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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**

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## LIST OF ABBREVIATIONS

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<b>Abbreviation</b>	<b>Full text</b>
Additional Protocol I	The first Protocol Additional to the Geneva Convention
Additional Protocol II	The second Protocol Additional to the Geneva Convention
AC	Appeals Chamber
<i>Cf</i>	<i>Conferatur</i> ('compare')
Costane	Rogor Costane
CPC	Code of Professional Conduct for counsel
ECCC	Extraordinary Chambers in the Courts of Cambodia
<i>e.g.</i>	<i>Exempli gratia</i> ('for example')
<i>et al.</i>	<i>Et alia</i> ('and others')
Ed	Edition
Ibbin	The Republic of Ibbin
<i>Ibid</i>	<i>Ibidem</i> ('in the same place')
ICC	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
<i>Id</i>	<i>Idem</i> ('the same')
IHL	International Humanitarian Law
Megor	Agon Megor
n	Note
NIAC	Non-International Armed Conflict
No.	Number

OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
QHSF	Quarth Homeland Security Force
Quarth	The State of Quarth
RPE	Rules of Procedure and Evidence
RS	Rome Statute of the International Criminal Court
SCSL	Special Court for Sierra Leone
TC	Trial Chamber
UNCRC	United Nations Convention on the Rights of the Child
the UN Report	Report of the United Nations High Commissioner for Human Rights on the Situation in Quarth
Valyeron	Colonel Reena Valyeron
v.	Versus

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## STATEMENT OF FACTS

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- I. **The States involved:** Ibbin became a party to the Rome Statute on 1 August 2020 whereas its neighbouring State, Quarth, remains a non-party State.
  
- II. **The Defendant:** Megor is a national of Ibbin and serves as the National Security Advisor of Ibbin. Megor allegedly provided hunter-killer drones, missiles and training used by Quarth in the attacks that killed approximately 1000 people.
  
- III. **The situation in Quarth:** The report by the UN High Commissioner for Human Rights outlined the situation in Quarth and details the October attacks. Quarth has a history of violating human rights, where it summarily executed nearly 2,000 people during its war on drugs. In the past three years, Quarth had been subject to sporadic attacks by the Tyvosh pirates. Due to its lack of a navy and army, Quarth was no match for them. In January 2019, the President of Quarth publicly declared a “war on piracy” but lacked the necessary weapons to effectively combat the Tyvosh pirates. Half of these pirates were juveniles under the age of 15 who were abducted and forcibly enlisted into pirate ranks.
  
- IV. **The attacks:** In October 2020, Quarth began deploying hunter-killer drones, reportedly supplied by Ibbin, in its counter-piracy operations. These drones decimated the pirates and killed approximately 300 innocent civilians.
  
- V. The first attack took place at a warehouse that burned down much of the Harbortown wharf. Civilians lodged in nearby boarding houses were amongst the 250 casualties. The second attack was launched against the anchored pirate “mother ship”, killing at least 90 pirates, more than half of whom were under the age of 15. The third attack was a night-time raid on a school used by the pirates to house kidnapped hostages. The school was destroyed by a missile strike, killing 50 hostages alongside dozens of pirates. The fourth attack was a night-time attack on a hospital where the remaining pirates sought shelter. The hospital’s staff and patients were used as human shields by the pirates. A missile strike incinerated the hospital, killing the pirates as well as 50 medical staff and patients.

- VI. **The Article:** Costane reported that prior to the attacks, Valyeron, the commander of the QHSF, had engaged in negotiations with Megor for the establishment of a future Ibbin military base in Quarth. During a side conversation, Valyeron informed Megor that the pirates were hiding out in schools and hospitals and that she wanted to eradicate the pirates, including the juveniles, whatever it takes. Megor offered the use of Ibbin's hunter-killer drones. These drones had the ability to destroy entire city blocks and cause numerous casualties in the area of deployment due to its imprecision. Megor supplied Valyeron with the drones, armour-piercing missiles, a mobile launch and control base as well as remote training in July 2020.
- VII. Costane retracted his article at the time this Court launched investigation into the October attacks. He has been found to have purchased an expensive Porsche despite his modest salary. Costane has also been suspended from his newspaper, pending an internal inquiry into whether he had been bribed to retract his article. Valyeron has since disappeared.
- VIII. **Procedural history:** The Prosecutor requested confirmation of charges against Megor for aiding and abetting, under Articles 12(2)(b) and 25(3)(c), crimes under Articles 7(1)(a), 7(1)(b), 8(2)(e)(i) and 8(2)(e)(iv) of the Rome Statute. Ibbin declined to cooperate with this Court's investigation into the alleged involvement of Megor. Applications were also made for separate legal representation for the victims. PTC VI found that it lacked temporal and personal jurisdiction, that the requirements of aiding and abetting were not met and that the alleged acts did not constitute war crimes or crimes against humanity. The Chamber also found that the gravity threshold was not met, and that there was insufficient evidence given the retraction of Costane's Article. Furthermore, PTC VI found no justification for appointing a Separate Legal Representative for the victims. The OTP has appealed against the decision of PTC VI.



## ISSUES

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- I. Whether the Pre-Trial Chamber erred in denying the Prosecution's request for confirmation of charges against Megor.
  
- II. Whether the Pre-Trial Chamber erred in deciding that a single Victims' Representative was sufficient to represent families of killed adult pirates as well as the families of juvenile pirates, hostages, and innocent bystanders who were also killed in the counter-piracy operations.

**I. Pre-Trial Chamber VI erred in denying the Prosecution's request for a confirmation of charges against Megor**

- (A) This court may exercise jurisdiction over Megor's acts. Temporal jurisdiction is satisfied as Article 11(2) of the Rome Statute only requires the underlying crimes against humanity and war crimes to be committed after the entry into force of the Rome Statute for the particular State. This is so even if Megor's contributions occurred before the entry into force of the Rome Statute for Ibbin. The gravity threshold is also met as the quantitative and qualitative criteria are met, given the number of deaths, scale and manner in which the attacks were carried out, and Megor's degree of participation. Furthermore, there is sufficient evidence to confirm the charges. Costane's article is a piece of highly relevant and probative evidence as it was created contemporaneously and is corroborated by the UN report. Costane's retraction of his article does not diminish its probative value due to the suspicious circumstances the retraction occurred in.
- (B) Megor aided and abetted the commission of the crimes against humanity and war crimes. Megor provided drones to Quarth which had a causal effect on the October attacks. Megor also lent his assistance with the intention of facilitating the crimes and was aware that the crimes would occur in the ordinary course of events. This is evident from Megor's willingness to supply imprecise drones despite Valyeron's inclination to target civilians in protected buildings.
- (C) The underlying crimes against humanity and war crimes are made out. This is because there was a systematic killing of a civilian population pursuant to a State policy. Valyeron's intention for the drone attacks to cause civilian casualties and the destruction of protected infrastructure is evinced from her use of indiscriminate weaponry. Additionally, protected buildings were targeted even though they were not legitimate military objectives.

**II. Pre-Trial Chamber VI erred in deciding that a single Victim's Representative was sufficient to represent all the victims**

- (A) A Separate Legal Representative is necessary to ensure adequate representation for the victims. Irreconcilable conflicts exist between both groups of victims that would prevent cooperation. These conflicts include fundamental disagreements on issues such as who deserves victim status, reparations and the necessity of protective measures. Fear and enmity between the victims would also form a barrier to cooperation. A Common Legal Representative would be unable to reconcile these conflicts, resulting in a conflict arising in respect of his duties towards the victims.
  
- (B) A Separate Legal Representative is consistent with and preserves Megor's right to an expeditious trial. The appointment of a Separate Legal Representative would not cause undue delay as the submissions of both groups of victims would differ materially. Furthermore, some delay is tolerable and can be remedied administratively. Lastly, the appointment of a Separate Legal Representative now would mitigate the risk of future delay should the Common Legal Representative be required to withdraw from proceedings due to an inability to discharge his duties.

**I. PRE-TRIAL CHAMBER VI ERRED IN DENYING THE PROSECUTION’S REQUEST FOR CONFIRMATION OF CHARGES AGAINST MEGOR**

1 The AC may review decisions made by the PTC on grounds of error of fact or law.<sup>1</sup> PTC VI made four findings pursuant to the charges against Megor. First, this Court lacks temporal and personal jurisdiction over Megor’s acts. Secondly, the case is inadmissible as the gravity threshold is not met. Thirdly, there is insufficient evidence. Finally, the allegations against Megor are not made out.<sup>2</sup> All four findings should be overturned as the evidence makes clear that Megor supplied the necessary means for Quarth to conduct the devastating October attacks. This was despite his awareness of the drones’ destructive capabilities and Valyeron’s disregard for civilian casualties.

