

**ICC MOOT COURT COMPETITION IN THE
ENGLISH LANGUAGE**

2019

COUNSEL FOR THE DEFENCE

Team Number: 49

Word Count: 9980



Original: **English**

Date:

THE APPEALS CHAMBER

SITUATION RELATING TO THE CRIME OF AGGRESSION AGAINST BRAVOS

**The Defence Counsel's Submission in the
Appeal from the Pre-Trial Chamber's Decision on Confirmation of Charges
against Defendant Dani Targarian of Cilanta**

PUBLIC DOCUMENT

Source: Defence for Dani Targarian

TABLE OF CONTENTS

| | |
|---|-----------|
| LIST OF ABBREVIATIONS | 4 |
| INDEX OF AUTHORITIES..... | 6 |
| STATEMENT OF FACTS..... | 16 |
| ISSUES..... | 18 |
| SUMMARY OF ARGUMENTS..... | 19 |
| WRITTEN ARGUMENTS | 20 |
| I. THE EVIDENCE SEIZED FROM THE HOME OF THE DEFENDANT MUST BE EXCLUDED UNDER ARTICLE 69(7) OF THE STATUTE CONSIDERING THE CIRCUMSTANCES IN WHICH IT WAS OBTAINED | 22 |
| A. There is a violation of the defendant’s internationally recognised human right to privacy | 22 |
| 1) <i>Right to privacy is an internationally recognized human right</i> | 22 |
| a. Right to privacy is recognized under Article 17 of the ICCPR as per Article 21(1)(b) of the Statute | 22 |
| b. The Court and <i>ad hoc</i> tribunals have previously recognized right to privacy | 23 |
| 2) <i>The illegal search and seizure conducted by the Cilanta police violated the right to privacy of the Defendant.....</i> | 24 |
| a. The search was unlawful and not in accordance with law | 24 |
| b. The search was arbitrary and disproportionate | 25 |
| c. Prosecutor v. Jean-Pierre Bemba can be distinguished..... | 26 |
| B. Admission of such evidence shall be antithetical to and would seriously damage the integrity of the proceedings | 27 |
| 1) <i>The integrity of proceedings is damaged in cases of serious breach of the Right to Privacy.....</i> | 27 |

- 2) *A serious violation of Defendant's Right to Privacy has occurred in the present case*28
- 3) *Seriousness of violation is further compounded by breach of professional confidentiality*29

II. THE FACTS DESCRIBED IN THE PRE-TRIAL CHAMBER'S DECISION WERE NOT OF THE CHARACTER, GRAVITY AND SCALE TO CONSTITUTE A MANIFEST VIOLATION OF THE UNITED NATIONS CHARTER31

A. The use of force in pursuance to the right of unilateral humanitarian intervention does not amount to an act of aggression31

- 1) *The use of force conducted on grounds of humanitarian intervention were consistent with the UN Charter*.....31
 - a. Airstrikes were in conformity with the principles of the UN Charter.....31
 - b. The airstrikes did not violate the territorial integrity, sovereignty and political independence of Bravos32
- 2) *There exists a customary right to humanitarian intervention*.....33
- 3) *Astipur's airstrikes amounted to genuine humanitarian intervention*.....35
 - a. An imminent threat of grave human rights violations existed35
 - b. The use of force adhered to *jus ad bellum* requirements of proportionality and necessity35
 - c. All peaceful alternatives were exhausted36
 - d. Astipur's use of force did not violate international humanitarian law36
 - i. *Use of force conformed to jus in bello principles of proportionality and necessity*36
 - ii. *The use of force adhered to the jus in bello principle of distinction*37

B. Astipur cannot be precluded from claiming its right to humanitarian intervention.....38

- 1) *Astipur did not have pre-textual motives*38
- 2) *Astipur did not contribute to the human rights violation in Bravos*39

| | |
|---|-----------|
| 3) <i>Astipur acted in good faith and cannot be estopped from invoking humanitarian intervention</i> | 39 |
| C. In any event, the use of force did not meet the threshold of Crime of Aggression under Article 8bis(1) | 40 |
| 1) <i>Airstrikes did not satisfy the qualitative dimension of ‘manifest by character’</i> | 40 |
| a. The questionable legal ‘character’ of airstrikes excluded it from the crime of aggression | 40 |
| b. The aims and objectives of the Statute excluded the airstrikes from the ambit of crime of aggression..... | 41 |
| c. Subjective element of collective intent was absent in the present matter | 41 |
| 2) <i>The use of force did not meet the quantitative dimension of ‘manifest by its gravity and scale’</i> | 42 |
| III. THE DEFENDANT CANNOT BE PROSECUTED FOR AIDING AND ABETTING THE CRIME OF AGGRESSION | 43 |
| A. The Defendant was not in a position to effectively exercise control or direction over the political or military action of a state | 43 |
| 1) <i>Aggression is intended to be a leadership crime, even for secondary liability</i> ... | 43 |
| 2) <i>The Defendant did not exercise control or direction over Astipur’s political or military action</i> | 44 |
| 3) <i>Additionally, previously laid down standards of “control” have not been satisfied</i> | 45 |
| B. In any event, the ‘shape or influence’ standard must not be applied | 46 |
| C. The Defendant did not fulfil the subjective criteria required under Article 25(3)(c) | 47 |
| SUBMISSIONS | 49 |

LIST OF ABBREVIATIONS

| | |
|---------------|--|
| ¶ | Paragraph |
| § | Section |
| AC | Appeal Chambers |
| AJIL | American Journal of International Law |
| a.m. | Ante Meridiem |
| Anr. | Another |
| App. | Application |
| ARISWA | Responsibility of States for Internationally Wrongful Acts |
| Art. | Article |
| CIL | Customary International Law |
| CJIL | Chinese Journal of International Law |
| CoA | Crime of Aggression |
| Crim. | Criminal |
| Doc. | Document |
| ECCC | Extraordinary Chambers in the Courts of Cambodia |
| ECHR | European Court on Human Rights |
| Econ. | Economic |
| ECOWAS | Economic Community of West African States |
| ECtHR | European Court of Human Rights |
| ed. | Edition |
| eds. | Editors |
| EHRR | European Human Rights Reports |
| EJIL | European Journal of International Law |
| FRY | Federal Republic of Yugoslavia |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| ICCPR | International Covenant on Civil and Political Rights |
| ICRC | International Committee of the Red Cross |
| ICTR | The International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |

MEMORIAL *for* DEFENCE

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| <i>Id.</i> | Idem |
| ILC | International Law Commission |
| IMT | International Military Tribunal |
| INT'L | International |
| IRRC | International Review of the Red Cross |
| J. | Journal |
| L. | Law |
| LJIL | Leiden Journal of International Law |
| LLAICLJ | Los Angeles Centre for Law and Justice |
| NMT | Nuremberg Military Tribunal |
| No. | Number |
| Ors. | Others |
| OTP | Office of the Prosecutor, International Criminal Court |
| Penn. | Pennsylvania |
| PTC | Pre Trial Chamber |
| Res. | Resolution |
| Rev. | Review |
| RFA | Request for Assistance |
| RPE | Rules and Procedure of Evidence |
| RtP | Right to Privacy |
| SWGCA | Special Working Group on Crime of Aggression |
| T.C. | Trial Chamber |
| UDHR | The United Declaration of Human Rights |
| UNGA | United Nations General Assembly |
| UNHRC | United Nations Human Rights Council |
| UNSC | United Nations Security Council |
| UNYB | Max Planck Yearbook of United Nations Law |
| v. | <i>Versus</i> |
| VCLT | Vienna Convention on the Law of Treaties |
| Vol. | Volume |

INDEX OF AUTHORITIES

TREATIES AND CONVENTIONS

1. European Convention on the Protection of Human Rights and Fundamental Freedoms (1953), UNTS 22223, 24, 26
2. International Covenant on Civil and Political Rights (1966), 999 U.N.T.S. 17122, 23, 24, 25
3. 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 U.N.T.S. 3, art. 52(2)36, 37
4. Rome Statute of the International Criminal Court (1998), 2187 U.N.T.S. 9020, 21, 22, 29, 31, 40, 41, 43, 45, 47
5. United Nations, Charter of the United Nations (1945), 1 U.N.T.S. XVI31
6. Universal Declaration of Human Rights (1948), G.A. Res. 217A (III)A23
7. Vienna Convention on the Law of Treaties (1969), 115 U.N.T.S. 33131, 33

INTERNATIONAL CRIMINAL COURT CASES

1. Prosecutor v. Al-Bashir, I.C.C.-02/05-01/09-3 (P.T.C.), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (March 4, 2009)24
2. Prosecutor v. Callixte Mbarushimana, I.C.C.-01/04-01/10 (P.T.C.), Decision on the confirmation of charges (December 16, 2011)47
3. Prosecutor v. Germain Katanga, I.C.C.-01/04-01/07-2635 (T.C.), Decision on the Prosecutor's Bar Table Motions (December 17, 2010)28
4. Prosecutor v. Jean-Pierre Bemba et al., I.C.C.-01/05-01/08-424 (P.T.C.), Decision Pursuant to art. 61(7)(a) and (b) on the Charges (2009)45
5. Prosecutor v. Jean-Pierre Bemba *et. al.*, I.C.C.-01/05-01/13 (T.C.), Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (April 29, 2016).....26, 27
6. Prosecutor v. Jean-Pierre Bemba *et. al.*, I.C.C.-01/05-01/13 A/A2/A3/A4/A5 (A.C.), Judgment pursuant to Article 74 of the Statute (March 8, 2018).....23, 24, 25, 26

MEMORIAL *for* DEFENCE

7. Prosecutor v. Jean-Pierre Bemba *et. al.*, I.C.C.-01/05-01/13-1855 (T.C.), Decision on Requests to Exclude Dutch Intercepts and Call Data Records (April 29, 2016)23
8. Prosecutor v. Katanga and Ngudjolo, I.C.C.-01/04-01/07-1497 (A.C.), Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of TC-II of 12 June 2009 on the Admissibility of the Case ¶37 (September 25, 2009).20
9. Prosecutor v. Katanga, I.C.C.-01/04-01/07-3436 (T.C.), Judgment pursuant to Article 74 of the Statute ¶ 50 (March 7, 2014)21
10. Prosecutor v. Thomas Lubanga Dyilo, I.C.C.-01/04-01/06 (T.C.), Decision on the Admission of Material from the “Bar Table” (June 24, 2009)23, 24, 28
11. Prosecutor v. Thomas Lubanga Dyilo, I.C.C.-01/04-01/06-803 (P.T.C.), Decision on the Confirmation of Charges (January 29, 2007).....23, 27, 28
12. Situation in the D.R.C., I.C.C.-01/04-169 (A.C.), Judgment on the Prosecutor’s appeal against the decision of PTC I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’ ¶33 (July 16, 2006).20

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA CASES

1. Prosecutor v. Brđanin and Talić, I.C.T.Y.-IT-99-36-T (T.C.), Decision on motion for production of documents – Dzonlić Testimony (April 8, 2002).....30
2. Prosecutor v. Brđanin, I.C.T.Y.-IT-99-36 (T.C.), Decision on the Defence Objection to Intercept Evidence (October 3, 2003).....29
3. Prosecutor v. Duško Tadić, I.C.T.Y.-IT-94-1-AR72 (A.C.), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶124 (October 2, 1995).....36
4. Prosecutor v. Haraqija and Morina, I.C.T.Y.-IT-04-84-R77.4 (A.C.) (July 23, 2009)29
5. Prosecutor v. Jadranko Prlić *et. al.*, I.C.T.Y.-IT-04-74-T (T.C.) ¶189 (May 29, 2013)37
6. Prosecutor v. Kordić and Čerkez, I.C.T.Y.-IT-95-14/2-A (A.C.), ¶52 (December 17, 2004)37
7. Prosecutor v. Kunarac *et. al.*, I.C.T.Y.-IT-96-23 & 23/1 (A.C.) (June 12, 2002)37
8. Prosecutor v. Kuprešić *et. al.*, I.C.T.Y.-IT-95-16 (T.C.) (January 14, 2000).....37
9. Prosecutor v. Milan Martić, I.C.T.Y.-IT-95-11-T (T.C.) ¶69 (June 12, 2007).....37
10. Prosecutor v. Mucić *et. al.*, I.C.T.Y.-IT-96-21 (T.C.), Decision on the Tendering of Prosecution Exhibits 104-108 (November 16, 1998)23
11. Prosecutor v. Radovan Karadžić, I.C.T.Y.-IT-95-5/18 (T.C.) (24 March, 2016).....46

