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THE APPEALS CHAMBER

SITUATION RELATING TO CRIMES AGAINST HUMANITY IN WESTEROS

IN THE CASE OF

THE PROSECUTOR v. McGREGOR KLEGANE

The Counsel for the Defence's Submission in the Appeal from the Pre-Trial Chamber's Decision on Confirmation of Charges against Defendant McGregor Klegane of Northeros

PUBLIC DOCUMENT

Source: Defence for McGregor Klegane

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LIST OF ABBREVIATIONS

$	United States Dollar
¶	Paragraph
Apr.	April
art.	Article
Aug.	August
CAH	Crimes against Humanity
CEO	Chief Executive Officer
Corr.	Corrigendum
Crim.	Criminal
Dec.	December
Doc.	Document
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
ed./eds.	Editors
Et al.	And
Feb.	February
Giant Fingers	Giant Fingers, Inc.
HRC	United Nations Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
Id.	Idem
ILO	International Labour Organisation
Inc.	Incorporated
INT'L	International
IT	International Tribunal
J.	Journal
Jan.	January
Jul.	July
Jun.	June
Just.	Justice
L.	Law
Mar.	March
Mr.	Mister
No.	Number
Nov.	November
Oct.	October
OECD	The Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OTP	Office of the Prosecutor
p.	Page

PTC	Pre-Trial Chamber
r.	Rule
Reg.	Regulation
Res.	Resolution
Rev.	Review
Sept.	September
STL	Special Tribunal for Lebanon
Supp.	Supplementary
U.N./UN	United Nations
U.N.T.S.	United Nations Treaty Series
UK	United Kingdom
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
v.	Versus
VCLT	Vienna Convention on the Law of Treaties

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STATEMENT OF FACTS

I. Background

Northeros, Southeros, and Westeros are three democratic countries. Due to high levels of unemployment in Southeros, many workers sought employment in the shrimp peeling industry of Westeros.

II. The employment contract between the workers and shrimp-shed operators

Under the general employment contract used, the shrimp-shed operators agree to pay for the transportation, permits, accommodation, and meals of the workers. The workers are also paid $8.50 as daily-wage. The workers work for three years to pay off their debt and entrust their identification documents to the operators.

III. Involvement of Little Fingers, Inc. and McGregor Klegane

Little Fingers, Inc., a seafood export company, purchases shrimp from the shrimp-shed operators. The Westeros Trial Court on 25 February 2017, found that Little Fingers' purchase of shrimps constituted acts of human trafficking.

McGregor Klegane is the CEO of Giant Finger, Inc., the sole-owner of Little Fingers, Inc. The Northeros Trial Court, after a fair and expeditious trial, acquitted him of charges of human trafficking and crimes against humanity on 7 May 2017.

IV. Role of Judge Nefarious

Northeros complies with international standards of due process. Judge Nefarious delivered the judgment at the Northeros Trial Court. However, a newspaper article questioned his impartiality.

V. Proceedings before the Pre-Trial Chamber

The case arises under the International Criminal Court's nationality jurisdiction since the Defendant is a national of Northeros. The Pre-Trial Chamber VI authorised an investigation on 2 July 2017, and issued an arrest warrant for the Defendant. On 30 July 2017, the Counsel for the Defendant raised several objections to the case. The Pre-Trial Chamber VI found sufficient evidence to establish substantial grounds to believe that Klegane was criminally liable for crimes against humanity in Westeros. Pursuant to the Leave to Appeal on 1

September 2017, the Appeals Chamber seeks submissions of all parties and participants on the three predetermined issues.

ISSUES

-A-

Whether the ICC should recognise human trafficking, as set forth in the facts described in the Pre-Trial Chamber's decision, as qualifying as "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" under Article 7(1)(k) of the ICC Statute.

-B-

Whether a corporate subsidiary that purchases shrimp at an extremely low price from the Westeros shrimp-sheds with knowledge of their labour abuses can be treated as an unindicted co-perpetrator for purposes of prosecuting the defendant under Article 25(3)(a) of the ICC Statute, notwithstanding Article 25(1) of the ICC's statute.

-C-

Whether a domestic court acquittal of the defendant based on an erroneous interpretation of the ICC Statute's definition of crimes against humanity under the circumstances of this case shall preclude the ICC from prosecuting the crime under the *ne bis in idem* principle enshrined in Article 20 of the ICC Statute.

SUMMARY OF ARGUMENTS

A. The Pre-Trial Chamber erred in finding that human trafficking in Westeros constitutes a crime against humanity under Article 7(1)(k) of the Statute.

1. The shed-operators have not committed human trafficking as the workers were employed under lawful contracts and were not exploited.
2. The Statute does not envision prosecuting human trafficking under Article 7(1)(k) as it recognises trafficking only as a 'means' of enslavement under Article 7(1)(c).
3. The objective and subjective elements of Article 7(1)(k) are not satisfied in the present case as the workers have not suffered any long-lasting harm and the shed-operators did not aim to cause any great suffering.
4. The acts were not committed in the context of a widespread or systematic attack directed against a civilian population.
5. Thus, the errors made by the Pre-Trial Chamber materially affected its findings on jurisdiction and confirmation of charges under Article 7(1)(k).

B. Little Fingers, Inc. cannot be treated as an unindicted co-perpetrator for prosecuting the Defendant under Article 25(3)(a) of the Statute.

1. Under Article 25(3)(a), co-perpetration is committed jointly with another person. In light of Article 25(1), both the co-perpetrators must be natural persons.
2. Corporations are not capable of criminal responsibility, and thus cannot be looked at as unindicted co-perpetrators.
3. In any case, the Defendant cannot be tried for failing to exercise proper control over Little Fingers, Inc. as the subjective and objective elements of indirect co-perpetration are not satisfied. Further, the mere omission cannot attract principal liability under Article 25(3)(a).
4. Thus, the errors made by the Pre-Trial Chamber materially affected its findings on jurisdiction and confirmation of the charge of co-perpetration.

C. The Pre-Trial Chamber erred in admitting the case against the Defendant as it disregarded the *ne bis in idem* principle enshrined in Article 20 of the Statute.

1. The requirements of Article 20(3) of the Statute are satisfied as McGregor Klegane has already been tried by the Northeros District Court for the same conduct of human trafficking.
2. The exceptions to Article 20(3) are inapplicable as the judiciary was independent and impartial. Further, the trial was *bona fide* and not conducted to shield Klegane.
3. The *Northeros Inquirer* article does not meet the requisite standard of proof for determining the admissibility of a case, as it is only indirect evidence with low probative value.
4. Thus, the errors materially affected the decision of the Pre-Trial Chamber in declaring the case admissible.

WRITTEN ARGUMENTS

PRELIMINARY SUBMISSIONS

The present appeal is preferred by the Counsel for the Defendant (**"Defence"**) McGregor Klegane (**"Klegane"**) under Article 82(1) of the Rome Statute of the International Criminal Court (**"Statute"**).[1] At the outset, the Defence clarifies **[I]** the standard of review over the impugned decision, **[II]** the preconditions to intervene with the impugned decision, and **[III]** the standard of proof applicable to this hearing.

I. Standard of Review on Appeal

Under Article 82(1) of the Statute, the Appeals Chamber (**"Chamber"**) can review decisions of a Pre-Trial Chamber which are affected by errors of law or errors of fact.[2] On errors of fact, the Chamber can intervene with the decision when the findings are manifestly incorrect and there is no reasonable basis on which the Pre-Trial Chamber could reach that particular finding.[3] On errors of law, the Chamber will not defer to the findings of the Pre-Trial Chamber and will come to its own conclusions.[4]

II. Preconditions for intervention with the impugned decision

If the aforementioned error materially affects the impugned decision, this Chamber is required to intervene and rectify the effects of such an error.[5] A decision is said to be materially affected by an error if the Court would have rendered a decision that is substantially different from the erroneous decision.[6] Therefore, in this document in support of

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[1] Rome Statute of the International Criminal Court art. 82(1), Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Statute].

