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THE APPEALS CHAMBER

Case before the International Criminal Court (ICC):

The Prosecutor v. Arrix Vragar

Situation in The Republic of Northeros

The Defense Counsel's Submission in the Appeal from the Pre-Trial Chamber's Decision on Denial of Confirmation of Charges against Defendant Arrix Vragar of the Republic of Northeros

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LIST OF ABBREVIATIONS

ABSS	A.I. Automated Border Control System
AC	Appeals Chamber
ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
AfCHPR	African Court on Human and Peoples' Rights
Art(s)	Article(s)
CAH	Crime against humanity
Cf.	Compare
CIL	Customary international law
Davos	State of Davos
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EoC	Elements of Crimes
Eg	exempli gratia (for example)
FOE	Freedom of expression
GC	Geneva Convention
HRC	Human Rights Committee
HRI	Human Rights International
IACtHR	Inter-American Court of Human Rights
Ibid.	Ibidem (in the same place)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTRY	International Criminal Tribunal for the former Yugoslavia

Ibid	ibidem (in the same place)
ILC	International Law Commission
Morghule	Varmiter Morghule
Northeros	Republic of Northeros
OTP	Office of the Prosecutor
PCA	Permanent Court of Arbitration
Pentos	State of Pentos
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
RS / the Statute	Rome Statute of the International Criminal Court
SCSL	Special Court for Sierra Leone
Shreaker	Syrix Shreaker
Southeros	Kingdom of Southeros
STL	Special Tribunal for Lebanon
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNHRC	United Nations Human Rights Council
Vragar	Arrix Vragar
Vragarsoft	Vragarsoft Corp.

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Appendix A, Map of the Area

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STATEMENT OF FACTS

Factual Background

The case involves four states situated on the Davos Passage: Northeros, Southeros, Davos and Pentos. All States are members of the United Nations however only Pentos is a party to the RS.

Arrix Vragar

The Defendant, the CEO and founder of Vragarsoft, was born to Davos parents while they were temporarily working in Pentos. Pentos law considers all persons born in Pentos to be Pentos nationals. Davos law grants nationality to all children of Davos nationals. Neither State has laws prohibiting dual nationality.

Vragar has lived in Davos since infancy, and both he and his Davos-incorporated company, Vragarsoft, pay substantial annual taxes to Davos authorities.

Alleged Criminal Acts by Arrix Vragar

Northeros, is governed by the Baleran regime who issued four decrees in November 2021 that curtailed the rights of females in Northeros.

In response undocumented Northeros migrants crossing into Southeros, Vragarsoft was contracted to develop and instal a fully ABSS.

ABSS entered into operation in July 2023. According to the report provided by the HRI, ABSS does not fire on persons lawfully crossing the bridge at the single official border crossing station. ABSS was also designed with a fail-safe to prevent killing of innocents.

ABSS has supposedly caused 3,460 individuals to have died while attempting to cross into Southeros.

Publication of Confidential Information

Vragarsoft operates Cyberleaks, a website publishing authentic leaked documents Vragar considers in the public interest. Cyberleaks has earned praise for promoting transparency, supporting press freedom, and enriching democratic discourse by challenging powerful institutions.

On 20 February OTP received a confidential report from HRI detailing Vragar's alleged complicity in aiding the Northeros government's systematic discrimination against females. It included the names of witnesses. Only a redacted version was available to the public.

Shortly after the hack, Cyberleaks published an unredacted version of the report.

The OTP has been unsuccessful in its attempts to locate or establish communication with the witnesses identified in the document.

Procedural History

On 10 August 2024, the PTC declined to confirm the charges concluding the Court lacked jurisdiction, there was insufficient evidence to establish crimes grounds under Articles 7(1)(k), 25(3)(c), and 70(1)(c) RS. Pursuant to Leave to Appeal, the Appeals Chamber has sought submissions of all parties on the three predetermined issues.

ISSUES

Issue 1

Whether the PTC erred in holding that the ICC lacked jurisdiction over the Defendant under Article 12(2)(b) of the RS because he lacked a sufficient link to Pentos, a State Party to the Rome Statute.

Issue II

Whether the PTC erred in finding that the allegations and evidence are insufficient to establish substantial grounds to believe that the Defendant aided and abetted the commission of the inhumane act of "gender apartheid" under Article 7(1)(k) and Article 25(3)(c) of the RS.

Issue III

Whether the PTC erred in finding that the Defendant cannot be tried for committing an offense against the administration of justice under Article 70(1)(c) of the RS when the web platform that he created and controlled published a confidential document hacked from the ICC that included the names of anticipated witnesses in this case.

SUMMARY OF ARGUMENTS

I. THE ICC LACKS JURISDICTION OVER VRAGAR UNDER ARTICLE 12(2)(B)

A. The ICC lacks jurisdiction over Vragar as a 'genuine link' must exist between an accused and a State Party to establish nationality-based jurisdiction. *Firstly*, the RS does not define 'national,' and under the VCLT, treaty terms must be interpreted in good faith. *Secondly*, CIL confirms that nationality requires more than a mere legal designation.

B. *Even if* a 'genuine link' is not required, the ICC retains competence to assess contested nationality claims.

C. *Lastly*, establishing jurisdiction over Vragar would contradict key policy considerations.

II. NO SUBSTANTIAL GROUNDS TO BELIEVE VRAGAR AIDED AND ABETTED "GENDER APARTHEID"

A. 'Gender apartheid' is not recognised as an "inhumane act" under Article 7(1)(k) of the RS.

B. *Even if* 'gender apartheid' could constitute a CAH, the alleged acts do not meet the legal threshold for Article 7(1)(k). *Firstly*, Article 7(1)(k) is a residual category that should not be arbitrarily expanded. *Secondly*, the alleged acts fail to inflict great suffering or serious injury, as required under Article 7(1)(k). *Thirdly*, the acts are not of a similar nature to other enumerated CAHs.

C. *Alternatively,* if the alleged acts of the Baleran regime constituted a CAH, Vragar did not aid and abet their commission under Article 25(3)(c). *Firstly*, Vragar lacked the requisite *mens rea*, as it is not evident he acted with the specific purpose of furthering gender apartheid. *Secondly*, his conduct did not amount to a substantial contribution, as providing a border security system to an unrelated State does not equate to aiding or abetting a crime.

III. VRAGAR CANNOT BE TRIED FOR COMMITTING AN OFFENCE UNDER ARTICLE 70(1)(C) FOR CYBERLEAKS' LAWFUL PUBLICATION

A. *Firstly*, Vragar lacked the requisite *mens rea* to obstruct the administration of justice.

B. *Even if* intent were established, Cyberleaks' publication does not meet the *actus reus* standard for witness interference. *Firstly*, Article 70(1)(c) is a conduct crime, meaning liability requires a direct act of obstruction, which is absent here. *Secondly*, a good faith interpretation of 'obstructing or interfering' is required to prevent excessive policy expansion, avoiding a precedent that could criminalize journalistic activity. *Thirdly*, Cyberleaks' passive publication of a leaked document does not constitute direct obstruction.

C. *Lastly*, Vragar's conduct is protected under the CIL of FOE.

I. THE ICC LACKS JURISDICTION OVER VRAGAR UNDER ARTICLE 12(2)(B)

The ICC lacks jurisdiction over Vragar because his ties to Pentos, a State Party to the RS,[1] are insufficient.[2] Under Article 12(2)(b), jurisdiction requires the accused to be a "national" of a State Party.[3] The PTC correctly found Vragar's mere birth in Pentos alone does not establish a sufficient connection. Consequently, the ICC lacks nationality-based jurisdiction because (**A**) a 'genuine link' is required under Article 12(2)(b); (**B**) the Court may assess its own competence in contested nationality cases; and (**C**) policy considerations prohibit jurisdiction under weak nationality claims.

