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SITUATION IN THE REPUBLIC OF NORTHEROS

IN THE CASE OF THE PROSECUTOR v. ARRIX VRAGAR

Common Legal Representative of the Victims' Submission in the Appeal of the Pre-Trial Chamber's Decision on Denial of Charges against Defendant Arrix Vragar from the State of Davos

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

Abbreviations	Full Text
ABSS	Automated Border Security System
AC	Appeals Chamber
CaH	Crimes Against Humanity
CJEU	Court of Justice of the European Union
Doc	Document
ECCC	Extraordinary Chambers in the Courts of Cambodia
edn.	Edition
ed./eds.	Editor/Editors
et al.	Et alii/et aliae (and others)
ETS	European Treaty Series
fn	Footnote
HCN	The Hague Convention on Nationality
IBA	International Bar Association
ibid	ibidem (‘in the same place’)
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
No	Number
OTP	Office of the Prosecutor
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs

PTC	Pre-Trial Chamber
RoC	Regulations of the Court
Rep	Report
RS	Rome Statute of the International Criminal Court
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
TC	Trial Chambers
UN	United Nations
UN Charter	Charter of the United Nations
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties of 1969
Vol.	Volume

INDEX OF AUTHORITIES

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7. Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, Lo. N. 4137, vol. 179. **[Hague Convention on Nationality 1930]**
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STATEMENT OF FACTS

I. Factual Background

1. This case concerns the situation on the borders between the Kingdom of **Southeros** and the Republic of **Northeros**. Following the adoption of four Decrees in 2021 that seriously restricted women's rights by the Baleran regime in Northeros, large numbers of Northeros' nationals, especially women, started fleeing toward Southeros by crossing the Rocky River and trying to arrive on Southeros' shores without drowning during the crossing. The majority of them are undocumented women, migrating since one of the four Decrees issued by Northeros deprived them of their travel documents.

2. In July 2022, Southeros contracted with the Defendant, **Arrix Vragar**, for the development and the furniture of the Automated Border Security System (**ABSS)**, an AI aimed at preventing the illegal crossings of Northeros' citizens. The system is made up of a series of towers along the Southeros' shore that are furnished with rifles that automatically strike all undocumented people trying to cross the border. Since the implementation of the ABSS, 3,460 individuals have died on the border between Southeros and Northeros.

3. On 5 April 2022, after the investigations against the Defendant opened, OTP reported the hacking of its database and the leak of the unredacted version of the Human Rights International Report (**HRI**) on which the charges against Mr. Vragar were based. The hacked document contained the names of two insider witnesses, and it was published on **Cyberleaks**, an online platform owned by the Defendant. After the publication, the two witnesses disappeared.

II. The Defendant

4. Mr. Vragar is a dual national of the States of **Pentos**, a State Party to the Rome Statute (**RS**), and **Davos**, a non-State Party to the International Criminal Court (**ICC** or **Court**). After his birth in Pentos to Davos' parents, he moved to Davos, where he still resides. There, he Vragarsoft Corp., a company mainly operating with technology and AI, and Cyberleaks, an online platform publishing leaked documents.

III. Procedural Background

5. On 10 March 2024, the Prosecutor requested to open the investigation against Mr. Vragar based on the HRI Report provided on 20 February 2024. On 20 March 2024, the Pre-Trial Chamber (**PTC**) authorized the investigation, and on 20 May 2024, it issued an arrest warrant against the Defendant. Davos, Southeros, and Northeros declared that they did not want to

cooperate with the Court. Differently, Pentos has declared its willingness to assist the Court but that its national Mr. Vragar was not on its territory.

6. After the filling of the Document Containing the Charges by the OTP on 1 June 2024 and the appointment of the Legal Representative of the Victims on 7 June 2024, the PTC XV decided on 10 August to deny the confirmation of charges against Mr. Vragar for aiding and abetting the commission of the inhumane act of gender apartheid under Articles 25(3)(c) and 7(1)(k) of the RS, and the offence against the administration of justice under Article 70(1)(c) of the RS.