12. Prosecutor v. Stansilav Galić, I.C.T.Y.-IT-98-29-T (T.C.), ¶58 (December 5, 2003).36
13. Prosecutor v. Vasiljevic, I.C.T.Y.-IT-98-32-A (A.C.) (February 25, 2004);47

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA CASES

1. Prosecutor v. Jerome Bicomumpaka, I.C.T.R.-99-50-I (1999).....28
2. Prosecutor v. Karera *et al.*, I.C.T.R.-01-74-T (T.C.) (December 7, 2007)49
3. Prosecutor v. Semanza, I.C.T.R.-97-20-T (T.C.) (15 May, 2003).....49
4. Prosecutor v. Seromba, I.C.T.R.-2001-66-A (A.C.) (March 12, 2008).....51

INTERNATIONAL COURT OF JUSTICE CASES

1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. 2, ¶242 (February 26, 2007).....41
2. Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Merits Judgement, 1970 I.C.J. 3 (1970).....32
3. Gabčíkovo Nagymaros Project (Hungary v. Slovakia), Merits Judgment, 1997 I.C.J. 7 ¶133 (September 25, 1997).....39
4. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16.....32
5. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 2 (July 8, 1996) (Dissenting Opinion of Judge Weeramantry) ..32
6. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 2, 257 (July 8, 1996).....37
7. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Merits Judgement, 1986 I.C.J. 14,(June 27, 1986)33
8. North Sea Continental Shelf (Federal Republic of Germany v. Denmark), Merits Judgment, 1969 I.C.J. 3, ¶77 (February 20, 1969)33

INTERNATIONAL TRIBUNAL FOR THE FAR EAST CASES

1. Judgment of the International Military Tribunal for the Far East, *in* THE TOKYO MAJOR WAR CRIMES TRIAL (R. Pritchard ed., 1998).....46
2. United States *et. al.* v. Sadao Araki, *in* THE TOKYO WAR CRIMES TRIAL: THE RECORDS OF IMT FOR FAR EAST (John Pictchard ed., 1998).....42

NUREMBERG MILITARY TRIBUNAL CASES

1. United States v. Krauch *et al.*, Military Tribunal VI, 8 Trials of War Criminals Before the NMT Under Control Council Law No. 10 (1952)44
2. United States v. Krupp Von Bohlen und Halbach *et al.*, Military Tribunal III, *Order of the Tribunal Acquitting the Defendant of the Charges of Crimes Against Peace*, 12 Trials of War Criminals Before the NMT Under Control Council Law No. 10 (1950)44
3. United States v. von Leeb *et al.*, 11 Trials of War Criminals Before the NMT Under Control Council Law No. 10 (1950)46
4. United States v. von Weizsäcker *et al.*, Military Tribunal XI, 14 Trials of War Criminals Before the NMT Under Control Council Law No. 10 (1949).....46

EUROPEAN COURT OF HUMAN RIGHTS CASES

1. Amann v. Switzerland, App. No. 27798/95 E.Ct.H.R. (February 16, 2000).....25
2. Andre & Anr. v. France, Application No. 18603/03 E.Ct.H.R. (July 24, 2008)30
3. Copland v. U.K., App. No. 62617/00 E.Ct.H.R. (April 3, 2007)25
4. Elsholz v. Germany, App. No. 25735/94, E.Ct.H.R. (July 13, 2000).....26
5. Foxley v. U.K., App. No. 33274/96 E.Ct.H.R. (June 20, 2000)29
6. Halford v. U.K., App. No. 20605/92 E.Ct.H.R. (June 25, 1997).....24
7. Huvig v. France, App. No. 1105/84 E.Ct.H.R. 528 (April 14, 1990).....24
8. Iliya Stefanov v. Bulgaria, App. No. 65755/01 E.Ct.H.R. (May 22, 2008).....26
9. Khan v. U.K., App. No. 35394/97 E.Ct.H.R. (October, 2000).....24
10. Khoroshenko v. Russia, App. No. 41418/04 E.Ct.H.R. (June 30, 2015).....24
11. Klass and Ors. v. Germany, App. No. 5029/71 E.Ct.H.R. (September 6, 1978).....26
12. Kučera v. Slovakia, App. No. 48666/99 E.Ct.H.R. (July 17, 2007)29
13. Niemietz v. Germany, App. No. 13710/88 E.Ct.H.R. (December 16, 1992)29
14. Petri Sallinen & Ors. v. Finland, App. No. 50882/99 E.Ct.H.R.(September 27, 2005)25, 30
15. Robathin v. Austria, App. No. 30457/06 E.Ct.H.R. (October 10, 2012).....26
16. Silver and Ors. v. U.K., App. No. 5947/72, E.Ct.H.R. (March 25, 1983).....26
17. Taylor-Sabori v. U.K., App. No. 47114/99, E.Ct.H.R. (October 22, 2002)25
18. The Sunday Times v. U.K., App. No. 6538/74 E.Ct.H.R. (April 26, 1979).....26
19. Zubaľ v. Slovakia, App. No. 44065/06 E.Ct.H.R. (November 9, 2010)29

MEMORIAL *for* DEFENCE

HUMAN RIGHTS COMMITTEE CASES

1. Tae Hoon Park v. Republic of Korea, CCPR/C/64/D/628/1995 (Nov. 3, 1998).....26
2. Toonen v. Australia, CCPR/C/50/D/488/1992 (March 31, 1994)25
3. Van Hulst v. Netherlands CCPR/C/82/D/903/1999 (November 5, 2004).....24, 25, 29

INTERNATIONAL CRIMINAL COURT OFFICIAL DOCUMENTS

1. Elements of Crimes of the International Criminal Court (2000), PCNICC/2000/1/Add.231, 48
2. Regulations of the International Criminal Court (2004), ICC-BD/01-01-0420
3. Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda (June 11, 2010), R/Con./Res.6, Annex II, 2140, 41, 46
4. Rules and Procedure of Evidence of the International Criminal Court (2002), PCNICC/2000/1/Add.120, 29
5. S.W.G.C.A Report, ICC-ASP/6/20/Add.1, Annex II (June, 2008)45
6. S.W.G.C.A Report, ICC-ASP/6/SWGCA/INF.1 (June 2007).....46
7. S.W.G.C.A, ICC-ASP/3/SWGCA/INF.1 (June, 2004).....44, 47
8. S.W.G.C.A., ICC-ASP/5/SWGCA/INF.1, ¶19 (June 2006).....40, 46
9. S.W.G.C.A., ICC-ASP/8/INF.2, ¶24 (June 2009)40
10. SWGCA Report, ICC-ASP/6/SWGCA/1 (December 2007)46
11. W.G.C.A., Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand, PCNICC/2002/WGCA/DP.5 (July 8, 2002)46

U.N. DOCUMENTS

1. Belarus, India, and Russian Federation: Draft Res., S/1999/328 (March 26, 1999) ...33
2. G.A. Res. 2444 (December 19, 1968).....37
3. G.A. Res. 2675 (December 9, 1970).....37
4. G.A. Res. 3314, A/Res/29/3314 (December 14, 1974)41
5. G.A., A/RES/60/1, World Summit Outcome (September 16, 2005).....32
6. I.L.C., Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)39, 44
7. I.L.C., Draft Conclusions on Identification of Customary International Law with Commentaries, A/71/10 7734
8. ILC, Draft conclusions on identification of Customary International Law with Commentaries, A/73/10 (2018).34

MEMORIAL *for* DEFENCE

9. Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', A/59/565 ¶207 (December 2, 2004)36
10. S.C. Res. S/RES/688 (April 5, 1991).....32
11. U.N.H.R.C., *General Comment No. 16, Article 17 (Right to Privacy)*, HRI/GEN/1/Rev.9, (April 8, 1988).....24, 25
12. U.N.S.C., Note by The President of The Security Council, S/22133, (1991)34

OTHER OFFICIAL DOCUMENTS

1. Rules and Procedure of Evidence of the ICTR (1995), ITR/3/Rev.123
2. Rules and Procedure of Evidence of the ICTY (2006), IT/32/Rev.37.....23

STATUTES

3. Allied Control Council Law No. 10, 20 Dec. 1945, 15 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951)46

BOOKS

1. AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES (1985).....47
2. AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 327 (R. Cryer *et. al.* eds., 2010).....40
3. ANNE ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW 34 (2003)42
4. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 39 (2008).....40, 42
5. BARTLOMIEJ KRZAN, PROSECUTING INTERNATIONAL CRIMES: A MULTIDISCIPLINARY APPROACH (Malgosia Fitzmaurice & Pheobe Okowa eds., 2016).....27
6. BEATRICE BONAFÈ, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES 123 (2009).....41
7. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2004).....34
8. CRIME OF AGGRESSION: A COMMENTARY (Claus Kreß and Stefan Barriga eds., 2016)32, 33, 40, 41, 42
9. DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIAL. CHARTER, INDICTMENT AND JUDGMENTS (N. Boister and R. Cryer, 2008)42
10. GARY D. SOLIS, LAW OF ARMED CONFLICT INTERNATIONAL HUMANITARIAN LAW IN WAR 18 (2010).....35

MEMORIAL *for* DEFENCE

| | |
|--|----------------|
| 11. GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 19 (Andrew Mitchell <i>et al.</i> eds., 2015) | 39 |
| 12. I.C.R.C., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 636 (Bruno Zimmerman <i>et. al.</i> eds., 1987) | 36 |
| 13. INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES (Schmitt M. and Pejic J. eds., 2006) | 35 |
| 14. KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME I (2013) | 47 |
| 15. KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME II (2014) | 48 |
| 16. M. POLITI AND G. NESI, THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION (2004) | 43 |
| 17. MILES JACKSON, COMPLICITY IN INTERNATIONAL LAW, 144 (2015) | 39 |
| 18. NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY (2000) | 34 |
| 19. OTTO TRIFFTERER AND KAI AMBOS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT COMMENTARY 1962 ¶19 (2016) | 20, 28, 43, 47 |
| 20. PETRA VIEBIG, ILLICITLY OBTAINED EVIDENCE AT THE INTERNATIONAL CRIMINAL COURT (Gerhard Werle <i>et. al.</i> eds., 2016) | 29 |
| 21. PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION (2009) | 47 |
| 22. SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY (2013) | 24 |
| 23. SERGEY SAYAPIN, THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW (2014) | 44 |
| 24. SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2001) | 33, 34 |
| 25. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma <i>et. al.</i> eds., 2002) | 32, 40 |
| 26. THE ROME STATUTE OF THE ICC (ANTONIO CASSESE <i>et. al.</i> , 2002) | 47 |
| 27. THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 29 (S. Barriga & C. Kreß eds., 2011) | 41, 47 |

MEMORIAL *for* DEFENCE

28. THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY ¶10 (Olivier Corten and Pierre Klein eds., 2011).....39
29. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 121 (2004).....35, 37

ARTICLES

1. Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 E.J.I.L. 1 (1999).....33, 36, 39
2. Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 E.J.I.L. 649 (2007).....46
3. B. M. Carnahan, *Unnecessary Suffering, the Red Cross and Tactical Laser Weapons*, 18 L.A. CENT. FOR L. & J. 705 (1996).....37
4. Barbara Goy, *Individual Criminal Responsibility before the International Criminal Court: A Comparison with the Ad Hoc Tribunals*, 12 INT’L CRIM. L. REV. 1 (2012)..47
5. Barry Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM L. REV. 120, 128 (1992).....38
6. C. DeNicola, *A Shield for the Knights of Humanity: ICC Should Adopt a Humanitarian Necessity Defence to the Crime of Aggression*, PENN. J. INT’L L., 641 (2008).....32
7. Christopher Greenwood, *The Case of Kosovo*, FINNISH Y.B. INT’L L., 141 (2002) ...33, 34
8. Claus Kreß, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*, 20 E.J.I.L. 1129, 1141 (2009).....41
9. David Schweigman, *Humanitarian Intervention under International Law: The Strife for Humanity*, 6 L.J.I.L. 91 (1993)32
10. Ellia Ciammaichella, *A Legal Advisor's Responsibility to the International Community: When Is Legal Advice a War Crime?*, 41 VAL. U. L. REV., 1143, 1160 (2007).....45
11. Emanuela Gillard, *The Law Regulating Cross-Border Relief Operations*, I.R.R.C. 373 (2013).....39
12. Enzo Cannizzaro, *Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese war*, 88 I.R.R.C. 779 (2006).....35