[2] Prosecutor v. Kony et al., ICC-02/04-01/05-408 OA3, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute", ¶80 (Sept. 16, 2009).

[3] Prosecutor v. Mbarushimana, ICC-01/04-01/10-283, Judgment on the appeal of Mr. Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled Decision on the 'Defence Request for Interim Release', ¶¶1, 15-18 (Jul. 14, 2011).

[4] Prosecutor v. Laurent Gbagbo, ICC-02/11-01/15 OA 8, Judgment on the appeals of Mr. Laurent Gbagbo and Mr. Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", ¶21 (Nov. 1, 2016).

[5] Prosecutor v. Katanga and Ngudjolo, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, ¶37 (Sept. 25 2009).

[6] Situation in the DRC, ICC-01/04-169, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ¶84 (Jul. 13, 2006).

appeal submitted by the Defence, pursuant to Regulations 64(2) and 65(4) of the Regulations of the Court ("**Regulations**"),[7] it is pointed out as to how each of the errors committed by Pre-Trial Chamber VI (**"PTC"**) have materially affected the decision.

III. Standard of Proof at the Confirmation of Hearing Stage

A decision that is materially affected by errors can be reversed or amended by this Chamber.[8] The standard of proof at the appellate hearing will be the same as that which was applicable at the Pre-Trial Chamber.[9] The Pre-Trial Chamber applies the standard of *"sufficient evidence to establish substantial grounds to believe"*,[10] which requires the Prosecutor to offer concrete and tangible proof demonstrating a clear line of reasoning underpinning the allegations.[11] Therefore, this evidentiary standard is applicable in this appeal.

[7] ICC, Regulations of the Court Reg. 64(2), 65(4), ICC-BD/01-01-04, (2004) [hereinafter Regulations].

[8] ICC, Rules of Procedure and Evidence Rule 158, ICC-PIOS-LT-03-003/16_Eng (2002) [hereinafter Rules].

[9] *Id.* at, r. 149.

[10] Statute, *supra* note 1, at art. 61(7).

[11] Prosecutor v. Bemba, ICC-01/05-01/08, Decision on the confirmation of charges, ¶29 (Jun. 15, 2009) [hereinafter Bemba Confirmation].

ARGUMENTS

A. THE PTC ERRED IN FINDING THAT THE ALLEGED ACTS OF HUMAN TRAFFICKING IN WESTEROS CONSTITUTE CRIMES AGAINST HUMANITY UNDER ARTICLE 7(1)(K) OF THE STATUTE.

The Defence submits that the PTC erred in confirming charges against Klegane as **[I.]** the acts of the shrimp shed operators (**"shed-operators"**) do not constitute human trafficking (**"trafficking"**) as the Southeros workers ("**workers"**) were lawfully employed by them. **[II.]** In any case, the alleged acts cannot be characterised as crimes against humanity (**"CAH"**) under Article 7(1)(k) of the Statute. **[III.]** Due to these errors, the decision of the PTC was materially affected and should be reversed.

I. The shed-operators have not committed trafficking as they lawfully employed the workers.

The Statute does not define trafficking.[12] Therefore, under Article 21(1)(b) of the Statute,[13] the Court may rely on the definition provided by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (**"Trafficking Protocol"**),[14] which is the applicable treaty[15] and relevant rule of international law.[16]

The definition requires three elements to be fulfilled cumulatively to constitute trafficking. These are an *action* by which a person is moved into a situation of trafficking, the *means* used to secure that action, and the exploitative *purpose* for which the *means* were used.[17] The Defence submits that trafficking did not occur as **[a.]** the workers were neither recruited by any prohibited means **[b.]** nor for an exploitative purpose.

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[12] ANNE GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 216 (2010) [hereinafter Gallagher].

[13] Statute, *supra* note 1, at art. 21(1)(b); Prosecutor v. Bemba, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶71 (Mar. 21, 2016) [hereinafter Bemba Trial].

[14] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime art. 3, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol].

[15] GEORGHIOUS PIKIS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 81 (2010).

[16] Gallagher, *supra* note 12, at 42; Trafficking Protocol, *supra* note 14, at art. 3; *Global Report on Trafficking in Persons 2016* 48, UNODC, https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf (last visited Feb. 23, 2018).

[17] Trafficking Protocol, *supra* note 14, at art. 3(a).

a. The workers were not recruited by any prohibited means.

The contractual recruitment of workers was valid as none of the five prohibited *means* in the Trafficking Protocol were employed to achieve their consent.[18] *First*, the workers were not 'coerced' as no threat or force was used against them.[19] *Second*, there was no 'fraud' or 'deception' as no false promises were made about the work conditions.[20] On the contrary, the contract elaborately discussed the nature of promised work and the conditions imposed.[21] *Third*, as there were no personal relationships between the workers and shed-operators, there could have been no 'abuse of power'.[22] *Fourth*, the shed-operators did not contract with any 'person having control' over workers to purchase them.[23] *Finally*, even if a lack of alternative employment opportunities constitutes a vulnerability,[24] the shed-operators did not abuse this vulnerability as the workers themselves sought employment in Westeros and were offered the standard wage.[25]

b. The workers were not recruited for an exploitative purpose.

The workers were not recruited for an exploitative *purpose*, as they were not maintained in a situation of **[1.]** forced labour, **[2.]** slavery, **[3.]** slavery-like practices, or servitude.

1. <u>The workers were not subjected to forced labour.</u>

Forced labour exists only where work is extracted under a menace of penalty, and the person has not offered himself voluntarily for the work.[26] A risk of unemployment faced by the

[18] *Id.*

[19] *Abuse of a position of vulnerability and other "means" within the definition of trafficking in persons* 17, UNODC, http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf (last visited Feb. 23, 2018) [hereinafter UNODC Trafficking]; *Operational indicators of trafficking in human beings* 4, ILO, www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_105023.pdf (last visited Feb. 23, 2018).

[20] UNODC Trafficking, *supra* note 19, at 17; *Assistance for the Implementation of the ECOWAS Plan of Action against Trafficking in Person* 34, UNODC, https://www.unodc.org/documents/human-trafficking/ecowas_training_manual_2006.pdf (last visited Feb 23. 2018); *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, COUNCIL OF EUROPE ¶82, https://rm.coe.int/16800d3812 (last visited Feb. 23, 2018).

[21] Case[p.4].

[22] UNODC Trafficking, *supra* note 19, at 17; *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* 343, UNODC, https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf (last visited Feb. 24, 2018).

[23] UNODC Trafficking, *supra* note 19, at 19.

[24] *Id.* at 24.

[25] Case[p.4].

[26] ILO Convention concerning Forced or Compulsory Labour art. 2(1), May 1, 1932, 39 U.N.T.S. 55.

workers cannot be treated as a menace of penalty to extract forced labour.[27] Merely because the workers object to a situation they initially consented to, the situation does not turn into forced labour.[28] Moreover, contracts of fixed duration, like in the present case,[29] are not considered exploitative unless workers are forced to work after the expiration of the contract.[30] Thus, the workers were not maintained in a situation of forced labour.

2. The workers were not subjected to slavery.

Slavery only includes situations where the victim is reduced to chattel.[31] The powers exercised over the victim are absolute, such that a person may be purchased or sold.[32] There is no commensurate compensation for the work performed.[33]

In the present case, the shed-operators have not exercised any powers over the workers that amount to slavery. *First*, the workers voluntarily sought employment in the shrimp industry.[34] *Second*, they received the average wage prevailing in Westeros.[35] *Finally*, they were free to leave the employment at the end of the three-year contractual period.[36]

3. The workers were not subjected to slavery-like practices or servitude.

Slavery-like practices, or servitude,[37] is understood to include situations of debt bondage and serfdom.[38] Both these situations require the impossibility of altering one's condition[39] due to

[27] *Report of the Committee set up to examine the representation made by the General Confederation of Portuguese Workers under article 24 of the Constitution alleging non-observance by Portugal of the Forced Labour Convention, 1930* ¶97, ILO, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2506962,en (last visited Feb. 23, 2018); ILO, FORCED LABOUR AND HUMAN TRAFFICKING CASEBOOK OF COURT DECISIONS 12 (2009).