**A. *This Court may exercise temporal and personal jurisdiction***

2 The temporal jurisdiction of this Court may only be exercised with respect to crimes committed after the entry into force of the Rome Statute for that State.<sup>3</sup> It may exercise personal jurisdiction when the accused is a national of a State party to the Rome Statute.<sup>4</sup> Megor is a national of Ibbin<sup>5</sup> who became a State party to the Rome Statute on 1 August 2020,<sup>6</sup> two months before the commission of the October attacks. Despite this, PTC VI determined that it may not exercise its jurisdiction under Article 24(1) of the Rome Statute.<sup>7</sup> This decision should be overturned because: (1) temporal jurisdiction may be exercised as Article 11(2) is satisfied; and (2) this Court’s exercise of jurisdiction is consistent with Article 24(1) and the broader principle of non-retroactivity.

**(1) *Jurisdiction may be exercised under Article 11(2) of the Rome Statute***

3 This Court may exercise temporal jurisdiction as the alleged crimes against humanity and war crimes occurred after the Rome Statute entered into force for Ibbin. The word “crimes” in Article 11(2) of the Rome Statute should be interpreted as referring solely to the crimes stipulated in Article 5 (“**underlying crimes**”) and not the accessory’s conduct. This interpretation is in line with the provision’s ordinary meaning in light of the object and purpose of the Rome Statute.<sup>8</sup>

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<sup>1</sup> Rome Statute (1998) 2178 UNTS 9018 (“**RS**”), Article 83(2).

<sup>2</sup> *Prosecutor v. Agon Megor of Ibbin*, Pre-Trial Chamber VI (15 September 2021) (“**Megor PTC**”), [13].

<sup>3</sup> RS (n 1), Article 11(2).

<sup>4</sup> *Id.*, Article 12(2)(b).

<sup>5</sup> *Megor PTC* (n 2), [1].

<sup>6</sup> *Ibid.*

<sup>7</sup> *Id.*, [13(1)].

<sup>8</sup> Vienna Convention on the Law of Treaties (1969) UN Doc 1155 UNTS 331, Article 31(1).

- 4 First, reading Article 11 of the Rome Statute in this manner coheres with Article 5, which exhaustively defines the relevant crimes that fall within the jurisdiction of this Court.<sup>9</sup> Unlike war crimes and crimes against humanity, aiding and abetting under Article 25(3)(c) is a mode of liability and not a crime *in itself*.<sup>10</sup> Secondly, Article 11 should not be interpreted in a manner that would frustrate the object and purpose of this Court in preventing impunity for the most serious crimes.<sup>11</sup> Requiring both the underlying crimes *and* accessory's conduct to be committed after the Rome Statute's entry into force would frustrate this Court's purpose to prosecute the most serious crimes. This is because it would allow individuals who were aware of the criminal nature of their actions, at the time they were committed,<sup>12</sup> to escape prosecution on a mere technicality. Thus, once the underlying crime takes place after the entry into force of the Rome Statute for that State, this Court may exercise temporal jurisdiction. Here, the underlying crimes were committed in October 2020,<sup>13</sup> two months after the Rome Statute entered into force for Ibbin.<sup>14</sup>
- 5 Even if this Court were to consider both the accessory's conduct and the underlying crime, it would still be able to exercise temporal jurisdiction. In *Samphân*, the ECCC held that it could exercise its temporal jurisdiction, notwithstanding that the accessory's contributions occurred before the entry into force of the relevant Statute.<sup>15</sup> This is because the accused's contributions formed part of a cluster of "transactions of a joint criminal enterprise that ... brought to fruition" the underlying crime within the temporal jurisdiction period.<sup>16</sup> Consequently, an accessory would remain part of the joint enterprise and responsible for the crimes committed by others in the enterprise unless he withdrew from it before the crime was brought to fruition.<sup>17</sup>
- 6 Megor's contributions to the October attacks formed a cluster of transactions which culminated in the underlying crimes. Megor did not only provide Valyeron with weapons, but also training for Quarth's anti-piracy operations.<sup>18</sup> These resources were presented as a gift to assist Valyeron in extinguishing the Tyvosh pirates.<sup>19</sup> Though Megor could have requested the return of the drones and

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<sup>9</sup> RS (n 1), Article 5.

<sup>10</sup> Otto Triffterer, *The Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart, 3rd Ed 2016) ("Triffterer"), 984.

<sup>11</sup> RS (n 1), Preamble and Article 1.

<sup>12</sup> See [8].

<sup>13</sup> *Megor* PTC (n 2), [4(4)].

<sup>14</sup> *Id.*, [1].

<sup>15</sup> *Samphân*, [221].

<sup>16</sup> *Id.*, [215].

<sup>17</sup> *Id.*, [217].

<sup>18</sup> *Megor* PTC (n 2), [5(6)].

<sup>19</sup> *Id.*, [5(2)].

missiles,<sup>20</sup> he chose not to do so at any point during the week-long attacks. Instead, he allowed Valyeron to use the drones to kill innocent civilians and did not withdraw his drones and military assistance which provided the means for the October attacks.

(2) *This Court's exercise of jurisdiction is consistent with Article 24(1) of the Rome Statute and the general principle of non-retroactivity*

7 An exercise of jurisdiction is consistent with Article 24(1) of the Rome Statute if the individual's conduct occurred after 1 July 2002. This is because Article 24(1) relates to the date the Rome Statute was first ratified and entered into force and not the date it entered into force for a particular State.<sup>21</sup> Here, an exercise of jurisdiction would not violate Article 24(1) as Megor's earliest relevant act occurred in April 2020 when he met with Valyeron and agreed to supply the drones.

8 The general principle of non-retroactivity embodied by Article 24(1) of the Rome Statute would not be breached as well. Megor foresaw the reasonable possibility of his prosecution in light of the impending entry into force of the Rome Statute for Ibbin. The principle of non-retroactivity would not be violated when an act, though not punishable before the particular court, was nevertheless criminalised under international law<sup>22</sup> and the accused could have reasonably foreseen his prosecution under international law.<sup>23</sup> Ibbin had deposited its instrument of accession to the Rome Statute in June 2020.<sup>24</sup> When Megor supplied the drones to Valyeron in July 2020, he did so with the understanding that the Rome Statute would soon come into force. Megor would have reasonably foreseen potential prosecution before this Court should Valyeron utilise his drones for criminal means. Therefore, an exercise of temporal and personal jurisdiction by this Court would be in line with its statutory provisions and the general principle of non-retroactivity.

**B. *The gravity threshold required by Article 17(1)(d) of the Rome Statute is satisfied***

9 To determine whether the gravity threshold is met, this Court will undertake a holistic assessment of all relevant quantitative and qualitative criteria.<sup>25</sup> The quantitative criterion alone is not determinative.<sup>26</sup> PTC VI found that the case was inadmissible as the alleged number of innocent

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<sup>20</sup> *Ibid.*, [5(5)].

<sup>21</sup> *Ali Kushayb AC*, [74]; Stahn, *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) (“**Stahn**”), 157.

<sup>22</sup> Spiga, “Non-retroactivity of criminal law: a new chapter in the Hissene Habre saga” (2011) 9(1) *Journal of International Criminal Justice* 5, 10.

<sup>23</sup> *Ali Kushayb AC*, [84] – [85].

<sup>24</sup> *Megor PTC* (n 2), [1].

<sup>25</sup> *Al Hassan AC*, [2].

<sup>26</sup> *Ibid.*

victims was too small to meet the gravity requirement.<sup>27</sup> This decision should be overturned as PTC VI erred in solely focusing on the quantitative criterion in its determination. Moreover, the death of 300 civilians is sufficient to meet the quantitative criterion.

10 The quantitative criterion is met. This criterion considers the number of victims killed,<sup>28</sup> and poses a low threshold.<sup>29</sup> This Court previously held that 50 to 55 injured civilians, together with 10 civilian deaths met this criterion.<sup>30</sup> As 300 civilians were killed<sup>31</sup> and countless more were injured in the October attacks, the quantitative criterion is satisfied.

