp.32-36 (the ILO reported that 16 million people were estimated to be victims of forced labor exploitation, 49.4% of which were subjected to trafficking patterns that corresponded to recruitment trafficking).

³⁸ Sorajjakool, *Human Trafficking in Thailand*, Ch.3.

³⁹ *Id.*

them in debt to “labor agents.”⁴⁰ Although they are “officially” required to work 60 hours a week, these victims were often forced to work overtime.⁴¹ Similar Burmese victims were described to have suffered permanent physical injuries including “severed fingers” as a result of prolonged usage of fishery equipment.⁴² “[R]epetitive-motion syndromes [and] respiratory problems” are also typically suffered by trafficked individuals.⁴³

16. Furthermore, recruitment trafficking victims face psychological trauma and acute difficulties in social reintegration. WHO reported “post-traumatic stress disorder, anxiety [and] depression” being commonly diagnosed in victims.⁴⁴ After being displaced in foreign locations, many victims returned to empty or ailing families or could not locate their families at all.⁴⁵ Family members often “struggl[e] to survive after the trafficking of their husband/father” and are considered “secondary victims of trafficking.”⁴⁶
17. Consistent with the above, the recruitment trafficking here is grave in nature. It was widespread, affecting “more than 10,000 [Southeros] migrants” and implicating 220 shrimp sheds in 2017 alone, while the practice had persisted since 2013.⁴⁷ Such practice specifically targeted the personal financial vulnerability of Southeros laborers and displaced them from their families in “isolated rural areas” in Westeros.⁴⁸ Together with the egregious health impacts on the victims and their subsequent fraught social reintegration, it is clear that the recruitment trafficking of Southeros laborers caused great suffering and is similar in gravity to other Art.7(1) acts, qualifying as a distinct CAH under Art.7(1)(k).

C. The Recruitment Trafficking Here Is Not Subsumed by Art.7(1)(c), Which Is Concerned Strictly with Enslavement Trafficking

18. Finally, Art.7(1)(c) only applies to enslavement trafficking but not recruitment trafficking. First,

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² From Trafficking to Post-Rescue, p.3.

⁴³ Understanding and Addressing Violence against Women: Human Trafficking, p.3.

⁴⁴ *Id.*

⁴⁵ From Trafficking to Post-Rescue, p.6.

⁴⁶ *Id.*

⁴⁷ Problem, p.4.

⁴⁸ *Id.*

the lineage of enslavement as CAH can be traced to the post-WWII trials at Nuremberg. Second, this then became the basis of Art.7(1)(c) enslavement. Third, the “trafficking” mentioned in Art.7(2)(c) is limited to enslavement trafficking, warranting a separate charge for recruitment trafficking under Art.7(1)(k).

1. Enslavement was First Included as CAH in the Nuremberg Charter to Prosecute Nazi Industrialists for Use of Slave Labor.

19. In WWII, civilians from across Europe were abducted and confined for work in industrial facilities under armed guard. A review of the drafting history of the Nuremberg Charter reveals that the framers intended such civilian enslavement to be prosecuted. The UK’s representative stressed that the Nazi abductions and “deportations [of persons into slavery] were in pursuance of a common plan [...] of making an unjust or illegal war.”⁴⁹ The US representative further emphasized that high-ranking Nazi officials were “clearly subject to prosecution on such specific charges as the use of slave labor,”⁵⁰ ultimately leading to the inclusion of enslavement as a CAH.⁵¹
20. Similarly, in the “subsequent Nuremberg trials” under Art.II(a) Control Council Law No. 10, Nazi industrialists were proven to have relied on systematic enslavement where civilians were abducted and deported to toil indefinitely under armed guard in Nazi camps⁵² under the “control and supervision” of the S.S.⁵³ The camps were surrounded by “barbed wire” and inmates “were guarded at all times.”⁵⁴ Evidence from *Krupp* revealed that the defendants had over 75,000 slave laborers toiling in similar plants across the Third Reich.⁵⁵

2. The CAH Enslavement Provision in the Nuremberg Charter Was the Basis for Art.7(1)(c) ICCSt.

21. Since the drafts of Art.7(1)(c) ICCSt and other CAHs were “drawn from the Charter of the

⁴⁹ July 23 Minutes.

⁵⁰ Jackson’s Report, p.435.

⁵¹ August 2 Minutes (discussed in the context of both war crimes and CAH).

⁵² *Flick Judgment*, p.9.

⁵³ *Krupp Judgment*, p.55.

⁵⁴ *Id*, p.98.

⁵⁵ *Id*, p.75.

Nurnberg Tribunal” and that law’s interpretation as “applied by the Nurnberg Tribunal,”⁵⁶ Art.7(1)(c) inherited not only the text of the Charter, but also its jurisprudence on Nazi enslavement trafficking.⁵⁷

22. Moreover, the Nuremberg notion of slavery as including abduction and confinement for indefinite compulsory labor, informs the inclusion of “trafficking in humans” within Art.7(1)(c)’s ambit (via the definition of “enslavement” in Art.7(2)(c)). More specifically, the modern manifestation of enslavement trafficking is the sex trafficking of women and children, as described in §A.2. above. Sex trafficking is now a \$99 billion industry where millions of women and children are reduced to sex objects and slaves.⁵⁸ They are systematically abducted, and indefinitely confined to brothels worldwide. Thus, the text of Draft Statute Art.7(2)(c), referring to “trafficking in persons,” was amended to include “women and children”⁵⁹ so that enslavement under the ICCSt also included sex trafficking where women and children are taken and sold into sexual slavery. The Nuremberg conception of enslavement above then became the basis for Art.7(1)(c).

3. The “Trafficking” Alluded to in Art.7(2)(c) Is Limited to Enslavement Trafficking and Is Different from Recruitment Trafficking, which Should Be Recognized as a Separate Phenomenon and Not Lumped in with Enslavement.

23. Therefore, as the above analysis indicates, the trafficking alluded to under Art.7(2)(c), which has its roots in the Nazi pattern of enslavement, is most accurately categorized as “enslavement trafficking.” Additionally, as demonstrated above, what is referred to as “recruitment trafficking” can be classified as a separate phenomenon, deserving of a charge under Art.7(1)(k), rather than being indistinctly lumped in with enslavement.