A. A 'genuine link' must exist between the accused and the State to establish jurisdiction

a) *The RS does not define 'national'*

Article 12(2)(b) of the RS establishes the Court's jurisdiction in instances where the person accused of the crime is a 'national' of a State Party. However, the terms "national" and "state of nationality" are undefined with the Court's RPE provide any relevant specifications.[4]

Accordingly, 'national' must be interpreted in accordance with good faith under the *VCLT*.[5] Article 31(1) requires treaties be interpreted in light of their object and purpose. The OTP recently emphasised that the "object and purpose" of the RS is "to end impunity *and* ensure that the Court's jurisdiction is triggered responsibly and lawfully".[6] A literal or overly expansive interpretation of 'national', disregarding the necessity for a "genuine connection",[7] violates this general principle of treaty interpretation. An overly formalistic interpretation would *prima facie* undermine state sovereignty and ICC legitimacy, contradicting the RS's goal of responsible and lawful jurisdiction.

The RS *travaux préparatoires* and subsequent work of the ICC Preparatory Commission do not address this issue,[8] likely because nationality-based jurisdiction was "not controversial" during

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[1] *Prosecutor v Arrix Vragar* (ICC, Pre-Trial Chamber XV, 15 September 2024) [8].
[2] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002, as amended 2010).
[3] *RS* art 12(2)(b).
[4] ICC, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002).
[5] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[6] *Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine* (ICC, Case No ICC-01/18, 22 January 2020) s 29 (emphasis added).
[7] *Nottebohm (Liechtenstein v Guatemala) (Judgement)* [1955] ICJ Rep (1955) 4, 29.
[8] Zsuzsanna Deen-Racsmány, 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court' (2001) 95 *American Journal of International Law* 606, 606.

drafting.[9] Moreover, the ICC has never prosecuted cases based on the accused's nationality,[10] rather than territory,[11] for jurisdiction.[12] Though considered in the 2014 reopening of the *Situation in Iraq*, where the Prosecutor examined possible criminal responsibility of State Party UK nationals for acts committed in non-State Party Iraq,[13] the preliminary examination was eventually closed in 2020.[14]

b) *Requirement of 'genuine' nationality to establish jurisdiction is CIL*

Despite this ambiguity, non-State Parties to the RS have "have long professed a fear that their nationals could be brought up before the court".[15] Indeed, non-States Parties Northeros, Southeros, and Davos refused to pursue criminal charges against Vragar, or cooperate with the court. Therefore to establish whether Vragar, a dual national of both Pentos and Davos, falls under ICC jurisdiction, CIL must be examined to determine whether his Pentos nationality is more than "notional".[16]

CIL is established if the "constitutive role attributed to the two elements of State practice and *opinio juris*" is met.[17] The requirement of a 'genuine link', which has "radiated throughout the international law of nationality" for decades,[18] receives such status. The *Hague Convention* mandates that a State's nationality to an individual be internationally recognized only if it aligns with "international conventions, custom, and generally recognized principles of [nationality] law".[19] The *European Convention,* which confirmed the international law principle of State sovereignty in relation to nationality,[20] affords international law the power not to "determine who is a national", but rather "the conditions under which that determination must be recognized by other States".[21] Therefore, Vragar's Pentos nationality wholly contradicts international law principles and customs.

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[9] William A Schabas, 'Article 12: Preconditions to the Exercise of Jurisdiction' in *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2nd ed, 2016) 354.
[10] *RS* art 12(2)(b).
[11] Ibid art 12(2)(a).
[12] *Schabas Art. 12 Commentary* 355.
[13] OTP, *Report on Preliminary Examination Activities* (ICC, 2 December 2014) <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Pre-Exam-2014.pdf> [44].
[14] ICC, *Preliminary Examination: Iraq/UK* (Web Page, 9 December 2020) <https://www.icc-cpi.int/iraq>.
[15] Andrew Wolman, 'Dual Nationality and International Criminal Court Jurisdiction' (2020) 18(5) *Journal of International Criminal Justice* 1081, 1082.
[16] OTP, *Report on Preliminary Examination Activities* (ICC, 5 December 2019) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/191205-rep-otp-PE.pdf> [35].
[17] Michael Wood, Special Rapporteur, *Second Report on Identification of Customary International Law*, UN Doc A/CN.4/672 (22 May 2014) 10.
[18] *Iran v United States (Case No A/18)* (1984) 5 Iran–US Cl Trib Rep 251, 263.
[19] *Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws*, opened for signature 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937) art 1.
[20] ILC, *Draft Articles on Diplomatic Protection with Commentaries*, UN GAOR, 58th sess, Supp No 10, UN Doc A/61/10 (2006) 29.
[21] *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000) art 3.

International law requires a genuine and effective link to a State, not merely formal nationality. Though the ICC has not ruled on nationality-based jurisdiction, the ICJ's decision in *Nottebohm* is relevant.[22] Nottebohm, a dual national, was found to have had an "extremely tenuous" link to Liechtenstein,[23] lacking a "genuine connection of existence, interests and sentiments".[24] Vragar similarly lacks a "social fact of attachment" to justify his Pentos nationality as a "legal bond".[25] Without a genuine connection to Pentos, nationality jurisdiction under Article 12(2)(b) cannot be established. Crucially, the *Nottebohm* rule has been accepted by various domestic,[26] bilateral[27] and international[28] courts. The ILC further described *Nottebohm* as "authority" for a 'genuine link' requirement in case of "dual or plural nationality".[29] Since the rule constitutes CIL, Pentos is bound when indiscriminately attributing nationality to Vragar

Scholars emphasise that nationality-based jurisdiction, as "a rule of general public international law",[30] must be grounded in a genuine connection between the individual and the State. Schabas urges the Court to consider whether the link is "genuine and substantial", rather than "some formal and perhaps even fraudulent grant of citizenship".[31] Blakesley similarly asserts that nationality must be based on "genuine and substantial links to the state in question", [32] describing the *Nottebohm* principle as a "rule of customary international law".[33] To ensure the legitimacy of ICC jurisdictional claims, the legal fiction of Vragar's Pentos nationality cannot be relied upon under Article 12(2)(b).

c) *Even if requirement of 'genuine' nationality is not CIL, it is a general principle consistent with other emerging tests for dual nationals*

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[22] *Nottebohm*.
[23] Ibid 25.
[24] Ibid 23.
[25] Ibid 25.
[26] *Sykes v Cleary* (1992) 176 CLR 77 [50].
[27] *Iran-US Case* 265; *Mergé Case (Italy v United States) (Decision No 55)* (Italian–United States Conciliation Commission, 10 June 1955) (1955) 3 RIAA 236.
[28] See recently, HRC, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3022/2017,* 140th sess, UN Doc CCPR/ C/140/D/3022/2017 (23 May 2024) [8.10]. See also *Nottebohm* [37]; *Expelled Dominicans and Haitians v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs) (IACtHR, 28 August 2014) (2014) Ser C No 282 [253]–[256]; *Petropavlovskis v Latvia* (ECtHR, Fourth Section, Application No 44230/06, 13 January 2015) [84]; *Michael Ballantine and Lisa Ballantine v Dominican Republic (Final Award)* (PCA, Case No 2016-17, 3 September 2019) [559].
[29] John Robert Dugard, Special Rapporteur, *First Report on Diplomatic Protection*, UN Doc A/CN.4/506 and Add 1 (7 March 2000) 228 [106].
[30] *Wolman* 1088.
[31] William A Schabas, *An Introduction to the International Criminal Court* (5th ed, Cambridge University Press, 2017) 59.
[32] Charles Blakesley, 'Jurisdiction Ratione Personae, or the Personal Reach of the Court's Jurisdiction' in José Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court* (Martinus Nijhoff, 2009) 423, 426.
[33] Ibid 426.

If the limitation that a "State may not be able to exercise nationality jurisdiction over persons with whom it has no genuine connection" is not accepted as CIL,[34] then the *Nottebohm* rule is an "expression of a general principle".[35] As a "general principle of law",[36] the *Nottebohm* requirement of a "genuine connection"[37] is still relevant to the ICC when establishing nationality-jurisdiction upon a "sufficient link" between Pentos and Vragar,[38] particularly since the court is guided by "rules and principles of international law".[39] Most recently, the OTP's found that the *de jure* South Korean citizenship attributed North Korean was merely "notional"[40] and therefore, not materially sufficient to establish nationality-based ICC jurisdiction.[41] This finding aligns well with the general principle requiring 'genuine connection' with a State to establish Article 12(2)(b) jurisdiction.

d) *Vragar has no sufficient link to Pentos so that jurisdiction can be established*

Evaluating Vragar's "purported"[42] Pentos nationality with "general 'genuine link' factors",[43] such as "habitual residence, center of interests, family ties, participation in public life and other evidence of attachment",[44] confirm Vragar's Pentos nationality is merely nominal. Vragar lacks all these ties, his only connection to Pentos was his birth.[45] Without a genuine and substantial link to Pentos, jurisdiction under Article 12(2)(b) cannot be established. The burden remains on the Prosecution.