11 The qualitative criterion is also met. This criterion examines factors including: (1) the scale, nature, and manner in which the crimes were carried out;<sup>32</sup> and (2) the degree of participation of the accused.<sup>33</sup>

(1) *The scale, nature, and manner of the October attacks were sufficiently grave*

12 In assessing the scale of the attacks, this Court will consider the geographical intensity of the attacks.<sup>34</sup> Elements of brutality such as immolation and attacking places sheltering internally displaced persons also point to the nature of the crimes being sufficiently grave.<sup>35</sup> Here, the scale of the October attacks was sufficiently extensive as they spanned across the entire northern region of Quarth.<sup>36</sup> The nature of the attacks and the manner in which they were committed were also sufficiently grave. Highly destructive and imprecise drones were used, which led to the incineration of boarding houses,<sup>37</sup> burning civilians to death in their homes.<sup>38</sup> A subsequent attack resulted in the incineration of the Harbortown Hospital (“**the Hospital**”) and the deaths of 50 medical staff and patients.<sup>39</sup>

(2) *Megor’s degree of participation was sufficiently high*

13 An accused who contributed the necessary means to successfully carry out the crimes would have a high degree of participation.<sup>40</sup> In *Katanga*, this element was met as the combatants would not have

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<sup>27</sup> *Megor* PTC (n 2), [13(2)].

<sup>28</sup> *Al Hassan* AC, [92].

<sup>29</sup> Stegmiller, *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection* (Duncker Humblot GmbH, 2011), 354.

<sup>30</sup> *Situation on the Registered Vessels of the Union of the Comoros*, [25] – [26].

<sup>31</sup> *Megor* PTC (n 2), [4(5)].

<sup>32</sup> *Situation in the Republic of Kenya* PTC, [188].

<sup>33</sup> *Al Hassan* AC, [92] – [93].

<sup>34</sup> *Situation in the Republic of Kenya* PTC, [62].

<sup>35</sup> *Id.*, [199].

<sup>36</sup> *Megor* PTC (n 2), Map of Quarth.

<sup>37</sup> *Id.*, [4(5)[1]].

<sup>38</sup> *Id.*, [4(5)].

<sup>39</sup> *Id.*, [4(5)[4]].

<sup>40</sup> *Katanga* 23 May TC, [65].

had the means to execute their criminal purpose without the accused's provision of weapons and ammunition.<sup>41</sup> Similarly, Quarth would not have been able to inflict the destruction it did without Megor's assistance. This is because before Megor's assistance, Quarth possessed neither an army nor navy but merely a lightly armed coast guard.<sup>42</sup> Quarth's had been unable to handle the Tyvosh pirates and had been struggling to combat them for the past 20 months.<sup>43</sup> Therefore, the significant civilian casualties, the circumstances surrounding the attacks, and Megor's crucial involvement indicates that the gravity threshold is met.

**C. *There is sufficient evidence to confirm the charges against Megor***

14 Shortly after this Court launched an investigation into the October attacks, Costane retracted his article which formed the basis of the investigation.<sup>44</sup> On the day of his sudden retraction, Costane acquired a luxury vehicle that was beyond his means. An internal inquiry was launched a day later by his employer to investigate allegations of bribery.<sup>45</sup>

15 Due to Costane's disavowal of the contents of the 13<sup>th</sup> October Article in the *Quarth News and Observer* ("**the Article**"), PTC VI held that there was insufficient evidence to confirm the charges against Megor under Article 61(7)(b) of the Rome Statute.<sup>46</sup> This decision should be overturned as: (1) the Article is highly relevant and probative; and (2) both the Article and the UN report are sufficient to confirm the charges against Megor.

*(1) Costane's article is highly relevant and probative*

16 In assessing whether there are substantial grounds to confirm the charges, this Court will base its decision on evidence that it considers relevant and of sufficient probative value.<sup>47</sup> In its assessment, this Court will only evaluate a piece of evidence if the defence mounts a challenge pursuant to Article 61(6)(b) of the Rome Statute.<sup>48</sup> In light of Megor's challenge to the Article<sup>49</sup> and PTC VI's finding,<sup>50</sup> this Court must examine its relevance and probative value.

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Megor* PTC (n 2), [4(3)].

<sup>43</sup> *Id.*, [4(2)].

<sup>44</sup> *Id.*, [6].

<sup>45</sup> *Ibid.*

<sup>46</sup> *Id.*, [13(3)].

<sup>47</sup> *Ntaganda* 8 June PTC, [25].

<sup>48</sup> *Id.*, [26]; Triffterer (n 10), 1535.

<sup>49</sup> *Megor* PTC (n 2), [11].

<sup>50</sup> *Id.*, [13(3)].



- 17 The Article is highly relevant. A piece of evidence is relevant when its contents bear a nexus to the charges,<sup>51</sup> and makes the existence of a fact more or less probable.<sup>52</sup> Here, the Article details facts directly relating to the charges. These include Megor’s agreement to supply the drones<sup>53</sup> which relates to essential elements of his assistance. It further details facts relating to Megor’s mental state, such as his warning that many casualties will occur in the area of deployment, Valyeron’s nonchalant attitude towards the potential loss of civilian lives, her intent to eradicate the Tyvosh pirates completely, and Megor’s decision to supply the weapons nonetheless.<sup>54</sup>
- 18 The Article is also highly probative. The fact that a piece of evidence is hearsay does not necessarily deprive it of probative value. Instead, its probative value depends on an assessment of the circumstances surrounding it.<sup>55</sup> Despite the Article’s hearsay nature, the surrounding circumstances indicate that it is highly probative as: (a) it was created contemporaneously; (b) it is corroborated by the UN report; and (c) its retraction occurred under suspicious circumstances.
- (a) Costane’s article was written contemporaneously with his meeting with Valyeron
- 19 Evidence that is created contemporaneously with the events it purports to record is more reliable and probative due to fewer errors associated with failing memories.<sup>56</sup> Here, the Article was published the day after Costane’s conversation with Valyeron.<sup>57</sup> It also contains direct quotations of Valyeron’s conversations with Megor, suggesting that Costane was able to recount his conversation with Valyeron precisely.
- (b) The presence of corroboration enhances the probative value of Costane’s article
- 20 The Article is highly probative as it is corroborated by the UN High Commissioner for Human Right’s Report (the “**UN Report**”). The presence of corroboration enhances the reliability and probative value of the evidence.<sup>58</sup> In *Lubanga* 2011 TC, the Court held that certain notebooks and documents were admissible as they were corroborated by a witness statement.<sup>59</sup> This was despite the authors of said documents being unavailable to testify and give further evidence.<sup>60</sup>

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<sup>51</sup> *Ruto et al.* PTC, [66].

<sup>52</sup> *Ibid*; *Muthaura et al.* PTC, [79].

<sup>53</sup> *Megor* PTC (n 2), [5(5)].

<sup>54</sup> *Ibid.*

<sup>55</sup> *Aleksovski*, [15].

<sup>56</sup> *Lubanga* 2011 TC, [38].

<sup>57</sup> *Megor* PTC (n 2), [5(1)].

<sup>58</sup> *Lubanga* 2011 TC, [40].

<sup>59</sup> *Ibid.*

<sup>60</sup> *Id.*, [5].

21 Likewise, the UN Report corroborates several facts described in Costane’s Article. First, the pirates’ use of schools and hospitals as hideouts.<sup>61</sup> Secondly, the specific description of the drones as “hunter-killer” drones and their ability to attack at night.<sup>62</sup> Thirdly, Ibbin’s involvement in providing the drones to Quarth.<sup>63</sup> Finally, the identification of victims of the October attacks, such as hostages, human shields and persons living near the attack.<sup>64</sup> These facts would not have been known to Costane unless the conversation between Valyeron and Megor had occurred and was recounted to him. This is because the UN Report was released in November,<sup>65</sup> one month *after* the Article was published,<sup>66</sup> making Costane’s reliance on the UN report impossible.