[28] Van Der Mussele v. Belgium, 8919/80, ECtHR ¶34 (1983); Tibet Menteş and Others v. Turkey, 57818/10, ECtHR ¶68 (2017).

[29] Case[p.4].

[30] *Guiding Principles to Combat Forced Labour* 2, ILO, http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/instructionalmaterial/wcms_099625.pdf (last visited Feb. 23, 2018).

[31] Siliadin v. France, 73316/0, ECtHR ¶122 (2005) [hereinafter Siliadin]; *R v. Tang* [2008] High Court of Australia 39 ¶32-3 (Aug. 28, 2008) [hereinafter Tang].

[32] U.N. ECOSOC, U.N. Doc. E/2357, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), 28 (1953).

[33] *Id.*

[34] Case[p.4].

[35] *Id.*

[36] *Id.*

[37] JEAN ALLAIN, SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING SLAVERY IN INTERNATIONAL LAW 144 (2012) [hereinafter Allain].

the indefinite nature of service,[40] or the inability to escape.[41] As the workers are free to depart after three years according to the contracts,[42] they were not maintained in a situation of slavery-like practices or servitude.

II. In any case, the alleged acts cannot be characterised as a CAH under Article 7(1)(k) of the Statute.

Article 7(1)(k) is a qualified residual clause which accommodates forms of inhumane conduct not otherwise prohibited under Article 7.[43] The Defence submits that **[a.]** the Statute does not envision prosecuting trafficking under Article 7(1)(k). **[b.]** Alternatively, the objective and subjective elements of Article 7(1)(k) are not satisfied in this case. **[c.]** In any case, the acts were not committed in the context of a widespread or systematic attack directed against a civilian population.

a. The Statute does not envision prosecuting trafficking under Article 7(1)(k).

Article 7(1)(k) must not be used to uncritically expand the scope of CAH.[44] In this regard, the Defence contends that **[1.]** the Statute recognises trafficking only as a 'means' of enslavement under Article 7(1)(c) and not a separate crime, and **[2.]** in this case, the acts of the operators do not constitute enslavement.

1. The Statute recognises trafficking only as a 'means' of enslavement and not a separate crime.

The drafters did not intend to punish trafficking as a distinct crime.[45] Thus, the PTC indiscriminately used Article 7(1)(k) to expand the scope of CAH as Article 7(2)(c) explicitly recognises trafficking as a mere 'means' of enslavement.[46]

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[38] Supplementary Convention on the Elaboration of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery art. (1)(a), Apr. 30, 1957, 266 U.N.T.S. 3 [hereinafter Supplementary Convention].

[39] Gallagher, *supra* note 12, at 182.

[40] Supplementary Convention, *supra* note 38, at art. (1)(a).

[41] *Id.*, at art. (1)(b).

[42] Case[p.4].

[43] Statute, *supra* note 1, at art. 7(1)(k); Chistopher, Larissa, *Jurisdiction, Admissibility and Applicable Law*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 235 (Ambos ed., 2016).

[44] Prosecutor v. Kenyatta, ICC-01/09-02/11-382-Red, Decision of the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶269 (Jan. 23, 2012) [hereinafter Kenyatta Confirmation].

[45] Allain, *supra* note 37, at 274.

[46] Gallagher, *supra* note 12, at 216.

2. The acts of the shed-operators do not amount to enslavement under Article 7(1)(c).

Enslavement[47] only includes situations of slavery[48] where the victim is reduced to chattel.[49] Therefore, situations of forced labour and practices similar to slavery,[50] are punishable only when they amount to such slavery.[51] As established above, the shed-operators have not exercised any powers over the workers that amount to slavery. Thus, the acts of the shed-operators do not constitute enslavement.

b. Alternatively, the objective and subjective elements of Article 7(1)(k) are not satisfied.

Other inhumane acts, under Article 7(1)(k), require the fulfilment of the **[1.]** objective and the **[2.]** subjective elements of the crime.[52] The Defence submits that neither of these elements are satisfied in the present case.

1. The objective elements of Article 7(1)(k) are not satisfied.

The objective elements of Article 7(1)(k) require the perpetrator to inflict great suffering or serious injury[53] resulting in long-term disadvantages.[54] Instances of serious bodily injury include beating,[55] mutilation,[56] and serious injury to organs.[57] Similarly, mental harm includes lasting impairment of the mental faculties,[58] which goes beyond mere psychological damage or attacks on human dignity.[59]

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[47] Statute, *supra* note 1, at art. 7(2)(c).

[48] JEAN ALLAIN, THE LAW AND SLAVERY 42 (2015).

[49] Siliadin, *supra* note 31, ¶122; Tang, *supra* note 31, at ¶32-3.

[50] ICC, Elements of Crimes art. 7(1)(c), ICC-ASP/1/3(II-B), 9 September 2002 [hereinafter Elements of Crimes].

[51] Statute, *supra* note 1, at art. 9(3); BASSIOUINI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT 400 (1998); Allain, *supra* note 37, at 282.

[52] Elements of Crimes, *supra* note 50, at art. 7(1)(k).

[53] *Id.*

[54] Prosecutor v. Krstić, IT-98-33-T, Trial Judgment, ¶510 (ICTY Aug. 2, 2001) [hereinafter Krstić Trial].

[55] Prosecutor v. Delalić, IT-96-21-T, Trial Judgment, ¶1034 (ICTY Nov. 16, 1998).

[56] Prosecutor v. Kvočka, IT-98-30/1-T, Trial Judgment, ¶¶208-9 (ICTY Nov. 2, 2001).

[57] Prosecutor v. Kayishema, ICTR-95-1-T, Trial Judgment, ¶109 (May 21, 1999).

[58] Krstić Trial, *supra* note 54, at ¶510.

[59] *Id.*, at ¶510.

In the present case, the workers have not suffered any instances of harm leading to lasting impairment.[60] In fact, they enjoy three meals a day, lodging in camps located near the shrimp sheds, and a daily wage of $8.50, which is the standard wage in Westeros.[61] Moreover, shrimp-peeling is ordinarily known to only cause minor health effects such conjunctivitis, skin infections and allergies that clearly do not compare in suffering or injury to crimes like murder, extermination or torture.[62]

2. The subjective elements of Article 7(1)(k) are not satisfied.

The subjective element of Article 7(1)(k) requires the aforementioned objective elements to be committed with *dolus directus* of the first or the second degree,[63] with factual awareness of the circumstances that established the character of the act.[64] *Dolus directus* of the first degree includes situations where the perpetrator meant to commit the alleged crime.[65] In the present case, the shed-operators did not possess the *dolus directus* of the first degree as the employment contracts were aimed at peeling shrimp, and not causing serious suffering through trafficking.[66] *Dolus directus* of the second degree includes situations where serious injury would certainly follow barring an unforeseen intervention.[67] The operators did not possess the *dolus directus* of the second degree as shrimp peeling does not lead to serious injury in the ordinary course of events.[68]

c. In any case, the acts were not committed in the context of a widespread or systematic attack directed against a civilian population.

To constitute CAH, an attack must be committed pursuant to a State or organisational policy.[69] In this regard, the requisite elements are not satisfied because **[1.]** Little Fingers, Inc.

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[60] Case[p.4].

[61] *Id.*

[62] United Workers Congress, *Precarious Work in the Asian Seafood Global Value Chain* 53, https://www.ituc-csi.org/IMG/pdf/precarious_work_in_the_asian_seafood_global_value_chain.pdf (last visited Feb. 23, 2018) [hereinafter Precarious Work Report].

[63] Prosecutor v. Katanga, ICC-01/04-01/07, Decision on the confirmation of charges, ¶455 (Sept. 30, 2008) [hereinafter Katanga Confirmation].

