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**THE APPEALS CHAMBER**

**Case before the International Criminal Court:  
Prosecutor v. Agon Megor of the Republic of Ibbin**

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

## TABLE OF CONTENTS

<b>LIST OF ABBREVIATIONS</b> .....	6
<b>INDEX OF AUTHORITIES</b> .....	7
<b>I. ARTICLES</b> .....	7
<b>II. BOOKS</b> .....	8
<b>III. CASES</b> .....	8
A. Court of Justice of the European Union .....	8
B. European Court of Human Rights .....	9
C. Extraordinary Chamber of Cambodia.....	9
D. International Criminal Court.....	9
E. International Criminal Tribunal for Rwanda .....	15
F. International Criminal Tribunal for the former Yugoslavia .....	15
G. Special Tribunal for Lebanon .....	16
<b>IV. MISCELLANEOUS</b> .....	16
<b>V. TREATIES AND CONVENTIONS</b> .....	17
<b>STATEMENT OF FACTS</b> .....	18
<b>ISSUES</b> .....	20
<b>SUMMARY OF ARGUMENTS</b> .....	21
<b>WRITTEN ARGUMENTS</b> .....	23
<b>I. THE PTC ERRED IN DENYING THE PROSECUTION’S REQUEST FOR CONFIRMATION OF CHARGES PERTAINING TO THE DEFENDANT, COLONEL AGON MEGOR</b> .....	23
<b>A. The ICC has jurisdiction over the Defendant’s acts pursuant to Article 5, Article 11 and Article 12 of the Statute</b> .....	23
<i>i. The ICC has temporal jurisdiction over the Defendant’s conduct pursuant to Article 11 of the Statute</i> .....	23
a. The effects of the Defendant providing the drones to Quarth to assist with the counter-piracy plan culminated in October 2020, two months after the entry into force of the Statute in Ibbin;.....	23
b. In any event, Article 18(b) of the VCLT provides that a State is obliged to refrain from acts which would defeat the object and purpose of a treaty pending the entry into force of the treaty.....	24
<i>ii. The ICC has personal jurisdiction over the Defendant’s acts pursuant to Article 12(2)(b) of the Statute, as the Defendant is a national of Ibbin, a State Party to the Statute</i> .....	25
<i>iii. The Defendant’s acts constitute CAH, among the most serious crimes of concern to the international community, under Article 5 of the Statute</i> .....	26
a. The attacks were perpetrated during peacetime in Quarth, therefore the Defendant is criminally responsible for CAH only.....	26
b. UNCLOS, not IHL, is the law applicable to counter-piracy operations.....	28

iv.	<i>The crimes perpetrated constitute CAH under Article 7(1)(a), (b) and (k) of the Statute and satisfy the elements of those crimes</i> .....	28
a.	The elements of the CAH of murder pursuant to Article 7(1)(a) of the Statute are satisfied .....	28
b.	The elements of the CAH of extermination pursuant to Article 7(1)(b) of the Statute are present .....	29
c.	The elements of the CAH of other inhumane acts pursuant to Article 7(1)(k) of the Statute are present .....	29
<b>B.</b>	<b>The Defendant is criminally responsible for the crimes perpetrated as the mens rea and actus rea requirements for aiding and abetting under Article 25(3)(c) of the Statute are satisfied</b> .....	29
i.	<i>By supplying the drones to CRV for the purpose of assisting Quarth in exterminating the Tyvosh pirates, the Defendant intended to facilitate the commission of the CAH.</i> .....	29
ii.	<i>The actus reus (objective elements) of aiding and abetting is satisfied as the Defendant's conduct, supplying the drones to Quarth, assisted in the commission of CAH.</i> .....	30
iii.	<i>The Defendant had the requisite mens rea (subjective elements) for aiding and abetting the perpetrator in the commission of the crimes</i> .....	30
a.	The Defendant knew that CRV planned to deploy the drones in attacks against the Tyvosh pirates and was aware that the crimes would be committed in the ordinary course of events .....	31
b.	The Defendant supplied the drones to CRV for the purpose of assisting in the commission of the crimes .....	31
<b>C.</b>	<b>The gravity of the case is sufficient to meet the threshold under Article 17(1)(d)</b> .....	31
i.	<i>There are a sufficient number of victims to satisfy the gravity threshold</i> .....	31
ii.	<i>The qualitative nature of the crime was not sufficiently taken into account</i> .....	32
a.	The geographical and temporal intensity of the attacks is of the required scale .....	32
b.	The attacks were committed on a discriminatory basis, that being the eradication of the Tyvosh pirates .....	32
c.	The drone attacks were conducted on vulnerable victims in a manner calculated to cause suffering .....	33
d.	The attacks on the Watertown elementary school and Harbortown hospital are attacks on protected buildings .....	34
e.	The Defendant had a high degree of participation in the attacks. ....	34
iii.	<i>The Child Pirates count as victims towards the gravity requirement</i> .....	34
<b>D.</b>	<b>There is sufficient evidence available to establish substantial grounds to believe that the Defendant committed the CAH in satisfaction of Article 61(7)(b) of the Statute</b> .....	35
i.	<i>The disclosed evidence is sufficient to satisfy Article 61(7)(b) of the Statute</i> .....	35
a.	The disclosed evidence contains relevant pieces of evidence with strong probative value. ....	35
b.	There is a distinction between the standard of proof required at the Pre-Trial and Trial Proceedings .....	36

c.	There is no bar preventing the introduction of indirect evidence at the Pre-Trial stage .	37
<b>II.</b>	<b>THE PTC ERRED IN RULING THAT THERE IS NO JUSTIFICATION FOR THE APPOINTMENT OF A SEPARATE VICTIMS’ REPRESENTATIVE UNDER ARTICLE 68(3) OF THE STATUTE AND RULE 90 OF THE RPE.....</b>	<b>37</b>
<b>A.</b>	<b>There is a disparity in the number and type of victims .....</b>	<b>37</b>
i.	<i>The different victim groups can be divided into “teams” and assigned SLRs for each “team” .....</i>	<i>37</i>
ii.	<i>Financial or logistical concerns should not triumph over separate legal representation .....</i>	<i>38</i>
iii.	<i>Conflicts of interest will arise without separate legal representation.....</i>	<i>39</i>
<b>B.</b>	<b>The appointment of separate legal representation for the victims is more effective and efficient for the trial proceedings .....</b>	<b>40</b>
i.	<i>SLRs will lead to less delay .....</i>	<i>40</i>
ii.	<i>Separate legal representation gives the victims a higher standard of representation ....</i>	<i>41</i>
<b>C.</b>	<b>The appointment of separate legal representation for the victims will not have an adverse impact on the rights of the Defendant .....</b>	<b>42</b>
i.	<i>The Defendant’s right to a fair trial under Article 67 of the Statute will not be compromised: .....</i>	<i>42</i>
a.	<i>The Defendant’s presumption of innocence will not be adversely impacted.....</i>	<i>42</i>
b.	<i>The victims are entitled to be legally represented under Article 68(3) of the Statute through either common legal representation or separate legal representation.....</i>	<i>43</i>
<b>SUBMISSIONS .....</b>		<b>45</b>

## LIST OF ABBREVIATIONS

AC	Appeals Chamber
CAH	Crimes Against Humanity
CIL	Customary International Law
CLR	Common Legal Representative
CRV	Colonel Reena Valyeron
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
Ibbin	The Republic of Ibbin
EOC	Elements of Crimes
ICC/The Court	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
NIAC	Non-International Armed Conflict
PTC	Pre-Trial Chamber
QHSF	Quarth Homeland Security Force
RPE	Rules of Procedure and Evidence of the International Criminal Court
SLR	Separate Legal Representative
STL	Special Tribunal for Lebanon
Statute	Rome Statute of the International Criminal Court
TC	Trial Chamber
UNHCHR	United Nations High Commissioner for Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNDHR	United Nations Declaration on Human Rights
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
VCLT	Vienna Convention on the Law of Treaties

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<i>AC Aleksovski</i>	<i>The Prosecutor v. Zlatko Aleksovski</i> (AC ICTY Decision on Prosecutor’s Appeal on Admissibility of Evidence) IT-95-14/1-AR73 (16 February 1999)

#### **G. Special Tribunal for Lebanon**

<i>PTJ Ayyash</i>	<i>The Prosecutor v. Salim Jamil Ayyash</i> (Pre-Trial Judge STL Decision Relating to Victim’s Participation in the Proceedings and their Legal Representation) STL-18-10/PT/PTJ (17 April 2020)
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#### **IV. MISCELLANEOUS**

ICC-OTP Iraq	ICC-OTP, Response to Communications Received Concerning Iraq (9 February 2006)
UNSCR 1816	Resolution 1816 (2008) Adopted by the Security Council at its 5902nd meeting on 2 June 2008 authorising action against piracy in Somalia.