22 The absence of specific corroboration of Megor’s involvement does not undermine the Article’s probative value. The probative value of “parts of a witness statement that have not been specifically corroborated” will not be impinged if it is consistent with the statement as a whole.<sup>67</sup> Hence, in certain circumstances, a single piece of evidence would be sufficient to establish a fact.<sup>68</sup> In *Lubanga AC*, video evidence was solely relied on to establish the age of conscripted children, which constituted a legal element of the crime charged.<sup>69</sup> This was necessary due to the impossibility of finding evidence corroborating the children’s date of birth.<sup>70</sup> As the exchange between Valyeron and Megor was a side conversation that had no other witnesses,<sup>71</sup> it would be impossible to find additional evidence which directly corroborates their exchange. Further, Megor had requested Valyeron to keep Ibbin’s involvement secret<sup>72</sup> and Ibbin has declined to cooperate with investigations.<sup>73</sup> Such factors exacerbate the impossibility of finding more evidence.

(c) Costane’s retraction does not diminish his article’s probative value

23 The probative value of the Article should not be impinged by Costane’s retraction pursuant to the principle behind Rule 68(2)(d) of the RPE which makes it easier to admit statements of compromised witnesses. This rule was implemented in recognition of how this Court’s work has been “repeatedly

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<sup>61</sup> *Megor* PTC (n 2), [4(5)[1]] c.f. [5(3)].

<sup>62</sup> *Id.*, [4(5)] c.f. [5(4)].

<sup>63</sup> *Id.*, [4(4)] c.f. [5(7)].

<sup>64</sup> *Id.*, [4(5)] c.f. [5(8)].

<sup>65</sup> *Id.*, [4].

<sup>66</sup> *Id.*, [5].

<sup>67</sup> *Lubanga* 2007 PTC, [122].

<sup>68</sup> *Lubanga AC*, [218].

<sup>69</sup> *Ibid.*

<sup>70</sup> *Id.*, [220].

<sup>71</sup> *Megor* PTC (n 2), [5(2)].

<sup>72</sup> *Id.*, [5(5)].

<sup>73</sup> *Id.*, [7].

thwarted by witness tampering”,<sup>74</sup> and how almost all cases in the confirmation of charges phases “have been or are confronted with incidents of ... witness tampering”.<sup>75</sup> Adopting a similar principle to the one governing Rule 68(2)(d), this Court should be slow to ascribe the Article low probative value as Costane’s retraction was done under suspicious circumstances.

24 The suspicious circumstances arose from three facts. First, the Article was only retracted three months after it was published, at the precise juncture when this Court launched an investigation into the October attacks.<sup>76</sup> Secondly, Costane was suddenly able to purchase a luxury car, fully in cash, that was far beyond his means as a journalist with a meagre salary.<sup>77</sup> Thirdly, an internal inquiry was launched shortly after Costane’s suspension due to concerns of bribery.<sup>78</sup> Cumulatively, these circumstances raise serious concerns as to potential witness tampering, as was recognised by the dissenting judge in PTC VI.<sup>79</sup>

(2) *The UN Report and Costane’s article are sufficient to meet the evidentiary threshold to establish the charges against Megor*

25 The standard of proof at the confirmation of charges stage is that of substantial grounds to believe that the accused committed the crimes charged.<sup>80</sup> The Prosecutor must demonstrate a clear line of reasoning underpinning his allegations and his case cannot be riddled with ambiguities, inconsistencies, or contradictions.<sup>81</sup> There must also be sufficient compelling evidence “going beyond mere theory or suspicion”.<sup>82</sup> Documentary or summary evidence would suffice at this stage<sup>83</sup> and it is ultimately not the amount of evidence provided, but its probative value, that is essential for this Court’s determination.<sup>84</sup>

26 Here, there are substantial grounds to believe that Megor aided and abetted the crimes against humanity and war crimes committed during the October attacks. The evidence submitted before this Court has high probative value,<sup>85</sup> and establishes crucial details relating to the allegations against

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<sup>74</sup> Fairlie, “The abiding problem of Witness Statements in International Criminal Trials” (2017) 50(1) *New York University Journal of International Law & Politics* 75, 77–78.

<sup>75</sup> OTP, Strategic Plan 2016–2018 (July 2015), [27].

<sup>76</sup> *Megor* PTC (n 2), [6].

<sup>77</sup> *Id.*, [6].

<sup>78</sup> *Ibid.*

<sup>79</sup> *Megor* PTC (n 2), Judge Variance dissent, [6].

<sup>80</sup> RS (n 1), Article 61(5).

<sup>81</sup> *Mbarushimana AC*, [46].

<sup>82</sup> *Gbagbo* 2013 PTC, [18].

<sup>83</sup> *Ibid.*

<sup>84</sup> *Bemba* 2009 PTC, [60].

<sup>85</sup> See [17] – [22].

Megor. Therefore, there is sufficient relevant and probative evidence to confirm the charges against Megor.

**D. *Megor aided and abetted the crimes against humanity under Articles 7(1)(a), (b) of the Rome Statute as well as war crimes under Articles 8(2)(e)(i) and (iv)***

27 Megor provided the drones that catalysed the planning and commission of the October attacks. He did so with the understanding that Valyeron was intent on destroying the pirates.<sup>86</sup> Ultimately, the attacks launched by Valyeron caused the deaths of nearly 1,000 people, including at least 300 civilians,<sup>87</sup> and the destruction of crucial infrastructures such as the Watertown Elementary School (“**the School**”) and the Hospital.<sup>88</sup> The charges should be confirmed as: (1) Megor is individually criminally responsible under Article 25(3)(c) of the Rome Statute; and (2) the crimes against humanity and war crimes are made out.

(1) *Megor is individually criminally responsible under Article 25(3)(c) of the Rome Statute*

28 An individual is criminally responsible if the material and mental elements under Article 25(3)(c) have been satisfied. The material element is satisfied if the accessory provided practical assistance, encouragement, or moral support which had a causal effect on the perpetration of the crime.<sup>89</sup> The mental element is satisfied if the accessory offered the assistance for the purpose of facilitating the commission of the crime.<sup>90</sup>

(a) Megor’s provision of weaponry and drones amounted to practical assistance

29 To satisfy the material element of aiding and abetting, the accused must have provided practical assistance<sup>91</sup> which had a causal effect on the crimes’ commission.<sup>92</sup> This Court does not impose a minimum threshold of assistance under Article 25(3)(c) of the Rome Statute since an express choice was made to omit the threshold of “direct and substantial” assistance.<sup>93</sup> Megor had provided practical assistance by providing the weapons for Valyeron to conduct the October attacks.<sup>94</sup> His contributions provided the necessary means to conduct the October attacks successfully.

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<sup>86</sup> *Id.*, [4(5)].

<sup>87</sup> *Ibid.*

<sup>88</sup> *Id.*, [4(5)[3]] – [4(5)[4]].

<sup>89</sup> *Bemba et al.* 2014 PTC, [35].

<sup>90</sup> RS (n 1), Article 25(3)(c).

<sup>91</sup> *Furundžija*, [235].

<sup>92</sup> *Id.*, [192].

<sup>93</sup> *Bemba et al.* TC, [93].

<sup>94</sup> *Megor* PTC (n 2), [4(4)].

(b) Megor possessed the requisite mental state in assisting Valyeron's commission of the crimes

30 To satisfy the mental element of aiding and abetting, the accused must possess the necessary mental state in relation to *both* the act of facilitation and the underlying crime.<sup>95</sup> The accessory's must intend to provide the means by which the perpetrator is able to realise his intent.<sup>96</sup> Megor possessed the requisite mental state as he had intentionally provided the drones to Valyeron and was aware that the October attacks would have occurred in the ordinary course of events.

(i) MEGOR INTENTIONALLY FACILITATED THE OCTOBER ATTACKS

31 Megor had the requisite mental state in relation to his act of facilitation. The mental state required for aiding and abetting is that of purpose<sup>97</sup> which is a distinct and higher subjective mental element compared to knowledge.<sup>98</sup> This elevated mental state relates only to the accessory's facilitation and not the principal offence. It is made out if "the lending of practical assistance [was] itself intentional".<sup>99</sup> This requirement is satisfied because Megor had intentionally facilitated Valyeron's campaign to eradicate the Tyvosh pirates, including the juvenile pirates. As Megor had offered the drones as "just what Quarth needs",<sup>100</sup> his act of gifting the drones was intentional.