[64] Elements, *supra* note 50, at art. 7(1)(k).

[65] Statute, *supra* note 1, at art. 30.

[66] Case[p.4].

[67] Statute, *supra* note 1, at art. 30; GEERT-JAN KNOOPS, MENS REA AT ICC 37 (2016).

[68] Precarious Work Report, *supra* note 62.

[69] Statute, *supra* note 1, at art. 7(1), 7(2)(a); Katanga Confirmation, *supra* note 63, at ¶393.

(**"LFI"**) is not an entity capable of committing crimes under Article 7. Further, **[2.]** the alleged attack was not committed pursuant to any 'policy' designed by LFI or Westeros.

1. LFI is not an entity capable of committing crimes under Article 7.

LFI is not an entity capable of committing CAH as **[i.]** it is neither a State entity, **[ii.]** nor a State-like entity. Further, **[iii.]** a broader interpretation of 'organisational policy' should be rejected.

i. LFI is not a State entity.

CAH requires the misuse of power primarily by State actors.[70] The drafters never intended to include non-State actors under Article 7(2).[71] Thus, organisational policy refers only to policies of organisations of a State, such as the military, or police.[72] Since LFI is not an organisation of the State, it is not an entity capable of committing crimes under Article 7.

ii. LFI is not a State-like entity.

Even if the definition of 'organisation' is extended, it may only include a 'State-like' non-State entities.[73] Previously, an organised criminal group was held to not fall within this meaning of 'organisation' despite having a court system and a quasi-military wing.[74] Therefore, FLI, a subsidiary seafood export company, with no state-like features, is not capable of committing crimes under Article 7 of the Statute.

iii. A broader interpretation of 'organisational policy' should be rejected.

A broader interpretation of 'organisational policy'[75] should be rejected for three reasons. *First*, the Chamber must dismiss any interpretation of the Statute that could result in rendering any of its provisions void.[76] A broad interpretation renders the separate contextual

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[70] BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 202 (2d ed. 1999) [hereinafter Bassiouni]; Cassese, *Crimes Against Humanity*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 360 (Cassesse ed., 2002); Prosecutor v. Limaj, IT-03-66-T, Trial Judgment, ¶212 (ICTY Nov. 30, 2005) [hereinafter Limaj].

[71] 1 BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS AND INTEGRATED TEXT 151-2 (2005).

[72] Bassiouni, *Crimes Against Humanity: The Case for a Specialised Convention*, 9 WASH. U. GLOBAL STUD. L. REV. 575, 585 (2010).

[73] *Situation in the Republic of Kenya*, ICC-01/09, Decision on the Authorization of an Investigation, Judge Kaul Dissent ¶67 (Mar. 31, 2010) [hereinafter Kenya Authorisation]; SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 152 (2010); Bassiouni, supra note 70, at 244-5.

[74] Kenyatta Confirmation, *supra* note 44, at ¶20, Judge Kaul Dissent.

[75] Kenya Authorisation, *supra* note 73, at ¶90.

[76] Bemba Trial, *supra* note 13, at ¶77; Prosecutor v. Katanga, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, ¶46 (Mar. 7, 2014) [hereinafter Katanga Trial].

requirement of "organisational policy" superfluous,[77] as any entity that has the capacity to carry out an attack under Article 7 would automatically satisfy the test of being an 'organisation'.

Second, a broader interpretation violates the principle of legality under Article 22(2) of the Statute by applying an open-ended definition.[78] Moreover, any ambiguity in the definition of a crime should be interpreted favourably for the defendant.[79] Thus, an 'organisation' should be restricted to 'State-like' entities.

Third, a broader interpretation indefinitely expands the scope of the Court's jurisdiction. In light of the Court's financial constraints, this will lead to arbitrary selection of situations, inefficient prosecutions, and incapacity to tackle all situations within the Court's jurisdiction.[80]

2. The alleged attack was not committed pursuant to any 'policy' designed by LFI or Westeros.

It is necessary to show that the attack was committed pursuant to a State or organisational 'policy'.[81] In this regard, **[i.]** purchasing shrimp does not constitute an organisational policy. **[ii.]** *Alternatively*, a delay in implementing reforms does not amount to a state policy.

i. Purchasing shrimp does not constitute an organisational policy.

To satisfy the policy requirement, it is important to demonstrate that the organisation meant to commit an attack.[82] A mere motive to commit an attack is insufficient.[83]

In the present case, LFI's acts of purchasing shrimp[84] for profits can only be a motive, and does not show an intent to commit trafficking. Thus, in the absence of any intent, an organisational policy does not exist.

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[77] Claus Kress, *On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision*, 23 LEIDEN J. INT'L. L. 855, 859, 866 (2010).

[78] Kenya Authorisation, *supra* note , at ¶55; H. OLASOLO, INTERNATIONAL CRIMINAL COURT AND INTERNATIONAL TRIBUNALS: SUBSTANTIVE AND PROCEDURAL ASPECTS 180 (2006).

[79] Statute, *supra* note 1, at art. 22(2).

[80] Kenya Authorisation, *supra* note 73, at ¶10.

[81] Katanga Trial, *supra* note 76, at ¶1115.

[82] *Id.*, at ¶1113; Prosecutor v. Ruto & Sang, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶213 (Jan. 23, 2012) [hereinafter Ruto Confirmation].

[83] Ruto Confirmation, *supra* note 82, at ¶213.

[84] Case[p.5].

ii. *Alternatively, a delay in bringing about reforms does not amount to a deliberate 'policy' on the part of Westeros.*

A State policy cannot be inferred by the inability to prevent an attack.[85] The conduct of private actors cannot be attributed to a State unless they act under the State's influence, direction, or control.[86]

Westeros is a developing economy based largely on shrimp exports.[87] Any drastic policy measures that gravely affect the economy require a reasonable time for planning and implementation to avoid unintended negative externalities.[88] Thus, a mere delay in implementing promised reforms does not constitute a State policy.

III. The decision of the PTC was materially affected, and should be reversed.

The aforementioned errors of law made by the PTC materially affected its decision in assuming jurisdiction *ratione materiae*, and in finding that there are substantial grounds to believe that crimes within the Court's jurisdiction occurred in this case.

[85] Elements of Crimes, *supra* note 50, at art. 7; Charles Jalloh, *What Makes A Crime Against Humanity A Crime Against Humanity*, 28 AM. U. INT'L L. REV 426 (2013) [hereinafter Jalloh]; Ruto Confirmation, *supra* note 82, at ¶210.

[86] Jalloh, *supra* note 85, at 424.

[87] Case[p.3].

[88] Lucie Cerna, *The Nature of Policy Change and Implementation: A Review of Different Theoretical Approaches* 11, OECD, http://www.oecd.org/education/ceri/The%20Nature%20of%20Policy%20Change%20and%20Implementation.pdf (last visited Feb. 23, 2018).

B. THE PTC ERRED IN TREATING LFI AS AN UNINDICTED CO-PERPETRATOR FOR PROSECUTING THE DEFENDANT UNDER ARTICLE 25(3)(A) OF THE STATUTE.

The Defence submits that the PTC erred in finding that LFI could be treated as an unindicted co-perpetrator under the Statute. It is contended that **[I.]** the Statute prohibits treating a company as an unindicted co-perpetrator, under Article 25(3)(a). **[II.]** In any case, Klegane cannot be tried for failing to exercise proper control over LFI. **[III.]** Due to these errors, the decision of the PTC was materially affected and should be reversed.

I. The Statute prohibits treating a company as an unindicted co-perpetrator under Article 25(3)(a).

The Defence submits that the Court must not consider Klegane and LFI as co-perpetrators since **[a.]** Article 25(3)(a) must be interpreted in light of Article 25(1) of the Statute. Moreover, **[b.]** LFI is incapable of incurring criminal responsibility under the Statute.

a. Article 25(3)(a) must be interpreted in light of Article 25(1) of the Statute.