UNSCR 2246	Resolution 2246 (2015) Adopted by the Security Council at its 7554th meeting, on 10 November 2015 regarding piracy and armed robbery at sea off the coast of Somalia
UNSCR 1838	Resolution 1838 (2008) Adopted by the Security Council at its 5987th meeting, on 7 October 2008 regarding the situation in Somalia
UNSCR 1846	Resolution 1846 (2008) Adopted by the Security Council at its 6026th meeting, on 2 December 2008 on repressing acts of piracy and armed robbery at sea off the coast of Somalia
UNSCR 1851	Resolution 1851 (2008) Adopted by the Security Council at its 6046th meeting, on 16 December 2008 on fight against piracy and armed robbery at sea off the coast of Somalia

## V. TREATIES AND CONVENTIONS

Statute	Rome Statute on the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90
UNCLOS	United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994)
VCLT	Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (opened for signature 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609
PCSUAASMN	Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 8 (opened for signature 14 February 2006, entered into force July 28, 2010) IMO Doc. LEG/CONF.15/21

## STATEMENT OF FACTS

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1. This case arises from a series of drone attacks targeted against a faction of the Tyvosh ethnic minority in Quarth; the Tyvosh pirates (including juveniles). Quarth is not a party to the Statute. Since 2017 Quarth was subject to sporadic attacks from the Tyvosh pirates. The Tyvosh pirates operate in the high seas and off the coast of Quarth.
2. The Defendant is a national of Ibbin who serves as the National Security Advisor and head of the National Security Council of Ibbin. Quarth became a party to the Statute on 1 August 2020.
3. It is alleged that following a request from CRV, commander of the QHSF, the Defendant supplied hunter-killer drones to CRV in July 2020 for the purpose of assisting in exterminating the Tyvosh pirates.
4. A UNHCHR report dated 14 November 2020 reported that in January 2019 the president of Quarth declared a “war on piracy” initiating a 20-month period of sporadic violence between the QHSF and Tyvosh pirates. The violence peaked the week beginning 8<sup>th</sup> October 2020 when the QHSF deployed drones across Quarth resulting in the extermination of the Tyvosh pirates (approximately 700), deaths of approximately 300 non-pirates and destruction of education, housing and medical facilities.
5. An article titled “*Tyvosh Pirates Extinguished*” by Roger Costane was published in the *Quarth News and Observer* on 13<sup>th</sup> October 2020 which reported that CRV admitted that the drones were supplied to Quarth by the Defendant for the purpose of exterminating the Tyvosh pirates.
6. Subsequently on 15<sup>th</sup> January 2021 *Quarth News and Observer* published an article titled “*Rogor Costane Retracts Drone Story*”. The article stated that Costane retracted his comments regarding CRV in the article dated 13<sup>th</sup> October 2020 as they were exaggerated and based on a misunderstanding. The newspaper suspended Costane as he allegedly accepted a bribe to retract the article and an internal investigation is underway. CRV has since resigned from government.
7. Owing to the widespread drone attacks there are a number of distinct victim groups including the adult pirates, juvenile pirates, non-pirate victims.

8. On 21<sup>st</sup> December 2020, PTC VI granted the Prosecution's request under Article 15(4) of the Statute to initiate an investigation into the Defendant's involvement in alleged crimes that occurred in Quarth in October 2020. As Ibbin was unwilling to pursue criminal charges against the Defendant, the Prosecutor on 1<sup>st</sup> February 2021, requested confirmation of charges against the Defendant.

## ISSUES

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### I.

Whether the preliminary jurisdictional prerequisites are satisfied under Articles 5, 11 and 12 of the Statute:

- A. Whether the Court has temporal jurisdiction over the Defendant's acts in supplying drones to Quarth for assisting in counter-piracy operations, pursuant to Article 11 of the Statute;
- B. Whether the Court has personal jurisdiction over the Defendant's acts in satisfaction of Article 12 of the Statute; and
- C. Whether the Defendant's acts constitute a crime under the jurisdiction of the Court pursuant to Article 5 of the Statute.

### II.

Whether the Defendant's acts satisfy the mens rea and actus reus requirements for aiding and abetting or otherwise assisting pursuant to Article 25(3)(c) of the Statute.

### III.

Whether there are substantial grounds to believe that the case is sufficiently grave to satisfy the requirement under Article 17(1)(d) of the Statute.

### IV.

Whether the evidence provided by the prosecution at the pre-trial stage was sufficient to establish substantial grounds to believe that the Defendant committed CAH, pursuant to Article 61(7)(b) of the Statute.

### V.

If the case proceeds, whether there exists justification for the appointment of a separate Victims' Representative for juvenile pirates and non-pirate victims under Article 68(3) of the Statute and Rules 89 and 90 of RPE.

## SUMMARY OF ARGUMENTS

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### I.

1. The jurisdictional prerequisites are satisfied in the present case:
  - A. The Court has temporal jurisdiction over the Defendant's conduct pursuant to Article 11(1) of the Statute as the material elements of his conduct, providing the drones to CRV, culminated in October 2020, two months after the entry into force of the Statute in Ibbin, when the drones were used in attacks against the Tyvosh pirates.
  - B. The Court has personal jurisdiction over the Defendant's conduct pursuant to Article 12(2)(b) of the Statute as the Defendant is a national of Ibbin, a State Party to the Statute.
  - C. The crimes perpetrated fall within the jurisdiction of the Court pursuant to Article 5 of the Statute as the crimes satisfy the elements of CAH pursuant to Article 7(1)(a), (b) and (k) of the Statute.

### II.

1. The actus reus and mens rea requirements for aiding and abetting are satisfied pursuant to Article 25(3)(c) of the Statute. Furthermore, the general intent requirement under Article 30 of the Statute is satisfied.
2. The Defendant provided the means for the commission of the attacks against the Tyvosh pirates resulting in the CAH.
3. The Defendant knew that the drones would be used in a counter-piracy plan to exterminate the Tyvosh pirates and was aware the crimes would be committed in the ordinary course of events.
4. The Defendant supplied the drones to Quarth for the purpose of assisting in the commission of the crimes.

### III.

1. The number of victims together with the qualitative factors present are sufficient to satisfy the gravity threshold under Article 17(1)(d) of the Statute.
2. Furthermore, the child pirates constitute victims and fall within the scope of the definition of a 'victim' outlined in Rule 85 of the RPE of the Court.

#### IV.

1. The evidence disclosed to PTC VI is relevant and probative, establishing substantial grounds to believe that the Defendant committed the CAH in satisfaction of Article 61(7)(b) of the Statute.

#### V.

1. The disparity in numbers of the different victims; the adult pirates, juvenile pirates and non-pirate victims, allows for three victims groups to be established with separate legal representation assigned. Furthermore, potential conflicts of interests among the victims, in line with Article 68(3) of the Statute, necessitates the appointment of SLRs.
2. The difficulties associated with a CLR acting for all victims, and recognising the issues experienced in the ECCC, necessitates the appointment of SLRs to avoid delays in proceedings and promote greater representation on each victim group's interests.
3. The Defendant's right to a fair trial will not be impacted. The role of victim's representative is not to act as a second prosecutor, there will be no inequality of arms. The Defendant's presumption of innocence will not be impacted as any conflict in the rights of victims' participation and the rights of the Defendant should be resolved in favour of the Defendant. The purpose of Article 68(3) is to allow for victims' views to be presented in proceedings, a right which they are entitled to.

## WRITTEN ARGUMENTS

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### I. THE PTC ERRED IN DENYING THE PROSECUTION'S REQUEST FOR CONFIRMATION OF CHARGES PERTAINING TO THE DEFENDANT, COLONEL AGON MEGOR

#### A. The ICC has jurisdiction over the Defendant's acts pursuant to Article 5, Article 11 and Article 12 of the Statute

1. Three jurisdictional prerequisites must be satisfied for the Court to have authority to hear and decide the case:
  - a. The crimes must have been committed within the timeframe specified in Article 11;
  - b. The crimes must either have been committed on the territory of a State Party to the Statute or by a national of that State, or have been committed on the territory of a State which has made a declaration under Article 12(3) of the Statute or by nationals of that State; and
  - c. The criminal conduct must fall within the categories of crimes set out in Article 5 and defined in Articles 6 to 8 of the Statute.<sup>1</sup>

2. It is submitted that all three jurisdictional pre-requisites are satisfied.

- i. The ICC has temporal jurisdiction over the Defendant's conduct pursuant to Article 11 of the Statute*