B. Vragar's birth in Pentos alone does not establish a sufficient jurisdictional link

a) *Vragar was merely born in Pentos*

If Pentos "can validly consider [Vragar] its national",[46] then ICC may exercise nationality-based jurisdiction. Though each State ordinarily "determine[s] under its own law who are its nationals"[47] because nationality is within a State's *domaine reserve*,[48] the acceptance of purported nationality vis-a-vis another State falls outside the *domaine reserve* and is regulated under international law.[49]

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[34] Danielle Ireland-Piper, *Accountability in Extraterritoriality: A Comparative and International Law Perspective* (Edward Elgar, 2017) 42.
[35] Luke Dimitrios Spieker and Ferdinand Weber, 'Bonds without Belonging? The Genuine Link in International, Union, and Nationality Law' (2025) *Yearbook of European Law* 4, 5.
[36] *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Separate Opinion of Judge Jessup)* [1970] ICJ Rep 3, 161, 186.
[37] *Nottebohm* 29.
[38] *Prosecutor v Arrix Vragar* (ICC, Pre-Trial Chamber XV, 15 September 2024) [17(a)].
[39] RS art 21(1)(b).
[40] *OTP 2019 Report* [35].
[41] Ibid [31].
[42] PTC Decision [1].
[43] *Wolman* 1086.
[44] *Iran-US Case* 265.
[45] PTC Decision [17].
[46] *Deen-Racsmány*, 611.
[47] *Hague Convention* art 1; *European Convention* art 3(1).
[48] *Nationality Decrees Issued in Morocco and Tunis* (Advisory Opinion) [1923] PCIJ (Ser B) No 4, 24.
[49] Oxford University Press, *Max Planck Encyclopedia of Public International Law* (online at 15 March 2025) 'Nationality' [4].

Where multiple nationalities arise from *jus soli* and *jus sanguinis* principles, mere *de jure* nationality is insufficient to establish that "international law permits" Pentos to validly regard Vragar as its national. States have concluded treaties designed to mitigate a foreseen collision of nationality rights and duties,[50] explicitly rejecting adopting a positive stance in support of multiple nationality.[51] Vragar's alleged Pentos nationality is based solely on his birth there where "all persons born in the territory of Pentos [are considered] Pentos nationals".[52] Vragar's birth was enitrely incidental to his Davosian parents' temporary deployment during a cholera outbreak,[53] with any genuine connection further disproven by their permanent return to Davos at seven months old.[54]

b) *Vragar has no other ties to Pentos*

Vragar lived in Pentos during infancy, making his connection to the territory extremely minimal and his nationality essentially nominal. In contrast, he has strong ties to Davos, where he is "educated, owns a home, owns a business, and pays taxes".[55] His superior connection to Davos is further demonstrated by his Davos passport; military service registration; and DIT scholarship, reserved for outstanding students of Davos nationality".[56] Unlike Davos, Vragar has no meaningful legal, economic or social ties to Pentos. This Court is not required to recognise nationality granted under a State's domestic laws,[57] and should instead exercise its competence to evaluate "competing or contested nationality claims".[58] Notwithstanding Pentos nationality laws, Vragar cannot be deemed a 'national' of Pentos for the material purposes of ICC jurisdiction, due to such deficiency.

c) *Vragar is not at risk of becoming stateless*

Even though nationality by birth is fundamentally recognized under international law,[59] a child's right to acquire nationality based on birth is intended as a safeguard against statelessness, [60] rather than an automatic entitlement in all circumstances. If a child already has nationality through the *jus*

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[50] *MPEPIL Nationality* [22].
[51] Council of Europe, *Explanatory Report to the European Convention on Nationality* (ETS No 166, 6 November 1997) [97]–[98].
[52] Appendix B, *Report of Human Rights International on the Situation of Human Rights in Northeros*, dated 20 February 2024 [13].
[53] Ibid [13].
[54] PTC Decision [3].
[55] Ibid [3].
[56] HRI Report [14].
[57] *Prosecutor v Delalić et al (Appeal Judgment)* (ICTY, Appeals Chamber, Case No IT-96-21-A, 20 February 2001), [77].
[58] *OTP 2019 Report* [29].
[59] *Spieker and Weber* 4.
[60] See, eg, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7(1); HRC, *General Comment No 17: Article 24 (Rights of the Child)*, UN Doc HRI/GEN/1/Rev.9 (27 April 1989) [8]. See also *European Convention* art 4(b), 6(1).

sanguinis principle, there is no compelling reason for nationality *jus soli*. Vragar obtained and perpetuated his Davos nationality through his parents and material links to that State. Thus, despite Pentos law codifying the principle of *jus soli* nationality, Vragar's birth in Pentos alone does not establish a sufficient link to support the exercise of nationality-based jurisdiction by the ICC.[61]

C. Furthermore, policy considerations essentially prohibit establishing ICC jurisdiction based on weak nationality claims

a) *Establishing jurisdiction undermines state sovereignty*

Establishing ICC jurisdiction based on weak nationality ties undermines state sovereignty, especially for States like Davos. The principle of state consent is vital in international law.[62] Allowing jurisdiction in such cases would encourage "illegitimate interference with the rights and interests of non-states parties".[63] If the ICC can charge an accused "under their State A citizenship for crimes they have committed as a citizen of State B", then it completely ignores "the bedrock principles of consent and non-intervention in international law".[64] If jurisdiction is exercised over dual-national individuals with no meaningful ties to the relevant State Party, it will unreasonably and unjustly interfere with the affairs of the non-State Party of which the accused is also a national.

b) *Establishing jurisdiction abuses jurisdictional limits of the ICC*

Allowing weak nationality claims to extend ICC jurisdiction risks exploiting the system. Instances of "citizenship overreach" involve where nationality is imposed on individuals from birthright who lack substantive links and "meaningful social connections" to a State.[65] If this concept forms the basis of ICC jurisdiction, it could create an unintended loophole for State Parties to assert control over individuals with no real connection to them. This would undermine the credibility of the ICC and should be regarded as an "abuse of rights",[66] when made in "bad faith".[67] To maintain its legitimacy, ICC jurisdiction must be based on clear and objective legal standards, not arbitrary or opportunistic nationality claims. The risk of abuse outweighs any potential benefits of extending jurisdiction in cases where no genuine link between the accused and the relevant State Party exists.

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[61] *RS* art 12(2)(b).
[62] Yoshiaki, Kitano, 'The Legal Basis for the Exercise of Jurisdiction by the International Criminal Court and the Preparatory Work of the Rome Statute (V)' (2019) 18(1) *Journal of International Relations and Comparative Culture* 37, 63.
[63] *Wolman* 1098.
[64] Douglas Sheehan, 'The Backdoor to the ICC: Jurisdiction over Dual Nationals and the Shadow of the Court' (2011) 17 *New England Journal of International and Comparative Law* 347, 349.
[65] Peter Spiro 'Citizenship Overreach' (2017) 38(1) *Michigan Journal of International Law* 167, 167.
[66] *Spieker and Weber* 6.
[67] *Dugard* 230 [120].

II. NO SUBSTANTIAL GROUNDS TO BELIEVE VRAGAR AIDED AND ABETTED "GENDER APARTHEID"

The PTC correctly found there are insufficient grounds to conclude that Arrix Vragar aided and abetted 'gender apartheid' under Article 7(1)(k) and Article 25(3)(c) of the RS. The Prosecution's case is fatally flawed in three key respects: (**A**) 'gender apartheid' is not recognized as a CAH under the RS; (**B**) it therefore cannot be prosecuted under Article 7(1)(k); and (**C**) even if it were, Vragar's actions fail to meet the legal threshold for aiding and abetting under Article 25(3)(c).