24. Recruitment trafficking is a global scourge that deserves recognition by this Court as a crime against humanity in its own right. Currently, as noted above, millions of victims of this pernicious practice exist worldwide.⁶⁰ The alarming scale of global recruitment trafficking warrants its recognition as a “concern to the international community as a whole,”⁶¹ and in light of this

⁵⁶ *Id.*

⁵⁷ See generally, *IG Farben Judgment*, *Flick Judgment*, and *Krupp Judgment*.

⁵⁸ Global Trafficking in Persons Report.

⁵⁹ Robinson, *Crimes Against Humanity*, p.85.

⁶⁰ See generally, Harroff-Tavel, *Human Trafficking in the Middle East*.

⁶¹ ICCSt, Preamble.

Court's mission to end impunity, should not be buried within Art.7(1)(c).

25. Ideally, a global crime of this nature and gravity warrants inclusion as a separately enumerated crime against humanity under Art.7(1). However, another Kampala Conference, where the ICCSt could be so amended, is not possible at this time – this is thus the ideal scenario for charging a “crime with no name” under Art.7(1)(k). Thus, for this Court to truly address the plague of recruitment trafficking and broadcast its depravity to the international community, it should uphold PTC VI's ruling and confirm a charge under Art.7(1)(k). This is the best available option for recognizing recruitment trafficking as a crime in its own right, rather than burying it under Art.7(1)(c).

II. This Court Should Uphold the PTC’s Ruling That Klegane’s Corporation, Little Fingers, Which He Wholly Controlled, Could Be Named as an Unindicted Co-Perpetrator with Klegane Pursuant to Art.25(3)(a)

26. PTC VI concluded that his wholly owned corporation, Little Fingers, could be treated as an unindicted co-perpetrator pursuant to Art.25(3)(a) (hereinafter referred to as ‘*the Naming Practice*’). This ruling should be upheld for three reasons. First, the ordinary meaning of “persons” in Art.25(3)(a) includes corporations, and the ICC has routinely utilized 25(3)(a) as a vehicle to name unindicted co-perpetrators. Second, this is true notwithstanding Art.25(1)’s reference to “natural persons,” as it uniquely serves as a jurisdiction gatekeeper – *i.e.*, limiting who can be charged – and is narrower in scope than Art.25(3)(a), which includes un-charged co-perpetrators. Third, this accords with important international law developments promoting corporate responsibility for atrocious crimes, and ICC rules mandating accurate and holistic prosecutorial charging practices.

A. As Stipulated in the VCLT, the Ordinary Meaning of the Term ‘Persons’ in Art.25(3)(a) Includes Corporations and Consistent ICC Practice Has Named Unindicted Co-Perpetrators via Art.25(3)(a).

27. PTC VI’s ruling that Little Fingers, which perpetrated the exploitative recruitment trafficking, could be named as an unindicted co-perpetrator under Art.25(3)(a) is supported by well-established principles of treaty law and the consistent practice of this Court and should be upheld.

1. The Interpretive Canons of the VCLT Support Naming Little Fingers as an Unindicted Co-Perpetrator Pursuant to Art.25(3)(a).

28. First, Art.31 VCLT requires that a treaty term be “interpreted in [its] ordinary meaning...” In this case, Art.25(3)(a) refers to a “person” jointly responsible for criminal conduct. It is well-established, and widely accepted in both international and domestic jurisdictions, that the legal definition of “person” encompasses corporations. To begin, the Cambridge and Oxford English Dictionaries, define “person” in a legal context as including “legal person.” This is consistent across domestic jurisdictions. For example, numerous provisions in the US Code define persons as including “corporations.”⁶² Similarly, the UK Interpretation Act defines “[p]erson” to include “a body of persons corporate.”⁶³ The same is true in international law. In *Barcelona Traction*, the ICJ collectively referred to natural persons and corporations as “persons.”⁶⁴ Significantly,

⁶² See, e.g., 15 US Code, §7; 26 US Code, §7701.

⁶³ Interpretation Act, c.30, Sch.1.

⁶⁴ See, e.g., *Barcelona Traction Case*, ¶28.

international criminal law jurisprudence defines “persons” identically. In *Akhbar Beirut S.A.L.*, the STL held that “person” in its statute “includes legal persons [referencing corporations] as well as natural persons.”⁶⁵

29. In the present case, consistent with this authority, and pursuant to Art.31 VCLT, the “ordinary meaning” of “person,” in a legal context such as the ICCSt, includes corporations.

2. Moreover, Consistent ICC Practice Has Named Unindicted Co-Perpetrators via Art.25(3)(a).

30. Second, also supporting the Naming Practice, unindicted co-perpetrators have consistently been named when prosecuting defendants under Art.25(3)(a). For example, in *Lubanga*, the defendant was charged and convicted of war crimes as a co-perpetrator under Art.25(3)(a), where other unindicted co-perpetrators, FPLC commanders “Tchaligonza, Bagonza and Kasangaki,” were named.⁶⁶ Similarly, in *Ntaganda*, unindicted co-perpetrators were said to have had “acted in concert” with the defendant, whose charges under, *inter alia*, Art.25(3)(a) were confirmed against him.⁶⁷ The same practice is also seen in *Ruto and Sang*, where the defendants were charged under, *inter alia*, Art.7(1)(h) and 25(3)(a) with other uncharged “co-perpetrators and/or persons belonging to their group.”⁶⁸

31. Given “persons” in Art.25(3)(a) includes corporations, and unincited co-perpetrators are routinely named under it, it necessarily follows that a corporation can so be named. Therefore, Little Fingers was correctly treated by the PTC VI as an unindicted co-perpetrator.

B. That “Persons” Include Corporations Is True Notwithstanding Art.25(1), which Serves Only as a Jurisdictional Gatekeeper.

32. The Defense may argue that “persons” in Art.25(3)(a) is restricted to only “natural persons” due to Art.25(1). This artificial linkage is untenable as Art.25(1) merely limits the persons over whom jurisdiction can be exercised, whereas Art.25(3)(a) has a wider ambit pertaining to modes of liability. This is further confirmed by ICC practice, as both deceased perpetrators and child soldiers have consistently been named despite being beyond the jurisdictional reach of the Court.