- a. The effects of the Defendant providing the drones to Quarth to assist with the counter-piracy plan culminated in October 2020, two months after the entry into force of the Statute in Ibbin;
3. To satisfy the temporal jurisdiction under Article 11, it is immaterial the Defendant provided the drones to CRV prior to the entry into force of the Statute in Ibbin. The CAH were perpetrated two months after the Statute entered into force in Ibbin, it was at that point in time when the Defendant aided, abetted or otherwise assisted in the commission of those crimes. The Court is limited to hearing and deciding on cases where the crimes were committed following the entry into force of the Statute, pursuant to Article 11(1). The Court cannot retroactively prosecute conduct prior to the entry into force of the Statute.<sup>2</sup> However, for evidentiary purposes, the ICC can consider prior conduct to establish elements of a crime that occurred within its temporal jurisdiction.<sup>3</sup> Similarly, ICTR jurisprudence does not preclude the admission of evidence of events that occurred prior to commencement of temporal jurisdiction to clarify the context of a

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<sup>1</sup> PTC III Burundi [31]; PTC I Harun & Kushayb [13]; PTC III Goudé [8] and PTC I Katanga [11]

<sup>2</sup> Article 24(1) Statute

<sup>3</sup> Nissel (2004) p. 658 and p. 663

crime, establish by inference elements of criminal conduct or to demonstrate a deliberate pattern of conduct.<sup>4</sup> To aid, abet or otherwise assist under the Statute there must be at least an attempt to commit the intended offence. Criminal responsibility for aiding, abetting or otherwise assisting is dependent on whether the perpetrator acts in attempting to commit the crime.<sup>5</sup>

4. The Statute came into force in Ibbin on 1<sup>st</sup> August 2020.<sup>6</sup> While the Defendant cannot be held criminally responsible for his conduct prior to its entry into force<sup>7</sup>, evidence prior to 1<sup>st</sup> August 2020 can be admitted to clarify the context in which the Defendant assisted in the attacks against the pirates.<sup>8</sup> The Defendant, during the course of negotiations with CRV, agreed to assist Quarth in its plan to eradicate the Tyvosh pirates. The Defendant agreed to provide CRV with hunter-killer drones for the purpose of executing the counter-piracy plan.<sup>9</sup> The Defendant supplied the drones to Quarth in July 2020 for deployment in attacks commencing 8<sup>th</sup> October 2020. These acts assist in establishing the elements of the Defendant's criminal conduct.<sup>10</sup> The Defendant's conduct in supplying the drones to Quarth for the purpose of extinguishing the Tyvosh pirates continued following the entry into force of the Statute in Ibbin. Ultimately the crimes were committed when the QHSF deployed the drones on the pirates on 8<sup>th</sup> October 2020. It was at that point, two months after the entry into force of the Statute, that the Defendant aided, abetted or otherwise assisted in the commission of the CAH. Therefore, the Court has temporal jurisdiction over the Defendant's conduct.

b. In any event, Article 18(b) of the VCLT provides that a State is obliged to refrain from acts which would defeat the object and purpose of a treaty pending the entry into force of the treaty.

5. Upon depositing its instrument of accession, Ibbin was obliged to refrain from engaging in conduct that would defeat the purpose of the Statute, in line with CIL.<sup>11</sup> In accordance with Article 126 of the Statute, the Statute enters "*into force on the first day of the month after the 60<sup>th</sup> day following the date of the deposit of the instrument of ratification*". Pursuant to Article 18(b) of the VCLT, States have an interim obligation not to defeat the object and purpose of a treaty that has been signed pending its entry into force as the State has already expressed its

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<sup>4</sup> PTC III Bikindi [27]; Nahimana et al. [315]

<sup>5</sup> TC Lubanga [998]

<sup>6</sup> PTC VI Megor [1]

<sup>7</sup> Article 24(1) of Statute; Nahimana et al. [317]

<sup>8</sup> PTC III Bikindi [27]; Nahimana et al. [315]

<sup>9</sup> PTC VI Megor [5(2)]

<sup>10</sup> PTC III Bikindi [27]; Nahimana et al. [315]

<sup>11</sup> Article 18(b) of VCLT

consent to be bound by the treaty. Furthermore, the VCLT is considered an ‘applicable treaty’ within the meaning of Article 21(1)(b) of the Statute<sup>12</sup> and is recognised as secondary law.<sup>13</sup>

6. Ibbin became a State Party to the Statute on 1<sup>st</sup> August 2020<sup>14</sup>. It appears Ibbin deposited its instrument of accession in or around late May 2020. In doing so, Ibbin expressed its consent to be bound to the Statute. In the absence of undue delay of the entry into force of the Statute and without the withdrawal of Ibbin’s consent to be bound to the Statute, Ibbin was under an interim obligation not to defeat the object and purpose of the Statute.<sup>15</sup> Notwithstanding the material elements of the crimes were perpetrated following the entry into force of the Statute in Ibbin, the Defendant was obliged not to act in a manner in contravention of the Statute from the date that Ibbin deposited its instrument of accession. By providing the drones to Quarth in July 2020, the Defendant acted in breach of Article 18(b) of VCLT by acting contrary to the object and purpose of the Statute prior to its entry into force<sup>16</sup>. As the Statute explicitly recognises the authority of the VCLT, the Court should have regard to the Defendant’s flagrant disregard to its interim obligations under the Statute prior to its entry into force.

*ii. The ICC has personal jurisdiction over the Defendant’s acts pursuant to Article 12(2)(b) of the Statute, as the Defendant is a national of Ibbin, a State Party to the Statute*

7. The Court exercises jurisdiction over crimes pursuant to Article 13 of the Statute in circumstances where the crime either occurred on the territory of a State Party or has been committed by a national of a State Party.<sup>17</sup> Pursuant to Article 12(2)(b) of the Statute, the Court can exercise jurisdiction over nationals of a State Party who are accused of a crime that falls within the remit of the Statute, regardless of whether the crime occurred in a State Party<sup>18</sup>. The accused’s links with a State should be genuine, rather than relying on a formal or fraudulent grant of citizenship.<sup>19</sup> There appears to be no dispute over the Defendant’s nationality, he is a national of Ibbin<sup>20</sup>. Therefore, the Defendant’s conduct falls within the jurisdiction of the Court as he is a national of a State Party to the Statute. It is immaterial that Quarth is not a State Party to the Statute for the purpose of satisfying the personal jurisdiction requirement under Article 12(2)(b).

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<sup>12</sup> Schabas (2017) p191; Presidency Decision [23]

<sup>13</sup> TC I Lubanga [601–602]

<sup>14</sup> PTC VI Megor [1]

<sup>15</sup> Dörr & Schmalenbach (2012) p255

<sup>16</sup> Opel Austria GmbH [82]&[90]

<sup>17</sup> Article 12(a)&(b) of Statute; PTC II Kenya [175]

<sup>18</sup> PTC I Al Bashir [36]; PTC II Mudacumura [10]; PTC II Kenya [39]&[175]

<sup>19</sup> Schabas (2017) p59

<sup>20</sup> PTC VI Megor [2]

iii. *The Defendant's acts constitute CAH, among the most serious crimes of concern to the international community, under Article 5 of the Statute*

a. The attacks were perpetrated during peacetime in Quarth, therefore the Defendant is criminally responsible for CAH only.

8. The violence between the Tyvosh pirates and the QHSF does not meet the threshold of a NIAC. Accordingly, the attacks were perpetrated during peacetime. To satisfy the third limb of the jurisdictional prerequisites, the crimes must fall within at least one of the categories of crimes in Article 5 and defined in Articles 6 - 8 of the Statute. War crimes under Article 8 of the Statute can only be perpetrated in the context of an armed conflict. IHL applies during an armed conflict, not during peacetime, and accordingly the killing of armed combatants is lawful.<sup>21</sup> The classification of the violence depends on the facts rather than the State's classification of the conflict.<sup>22</sup>

9. A NIAC exists when there is "*protracted armed violence between government authorities and organized armed groups or between such groups within a State*".<sup>23</sup> The presence of these elements distinguishes an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to IHL.<sup>24</sup> The core elements constituting a NIAC are:

1) The intensity of the violence<sup>25</sup>

9. Relevant factors include the seriousness of the attacks; spread of violence over land and time; increases in numbers of governmental forces and the distribution and mobilisation of weapons among the parties. To satisfy Article 8(2)(f) of the Statute, the violence must be more than sporadic or isolated.<sup>26</sup> Whether the conflict has attracted attention of the UNSC is also a determinative factor, including any resolutions that have been passed.<sup>27</sup>

10. Although the violence used by the Tyvosh pirates seems to accord with that found in some conflicts (use of machine guns, mortars, RPGs, and shipboard missiles), the violence has been sporadic.<sup>28</sup> The lack of a response from the international community, particularly the UNSC,

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<sup>21</sup> Blank (2013) p400

<sup>22</sup> Blank (2013) p401

<sup>23</sup> AC Tadic [70]; TC Tadic [561]; TC III Bemba [127-128]

<sup>24</sup> AC Tadic [70]; Article 8(2)(f) of Statute; Ch I Akayesu [620]