32 Megor's attempt to conceal Ibbin's involvement indicates an intent to facilitate the crimes against humanity and war crimes. In *Bemba* TC, the Court inferred the accessory's intent to assist in facilitating the commission of the crimes from his attempts to conceal the crimes from others.<sup>101</sup> Similarly, Megor had attempted to conceal his involvement by requesting Valyeron to keep Ibbin's involvement secret as well as return the drones and unused missiles after the operation has been completed.<sup>102</sup>

(ii) MEGOR WAS AWARE THAT CRIMES AGAINST HUMANITY AND WAR CRIMES WOULD OCCUR IN THE ORDINARY COURSE OF EVENTS

33 Megor possessed the necessary mental state in relation to the crimes against humanity and war crimes. This is because he knew that his actions would result in the murder,<sup>103</sup> extermination<sup>104</sup> and wilful

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<sup>95</sup> *Charles Taylor*, [403].

<sup>96</sup> Kaleck *et al.*, "Corporate accountability for human rights violations amounting to international crimes: the status quo and its challenges" (2010) 8(3) *Journal of International Criminal Justice* 699, 862.

<sup>97</sup> RS (n 1), Article 25 para. 3(c).

<sup>98</sup> *Bemba et al.* TC, [97].

<sup>99</sup> *Charles Taylor*, [403].

<sup>100</sup> *Megor* PTC (n 2), [5(4)].

<sup>101</sup> *Bemba et al.* TC, [870].

<sup>102</sup> *Megor* PTC (n 2), [5(5)].

<sup>103</sup> RS (n 1), Article 7 para. 1(a).

<sup>104</sup> *Id.*, Article 7 para. 1(b).

killing<sup>105</sup> of numerous innocent civilians, as well as the destruction of protected infrastructure<sup>106</sup> in the ordinary course of events. He was also aware of the essential elements of the alleged crimes.

34 Megor was aware that the crimes against humanity and war crimes would occur in the ordinary course of events. The standard of knowledge necessary is “near but not absolute certainty”.<sup>107</sup> The accused must know that his or her actions would necessarily bring about the consequences in question barring an unforeseen intervening event.<sup>108</sup> This standard is met as Megor was aware that the deaths of civilians were an inevitable consequence of his actions. In Megor’s discussions with Valyeron, he promoted the destructive capabilities of the drones and their ability to deploy powerful armour piercing missiles<sup>109</sup> despite being aware that Valyeron was adamant on decimating all the Tyvosh pirates, “whatever it takes”.<sup>110</sup> Furthermore, when Megor warned Valyeron about the possibility of significant casualties in the area of deployment, Valyeron simply reiterated her desire to eradicate the pirates.<sup>111</sup>

35 Additionally, Megor was aware of the potential destruction of protected buildings which are not military objectives. This is because Valyeron had specifically informed Megor that the pirates were unscrupulous as they hid in schools and hospitals and that she wanted to extinguish them.<sup>112</sup> Knowing this, Megor still promoted the use of the drones to wipe out the Tyvosh pirates wherever they are found<sup>113</sup> and emphasised how its missiles could destroy an entire city block.<sup>114</sup>

36 Finally, Megor was aware of the essential elements of the crimes. An accessory need not know the precise offence which was intended or the specific circumstances and details in which the offence would be committed.<sup>115</sup> He need only be aware of the essential elements of an offence. This would include the principal offender’s state of mind.<sup>116</sup> Megor would have been aware of Valyeron’s intention to kill civilians and destroy protected buildings as he would have known about Quarth’s history of violating human rights in its war against drugs.<sup>117</sup> As Ibbin’s National Security Advisor,

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<sup>105</sup> *Id.*, Article 8 para. 2(e)(i).

<sup>106</sup> *Id.*, Article 8 para. 2(e)(iv).

<sup>107</sup> *Katanga* 7 March TC, [776].

<sup>108</sup> *Id.*, [777].

<sup>109</sup> *Megor* PTC (n 2), [5(4)].

<sup>110</sup> *Id.*, [5(5)].

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Id.*, [5(4)].

<sup>114</sup> *Ibid.*

<sup>115</sup> *Bemba et al.* TC, [98]; *Šainović et al.*, [1773].

<sup>116</sup> *Charles Taylor*, [403]; *Haradinaj et al.*, [58].

<sup>117</sup> *Megor* PTC (n 2), [4(1)].

Megor would have concerned himself with events transpiring in Ibbin's neighbouring country, Quarth.<sup>118</sup> This knowledge combined with Valyeron's willingness to accept mass collateral damage from the use of imprecise drones<sup>119</sup> points to Megor's awareness that Valyeron would readily kill civilians and destroy protected infrastructure.

(2) *The crimes against humanity and war crimes that Megor is charged with aiding and abetting are made out*

37 The October attacks specifically targeted protected buildings, and indiscriminately killed numerous pirates and innocent civilians. Accordingly, the alleged crimes against humanity under Article 7(1) (a) and (b), and war crimes under Article 8(2)(e)(i) and (iv) of the Rome Statute are made out as the requisite contextual, objective and subjective elements are satisfied. Article 7(1)(k) is inapplicable as the conduct in question may be charged under another specific crime in the Article 7(1) provision.<sup>120</sup>

(a) The crimes against humanity under Articles 7(1)(a) and (b) of the Rome Statute are made out

(i) THE CONTEXTUAL ELEMENTS OF ARTICLE 7 OF THE ROME STATUTE ARE MADE OUT

38 There are three contextual elements under Article 7(1). First, there must either be a widespread or systematic attack.<sup>121</sup> Secondly, the attacks must be pursuant to or in furtherance of a State policy.<sup>122</sup> Thirdly, the attack must be directed against a civilian population.<sup>123</sup> All three elements are satisfied.

39 The October attacks were systematic and in furtherance of Quarth's State policy. An attack is systematic if it is organised and is not an accidental or random occurrence.<sup>124</sup> Any systematic attack directed against a civilian population will, in principle, "presuppose the existence of a State or organisational policy".<sup>125</sup> Here, the QHSF had planned and organised the October anti-piracy operation since July 2020,<sup>126</sup> and had conducted the attacks pursuant to Quarth's declaration of its

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<sup>118</sup> *Id.*, [1].

<sup>119</sup> *Id.*, [4(3)].

<sup>120</sup> *Muthaura et al.* PTC, [269].

<sup>121</sup> Elements of Crimes (2011) UN Doc PCNICC/2000/1/Add.2 ("**Elements of Crimes**"), Article 7(1)(b)(3); Triffterer (n 10), 156.

<sup>122</sup> Cryer, *An introduction to international criminal law and procedure* (Cambridge University Press, 2nd Ed, 2014), 229 and 239.

<sup>123</sup> Elements of Crimes (n 121), Article 7(1)(b)(3).

<sup>124</sup> *Ongwen* TC, [2682].

<sup>125</sup> *Katanga 7 March* TC, [1111].

<sup>126</sup> *Megor* PTC (n 2), [4(5)] and [5(6)].

war on piracy.<sup>127</sup> Notably, during the operation, all of the major attacks resulted in significant civilian casualties.<sup>128</sup>

- 40 The October attacks were directed against a civilian population. To satisfy the final element, the civilian population must be the primary target, but it need not be the purpose or objective of the attack.<sup>129</sup> The use of indiscriminate weapons in civilian-populated areas that are likely to hit non-military targets<sup>130</sup> and the detonation of explosions near houses belonging to civilians<sup>131</sup> indicate that the civilian population was the primary target. Here, the October attacks were directed against civilians as the drones used were not a precision weapon<sup>132</sup> and targeted areas such as the Harbortown wharf area where there were civilians living in nearby boarding houses.<sup>133</sup> At no point was any effort made to warn or evacuate these civilians. The destruction of the Hospital left the Harbortown residents vulnerable without medical support, likely leading to further loss of innocent lives.
- 41 The killing of juvenile pirates who were not engaged in combat also constituted an attack directed against civilians. IHL provides a general protection for children as persons taking no part in hostilities.<sup>134</sup> The mere membership of children under the age of 15 years in armed groups would not cause them to lose this protection, as it is lost only during their active participation in hostilities.<sup>135</sup> Here, the targeted pirate “mother ship” that was anchored in Lightning Bay was not engaged in hostilities and the juvenile pirates aboard did not lose their protection under IHL. As the attack resulted in the deaths of more than 45 juvenile pirates<sup>136</sup> who were not actively engaged in combat, this constituted an attack against a civilian population.

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<sup>127</sup> *Id.*, [5(6)].

<sup>128</sup> *Id.*, [4(5)[1]], [4(5)[3]] and [4(5)[4]].

<sup>129</sup> *Fofana et al.*, [299].

<sup>130</sup> *Blaškić*, [512].