ISSUES

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

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

III. Whether the PTC erred in finding that Arrix Vragar cannot be tried for committing an offence against the administration of justice under Article 70(1)(c) of the Statute 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 THE ARGUMENTS

I. THE PTC ERRED IN LAW IN FINDING THAT THE COURT LACKS JURISDICTION OVER MR. VRAGAR BASED ON ARTICLE 12(2)(b) OF the RS

A. *Firstly*, based on a textual, contextual, and teleological interpretation of the RS, there is no requirement of a "substantial link" between the individual and the State Party to establish the Court's jurisdiction based on Article 12(2)(b).

B. *Secondly,* it would infringe on Pentos' sovereign right to exercise its active personality jurisdiction over his national.

II. THE PTC ERRED IN LAW AND FACT IN FINDING THAT MR. VRAGAR DID NOT AID OR ABET THE COMMISSION OF THE OTHER INHUMANE ACTS OF GENDER APARTHEID

A. *Firstly*, the residual clause of Article 7(1)(k) must be applied to prosecute Mr. Vragar's serious violation as the crime against humanity of gender apartheid.

B. *Secondly*, following the requirements of Article 7(1)(k) of the RS, the acts of gender apartheid are of a similar character to the other inhumane acts listed in Article 7(1) of the RS because of their nature and gravity.

C. *Thirdly and subsidiarily*, if the acts committed by Mr. Vragar could not fall under Article 7(1)(k) of the RS, the charges should be amended to prosecute them as gender persecution under Article 7(1)(g) of the RS.

D. *Fourthly,* Mr. Vragar acted with the necessary *mens rea* to aid and abet the commission of inhumane acts under Article 25(1)(c) of the RS.

III. THE PTC ERRED IN PROCEDURE AND IN LAW IN CONSIDERING THAT MR. VRAGAR IS NOT RESPONSIBLE FOR OBSTRUCTING AND INTERFERING WITH THE ADMINISTRATION OF JUSTICE

A. *Firstly,* to ensure the fairness of the trial and prosecution of the serious acts committed by Mr. Vragar, a single judge of a different Chamber should be competent for proceedings under Article 70 of the RS.

B. *Secondly*, there is sufficient evidence to establish that Mr. Vragar intentionally obstructed and interfered with the attendance and the testimony of the witnesses through the publication of the hacked HRI Report containing their names.

I. THE PTC ERRED IN LAW IN FINDING THAT THE COURT LACKS JURISDICTION OVER MR. VRAGAR BASED ON ARTICLE 12(2)(b) OF the RS

1. On 15 September 2014, the PTC XV decided to dismiss the charges against Mr. Vragar based on a lack of jurisdiction according to Article 12(2)(b) because there was no "sufficient link" between the Defendant and the State of Pentos.[1] Mr. Vragar is a national of the State of Pentos, a State Party to the RS, and also of the State of Davos, which is not a party to the ICC. He lawfully acquired the citizenship of Pentos *ius soli* since he was born there on 25 April 1972.[2] He is also a citizen of Davos *ius sanguinis* since his parents were citizens, and Davos' national law automatically deems descendants of nationals to be citizen of Davos.[3] Even if he grew up and resides in Davos,[4] Pentos declared to the Court that it considers him "*its national*".[5]

2. The PTC XV justified its decision not to recognize its jurisdiction over Mr. Vragar by considering that the only link between the accused and the State Party resided in his *ius soli* citizenship. The Defendant was found to have stronger links with Davos, so Article 12(2)(b) could not constitute a valid ground to establish jurisdiction. In doing so, the PTC XV erred in law in considering that in the case of dual nationality, the jurisdiction of the Court can be established only if there are "sufficient links" with the State Party to the RS. In fact, no such requirement appears from a textual, contextual, or teleological interpretation of the RS **(A)**. Also, it would infringe Pentos' sovereign right to exercise the active personality jurisdiction over its national **(B)**.