A. The general theoretical concept of 'gender apartheid' is not a CAH under Article 7(1)

a) *There is no legal definition of such a purported crime within the RS itself*

If this Court does have jurisdiction to hear this case, then it will be limited to the four "most serious crimes of concern",[68] codified in the RS. While provision is made in the Statute for the crime of apartheid,[69] and gender-based persecution,[70] it does not list 'gender apartheid' as an enumerated CAH, and no ICC precedent has recognized it as an "inhumane act" under Article 7(1)(k). As identified by the PTC, "apartheid only applies to racial oppression not gender discrimination".[71]

b) *Alternatively, there is no CIL that presently authenticates the crime as a CAH, in the absence of RS endorsement*

Without a "legal solution", "[p]rinciples and rules of law constitute a secondary source" to define the purported CAH.[72] If the "constitutive role attributed to … State practice and *opinio juris*" is met, then CIL will be established.[73] HRI defines 'gender apartheid' as "inhumane acts", committed within an "institutionalized regime of systematic oppression and domination by one gender group over any other" and "with the intention of maintaining that regime".[74] However, no "specific crime of gender apartheid" is currently recognised under international law as there is currently "no treaty or customary law basis for such a crime".[75] Therefore, there is *prima facie* no CIL.

i. No widespread and consistent State practice

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[68] *RS* art 5.
[69] *RS* arts 7(1)(j) and 7(2)(h).
[70] *RS* arts 7(1)(h) and 7(3).
[71] PTC Decision [17].
[72] *Prosecutor v Germain Katanga (Decision on the Confirmation of Charges)* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/07-717, 30 September 2008) [508]; *RS* art 21(1)(b).
[73] *Wood Custom Report* [25].
[74] HRI Report [2].
[75] See detailed discussion by Alison Macdonald, Ben Juratowitch, Amy Sander and Naomi Hart, *Re: Crime of Gender Apartheid* (Essex Court Chambers, 6 March 2023) [4].

State practice must be "extensive and virtually uniform",[76] yet no consistent record exists of States prosecuting or recognizing gender apartheid as a distinct CAH, unlike the crime of apartheid.[77] Even States that strongly condemn gender discrimination,[78] have not criminalized 'gender apartheid' specifically in their own legal systems. Beyond the ICC, international criminal tribunals, such as the ICTY and ICTR, have also never prosecuted "gender apartheid" as a standalone crime.

ii. No *opinio juris*

Opinio juris requires that states act out of a "belief" that a rule is legally binding, not just for political or moral reasons.[79] Though international discussions on gender apartheid have occurred in NGO and human rights contexts,[80] as well as within the UN,[81] references to gender apartheid remain declaratory, rather than legally binding upon States.

c) *In any event, the* nullum crimen sine lege *principle is codified in the RS*

The RS mandates that the accused "shall not be criminally responsible" unless the conduct constitutes a crime within the Court's jurisdiction "at the time it takes place". Since 'gender apartheid' was not a crime within ICC jurisdiction when the Baleran regime began issuing female-exclusionary decrees in November 2021,[82] prosecuting on this basis would contradict this principle. This Court is barred by this "principle of strict legality" to not "adopt an interpretation method that would broaden the definition of crimes" beyond the intended scope of Article 7(1).[83] Therefore, it cannot allow the prosecution of a potential crime currently beyond the scope of its jurisdiction.

B. The specific acts of alleged 'gender apartheid' cannot be characterised as a CAH under Article 7(1)(k)

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[76] *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Judgement)* [1969] ICJ Rep 3 [74].
[77] *International Convention on the Suppression and Punishment of the Crime of Apartheid*, opened for signature 30 November 1973, 1015 UNTS 243 (entered into force 18 July 1976) art II; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 85(4)(c).
[78] Eg United States, United Kingdom and France in SC Res 2593, UN SCOR, 76th sess, 8848th mtg, UN Doc S/RES/2593 (30 August 2021).
[79] *North Sea Cases* [77].
[80] *Macdonald* 2; Richard Bennett, Special Rapporteur, *The Phenomenon of an Institutionalized System of Discrimination, Segregation, Disrespect for Human Dignity and Exclusion of Women and Girls: Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan*, UN GAOR, 56th sess, Agenda Item 2, UN Doc A/HRC/56/25 (13 May 2024); 'Gender Apartheid Must Be Recognized in International Law', *Amnesty International* (Web Page, 17 June 2024) <https://www.amnesty.org/en/latest/news/2024/06/gender-apartheid-must-be-recognized-international-law/>.
[81] Working Group on Discrimination Against Women and Girls, *Draft Articles on Prevention and Punishment of Crimes Against Humanity: Recommendations from the Working Group on Discrimination Against Women and Girls*, UN GAOR, 40th sess, UN Doc A/HRC/WG.11/40/1 (15 February 2024) 6.
[82] HRI Report [5].
[83] *Prosecutor v Jean-Pierre Bemba Gombo (Judgment pursuant to Article 74 of the Statute)* (ICC, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [83].

a) *Article 7(1)(k) must be interpreted in accordance with the general rule*

The general rule of interpretation espoused in the *VCLT* requires that the terms of the RS be interpreted in good faith, based on their ordinary meaning, in the context and in light of the object and purpose of the Statute.[84] However, the RS has been criticised by ad hoc tribunal judges for failing "to provide an indication, even indirectly, of the legal standards which would allow us to identify the prohibited inhumane acts". Therefore, interpretation is required to ascertain whether the conduct of the Baleran government of Northeros, as alleged perpetrator of the commission of the CAH of 'gender apartheid', constitutes an "other inhumane act".[85] So long as interpretation does not "expand uncritically" the scope of what was intended for Article 7(1)(k).[86]

b) *Article 7(1)(k) is a residual category and should not be expanded arbitrarily*

The alleged acts of gender apartheid will characterised as a CAH under the RS if they qualify as other inhumane acts "of a similar character" to those enumerated in Article 7(1) that "intentionally causing great suffering, or serious injury to body or to mental or physical health".[87] However, this Court has stated that "inhumane acts are to be considered as serious violations of international customary law".[88] Unlike the RS' peers, such as the ICTR[89] and ICTY Statutes,[90] which conceived "other inhumane acts" as a "catch all provision",[91] the RS intentionally limits the scope of ICC jurisdiction.[92] Indeed, a "narrower and more restrictive interpretation" is required by this Court.[93]

Therefore, conduct carried out pursuant to the commission of the CAH of "gender apartheid", which presently has no established international customary law supporting it, *prima facie* cannot be characterised as a CAH under Article 7(1)(k) since this would unduly expand the scope of this "residual category".[94] In any event, the ICC's EoC document can assist in the interpretation and application of Article 7(1)(k),[95] noting that the "language" of the ICC materials and the

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[84] *VCLT* art 31(1).
[85] *RS* art 7(1)(k).
[86] *Prosecutor v Uhuru Muigai Kenyatta (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-382-Red, 29 January 2012) [269].
[87] *RS* art 7(1)(k).
[88] *Katanga Confirmation* [448].
[89] SC Res 955, UN Doc S/RES/955 (8 November 1994) annex.
[90] SC Res 827, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN Doc S/RES/1877 (7 July 2009).
[91] Machteld Boot, 'Article 7: Crimes against Humanity' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck, 2nd ed, 2008) 230 [79].
[92] *Katanga Confirmation* [450].
[93] William A Schabas, 'Article 7. Crimes against Humanity' in *The International Criminal Court: A Commentary on the Rome Statute* (Oxford Academic, 2nd ed, 2016) 207.
[94] *Kenyatta Confirmation* [269].
[95] ICC, *Elements of Crimes*, Doc No ICC-PIOS-LT-03-002/15_Eng (amended 11 June 2010) 8.