Article 25(1) limits the jurisdiction of the Court to natural persons and excludes legal persons.[89] Under Article 25(3)(a), co-perpetration can only exist when a crime is committed jointly with another person.[90] The term 'person' in Article 25(3)(a) must be interpreted in light of Article 25(1).[91] Any interpretation to the contrary would defeat the object and purpose of Article 25(1).[92] In the present case, LFI is a legal person.[93] Thus, it cannot be a co-perpetrator under the Statute.

b. LFI is incapable of incurring criminal responsibility under the Statute.

The ICC,[94] ICTY,[95] and STSL[96] have considered unindicted co-perpetrators only when they are capable of incurring criminal responsibility.[97] Attribution of conduct and *mens rea* to a

[89] U.N. Diplomatic Conference of Plenipotentiaries and the Establishment of an ICC, 26th mtg., U.N. Doc. A/CONF.183/C.1/SR.26 3 (Jul. 8, 1998).

[90] Statute, *supra* note 1, art. 25(3)(a).

[91] Vienna Convention on the Law of Treaties art. 31(1), Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT]; Rolf Fife, *Applicable Penalties*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1885 (Ambos ed., 2016); Schabas, *General Principles of Criminal Law in the International Criminal Court Statute (Part III)*, 6 EUR. J. CRIM. L. & JUST. 400, 409 (1998).

[92] VCLT, *supra* note 91, at art. 31(1).

[93] Case[p.5].

[94] Prosecutor v. Ongwen, ICC-02-04-01/15-375-AnxA-Red, Document Containing the Charges, ¶15 (Dec. 22, 2015) [hereinafter Ongwen].

[95] Prosecutor v. Prlić, Case No. IT-04-74-A, Decision On Application by The Republic of Croatia For Leave To Appear As Amicus Curiae And To Submit Amicus Curiae Brief, ¶9 (ICTY Jul. 18, 2016) [hereinafter Prlić].

[96] Prosecutor v. Ayyash, STL-11-01/T/TC, Decision Amending The Consolidated Indictment (Sept. 7, 2016) [hereinafter Ayyash].

company is necessary to impute criminal responsibility.[98] The Defence submits that the Court cannot treat LFI as an unindicted co-perpetrator as it is incapable of incurring criminal responsibility, as **[1.]** the Statute intentionally excludes standards of attribution for companies, and **[2.]** no universally recognized standards of attribution for companies exist under international criminal law.

1. The Statute does not provide standards of attribution for companies.

The drafting history reflects that there was no consensus over standards of attribution,[99] and certain standards such as 'collective knowledge of members' were explicitly rejected.[100] Thus, in the absence of attribution standards for companies within the Statute, LFI cannot be treated as a co-perpetrator.

2. No universally recognised standards of attribution exist under international criminal law.

There exist no universally recognised standards of attribution for companies.[101] The ICC[102] and *ad-hoc* tribunals[103] have refrained from making findings on organisations owing to the lack of specific attribution standards.[104] Thus, LFI is incapable of being treated as a co-perpetrator as no mens rea or conduct can be attributed to it.

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[97] Prlić, *supra* note 95.

[98] Cristina Chiomenti, *Corporations and the International Criminal Court*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 296 (Olivier de Schutter ed., 2006).

[99] UNGA, Report of The Inter-Sessional Meeting from 19 to 30 January 1998 In Zutphen, The Netherlands, U.N. Doc. A/AC.249/1998/L.13 (Feb. 4, 1998); U.N. Diplomatic Conference of Plenipotentiaries and the Establishment of an ICC, U.N. Doc. A/CONF.183/13(Vol. III) 251 (2002) [hereinafter Working Group]; *Id.*, at 291.

[100] U.N. Diplomatic Conference of Plenipotentiaries and the Establishment of an ICC, 1st mtg., U.N. Doc. A/CONF.183/C.1/SR.1 133 (Nov. 20, 1998); Working Group, *supra* note 99.

[101] James Crawford, STATE RESPONSIBILITY: THE GENERAL PART 81 (2014); Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 189, 199 (Lee ed., 1999) [hereinafter Saland]; Kai Ambos, *General Principles Of Criminal Law In The Rome Statute*, 10 CRIM. L. FORUM 1 (1999)

[102] Ongwen, *supra* note 94, at ¶15; Prosecutor v. Ongwen, ICC-02-04-01/15-422-Red, Decision on the Confirmation of Charges Against Dominic Ongwen, ¶66 (Mar. 23, 2016); Prosecutor v. Bemba, ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute, ¶¶125, 131, 320-3 (Oct. 19, 2016).

[103] Prlić, *supra* note 95, at ¶9.

[104] Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 9, Aug. 8, 1945, 82 U.N.T.S 280.

II. In any case, Klegane cannot be tried for failing to exercise proper control over LFI, which is implicated in acts of trafficking committed by its suppliers.

Co-perpetration under Article 25(3)(a) encompasses the mode of indirect co-perpetration.[105] The Defence submits that Klegane cannot be tried as an indirect co-perpetrator as **[a.]** neither the objective elements **[b.]** nor the subjective elements of indirect co-perpetration[106] are satisfied.

a. The objective elements of indirect co-perpetration are not satisfied.

The objective elements of indirect co-perpetration are not satisfied as Klegane and LFI **[1.]** did not have a common plan, and **[2.]** did not make any essential contribution to the alleged plan. Alternatively, **[3.]** a mere omission to supervise LFI cannot trigger principal liability for Klegane. Further, **[4.]** Klegane had no control over the organisation.

1. A common plan did not exist between the co-perpetrators.

The common plan between the co-perpetrators must inherently[107] include an element of criminality.[108] A common plan has previously been evinced from meetings[109] and regular briefings to the perpetrators[110].

In the present case, there exists no explicit common plan between the co-perpetrators. In any case, the only inferable plan is that of LFI purchasing shrimp at a competitive price, which lacks the necessary element of criminality. In fact, LFI was even willing to make the processing in-house.[111] Thus, no common plan can be sad to exist between the co-perpetrators.

[105] Prosecutor v. Al Bashir, ICC-02/05-01/09-3, Prosecution's Application for Warrant of Arrest against Al Bashir, ¶210 (Mar. 4, 2009); Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on confirmation of charges, ¶326-8 (Jan. 29, 2007) [hereinafter Lubanga Confirmation]; Katanga Confirmation, *supra* note 63, at ¶492; Prosecutor v. Blé Goudé, ICC-02/11-02/11, Decision on confirmation of charges, ¶136 (Dec. 11, 2014) [hereinafter Blé Goudé Confirmation].

[106] Katanga Confirmation, *supra* note 63, at ¶¶500-571.

[107] Blé Goudé Confirmation, *supra* note 105, at ¶140.

[108] Lubanga Confirmation, *supra* note 105, at ¶344.

[109] Kenyatta Confirmation, *supra* note 44, at ¶308.

[110] Lubanga Confirmation, *supra* note 105, at ¶373.

[111] Case[p.4].

2. The co-perpetrators did not make any essential contribution.

Co-perpetrators must make essential contributions to the common plan.[112]A contribution is considered 'essential' only if its absence would frustrate the crime.[113]

In the present case, the alleged crimes result from the employment contracts between the workers and shed-operators. LFI's only contribution was buying shrimp from the shed-operators at the prevailing price. This contribution cannot be considered 'essential' for two reasons. *First,* if LFI decided to purchase shrimp at higher prices, the shed-operators would absorb the profit and continue to exploit workers in the absence of any governmental oversight. *Second,* if LFI stopped purchasing shrimp altogether, the shed-operators would continue to exploit workers and sell shrimp to other export companies. Thus, the crime would not be frustrated in either case.