A. The RS does not require a "sufficient link" to the State Party to establish jurisdiction based on Article 12(2)(b)

3. Article 12(2)(b) of the RS states that the Court has jurisdiction over those crimes that nationals of a State Party have allegedly committed.[6] In the absence of any definition of nationality in the RS and according to Article 21(1) of the RS, the ICC's jurisdiction *rationae personae* is inferred by referring to the rules of interpretation of treaties set out in Article 31 of the Vienna

[1] *The Prosecutor v. Arrix Vragar*, PTC XV Decision on Confirmation of Charges, ICCMC, 15 September 2024, para. 17.
[2]Unredacted version of the Report of Human Rights International, Appendix B to Decision on Confirmation of Charges (15 September 2024, HRI Report, para. 13.
[3] HRI Report, para. 14.
[4] *Ibid* paras. 14 and 16.
[5] ICCMCC Decision, para 8.
[6] Rome Statute of the International Criminal Court, Article 12(2)(b): "The State of which the person accused of the crime is a national." See Micaela Frulli, "Jurisdiction *rationae personae*", in *The Rome Statute of the International Criminal Court: A Commentary,* vol.1., Oxford University Press, 2002, p. 535.

Convention on the law of treaties (VCLT).[7] Based on a textual, contextual, and teleological interpretation of the RS, the State Parties of the ICC had no intention of subjecting the personal jurisdiction of the Court to the existence of a sufficient or genuine link with the State of nationality, especially in the case of dual nationals.

a. There is no need for a "sufficient link" to establish the Court's jurisdiction according to a textual and contextual interpretation

4. First, the absence of such a requirement is clear by comparing the text of Article 12(2)(b) to Article 36(7) of the RS. While the former refers to nationality without any further specification, the latter expressly lie down that in the case of a dual national, the person "*shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights*".[8] This Article attributes a special meaning[9] to the notion of nationality and requires assessing the links between the individual and the States of nationality for the purpose of the election of the judges of the Court. Yet, since Article 12(2)(b) does not require any evaluation of a link between the accused and the State Party of nationality, it can be concluded that the drafters of the RS decided to exclude such a provision for establishing the jurisdiction of the Court.[10] Mr. Vragar lawfully possesses both the citizenship of the States of Davos and Pentos, which consider him as their national and grant him rights and obligations deriving from his citizenship.[11] The fact that he freely chooses to reside in Davos and to only exercise the rights and obligations deriving from his Davos nationality[12] does not constitute criteria to consider him a national of one State rather than the other for the purpose of Article 12(2)(b).

5. Second, in the absence of any specific definition of the notion of nationality in the RS, the term should be interpreted according to the ordinary definition generally recognized in international law.[13] Nationality is commonly defined as the legal bond between an individual and a State that creates rights and obligations between one subject and the other.[14] Moreover, The Hague Convention on Nationality (HCN) of 1931 expressly states that the determination

[7] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331., p. 331, Article 31(1). See, *The Prosecutor v. Omar Hassan Ahmad Al Bachir, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009.*, para. 126.
[8] RS, Article 36(7).
[9] VCLT, Article 31(4).
[10] Andrew Wolman, "Dual Nationality and International Criminal Court Jurisdiction", 18, J. Int. Crim. Just. 1081, 2020, p. 8.
[11] HRI Report, paras. 13-14.
[12] *Ibid*, para. 14.
[13] VCLT, Article 31(2).
[14] Albrecht Randelzhofer, "Nationality", in 3 Encyclopedia of Public International Law, 501, 502, 1997. See also Laura van Waas and Marìa Jose Recalde Vela, "Nationality and Staleness", in Oxford Bibliographies, 2023.

of nationality is subject to national legislation.[15] This approach has been confirmed by the European Convention on Nationality.[16] Also, the Harvard Draft Convention of 1935 specifies that in the case of dual nationals, "*[i]f international law permits the State to regard the accused as its national, its competence is not impaired or limited by the fact that he is also a national of another State.*"[17] Nationality has to be evaluated based on the existence of a legal tie between the accused and the State Party, especially considering if the individual can enjoy rights and obligations deriving from it, not his social and cultural links with the territory. Also, no differentiation should be made between one nationality and the other, since the two should be read in light of the principle of equality.[18] On the contrary, the PTC's reference to a "genuine" or "sufficient" link test appears to be a misapplication of the *Nottebohm Case*[19] to international criminal law. The legal reasoning used by the International Court of Justice (ICJ) in *Nottebohm* was used in the context of diplomatic protection rather than international criminal responsibility,[20] and in any case, its relevance as an established precedent in international law has never been recognized.[21]