<sup>25</sup> AC Tadic [66]

<sup>26</sup> PTC I Lubanga [538]

<sup>27</sup> TC II Limaj [90]; TC Milosevic [23-24]; TC III Bemba [142-144]; TC II Katanga [1216-1217]

<sup>28</sup> PTC VI Megor [4(2)&(3)]

and the absence of a military (the QHSF comprises a lightly-armed coast guard and police contingent) confirms the situation in Quarth does not amount to a NIAC.<sup>29</sup>

2) The organisation of the parties to the conflict.<sup>30</sup>

11. Armed groups to a conflict must be sufficiently organised to carry out protracted armed violence.<sup>31</sup> The existence of designated operation zones; headquarters; internal hierarchy and command structure of the group; seriousness and intensity of any military involvement and the ability to procure, transport, and distribute arms should be taken into consideration.<sup>32</sup>
12. Quarth has been subject to “*sporadic*” attacks by the “*loosely organised*” pirates<sup>33</sup>. The Tyvosh pirates do not satisfy the definition of armed groups warranting combatant status; they control no territory,<sup>34</sup> generally they do not conduct hostilities within Quarth<sup>35</sup> and their attacks are not directed against government forces, rather they are sporadic attacks in retaliation to such forces.<sup>36</sup> The pirates have some degree of organisation, however, they do not appear to conduct their operations with the level of responsible or superior command required under IHL.<sup>37</sup> Typically pirates answer to the captain of their ship, a relationship more akin to a criminal group rather than a level of organisation characterised as an armed conflict.<sup>38</sup>
13. Evidently the intensity of the violence and organisation of the parties does not meet the threshold of a NIAC. The violence aligns more closely with “*situations of internal disturbances and tensions*” falling below armed conflict status.<sup>39</sup> Accordingly, the crimes were perpetrated during peacetime and IHL does not apply. Therefore, the targeting of all pirates, including juveniles, was not legitimate and cannot be justified. CAH under Article 7 of the Statute were committed.

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<sup>29</sup> Blank (2013) [402]

<sup>30</sup> AC Tadic [66]

<sup>31</sup> TC II Katanga [1185]; TC I Lubanga [536]; PTC I Al Hassan et al. [107]

<sup>32</sup> TC II Limaj [90]; TC Milosevic [23-24]; TC III Bemba [134-135]; TC II Katanga [1186]; TC I Lubanga [536]

<sup>33</sup> PTC VI Megor [4(2)]

<sup>34</sup> Article 1(1) of AP II

<sup>35</sup> Article 1(1) of AP II

<sup>36</sup> AC Tadić [70]; Article 8(2)(f) of Statute; Guilfoyle (2010) Part II

<sup>37</sup> Passman (2008) [23]; Henckaerts & Doswald-Becks (2005) p14 & 15–17

<sup>38</sup> Blank (2013) [403]; Guilfoyle (2010) p146

<sup>39</sup> Article 8(2)(e) of Statute

b. UNCLOS, not IHL, is the law applicable to counter-piracy operations

14. Pirates are not legitimate military targets as piracy falls outside the laws of war. The UNSC explicitly stated that UNCLOS is the legal framework applicable to combating piracy.<sup>40</sup> The UNSRs regarding the fight against piracy on the high seas and territorial seas<sup>41</sup> authorise states to only use necessary means in accordance with UNCLOS, under the laws of peace. The level of force permitted under IHL is not authorised. Under UNCLOS, force can be used to combat and apprehend pirates in accordance with the principles of necessity and proportionality. Any use of force should “*not exceed the minimum degree of force which is necessary and reasonable in the circumstances.*”<sup>42</sup> The drone attacks against the Tyvosh pirates were disproportionate and indiscriminate. The Tyvosh pirates cannot be categorised as legitimate military targets, therefore the level of force used was disproportionate and their deaths were unlawful.

iv. *The crimes perpetrated constitute CAH under Article 7(1)(a), (b) and (k) of the Statute and satisfy the elements of those crimes*

15. The Defendant assisted in the commission of CAH of murder, extermination, and other inhumane acts on the population of Quarth by supplying the drones to CRV. The Defendant must be held criminally responsible as he committed material elements of the crimes with intent and knowledge.<sup>43</sup>

a. The elements of the CAH of murder pursuant to Article 7(1)(a) of the Statute are satisfied

16. To satisfy the elements of CAH of murder, the attacks must have been directed against a civilian population, and they must have been the primary object of the attack. The entire civilian population does not have to be targeted; only more than a limited and randomly selected number.<sup>44</sup> The drone attacks were widespread, large scale, frequent, carried out as part of a premeditated governmental plan<sup>45</sup> and directed against part of the civilian population (the Tyvosh pirates) resulting in the death of approximately 1,000 civilians. The geographical scope of the drone attacks covered locations across Quarth (Harbortown, Lightning Bay, and

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<sup>40</sup> UNSCR 2246

<sup>41</sup> UNSCR 1816, 1838, 1846 and 1851

<sup>42</sup> PCSUAASMN, Article 8bis(9)

<sup>43</sup> Article 30 of Statute; EOC p1, para 2

<sup>44</sup> TC I Perišić [83]; TC II Đorđević [1591-1592]; TC I Gotovina et al. [1704]; TCIII Semanza [330]; PTC II Kenyatta [110]

<sup>45</sup> PTC II Ruto et al. [210]

Watertown).<sup>46</sup> Furthermore, the Defendant knew the drones would be used for the purpose of a widespread attack against the Tyvosh pirates and would likely cause casualties to the wider population as the drones were not precise. Accordingly, the elements of Article 7(1)(a) of the CAH of murder are satisfied in the present case.<sup>47</sup>

b. The elements of the CAH of extermination pursuant to Article 7(1)(b) of the Statute are present

17. The drones supplied by the Defendant were used in attacks that were intended to bring about the destruction of part of the population in Quarth; the Tyvosh pirates. The Defendant knew the drones would be used for the purpose of exterminating the pirates following his side-discussions with CRV during negotiations<sup>48</sup>. The Defendant's conduct in assisting with the extermination of the pirates can be indirect for the purpose of establishing liability.<sup>49</sup> The drone attacks successfully exterminated all Tyvosh pirates and caused further killings of civilians.<sup>50</sup> Therefore, the elements of Article 7(1)(b), the CAH of extermination have been satisfied.<sup>51</sup>

c. The elements of the CAH of other inhumane acts pursuant to Article 7(1)(k) of the Statute are present

18. The drones were used in attacks that inflicted great suffering on the Quarth population. The attacks caused fuel drums to ignite in a warehouse in Harbortown resulting in a fire that burned down much of the Harbortown wharf area, including accommodation. Furthermore, the attacks resulted in the destruction of Harbortown hospital and Watertown elementary school. This inflicted great suffering on the population impacting their access to education, shelter and medical treatment. The Defendant knew the drones were not precise and would cause collateral damage causing great pain and suffering to the civilian population. Therefore, the elements of Article 7(1)(k), the CAH of other inhumane acts are satisfied.<sup>52</sup>

**B. The Defendant is criminally responsible for the crimes perpetrated as the mens rea and actus rea requirements for aiding and abetting under Article 25(3)(c) of the Statute are satisfied**

i. *By supplying the drones to CRV for the purpose of assisting Quarth in exterminating the Tyvosh pirates, the Defendant intended to facilitate the commission of the CAH.*

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<sup>46</sup> PTC II Ruto et al. [176-177].

<sup>47</sup> EOC p5

<sup>48</sup> PTC VI Megor [5(2)]

<sup>49</sup> EOC p. 6, footnote 10; TC Kunarac et al. [418]

<sup>50</sup> AC Ntakirutimana et al. [542]

<sup>51</sup> EOC p6

<sup>52</sup> EOC p12

19. Article 25(3) of the Statute distinguishes the modes of individual criminal responsibility within the Court’s jurisdiction. Subparagraph (c) relates to situations where the perpetrator “for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission”<sup>53</sup>. To be held criminally responsible, the Defendant must have assisted in the commission of the crime and by engaging in such conduct, intended to facilitate the commission of the crime.<sup>54</sup> There is no requirement to meet any specific threshold in satisfaction of assistance, any form of assistance that aids in the commission of a crime will satisfy Article 25(3)(c)<sup>55</sup>. It is only necessary that the accused’s contribution had a causal effect on the commission of the crime<sup>56</sup>.

ii. *The actus reus (objective elements) of aiding and abetting is satisfied as the Defendant’s conduct, supplying the drones to Quarth, assisted in the commission of CAH.*