⁶⁵ *Akhbar Beirut S.A.L. Interlocutory Appeal Decision*, ¶73.

⁶⁶ *Lubanga Charges*, ¶¶20, 24; see also *Lubanga Art.74 Judgment*, ¶1019.

⁶⁷ *Ntaganda Charge*, ¶16; see also *Ntaganda Updated Charge*, ¶16.

⁶⁸ *Ruto & Sang Confirmation Decision*, ¶22.

As no jurisdiction is contemplated over Little Fingers, Art.25(1) is irrelevant.

1. Art.25(1) Limits Only Jurisdiction and Is Irrelevant Here as Little Fingers Is Unindicted.

33. As demonstrated previously, a treaty provision is interpreted, in the first place, in accordance with its “ordinary meaning.”⁶⁹ Art.25(1) in its entirety states that “[t]he Court shall have jurisdiction over natural persons pursuant to this Statute.” The ordinary meaning of this language is clear – Art.25(1) only limits the Court’s *jurisdictional* ambit, such that only natural persons can be charged and placed as defendants before the Court. This understanding is affirmed by Triffterer and Schabas.⁷⁰ As the naming of *unindicted* perpetrators does not invoke the Court’s jurisdiction over such persons, Art.25(1) is simply irrelevant to this practice.
34. If Art.31 VCLT fails to provide a satisfactory interpretation, Art.32 permits recourse to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion...” Thus, even if the Court disagrees with the above argument on Art.25(1)’s plain meaning, recourse to the “preparatory work” of the ICC Statute confirms the role of Art.25(1) as a jurisdictional limit in two aspects.
35. First, the adopted version of Art.25(1) was the product of insufficient time at the Rome Conference for delegations to reach a consensus on including juridical persons within the jurisdiction of the ICC.⁷¹ The main dividing issue was complementarity implications for delegations whose countries’ legal system did not provide for corporate criminal responsibility at the time. As such, the entire focus of the deliberation process of Art.25(1) was on whether a legal person could be placed as a defendant before the ICC. The naming of legal persons as unindicted perpetrators was not even implicated in the scope of Art.25(1).
36. Second, the “juridical persons” proposal later became acceptable to “a relatively broad majority” as the *Summary Records* showed that “all delegations had recognized the great merits of the relevant proposal.”⁷² It became clear that delegates conceptually accepted the notion of corporations being capable of committing crimes. They further felt the need to address corporate

⁶⁹ VCLT, Art.31(1).

⁷⁰ Schabas, *Commentary*, pp.564-566 (“Affirming that the Court has jurisdiction over ‘natural persons’ is an indirect way of clarifying that the Court does not have jurisdiction over corporate bodies.”); Triffterer, *Commentary*, p.986 (“As far as the jurisdiction over natural persons is concerned, paragraph 1 states the obvious.”).

⁷¹ Saland, *International Criminal Law Principles*, p.189.

⁷² *Id.*; 26th Meeting on ICC Establishment, ¶10.

atrocities crimes, as reflected by the fact that corporate criminal liability was nearly incorporated in the ICCSt.⁷³ This clearly shows that Art.25(1) was not intended to bar merely naming corporations as unindicted co-perpetrators.

37. This reading is further confirmed by prevailing international criminal practice, where consideration of corporate conduct in prosecuting corporate officers was never held to be precluded by a “natural person” jurisdictional limit. In *Ruto and Sang*, the latter defendant, who was the corporate executive of his radio station Kass FM, was prosecuted as an indirect co-perpetrator for crimes against humanity by radio broadcasting hate speech. The corporate radio station was addressed as a separate and distinct entity by both the OTP and the PTC in describing its involvement and instrumentality in Sang’s alleged criminal conduct.⁷⁴ Similarly, in the ICTR “Media Case” of *Nahimana et al.*, the radio station responsible for broadcasting hate speech, RTLM, was again addressed in its own right, for example, when describing its activities and involvement, in the prosecution of RTLM’s directors.⁷⁵
38. In the current case, the Court is exercising jurisdiction over Klegane whose status as a natural person is undisputed. No jurisdiction is being exercised over the corporate subsidiary. Little Fingers is not indicted, not made a defendant in these proceedings, and its criminal liability is not at issue. Rather, the Court is asked only to *consider* the conduct of its corporate subsidiary to determine, and put in context, Klegane’s individual criminal responsibility. Per Art.25(1)’s ordinary meaning and preparatory work, this does not implicate its jurisdictional limit and is therefore not barred by it.

2. That Art.25(1) Serves Strictly as Jurisdictional Gatekeeper Is Reinforced by the Accepted Practice of Naming Unindicted Persons Who Exceed the Jurisdictional Reach of the Court.

39. Deceased persons, consistent with juridical persons, are excluded from ICC jurisdiction pursuant to Art.25(1). The Court has, however, repeatedly named such persons as unindicted co-perpetrators. For example, in *Ongwen*, the defendant was charged as a co-perpetrator under, *inter alia*, Art.25(3)(a).⁷⁶ After PTC II declared one of the co-perpetrators, Lukwiya, deceased, and

⁷³ *Id.*

⁷⁴ *Ruto & Sang Confirmation Decision; Ruto & Sang Updated Charge.*

⁷⁵ *Nahimana Amended Indictment; Nahimana Judgment.*

⁷⁶ *Ongwen Confirmation Decision.*

found that the Court’s jurisdiction over him was excluded by Art.25(1),⁷⁷ he was named as an unindicted co-perpetrator in charges against the defendant,⁷⁸ which were subsequently confirmed on this basis.⁷⁹ Similarly, the ICTY and ICTR both established a long-standing practice of naming deceased persons as unindicted perpetrators, especially where a joint criminal enterprise was alleged, and routinely made findings as to their conduct and role in the enterprise.⁸⁰ For example, in *Karadžić*, the accused was charged and subsequently convicted for counts of genocide, CAH and war crimes in a joint criminal enterprise with multiple deceased co-accused.