6. As previously mentioned, Mr. Vragar has been lawfully granted two citizenships by Pentos and Davos based on their national legislation.[22] Neither of them prohibits dual nationality,[23] and the accused can freely decide to exercise the rights and obligations attached to his nationalities. Therefore, there is no reason to believe that his Davos nationality should prevail over his Pentos one, since it presents all the elements that are generally required to qualify for nationality under international law.

b. Requiring a "sufficient link" to establish the Court's jurisdiction is contrary to the Court's objective to end impunity for serious crimes suffered by the victims

7. The absence of a requirement of a "sufficient link" with the State Party to establish jurisdiction according to Article 12(2)(b) can also be inferred by a teleological interpretation

[15] Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, Lo. N. 4137, vol. 179, Art. 1: "*it is for each State to determine under its own law who are its nationals*".
[16] European Convention on Nationality, 6 November 1997, ETS 166.
[17] Harvard Draft Convention on Jurisdiction with Respect to Crime, with Comment, Art. 5, reprinted in 29 AJIL Supp., 1935, para. 439.
[18] *Ibid,* para. 340.
[19] ICJ, *Nottebohm Case* (Liechtenstein v. Guatemala), 6 April 1955, I.C. J. Reports 1955, p. 4.
[20] Peter Spero, "Nottebohm and 'Genuine Link': anatomy of a jurisprudential illusion", *Investment Migration Research Paper 1*, 2019.
[21] Wolman, 2020, p. 9.
[22] See para. 1.
[23] HRI Report, paras.13-14.

of the RS. Indeed, as emphasized by the Preamble,[24] Article 1,[25] and the *Travaux Préparatoires* of the RS, the ICC was established to fight against the impunity of the perpetrators of the most serious crimes of international law.[26] The Preamble of the RS guides the objectives and aims of the ICC. Although its wording is not binding, the motives and aims are tools to understand and interpret the provisions contained in the binding provisions of a treaty.[27] For the purposes of the RS and consequentially the ICC, its Preamble states that the Court's objective is to ensure that the most serious crimes of concern to the international community will not go unpunished and that every State Party can exercise their jurisdiction over those responsible for international crimes.[28] The jurisdiction of the Court was conceived to balance the willingness to bring to justice those responsible for the most serious crimes and to respect the sovereignty of non-State Parties.[29] Providing accountability for serious crimes is especially important for the victims who suffered those violations,[30] so it's in their primary interest to ensure that the Court recognizes its jurisdiction over Mr. Vragar.

8. Dismissing accusations of crimes that fall under ICC jurisdiction based on the Defendant's dual nationality despite being a national of a State Party to the RS since birth would be a direct violation of the ICC's basic functions and objectives. It would favour and promote impunity for the most serious crimes of concern to the international community by allowing all international crimes committed or allegedly committed by dual nationals to go unpunished.[31] Also, it would promote criminals from escaping the jurisdiction of State Parties to the RS by acquiring citizenship to non-States Parties. The same legal reasoning concerning the relationship between the fight against impunity, jurisdiction, and nationality has been used by the International Criminal Tribunal for the Former Yugoslavia (ICTY). The *ad hoc* tribunal decided to interpret the notion of nationality in order to ensure that justice could be made for those who were victims of the most serious violations of the Geneva Convention of 1949.[32] There, the *ad hoc* tribunal considered that war crimes committed in the former Yugoslavia