MEMORIAL for DEFENCE

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|--|------------|
| 13. Fernando Téson, <i>Humanitarian Intervention: An Inquiry into Law and Morality</i> , 30 INT'L COMP. L. QUART. (1997) | 32, 33 |
| 14. George Edwards, <i>International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy</i> , 26 Yale J. Int'l L. (2001)..... | 23 |
| 15. George Porter, <i>Chlorine: An Introduction</i> , 68 PURE AND APPLIED CHEMISTRY 1683, 1684 (1996)..... | 36 |
| 16. J. E. Linter, <i>Humanitarian Intervention: Legitimising the Illegal?</i> 5 JOURNAL OF DEFENCE STUDIES 271 (2005)..... | 34 |
| 17. Jean Fonteyne, <i>The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter</i> , 4 Cal. W. Int'l L.J. 203 (1974)..... | 35, 39 |
| 18. Jennifer Trahan, <i>Defining the 'grey area' where humanitarian intervention may not be fully legal, but is not the Crime of aggression</i> , 2 J. ON USE OF FORCE & INT'L L. 42, 60 (2015)..... | 40 |
| 19. John J Merriam, <i>Kosovo and Law of Humanitarian Intervention</i> , 33 CASE W. RES. J. INT'L L. 11 (2001)..... | 33 |
| 20. Joshua L. Root, <i>First Do No Harm: Interpreting the Crime of Aggression to Exclude Humanitarian Intervention</i> , 2 U. BALT. J. INT'L L. 63, 84 (2013-14) | 40, 41 |
| 21. Judith Gardam, <i>Proportionality and Force in International Law</i> , 87 A.J.I.L. 391, 407 (1993)..... | 36, 37, 40 |
| 22. Julia Brower <i>et al.</i> , <i>Historical examples of unauthorized humanitarian intervention</i> , YALE L. J. (2013) | 33 |
| 23. Keith Petty, <i>Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict</i> , 33 SEATTLE U. L. REV. 107 (2009) .. | 32 |
| 24. Kevin Jon Heller, <i>Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression</i> , 18 E.J.I.L. 477 (2007)..... | 43, 44, 46 |
| 25. Michael J. Glennon, <i>The Blank-Prose Crime of Aggression</i> , 35 YALE J. INT'L L., 71 (2010)..... | 31, 40 |
| 26. Nikola Hadjin, <i>The Nature of Leadership in the Crime of Aggression</i> , 17 INT'L CRIM. L. REV. (2017)..... | 44 |

MEMORIAL for DEFENCE

27. O. Solera, *The Definition of the Crime of Aggression: Lessons Not Learned*, 42 CASE W. RES, J. INT'L L. 801, 819 (2010).....42
28. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1629 (1984).....38
29. Peter Hipold, *Humanitarian Intervention: Is there a need for legal reappraisal*, E.J.I.L 453.....32
30. Philip Levy, *Sanctions on South Africa: What Did They Do?* 89 AM. ECON. REV. 417 (February, 1999)38
31. Sean D. Murphy, *Aggression, Legitimacy and the International Criminal Court*, 20 E.J.I.L. 1147 (2010)42
32. Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. INT'L L. 341 (2009)33
33. Tom Ruys, *Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC*, 20 E.J.I.L. 887, 892 (2018)40, 42
34. Tom Ruys, *Of Arms, Funding and “Non- lethal Assistance: Issues Surrounding Third-State Intervention in the Syrian Civil War*, 13 CHINESE J. INT'L L. ¶10 (2014) 39
35. Van Schaack, *The Crime of Aggression and Humanitarian Intervention on Behalf of Women*, 11 INT'L CRIM. L. REV. 477 (2011).....42

MISCELLANEOUS

1. Black's Law Dictionary (2014)40, 42, 44
2. James Stewart, *An important new orthodoxy on complicity in the ICC statute?*, MANIFESTO (21 January, 2015).....47
3. Press Release, Office of the Spokesperson, Constraining Iran's Nuclear Program, U.S Department of State38
4. Press Release, Prime Minister's Officer, Policy Paper on Syria action- U.K. government legal position (April 18, 2018).....42
5. Press Release, Remarks by the President in Address to the Nation on Syria (September 10, 2013).....34
6. *Syria Crisis: David Cameron Makes Case for Military Action*, BBC (August 29, 2013)34
7. *U.S. sanctions Zimbabwe*, CNN (February 22, 2002)38

STATEMENT OF FACTS

I. Background

Astipur is a technologically advanced country and a major exporter of cobalt. It holds a strong record of human right compliance, whereas Bravos, a developing country, has been subject to frequent human rights complaints. Cilanta, a neighbouring country is home to Dr. Dani Targarian, world's most cited international law scholar. Recently, the discovery of cobalt reserves in Bravos, resulted in it quickly gaining a large market-share due to its low-prices. Pentaas Chemicals, an Astipur based company supplied chlorine to Bravos and dozen other countries for industrial use.

II. Workers Protest and Bravos' Human Rights Violations

On July 21st 2018, the cobalt mine workers in Bravos began protesting for better wages and working conditions. When an armed riot erupted, Bravos deployed chlorine aerial bombs, leading to the death of 800 workers. A draft resolution introduced by Astipur to the UNSC condemning Bravos' attack on its civilians was blocked by a permanent member, known to import large amounts of cobalt from Bravos.

On July 24th, Bravos in response to a protest against the initial bombing again fired dozens of chlorine aerial bombs killing 1400 civilians. Subsequently, Astipur introduced another draft resolution to create an UN investigative commission to examine the international liability that Bravos' policymakers might be exposed to, which was blocked by the same Permanent Member.

III. Astipur's Airstrikes to Prevent Further Human Catastrophe

At 1:30 AM on July 29th, Astipur launched airstrikes against Bravos targeting its chemical weapons facilities. Astipur justified the airstrikes as a humanitarian intervention in order to avoid the imminent use of chemical weapons by Bravos against its own civilians. It claimed to have relied on the opinion of Dani Targarian. Thereafter, the Permanent Member introduced a resolution condemning Astipur's airstrikes, which was defeated by a majority.

IV. Search and Seizure at Dani Taragarian's Home

Cognizant of the Defendant's role in the airstrikes, at 1:30 AM, the Cilanta police carried out a warrant-less search in her residence and seized all the computers belonging to her and her family. The seized documents which was submitted to the OTP revealed that the President of Astipur desired the authorization of the proposed attack against Bravos. Additional remuneration was provided for a more definitive opinion after the first draft opined that the law was unsettled on the matter. Accordingly, she amended the first draft which was favourably voted upon by Astipur's Cabinet.

V. Proceedings Before the Pre-Trial Chamber

The Pre-Trial division found that there was sufficient evidence to charge the Defendant for aiding and abetting the crime of aggression under Article *8bis* and Article 25(3)(c) of the ICC Statute. Pursuant to Leave to Appeal, the Appeals Chamber has sought submissions of all parties the three predetermined issues.

ISSUES

-I-

Whether evidence seized from the home of the Defendant under the circumstances described in the Pre-Trial Chamber's opinion must be excluded under Article 69(7) of the ICC Statute.

-II-

Whether the facts described in the Pre-Trial Chamber's decision were of the "character, gravity and scale" to "constitute a manifest violation of the Charter of the United Nations" as required for the prosecution of the crime of Aggression under Article 8bis of the ICC Statute.

-III-

Whether a lawyer who on commission provides the government one-sided legal advice calculated to justify an armed attack on another State can be prosecuted for aiding and abetting the Crime of Aggression under Article 25(3)(c) of the ICC Statute.

SUMMARY OF ARGUMENTS

I. Right to privacy is an international recognized human right since it is recognized under the ICCPR as per the Rome Statute. Furthermore, it has been previously recognized by the International Criminal Court and *ad hoc* tribunals. The illegal search and seizure conducted by the Cilanta police violated the Defendant's right to privacy since it was unlawful, arbitrary and disproportionate. Admission of such evidence would be antithetical to and seriously damage the integrity of the proceedings since the violations were serious in nature owing to the circumstances of the search and the breach of confidentiality.

II. The use of force in pursuance of the right to humanitarian intervention did not amount to an act of aggression. This is because the airstrikes conducted were in conformity with the principles of the UN Charter. Additionally, there exists a customary right to humanitarian intervention and the said use of force constituted genuine humanitarian intervention. In any event, the airstrikes did not rise to the level of crime of aggression. This is because the use of force was not a manifest violation of the UN Charter and the requirements of character and gravity, scale was not satisfied.

III. A lawyer under the given circumstances cannot be prosecuted for aiding and abetting the crime of aggression since the appropriate standard is the ability to control or direct a State's political or military action. The previously established standards of 'control' may be applied in determining the present case while the shape or influence standard cannot be used. Furthermore, the subjective elements required for aiding and abetting are not met in the present case.

WRITTEN ARGUMENTS

PRELIMINARY OBSERVATIONS

1. The present appeal has been preferred by Dr. Dani Targarian (*“Defendant”*) pursuant to Art. 82(1) of the Rome Statute to the International Criminal Court (*“the Statute”*).¹ At the outset, the Defence wishes to make the following preliminary submissions.

i. Standard of Review on Appeal

2. An appeal may deal with errors of law, fact or procedure,² and if they materially affect the impugned decision, the Appeals Chamber (*“AC”*) must intervene and rectify their effects.³ The following submissions shall highlight the material defects in the decision of the Pre-Trial Chamber VI (*“PTC”*).⁴

ii. Applicable Standard of Proof

3. The rules governing submissions and procedure before the PTC are applicable *mutatis mutandis* to the proceedings before AC.⁵ The AC must adopt the same standard of proof that is applicable to the PTC,⁶ which is that of *“sufficient evidence to establish substantial grounds to believe”*.⁷

iii. The principle of *nullum crimen sine lege* must be applied to the present matter

¹ Rome Statute of the International Criminal Court (1998), 2187 U.N.T.S. 90 [*“Statute”*].

² Situation in the D.R.C., I.C.C.-01/04-169 (A.C.), Judgment on the Prosecutor’s appeal against the decision of PTC I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’ ¶33 (July 16, 2006).

³ Prosecutor v. Katanga and Ngudjolo, I.C.C.-01/04-01/07-1497 (A.C.), Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of TC-II of 12 June 2009 on the Admissibility of the Case ¶37 (September 25, 2009) ; Rules and Procedure of Evidence of the International Criminal Court (2002), PCNICC/2000/1/Add.1, rule 158 [*“R.P.E.”*].

⁴ Regulations of the International Criminal Court (2004), ICC-BD/01-01-04, regulations 64(2),65(4).

⁵ R.P.E., rule 149.

⁶ *Id*; OTTO TRIFFTERER AND KAI AMBOS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT COMMENTARY 1962 ¶19 (2016) [*“OTTO TRIFFTERER”*].

⁷ Statute, art. 61(7).

MEMORIAL *for* DEFENCE

4. The Statute mandates strict construction of the definition of crimes and a prohibition against analogical reasoning.⁸ Further, any ambiguity must be interpreted in favour of the person being prosecuted.⁹ Any broad interpretation, which is to the detriment of the accused, must be discarded.¹⁰ The Defence seeks application of this principle to each of the following submissions.

⁸ *Id.*, art. 22(2).

⁹ *Id.*

¹⁰ Prosecutor v. Katanga, I.C.C.-01/04-01/07-3436 (T.C.), Judgment pursuant to Article 74 of the Statute ¶ 50 (March 7, 2014)

ARGUMENTS

I. THE EVIDENCE SEIZED FROM THE HOME OF THE DEFENDANT MUST BE EXCLUDED UNDER ARTICLE 69(7) OF THE STATUTE CONSIDERING THE CIRCUMSTANCES IN WHICH IT WAS OBTAINED

5. Evidence obtained in violation of the Statute *or* an internationally recognized human right is inadmissible¹¹ if the violation raises substantial doubts on its reliability¹² *or* its admission is antithetical to and seriously damages the integrity of the proceedings.¹³
6. The PTC erred in determining that there was a violation of the Defendant's internationally recognized human right to privacy ("*RtP*") [A.], and admission of such evidence shall be antithetical to and would seriously damage the integrity of the proceedings [B.].