"fundamental principles of criminal law" require that Article 7(1)(k) be "interpreted conservatively" so as to unduly expand the powers of jurisdiction afforded within the provision.[96]

c) *The alleged acts do not meet the specific legal threshold for Article 7(1)(k)*

i. The alleged acts did not inflict great suffering or serious injury

To satisfy the material elements of an Article 7(1)(k) crime, the alleged acts must have inflicted "great suffering or serious injury" to the women of Northeros. The four decrees issued by the Baleran government,[97] although discriminatory and restrictive, do meet the standard set by the ICC and ad hoc tribunals. For example, physical harms of beatings,[98] mutilation,[99] serious injury to organs,[100] as well as mental harm incurred from watching family members be brutally murdered,[101] or some other "serious attack on human dignity".[102] Psychological harm alone, such as distress over restricted movement or the loss of professional opportunities, does not meet this threshold.[103]

ii. The alleged acts are not similar in character to other enumerated CAHs

Moreover, the character of the alleged acts must be comparable to other crimes referred to in Article 7(1).[104] The operation of the four decrees – banning females from holding professional positions, restricting their education, restricting local travel, preventing international travel – though restrictive, do not materially inflict suffering of a comparable "nature and gravity" to,[105] for example, extermination,[106] enslavement[107] or torture.[108] Conversely, the crime of 'forced marriage', where an individual is forced "to serve as a conjugal partner",[109] meets this high threshold.[110] Therefore, the PTC correctly found that the alleged acts of 'gender apartheid' are "not sufficiently similar" to other enumerated CAHs to be recognized as an "other inhumane act".

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[96] *Kenyatta Confirmation* [269].
[97] HRI Report [5].
[98] *Delalić* [1034]; *Prosecutor v Tadić* (*Judgment*) (ICTY, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [730].
[99] *Prosecutor v Kvočka* (*Judgment*) (ICTY, Trial Chamber, Case No IT-98-30/1-T, 2 November 2001) [208]–[209]; *Prosecutor v Francis Muthaura* (*Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*) (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11, 23 January 2012) [270]–[273].
[100] *Prosecutor v Kayishema and Ruzindana* (*Judgment*) (ICTR, Trial Chamber, Case No ICTR-95-1-T, 21 May 1999) [109].
[101] *Muthaura* [277].
[102] *Delalić* [543].
[103] *Prosecutor v Krstić* (*Judgment*) (ICTY, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [510].
[104] *RS* art 7(1); *EoC* 8.
[105] *EoC* 8.
[106] *RS* art 7(1)(b).
[107] Ibid art 7(1)(c).
[108] Ibid art 7(1)(f).
[109] *Prosecutor v Dominic Ongwen* (*Decision on the Confirmation of Charges Against Dominic Ongwen*) (ICC, Pre-Trial Chamber II, Case No ICC-02/04-01/15/422/Red, 23 March 2016) [91].
[110] *Prosecutor v Brima et al* (*Judgment*) (SCSL, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [201].

iii. The perpetrator was not aware of the factual circumstances that established the character of the act

Under Article 7(1)(k), the perpetrator must be aware of the inhumane nature of the acts they commit.[111] Awareness requires that the perpetrator understand the act's inhumane nature and character, typically demonstrated through specific "intent to inflict serious physical or mental suffering" or knowledge of the likely consequences of the act.[112] In the context of the Baleran regime's decrees, there is no indication that the regime's leadership had the specific *mens rea* required to meet this awareness threshold. The imposition of restrictive laws, while oppressive, was primarily motivated by the regime's consolidation of power in an extremely politically unstable and poverty-stricken Northeros,[113] not by a deliberate intent to commit CAHs. While intent can be "inferred",[114] it cannot be wholly "transformed"[115] to superficially satisfy this requirement.

d) *In any event, the contextual elements for a CAH under Article 7(1) are not met*

i. The alleged acts were not part of a widespread or systematic attack against a civilian population

For the Baleran regime to have committed a CAH under the RS, the contextual elements under Article 7(1) must be satisfied. The Prosecution may seek to argue that the issuance of, and compliance with the decrees, constitutes an 'attack' on the women of Northeros since violators are publicly flogged. This Court has found 'systematic' refers to "the organised nature of the acts of violence and the improbability of their random occurrence",[116] and 'widespread' to attacks on a quantitatively,[117] or geographically,[118] large-scale. For example, an attack will be widespread if it is against "hundreds of thousands of individuals",[119] or otherwise over a "large geographical area".[120] Since punishment for violation of state-issued decrees and "other serious crimes" has only occurred

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[111] *EoC* 8.
[112] *Prosecutor v Radovan Karadžić* (*Public Redacted Version of Judgment Issued on 24 March 2016*) (ICTY, Trial Chamber, Case No IT-95-5/18-T, 24 March 2016) [494].
[113] HRI Report [5].
[114] *Karadžić* [526].
[115] *Katanga Confirmation* [463].
[116] *Prosecutor v Germain Katanga (Judgment pursuant to article 74 of the Statute)* (ICC, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1123]; *Prosecutor v Bosco Ntaganda* (*Judgement*) (ICC, Trial Chamber VI, Case No ICC-01/04-02/06, 8 July 2019) [692]; *Prosecutor v Ongwen (Judgement)* (ICC, Trial Chamber IX, Case No ICC-02/04-01/15, 4 February 2021) [2679]; *Prosecutor v Al Bashir* (*Warrant of Arrest*) (ICC, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [81].
[117] *Prosecutor v Al Hassan (Judgment)* (ICC, Trial Chamber X, Case No ICC-01/12-01/18, 26 June 2024) [1105].
[118] *Prosecutor v Jean Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (ICC, Pre-Trial Chamber II, Case No ICC-01/05-01/08-424, 15 June 2009) [83]; *Katanga Confirmation* [395].
[119] *Al Bashir* [84].
[120] *Bemba Confirmation* [117].

in a few dozen cases,[121] exclusively in the State of Northeros,[122] and "in various forms and intensity"[123] with seemingly no similar pattern,[124] the 'attack' threshold is factually not met.[125]

ii. The perpetrator did not know or intend for the conduct to be part of a widespread or systematic attack

Though members of the Baleran regime's leadership need not be "aware of the precise details of the plan or policy of the State or organisation", they must have known that the conduct was "part of or intended to be part of" a widespread or systematic attack against a civilian population.[126] Since there has been no regular "pattern" of such conduct, the leaders of the Baleran regime could not have "have known that [their] acts fit into such a pattern".[127] Thus, the mental component of the contextual requirements for a CAH under the RS is also not satisfied.

C. Even if the alleged acts of the Baleran regime can constitute a CAH under Article 7(1)(k), Vragar did not aid and abet the commission of 'gender apartheid' under Article 25(3)(c)

a) *Vragar lacked the requisite* mens rea *under Article 25(3)(c)*

The *Bemba* Trial Judgment clarified that aiding and abetting under Article 25(3)(c) requires a twofold *mens rea* standard: (i) in relation to the "principal offence", the accused must be aware that the crime is being committed; and (ii) in relation to their "own conduct", the accused must act with the specific "aim of facilitating" the crime.[128] This heightened mental element, which goes beyond mere knowledge, distinguishes aiding and abetting liability at the ICC from the broader standards applied by the ad hoc tribunals.[129] Vragar's conduct meets neither limb.

i. Principal offence

Article 30 of the RS sets the general *mens rea* standard of "intent and knowledge",[130] requiring that an accused must mean to engage in the conduct and mean to cause the consequence or be aware that

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[121] HRI Report [5].
[122] Appendix A, *Map of the Area*.
[123] HRI Report [5].
[124] *Al Bashir* [85].
[125] *Ntaganda* [691].
[126] *Al Hassan* [1117].
[127] *Prosecutor v Tadić* (*Appeals Judgement*) (ICTY, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [248].
[128] *Prosecutor v Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (Judgment pursuant to Article 74 of the Statute)* (ICC, Trial Chamber VII, Case No ICC-01/05-01/13-1989-Red, 19 October 2016) [97].
[129] *Prosecutor v Callixte Mbarushimana* (*Decision on the Confirmation of Charges*) (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/10-465-Red, 16 December 2011) [274]; *Tadić Trial* [692]; *Delalić* [326], [328]; *Prosecutor v Furundžija* (*Trial Judgment*) (ICTY, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [236]–[249]; *Prosecutor v Akayesu* (*Judgment*) (ICTR, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998) [476]–[479].
[130] *RS* art 30(1).