20. The Defendant provided the means for the commission of the attacks against the pirates. It is immaterial that the Defendant’s practical assistance occurred before the CAH were perpetrated.<sup>57</sup> There is a causal connection<sup>58</sup> between the Defendant’s conduct and the commission of the CAH of murder, extermination, and other inhumane acts. By supplying the drones to CRV, the Defendant advanced the commission of the CAH. The drones were an experimental, unique weapon developed by Ibbin.<sup>59</sup> Therefore, the attacks, resulting deaths and collateral damage were dependant on the Defendant’s assistance.

iii. *The Defendant had the requisite mens rea (subjective elements) for aiding and abetting the perpetrator in the commission of the crimes*

18. The Defendant must have had both specific intent required under Article 25(3)(c) together with general intent required under Article 30 of the Statute to satisfy the *mens rea* of aiding and abetting.<sup>60</sup> Specific intent requires that the aiding and abetting was for the purpose of facilitating the crime.<sup>61</sup> Pursuant to Article 30, to satisfy the *mens rea* of aiding and abetting of a crime, the aider or abettor at a minimum must have known that the principal perpetrator’s offence would occur in the ordinary course of events. It is not necessary for the accused to know the precise crime committed; rather it is sufficient that the accused was aware of the essential elements of the crime.<sup>62</sup>

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<sup>53</sup> Article 25(3)(c) of Statute

<sup>54</sup> PTC I Goudé [167]

<sup>55</sup> PTC II Gombo et al [35]; PTC I Goudé [167]; PTC II Ongwen [43]; PTC I Al Mahdi [26]; TCVII Gombo et al [93-94]

<sup>56</sup> TCVII Gombo et al. [93-94]

<sup>57</sup> AC Blaškić [48]

<sup>58</sup> TCVII Gombo et al. [94]

<sup>59</sup> PTC VI Megor [5]

<sup>60</sup> PTC I Mbarushimana [289]; TCVII Gombo et al. [97]

<sup>61</sup> Article 25(3)(c); PTC I Mbarushimana [274]&[281]; TCVII Gombo et al. [97]

<sup>62</sup> TC VII Gombo et al. [98]

- a. The Defendant knew that CRV planned to deploy the drones in attacks against the Tyvosh pirates and was aware that the crimes would be committed in the ordinary course of events

19. The Defendant knew that supplying the drones would assist in the perpetration of the CAH. CRV sought his assistance in exterminating the pirates and the Defendant supplied the drones for that purpose. The Defendant informed CRV that the drones were not precise weapons and would likely cause collateral deaths and this was considered acceptable.<sup>63</sup> The Defendant knew his conduct would assist in the commission of the crimes and that the crimes would be committed in the ordinary course of events.

- b. The Defendant supplied the drones to CRV for the purpose of assisting in the commission of the crimes

20. CRV requested the Defendant's assistance in "extinguishing" the pirates before November 2020<sup>64</sup> and the Defendant agreed by supplying "*the most powerful and sophisticated*"<sup>65</sup> drones to CRV for the purpose of assisting in the extermination of the Tyvosh pirates. Furthermore, the Defendant was aware and informed CRV of the likelihood of collateral damage in deploying the drones. Accordingly, there are substantial grounds to believe that the Defendant provided the drones to Quarth for the purpose of assisting in the commission of the crimes.<sup>66</sup>

### **C. The gravity of the case is sufficient to meet the threshold under Article 17(1)(d)**

21. Article 17(1)(d) provides that a Court will determine that a case is inadmissible where is not considered sufficiently grave to justify 'further action' by the Court.<sup>67</sup> ICC jurisprudence demonstrates that the number of victims is a 'key consideration'<sup>68</sup> in determining the gravity of a case.

- i. *There are a sufficient number of victims to satisfy the gravity threshold.*

22. PTC VI ruled that 1,000 victims was insufficient to satisfy the gravity threshold in terms of the admissibility of the case under Article 17(1)(d) of the Statute.<sup>69</sup> The PTC in *Comoros* listed a number of factors which must be considered in order to reach a gravity determination for the admissibility of a case.<sup>70</sup> These factors include: the scale, nature, the manner of commission and the impact of the alleged crimes.<sup>71</sup> In *Goudé*, the PTC held that the gravity

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<sup>63</sup> PTC VI Megor [5(4) & (5)]

<sup>64</sup> PTC VI Megor [5]

<sup>65</sup> PTC VI Megor [5]

<sup>66</sup> PTC VI Megor [5]

<sup>67</sup> PTC I Al Mahdi [43]

<sup>68</sup> ICC-OTP Iraq p.9.

<sup>69</sup> PTC VI Megor [13]

<sup>70</sup> PTC I Comoros et al. (2) [20]

<sup>71</sup> PTC I Comoros et al. (2) [20]

threshold had been sufficiently met, despite there being below 1,000 victims.<sup>72</sup> Moreover, in *Katanga*<sup>73</sup>, the PTC ruled that the killing of 200 people was a sufficient number of victims to constitute a ‘widespread’ attack. Furthermore, the PTC in *Ruto* observed that an attack does not need to be against an entire “population” to be considered widespread.<sup>74</sup>

23. It is evident that a specific quantity of victims is not necessary to satisfy the gravity threshold. In assessing the gravity of a case, the Court must consider quantitative and qualitative factors.<sup>75</sup> The rulings in *Katanga* and *Goudé* clearly demonstrate that fewer than 1,000 victims may satisfy the gravity threshold. Therefore, PTC VI erred in ruling that the number of victims does not satisfy the gravity threshold for admissibility under Article 17(1)(d) of the Statute.

ii. *The qualitative nature of the crime was not sufficiently taken into account*

a. The geographical and temporal intensity of the attacks is of the required scale

24. The PTC in *Comoros* outlined that an assessment of gravity must be carried out from both a qualitative and quantitative ‘viewpoint’.<sup>76</sup> One of the first criterion outlined in the *Comoros* judgment is the scale of the alleged attack including its geographical and temporal intensity. In the present case, the drone attacks were carried out in several geographical locations where the Tyvosh pirates were known to be hiding or holding hostages.<sup>77</sup> These attacks were perpetrated on four separate occasions in Quarth within a short-time period between the 8<sup>th</sup> and 11<sup>th</sup> of October 2020.

25. The perpetration of the attacks is significant as it led to the damage and destruction of several buildings and resulted in more than 1,000 victims. Hence, it is submitted that PTC VI overlooked the qualitative nature of the crime as the geographical and temporal intensity of the drone attacks clearly satisfies the gravity threshold under Article 17(1)(d) of the Statute.

b. The attacks were committed on a discriminatory basis, that being the eradication of the Tyvosh pirates

26. The second criterion in *Comoros* refers to the nature of the alleged crimes. Charges were brought against the Defendant for his involvement in crimes of murder, extermination, and

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<sup>72</sup> PTC I Goudé [21-22]

<sup>73</sup> PTC I Katanga & Chiu [408]

<sup>74</sup> PTC II Ruto [164]

<sup>75</sup> PTC I Comoros et al.

<sup>76</sup> PTC I Comoros et al. [21(a)]

<sup>77</sup> PTC VI Megor [5]

other inhumane acts<sup>78</sup> constituting CAH under Article 7(1) of the Statute. Article 7(1)(b) of the Statute defines ‘extermination’ as a crime which is ‘calculated to bring about the destruction of part of a population’.

27. In the present case, the drone attacks were aimed at eradicating the Tyvosh pirates and this clearly encompasses the definition ‘extermination’ under the Statute. Moreover, the four drone attacks which were intended to kill the pirates also satisfies the scope of Article 7(1)(a) pertaining to murder. Accordingly, as the attacks were committed on a discriminatory basis, the qualitative element of the gravity threshold is satisfied in this case.

c. The drone attacks were conducted on vulnerable victims in a manner calculated to cause suffering

28. The third and fourth criteria in determining the gravity outlined in *Comoros* are: the manner of the commission of the crime and the impact of the crime. For example, the PTC in *Comoros* noted that a determinative factor is whether the commission of the crimes were against victims who were particularly “vulnerable or defenceless.”<sup>79</sup> Hundreds of vulnerable victims were killed and seriously injured as a result of the drone attacks in October 2020. Article 7(1)(k) of the Statute provides that it is a CAH to intentionally cause “great suffering, or serious injury to body or to mental or physical health.”<sup>80</sup>

29. Article 7(1)(k) applies to the present case as the drone attacks were intended to cause significant “suffering or serious injury” to the casualties and victims. Furthermore, the purpose of employing drones was to ensure that suffering or serious injury would be inflicted. The drone strikes resulted in 1,000 victims, the roof of a school collapsing, a warehouse being burnt to the ground, and a hospital building being entirely “incinerated.”<sup>81</sup> Therefore, PTC VI did not consider the qualitative nature of the crimes as the drone attacks were carried out mercilessly against defenceless victims including children, hostages, and medical staff. As a result, the manner and impact of the drone attacks clearly satisfies the criteria required to satisfy the gravity threshold for admissibility.