A. THERE IS A VIOLATION OF THE DEFENDANT'S INTERNATIONALLY RECOGNISED HUMAN RIGHT TO PRIVACY

7. The Statute mandates the International Criminal Court ("*the Court*") to interpret the law in consonance with internationally recognized human rights.¹⁴ The RtP is an internationally recognized human right under Art. 21 [1.] and the illegal search and seizure conducted by the Cilanta police violates the RtP of the Defendant. [2.].

1) Right to privacy is an internationally recognized human right

8. Since there exists no express mention of the RtP in the primary sources such as the Statute, Elements of Crime or Rules of Procedure and Evidence,¹⁵ the Court must rely on applicable treaties and the principles of international law.¹⁶

a. Right to privacy is recognized under Article 17 of the ICCPR as per Article 21(1)(b) of the Statute

9. International treaties such as the ICCPR¹⁷ and UDHR¹⁸ are covered under Art. 21(1)(b) because majority signatories to the Statute have adhered to them and the *travaux*

¹¹Statute, art. 69(7).

¹² *Id.*, art. 69(7)(a).

¹³ *Id.*, art. 69(7)(b).

¹⁴ *Id.*, art. 21(3).

¹⁵ *Id.*, art. 21(1)(a).

¹⁶ *Id.*, art. 21(1)(b).

¹⁷ International Covenant on Civil and Political Rights (1966), 999 U.N.T.S. 171 ["I.C.C.P.R."].

préparatoires repeatedly refer to the incorporation of these treaties into the Statute.¹⁹ Furthermore, the Court has consistently relied upon such international as well as regional treaties²⁰ while interpreting ‘internationally recognized human rights’ under Art. 21(1)(b).²¹

10. In this context, Art. 17 of the ICCPR provides that individuals shall not be subjected to any arbitrary or unlawful interference with their privacy, family, home or correspondence.²² The language used under this provision is synonymous to provisions of various international treaties that recognize the RtP.²³

b. The Court and ad hoc tribunals have previously recognized right to privacy

11. The Court in *Lubanga*²⁴ recognized RtP as a fundamental internationally recognized human right by relying on the jurisprudence of the ICCPR and ECHR.²⁵ This position has been supported in subsequent decisions of this Court.²⁶

12. Furthermore, mandatory requirements for exclusion of evidence under Article 69(7) of the Statute are akin to the rules adopted by *ad hoc* tribunals.²⁷ Both the ICTY²⁸ as well as

¹⁸ Universal Declaration of Human Rights (1948), G.A. Res. 217A (III)A [“**U.D.H.R.**”].

¹⁹ George Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 Yale J. Int’l L. 323, 384(2001).

²⁰ European Convention on the Protection of Human Rights and Fundamental Freedoms (1953), U.N.T.S. 222 [“**E.C.H.R.**”].

²¹ Prosecutor v. Thomas Lubanga Dyilo, I.C.C.-01/04-01/06 (T.C.), Decision on the Admission of Material from the “Bar Table” ¶21, 22 (June 24, 2009) [“**Lubanga Bar Table Decision**”]; Prosecutor v. Jean-Pierre Bemba *et. al.*, I.C.C.-01/05-01/13-1855 (T.C.), Decision on Requests to Exclude Dutch Intercepts and Call Data Records ¶10 (April 29, 2016) [“**Bemba Dutch Intercepts**”].

²² I.C.C.P.R., art. 17(1).

²³ U.D.H.R., art. 12 E.C.H.R., art. 8.

²⁴ Prosecutor v. Thomas Lubanga Dyilo, I.C.C.-01/04-01/06-803 (P.T.C.), Decision on the Confirmation of Charges ¶73 (January 29, 2007) [“**Lubanga P.T.C. Decision**”].

²⁵ *Id.*, ¶73,75.

²⁶ Lubanga Bar Table Decision, ¶21; Prosecutor v. Jean-Pierre Bemba *et. al.*, I.C.C.-01/05-01/13 A/A2/A3/A4/A5 (A.C.), Judgment pursuant to Article 74 of the Statute ¶284 (March 8, 2018) [“**Bemba A.C. Decision**”].

²⁷ Rules and Procedure of Evidence of the ICTY (2006), IT/32/Rev.37, rule 95; Rules and Procedure of Evidence of the ICTR (1995), ITR/3/Rev.1, rule 95.

²⁸ Prosecutor v. Mucić *et. al.*, I.C.T.Y.-IT-96-21 (T.C.), Decision on the Tendering of Prosecution Exhibits 104-108 ¶23 (November 16, 1998).

the ICTR²⁹ have held that accused persons must be afforded privacy rights related to search and seizure. The RtP is thus clearly an internationally recognized human right.

2) The illegal search and seizure conducted by the Cilanta police violated the right to privacy of the Defendant

13. The degree of violation of RtP is irrelevant in determining whether the *chapeau* of Art. 69(7) has been violated.³⁰

a. The search was unlawful and not in accordance with law

14. In order to find a violation of the RtP, the Court has equally relied on the standards of the ICCPR and ECHR.³¹ Since the Court has consistently referred to the ECHR even in cases involving non-signatories,³² it is immaterial whether the Cilanta is a signatory to the ECHR.

15. The ICCPR restricts any unlawful interference with a person's RtP.³³ The term "unlawful" implies that no interference with RtP can take place except in accordance with the law and must comply with the aims and objectives of the Covenant.³⁴

16. The above-mentioned "in accordance with law" provision is also provided under the ECHR.³⁵ This standard requires the impugned measures to have some basis in law, which should be accessible and foreseeable to concerned persons³⁶ – that is, the law must

²⁹ Prosecutor v. Jerome Bicomumpaka, I.C.T.R.-99-50-I (1999).

³⁰ Lubanga Bar Table Decision, ¶35.

³¹ *Id.*, ¶21,22; Bemba A.C. Decision ¶331.

³² Prosecutor v. Al-Bashir, I.C.C.-02/05-01/09-3 (P.T.C.), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶9,32 (March 4, 2009).

³³ I.C.C.P.R., art. 17(1); SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY, 535 (2013).

³⁴ U.N.H.R.C., *General Comment No. 16, Article 17 (Right to Privacy)*, HRI/GEN/1/Rev.9, ¶3 (April 8, 1988) [**"General Comment"**]; Van Hulst v. Netherlands CCPR/C/82/D/903/1999, ¶7.3 (November 5, 2004) [**"Van Hulst"**].

³⁵ E.C.H.R., art. 8(2).

³⁶ Huvig v. France, App. No. 1105/84 E.Ct.H.R. ¶26, 29 (April 14, 1990) [**"Huvig Case"**]; Khoroshenko v. Russia, App. No. 41418/04 E.Ct.H.R. ¶110 (June 30, 2015); Khan v. U.K., App. No. 35394/97 E.Ct.H.R. ¶26 (October, 2000); Halford v. U.K., App. No. 20605/92 E.Ct.H.R. ¶49 (June 25, 1997).

provide sufficient conditions in which a measure may be applied, to enable individuals to regulate their conduct.³⁷

17. In the absence of any domestic law,³⁸ any warrant-less action by the police has been held to be unlawful.³⁹ In the present matter, the search and seizure conducted by the Cilanta police was unlawful as there was no domestic law that could authorize such interference.⁴⁰ Thus, the actions of the Cilanta police go against the aims and objectives of the ICCPR, which is to grant inalienable rights to all citizens.⁴¹

18. Furthermore, in the absence of any domestic legislation,⁴² the Defendant could not foresee a possibility of a search being conducted in her home. She was thus unable to protect herself against such unlawful attacks and have an effective remedy for the same.⁴³ In such circumstances, the seizure of computers from the Defendant's home constituted an unlawful infringement on her RtP.

b. The search was arbitrary and disproportionate

19. According to the ICCPR, "arbitrary interference" with a person's RtP is prohibited,⁴⁴ which implies that even the lawful interference should be reasonable in the particular circumstances.⁴⁵ Reasonableness implies that the interference be proportionate to the end sought.⁴⁶ In *Bemba*, it was held that the proportionality rule under Art. 8 of the ECHR is integral to the condition of arbitrariness within the meaning of the Art. 17 of the ICCPR.⁴⁷

³⁷ Bemba Dutch Intercepts, ¶10; Petri Sallinen & Ors. v. Finland, App. No. 50882/99 E.Ct.H.R. ¶76 (September 27, 2005) [**"Petri Sallinen"**]; Amann v. Switzerland, App. No. 27798/95 E.Ct.H.R. ¶50 (February 16, 2000).

³⁸ Copland v. U.K., App. No. 62617/00 E.Ct.H.R. ¶48 (April 3, 2007).

³⁹ Taylor-Sabori v. U.K., App. No. 47114/99, E.Ct.H.R. ¶11, 19 (October 22, 2002).

⁴⁰ Case¶13.

⁴¹ I.C.C.P.R., Preamble.

⁴² General Comment, ¶8.

⁴³ General Comment, ¶9, 11.

⁴⁴ I.C.C.P.R., art. 17(1).

⁴⁵ General Comment, ¶4.

⁴⁶ Van Hulst, ¶7.6; Toonen v. Australia, CCPR/C/50/D/488/1992, ¶8.3(March 31, 1994).

⁴⁷ Bemba A.C. Decision, ¶331.

20. For the act to be necessary in a democratic society,⁴⁸ there must be a pressing social need.⁴⁹ The Defendant posed no imminent threat to national security or public safety, given her actions and profession as an academician.⁵⁰ Further, there was no possibility of any disorder or crime taking place which needed urgent prevention.⁵¹ Hence, the Cilanta Police pursued no legitimate aim that could justify the interference.⁵²
21. Moreover, in the context of seizure of electronic documents from a lawyer's office, the RtP violations have been held to be disproportionate, despite there being a warrant for the same, since there were no adequate safeguards to ensure that limited intrusion of the data contained in the electronic device was carried out.⁵³
22. In the present matter, while the objective of the raid was to search for potentially incriminating evidence, the act of carrying out the search at an inappropriate and untimely hour⁵⁴ and confiscating all the computers belonging to the Defendant and her family constituted an arbitrary interference.⁵⁵ The forensic expert further indiscriminately accessed all of the Defendant's files without any adequate safeguards that could limit the scope of inspection,⁵⁶ which highlights the disproportionate interference.

c. Prosecutor v. Jean-Pierre Bemba⁵⁷ can be distinguished

23. The Court held, with regard to the impugned interception and surveillance of communications of the accused, that there was no violation of the RtP of the accused⁵⁸

⁴⁸ E.C.H.R., art. 8.

⁴⁹ *Robathin v. Austria*, App. No. 30457/06 E.Ct.H.R. ¶43 (October 10, 2012); *The Sunday Times v. U.K.*, App. No. 6538/74 E.Ct.H.R. ¶62 (April 26, 1979).

⁵⁰ *Klass and Ors. v. Germany*, App. No. 5029/71 E.Ct.H.R. ¶45 (September 6, 1978); *Tae Hoon Park v. Republic of Korea*, CCPR/C/64/D/628/1995 ¶10.3 (Nov. 3, 1998).

⁵¹ *Silver and Ors. v. U.K.*, App. No. 5947/72, E.Ct.H.R. ¶102 (March 25, 1983).

⁵² E.C.H.R., art. 8(2); *Elsholz v. Germany*, App. No. 25735/94, E.Ct.H.R. ¶45 (July 13, 2000).

⁵³ *Iliya Stefanov v. Bulgaria*, App. No. 65755/01 E.Ct.H.R. ¶42 (May 22, 2008); *Lubanga P.T.C. Decision*, ¶81.

⁵⁴ Case ¶13.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Bemba AC Decision*; *Bemba Dutch Intercepts*; *Prosecutor v. Jean-Pierre Bemba et. al.*, I.C.C.-01/05-01/13 (T.C.), Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (April 29, 2016) [**"Bemba Western Union"**].

⁵⁸ *Bemba A.C. Decision*, ¶499.

since the ICC Prosecution itself sent a RFA to the domestic authorities⁵⁹ and this was further acted upon a competent judicial authority by adopting applicable domestic procedure.⁶⁰

24. This decision can be distinguished from the present matter since *firstly*, no RFA was made by the Prosecution and the search was made without any order from a judicial authority.⁶¹ *Secondly*, while the orders in *Bemba* were carried out in accordance with domestic legislation, the search in this case was carried out in the absence of any domestic legislation which could authorize it.⁶²
25. Therefore, the PTC's decision to apply *Bemba et. al.* is not well founded and the first part of the two-pronged test under Art. 69(7) of the Statute is satisfied.