it will occur in the ordinary course of events.[131] This standard "applies by default" to Vragar in relation to the purported CAH commissioned by the Baleran regime.[132] However, there is insufficient evidence to suggest Vragar *knew* the ABSS would be used as an indirect instrument of gender apartheid by the Baleran government,[133] or that he *intended* for this to be a consequence of his conduct of contracting with the Southeros government.[134] Since "liability for aiding and abetting an offence requires [such] proof",[135] Vragar is not liable.

ii. Vragar's own conduct

The Article 30 standard will automatically apply "[u]nless otherwise provided".[136] However, Article 25(3)(c) requires purposeful facilitation,[137] beyond mere passive assistance. Vragar contracted with Southeros for the *commercial* purpose of providing an automated AI security system "to protect its borders from unlawful migration"[138] in exchange for $120 million.[139] The ABSS is designed with a "fail-safe" that always emits a "warning sound" prior to operation and allows for temporary weapon deactivation by Southeros border security personnel.[140] Though "women, men, and children" from Northeros have attempted to illegally enter Southeros,[141] there is no evidence that the system discriminates against women specifically when securing the border. Vragarsoft began developing similar systems for private corporations two years before the ABSS was operational in Southeros.[142] Thus, there is insufficient evidence to suggest Vragar acted with the specific purpose of furthering gender apartheid and "intend[ed] to facilitate the commission of the crime"[143] when he developed and installed such established technology, in line with his contractual obligations to Southeros.[144]

b) *Moreover, Vragar did not sufficiently contribute to the commission of a crime*

Whether Vragar's conduct amounts to "assistance in the commission of the crime" of gender apartheid can "only be determined in light of the facts".[145] With this annunciation of the relevant

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[131] Ibid 30(2)-(3).
[132] *Bemba Trial* [98].
[133] HRI Report [10].
[134] Ibid [8].
[135] *Bemba Trial* [98].
[136] *RS* art 30(1).
[137] *RS* art 25(3)(c); *Schabas Art. 7 Commentary* 578.
[138] PTC Decision [17(b)].
[139] HRI Report [8].
[140] Ibid [11].
[141] Ibid [7].
[142] Ibid [18].
[143] *Prosecutor v Blé Goudé* (*Decision on the Confirmation of Charges Against Charles Blé Goudé*) (ICC, Pre-Trial Chamber I, Case No ICC-02/11-02/11-186, 11 December 2014) [167]; *Ongwen Confirmation* [43].
[144] *Blé Goudé* [170].
[145] *Prosecutor v Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (Judgment pursuant to Article 74 of the Statute)* (ICC, Appeals Chamber, Case No ICC-01/05-01/13-2275-Red, 8 March 2018) [18], [1327].

aiding and abetting *actus reus* standard, this Court has seemingly departed from the "substantial contribution" required by the ad hoc tribunals for aiding and abetting.[146] Thus, Article 25(3)(c) seemingly establishes a "relatively low objective but relatively high subjective threshold".[147]

However, since the *Mbarushimana* PTC made the observation that "[w]ithout some threshold level of assistance, every landlord, every grocer, every power utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability", similar consideration can be paid to Article 25(3)(c) liability.[148] Equally, the *Lubanga* Trial Chamber impliedly endorsed the "substantial contribution" standard for aiding and abetting under Article 25(3)(c), suggesting that if accessories must have had "a substantial effect on the commission of the crime", then co-perpetrators must have had "more than a substantial effect".[149] Therefore, the precise "contribution threshold" appears to be an "unresolved issue" in ICC jurisprudence.[150]

If substantial contribution is required, then Vragar's involvement was not significant enough to establish criminal responsibility for the Baleran regime's commission of gender apartheid. However, even if Vragar's assistance need only be determined in light of the specific facts, there is insufficient evidence to suggest that merely by providing a border security system to an unrelated State, Vragar aided, abetted or otherwise assisted in the commission of gender apartheid.[151]

III. VRAGAR CANNOT BE TRIED FOR COMMITTING AN OFFENCE UNDER ARTICLE 70(1)(C) FOR CYBERLEAKS' LAWFUL PUBLICATION

Although Cyberleaks, a web platform "owned and controlled" by Vragar,[152] published a confidential document hacked from the ICC, the PTC correctly found that he cannot be tried for an offense against the administration of justice under Article 70(1)(c). The mere publication of leaked documents by Cyberleaks neither (**A**) establishes Vragar's intent to obstruct justice,[153] nor (**B**)

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[146] *Bemba Appeal* [1326]; *Tadić Appeal* [229]; *Prosecutor v Blaškić* (*Appeal Judgment*) (ICTY, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [46]; *Prosecutor v Kalimanzira* (*Appeal Judgment*) (ICTR, Appeals Chamber, Case No ICTR-05-88-A, 20 October 2010) [74]; *Prosecutor v Taylor (Appeal Judgment)* (SCSL, Appeals Chamber, Case No SCSL-03-01-A, 26 September 2013) [436], [475]; *Tadić Trial* [688]; *Furundžija* [233].
[147] Kai Ambos, 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck, 2nd ed, 2008) 483.
[148] *Mbarushimana* [277].
[149] *Prosecutor v Thomas Lubanga Lubanga (Judgement pursuant to Article 74 of the Statute)* (ICC, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012) [997].
[150] Manuel J Ventura, 'Aiding and Abetting and the International Criminal Court's *Bemba et al* Case: The ICC Trial and Appeals Chamber Consider Article 25(3)(c) of the Rome Statute (1998)' (2020) 20(6) *International Criminal Law Review* 1138, 1147.
[151] *RS* art 25(3)(c).
[152] PTC Decision [2].
[153] *RS* art 70(1).

constitutes the requisite *actus reus* for interfering with the testimony of the two anticipated witnesses,[154] Morghule and Shreaker.[155] In any event, (**C**) the publication is protected by FOE.

A. Vragar lacked the required *mens rea* to violate Article 70(1)

a) *Article 30 standard applies to Article 70*

The RS states that, "unless otherwise provided", the elements of intent and knowledge apply. [156] This "basic intent" standard applies to Article 70 offences, as affirmed in *Bemba*.[157] Unlike the ICYT, which required "specific intent" to interfere with the administration of justice,[158] the ICC's interpretation confirms that Article 70 does not introduce an "additional mental element",[159] beyond the general standard set by Article 30. Therefore, Vragar must have the necessary intent and knowledge to be criminally responsible.

b) *Vragar did not intend to obstruct the administration of justice*

Even if no special specific intent is required, Vragar did not harbour any basic intent to obstruct the administration of justice. Cyberleaks, a platform that habitually "publishes leaked materials",[160] merely released the leaked HRI report as part of its normal operations within hours of it being made publicly accessible on 5 April 2024.[161] This rapid publication suggests that Cyberleaks' general editorial process did not involve deliberate intent to obstruct justice. Rather, despite unsubstantiated allegations that "[n]othing is posted without his say so",[162] it is unclear if Vragar was even aware of the unredacted document's online presence,[163] let alone that he personally directed the publication with the intended consequence of interfering with witness testimony. [164]

Moreover, even if Vragar was aware and did allow the publication of a document directly relevant to his own trial, it is evident that his primary interest lay in "increasing transparency",[165] aligning with Cyberleaks' reputation. Had his intent been to manipulate opinions rather than disclose

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[154] Ibid art 70(1)(c); as alleged in Appendix C, *Report of the Office of the Prosecutor of the International Criminal Court Relating to the Hacking and Publication of Confidential Information and the Resulting Disappearance of Witnesse*s, dated 13 May 2024 [6], pursuant to *RPE* r 165.
[155] HRI Report [8] and [16].
[156] *RS* art 30(1).
[157] *Bemba Appeal* [677].
[158] See, eg, *Prosecutor v Begaj (Judgement on contempt allegations)* (ICTY, Trial Chamber I, Case No IT-03-66-T-R77, 27 May 2005) [22].
[159] *Bemba Appeal* [678].
[160] HRI Report [17].
[161] PTC Decision [5].
[162] HRI Report [17].
[163] *RS* art 30(3).
[164] *RS* art 30(2)(b).
[165] HRI Report [17].