[24] RS, Preamble.
[25] RS, Article 1(1).
[26] *Situation in Palestine,* ICC-01/18 Decision on The Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, 5 February 2021, para. 29.
[27] Makane Moïse, Mbengue, "The Notion of Preamble", in: The Max Planck Encyclopedia of Public International Law, Oxford University Press, 2008.
[28] RS, Preamble, paras. 4 - 6.
[29] Wolman, 2020, p. 20.
[30] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, PTC I, 13 May 2008.*, para. 39.
[31] RS, Preamble, paras. 4 and 5.
[32] See *Prosecutor v. Delalic*, Case No. IT-96-2 1-A, Judgment, 9 56-84, 20 February 2001; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Judgment, 19 151-52, 24 March 2000; *Prosecutor v. Tadic*, Case No. IT-94-1, Judgment, 15 July 1999. 163-69.

conflict were due to ethnic rather than national belonging, so it was necessary to interpret the latter's definition in light of the role of ethnicity to ensure international accountability for those responsible.[33]

9. Here, Mr. Vragar is accused of aiding and abetting the commission of crimes against humanity that caused the death of thousands of women of Northeros.[34] Considering the gravity of the alleged acts, it is contrary to the objective and purpose of the ICC to deny justice to victims only because of the accused's dual nationality. This is even clearer when comparing his situation with the case of an individual who, having only a State Party citizenship, has resided for decades in a non-state Party. In this case, there would be no doubt about the applicability of Article 12(2)(b) even if his links, interests, and social bonds were only with the State of residence.

10. Therefore, by using the criteria of interpretation laid down in Article 31 of VCLT, the use of the "sufficient links" test cannot be justified with respect to the application of Article 12(2)(b) of the RS.

B. Dismissing the Court's jurisdiction over Mr. Vragar would infringe Pentos' sovereign right to exercise the active personality jurisdiction over its national

11. Affirming that Article 12(2)(b) cannot be applied to Mr. Vragar's case despite Pentos' willingness to cooperate in his prosecution goes directly against the RS's aim of promoting the State's exercise of jurisdiction over their citizens accused of international crimes under paragraph 6 of the RS's Preamble.[35] The PTC's denial of the Court's jurisdiction over Mr. Vragar based on the "sufficient links" criteria can be regarded as a violation of the active personality principle, which is a customary rule of international criminal law.[36]

12. First, the dismissal obviates Pentos' sovereignty as a whole by ignoring the explicit wishes of the State, to which Mr. Vragar is a national, to cooperate with the ICC for his prosecution.[37] The principle of sovereignty has been engraved in the body of international law since the beginning of the creation of the States. It is a well-recognized general principle that is

[33] Robert D. Sloane, "Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality", 50 Harv. Int'l L.J. 1, 2009, p. 58-59.
[34] ICCMCC Decision.
[35] RS, Preamble, para. 6.
[36] Hans-Peter Kaul, "Preconditions to the exercise of jurisdiction", in Antonio Cassese and others, *The Rome Statute of the International Criminal Court: A Commentary,* vol.1., Oxford University Press, 2002, p. 609-610.
[37] ICCMCC Decision, para. 8.

illustrated in the UN Charter[38], case law of the ICJ,[39] and the doctrine of the International Law Commission (ILC).[40] Article 14 of the VCLT provides that a State can, as an expression of its sovereignty, declare to be bound by a treaty through ratification, such as Pentos has done with the RS.[41] This consent-based approach is the cornerstone of Treaty law. The choice to refer to nationality as a ground to establish jurisdiction in the RS can be regarded as an application of the active personality principle, a customary rule of international criminal law allowing States to pursue crimes committed abroad by their nationals.[42] State Parties of the RS sovereignly decided the conditions and the extent of the delegation to the Court for the most serious crimes of international law[43] and in light of the principle of complementarity.[44] Therefore, in the absence of any provision in this sense, there is no evidence that the jurisdiction based on nationality foreseen in Article 12(2)(b) of the RS should be limited in the case of dual nationality by the "sufficient links" criteria.