B. ADMISSION OF SUCH EVIDENCE SHALL BE ANTITHETICAL TO AND WOULD SERIOUSLY DAMAGE THE INTEGRITY OF THE PROCEEDINGS

26. The evidence seized from the home of the Defendant, if admitted, would be antithetical to and seriously damage the integrity of the proceedings. It is settled that the integrity of proceedings is damaged in cases of serious breach of the RtP [1.]. Such a serious violation of Defendant's RtP has occurred in the present case [2.], which is further compounded by the breach of professional confidentiality [3.].

1) The integrity of proceedings is damaged in cases of serious breach of the Right to Privacy

27. While deciding on integrity of the trial, the Court endorsed the human rights and ICTY jurisprudence⁶³ in holding that only a serious human rights violation can lead to the exclusion of evidence.⁶⁴
28. In this context, the purpose behind Art. 69(7)(b) is to protect the integrity of the Court which in turn was created to redress serious violations of international humanitarian law

⁵⁹ Bemba Dutch Intercepts, ¶23; Bemba Western Union, ¶45,55.

⁶⁰ Bemba Dutch Intercepts, ¶30.

⁶¹ Case ¶13.

⁶² *Id.*

⁶³ Lubanga P.T.C. Decision, ¶89.

⁶⁴ *Id.*, ¶87; BARTLOMIEJ KRZAN, PROSECUTING INTERNATIONAL CRIMES: A MULTIDISCIPLINARY APPROACH, 204 (Malgosia Fitzmaurice & Pheobe Okowa eds., 2016).

(“*IHL*”).⁶⁵ Hence, admitting evidence obtained by means of any human rights violation would be against the core values of the Statute.⁶⁶

29. Additionally, the Court has held that the probative value of the impugned evidence cannot affect the decision on admissibility.⁶⁷ The seriousness of the charges of the accused as well as the public interest in their prosecution also cannot be factors relevant to the admissibility of evidence.⁶⁸

2) A serious violation of Defendant’s Right to Privacy has occurred in the present case

30. A serious of violation is to be determined on a case-by-case basis.⁶⁹ In ruling that admission of evidence would not damage integrity of the proceedings,⁷⁰ the Court in *Lubanga*,⁷¹ held that the RtP violations were not serious in nature since these violations related solely to a third party,⁷² the process was initiated on the orders of the OTP⁷³ and the illegal acts were committed by the domestic authorities under the domestic law.⁷⁴

31. The present matter is factually different from *Lubanga* and thus highlights the seriousness of RtP violation since *firstly*, the RtP violation is primarily of the Defendant.⁷⁵ *Secondly*, no order was provided by a judicial authority.⁷⁶ *Thirdly*, due to the absence of any domestic legislation, the search conducted by the Cilanta police was illegal.

32. The illicit manner in which the search was conducted must be taken into account. A warrant-less search can inherently cause a risk of abuse of authority and violation of

⁶⁵ OTTO TRIFFTERER, 1748, ¶69.

⁶⁶ Lubanga Bar Table Decision, ¶42.

⁶⁷ *Id.*, ¶43.

⁶⁸ *Id.*, ¶44.

⁶⁹ Prosecutor v. Germain Katanga, I.C.C.-01/04-01/07-2635 (T.C.), Decision on the Prosecutor’s Bar Table Motions ¶40 (December 17, 2010).

⁷⁰ Lubanga Bar Table Decision, ¶47.

⁷¹ *Id.*, Lubanga P.T.C. Decision.

⁷² Lubanga Bar Table Decision, ¶47.

⁷³ Lubanga P.T.C. Decision, ¶76.

⁷⁴ Lubanga Bar Table Decision, ¶46,47.

⁷⁵ Case¶13.

⁷⁶ *Id.*

human dignity.⁷⁷ Moreover, a search carried out at an untimely hour can hamper a person's reputation.⁷⁸

33. In the present matter, the Cilanta police knowingly carried out a warrant-less and unauthorized interference during the early morning hours on July 30th, 2018 between 1:15 a.m.-2:00 a.m.⁷⁹ This not only shows bad faith on part of Cilanta police,⁸⁰ but also tarnished the Defendant's reputation, which further adds to the seriousness of the violation.

34. Furthermore, while the objective of the search was to find incriminating evidence, the Cilanta police indiscriminately went through the Defendant's family's personal belongings and confiscated all of the computers found in her home. There is no evidence to indicate that the computers have been returned to them, even after a hard copy has been submitted to the OTP.⁸¹ The above-mentioned facts, when read in totality, showcase the gravity of the violation of the Defendant's RtP.

3) Seriousness of violation is further compounded by breach of professional confidentiality

35. The Statute respects privileges on professional confidentiality.⁸² Communications made in the context of a professional relationship are mandatorily regarded as privileged and consequently not subject to disclosure.⁸³ This privilege is an important part of RtP as its contravention can affect proper administration of justice⁸⁴ and the client's right of self-

⁷⁷ Kučera v. Slovakia, App. No. 48666/99 E.Ct.H.R. ¶122(July 17, 2007).

⁷⁸ Zubal' v. Slovakia, App. No. 44065/06 E.Ct.H.R. ¶44 (November 9, 2010).

⁷⁹ Case¶13.

⁸⁰ Prosecutor v. Haraqija and Morina, I.C.T.Y.-IT-04-84-R77.4 (A.C.) ¶28(July 23, 2009); Prosecutor v. Brđanin, I.C.T.Y.-IT-99-36 (T.C.), Decision on the Defence Objection to Intercept Evidence ¶63(October 3, 2003); PETRA VIEBIG, ILLICITLY OBTAINED EVIDENCE AT THE INTERNATIONAL CRIMINAL COURT, 184 (Gerhard Werle *et. al*, eds., 2016).

⁸¹ *Id.*

⁸² Statute, art. 69(5).

⁸³ R.P.E., rule 73.

⁸⁴ Van Hulst, ¶6.7; Niemietz v. Germany, App. No. 13710/88 E.Ct.H.R. ¶37(December 16, 1992); Foxley v. U.K., App. No. 33274/96 E.Ct.H.R. ¶50 (June 20, 2000).

incrimination.⁸⁵ The scope of this confidentiality extends only to communications and documents generated for purpose of giving or receiving legal advice.⁸⁶

36. In the present matter, the President of Astipur commissioned a legal opinion from the Defendant on the legality of impugned airstrikes and prospective liability.⁸⁷ The legal opinion, for which the Defendant received remuneration was covered under confidential communication.⁸⁸ The President neither consented to the disclosure nor did he make any voluntary disclosure as to the legal documents to the Cilanta. Usage of such communication would also affect the President's right against self-incrimination.
37. Moreover, even where there is a *prima facie* basis for believing that the crime-fraud exception to legal professional privilege could be applied, violations of RtP have nonetheless been found when the measures were not in accordance with the law,⁸⁹ which is the case in the present matter.
38. Thus, the fact that such privileged documents were indiscriminately seized by the Cilanta police highlights the seriousness of the violation of Defendant's RtP. The admission of such tainted evidence would seriously damage integrity of the proceedings.

⁸⁵ Andre & Anr. v. France, Application No. 18603/03 E.Ct.H.R. ¶41 (July 24, 2008).

⁸⁶ Prosecutor v. Brđanin and Talić, I.C.T.Y.-IT-99-36-T (T.C.), Decision on motion for production of documents – Dzonlić Testimony ¶5,7 (April 8, 2002).

⁸⁷ Case¶8.

⁸⁸ Case, Appendix II, III.

⁸⁹ Petri Sallinen, ¶76,82,94.

II. THE FACTS DESCRIBED IN THE PRE-TRIAL CHAMBER'S DECISION WERE NOT OF THE CHARACTER, GRAVITY AND SCALE TO CONSTITUTE A MANIFEST VIOLATION OF THE UNITED NATIONS CHARTER

39. To qualify as an 'act of aggression', the use of force must be directed against the territory, sovereignty or political independence of a State.⁹⁰ Whereas in the case of crime of aggression ("CoA"), the concerned act must by its character, gravity and scale, manifestly violate the UN Charter ("Charter").⁹¹
40. The PTC erred in determining that the airstrikes can be prosecuted as CoA because the use of force in pursuance to the right of unilateral humanitarian intervention does not amount to an act of aggression [A.], Astipur cannot be precluded from claiming its right to humanitarian intervention [B.] and in any event, the use of force did not meet the threshold of CoA under Art. 8bis(1) [C.].

A. THE USE OF FORCE IN PURSUANCE TO THE RIGHT OF UNILATERAL HUMANITARIAN INTERVENTION DOES NOT AMOUNT TO AN ACT OF AGGRESSION

41. Prior to proving the CoA, the use of force must qualify as an act of aggression.⁹² In the present matter, there was no act of aggression since the use of force conducted on grounds of humanitarian intervention were consistent with the UN Charter [1.] and there exists a customary right to humanitarian intervention [2.]. Further, Astipur's airstrikes amounted to genuine humanitarian intervention [3.].

1) The use of force conducted on grounds of humanitarian intervention were consistent with the UN Charter

a. Airstrikes were in conformity with the principles of the UN Charter

42. A treaty must be interpreted in light of its object and purpose.⁹³ The Charter is committed towards universal respect for human rights and fundamental freedoms to all.⁹⁴ Thus, the

⁹⁰ Statute, art. 8bis(2).

⁹¹ *Id.*, art. 8bis(1).

⁹² Elements of Crimes of the International Criminal Court (2000), PCNICC/2000/1/Add.2, 3 ["EoC"]; Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L., 71, 89(2010) ["Michael Glennon"].

⁹³ Vienna Convention on the Law of Treaties (1969), 115 U.N.T.S. 331, art. 31(1) ["V.C.L.T."].

⁹⁴ United Nations, Charter of the United Nations (1945), 1 U.N.T.S. XVI, art. 1(3), 55, 56 ["Charter"].

prohibition against use of force⁹⁵ must be understood in good faith with regard to the Charter's overall human right objectives.⁹⁶

43. Dignity and worth of an individual are fundamental principles of the Charter,⁹⁷ and their suppression would result in gross violation of the aims and objectives.⁹⁸ Astipur's use of force was in consonance with the objectives of the Charter since it aimed at preventing any further human right violations from taking place.⁹⁹ In any event, there is an obligation on States towards the international community as a whole,¹⁰⁰ to prevent mass human rights violations contrary to international law.¹⁰¹

b. The airstrikes did not violate the territorial integrity, sovereignty and political independence of Bravos

44. The sovereignty of a State is conditional on compliance with its human rights responsibilities.¹⁰² Advocating large-scale atrocities against its own civilians restricts the concept of absolute sovereignty,¹⁰³ as the basic obligation of a State is to preserve the rights of its civilians.¹⁰⁴ Since human rights cannot be considered an exclusive concern of

⁹⁵ *Id.*, art. 2(4).

⁹⁶ David Schweigman, *Humanitarian Intervention under International Law: The Strife for Humanity*, 6 L.J.I.L. 91, 101(1993).

⁹⁷ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 2, 141 (July 8, 1996) (Dissenting Opinion of Judge Weeramantry).

⁹⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 ¶131.

⁹⁹ Keith Petty, *Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 SEATTLE U. L. REV. 107, 124 (2009).

¹⁰⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Merits Judgement, 1970 I.C.J. 3, 32 (1970)

¹⁰¹ Peter Hipold, *Humanitarian Intervention: Is there a need for legal reappraisal*, E.J.I.L 438, 453; S.C. Res. S/RES/688 (April 5, 1991)

¹⁰² THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 161 (Bruno Simma *et. al.* eds., 2002) [**“BRUNO SIMMA”**].

¹⁰³ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 30 INT'L COMP. L. QUART. 487(1997) [**“TÉSON”**]; C. DeNicola, *A Shield for the Knights of Humanity: ICC Should Adopt a Humanitarian Necessity Defence to the Crime of Aggression*, PENN. J. INT'L L., 641(2008).