3. A mere omission to supervise LFI cannot trigger principal liability for Klegane.

The drafters of the Statute,[114] the ICC,[115] and the ICTY[116], have noted that a mere omission is insufficient to confirm the charge of co-perpetration. If the Court were to proceed with omission cases without any general criteria, it would violate the principle of *nullum crimen sine lege*.[117] Thus, Klegane, as CEO of Giant Fingers, Inc. (**"GFI"**), cannot be held liable as a co-perpetrator for omitting to supervise the actions of LFI.[118]

4. Klegane had no control over the organisation.

The Defendant must have control over the organisation, such that his orders are met with 'automatic compliance'[119]. He must control[120] the will of the direct perpetrator,[121] so that the latter has no liberty to decide the terms of performance.[122]

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[112] Katanga Confirmation, *supra* note 63, at ¶522; Lubanga Confirmation, *supra* note 105, at ¶347.

[113] Ruto Confirmation, *supra* note 82, at ¶306; Katanga Confirmation, *supra* note 63, at ¶525.

[114] U.N. Diplomatic Conference of Plenipotentiaries and the Establishment of an ICC, 23th mtg., U.N. Doc. A/CONF.183/C.1/SR.23 264 (Jul. 3, 1998).

[115] Lubanga Confirmation, *supra* note 105, at ¶205; Bemba Confirmation, *supra* note 11, at ¶220; Saland, *supra* note 101, at 189-216.

[116] Prosecutor v. Blaškić, IT-95-14-A, Appeals Judgment, ¶47 (ICTY Jul. 29, 2004); Prosecutor v. Limaj, *supra* note 70, at ¶514; Prosecutor v. Tadić, IT-94-1-A, Appeals Judgment, ¶188 (ICTY Jul. 15, 1999); GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 965 (2005).

[117] Saland, *supra* note 101, at 189-216; Kai Ambos, *Individual Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1027 (Ambos ed., 2008) [hereinafter Ambos].

[118] Case[p.5].

[119] Ruto Confirmation, *supra* note 82, at ¶292; Katanga Confirmation, *supra* note 63, at ¶511.

In this case, Klegane had no control over the shed-operators for two reasons. *First*, the latter had absolute liberty to dictate and control the conditions of employment in Westeros, as they were operating independently.[123] *Second*, the shrimp-exporting companies recognised that they were unable to monitor the functioning of the shrimp sheds.[124] Therefore, Klegane had no control over the organisation.

b. Subjective elements of co-perpetration are not met in this case.

Defence submits that the subjective elements of indirect co-perpetration are not satisfied as **[1.]** Klegane and LFI did not share a mutual intention and awareness to fulfil the material elements of the crimes. Further, **[2.]** Klegane does not satisfy the subjective elements of the crime and **[3.]** was not aware of the factual circumstances that enabled him to exercise joint control over the crime.

1. The co-perpetrators did not share a mutual intention and awareness to fulfil the material elements of the crimes.

Co-perpetrators are required to be aware that implementing the common plan would result in the realisation of the objective elements of the crime.[125] Pursuant to Article 30 of the Statute, the subjective element requires *dolus directus* of the first or the second degree.[126]

In the present case, Klegane and LFI did not possess the *dolus directus* of the first degree as their act of purchasing shrimps was aimed at earning profits, and not at committing trafficking.[127] Even if trafficking occurred, corporate practice demonstrates that public reports are not sufficient to attribute knowledge of labour abuse to companies.[128] Klegane and LFI cannot be expected to be aware of abuses in the absence of any mandatory due diligence or

[120] Eser, *Individual Criminal Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767 (Cassesse ed., 2002); Prosecutor v. Delalić, IT-96-21-A, Appeal Judgment, ¶¶258-66 (ICTY Feb. 20, 2001); Prosecutor v. Kordić, IT-95-14/2-T, Trial Judgment, ¶415 (ICTY Feb. 26, 2001).

[121] Katanga Confirmation, *supra* note , at ¶497.

[122] Katanga Trial, *supra* note 76, at ¶1411; Claus Roxin, *Crimes as Part of Organized Power Structures*, 9 J. INT'L. CRIM. JUST. 204 (2011); Katanga Confirmation, *supra* note 63, at ¶511.

[123] Case[p.4].

[124] Case[p.4].

[125] Statute, *supra* note 1, at art. 7(1)(k); Elements of Crime, *supra* note 50, at art. 7(1)(k).

[126] Statute, *supra* note 1, at art. 30.

[127] Case[p.5].

[128] ELIZABETH KACZMAREK, THE BUSINESS OF HUMAN TRAFFICKING 17-8 (2014).

disclosure laws requiring them to investigate into the acts of the shrimp shed-operators.[129] This is pertinent as the government, having the primary responsibility to tackle trafficking,[130] promised to investigate into the matter and implement reforms.[131] Thus, Klegane and LFI did not share a mutual intention and awareness to fulfil the material elements of the crimes.

2. Klegane does not satisfy the subjective elements of the crime.

The Defendant must fulfil the subjective elements of Article 7(1)(k) of the Statute.[132] In this case, Klegane did not possess the *dolus directus* of the first degree as the employment contracts were aimed at peeling shrimp, and not at causing serious suffering.[133] Further, he did not possess the *dolus directus* of the second degree as shrimp peeling does not lead to serious injury in the ordinary course of events, as established above.

3. Klegane was not aware of any factual circumstances that enabled him to exercise joint control over the crime.

The Defendant is required to be aware of his essential role, which empowers him to frustrate the occurrence of the crime.[134] The *mens rea* requirement under Article 25(3)(a) is that the perpetrator 'must know',[135] and not 'should have known',[136] of the factual circumstances. As established above, a lack of mandatory due diligence and the government's proclamation to intervene successfully rebuts the existence of *dolus directus* of the first and second degree.

III. The decision of the PTC was materially affected and should be reversed.

The aforementioned errors of law made by the PTC materially affected its decision in assuming jurisdiction *ratione personae*, and in finding that there are substantial grounds to confirm the mode of liability of indirect co-perpetration against Klegane.

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[129] *Modern Slavery in Company Operation and Supply Chains* 16, BHRRC, http://www.l20argentina.org/pdf/modern_slavery_in_company_operation_and_supply_chain_final.pdf (last visited Feb. 24, 2018); *Scandal: Inside the global supply chains of 50 top companies* 7, ITUC, https://www.ituc-csi.org/IMG/pdf/pdffrontlines_scandal_en-2.pdf (last visited Feb. 24, 2018).

[130] Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework 10, U.N. OHCHR, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited Feb. 24, 2018).

[131] Case[p.4].

[132] Statute, *supra* note 1, at art. 30.

[133] Case[p.4].

[134] Lubanga Confirmation, *supra* note 105, at ¶367.

[135] Statute, *supra* note 1, at art. 30.

[136] Bemba Confirmation, *supra* note 11, at ¶354.

C. THE PTC ERRED IN ADMITTING THE CASE AGAINST THE DEFENDANT AS IT DISREGARDED THE *NE BIS IN IDEM* PRINCIPLE ENSHRINED IN ARTICLE 20 OF THE STATUTE.

The *ne bis in idem* principle enshrined in Article 20(3) of the Statute[137] prohibits double prosecution.[138] The PTC erred in admitting the case against Klegane as **[I.]** the requirements of Article 20(3) of the Statute are satisfied in the present case, and **[II.]** the exceptions to Article 20(3) of the Statute are inapplicable. **[III.]** In any case, the newspaper article from the *Northeros Inquirer* does not meet the requisite standard of proof for determining the admissibility of a case. **[IV.]** Thus, the decision of the PTC was materially affected and should be reversed.

I. The requirements of Article 20(3) of the Statute are satisfied.

Article 20(3) of the Statute prohibits this Court from admitting a case against a person if the "*same conduct and same person*" test is satisfied.[139] This test precludes a second trial before the ICC if **[a.]** the person has already been tried by another court, and **[b.]** the trial was for conduct proscribed by Article 7.[140] In this regard, the Defendant's trial by the Northeros District Court satisfies the requirements of Article 20(3).

a. The Defendant has already undergone trial in the Northeros District Court.

The phrase 'tried by another court' in Article 20(3) of the Statute includes a court's[141] final decision leading to an acquittal.[142] In this regard, Klegane underwent trial and the Northeros District Court acquitted him after finally adjudicating on the merits of the case.[143]

b. The trial in the Northeros District Court was for conduct proscribed by Article 7.