information, he would have refrained from publishing the damning report altogether, unredacted or otherwise. Since there is no evidence that Vragar was involved in the hacking of the ICC,[166] nor even the publication of the leaked document on Cyberleaks thereafter,[167] there are no substantial grounds to believe Vragar intentionally engaged in obstructive conduct under Articles 30 and 70(1).

c) *Foreseeability alone is insufficient for criminal responsibility*

The Prosecution contends that, even if Vragar did not intend to obstruct justice, witness interference was a "reasonably foreseeable" consequence of Cyberleaks' publication.[168] However, foreseeability alone does not meet the requisite *mens rea* standard for establishing individual criminal responsibility under ICC jurisprudence.[169] Rather, the inclusion of *dolus eventulis* in the text of Article 30 would be inconsistent with the intentions of the drafters.[170] The ICC has consistently held that mere awareness of potential consequences is inadequate; instead, the "standard for the foreseeability of events is virtual certainty".[171] There is no evidence to suggest that Vragar had *virtual certainty* that Cyberleaks publishing the document would result in Morghule and Shreaker being unable to testify or moreover, that the administration of justice would be obstructed.

d) *At most, Vragar acted recklessly, which is also insufficient*

If Vragar was aware that the publication of the unredacted HRI report could potentially impact witness testimony and pose a risk to the administration of justice, it could be argued that he acted recklessly, though not with intent. However, any undue degradation on the requisite *mens rea*, "such as *dolus eventualis*, recklessness and negligence" would nonetheless be "insufficient to establish 'intent' and 'knowledge' in relation to a consequence under Article 30(2)(b)".[172] Regarding Article 70 offences specifically, the ICC confirmed in *Bemba* that "there is no suggestion that recklessness would be sufficient",[173] or that "any lower *mens rea* threshold" could be accepted.[174]

B. Vragar's conduct did not constitute witness interference under Article 70(1)(c)

a) *Offences against the administration of justice are 'conduct crimes'*

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[166] OTP Report [6]
[167] *RS* art 30(2)(a).
[168] OTP Report [6].
[169] *Prosecutor v Thomas Lubanga Dyilo (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction)* (ICC, Appeals Chamber, Case No ICC-01/04-01/06 A 5, 1 December 2014) [447]–[450]. *Katanga Trial* [774]–[777]; *Bemba Trial* [29]; and *Bemba Confirmation* [357]–[369].
[170] *Bemba Confirmation* [363].
[171] *Lubanga Appeal* [447]. See also *Bemba Confirmation* [362].
[172] *Ntaganda Trial* [774] fn 2348.
[173] *Bemba Appeal* [732].
[174] *Bemba Appeal* [835].

An offence under Article 70(1)(c) is "a conduct crime, not a result crime",[175] meaning that liability will attach to the alleged act of interference itself, independent of whether the witnesses were ultimately deterred or debilitated from testifying. The ICC "does not require proof that the conduct had an actual effect on the witness".[176] However, the Prosecution must nonetheless establish a sufficiently direct act of obstruction by Vragar with the testimony of the witnesses to "qualify as constitutive elements of the offence at issue".[177] The mere ownership and management of a platform that habitually publishes leaked documents does not, in itself, satisfy this requirement.

b) *Good faith interpretation of 'obstructing or interfering' is required*

Treaty provisions must be interpreted in good faith and according to their ordinary meaning. [178] Therefore, Article 70(1)(c) should not be read in a way that leads to excessive policy expansion, especially given the Court's universal jurisdiction,[179] notwithstanding its "open-ended" nature.[180] If "obstructing or interfering" is interpreted too broadly, it could set a precedent that subjects virtually any publication of leaked materials to the ICC's jurisdiction. This interpretation would chill journalistic activity and risk the ICC turning into a censorship body, rather than an institution focused on prosecuting the "most serious crimes of concern to the international community".[181] Only conduct that specifically "impose[s] in a way that hinders"[182] or otherwise "hinder[s] from … operation"[183] the "attendance or testimony of a witness" should be criminalized under Article 70(1)(c), not general acts of publication that may incidentally relate to ongoing cases.

c) *Vragar's conduct did not obstruct the administration of justice*

Vragar's only alleged act was the passive ownership of the free online platform Cyberleaks, a division of Vragarsoft,[184] established in 2011 to expose diplomatic and corporate secrets.[185] There is no evidence that he directed the publication of the specific document in question or that he intended to interfere with witness testimony.

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[175] *Prosecutor v Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (ICC, Pre-Trial Chamber II, Case No ICC-01/05-01/13-749, 11 November 2014) [30].
[176] *Bemba Appeal* [737]; *Bemba Trial* [48]. See also *Bemba Appeal* [1430].
[177] *Prosecutor v Walter Osapiri Barasa (Warrant of arrest for Walter Osapiri Barasa)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/13, 2 August 2013) [13] (Judge Tarfusser).
[178] *VCLT* art 31(1).
[179] PTC Decision [17(c)]; OTP Report [6].
[180] *Bemba Trial* [45]; *Bemba Appeal* [724].
[181] *RS* Preamble.
[182] *Merriam-Webster Dictionary* (online at 15 March 2025) 'interfere' (def 2).
[183] Ibid 'obstruct' (def 2).
[184] PTC Decision [5].
[185] HRI Report [17].

This Court held in *Bemba* that the accused's conduct, bribing, coaching, and instructing witnesses to fabricate testimony,[186] constituted deliberate manipulations designed to undermine the integrity of the evidence before the Court [187] Albeit in the context of the first alternative of Article 30(1)(c),[188] rather than the second,[189] the Trial Chamber provided examples of modifying witness testimony,[190] such as "instructing, correcting or scripting the answers to be given in court".[191] Moreover, 'influencing' was further interpreted to include "pressuring, intimidating or threatening witnesses or causing injuries that aim at procuring a particular testimony by the witnesses".[192] The *Bemba* case involved affirmative steps to alter witness testimony, whereas Cyberleaks' publication of a leaked report was an independent editorial decision made by a media platform without any interaction with witnesses at all. Unlike Mr Bemba, there is no evidence to suggest Vragar took any actions whatsoever "in order to authorise, ensure and/or implement measures" to force the publication,[193] let alone undermine the administration of justice more generally.

Beyond the ICC, a further critical distinction arises from the case of *Al Akhbar*,[194] where the STL found that publishing highly sensitive, detailed personal information could constitute interference. In that case, the disclosure included identifying photographs and extensive personal data, including witnesses name, their mothers names, residential addresses, occupation and date of birth, [195] which could all realistically affect the Tribunal's administration of justice.[196] By contrast, Cyberleaks did not publish any "identifying information",[197] beyond the names and general job titles of the two witnesses.[198] The *Al Akhbar* publication was a targeted two-article exposé that deliberately identified 32 witnesses to the broader public.[199] Whereas, Cyberleaks publication involved the indiscriminate release of the unaltered HRI report, maintaining its original content without redaction or modification, as part of its standard transparency practice.

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[186] *Bemba Appeal* [159].
[187] Ibid [730].
[188] *RS* art 70(1)(c): "Corruptly influencing a witness …".
[189] Ibid: "… obstructing or interfering with the attendance or testimony of a witness …".
[190] See *Bemba Trial* [43]–[50], affd *Bemba Appeal* [786].
[191] *Bemba Trial* [46].
[192] Ibid [45].
[193] *Bemba Appeal* [782].
[194] *Prosecutor v Akhbar Beirut (Judgment)* (STL, Case No STL-14-06/T/CJ, 15 July 2016) [1].
[195] Ibid [47].
[196] Ibid [161]
[197] PTC Decision [2]. Cf. ibid [120].
[198] HRI Report [8] and [16].
[199] *Akhbar Beirut* [47]–[48].

Therefore, Vragar's conduct does not meet the *actus reus* standard under Article 70(1)(c), as there is no proof, beyond reasonable doubt,[200] that he obstructed or interfered with witness testimony.