¹⁰⁴ G.A., A/RES/60/1, World Summit Outcome 138 (September 16, 2005); Claus Kreß, *The State Conduct Element*, in CRIME OF AGGRESSION: A COMMENTARY 525 (Claus Kreß and Stefan Barriga eds., 2016) [**“KREß”**].

the State,¹⁰⁵ a subsidiary international responsibility arises in case the state organs fail to discharge their functions.¹⁰⁶

45. Furthermore, genuine humanitarian intervention does not seek to injure the territorial integrity or political independence of the State.¹⁰⁷ In the instant case, Astipur's airstrikes were directed towards curbing the inhumane violations by Bravos and not towards its conquest and subjugation.¹⁰⁸

2) There exists a customary right to humanitarian intervention

46. Intervention on humanitarian grounds is recognized under Customary International Law ("*CIL*")¹⁰⁹ on account of existing state practice and *opinio juris*.¹¹⁰ New exceptions to principles can emerge from subsequent state practice,¹¹¹ which if affirmed by other States, would direct towards alteration of CIL.¹¹²

47. Astipur's airstrikes must be viewed in light of NATO's intervention in FRY (1999)¹¹³ – wherein an aerial bombardment was carried out without prior authorisation, providing the right to intervene.¹¹⁴ In this regard, a draft resolution by States condemning the said intervention did not receive approval.¹¹⁵ Further, in Tanzania's intervention in Uganda (1978)¹¹⁶ and the French intervention in Central African Republic (1979),¹¹⁷ the use of

¹⁰⁵ Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 E.J.I.L. 1, 26 (1999) ["Antonio Cassese, 1999"].

¹⁰⁶ KREß, 525.

¹⁰⁷ Téson, 151.

¹⁰⁸ Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. INT'L L. 341, 372 (2009).

¹⁰⁹ Christopher Greenwood, *The Case of Kosovo*, FINNISH Y.B. INT'L L., 141, 161(2002) ["Greenwood"].

¹¹⁰ North Sea Continental Shelf (Federal Republic of Germany v. Denmark), Merits Judgment, 1969 I.C.J. 3, ¶77 (February 20, 1969).

¹¹¹ V.C.L.T., art. 31(3); Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Merits Judgement, 1986 I.C.J. 14, ¶207 (June 27, 1986) ["Nicaragua"].

¹¹² *Id.*; Kreß, 491.

¹¹³ Antonio Cassese 1999, 28; Greenwood, 171-173.

¹¹⁴ John J Merriam, *Kosovo and Law of Humanitarian Intervention*, 33 CASE W. RES. J. INT'L L. 111, 151 (2001).

¹¹⁵ Belarus, India, and Russian Federation: Draft Res., S/1999/328 (March 26, 1999).

¹¹⁶ SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 100 (2001) ["CHESTERMAN"].

¹¹⁷ Julia Brower *et al.*, *Historical examples of unauthorized humanitarian intervention*, YALE L. J. 8 (2013).

force was carried out due to necessary circumstances and in a proportionate manner in order to prevent the furtherance of mass atrocities committed by the government against their own citizens.

48. Moreover, in the case of intervention in Liberia (1990), the President of the UNSC issued statements praising the efforts made by the ECOWAS to foster peace and normalcy in the region.¹¹⁸ Such interventions were tolerated and acknowledged by the global community, thus amounting to their implied approval.¹¹⁹
49. Official public pronouncements and legal opinions on behalf of States,¹²⁰ along with their failure to act against a consistent practice is evidence of *opinio juris*.¹²¹ Belgium, Netherlands, Canada and UK's public statements¹²² in the intervention in FRY (1999)¹²³ and the absence of any official sanction against intervention by Uganda adds support to humanitarian intervention.¹²⁴ Furthermore, representatives of U.S.A.¹²⁵ and U.K.¹²⁶ justified potential limited intervention in Syria (2013) to prevent the use of chemical weapons by the government.
50. Hence, unilateral intervention would evidently amount to CIL, if the intervention is to prevent an imminent, unlawful attack on civilians, and if the force used is necessary and proportionate to achieve that end.

¹¹⁸ U.N.S.C., Note by The President of The Security Council, S/22133, (1991).

¹¹⁹ CHESTERMAN, 104; NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 123 (2000).

¹²⁰ ILC, Draft conclusions on identification of Customary International Law with Commentaries, A/73/10 140 (2018).

¹²¹ I.L.C., Draft Conclusions on Identification of Customary International Law with Commentaries, A/71/10 77 (2016).

¹²² CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 43(2004).

¹²³ Greenwood, Page 157.

¹²⁴ J. E. Linter, *Humanitarian Intervention: Legitimising the Illegal?* 5 *JOURNAL OF DEFENCE STUDIES* 271, 282 (2005).

¹²⁵ Press Release, Remarks by the President in Address to the Nation on Syria (September 10, 2013) <https://obamawhitehouse.archives.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>.

¹²⁶ *Syria Crisis: David Cameron Makes Case for Military Action*, BBC (August 29, 2013) <http://www.bbc.co.uk/news/uk-politics-23883427>.

3) Astipur's airstrikes amounted to genuine humanitarian intervention

a. An imminent threat of grave human rights violations existed

51. Imminent threat of large-scale atrocities is the primary prerequisite for humanitarian intervention,¹²⁷ which is to be judged by determining the probability of the attack.¹²⁸ In the present matter, there was clear evidence of potential use of force by Bravos in view of its history of frequent human rights complaints¹²⁹ and the large-scale protests taking place in multiple cities post the internal bombings.¹³⁰ Hence, it was reasonable for Astipur to believe that Bravos would again resort to use of force.

b. The use of force adhered to jus ad bellum requirements of proportionality and necessity

52. The principle of proportionality permits the use of necessary means¹³¹ to prevent the initial use of force.¹³² Circumstances prevailing at the time of attack must be considered and the benefit of hindsight must not be given.¹³³

53. In the instant case, Astipur's airstrikes were proportionate as they were specifically directed towards destroying Bravos' chlorine production, storage and delivery facilities.¹³⁴ Further, due to UNSC being paralyzed by a permanent member veto,¹³⁵ it was necessary for Astipur to act unilaterally. Thus, the airstrikes satisfied the

¹²⁷ Jean Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter*, 4 Cal. W. Int'l L.J. 203, 260(1974) [**"Fonteyne"**].

¹²⁸ INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 151 (Schmitt M. and Pejic J. eds., 2006).

¹²⁹ Case¶3.

¹³⁰ Case¶11.

¹³¹ Enzo Cannizzaro, *Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese war*, 88 I.R.R.C. 779 (2006).

¹³² GARY D. SOLIS, *LAW OF ARMED CONFLICT INTERNATIONAL HUMANITARIAN LAW IN WAR* 18 (2010).

¹³³ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 121(2004) [**"YORAM DINSTEIN"**].

¹³⁴ Case¶11.

¹³⁵ Case¶5,10.

requirements under *jus ad bellum* since Bravos had also violated the customary prohibition on the use of chemical weapons on its citizens.¹³⁶

c. All peaceful alternatives were exhausted

54. Use of force may be justified if all peaceful means were exhausted.¹³⁷ In the present case, Astipur introduced a resolution condemning Bravos' initial chlorine attacks on the mineworkers.¹³⁸ Another resolution was introduced after the second attack to constitute an UN Independent Investigative Commission, thereby ruling out any ulterior motive.¹³⁹ While both the resolutions received majority support, they failed on account of veto of a permanent member.¹⁴⁰ Thus, proportionate force was used only after exhausting all the alternatives.

d. Astipur's use of force did not violate international humanitarian law

i. Use of force conformed to *jus in bello* principles of proportionality and necessity

55. Proportionality and necessity require the attacks to be limited to specific military objectives.¹⁴¹ Targeting a particular military objective must provide advantage from weakening the enemy military forces.¹⁴² Considering the volatile nature¹⁴³ and purpose for which chlorine was used,¹⁴⁴ destruction of its manufacturing, storage and transportation facilities thus offered a definite military advantage.¹⁴⁵

¹³⁶ Prosecutor v. Duško Tadić, I.C.T.Y.-IT-94-1-AR72 (A.C.), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶124(October 2, 1995) [“Tadić”].

¹³⁷ Cassese 1999, 26; Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', A/59/565 ¶207(December 2, 2004).

¹³⁸ Case¶7.

¹³⁹ Case¶10.

¹⁴⁰ Case¶7,10.

¹⁴¹ 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 U.N.T.S. 3, art. 52(2) [“Additional Protocol I”]; Judith Gardam, *Proportionality and Force in International Law*, 87 A.J.I.L. 391, 407 (1993) [“Gardam”].

¹⁴² Prosecutor v. Stansilav Galić, I.C.T.Y.-IT-98-29-T (T.C.), ¶58 (December 5, 2003).

¹⁴³ George Porter, *Chlorine: An Introduction*, 68 PURE AND APPLIED CHEMISTRY 1683, 1684 (1996).

¹⁴⁴ I.C.R.C., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 636 (Bruno Zimmerman *et. al.* eds., 1987).

¹⁴⁵ Case¶11.

56. IHL prohibits attacks which cause excessive¹⁴⁶ and indiscriminate¹⁴⁷ civilian losses. Collateral civilian losses are not *per se* unlawful, as long as they are ancillary to the conduct of the military operations.¹⁴⁸ Moreover, reasonable care must be taken so that civilians are not injured due to carelessness¹⁴⁹ or negligence.¹⁵⁰ In the instant case, a narrowly tailored attack in early morning hours i.e. 1:30 a.m. to minimize the incidental loss.¹⁵¹ Thus, the airstrikes were proportionate and necessary.

ii. The use of force adhered to the *jus in bello* principle of distinction

57. An attack is considered contrary to IHL when civilians are the primary targets rather than being incidental to the attacks.¹⁵² States must not consequently use weapons that are incapable of distinguishing between civilians and military targets.¹⁵³ Further, only weapons that increase suffering without providing military advantage are prohibited.¹⁵⁴

58. Airstrikes cannot *prima facie* be unlawful since the criteria is merely one of ability to identify and acquire potential military objectives.¹⁵⁵ In this instance, the narrowly launched airstrikes, which were capable of distinguishing, directly targeted the chlorine storage facilities,¹⁵⁶ which in turn contributed to the military advantage. Further, the

¹⁴⁶ Additional Protocol I, art. 51(4).

¹⁴⁷ Additional Protocol I, art. 51(5)(b).

¹⁴⁸ Prosecutor v. Jadranko Prlić *et. al.*, I.C.T.Y.-IT-04-74-T (T.C.) ¶189(May 29, 2013); Prosecutor v. Kordić and Čerkez, I.C.T.Y.-IT-95-14/2-A (A.C.) ¶52 (December 17, 2004) [**“Kordić and Čerkez”**].

¹⁴⁹ Additional Protocol I, art. 57, 58; Prosecutor v. Kuprešić *et. al.*, I.C.T.Y.-IT-95-16 (T.C.), ¶524(January 14, 2000).

¹⁵⁰ Gardam, 407.

¹⁵¹ Case¶11.

¹⁵² Kordić and Čerkez, ¶48; Prosecutor v. Kunarac *et. al.*, I.C.T.Y.-IT-96-23 & 23/1 (A.C.), ¶92 (June 12, 2002); G.A. Res. 2444 (December 19, 1968); G.A. Res. 2675 (December 9, 1970).

¹⁵³ Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 2, 257 (July 8, 1996); Additional Protocols I, art. 48.

¹⁵⁴ Prosecutor v. Milan Martić, I.C.T.Y.-IT-95-11-T (T.C.) ¶69 (June 12, 2007); B. M. Carnahan, *Unnecessary Suffering, the Red Cross and Tactical Laser Weapons*, 18 L.A. CENT. FOR L. & J. 705, 713 (1996).

¹⁵⁵ YORAM DINSTEIN, 119.

¹⁵⁶ Case¶11.

unfortunate death of less than 100 people¹⁵⁷ did not *ipso facto* render the airstrikes unlawful.

B. ASTIPUR CANNOT BE PRECLUDED FROM CLAIMING ITS RIGHT TO HUMANITARIAN INTERVENTION

59. The use of force amounted to genuine humanitarian intervention since Astipur did not have any pre-textual motives [1.] and it did not contribute to the human rights violation in Bravos [2.]. Further, States acting in good faith cannot be estopped from invoking the right to humanitarian intervention [3.].