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<sup>78</sup> PTC VI Megor [8]

<sup>79</sup> PTC Comoros et al. (2) [20]

<sup>80</sup> PTC Comoros et al. [446]

<sup>81</sup> PTC VI Megor [5]

d. The attacks on the Watertown elementary school and Harbortown hospital are attacks on protected buildings

30. The Watertown Elementary School and Harbortown Hospital are buildings afforded a certain level of protection under the Statute. Article 8(2)(b)(ix) provides that it is a war crime to intentionally direct attacks against buildings dedicated to “religion, education, art, science...hospitals and places where the sick and wounded.” In terms of ‘intentionally directing an attack’, the *Al Mahdi* judgment outlines that the occurrence of actual damage is not required, it is sufficient that the act was against a protected building.<sup>82</sup>

31. In the present case, it is clear that the drone attacks were intentionally directed at protected buildings; the school and the hospital. Therefore, the supply of drones to Quarth which resulted in the destruction of these buildings, clearly satisfies the gravity threshold in terms of admissibility under Article 17(1)(d).

e. The Defendant had a high degree of participation in the attacks.

32. The Defendant played a central role in the drone attacks. The Defendant supplied the QHSF with drones for the purpose of eradicating the Tyvosh pirates.<sup>83</sup> Article 25(3)(c) of the Statute refers to the crime of facilitating the commission of a crime through aiding and abetting.

33. The Defendant is responsible for supplying the drones to QHSF and facilitating the eradication of the Tyvosh pirates; the drones were essential to achieve this aim. Moreover, the Defendant knew that the drones would be used to exterminate the pirates.<sup>84</sup> Hence, the Defendant is responsible for aiding and abetting the drone attacks which is a crime under Article 25(3)(c) of the Statute. As a result, the gravity threshold has been satisfied due to the Defendant’s high degree of participation in the drone attacks.

*iii. The Child Pirates count as victims towards the gravity requirement*

34. The ICC has adopted a broad understanding of the concept of harm<sup>85</sup> which may include physical, ‘emotional suffering and economic loss.’<sup>86</sup> The Court has stressed that victims must have personally suffered such harm.<sup>87</sup> Under Rule 85 RPE, a victim is defined as a natural

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<sup>82</sup> PTC I Al Mahdi [43]

<sup>83</sup> PTC VI Megor [5]

<sup>84</sup> PTC VI Megor [5]

<sup>85</sup> TC VIII Al Mahdi [20]

<sup>86</sup> TC I Gbagbo [33]

<sup>87</sup> AC Lubanga [6 -10]

person who has suffered “harm”.<sup>88</sup> PTC VI ruled that the juvenile pirates do not count as ‘innocent victims’, however they were innocent children under the age of 15 who were forcibly enlisted into the pirate ranks<sup>89</sup>, they were particularly helpless and vulnerable. The Statute aims to protect vulnerable children, including those who are conscripted into a life of criminal activity.<sup>90</sup> Accordingly, the child pirates are innocent victims; the attacks caused personal harm through serious injury and death. Therefore, the juvenile pirates should not have been excluded by PTC VI in its assessment of gravity under Article 17(1)(d).

**D. There is sufficient evidence available to establish substantial grounds to believe that the Defendant committed the CAH in satisfaction of Article 61(7)(b) of the Statute**

*i. The disclosed evidence is sufficient to satisfy Article 61(7)(b) of the Statute*

- a. The disclosed evidence contains relevant pieces of evidence with strong probative value.

35. PTC VI erred in ruling that there was insufficient evidence to confirm the charges against the Defendant. Article 61(7) of the Statute outlines the standard which must be met by the prosecution for the confirmation of charges at the Pre-Trial stage. There must be sufficient evidence presented by the prosecution to establish “substantial grounds to believe that the person committed each of the crimes charged”.<sup>91</sup> This was confirmed in *Ntaganda* where the PTC outlined that the evidentiary test which must be met by the Prosecution is whether the Court is “sufficiently satisfied that the allegations are strong”.<sup>92</sup> Similarly, in *Lubanga*, the PTC referred to the requirement that evidence must be “sufficiently strong”<sup>93</sup> in order to commit a Defendant to trial. The Chamber may decline to confirm charges against a Defendant where substantial grounds cannot be established.<sup>94</sup>

36. The disclosed evidence includes a report compiled by the UNHCHR on the Situation in Quarth and an article from *Quarth News* titled “Tyvosh Pirates Extinguished.”<sup>95</sup> PTC VI erred in allowing the hearsay nature of the evidence and the journalist’s decision to recant the article to overshadow the probative weight and relevancy of the evidence as the AC of the ICTY has

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<sup>88</sup> Rule 85, RPE, p. 31

<sup>89</sup> PTC VI Megor [5]

<sup>90</sup> TC I Lubanga [618-619] <sup>91</sup>Article 61(7) Statute

<sup>91</sup>Article 61(7) Statute

<sup>92</sup> PTC II Ntaganda [9]

<sup>93</sup> PTC I Lubanga [39]

<sup>94</sup> Article 61(7)(b) Statute

<sup>95</sup> PTC VI Megor [5]

held that “relevant out of court statements which a Trial Chamber considers probative are admissible.”<sup>96</sup>

37. In applying *Lubanga* and *Ntaganda* to the facts, the newspaper article and the UN report are sufficiently strong pieces of documentary evidence, establishing substantial grounds to believe that the Defendant aided and abetted the drone-attacks. The newspaper article is ‘sufficiently strong’ tangible proof underpinning the specific allegations against the Defendant. Moreover, the article explicitly refers to the Defendant supplying drones for the purpose of eradicating the pirates which creates a substantial link between the Defendant and the crimes charged.<sup>97</sup> In relation to the UN Report, this is a reliable piece of documentary evidence which also corroborates many elements outlined in the newspaper article. Both pieces of evidence combined support the charges brought against the Defendant. Therefore, the disclosed evidence is sufficiently substantial, probative and relevant to confirm the charges against the Defendant under Article 61(7)(b) of the Statute.

b. There is a distinction between the standard of proof required at the Pre-Trial and Trial Proceedings

38. The evidence required to support the charges against a Defendant in the PTC is distinct from the evidence required at Trial. This issue was considered by the AC in *Al Bashir* where it was held that a PTC “should not require a level of proof that would be required for the confirmation of charges or for conviction.”<sup>98</sup> Furthermore, as outlined by the PTC in *Al Hassan*, the objective of the ‘substantial grounds to believe’ standard is to “filter...out those cases and charges for which the evidence is insufficient to justify a trial.”<sup>99</sup>

39. Applying *Al Bashir* and *Al Hassan* to the facts, it is evident that the substantial grounds standard of proof is less onerous than the conviction standard ‘beyond a reasonable doubt’.<sup>100</sup> Moreover, the evidence presented at the Pre-Trial stage by the prosecution is neither expected to be comprehensive nor conclusive as evidence is often “strategically withheld” at this stage of the proceedings by the prosecution in order to gain an “advantage” at trial.<sup>101</sup> In the present case, the evidence disclosed by the prosecution to PTC VI was sufficiently strong to believe that the Defendant committed the CAH. PTC VI erred in considering that the disclosed evidence was insufficient to justify the confirmation of charges against the Defendant.

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<sup>96</sup> AC Aleksovski [15]

<sup>97</sup> PTC VI Megor [5]

<sup>98</sup> AC Al Bashir [30]

<sup>99</sup> PTC I Al Hassan [38]

<sup>100</sup> Bergsmo et al., (2018) p.225.

<sup>101</sup> Virgina (2010) p.181

Therefore, the disclosed evidence sufficiently satisfies the standard of proof required for the confirmation of charges against the Defendant.

- c. There is no bar preventing the introduction of indirect evidence at the Pre-Trial stage

40. Indirect evidence is admissible at the Pre-Trial stage of proceedings. Article 69(4) of the Statute explicitly allows the PTC to rule on the relevancy or admissibility of any evidence, whether direct or indirect. In *Bemba*<sup>102</sup>, the TC held that there is no requirement as a matter of law to rely mainly or exclusively on “direct or oral testimony evidence”<sup>103</sup> in order to prove some or the totality of its allegations.

41. In the present case, although the newspaper article constitutes hearsay evidence, the Statute does not bar such evidence being admitted at the Pre-Trial stage or prevent the TC from relying on such evidence.<sup>104</sup> Furthermore, the fact that evidence is hearsay in nature does not necessarily “deprive it of probative value.”<sup>105</sup> Although the disclosed evidence may be less probative in nature than viva voce evidence, the article and UN report have sufficient probative value to confirm the charges against the Defendant at the Pre-Trial stage. Moreover, during Pre-Trial proceedings, the prosecution may rely on documentary or summary evidence and is not obliged to call witnesses expected to testify at trial under Article 61(5) of the Statute. Therefore, PTC VI erred in ruling that the disclosed evidence was insufficient to satisfy Article 61(7)(b) of the Statute and confirm the charges against the Defendant.