40. Similarly, the Court has considered the conduct of child soldiers in the context of crimes allegedly committed by indicted defendants, notwithstanding that Art.26 ICCSt excludes jurisdiction “over persons under eighteen.” In *Lubanga*, child soldiers were named (in redacted fashion) and their armed conflict activities listed in the indictment against the defendant,⁸¹ who was later convicted of the war crime of using children below 15 to participate in hostilities.⁸²
41. Consistent with this well-accepted international criminal practice, Little Fingers is beyond the ICC’s jurisdiction under Art.25(1) does not preclude it being named and its conduct being considered by the Court.

C. The PTC’s Naming of Little Fingers Is Consistent with Important International Law Developments Promoting Consideration of Corporate Responsibility for Atrocity Crimes and ICC Rules Mandating Accurate and Holistic Indictments.

42. The naming of Little Fingers as an unindicted co-perpetrator is also consistent with important international law developments along with the ICC’s rules and policy preferences. First, this allows consideration of the role played by Klegane’s corporation, which mirrors international criminal law’s significant trend toward acknowledging corporate responsibility for atrocities in line with progressing human rights standards. Second, by promoting consideration of the corporate penal responsibility as a concern to the global community, PTC VI has helped further this Court’s fundamental object and purpose – ending impunity for core international crimes. Third, PTC VI’s ruling is supported by important ICC indictment rules as applied in the context

⁷⁷ *Lukwiya Proceeding Termination Decision*.

⁷⁸ *Ongwen Charge*.

⁷⁹ *Ongwen Confirmation Decision*, ¶66.

⁸⁰ See, e.g., *Karadžić Judgment*, ¶¶3250-3256, 3274-3297, 3321-3325; *Karemera Amended Indictment Prosecution Submission*, ¶¶23-28.

⁸¹ *Lubanga Charges Document*, ¶¶41-84.

⁸² *Lubanga Art.74 Judgment*, ¶1358.

of prosecutions against corporate officers.

1. Naming Corporations as Unindicted Co-Perpetrators Conforms with International Law's Development Towards Corporate Responsibility.

43. As argued above, the Naming Practice is consistent with the text of the ICCSt, which is applied in the “first place” following Art.21(1)(a). But this position is further strengthened if the Court finds it suitable to reference principles derived from “international law” and “national laws of legal systems of the world,” pursuant to Arts.21(1)(b) and (c). In this regard, consideration of corporate criminal responsibility is widely embraced in international law, as particularly evidenced in numerous multilateral treaties. Moreover, corporate criminal liability is now established in an overwhelming number of domestic jurisdictions.
44. The notion that corporate criminal responsibility is within the purview of international law is deeply-entrenched. This is evidenced from three different perspectives. First, consideration of corporate responsibility in atrocity crimes has been progressively acknowledged in international criminal justice. Early on, the NMT in *I.G. Farben* remarked that the liability of the Farben organization was interlinked with individual penal responsibility, noting that Farben was “the instrument by and through which [the defendants] committed the crimes.”⁸³ As noted above, *Ruto and Sang* and *Nahimana et al* evidence consideration of corporate activities in prosecuting corporate officers responsible for atrocity crimes. Most significantly, the ACtJHR Statute was recently amended to provide for jurisdiction over corporations for international crimes, including CAH.⁸⁴
45. Second, many international treaties recognize corporate criminal liability, further evidencing that corporations are not insulated from international criminal law. These include the Convention on the Suppression and Punishment of the Crime of Apartheid,⁸⁵ the Convention for the Suppression of the Financing of Terrorism,⁸⁶ the Convention against Transnational Organized Crime,⁸⁷ the Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution

⁸³ *IG Farben Case*, p.1108.

⁸⁴ Art.46C.

⁸⁵ Art.I, ¶2.

⁸⁶ Art.5.

⁸⁷ Art.10.

and Child Pornography,⁸⁸ and the Convention against Corruption.⁸⁹ These treaties mandate member States to impose criminal liability or other equivalent accountability measures on corporations.

46. Third, acknowledgment of corporate criminal responsibility is also manifest in the international human rights context. For example, the ILC latest draft Convention on Crimes Against Humanity provides for corporate criminal liability.⁹⁰ The UNHRC also unanimously endorsed the UN Guiding Principles on Business and Human Rights, which serves to reinforce corporate accountability.⁹¹ These developments led the Appeals Panel of the STL in *New TV S.A.L.* to conclude there exists “a concrete movement on an international level backed by the UN for ... corporate accountability” for human rights.⁹²
47. Domestically, the number of jurisdictions that provide for corporate criminal responsibility is equally noteworthy. Most common law jurisdictions, including the US, UK, Canada, New Zealand, and Australia, have been enforcing criminal law against corporations since early times.⁹³ Major civil law jurisdictions, including Denmark, Finland, France, Iceland, Indonesia, Japan, the Netherlands, Norway, the People’s Republic of China, Portugal, and South Africa, had municipally codified corporate criminal responsibility when the Rome Conference was held in 1998.⁹⁴ Even a significant number of the countries that originally strongly resisted including juridical persons in the ICC’s jurisdiction, as their legal systems did not provide for corporate criminal liability at that time, later adopted the principle, including Austria, Luxemburg, Spain, and Switzerland.⁹⁵
48. Here, naming Little Fingers as an unindicted co-perpetrator engages the consideration of its responsibility for the abusive labor practices at issue, and acknowledges its proper role in the CAH committed by Klegane. This fully accords with the embracement of corporate responsibility

⁸⁸ P.227.

⁸⁹ Art.26.

⁹⁰ CAH: The Draft Preamble, the Draft Articles and the Draft Annex, Art.6(7).

⁹¹ Guiding Principles on Business and Human Rights.

⁹² *New TV S.A.L. Interlocutory Appeal Decision*, ¶46.

⁹³ Kyriakakis, *Corporate Criminal Liability*, pp.336-339.

⁹⁴ *Id*, pp.340-342.

⁹⁵ *Id*, pp.336-348.

both in international law and domestic legal systems.