13. The PTC XV's application of the "sufficient links" to Mr. Vragar's case can be seen as a misuse of the diplomatic protection[45] framework for dual nationals, applied in the *Nottebohm Case*,[46] to the exercise of the active personality principle of international criminal law. In fact, even if the general rule for diplomatic protection of dual nationals prevents a State of nationality from acting against the other State of nationality,[47] some exceptions have been practiced by some States by referring to a "dominant nationality" test.[48] However, the use of such an approach overlooks the distinct conditions of ICC's jurisdiction and would favour abuses.[49]

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[38] United Nations, Charter of the United Nations, 1 UNTS XVI, 24 October 1945., Article 2.
[39] See for ex. ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, 19 December 2005, I.C.J. Rep. 2005 p.168, *Corfu Channel Case*, Judgment, 9 April 1949, I.C. J. Reports 1949, p. 4.; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, 27 June 1986, I.C.J. Reports 1986, p. 14.
[40] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, UN GAOR 56th Session Supp No 10, UN Doc A/74/10, Article 2.
[41] VCLT, 1969, Article 14.
[42] Zsuzsanna Deen-Racsmany, "The Nationality of the Offender and the Jurisdiction of the International Criminal Court", 95 Am. J. Int'l L. 606 (2001), p. 5. See also Kaul, 2002, p. 609-610.
[43] RS, Preamble para. 4 and 9; Article 5.
[44] *Ibid*, Preamble para. 10; Article 1; Article 17.
[45] See ILC, Draft Articles on Diplomatic Protection, 2006, UN Doc A/CN.4/L.684, Article 1. See also John Dugard, "Diplomatic protection", in Max Planck Encyclopedias of International Law, June 2021.
[46] ICJ, *Nottebohm*, 1955. See *supra* I(A)(a).
[47] Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, Lo. N. 4137, vol. 179, Article 4.
[48] ICL, Draft Articles on Diplomatic protection, Article 7; ILC, Diplomatic protection: Comments and observations received from Governments, Document A/CN.4/561 and Add. 1–2, 2006, p. 44-45.
[49] Zsuzsanna Deen-Racsmany, "Diplomatic Protection and International Criminal Law: Can the Gap Be Bridged?", 20 LJIL 909, 2007, pag. 9.

14. Secondly, a dismissal by this Court raises great concerns over the value of the sovereignty of some States above others.[50] Dismissing the jurisdiction of the ICC over Mr. Vragar because he did not engage in sufficient political and economic activities in Pentos raises, can be criticized as enforcing an interpretation of ICC jurisdiction that favours countries with more developed economies and infrastructures like Davos over less economically and politically powerful states like Pentos. The RS reaffirms all principles and purposes of the Charter of the United Nations (UN Charter).[51] Article 2 (1) of the UN Charter's sovereign equality is a principle of not only the UN but of the ICC and international law as a whole.[52] Also, Article 21(4) of the RS expressly states that no discrimination, such as for *"[...] national, ethnic or social origin, wealth, birth or other status*" should be made while interpreting the RS.[53] In the case of dual nationals, the fact that they are more likely to reside in the wealthiest country of nationality cannot justify an attempt to the fundamental principle of equal sovereignty of States. Therefore, nothing in the words of Article 12(2)(b) of the RS should be interpreted as allowing Mr. Vragar's choice to spend his life in a wealthy State to imply his impunity for the commission of crimes against humanity.

15. In conclusion, the PTC XV erred in law by considering that the Court lacked jurisdiction to judge the allegations of crimes against humanity against Mr. Vragar because of the absence of "sufficient links" with Pentos. The existence of such criteria cannot be inferred by interpreting the RS, either through its literal, contextual, or teleological interpretation. Also, rejecting the PTC's jurisdiction over Mr. Vragar would be contrary to the RS's objective of ensuring end impunity for those responsible for the most serious crimes of international law, and it would prevent Pentos from bringing his national to justice only because he decided to reside in another country. In sum, dismissing the Court's jurisdiction over Mr. Vragar would mean denying justice for the thousands of innocent victims based on unfunded and unfair criteria of interpretation of nationality.

[50] Lemuel Ekedegwa, Odeh, "A comparative analysis of global north and global south economies." *Journal of Sustainable Development in Africa* 12, no. 3, 2010, 338-348.
[51] RS, Preamble, para. 7.
[52] UN Charter, 1948, Article 2(1).
[53] RS, Article 21(4).