## **II. THE PTC ERRED IN RULING THAT THERE IS NO JUSTIFICATION FOR THE APPOINTMENT OF A SEPARATE VICTIMS’ REPRESENTATIVE UNDER ARTICLE 68(3) OF THE STATUTE AND RULE 90 OF THE RPE.**

### **A. There is a disparity in the number and type of victims**

- i. *The different victim groups can be divided into “teams” and assigned SLRs for each “team”*

42. Where personal interests of victims are affected, the Court will permit their views and concerns to be presented and considered.<sup>106</sup> The default rule is that a victim is free to choose a legal representative.<sup>107</sup> In the interests of efficiency, the Court may request the appointment

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<sup>102</sup> TC Bemba [236]

<sup>103</sup> TC Bemba [236]

<sup>104</sup> TC III Bemba [238]

<sup>105</sup> AC Ngudjolo [226]

<sup>106</sup> Article 68(3) of Statute

<sup>107</sup> Rule 90(1) of RPE

of a CLR.<sup>108</sup> Early jurisprudence of the Court established a practice of allowing a number of SLRs for different groups. The numbers of victims in those cases are comparable, and it is illustrative to reiterate the exact numbers – 57 victims participated in *Katanga & Ngudjolo* at the confirmation of proceedings stage, represented by four different representatives, which were organised into three “teams”.<sup>109</sup> In *Lubanga*, 120 victims partook in proceedings and were represented by eight representatives.<sup>110</sup> At the trial stage of *Bemba*, approximately 1,335 victims warranted two common legal representatives.<sup>111</sup> The Court has since held that a presentation of victims’ views and concerns by a SLR would be appropriate “in order to ensure [the] effectiveness of pre-trial proceedings.”<sup>112</sup>

43. PTC VI determined that it would not be appropriate to appoint SLRs for the victims, meaning a CLR would be appointed.<sup>113</sup> It is submitted that a single CLR in this case would be inappropriate. This case concerns different groups of victims: the adult pirates; juvenile pirates; and non-pirates. Each group should be divided into a “team” and assigned a SLR to effectively present their particular views and concerns. An accurate breakdown of the numbers of victims can be achieved herein – 700 pirate victims, approximately 350 of these being juvenile pirates, and 300 non-pirate victims.<sup>114</sup> Applying the *Katanga* principle, this gives three easily distinguishable teams. While it is not suggested that it be distilled into mathematical terms, a measure of 1,000 victims is similar in stature to warrant at least two SLRs, in accordance with *Bemba*. Therefore, given that each victim group has distinct interests, it is appropriate to appoint SLRs to ensure the effectiveness of pre-trial proceedings.

*ii. Financial or logistical concerns should not triumph over separate legal representation*

44. The right of victims to choose a legal representative is not absolute,<sup>115</sup> however, the language of Rule 90 gives rise to a sequential approach.<sup>116</sup> First, victims are to be given the choice of legal representation.<sup>117</sup> If this fails, the Court can direct the registrar to appoint a CLR within a mandated timeframe. However, recently most CLRs have been appointed by the Chamber or Registry, without a prior attempt having been made to assist victims to choose counsel.<sup>118</sup>

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<sup>108</sup> Rule 90(2) of RPE

<sup>109</sup> TC II *Katanga* [7]

<sup>110</sup> WCRO (2011) p.3

<sup>111</sup> TC III *Bemba* [7]

<sup>112</sup> PT III *Bemba* [7]

<sup>113</sup> PTC VI *Megor* 13[4]

<sup>114</sup> PTC VI *Megor* [5]

<sup>115</sup> TC IV *Banda et al.* [12-13]

<sup>116</sup> REDRESS (2015) p.8

<sup>117</sup> Rule 90(1) of RPE

<sup>118</sup> REDRESS (2015) p.8

This creates a scenario in which the victims are subject to the resources available in allocating court mandated legal representatives.

45. Whilst it is natural that the right to victims' selection of legal representation be subject to "important practical, financial, infrastructural and logistical constraints",<sup>119</sup> the Court risks undermining a key pillar of its legitimacy if victims' rights are set aside for budgetary reasons.<sup>120</sup> This factual matrix posits a scenario in which the exact numbers of adult pirates, juvenile pirates and non-pirate victims can be broken down.<sup>121</sup> This simplifies the exercise the Court must undertake in granting separate legal representation and upholding one of its core tenets. The jurisprudence of the Court should be followed, and separate legal representation be granted.

*iii. Conflicts of interest will arise without separate legal representation*

46. The Court must take all reasonable steps to ensure the different interests of victims are represented and any conflict of interest avoided.<sup>122</sup> Separate legal representation is necessary not solely due to the numbers of victims, but also due to the different experiences of the victims, which in the circumstances will inevitably lead to conflicts of interest. Conflicts of interest exists where "the situation or the specificity of the victims is so different that their interests are irreconcilable". The situation of the adult pirates, juvenile pirates and non-pirate victims are irreconcilable owing to their experiences that led to them being the targets of the attacks.<sup>123</sup>

47. In *Katanga*, eight separate legal teams were divided into three "teams" to avoid a conflict of interest, as one team comprised child soldier victims, who took an active part in hostilities and were arguably perpetrators. In *Ntaganda*, two victims' representatives were appointed; one for UPC/FPLC child soldiers and another consisting of alleged victims of UPC/FPLC attacks.<sup>124</sup> In *Ayyash*, the STL found that three distinct attacks, which took place in different circumstances, on different dates and in different locations meant that personal interests of victims of each connected attack were likely to differ and that these differences could give

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<sup>119</sup> TC II Katanga [11]

<sup>120</sup> HRW (2017) p. 44

<sup>121</sup> PTC VI Megor [1-4]

<sup>122</sup> RPE 90(4)

<sup>123</sup> TC IV Banda [42]

<sup>124</sup> TC VI Ntaganda [10] and [23]

rise to conflicting interests and consequently prejudice the entire proceedings if a CLR was appointed. SLRs were appointed as three groups were created, one for each attack.<sup>125</sup>

48. This approach for avoiding conflicts of interests can be applied to the instant case by assigning a SLR to the adult pirate victims, juvenile pirate victims, and the “innocent” non-pirate victims. A CLR could not advocate for the interests of both the adult pirates and the non-pirate victims; while they may have some similar interests, it is likely they harbour many different grievances, such as the non-pirate victims who perhaps were exposed to acts of piracy by the pirates. Similarly, the adult pirates and juvenile pirates will have different interests as the juvenile pirates were forcibly entered into the pirate ranks against their will. Child soldiers and juvenile pirates are analogous as both are children forced to fight, meaning that per *Katanga* and *Ntaganda*, the juvenile pirates at the very least are entitled to separate legal representation. It would accord with the decision in *Ayyash* also, as the victims were in different attacks on different dates. This would allow for adequate representation of interests, and avoidance of conflicts. Therefore, SLRs should be appointed to avoid conflicts of interest between the different categories of victims.

**B. The appointment of separate legal representation for the victims is more effective and efficient for the trial proceedings**

49. Article 68(3) of the Statute provides that victims have the right to participate directly in the proceedings, provided the Court considers it appropriate for the views and concerns of victims to be presented by a legal representative.<sup>126</sup> Article 68(3) must not be exercised in a manner which is prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Court may permit victims to be legally represented at any stage of the proceedings, where the personal interests of victims are affected. In determining the manner in which victims may participate, the Court must take into consideration the right of the accused to a fair and impartial trial.<sup>127</sup>

*i. SLRs will lead to less delay*

50. Victims will have differing views and positions on matters being litigated before the Court which will invariably lead to delay.<sup>128</sup> It would be more expeditious to appoint SLRs to focus on each group’s concerns in proceedings. Judge Song concluded that participation of victims

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<sup>125</sup> PTJ *Ayyash* [68-70]

<sup>126</sup> TC I *Dyilo* [115]

<sup>127</sup> *Pena* (2010) p. 510

<sup>128</sup> *Hirst & Sahyouni* (2020) p. 22

*per se* is not contrary to the right to an expeditious trial, as “[u]nless special circumstances exist, this delay is not inconsistent with the rights of the accused, but merely a consequence of the fact that the Statute provides for the participation of victims in the proceedings before the Court.”<sup>129</sup> The Court has a duty to ensure that proceedings are conducted in a fair and expeditious manner.<sup>130</sup> This includes the “proper organisation of victims’ participation and related legal representation.”<sup>131</sup> Legal representation should be organised as early as possible to give sufficient time to the victims’ representatives to prepare.<sup>132</sup>

51. Appointing SLRs would not cause a delay inconsistent with the rights of the accused. No special circumstances exist in which a delay would be prejudicial. Allowing each group SLRs enables the submission of faster and more focused representations of the victims’ views. Facilitating legal representatives for different groups as early as possible accords with both the rights of the victims to be represented and the right of the accused to an expeditious trial. The combination of these factors will create a smoother and more streamlined process for the running of the trial.