2. Naming Little Fingers as an Unindicted Co-Perpetrator Furthers the ICC Statute's Fundamental Object and Purpose by Promoting Consideration of Corporate Responsibility for Atrocity Crimes, Which Helps Combat the Culture of Impunity.

49. Per the ICCSt's Preamble, the ICC's object and purpose is to "put an end to impunity for the perpetrators" of "the most serious crimes of concern to the international community" and to contribute "to the prevention of such crimes." Furthermore, the Court, by effective enforcement, "build[s] awareness and show[s] potential perpetrators that [they] will no longer enjoy immunity."⁹⁶ It is undeniable that corporate atrocity crimes have become "crimes of concern to the international community as a whole." This is evidenced by the significant development of corporate responsibility as elaborated in §C.1. above. Further, corporations are being increasingly implicated in international crimes with relevant actors enjoying "systemic impunity."⁹⁷ Accordingly, it is now an integral part of the ICC's mandate to ensure the effective prosecution and prevention of corporate atrocity crimes.

50. Given Little Fingers cannot be indicted in this case, the Naming Practice crucially furthers this mandate. Expressly naming the corporation in an ICC indictment clearly notifies would-be corporate offenders that their atrocities will no longer be shielded from international justice. PTC VI explicitly announced this motive in its Confirmation Decision by stating "[t]ackling human trafficking requires companies to take active steps to identify and prevent human rights abuses in their supply chains."⁹⁸ Moreover, the Naming Practice allows for the effective prosecution of responsible corporate officers, a point further illustrated below.

3. Naming Corporations as Unindicted Co-Perpetrators Facilitates the Accurate and Holistic Indictment of Corporate Officers as Required by the ICCSt and Helps the Defense Prepare for Trial.

51. The ICCSt's indictment regime allows a defendant to be "meaningfully informed of the nature, cause, and content of the charges" to prepare "an effective defense."⁹⁹ Reg.52(c) of the Regulations of the Court requires the Prosecution to present in its charges "the precise form of participation under Arts.25 and 28 [of the ICCSt];" similarly, Reg.58(2) of the Regulations of

⁹⁶ Triffterer, *Commentary*, p.10.

⁹⁷ Kyriakakis, *Corporations before ICC*, pp.221-240; Van den Herik, *Corporations under International Law*, pp.725-743.

⁹⁸ Problem, p.7, ¶1(b).

⁹⁹ *Bemba Art.74 Judgment*, ¶33.

the OTP mandates the Prosecution to “clearly [state] the mode or modes of liability” which allegedly “renders the person individually responsible” for each crime charged. The AC in *Lubanga* stated the more remote the form of individual criminal responsibility charged (for example, superior responsibility as opposed to direct perpetration), the greater the “degree of specificity” is required in identifying “the [defendant’s] ‘particular course of conduct’ [forming] the basis for the charges.”¹⁰⁰ As well-documented above, the ICC general practice of naming uncharged co-perpetrators also strengthens the policies underlying these indictment requirements.

52. Consistent with these objectives, prosecuting corporate officers for crimes perpetrated through their companies, such as Little Fingers in the present case, requires naming the implicated corporations as unindicted co-perpetrators. Here, Klegane is rendered individually responsible under Arts.25(3) and 28(b) because the corporate structure of Little Fingers and its parent Giant Finger gave Klegane “ultimately authority” and “supervisory control” over Little Fingers’ corporate actions.¹⁰¹ Little Fingers’ “only source of business” was the human trafficking-tainted Westeros shrimps exports, meaning its sole existence pertains to the criminal activity for which Klegane is now prosecuted.¹⁰² As a result, the prosecution can only effectively and holistically shed light on Klegane’s participation in the charged crimes through the Naming Practice.

¹⁰⁰ *Lubanga Appeal Judgment*, ¶¶122-123.

¹⁰¹ *Id.*

¹⁰² Problem, p.5.

III. The PTC’s Determination That the *Ne Bis* Principle Does Not Apply in This Case Should Be Upheld.

53. PTC VI rejected the *Ne Bis* argument raised by the Defense. In particular, the Chamber held that because the acquittal was based on an error of law and there were reasons to doubt the impartiality of the domestic judge, Art.20(3) does not bar the current charges.
54. The Prosecution submits that PTC VI’s decision should be upheld for four reasons. First, the Northeros District Court did not exercise jurisdiction over Klegane, therefore there was no trial that would trigger the operation of the *Ne Bis* principle. Second, even if the Court finds that the Northeros District Court did exercise jurisdiction, there was no determination on the merits as required for a “trial” for purposes of Art.20. Third, in any event, what Northeros labelled as a “trial” cannot trigger *Ne Bis* protection as it was based on an error of law. Fourth, proceeding on the basis that a valid trial had in fact been conducted by the Northeros Court, the instant case nevertheless falls under the Art.20(3)(b) exception, as there was a lack of impartiality, and therefore precludes the operation of *Ne Bis*.

A. The *Ne Bis* Principle Only Operates Where the First Court Actually Exercised Jurisdiction and No Jurisdiction Was Exercised by the Northeros District Court.

55. The ICC Statute establishes a “close relationship” between the Art.20(3)’s *Ne Bis* principle and Art.17(1)(c)’s “principle of complementarity,” in that the protection of double jeopardy should be seen as an issue of inadmissibility.¹⁰³ This permits the ICC to serve as a “jurisdictional ‘safety net’” when domestic jurisdictions do not take adequate justice measures.¹⁰⁴ In this regard, at a minimum, jurisdiction must have “already been asserted by a national judicial body” for Art.20(3) to block an ICC prosecution.¹⁰⁵
56. In this case, Art.20 does not bar prosecution of the acts of Klegane as jurisdiction over it was never asserted by the Northeros District Court. In its decision, the Northeros Court decided it lacked both subject matter and territorial jurisdiction.

1. The Northeros Court Did Not Assert Subject Matter Jurisdiction.

57. The state of Northeros charged Klegane with aiding and abetting CAH under the Northeros ICC Implementation Act of 2003 and the domestic crime of human trafficking under the Northeros

¹⁰³ Finlay, *Art.20 Rome Statute Analysis*, p.228.