<sup>131</sup> *Id.*, [511].

<sup>132</sup> *Megor* PTC (n 2), [5(5)].

<sup>133</sup> *Id.*, [4(5)[1]].

<sup>134</sup> See e.g. *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (1977), 1125 UNTS 609, Article 4(3)(c) – (d); International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) (“**ICRC Commentary**”), [4544]; Plattner, “Protection of Children in International Humanitarian Law” (1984) 240 *International Review of the Red Cross* 140, 141.

<sup>135</sup> *Ntaganda* 9 June PTC, [78] – [79].

<sup>136</sup> *Megor* PTC (n 2), [4(5)[2]].



(ii) THE OBJECTIVE AND SUBJECTIVE ELEMENTS OF ARTICLES 7(1)(A) AND (B) OF THE ROME STATUE ARE MADE OUT

- 42 The objective element of extermination is made out. To satisfy this element, there must be a mass killing of members of a civilian population in which the perpetrator killed one or more persons.<sup>137</sup> While there is no numerical minimum to meet this requirement,<sup>138</sup> the extermination must be collective in nature and not directed at singled out individuals.<sup>139</sup> However, there need not be discriminatory intent to destroy the group on specific grounds.<sup>140</sup> A mass killing of at least 60 persons<sup>141</sup> in an attack directed against a neighbourhood<sup>142</sup> would satisfy this element. Here, Valyeron had used the drones to kill 300 civilians located in Harbortown and Watertown.<sup>143</sup>
- 43 The subjective element of the crime of extermination is also made out. The perpetrator must have known that the conduct was part of a widespread or systematic attack against a civilian population.<sup>144</sup> Here, Valyeron was fully aware of and accepted the potential for numerous civilian casualties. Valyeron was not only warned that the use of the drones would result in many casualties,<sup>145</sup> but had specifically used them in night-time raids against buildings containing civilian hostages, making the civilians' deaths more certain.<sup>146</sup> Valyeron, as the commander of the QHSF,<sup>147</sup> would have known that there were juvenile pirates aboard the pirate "mother ship".<sup>148</sup> She would have also been aware of the IHL protections accorded to child combatants and her State's obligations to take all feasible measures to prevent their recruitment,<sup>149</sup> even by armed groups against the State.<sup>150</sup> Despite this, she went ahead and conducted the attacks against these juvenile pirates, who were below the age of 15 and were still civilians under international law.
- 44 The elements for the crime against humanity of extermination significantly overlap with that of murder, with extermination having an additional element of mass killing which is not required for

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<sup>137</sup> Elements of Crimes (n 121), Article 7(1)(b)(1) and (2).

<sup>138</sup> *Ntakirutimana*, [516].

<sup>139</sup> *Vasiljević*, [227].

<sup>140</sup> *Krstić*, [500].

<sup>141</sup> *Lukić*, [544].

<sup>142</sup> *Kamuhanda*, [694].

<sup>143</sup> *Megor* PTC (n 2), [4(5)].

<sup>144</sup> *Omar Al Bashir* 2009 PTC, [86].

<sup>145</sup> *Megor* PTC (n 2), [5(5)].

<sup>146</sup> *Id.*, [4(5)[3]] and [4(5)[4]].

<sup>147</sup> *Id.*, [5(1)].

<sup>148</sup> *Id.*, [4(5)[3]].

<sup>149</sup> UN General Assembly *Convention on the Rights of the Child* (1989) 1577 UNTS 3, Article 38(2).

<sup>150</sup> Mark Drumbl, "Article 38: The Rights of Children in Armed Conflict" in *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019), 1537.

murder.<sup>151</sup> Since the crime of extermination is made out, the crime of murder would similarly be made out.

(b) The war crimes under Articles 8(2)(e)(i) and (iv) of the Rome Statute are made out

45 PTC VI's holding should be overturned as the alleged acts constitute war crimes. Here, the contextual elements are not in dispute as neither party contests the presence of an NIAC.<sup>152</sup> Further, the objective and subjective elements of Article 8(2)(e)(i) and Article 8(2)(e)(iv) are made out.

(i) THE INDISCRIMINATE BOMBING OF CIVILIAN-POPULATED AREAS CONSTITUTE WAR CRIMES UNDER ARTICLE 8(2)(E)(I) OF THE ROME STATUTE

46 The objective elements are made out. To satisfy these elements, there must be an attack<sup>153</sup> which includes any act of violence against an adversary.<sup>154</sup> A civilian population would have to be the object of the attack,<sup>155</sup> though it need not be the sole and exclusive target.<sup>156</sup> The use of indiscriminate weaponry that fails to distinguish between civilian objects and potential military objects would satisfy this requirement.<sup>157</sup> This prohibition against targeting civilians is absolute and cannot be counterbalanced by military necessity.<sup>158</sup> Here, drones were used to conduct night-time raids and attacks.<sup>159</sup> Although the Tyvosh pirates hiding in the School and the Hospital were military targets, there were civilians in those buildings as well.<sup>160</sup> Despite this, Quarth failed to distinguish between civilians and the Tyvosh pirates by employing imprecise missiles which were powerful enough to level a city block.<sup>161</sup>

47 The subjective element is also made out. The perpetrator must have intended the civilian population to be the object of the attack.<sup>162</sup> In *Mbarushimana* PTC, this intention was inferred from the decision to target *both* military objectives and individual civilians not taking direct part in the hostilities as no distinction was made between both groups.<sup>163</sup> Likewise, Valyeron, as the commander of the QHSF,

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<sup>151</sup> *Tolimir*, [146]; Triffterer (n 10), 187.

<sup>152</sup> *Megor* PTC (n 2), [11].

<sup>153</sup> Elements of Crimes (n 121), Article (8)(2)(e)(i)(1); *Katanga 7 March TC*, [796].

<sup>154</sup> *Katanga 7 March TC id*, [798].

<sup>155</sup> Elements of Crimes (n 121), Article (8)(2)(e)(i)(2).

<sup>156</sup> *Mbarushimana* PTC, [142].

<sup>157</sup> *Galić*, [36]; *Katanga 7 March TC*, [802]; *Milošević*, [948].

<sup>158</sup> *Katanga 7 March TC id*, [800].

<sup>159</sup> *Megor* PTC (n 2), [4(5)].

<sup>160</sup> *Id*, [4(5)[3]] and [4(5)[4]].

<sup>161</sup> *Id*, [5(5)].

<sup>162</sup> Elements of Crimes (n 121), Article 8(2)(e)(i)(3).

<sup>163</sup> *Mbarushimana* PTC, [144].

was aware that civilians were present. As the pirates took hostages in their land bases,<sup>164</sup> she could have reasonably foreseen that the School would house hostages. Valyeron would have known that the pirates' supply centre contained fuel and oil tankers<sup>165</sup> and hence would have been aware that if the missiles ignited the fuel drums, it would result in the death of nearby civilians in Harbortown.

(ii) THE TARGETING OF THE SCHOOL AND THE HOSPITAL CONSTITUTE WAR CRIMES UNDER ARTICLE 8(2)(E)(IV) OF THE ROME STATUTE

48 The objective element is made out as there was an attack on the School and Hospital,<sup>166</sup> both of which were not legitimate military objectives. Military objectives are objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction offers a definite military advantage that is not only potential or indeterminate.<sup>167</sup>

49 The School was not a military objective as its destruction would not have offered a definite military advantage. When there is doubt on whether there is such an advantage, the safety of the civilian population *must* be taken into consideration.<sup>168</sup> Here, the School was only recently appropriated for temporary use as a holding centre pending ransom payments.<sup>169</sup> There would have been limited advantage to be gained by its destruction as the Tyvosh pirates are unlikely to have brought much of their resources or weaponry. Moreover, Quarth failed to consider the safety of the hostages. The QHSF could have waited until the pirates released the hostages upon ransom payment before attacking,<sup>170</sup> but chose not to do so.

50 The Hospital also did not constitute a military objective and its destruction would not have offered a definite military advantage. Civilian hospitals may “in no circumstances be the object of attack” and ought to be protected by parties to the conflict.<sup>171</sup> This protection would cease only if the hospital was used to commit acts harmful to the enemy.<sup>172</sup> At the time the 11 October attack occurred, the remaining pirates who fled to the Hospital did not offer any resistance.<sup>173</sup> Any advantage gained from eradicating them, after the armed conflict was already resolved in Quarth's favour, would be

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<sup>164</sup> *Megor* PTC (n 2), [4(5)[3]].