1) Astipur did not have pre-textual motives

60. A State's use of force on another State for the former's gain and not for preservation of human rights amounts to pre-textual intervention.¹⁵⁸ Astipur's use of force however amounted to altruistic intervention since it was carried out to prevent the furtherance of human rights violations.¹⁵⁹

61. Astipur's request to the international community to impose an export ban on cobalt cannot by itself suggest the existence of pre-textual motives. This is in light of the fact that previously, Japan imposed sanctions on South Africa (1986)¹⁶⁰ and U.S.A pressed unilateral sanctions on Zimbabwe (2002)¹⁶¹ and Iran (2018)¹⁶² to stop them from producing weapons and to prevent human rights violations.

62. In the present matter, Bravos was accused of frequent human rights violations¹⁶³ and deployed chlorine bombs against its civilians.¹⁶⁴ Hence, it was rational for Astipur to call

¹⁵⁷ *Id.*

¹⁵⁸ Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1629(1984).

¹⁵⁹ Barry Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM L. REV. 120, 128 (1992).

¹⁶⁰ Philip Levy, *Sanctions on South Africa: What Did They Do?* 89 AM. ECON. REV. 417(February, 1999).

¹⁶¹ *U.S. sanctions Zimbabwe*, CNN (February 22, 2002) <http://edition.cnn.com/2002/WORLD/africa/02/22/us.zimbabwe/index.html>

¹⁶² Press Release, Office of the Spokesperson, Constraining Iran's Nuclear Program, U.S Department of State, (November 5, 2018) <https://www.state.gov/r/pa/prs/ps/2018/11/287133.htm>.

¹⁶³ Case¶3.

¹⁶⁴ Case¶5.

for an embargo until Bravos ceased its chemical weapon production.¹⁶⁵ In any case, the existence of States' national interests do not *ipso facto* invalidate the intervention if the overriding motive was to preserve human rights.¹⁶⁶

2) Astipur did not contribute to the human rights violation in Bravos

63. Preventing mass human right atrocities is an 'essential interest' of the international community.¹⁶⁷ States can be precluded only when their contribution to such human catastrophe is considered 'sufficiently substantial' and not peripheral.¹⁶⁸ The subsequent use of chlorine as bombs by Bravos was unknown to Astipur,¹⁶⁹ which does not establish its intention to encourage the commission of the crime.¹⁷⁰

3) Astipur acted in good faith and cannot be estopped from invoking humanitarian intervention

64. Economic relations including assistance, military aid or otherwise to another state are not *per se* against international law.¹⁷¹ Good faith requires concerned States to fulfil such obligations in a reasonable way and in such a manner that its purpose can be realized.¹⁷² In the present matter, Pentaas Chemicals obtained a license from Astipur to supply 10,000 metric tonnes of chlorine to Bravos and a dozen other States for industrial use, which negates any possibility of bad faith on part of Astipur.¹⁷³

¹⁶⁵ Case ¶11.

¹⁶⁶ Fonteyne, 261.

¹⁶⁷ Cassese 1999, 26; Emanuela Gillard, *The Law Regulating Cross-Border Relief Operations*, I.R.R.C. 373 (2013).

¹⁶⁸ I.L.C., Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 84 (2001) [**"A.R.S.I.W.A. Commentary"**]; Gabčíkovo Nagymaros Project (Hungary v. Slovakia), Merits Judgment, 1997 I.C.J. 7 ¶133 (September 25, 1997) [**"Gabčíkovo Nagymaros Project"**].

¹⁶⁹ Case ¶11.

¹⁷⁰ Tom Ruys, *Of Arms, Funding and "Non-lethal Assistance: Issues Surrounding Third-State Intervention in the Syrian Civil War*, 13 CHINESE J. INT'L L. ¶10 (2014).

¹⁷¹ Nicaragua, ¶245; MILES JACKSON, *COMPLICITY IN INTERNATIONAL LAW*, 144(2015).

¹⁷² Gabčíkovo Nagymaros Project, ¶142; GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 19 (Andrew Mitchell *et al.* eds., 2015); Jean Salmon, *Article 26*, in THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY ¶10 (Olivier Corten and Pierre Klein eds., 2011).

¹⁷³ Case ¶6.

C. IN ANY EVENT, THE USE OF FORCE DID NOT MEET THE THRESHOLD OF CRIME OF AGGRESSION UNDER ARTICLE 8BIS(1)

65. The threshold requirement of CoA requires the violation to be ‘manifest’,¹⁷⁴ is an objective stipulation¹⁷⁵ and cannot be satisfied by a singular component.¹⁷⁶ In this context, manifest is related to the obviousness and intensity of use of force.¹⁷⁷
66. The airstrikes by Astipur did not satisfy the qualitative dimension of ‘manifest by character’ [1.] and further failed to meet the quantitative dimension of ‘manifest by its gravity and scale’ [2.].

1) Airstrikes did not satisfy the qualitative dimension of ‘manifest by character’

a. The questionable legal ‘character’ of airstrikes excluded it from the crime of aggression

67. The use of force to prevent human catastrophe without UNSC authorization, does not by itself meet the character component of CoA.¹⁷⁸ In order to constitute a CoA, the standard must be one of absolute illegality.¹⁷⁹ Even if humanitarian intervention is not recognized to be unambiguously legal in nature, its status is at worst still considered controversial.¹⁸⁰
68. The *travaux préparatoires* also provided that state parties sought to agree on an exception on borderline cases¹⁸¹ falling within the grey area.¹⁸² Hence, Astipur’s intervention, due

¹⁷⁴ Statute, art. 8bis(1).

¹⁷⁵ Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda (June 11, 2010), R/Con./Res.6, Annex II, 21 [“RC/Res.6”].

¹⁷⁶ *Id.*, Understanding 7.

¹⁷⁷ *Manifest*, Black’s Law Dictionary, 1106 (2014) [“Black’s Law”]; Joshua L. Root, *First Do No Harm: Interpreting the Crime of Aggression to Exclude Humanitarian Intervention*, 2 U. BALT. J. INT’L L. 63, 84 (2013-14) [“Joshua Root”]; Tom Ruys, *Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC*, 20 E.J.I.L. 887, 892(2018) [“Ruys, 2018”].

¹⁷⁸ Michael Glennon, 89; Elizabeth Wilmshurst, *Aggression*, in AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 327 (R. Cryer *et. al.* eds., 2010).

¹⁷⁹ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 39 (2008) [“CASSESE, 2008”]; Jennifer Trahan, *Defining the ‘grey area’ where humanitarian intervention may not be fully legal, but is not the Crime of aggression*, 2 J. ON USE OF FORCE & INT’L L. 42, 60(2015) [“Trahan”].

¹⁸⁰ BRUNO SIMMA, 130.

¹⁸¹ Trahan, 59; S.W.G.C.A., ICC-ASP/8/INF.2, ¶24 (June 2009); S.W.G.C.A., ICC-ASP/5/SWGCA/INF.1, ¶19 (June 2006) [“ICC-ASP/5/SWGCA/INF.1”].

¹⁸² KREß, 502.

to its disputable nature, cannot be the basis for prosecuting CoA. This reasoning also finds support in customary international criminal law.¹⁸³

b. The aims and objectives of the Statute excluded the airstrikes from the ambit of crime of aggression

69. The Statute mandates cases to be sufficiently grave in order to justify action by the Court,¹⁸⁴ so as to ensure consistency and efficient functioning.¹⁸⁵ This principle has been further recognised under the Resolution 3314¹⁸⁶ and understandings of Kampala Conference.¹⁸⁷

70. Excluding humanitarian intervention from the threshold of ‘manifest’ under Art. 8bis(1) is in consonance with the Statute’s object and purpose¹⁸⁸ – which is to prevent gross human right violations, try the most serious crimes¹⁸⁹ and advocate deterrence.¹⁹⁰

c. Subjective element of collective intent was absent in the present matter

71. The collective intent of the State may be determined by inference of State actions¹⁹¹ and the purpose behind the same.¹⁹² This is an additional requirement when ascertaining the subjective criteria within the term ‘character’.

72. Collective intent is absent in cases of genuine humanitarian intervention, such as the present matter.¹⁹³ This is because the airstrikes were not directed at annexing the territory

¹⁸³ *Id.*, 526.

¹⁸⁴ Statute, art. 17(d).

¹⁸⁵ KREß, 508.

¹⁸⁶ G.A. Res. 3314, A/Res/29/3314 (December 14, 1974).

¹⁸⁷ Joshua Root, 93; RC/Res.6, Understanding 6.

¹⁸⁸ S. Barriga, *Negotiating the Amendments on the Crime of Aggression*, in THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 29 (S. Barriga & C. Kreß eds., 2011) [“S. Barriga”].

¹⁸⁹ ICC-ASP/5/SWGCA/INF.1, ¶19.

¹⁹⁰ Statute, Preamble.

¹⁹¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. 2, ¶242 (February 26, 2007).

¹⁹² BEATRICE BONAFÈ, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES 123 (2009).

¹⁹³ Claus Kreß, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*, 20 E.J.I.L. 1129, 1141 (2009).

of Bravos, or changing its political government.¹⁹⁴ Instead, its object and purpose was to mitigate the humanitarian suffering of innocent civilians.¹⁹⁵

2) The use of force did not meet the quantitative dimension of ‘manifest by its gravity and scale’

73. Gravity refers to the seriousness of harm,¹⁹⁶ which requires consideration of effects¹⁹⁷ and consequences¹⁹⁸ of the act. The airstrikes, which led to the death of less than 100 people, were conducted to eliminate Bravos’ chlorine stockpiles in order to prevent any further atrocities against civilians.¹⁹⁹
74. The term ‘scale’ requires contemplation of the intensity of the means utilized to carry out the act,²⁰⁰ which must be measured after considering the circumstances, unnecessary sufferings and area of operations.²⁰¹ A single airstrike incident does not meet the abovementioned threshold to quantify as a manifest violation of the Charter.²⁰²
75. In the instant case, the airstrike carried out by Astipur were specifically directed against Bravos’ chlorine manufacturing and transportation facilities, thereby limiting the scale of the attacks.²⁰³ The necessary thresholds to constitute a ‘manifest violation’ of the UN Charter are thus absent in the present matter.

¹⁹⁴ *Id.*; CASSESE 2008, 160; O. Solera, *The Definition of the Crime of Aggression: Lessons Not Learned*, 42 CASE W. RES, J. INT’L L. 801, 819 (2010).

¹⁹⁵ Case¶11; ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* 34 (2003); Press, Prime Minister’s Officer, Policy Paper on Syria action- U.K. government legal position (April 18, 2018) <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>.

¹⁹⁶ *Gravity*, Black’s Law, 817 (2014)

¹⁹⁷ KREB, 520.

¹⁹⁸ Van Schaack, *The Crime of Aggression and Humanitarian Intervention on Behalf of Women*, 11 INT’L CRIM. L. REV. 477, 484(2011).

¹⁹⁹ Case¶11.

²⁰⁰ KREB, 520; *I.M.T. for the Far East, Majority Judgment*, in, DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIAL. CHARTER, INDICTMENT AND JUDGMENTS 457-58 (N. Boister and R. Cryer, 2008).

²⁰¹ *United States et. al. v. Sadao Araki*, in THE TOKYO WAR CRIMES TRIAL: THE RECORDS OF IMT FOR FAR EAST ¶493, 498 (John Pictchard ed., 1998).

²⁰² Ruys 2018, 909; Sean D. Murphy, *Aggression, Legitimacy and the International Criminal Court*, 20 E.J.I.L. 1147, 1153(2010).

²⁰³ Case¶11

III. THE DEFENDANT CANNOT BE PROSECUTED FOR AIDING AND ABETTING THE CRIME OF AGGRESSION

76. The provisions of Article 25(3) with respect to the CoA only apply to persons who are in a position to effectively exercise control over or direct the political or military action of a State.²⁰⁴
77. In the instant case, the Defendant cannot be prosecuted for aiding and abetting the CoA since she was not in a position to effectively exercise control or direction over the political or military action a State [A.]. In any event, the ‘shape or influence’ standard must not be applied [B.] and the Defendant did not fulfil the subjective criteria required by Art. 25(3)(c) [C.].

A. THE DEFENDANT WAS NOT IN A POSITION TO EFFECTIVELY EXERCISE CONTROL OR DIRECTION OVER THE POLITICAL OR MILITARY ACTION OF A STATE

78. Aggression is intended to be a leadership crime, even for secondary liability [1.], the Defendant does not exercise control or direction over Astipur’s political or military action [2.] and in any event, previously laid down standards of “control” have not been satisfied [3.].