¹⁰⁴ Rosenfeld, *US Status of Force Agreement and Art.98 Rome Statute*, p.278.

¹⁰⁵ Finlay, *supra*.

Human Trafficking Act of 2013. The Northeros District Court decided it could not assert jurisdiction over either of these charges. First, it found it had no subject matter jurisdiction over the CAH count. In its decision, the court stated Klegane’s acts “constitute human trafficking but do not constitute CAH as defined in the Northeros ICC Implementation Act.”¹⁰⁶ Thus, the court did not assert subject matter jurisdiction as to that charge.

2. The Northeros Court Did Not Assert Territorial Jurisdiction.

58. Second, after the court deemed it lacked jurisdiction over count one, it went on to consider whether jurisdiction could be asserted over count two, the alleged violation of the Northeros Human Trafficking Statute. Here, it determined that the Statute had no extraterritorial application and therefore Klegane’s acts equally could not be adjudicated under it.¹⁰⁷ Overall, then, proceedings were initiated merely to determine that jurisdiction was lacking and thus Klegane’s case could not be before the court. Hence, the protection of Art.20(3), which aims to avoid subjecting a defendant to another trial on the merits,¹⁰⁸ was not even remotely engaged.

B. Even if Jurisdiction Had Been Exercised, There Was No Previous Domestic Court “Trial” for the Purposes of Art.20(3).

59. Even assuming there was jurisdiction in the case, Klegane was certainly not “tried,” which is the bare minimum required to trigger *Ne Bis* under Art.20(3). This is true for three reasons. First, the Northeros proceedings were not a trial because according to standard criminal procedural models in court systems that “comply with international standards of due process,”¹⁰⁹ a criminal trial is routinely preceded by an initial hearing that deals with preliminary matters, including identifying the defendant, taking his plea, verifying venue/jurisdiction and the charges. Klegane’s Northeros Court appearance was precisely such a preliminary proceeding. Second, in any event, the Northeros proceeding is not a “trial” within the meaning of Art.20(3) as there was no consideration of the case’s merits. And third, the label of Klegane’s first appearance as a “trial” is not determinative for purposes of *Ne Bis*.

¹⁰⁶ Problem, p.5.

¹⁰⁷ *Id.*, pp.5-6.

¹⁰⁸ Triffterer, *Commentary*, p.902.

¹⁰⁹ Problem, p.3.

1. Despite Judge Nefarious Labeling It a “Trial,” Klegane’s First Appearance Was Merely an Initial Hearing, Not a Trial on the Merits as Required.

a. Criminal Systems with International Due Process Standards Routinely Hold Initial Hearings Before Actual Trials.

60. As the word “trial” under Art.20(3) is not defined in the ICCSt and Northeros is a “democracy” with “court systems that generally comply with international standards of due process,”¹¹⁰ this Court should draw reference from due process procedures in democracies to determine the precise nature of the Northeros hearing.
61. Preliminary pre-trial hearings are well-recognized parts of democratic legal systems. Publicists have observed that pre-trial hearings “scrutinize prosecutorial charging decisions” to eliminate “inadequate or ill-motivated charges,”¹¹¹ and “determine whether a trial is justified.”¹¹²
62. For example, in the US, at an initial appearance, *inter alia*, proper jurisdiction is ascertained.¹¹³ A preliminary hearing is then conducted to determine whether the prosecution has established “probable cause” to commit a defendant to trial.¹¹⁴ Significantly, discharge of a defendant at this stage does not preclude later prosecution “for the same offence.”¹¹⁵ Similarly, such pre-trial hearings exist in the UK.¹¹⁶ A dismissal at this stage again does not trigger *Ne Bis* protection.¹¹⁷
63. The same is true in civil law systems. In Germany, “preparatory proceedings” are held to determine whether there are “sufficient grounds” to open “main proceedings.”¹¹⁸ Italy similarly adopts preliminary hearings to decide whether there are “grounds” for a trial to “proceed.”¹¹⁹
64. Significantly, this Court has initial hearings in advance of the trial stage. In particular, hearings

¹¹⁰ Problem, p.3.

¹¹¹ Leipold, *Screening Prosecutorial Charging Decisions*, p.162.

¹¹² Dautrich, *Enduring Democracy*, p.237.

¹¹³ Federal Rules of Criminal Procedure, R.5.1(e).

¹¹⁴ Leipold, *Screening Prosecutorial Charging Decisions*, p.166.

¹¹⁵ Federal Rules of Criminal Procedure, R.5.1(f).

¹¹⁶ Criminal Procedure Rules, Pt.3.13.

¹¹⁷ Double Jeopardy Consultation Paper, ¶¶2.8 (surveying UK’s legal position on the double jeopardy rule).

¹¹⁸ German Code of Criminal Procedure, §§199 and 203.

¹¹⁹ Italian Code of Criminal Procedure, Art.422; Delmas-Marty, *European Criminal Procedures*, p.367.

are held to challenge admissibility and jurisdiction under Art.19 and Rule 58 of the RPE.¹²⁰ Likewise, Art.61 provides for a pre-trial confirmation of charges hearing, which calls for the parties to “present evidence” based on which the court may “decline to confirm [the] charges.”¹²¹

b. Klegane’s First Court Appearance Is an Initial Hearing Insufficient to Trigger *Ne Bis*.

65. At present, Klegane’s first court appearance bears all the indicia of an initial hearing in two respects. First, the Northeros proceeding closely resembles initial hearings in other jurisdictions and the ICC, which do not constitute trials. The Northeros Court merely described Klegane’s particulars, reviewed preliminary evidence solely based on the previous Westeros judgment without performing its own fact-finding exercise, and dismissed the case on jurisdiction. This is remarkably akin to the hallmarks of initial hearings above.
66. Second, the brevity of the Northeros proceedings further supports this. Klegane’s first appearance was less than three months after the case was opened, (as the Westeros case was terminated on 25 February), which is insufficient time to prepare for actual trial given the copious amount of evidence in this case.¹²² Moreover, per the above due process standards, an accused must have “adequate time and facilities for the preparation of his defense,”¹²³ which was not afforded to Klegane, were his appearance a “trial.”
67. In conclusion, the Northeros proceeding is merely a pre-trial hearing, which should not shield Klegane from justice as *Ne Bis* can only be triggered by a “trial.”