52. In appointing SLRs, the victims’ different views can be litigated in an efficient manner. SLRs, properly organised for each team, can facilitate a swifter trial, especially as this trial is still at an early stage. Organising the victims’ representation at this stage of proceedings would vindicate both the rights of the victims to effective and meaningful participation and the right of the accused to an expeditious trial, as the earlier SLRs are appointed, the sooner the views and concerns of each victim group can be put before the Court.

*ii. Separate legal representation gives the victims a higher standard of representation*

53. CLRs have, at times when appointed to thousands of victims, had great difficulties in communicating with their clients, for reasons of geography, proximity or security.<sup>133</sup> SLRs will be able to devote more time to research and focus on the discrete issues of the victims they act for. The Court has stressed that it attaches the greatest importance to the requirement that the participation of victims, through their legal representatives, must be as meaningful as

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<sup>129</sup> AC Dyilo [27]

<sup>130</sup> Article 67(1) of Statute

<sup>131</sup> PTC II Ntaganda [19]

<sup>132</sup> PTC II Ntaganda [21]

<sup>133</sup> Hirst & Sahyouni (2020) p.22

possible as opposed to being purely symbolic.<sup>134</sup> A lack of sufficient resources leads to symbolic participation. In *Ongwen* the OPCV only requested permission to present five expert witnesses but did not seek to have the Court hear from any of their clients.<sup>135</sup> In *Gbagbo and Blé Goudé*, the legal representatives did not request to call any oral evidence, seeking only to tender a single document.<sup>136</sup> The ECCC provides a stark comparison of the dangers of insufficient numbers of legal representation. *Case 002/02* was severed along lines proposed by the prosecution, and the ECCC's equivalent of CLR's led to 75% of victims being dismissed.<sup>137</sup> This resulted victims' harms being absent from the judgment, with associated limitations being placed on their ability to participate directly through the provision of testimony or statements of suffering.<sup>138</sup>

54. In the present case, appointing SLRs would ensure greater access to the court for victims. This would enable greater numbers of victims to give oral evidence, along with a greater number of documents tendered in evidence, and the views of each victim group would be represented more impactfully. Additionally, a greater depth of research could be undertaken into the concerns of each group, instead of putting forward the views of pirate and non-pirate victims in one application. Rather than presenting adult pirates and juvenile pirates as a single group with identical issues, this approach would allow for nuance and distinctions to be made between the victims' positions, along with more substantial and cohesive arguments for each individual group. SLRs for each victim group would allow meaningful, as opposed to symbolic, engagement with the Court. Thus, SLRs will provide greater assistance to the Court by delivering distinct submissions and applications tailored to each group of victims.

### **C. The appointment of separate legal representation for the victims will not have an adverse impact on the rights of the Defendant**

*i. The Defendant's right to a fair trial under Article 67 of the Statute will not be compromised:*

a. The Defendant's presumption of innocence will not be adversely impacted

55. The participation of victims in the criminal process does not conflict with an accused's right to be presumed innocent.<sup>139</sup> Article 68(3) confirms that victim participation cannot prejudice

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<sup>134</sup> TC II Katanga et. al [10(a)]

<sup>135</sup> Hirst & Sahyouni (2020) p.24

<sup>136</sup> TC I Gbagbo and Blé Goudé [1]

<sup>137</sup> Chea & Samphan

<sup>138</sup> Killean & Moffett (2017) p.721

<sup>139</sup> McGonigle Leyh (2011) p. 349

or be inconsistent with the accused's rights and requires judges to resolve any such conflicts between victims' rights and the rights of the accused in the accused's favour, protecting their presumption of innocence.<sup>140</sup> It is not possible for victims to successfully raise the argument that the presumption of innocence is violating or improperly impacting their rights to participation.<sup>141</sup> Furthermore, should the essential ingredients of a fair trial be missing and no indication that this will be resolved during the trial process, the Court has held "it is necessary – indeed, inevitable – that the proceedings should be stayed."<sup>142</sup>

56. The Statute and jurisprudence mandate that the presumption of innocence takes precedence over victim's rights of participation. *Dicta* confirms that any interference with this necessitates a stay in the proceedings. The appointment of SLRs will not prejudice the Defendant's presumption of innocence.

b. The victims are entitled to be legally represented under Article 68(3) of the Statute through either common legal representation or separate legal representation

27. Article 68(3) of the Statute provides that victims have the right to participate directly in the proceedings, provided the Court considers it appropriate for the views and concerns of victims to be presented by a legal representative.<sup>143</sup> Article 68(3) must not be exercised in a manner which is prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Court may permit victims to be legally represented at any stage of the proceedings, where the personal interests of victims are affected. In determining the manner in which victims may participate, the Court must take into consideration the right of the accused to a fair and impartial trial.<sup>144</sup>

28. The Court has noted the function of Article 68(3) stating "...the Chamber has a dual obligation: on the one hand, to allow victims to present their views and concerns, and, on the other, to examine them."<sup>145</sup> The "object and purpose of article 68(3) of the Statute and Rules ... is to provide victims with a meaningful role...before the Court (including at the pre-trial stage of a case) so that they can have a substantial impact in the proceedings".<sup>146</sup>

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<sup>140</sup> Coleman (2020) p. 386

<sup>141</sup> Coleman (2020) p. 386

<sup>142</sup> TC I Lubanga Dyilo [91]

<sup>143</sup> TC I Dyilo [115]

<sup>144</sup> Pena (2010) p.510

<sup>145</sup> PTC I Congo [71]

<sup>146</sup> PTC I Katanga et. al [157]

29. Victims and their counsel have several procedural rights. Legal representatives have “the general right to consult the record of the case”, as well as inspect submissions, transcripts and evidence.<sup>147</sup> The legal representatives have the right to attend public and non-public hearings, and not only make submissions but also to make replies.<sup>148</sup> Victims are permitted to introduce evidence if it assists in the determination of the truth, and with leave of the Court are permitted to question witnesses including the defendant and their experts. This can be done whenever their personal interests are engaged by the evidence under consideration.<sup>149</sup> Furthermore, victim’s legal representatives even have the right to initiate procedures, as there is “nothing in the Court's statutory and regulatory provisions which prevents victims from filing requests or applications to the Chamber whenever an issue arises that affects their interests...in accordance with Article 68(3) of the Statute.”<sup>150</sup> These procedural rights are not prescribed by any provisions of the Statute, and are mandated accordingly by the Court “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.<sup>151</sup>

30. Given that participation is enshrined in the Statute and will not impinge on the rights of the accused to a fair trial, separate legal representation should be appointed for the juvenile pirates and non-pirate victims. It is crucial that the representation be more than symbolic. This principle is recognised by the extensive procedural rights that have been granted at the discretion of the Court. This will allow victim participation to be meaningful and substantial. To fully achieve this, SLRs must be appointed. It will allow the adult pirates, juvenile pirates, and non-pirates to present their distinct views and concerns, make submissions, and tender evidence and, if necessary, initiate applications. This honours the victim’s participation and is equally fair to the accused as any views and concerns will be subject to the scrutiny of the Court in a manner the Court deems consistent with the rights of the accused. Therefore, the victims are entitled to SLRs under Article 68(3).

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<sup>147</sup> PTC II Ongwen (2) [25-35]

<sup>148</sup> PTC II Ongwen (2) [25-35]

<sup>149</sup> TC I Lubanga [108]

<sup>150</sup> TC I Lubanga [118]

<sup>151</sup> PTC I Katanga et al. (2) [45]

## SUBMISSIONS

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**For these reasons the Counsel for the Prosecution respectfully submit that:**

- a. The ICC has jurisdiction as the jurisdictional prerequisites are satisfied pursuant to Article 5, Article 11(1) and Article 12(2)(b) of the Statute.
- b. The Defendant's acts satisfy the actus reus and mens rea requirements of aiding and abetting CAH, in accordance with Article 25(3)(c) of the Statute.
- c. The case is admissible as there are a sufficient number of victims and range of qualitative factors present to satisfy the gravity threshold under Article 17(1)(d) of the Statute. Furthermore, the pirates constitute victims.
- d. The evidence disclosed to PTC VI establishes substantial grounds to believe that the Defendant committed the CAH satisfying Article 61(7)(b) of the Statute.
- e. On the basis that the case will proceed and charges against the Defendant are confirmed, separate Victims' Representatives should be appointed for the adult pirates, juvenile pirates and non-pirate victim groups, in accordance with Article 68(3) of the Statute and Rule 90 of RPE.