1) Aggression is intended to be a leadership crime, even for secondary liability

79. The wording of Art. 25(3*bis*) is identical to the definition of CoA,²⁰⁵ emphasising the intent of the drafters to limit the scope of culpability only to the leadership level – for principal and secondary perpetrators alike.²⁰⁶ The plain grammatical meaning of the provision implies that a CoA can only be committed by high ranking leaders of a State, to which the underlying act of aggression is attributable.²⁰⁷
80. The term “a person” must be interpreted strictly,²⁰⁸ to include only those persons who are in a position to effectively control or direct the political or military action of a State.²⁰⁹

²⁰⁴ Statute, art. 25(3*bis*); EoC, art. 8*bis*, 2.

²⁰⁵ Statute, art. 8*bis*(1).

²⁰⁶ Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 E.J.I.L. 477, 495 (2007) [“Kevin Heller”].

²⁰⁷ OTTO TRIFFTERER, 590 ¶33; Kaul, *The Crime of Aggression: Definitional Options for the Way Forward*, in M. POLITI AND G. NESI, *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 46 (2004).

²⁰⁸ Statute, art. 22(2).

The leadership clause under Art. 25(3*bis*) hence excludes individuals with less authority from the CoA, even if their actions were otherwise criminal under Art. 25(3).²¹⁰

2) The Defendant did not exercise control or direction over Astipur’s political or military action

81. The objective of CoA was to restrict its scope to *de-facto* rather than *de-jure* leadership,²¹¹ and it was never intended to apply to those who could not exercise effective control over a State’s political or military action.²¹²
82. The ordinary meaning of the word ‘control’ in international law refers to “domination” of wrongful conduct, rather than instances of mere oversight, influence or concern.²¹³ This interpretation aligns with the dictionary meaning of the word.²¹⁴ Further, this meaning was propounded in *Nicaragua*, while laying down the “effective control” test.²¹⁵ Similarly, the word ‘direct’ implies “actual direction of an operative kind”, and excludes “mere incitement or suggestion” without exercising any real power over the official action.²¹⁶
83. Dealers of arms and ammunition were previously acquitted by the NMT since they were private citizens who had no control over the military action.²¹⁷ Furthermore, even providing other raw material essential for waging aggressive war did not amount to control over the actions of the aggressor State.²¹⁸

²⁰⁹ SERGEY SAYAPIN, *THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW* 277 (2014).

²¹⁰ Kevin Heller, 490.

²¹¹ S.W.G.C.A, ICC-ASP/3/SWGCA/INF.1, ¶44 (June, 2004) [“**S.W.G.C.A. 2004 Report**”].

²¹² *Id.*

²¹³ A.R.S.I.W.A. Commentary, art. 17, ¶7.

²¹⁴ *Control*, Black’s Law, 403

²¹⁵ *Nicaragua*, ¶115.

²¹⁶ A.R.S.I.W.A. Commentary, art. 17, ¶7; Nikola Hadjin, *The Nature of Leadership in the Crime of Aggression*, 17 INT’L CRIM. L. REV. 543, 561 (2017).

²¹⁷ *United States v. Krupp Von Bohlen und Halbach et al.*, Military Tribunal III, *Order of the Tribunal Acquitting the Defendant of the Charges of Crimes Against Peace*, 12 Trials of War Criminals Before the NMT Under Control Council Law No. 10, 449(1950).

²¹⁸ *United States v. Krauch et al.*, Military Tribunal VI, 8 Trials of War Criminals Before the NMT Under Control Council Law No. 10, 1298(1952).

84. In the present matter, the Defendant holds a Chaired Professorship at the Queen's Landing University in Cilanta²¹⁹ and is thus merely a private lawyer. While the legal opinion provided by her might amount to suggestion or influence over the wrongful conduct, it would not reach the standard of "domination", or any actual direction of an operative kind.
85. Moreover, the conduct of amending a policy to adhere to international standards or justifying the legality of a policy falls under the role of genuine legal counsel.²²⁰ The Defendant provided a balanced legal opinion at the instance of the President of Astipur and only tempered it to a more one-sided opinion upon further instruction, which further does not show any control or direction on her part.²²¹
86. The Defendant's conduct thus did not satisfy the requisite threshold of exercising control or direction.

3) Additionally, previously laid down standards of "control" have not been satisfied

87. The Statute provides no express definition of "effective control". Accordingly, the tests laid down with respect to command responsibility under the Statute²²² and that of State responsibility for the conduct of private groups may be applied.²²³
88. *Firstly*, the standard of "effective control" under Art. 28 requires the person to possess the material ability to prevent and punish the commission of offences.²²⁴ General influence on the part of the defendant is not sufficient to meet this standard.²²⁵ *Secondly*, in

²¹⁹ Case¶3.

²²⁰ Ellia Ciammaichella, *A Legal Advisor's Responsibility to the International Community: When Is Legal Advice a War Crime?*, 41 VAL. U. L. REV., 1143, 1160 (2007).

²²¹ Case¶14.

²²² Statute, art. 28; S.W.G.C.A Report, ICC-ASP/6/20/Add.1, Annex II ¶20 (June, 2008).

²²³ Nicaragua, ¶115.

²²⁴ Prosecutor v. Jean-Pierre Bemba et al., I.C.C.-01/05-01/08-424 (P.T.C.), Decision Pursuant to art. 61(7)(a) and (b) on the Charges, ¶415(2009).

²²⁵ *Id.*; Prosecutor v. Semanza, I.C.T.R.-97-20-T (T.C.) ¶402 (15 May, 2003); Prosecutor v. Karera *et al.*, I.C.T.R.-01-74-T (T.C.) ¶564 (December 7, 2007).

Nicaragua, the issuance of specific directions or their enforcement was held to constitute effective control.²²⁶

89. In the instant case, the final decision with respect to the airstrikes vested with the State of Astipur,²²⁷ and thus the Defendant was not in a position to prevent the crime. She was also in no position to issue any orders²²⁸ or directions and ensure enforcement of the same. Furthermore, since the Defendant held no authoritative position in any State,²²⁹ she could not punish the government officials of Astipur.

B. IN ANY EVENT, THE ‘SHAPE OR INFLUENCE’ STANDARD MUST NOT BE APPLIED

90. A less stringent leadership standard of ‘shape or influence’ was adopted by the NMT²³⁰ in the *High Command*²³¹ and *Ministries*²³² and the IMTFE.²³³ This standard was laid down in order to include private actors within the ambit of the crime.²³⁴

91. However, the proposal to incorporate the word “effective” under Article 25(3*bis*),²³⁵ was accepted by the drafting committee,²³⁶ to ensure that CoA remained a leadership crime and its definition is not diluted.²³⁷ Furthermore, the rationale behind rejecting the “shape

²²⁶ *Nicaragua*, ¶115; Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 E.J.I.L. 649, 653(2007).

²²⁷ Case¶11.

²²⁸ Prosecutor v. Radovan Karadžić, I.C.T.Y.-IT-95-5/18 (T.C.) ¶ 581 (24 March, 2016).

²²⁹ Case¶3.

²³⁰ Allied Control Council Law No. 10, 20 Dec. 1945, 15 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, art. 2 ¶2(f) (1951).

²³¹ United States v. von Leeb *et al.*, Military Tribunal XII, 11 Trials of War Criminals Before the NMT Under Control Council Law No. 10, 489 (1950)

²³² United States v. von Weizsäcker *et al.*, Military Tribunal XI, 14 Trials of War Criminals Before the NMT Under Control Council Law No. 10, 425(1949).

²³³ Judgment of the International Military Tribunal for the Far East, *in* THE TOKYO MAJOR WAR CRIMES TRIAL, ¶1190, 1191(R. Pritchard ed., 1998).

²³⁴ Kevin Heller, 489; S.W.G.C.A Report, ICC-ASP/6/SWGCA/INF.1, ¶12 (June 2007); SWGCA Report, ICC-ASP/6/SWGCA/1, ¶9 (December 2007); ICC-ASP/5/SWGCA/INF.1 ¶84.

²³⁵ Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand, PCNICC/2002/WGCA/DP.5 ¶2 (8 July, 2002).

²³⁶ RC/Res.6, ¶5.

²³⁷ W.G.C.A., Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand, PCNICC/2002/WGCA/DP.5 ¶2 (July 8, 2002).

or influence” standard,²³⁸ and even the similar “major role” standard,²³⁹ was that they were overly broad.²⁴⁰ This was because an excessively large number of people would be brought within the ambit of CoA, especially in democracies.²⁴¹

92. Hence, the ‘shape or influence’ test is inapplicable to the present matter, which in turn negates the possibility of applying the ‘overall control’ test.²⁴²

C. THE DEFENDANT DID NOT FULFIL THE SUBJECTIVE CRITERIA REQUIRED UNDER ARTICLE 25(3)(C)

93. There is a dual subjective element in Art. 25(3)(c),²⁴³ which is more rigid than the threshold requirements as laid down by the *ad hoc* tribunals.²⁴⁴ *Firstly*, the act of aiding and abetting must be done for the purpose of facilitating the commission of the crime.²⁴⁵ Purpose implies a specific subjective requirement, which is stricter than mere knowledge.²⁴⁶ It is not concerned with the consummated offense, but attaches to the act of facilitation only and not to the consequences that flow from it.²⁴⁷

94. *Secondly*, the accomplice must be aware of the perpetrator’s mental element, as required by the relevant crime.²⁴⁸ For the CoA, there must be awareness that the use of force would be a manifest violation of the UN Charter.²⁴⁹

²³⁸ OTTO TRIFFTERER, 592.

²³⁹ S.W.G.C.A. 2004, ¶44.

²⁴⁰ Stefan Barriga, *Against the Odds: The Results of the Special Working Group on the Crime of Aggression*, in PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION 8 (2009)

²⁴¹ S. Barriga, 22.

²⁴² Tadić, ¶120.

²⁴³ James Stewart, *An important new orthodoxy on complicity in the ICC statute?*, MANIFESTO (21 January, 2015), <http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/>.

²⁴⁴ Prosecutor v. Seromba, I.C.T.R.-2001-66-A (A.C.) ¶56 (March 12, 2008); Prosecutor v. Vasiljevic, I.C.T.Y.-IT-98-32-A (A.C.) ¶102 (February 25, 2004); Barbara Goy, *Individual Criminal Responsibility before the International Criminal Court: A Comparison with the Ad Hoc Tribunals*, 12 INT’L CRIM. L. REV. 1, 63 (2012) [“Barbara Goy”].

²⁴⁵ Statute, art. 25(3)(c).

²⁴⁶ Barbara Goy, 63; Prosecutor v. Callixte Mbarushimana, I.C.C.-01/04-01/10 (P.T.C.), Decision on the confirmation of charges, ¶274 (December 16, 2011); AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES § 2.06 (1985); Albin Eser, *Individual Criminal Responsibility*, in THE ROME STATUTE OF THE ICC 767, 801 (ANTONIO CASSESE *et. al.*, 2002).

²⁴⁷ *Id.*

²⁴⁸ KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME I, 166 (2013).

MEMORIAL *for* DEFENCE

95. In the present matter, the Defendant, vide her legal opinions, did not facilitate the commission of the crime as the main objective was to receive remuneration for the same.²⁵⁰ Moreover, it cannot be said that the Defendant was aware of the manifest nature of the intervention, since the underlying assumption behind it was to put an end to large-scale atrocities in Bravos.

96. Hence, the Defendant cannot be prosecuted for aiding and abetting the CoA.

²⁴⁹ EoC, 4, 6; KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME II, 211 (2014).

²⁵⁰ Case¶14.

SUBMISSIONS

Wherefore in the light of issues raised, arguments advanced and authorities cited, the Defence Counsel respectfully requests this Court to reverse the impugned decision of the PTC and adjudge and declare that:

- I. The evidence seized from the Defendant's home under the circumstances described must be excluded under Article 69(7) of the Statute.
- II. Astipur's airstrikes were not of the "character, gravity and scale" to constitute a manifest violation of the U.N. Charter as required under Article *8bis* of the Statute.
- III. The Defendant cannot be prosecuted for aiding and abetting the Crime of Aggression under 25(3)(c) of the Statute.

On Behalf of Defence

COUNSEL FOR THE DEFENCE