2. Further, Klegane’s Initial Hearing Is Not a “Trial” as There Was No Adjudication on the Merits Pursuant to Any Standard of Proof.

68. In *Bemba*, TC III rejected a *Ne Bis* admissibility challenge because the domestic decision “was not in any sense a decision on the merits of the case” and it “did not result in a final decision or acquittal of the accused.”¹²⁴ This reading of Art.20(3) is further supported by the ILC’s commentary,¹²⁵ which makes clear that *Ne Bis* only operates “where the first court actually

¹²⁰ ICCSt, Art.19; RPE, R.58.

¹²¹ ICCSt, Arts.61(6)(c), 7(b).

¹²² Problem, ¶3.

¹²³ ICCPR, Art.14(3)(b).

¹²⁴ *Bemba Abuse of Process Decision*, ¶248.

¹²⁵ ILC Draft Code, Art.42.

exercised jurisdiction and made a determination *on the merits* with respect to the particular acts constituting the crime.”¹²⁶ This has been explicitly adopted in *Tadić* where the TC held that there is no trial unless the defendant has been “the subject of a judgment on the merits.”¹²⁷

69. A decision on the merits was not present in the Northeros proceedings, where there was no analysis of the elements of the offences charged vis-à-vis the requisite standard of proof in Northeros (presumably beyond reasonable doubt).¹²⁸ In fact, the court merely concluded it lacked jurisdiction, discharging Klegane summarily without definitively resolving his guilt or innocence. This jurisdictional dismissal was not a “judgment on the merits” as required.
70. This is true notwithstanding the language of Arts.20(1) and (2) ICCSt, which forbid ICC trials after previous “convictions” or “acquittals,” being different from “trials” in Art.20(3). As mentioned above, “tried by another court” in Art.20(3) was held in *Bemba* and *Tadić* to mean a trial on the merits leading to a “conviction” or “acquittal,” consistent with the language of Arts.20(1) and (2), and the opinion of publicists.¹²⁹
71. Significantly, Art.20 is not the only ICCSt provision that refers to different matters with similar wording. For instance, “killing” and to “cause death” both carry the same meaning within Art.8(2).¹³⁰ The meaning of Art.20(3) therefore does not deviate from that in Arts.20(1) and (2). As such, the Northeros decision is not a trial on the merits and hence is insufficient to trigger *Ne Bis*.

3. Labeling Klegane’s Initial Appearance as a “Trial” Is Not Determinative for Purposes of *Ne Bis*

72. PTC I in *Gaddafi and Al-Senussi* noted that domestic “legal characterization[s]” do not bind the ICC, it makes its own independent assessment as to a case’s admissibility.¹³¹ Triffterer further noted that the ICC “carefully scrutinize[s] the national decision in question” when deciding

¹²⁶ ICC Draft Statute 1994, p.57.

¹²⁷ *Tadić Decision*, ¶24.

¹²⁸ Franck, *Role of Law in Responding to the Threat of Terror*, p.686 (“The criminal laws of liberal democracies require . . . a fair trial at which guilt must be proven by the accusing state beyond a reasonable doubt . . .”).

¹²⁹ Triffterer, *Commentary*, p. 921.

¹³⁰ Elements of Crimes, Art.8(2)(a)(i), fn.31; see also ICC Statute, Arts.8(2)(a)(i), 8(2)(b)(vi), 8(2)(b)(xi), 8(2)(e)(ix), 8(2)(b)(x), 8(2)(e)(xi).

¹³¹ *Al-Senussi Admissibility Decision*, ¶66.

whether a defendant “has been tried.”¹³² A domestic court’s labelling is thus clearly not determinative of whether a trial has taken place under Art.20.

73. Accordingly, this Court must independently assess all the compelling evidence above that indicates the proceedings were a preliminary hearing. If anything, this questionable labeling of the hearing as a “trial” resulting in an “acquittal,” further bolsters the Prosecution’s claim of judicial bias, as further elaborated in §D below.

C. In Any Event, the Northeros Court’s Error of Law Precluded the Operation of *Ne Bis*

74. Even if this Court finds that the Northeros Court did exercise jurisdiction and its proceedings did constitute a “trial,” the operation of *Ne Bis* is still precluded as the Northeros Court’s decision is based on an error of law. This is supported by a well-established understanding of the *Ne Bis* principle in international law, particularly as codified in multiple international human rights instruments, as well as in domestic jurisdictions.

1. International Human Rights Instruments Uniformly Preclude the Operation of *Ne Bis* Where the First Judgment Contains an Error of Law.

75. As this is “the first case to address the defense of *Ne Bis*” at the ICC,¹³³ this Court should be informed by principles derived from “applicable treaties and...international law” pursuant to Art.21(1)(b). Furthermore, the Court should be guided by international human rights instruments that *contain Ne Bis* for an application of Art.20 “consistent with internationally recognized human rights,” as required by Art.21(3). Considering these sources, it is clear that they all prescribe “error of law” as a preclusion to the operation of *Ne Bis*.

76. For example, Art.4 Protocol No. 7 ECHR prescribes the right not to be tried or punished twice. It expressly provides that a “fundamental defect in the previous proceedings...which could affect the outcome of the case” precludes the operation of *Ne Bis*. In interpreting this provision, the ECtHR stated that a case containing, *inter alia*, “manifest errors in the application of substantive law,” could be reopened to “correct judicial errors.”¹³⁴ Similarly, Art.8(4) ACHR provides that a person “acquitted by a nonappealable judgment” shall not be retried. Judge García-Ramírez of the IACtHR in *Gutiérrez-Soler v. Colombia* noted that such provision should not be read to render all final domestic decisions “incontestable” where they contain “incorrectness” and

¹³² Triffterer, *Commentary*, p.921.

¹³³ Problem, p.3

¹³⁴ *Chistyakov v. Russia*, ¶¶22, 26.