<sup>165</sup> *Id.*, [4(2)].

<sup>166</sup> See [46].

<sup>167</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (1977) 1125 UNTS 3, Art 52(3); Triffterer (n 10), 420.

<sup>168</sup> ICRC Commentary (n 134), [2024].

<sup>169</sup> *Megor* PTC (n 2), [4(5)[3]].

<sup>170</sup> *Ibid.*

<sup>171</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)* (1949) 75 UNTS 287, Article 18.

<sup>172</sup> *Id.*, Article 19.

<sup>173</sup> *Id.*, [4(5)[4]].

insufficient to constitute the necessary definite military advantage. The fleeing Tyvosh pirates' attempt to use hospital staff and patients as human shields could not have constituted an act harmful to Quarth as the Hospital was at no point militarised.

51 The subjective element is also made out. The perpetrator must have intended for the protected buildings to be the object of the attack.<sup>174</sup> While the perpetrator must have been aware of the objects' protected status, a *legal* assessment of its protected status need not have been made.<sup>175</sup> This element is satisfied as Valyeron was aware that she was attacking protected buildings when she intentionally targeted the School and Hospital.<sup>176</sup>

52 In light of the aforementioned reasons, PTC VI's decision that there was insufficient evidence and grounds to confirm the charges against Megor should be overturned.

## **II. PRE-TRIAL CHAMBER VI ERRED IN DECIDING THAT A SINGLE VICTIMS' REPRESENTATIVE WAS SUFFICIENT TO REPRESENT ALL THE VICTIMS**

53 PTC VI held that the families of the adult pirates (“**VG1**”) and the families of the juvenile pirates and innocent civilians (“**VG2**”) should be allocated a Common Legal Representative (“**CLR**”).<sup>177</sup> This decision should be overturned because: (**A**) a Separate Legal Representative (“**SLR**”) is necessary to ensure adequate representation for all the victims; and (**B**) an SLR is consistent with and preserves Megor's right to an expeditious trial.

54 The appointment of a CLR is warranted only where the distinct interests of the victims are represented, and irreconcilable conflicts of interest between victims are avoided.<sup>178</sup> A positive obligation exists for this Court to enable victims to exercise their right of access to this Court effectively.<sup>179</sup> However, the mode of victim participation must not prejudice the rights of the accused.<sup>180</sup> This Court ultimately has to balance all the parties' interests when deciding the proper mode of victim participation.

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<sup>174</sup> Elements of Crimes (n 121), c.f. Article 8(2)(e)(iv)(3).

<sup>175</sup> Triffterer (n 10), 421.

<sup>176</sup> *Megor* PTC (n 2), [4(5)[3]] – [4(5)[4]].

<sup>177</sup> *Id.*, [13(4)].

<sup>178</sup> Rules of Procedure and Evidence of the International Criminal Court (2000) UN Doc PCNICC/2000/1/Add.1 (“**RPE**”), Rule 90(4).

<sup>179</sup> *Situation in the Democratic Republic of the Congo* PTC, [71].

<sup>180</sup> RS (n 1), Article 68(3).

**A. A Separate Legal Representative is necessary to ensure that all victims receive adequate representation**

55 The core values of the Office of the Prosecutor (“OTP”) mandate it to act justly and in service of this Court.<sup>181</sup> The Prosecution’s duty to act in the interests of justice requires it to consider and respect the possibly divergent views of the victims.<sup>182</sup> In support of this, the OTP recognises that victim participation is a statutory right<sup>183</sup> which is a cornerstone of the Rome Statute.<sup>184</sup> Victims bring a unique and necessary perspective to proceedings, are essential to this Court and contribute to fair and efficient trials.<sup>185</sup> In this vein, resource-related constraints do not bar victim participation but instead require practical solutions and consideration on a case by case basis.<sup>186</sup> Thus, this Court should be flexible in deciding on the mode of victim representation.<sup>187</sup>

56 Here, both VG1 and VG2 became victims through starkly different circumstances. VG1 comprises the families of the adult pirates. These adult pirates hijacked vessels, killed passengers, and kidnapped hostages for ransom.<sup>188</sup> This resulted in 20-month conflict which ultimately culminated in the October attacks.

57 In contrast, VG2 comprises the families of the juvenile pirates and civilians. The juvenile pirates, all of whom were below the age of 15, were forcibly abducted and enlisted into the pirate ranks.<sup>189</sup> Similarly, the civilians comprise hostages in the School, residents in the Harbortown area and individuals used as human shields in the Hospital.<sup>190</sup> The underlying commonality is that the juvenile pirates and innocent civilians were unwilling participants of the adult pirates’ enterprise and were subjected to the October attacks because of the adult pirates’ actions.

58 These exceptional circumstances require the appointment of an SLR to ensure adequate representation for all victims because: (1) VG1 and VG2 have irreconcilable conflicts and cannot cooperate; and (2) the inability to represent the distinct interests of all victims would give rise to a conflict in the duties of the CLR.

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<sup>181</sup> OTP, “Statement of Core Values” (September 2015), 2.

<sup>182</sup> OTP, “Policy Paper on the Interests of Justice” (September 2007), 5.

<sup>183</sup> OTP, “Policy Paper on Victims’ Participation” (April 2010) (“OTP PPVP”), 3; *Lubanga* 2008 Dissenting TC, [13].

<sup>184</sup> Stahn (n 21), 1134.

<sup>185</sup> OTP PPVP (n 183), 2 and 5.

<sup>186</sup> *Id.*, 5.

<sup>187</sup> *Lubanga* 2008 TC, [125].

<sup>188</sup> *Megor* PTC (n 2), [4(3)].

<sup>189</sup> *Ibid.*

<sup>190</sup> *Id.*, [4(5)].

(1) *The victim groups have irreconcilable conflicts that prevent their cooperation*

59 The exceptional circumstances as described above would give rise to irreconcilable conflicts between the victims that prevent their cooperation. In such circumstances, victims should not be expected to accept joint representation.<sup>191</sup>

(a) The victims irreconcilably conflict on whether the adult pirates deserve victim status

60 Owing to their disparate circumstances, the victims would disagree on who deserves victim status. This disagreement derogates from the victims right to establish the truth and their narrative of events.<sup>192</sup> VG1 would hold the view that the adult pirates were victims of the use of disproportionate force by Quarth. In contrast, VG2, whose families were unwillingly put in harm's way by the adult pirates during the October attacks, would view the week-long attacks as the natural outcome of the adult pirates' protracted conflict with Quarth. VG2 would want to establish the narrative that their deceased family members were killed as the result of the actions of the adult pirates and that they are the only victims of the October attacks. As a result, the two groups of victims would fundamentally disagree on who deserves victim status, and these opposing narratives would undermine each group's right to establish the truth.

(b) The victims hold irreconcilable views on the adult pirates' entitlement to reparations

61 The divergence in opinion about the blameworthiness of the adult pirates may impact the victim's submissions on the issue of reparations which is a key victim interest and component of their right to justice.<sup>193</sup> In assessing reparations, this Court would invite submissions from all victims.<sup>194</sup> Since the actions of the adult pirates catalysed the October attacks, VG2 would argue that VG1 does not deserve reparations. VG2 would also argue that it was the adult pirates' actions against the juvenile pirates and civilians that caused them to fall victim to the October attacks, thus demeriting reparations. In effect, VG2 would never agree to downplay the adult pirate's blameworthiness and their narrative would undermine VG1's ability to justify their claim to reparations.

(c) The victims hold irreconcilable views on the necessity of protective measures

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<sup>191</sup> *Lubanga* 2008 TC, [79].

<sup>192</sup> Triffterer (n 10), 1685; *Gbagbo* 2012 PTC, [21].

<sup>193</sup> Triffterer (n 10), 1685.

<sup>194</sup> RPE (n 178), Rule 97(2).