C. Vragar's conduct in relation to Cyberleaks is protected under CIL on FOE

a) *FOE is recognized as CIL*

This Court is guided by Article 21, which mandates respect for applicable treaties and general principles of international law.[201] Thus, broad recognition of FOE as CIL compels an interpretation of Article 70(1)(c) that does not criminalize acts protected under international FOE standards.

i. Consistent state practice of FOE

FOE is firmly established in international law through its codification in core human rights treaties. The *UDHR* recognizes the right to "seek, receive, and impart information and ideas through any media".[202] This foundational principle was later reinforced in binding treaty law under the *ICCPR*,[203] which protects FOE, including "internet-based modes of expression",[204] such as Cyberleaks publications. Only limited restrictions that are "provided by law" and "necessary" for specific legitimate aims are permitted.[205] Regional human rights instruments, such as the *ECHR*,[206] *ACHR*[207] and *ACHPR*,[208] further entrench FOE. Thus, the widespread ratification and consistent application of these instruments demonstrate uniform and widespread state practice,[209] fulfilling the objective element required.

ii. Normative recognition of FOE in *opinio juris*

The UNHRC has expressly affirmed FOE as a cornerstone of democratic society, describing it as "essential for any society",[210] underscoring the widespread recognition that adherence to FOE is a legally binding norm amongst democratic States. Moreover, Courts have consistently protected

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[200] *RS* art 66(1).
[201] *RS* art 21(1)(b).
[202] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 19.
[203] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.
[204] HRC, *General Comment No 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [12].
[205] *ICCPR* art 19(3).
[206] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 10.
[207] *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 33 (entered into force 18 July 1978) art 13.
[208] *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 2986) art 9.
[209] *North Sea Cases* [74].
[210] *UNHRC on Article 19* [2].

FOE, particularly by journalists, and upheld that it extends beyond a treaty-based right,[211] affirming its status as a customary norm. Thus, the subjective "belief" element for CIL is also satisfied.[212]

b) *FOE protects Vragar's conduct in relation to Cyberleaks under CIL*

i. Cyberleaks' publication was a legitimate exercise of its right to impart information

Cyberleaks' publication of the HRI report is protected under Article 19 of the *UDHR* and *ICCPR*, which guarantees the right to seek, receive, and impart information. The UNHRC reaffirmed that FOE applies equally online and offline, "regardless of frontiers and through any media of one's choice".[213] Journalists are protected under FOE, provided they act in "good faith" to deliver "accurate and reliable information".[214] Cyberleaks' long-standing reputation for exposing corruption and promoting transparency reinforces that its function was journalistic, not obstructive.

Unlike cases involving illegal data acquisition;[215] breach of court orders;[216] or unlawful payments for confidential information,[217] Cyberleaks merely facilitated public access to an existing leak**.** The Prosecution concedes no evidence of hacking or unlawful procurement by Vragar,[218] and even if the document was illegally obtained by an unknown third party, Cyberleaks' publication remains a protected journalistic activity under international FOE standards.

While FOE is subject to certain restrictions, these must be carefully balanced against the public interest.[219] In *Stoll*, the ECtHR rejected FOE as a defence where the publication of confidential diplomatic documents risked causing "considerable damage" to national interests.[220] However, Vragar's case is distinct — Cyberleaks did not endanger state security or diplomatic relations, but rather sought to promote institutional accountability. The ECtHR has consistently emphasized the role of the press in scrutinizing judicial and governmental institutions, a function Cyberleaks has

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[211] See, eg, *Lohé Issa Konaté v Burkina Faso (Merits)* (African Court on Human and Peoples' Rights, App No 004/2013, 5 December 2014) [164]; *Gîrleanu v Romania* (2019) 68 Eur Court HR 19 [84]; *Vélez Restrepo and Family v Colombia (Judgment)* (IACtHR, Series C No 248, 3 September 2012) [137].
[212] *North Sea Cases* [77].
[213] Human Rights Council, *The promotion, protection and enjoyment of human rights on the internet*, 32nd sess, UN Doc A/HRC/32/L.20 (27 June 2016) 3.
[214] *Gîrleanu* [84].
[215] *Phillips v News Group Newspapers Ltd* [2013] 1 AC 1 [19]–[21].
[216] *Attorney General v Punch Limited* [2003] 1 AC 1046.
[217] *R v France* [2016] EWCA Crim 1588; *R v Chapman, Gaffney and Panton* [2015] EWCA Crim 539.
[218] OTP Report [6].
[219] *Kaperzynski v Poland* (ECtHR**,** App No 43206/07, 3 April 2012).
[220] *Stoll v Switzerland* (ECtHR, Grand Chamber, Application No 69698/01, 10 December 2007) [136].

been widely praised for.[221] Criminalizing its actions would set a dangerous precedent of non-proportional restriction,[222] undermining legitimate investigative journalism and transparency.[223]

ii. Alternatively, public interest necessitated publication

International law protects the right to impart information, especially on matters of public interest,[224] which includes the transparency and accountability of judicial institutions like the ICC. The ECtHR has repeatedly emphasized that press freedom extends to information that may "offend, shock or disturb" and that the public has a right to receive it.[225] Cyberleaks' publication of the HRI report, "bearing the log-in markings of the OTP",[226] revealed serious security vulnerabilities in the Court's handling of confidential information. The fact that the document contained the names of anticipated witnesses does not automatically override the public interest in exposing institutional failings. This is consistent with ECtHR precedent, which has upheld the public's right to know about governmental and institutional misconduct, even where confidential materials are involved.[227]

c) *Criminalizing Cyberleaks would create a chilling effect on investigative journalism*

Holding Vragar liable for Cyberleaks' publication could also have far-reaching consequences for press freedom. The chilling effect involves legal threats, surveillance, and prosecution to discourage journalists from reporting on issues of public interest, leading to widespread "self-censorship and thus less transparency".[228] This effect is particularly dangerous in cases where reporting exposes governmental and institutional misconduct, as it prevents public scrutiny and weakens democratic accountability. The imposition of sanctions and criminal convictions on journalists has consistently been recognised as deterring investigative reporting and creating a "chilling effect".[229]

While consideration of the 'chilling effect' must be reserved for cases where genuine issues are at stake,[230] Cyberleaks, with its critical role in exposing corruption, clearly falls within the protected

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[221] HRI Report [17].
[222] Trine Baumbach, 'Chilling Effect as a European Court of Human Rights' Concept in Media Law Cases' (2018) 6(1) *Bergen Journal of Criminal Law and Criminal Justice* 92, 93.
[223] *Stoll* [110].
[224] HRI Report [17].
[225] *Handyside v United Kingdom* (1979) 1 Eur Court HR 737 [49]; *Lillo-Stenberg and Sæther v Norway* (ECtHR, App No 13258/09, 16 January 2014) [28]. See also Baumbach 94.
[226] OTP Report [3].
[227] See, eg, *Guja v Moldova* (ECtHR, App No 14277/04, 12 February 2008) [95].
[228] Elisabeth Eide, 'Chilling Effects on Free Expression: Surveillance, Threats and Harassment' in Roy Krøvel and Mona Thowsen (eds), *Making Transparency Possible: An Interdisciplinary Dialogue* (Cappelen Damm Forskning, 2019) 228.
[229] *Mosley v United Kingdom* (ECtHR, App No 48009/08, 10 May 2011) [127]; *Dmitriyevskiy v Russia* (ECtHR, App No 42168/06, 3 October 2017) [117]; *Timpul Info-Magazin and Anghel v Moldova* (ECtHR, App No 42864/05, 27 November 2007) [39].
[230] Baumbach 114.

realm of investigative journalism. Holding Vragar accountable would not only undermine press freedom but also deter future transparent publications, violating fundamental international principles of FOE, which safeguard the press as a cornerstone of democracy and accountability.

SUBMISSIONS

Having presented all arguments, the Defense respectfully requests the Appeals Chamber to

1. **Uphold the Decision**, and
2. **Reaffirm**
    a. the denial of the Prosecution's motion to confirm charges.

Respectfully submitted,

COUNSEL FOR THE DEFENSE

On behalf of Mr. Arrix Vragar