Under Article 20(3), a subsequent trial at the ICC is prohibited if it is based on the same conduct as the domestic trial.[144] In this regard, Klegane had already been tried for the conduct

[137] Statute, *supra* note 1, at art. 20(3).

[138] *Id.*, at art. 30; ANTONIO CASSESE, THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 304 (2009).

[139] Prosecutor v. Katanga, ICC-01/04-01/07-4, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ¶20 (Jul. 6, 2007).

[140] Statute, *supra* note 1, at art. 20(3).

[141] Immi Tallgren, Coracini, *Ne Bis in Idem*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 915 (Ambos ed., 2016) [hereinafter Coracini].

[142] Prosecutor v. Bemba, ICC-01/05-01/08-1019, Decision on the Admissibility and Abuse of Process Challenges, ¶248 (Oct. 19, 2010); *Id.*, at 920.

[143] Case[p.6].

of trafficking by the Northeros District Court.[145] Therefore, even if the PTC's legal characterisation of trafficking differs from that of the Northeros District Court, this Court cannot pursue a subsequent trial.[146] Thus, the requirements of Article 20(3) are satisfied.

II. The exceptions to Article 20(3) do not apply to the present case.

Since the requirements of Article 20(3) are satisfied, a subsequent prosecution is only permissible under the two exceptions stipulated in Article 20(3).[147] The Defence submits that **[a.]** this Court cannot intervene except in clear cases of unwillingness. **[b.]** Such an assessment of unwillingness cannot be based on the substantive outcome of the proceedings. Therefore, the PTC erred in admitting the present case as **[c.]** the trial was conducted independently and impartially, and **[d.]** was not conducted to shield the Klegane from criminal responsibility.

a. The ICC cannot intervene except in clear cases of unwillingness.

The underlying premise of the complementarity regime is that the Court is neither an international court of appeal nor a human rights body.[148] It does not interfere in domestic trials except in the most obvious cases of unwillingness.[149] The onus on the Prosecution to prove unwillingness is higher in cases where domestic proceedings have already taken place.[150] Therefore, a *bona fide* effort by Northeros to prosecute Klegane is sufficient to bar the ICC from exercising jurisdiction.[151]

[144] Prosecutor v. Kubura, IT-01-47-T, Trial Judgment, ¶257 (ICTY Mar. 15, 2006); U.N. INT'L L. COMM., *Draft Code of Offences Against the Peace and Security of Mankind,* at art. 42(2)(a), U.N. Doc. A/26939 U.N. G.A.O.R Supp. No. 9 (1954); Coracini, *supra* note , at 919.

[145] Case[p.5].

[146] Philipp Ambach, *Relationship of the Court with the UN*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 40 (Ambos ed., 2016).

[147] Statute, *supra* note 1, at art. 20(3).

[148] OTP, *Informal Expert Paper: The Principle of Complementarity in Practice* 16, ICC (Nov. 2013), https://www.icc-cpi.int/RelatedRecords/CR2009_02250.pdf. [hereinafter Informal Expert Paper].

[149] *Report of the International Law Commission on the work of its forty-sixth session*, U.N. Doc. A/49/10 119 (1994) [hereinafter Draft Statute]; *Id.*, at 16.

[150] Holmes, *Complementarity: National Courts versus the ICC*, *in The Rome Statute of the International Criminal Court: A* Commentary 678 (Cassese ed., 1999); Coracini, *supra* note 141, at 925.

[151] Coracini, *supra* note 141, at 920.

b. An assessment of unwillingness cannot be based on the substantive outcome of the proceedings.

Any attempt to prove that a State is unwilling to prosecute the defendant must be based on procedural and institutional factors.[152] An assessment of unwillingness based on the outcome of proceedings is inconsistent with the Statute,[153] as it undermines the defendant's right to be presumed innocent before the ICC.[154] Thus, the acquittal of Klegane cannot be the basis to establish unwillingness.

c. The trial was conducted independently and impartially in accordance with the norms of due process recognised by international law.

Only a complete absence of fairness and impartiality violates norms of due process under Article 20(3), rendering a case admissible.[155] In assessing due process violations, this Court may be guided by the jurisprudence of international human rights courts and conventions.[156] The Defence submits that **[1.]** the trial in the Northeros District Court was conducted independently, and **[2.]** Judge Nefarious acted impartially.

1. <u>The trial in the Northeros District Court was conducted independently.</u>

The trial in Northeros was conducted independently as **[i.]** the appointment procedure of the judiciary was satisfactory, and **[ii.]** Judge Nefarious enjoyed security of tenure.

i. <u>The appointment procedure of Judge Nefarious was satisfactory.</u>

The method of appointment of judges constitutes a key factor in determining the independence of the judiciary.[157] However, a judge's independence may only be challenged if it is proved that there was an external influence that rendered the entire appointment procedure unsatisfactory.[158]

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[152] Informal Expert Paper, *supra* note 148, at 14.

[153] *Id.*

[154] Statute, *supra* note 1, at art. 66; ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW 174 (2008) [hereinafter Zeidy].

[155] Statute, *supra* note 1, at art. 20(3)(b); Prosecutor v. Saif Al-Islam Gaddafi, ICC-01/11-01/11-466-Red, Decision on the admissibility of the case against Abdullah Al-Senussi, ¶¶188, 241 (Oct. 11, 2013); Coracini, *supra* note 141, at 927.

[156] Prosecutor v. Lubanga, ICC-01/04-01/06-512, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute, ¶38 (Oct. 3, 2006); JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 129 (2008); Prosecutor v. Furundžija, IT-95-17/1-A, Appeals Chamber, ¶183-9 (ICTY Jul. 21, 2000) [hereinafter Furundžija].

[157] Campbell and Fell v. UK, 7819/77, ECtHR, ¶78 (1984) [hereinafter Campbell]; Baischer v. Austria, 32381/96, ECtHR, ¶23 (2001) [hereinafter Baischer].

[158] DJ HARRIS, M O'BOYLE, C WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 223 (1995); Zeidy, *supra* note 154, at 198.

In this case, the mere appointment of Judge Nefarious by the former President of Northeros[159] does not affect the independence of the trial,[160] especially because the court system in Northeros complies with international standards of due process.[161]

ii. Judge Nefarious enjoyed security of tenure.

Judges require security of tenure to be independent.[162] The ECtHR has held terms as short as three years[163] and five years[164] to be consistent with independence. Therefore, Judge Nefarious enjoyed security of tenure as he was appointed for a fixed eight-year term,[165] leaving no scope for executive abuse.[166]

2. Judge Nefarious acted impartially.

Impartiality denotes an absence of prejudice or bias.[167] In the present case, Judge Nefarious acted impartially as both **[i.]** the subjective test, and **[ii.]** the objective test are satisfied.

i. The subjective test is satisfied.

The subjective test presumes the impartiality of a judge until there is proof to the contrary. [168] It must be shown that the judge displayed hostility towards the applicant or acted with personal bias.[169] Personal bias includes preconceptions,[170] or language,[171] which explicitly shows an unfavourable view towards a party.[172] In this regard, there is nothing in the facts to show that Judge Nefarious acted with personal bias.

[159] Case[p.8].

[160] Baischer, *supra* note 157; Campbell, *supra* note 157, at ¶79; Flux v. Moldova, 22824/04, ECtHR, ¶27 (2008) [hereinafter Flux]; Zolotas v. Greece, 33310/09, ECtHR, ¶24 (2013).

[161] Case[p.2].

[162] Incal v. Turkey, 22678/93, ECtHR, ¶65 (1998); Garcia v. Peru, Case 11.006, IACtHR, Report No. 7/98, OEA/Ser.L/V/II.88, doc. 9 rev. 95 (1995).

[163] Campbell, *supra* note 157, at ¶80.

[164] A.K. v. Liechtenstein, 38191/12, ECtHR, ¶76 (2015) [hereinafter AK].