62 The victims would also have irreconcilable conflicts regarding the necessity of ancillary matters such as protective measures.<sup>195</sup> These measures aim to protect the safety and privacy of victims and enable their participation in proceedings<sup>196</sup> which is in line with the right to privacy under the ICCPR<sup>197</sup> which both Quarth and Ibbin are State parties to. Conversely, these measures may impede the victims right to participate meaningfully by preventing a steady and reliable flow of information.<sup>198</sup> In *Lubanga* PTC, the request for the expungement of the identities of some victims led to this Court to reject their representative's application for access to the whole record of the situation. Instead, the CLR only received publicly available documents and was only allowed to attend conferences and hearings held in public.<sup>199</sup> Here, VG1 may fear prejudice caused by being publicly associated with the adult pirates and their actions. They would want to minimise the amount of personal information, such as their identities, that is available to the public. This would limit the information available to the CLR. On the other hand, VG2 would object to the necessity of protective measures as they would want to receive all available information. Further, they would be unsympathetic and consider the prejudice suffered by VG1 as a necessary consequence of their association with the adult pirates.

(d) The victims are unable to cooperate with each other due to fear and enmity

63 Fear and distrust would exist between VG2 and VG1 causing them to be unable to cooperate. This is crucial as the basis for common legal representation is that the victims have common interests which necessitate joint representation and cooperation.<sup>200</sup> This Court, on two previous occasions, has recognised the necessity of an SLR on such exceptional facts.<sup>201</sup> In *Katanga* 2009 TC, child soldiers, who were victims in the proceedings, had participated in attacks which harmed other victims in the proceedings. This formed the basis for this Court's appointment of an SLR for the child soldiers.<sup>202</sup> Here, the adult pirates participated in the harm suffered by the juvenile pirates and innocent civilians. Further, as VG1 comprises the families of the adult pirates, VG2 would associate VG1 with the kidnapping of their deceased relatives and may fear that similar harm may befall them. VG2 would also carry contempt for the adult pirates for their role in the demise of their relatives. This creates an

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<sup>195</sup> *Id.*, Rule 87.

<sup>196</sup> RS (n 1), Article 68(1); *Lubanga* 2006 PTC, 6.

<sup>197</sup> International Covenant on Civil and Political Rights (1966) 999 UNTS 171, Article 17(1).

<sup>198</sup> *Katanga* 2009 TC, [10(a)].

<sup>199</sup> *Lubanga* 2006 PTC, 6 – 8.

<sup>200</sup> *Lubanga* 2008 TC, [125].

<sup>201</sup> *Katanga* 2009 TC, [12] – [13]; *Ntaganda* 2013 PTC, [10] and [25].

<sup>202</sup> *Katanga* 2009 TC, [12] – [13].

atmosphere of tension and enmity between the groups which would diminish any basis for cooperation,<sup>203</sup> thereby necessitating an SLR.

(2) *The inability to represent the distinct interests of all victims would give rise to a conflict in the duties of the Common Legal Representative*

64 A CLR must ensure fair representation of the different yet consistent positions of his clients.<sup>204</sup> Further, CLRs appearing before this Court are mandated to act in good faith and fairness towards their clients.<sup>205</sup> If the CLR is unable to reconcile the interests of the victims, he must withdraw from the proceedings if the victims do not consent to him continuing the representation.<sup>206</sup> The inability to reconcile the conflicts between the victims outlined above would prevent the CLR from discharging his duties.

65 First, a conflict would arise for the CLR because he would inevitably undermine either group's view when representing the conflicting positions of VG1 and VG2. This was evident in *Ruto et al*, where the majority of victims wanted the trial to be held at The Hague.<sup>207</sup> Conversely, the minority argued for Kenya and Tanzania as the proper trial venue. In its submissions, the CLR argued for the minority position and actively dissuaded the Court from preferring the majority position.<sup>208</sup> The disagreements in the present case manifest beyond mere logistical disagreements and directly affect the victims' core interest of establishing the truth.<sup>209</sup> A CLR will be forced to adopt either VG1's or VG2's view on the blameworthiness of the adult pirates, the appropriate reparations to be awarded and the necessity of protective measures. A CLR would inevitably undermine either of the victims' diametrically opposed positions, thereby creating a conflict in respect of his duty to ensure fair representation.

66 Secondly, endeavouring to represent all contradictory viewpoints would conflict with the CLR's duty to ensure fair representation.<sup>210</sup> Representing all contradictory positions or synthesising a common position could undermine the strength of the victims' overall position and their personal interests.<sup>211</sup> The alternative of filing two sets of submissions to ensure equal discussion of all viewpoints may not

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<sup>203</sup> ICC Assembly of State Parties, "Report of the Court on the review of the system for victims to apply to participate in proceedings", ICC-ASP/11/22 (November 2012), [44].

<sup>204</sup> Code of Professional Conduct for counsel, UN Doc ICC-ASP/4/Res.1 ("CPC"), Article 16(2).

<sup>205</sup> *Id.*, Article 14(1).

<sup>206</sup> *Id.*, Article 16(3).

<sup>207</sup> *Ruto et al.* TC, [5].

<sup>208</sup> *Id.*, [28].

<sup>209</sup> Triffterer (n 10), 1685; *Gbagbo* 2012 PTC, [21].

<sup>210</sup> CPC (n 204), Article 14(1).

<sup>211</sup> Jasini *et al.*, *Advancing the Impact of Victim Participation at the International Criminal Court* (ICCBA, 2020 Ed), 22.



be possible without leave from this Court.<sup>212</sup> Even if leave were obtained, this very situation where leave is necessary to perform the simplest procedural activities should be avoided.<sup>213</sup> This would derogate from the victims' procedural right of access to this Court, making their rights merely symbolic.<sup>214</sup> Thus, representing both groups of victims would create a conflict for the CLR in respect of his duty to act in good faith and ensure fair representation.

**B. *A Separate Legal Representative is consistent with and preserves Megor's right to an expeditious trial***

67 The appointment of an SLR achieves the right balance between victim participation and Megor's right to an expeditious trial. First, submissions from an SLR would not unduly delay the proceedings. Such a delay would only arise where there is an unnecessary repetition or multiplication of similar arguments and submissions.<sup>215</sup> Presently, there will be minimal duplication of arguments as VG1 and VG2 have fundamental disagreements on factual and legal issues, which will manifest in their arguments.

68 Secondly, some delay is tolerable and may be remedied administratively. As recognised by Judge Song, delay arising from the participation of victims is not inconsistent with the rights of the accused but a consequence of the Rome Statute providing for victim participation.<sup>216</sup> Solutions such as releasing Megor pending trial would strike a balance between victim participation and the rights of Megor.<sup>217</sup> As Megor is currently not in remand and has even been found innocent by Ibbin,<sup>218</sup> he would suffer minimal detriment to his liberty as a result of some delay.

69 Lastly, appointing an SLR now would avoid the possibility of a subsequent recusal of the appointed CLR. If the CLR is unable to reconcile the interests of the victims, he must withdraw from the proceedings if the victims do not consent to him continuing the representation.<sup>219</sup> If this possibility eventuates, this would unduly prolong proceedings more than if an SLR is appointed now. An SLR appointed subsequently would then have to orientate himself to the cases of each victim group,

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<sup>212</sup> Regulations of the Court (2004) UN Doc ICC-BD/01-05-16, Regulation 24(2). The term "a response" suggests only one set of responses may be filed ordinarily.

<sup>213</sup> *Katanga* PTC, [51].

<sup>214</sup> *Ibid.*

<sup>215</sup> *Katanga* 2009 TC, [10].

<sup>216</sup> *Lubanga* 2008 TC, [18].

<sup>217</sup> Zappala, "The Rights of Victims v. the Rights of the Accused" (2010) 8(1) *Journal of International Criminal Justice* 137, 145 – 146.

<sup>218</sup> *Megor* PTC (n 2), [7] and [9].

<sup>219</sup> CPC (n 204), Article 16(3).

thereby placing proceedings on the backfoot.<sup>220</sup> Even if a conflict does not arise at the present stage, the possibility of delay remains and the irreconcilable view of the victims would eventually necessitate the appointment of an SLR. Thus, the appointment of an SLR at this stage of the proceedings would negate the risk of future delay and should be granted.

70 In light of the aforementioned reasons, PTC VI's erred in deciding that an SLR should not be appointed. Instead, appointing an SLR is necessary to ensure adequate representation of all victims, and would also be consistent with the rights of Megor to an expeditious trial.

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<sup>220</sup> *Ntaganda* 2013 PTC, [21].

## SUBMISSIONS

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

- (A) The Pre-Trial Chamber had erred in denying the Prosecution's request for confirmation of charges against Megor; and
- (B) The Pre-Trial Chamber had erred in deciding that a single Victims' Representative was sufficient to represent all victims.

On Behalf of the Office of the Prosecutor