“error[s],” otherwise “international criminal jurisdiction can hardly be effective.”¹³⁵

77. In the current case, the Northern Court clearly committed an error in law in its decision to “acquit” Klegane of trafficking as a crime against humanity. As submitted by the Prosecution in Issue (I) above, under the correct interpretation of Art.7(1)(k), human trafficking as set forth in the present facts constitutes CAH. The Northern Court evidently erred in its interpretation of Art.7(1)(k) and consequently held the wrong “yardstick” in determining whether Klegane’s actions qualify as CAH. Consistent with the established understanding of the *Ne Bis* principle in international law and human rights instruments, the Northern Court’s error should preclude Klegane from invoking the principle of *Ne Bis* to avoid the current proceedings.

2. Moreover, in Domestic Criminal Practice, an Erroneous Acquittal Does Not Trigger *Ne Bis* to Preclude a Defendant from Being Subjected to Further Proceedings.

78. The Court is further entitled to be informed by the operation of *Ne Bis* (also termed the “double jeopardy” principle in common law jurisdictions) in domestic criminal jurisdictions, pursuant to Art.21(1)(c). Common law jurisdictions have traditionally maintained a strict application of the double jeopardy principle, where acquittals are considered absolutely final thus not reviewable or appealable.¹³⁶ Despite this, it is well-established that a legally incorrect decision does not attract double jeopardy protection. For example, in the UK, the House of Lords in *Re Harrington*, where the appeals court refused to remit an erroneously acquitted defendant for retrial on the ground of double jeopardy, held that jeopardy “only arises after a lawful acquittal” and accordingly the first court’s error precluded the operation of double jeopardy.¹³⁷ Significantly, subsequent legislative reforms effectively rendered error of law an exception to double jeopardy as a retrial is permissible if a defendant’s acquittal is “wrong in law.”¹³⁸ This position is also consistent in Australia, as a further example. It is statutorily provided in four out of the six states in Australia that a rehearing or new trial following an acquittal may be ordered if such verdict involved an error of law.¹³⁹

¹³⁵ *Gutiérrez-Soler v. Colombia*, *Opinion of Judge García-Ramírez*, ¶19.

¹³⁶ Finlay, *Art.20 Rome Statute Analysis*, p.241.

¹³⁷ *Re Harrington*, ¶752D.

¹³⁸ See, e.g., Criminal Justice Act, §67.

¹³⁹ McMahon, *Exception to Rule Against Double Jeopardy*, p.171; see also, e.g., Crimes (Appeal and Review) Act, §107(2); Criminal Appeals Act, §24(2)(e)(i); Criminal Law Consolidation Act, §352(1)(ab)(ii).

79. Civil law jurisdictions even contain a looser application of *Ne Bis*. For instance, in France, a defendant is not precluded by *Ne Bis* from being subjected to further proceedings if the first proceedings are based on, *inter alia*, errors of law.¹⁴⁰ In Germany, erroneous acquittals are not considered “final” such that consequent proceedings do not offend *Ne Bis*.¹⁴¹

80. Therefore, in accordance with such well-established application of *Ne Bis* across domestic criminal jurisdictions, subjecting Klegane to the present proceedings does not violate the principle since the Northeros acquittal was wrong in law.

D. Even If a Trial Within the Meaning of Art.20 Had Been Conducted, *Ne Bis* Nevertheless Will Not Operate as the Instant Case Falls Under the Art.20(3)(b) Exception.

81. Even if Klegane had been “tried” under Art.20(3), the “lack of impartiality” exception in Art.20(3)(b) renders *Ne Bis* inapplicable. In *Banda/Jerbo*, the ICC, held that the relevant test is “whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the [judge].”¹⁴² This is affirmed in *Lubanga*, which held “actual bias” is unnecessary and “the appearance of grounds to doubt...impartiality [is] sufficient.”¹⁴³

82. At present, Klegane’s significant influence in Northeros gives rise to an implication of bias for two reasons. First, in a relatively small country (geographically smaller than Ecuador), Klegane’s subsidiary company purchases 60% of the shrimp in this developing economy’s key industry. For reference, Vietnam, whose shrimp exports account for only 0.5% of its GDP (with a GDP per capita ranking 132nd worldwide), makes more than \$1.5 billion yearly exporting shrimps. Klegane’s subsidiary company further enjoyed an unusually high profit margin due to the low cost of Westeros labor,¹⁴⁴ corroborating PTC VI’s finding that Klegane was “extremely wealthy and powerful.”¹⁴⁵

83. Second, Klegane contributed “millions of dollars (US) to the campaign of the former president”¹⁴⁶ in a country populated with 2 million people, which generates an annual GDP of

¹⁴⁰ See, e.g., Dadomo, *French Legal System*, p.220.

¹⁴¹ German Criminal Code, §§312, 333.

¹⁴² *Banda/Jerbo Decision*, ¶11 (discussed in the context of recusal).

¹⁴³ *Lubanga Decision*, ¶¶9-10

¹⁴⁴ Problem, p.5.

¹⁴⁵ *Id*, p.8.

¹⁴⁶ *Id*, p.8.

\$10 billion. This clearly indicates Klegane's extreme influence because of his wealth.

84. Accordingly, an objective appearance of bias arises from the financial link between Klegane and the former President. The fact that he is no longer in office is immaterial as the inquiry is whether the person "*has had* any association" that objectively gives rise to bias, and not whether such association is *currently* present.
85. Moreover, Judge Nefarious' lack of impartiality is further bolstered by his labelling Klegane's initial preparatory court appearance as a "trial." The labelling of jurisdictional dismissal as an "acquittal" further raises an inference as to lack of impartiality given that it nominally triggers *Ne Bis* protection that can shield Klegane from justice.

SUBMISSIONS

The Prosecution respectfully requests that the ICC:

- a) Determine that human trafficking in these facts qualifies as “other inhumane acts” under Art.7(1)(k) ICCSt;
- b) Determine that Little Fingers, a corporate subsidiary wholly controlled by the Klegane, can be treated as an unindicted co-perpetrator with Klegane pursuant to Art.25(3)(a) ICCSt;
- c) Determine that the *Ne Bis* principle enshrined in Art.20 ICCSt does not apply in the present case;
- d) Commit Klegane for trial on the charges as confirmed.