[165] Case[p.8].

[166] Campbell, *supra* note 157, at ¶80.

[167] Piersack v. Belgium, 8692/79, ECtHR, ¶30 (1982).

[168] *Id.*; Steck-Risch v. Liechtenstein, 63151/00, ECtHR, ¶40 (2005).

[169] De Cubber v. Belgium, 9186/80, ECtHR, ¶25 (1984); Hauschildt v. Denmark, 10486/83, ECtHR, ¶46 (1989).

[170] Buscemi v. Italy. 29569/95, ECtHR, ¶68 (1999).

[171] Vardanyan & Nanushyan v. Armenia, 8001/07, ECtHR, ¶82 (2016).

[172] Kyprianou v. Cyprus, 73797/01, ECtHR ¶130 (2005).

ii. The objective test is satisfied.

The objective test requires negating even an appearance of bias.[173] However, this appearance must be objectively justified.[174] The Defence submits that the test is satisfied as **[ii.a]** the alleged link between Klegane and Judge Nefarious is too remote, and **[ii.b]** the allegation of bias against Judge Nefarious will unduly hamper the administration of justice.

ii.a The alleged link between Klegane and Judge Nefarious is too remote.

Any judge who has a financial interest in the outcome of a case may reasonably be called biased.[175] However, a remote financial link between the judge and the parties does not show such bias.[176]

In the present case, the former President appointed Judge Nefarious seven years ago.[177] Even though Klegane contributed to the former President's campaign, he has no executive control that may be leveraged over Judge Nefarious.[178] Therefore, such a link between Judge Nefarious and Klegane is very remote and does not raise a reasonable apprehension of bias.

ii.b The allegation of partiality against Judge Nefarious will unduly hamper the administration of justice.

Claims of bias should not paralyse the legal system of Northeros.[179] Thus, excessively strict standards in respect of impartiality must not be applied as it would hamper the administration of justice.[180]

In the present case, if the remote link between Judge Nefarious and Klegane is accepted, it would effectively paralyse proceedings against any campaign contributor of the President, as all judges will be deemed to be biased in light of their appointment by the President. Therefore, the administration of justice in Northeros will be unduly hampered.

[173] Furundžija, *supra* note 156, at ¶¶189-90.

[174] Wettstein v. Switzerland, 33958/96, ECtHR, ¶44 (2001); Pabla Ky v. Finland, 47221/99, ECtHR, ¶30 (2004); Micallef v. Malta, 17056/06, ECtHR, ¶96 (2009).

[175] Furundžija, *supra* note 156, at ¶189.

[176] AK, *supra* note 164, at ¶75.

[177] Case[p.8].

[178] Campbell, *supra* note 157, at ¶77.

[179] AK, *supra* note 164, at ¶82.

[180] *Id.*; Biagioli v. San Marino, 8162/13, ECtHR, ¶¶80, 103 (2014).

d. The trial was not conducted to shield Klegane from criminal responsibility.

Under the principle of complementarity, Northeros honoured its primary responsibility to investigate and prosecute international crimes.[181] The Defence submits that the trial was not conducted for the purpose of shielding Klegane as **[1.]** the trial was *bona fide*, and **[2.]** Northeros suitably discharged its duty towards the ICC by cooperating under Article 59 and Article 86 of the Statute.

1. <u>The trial was bona fide.</u>

Shielding requires satisfying a high evidentiary burden[182] by showing a clear and devious intent of the state.[183] The ECtHR[184] and IACtHR[185] have only found instances of shielding when there existed a disregard for relevant facts and obvious investigative steps, or manipulation of evidence.[186] Mere errors by the domestic court do not suffice.[187]

In this regard, *first*, the trial in Northeros was *bona fide* as the investigation or trial does not indicate any extraneous considerations or influences.[188] *Second*, the lack of extra-territorial application of the domestic act is a legislative decision beyond the control of the judiciary.[189] *Finally*, alleging that the court made a clear error in interpreting the definition of CAH in an otherwise *bona fide* trial is insufficient to allege shielding.[190] Thus, the trial does not evince an intent to shield the accused.

[181] Statute, *supra* note 1, at Preamble; *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, UN CHRONICLE, https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law.com (last visited Feb. 23, 2018).

[182] BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 90 (2003) [hereinafter Broomhall]; Coracini, *supra* note 141, at 925.

[183] Zeidy, *supra* note 154, at 170; Louise Arbour and Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, *in* REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT 131 (Herman A. M. von Hebel et al. eds., 1999).

[184] Nachova v. Bulgaria, 43577/98, 43579/98, ECtHR, ¶¶132-3 (2005); Timurtas v. Turkey, 23531/94, ECtHR, ¶¶ 88, 110 (2000).

[185] Velásquez Rodríguez v. Honduras, IACtHR, Judgment, (Ser. C) No. 4 (1988), ¶177 (1988); Villagran Morales v. Guatemala, IACtHR, Judgment, Series C no 63, ¶226 (1999); Myrna Chang v. Guatemala, IACtHR, Judgment, Series C No 101, ¶¶166-73 (2003).

[186] Zeidy, Schabas, *Issue of Admissibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 819-21 (Ambos ed., 2016).

[187] Coracini, *supra* note 141, at 925; Draft Statute, *supra* note 149, at 58.

[188] Vardanyan and Nanushyan v. Armenia**,** 8001/07, ECtHR, ¶82 (2016).

[189] D. HALJAN, SEPARATING POWERS: INTERNATIONAL LAW BEFORE NATIONAL COURTS 36 (2013).

[190] Coracini, *supra* note 141, at 925.

2. Northeros suitably discharged its duty towards the ICC by cooperating under Article 59 and Article 86 of the Statute.

Northeros discharged its obligation under Article 59[191] and Article 86[192] of the Statute by taking the Defendant into custody, and transferring him to the ICC in eight days after the ICC issued a warrant of arrest against him.[193] This cooperation with the ICC clearly shows an intent to bring Klegane to justice.[194]

IV. The newspaper article from the Northeros Inquirer does not meet the requisite standard of proof for determining the admissibility of a case.

The prosecution has to satisfy a high evidentiary burden to prove that a case is admissible when domestic proceedings have already taken place.[195] Indirect evidence such as media reports are of low probative value,[196] and can only be used when there exists other evidence to corroborate them.[197]

The PTC doubted the impartiality of Judge Nefarious based on facts drawn from an article by the *Northeros Inquirer*, a domestic newspaper.[198] The article alleged an indirect financial link between Klegane and Judge Nefarious. Therefore, the PTC erred by basing its decision substantially on this article, as it did not apply the standard of proof required in admissibility proceedings.

V. The decision of the PTC was materially affected and should be reversed.

The aforementioned errors of law made by the PTC materially affected its decision on the admissibility of the case by concluding that the principle of *ne bis in idem* does not apply.

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[191] Statute, *supra* note 1, at art. 59.

[192] *Id.*, at art. 86.

[193] Case[p.6].

[194] OTP, *Policy Paper on Preliminary Examinations*, ICC 18 (Nov. 2013), https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf.

[195] Broomhall, *supra* note 182.

[196] Ruto Confirmation, *supra* note 82, at ¶78.

[197] Bemba Confirmation, *supra* note 11, at ¶52.

[198] Case[p.8].

SUBMISSIONS

Wherefore in light of issues raised, arguments advanced, and authorities cited, the Counsel for the Defence respectfully requests this Chamber to reverse the impugned decision of the Pre-Trial Chamber and to adjudge and declare that:

A. Human trafficking, as set forth in the facts does not qualify as other inhumane acts under Article 7(1)(k) of the Statute.
B. Little Fingers, Inc. cannot be treated as an unindicted co-perpetrator for purpose of prosecuting Klegane under Article 25(3)(a) of the Statute.
C. The case against Klegane is inadmissible at the ICC, owing to the *ne bis in idem* principle.

On Behalf of Defence

COUNSEL FOR THE DEFENCE