II. THE PTC ERRED IN LAW AND FACT IN FINDING THAT MR. VRAGAR DID NOT AID OR ABET THE COMMISSION OF THE OTHER INHUMANE ACTS OF GENDER APARTHEID

16. The PTC XV's Denial of Confirmation of Charges against Mr. Vragar is based on the affirmation that the term "apartheid" can only be applied to racial discrimination.[54] Also, il considers that the allegations are not sufficiently similar to the specific crimes listed in Article 7(1) RS to characterize one other inhumane act under Article 7(1)(k).[55] Also, the PTC considered insufficient evidence of Mr. Vragar's *mens rea* to fulfil the threshold of Article 25(3)(c) RS.[56] Primarily, the Court erroneously considered that the notion of apartheid is inapplicable to gender oppression for the purpose of Article 7(1)(k) **(A)** and that the inhumane act committed by Mr. Vragar is not of a similar character to the enumerated crimes under Article 7(1) RS **(B)**. Additionally, and subsidiarily, the Victim's Council solicits the additional qualification of the allegations against the Defendant as gender persecution, according to Article 7(1)(h) **(C)**. Lastly, the evidence against Mr. Vragar is sufficient to establish the *mens rea* for aiding and abetting the commission of the crime **(D)**.

A. The notion of apartheid can be applied to gender oppression for the purpose of Article 7(1)(k) of the RS

17. The PTC XV made an error of law by considering that "*apartheid only applies to racial oppression not gender discrimination*".[57] The reference to gender apartheid should be interpreted in the context of the characterization of other inhumane acts under Article 7(1)(k) of the RS. On the contrary, the Court erroneously applied the definition of apartheid relevant to the purpose of the crime of apartheid in Article 7(1)(j) of the RS.

18. Based on the text of Article 7(1)(k) and its interpretation, the inclusion of the residual category of "*other inhumane acts*" into the RS was intended to ensure the prosecution of other serious crimes against humanity than those expressly listed.[58] It has been used by international criminal tribunals to secure convictions for different gender-based crimes,[59] such as forced

[54] ICCMCC Decision, para. 17(b).
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid*.
[58] Kai Ambos, *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th edn, Bloomsbury Publishing, 2022, pag. 253. See also International Committee of the Red Cross (ICRC), Commentary on IVth Geneva Convention, p. 39.
[59] *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15 A A2, Amicus Curiae Brief on Forced Marriage, 22 December 2021, para. 4.

marriage.[60] Article 7(1)(k) requires that for the act to be qualified as another inhumane act, it cannot simultaneously fall within one of the other enumerated crimes of Article 7.[61] The Court repeatedly clarified that the scope of this residual clause should be interpreted restrictively to cover the most serious violations of customary international law and human rights law.[62] The notion of gender apartheid has been used to refer to the most serious violations of the rights of women caused by the regime in Afghanistan.[63] The deprivations suffered by the women of Northeros[64], such as those of the Afghan women, can be regarded as satisfying the level of severity required by Article 7(1)(k)[65] but they cannot fall under the crime of apartheid of Article 7(1)(j) of the RS that is limited to racial oppression.[66]

19. Since the adoption of the Decrees by the Baleran regime, the women of Northeros are obliged to illegally escape to Southeros[67] to guarantee their fundamental rights and freedoms. Women are the sole object of those serious violations, and that is expressly due to their gender.[68] Considering the public divulgation of those Decrees, Southeros and Mr. Vragar were conscious of the discriminatory nature of those politics, and yet they created and installed the ABSS, a system designed to kill those who tried to ensure their lives in a foreign country.[69] Since gender apartheid has not been recognized yet as a stand-alone crime against humanity (CaH)[70] and is not included in the RS, the only protection that can be offered to the victims is to be found in the residual clause of Article 7(1)(k) of the RS.

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[60] *The Prosecutor v. Dominic Ongwen,* ICC-02/04-01/15, Judgment, PTC IX, 4 February 2021, paras. 2247-2248. See also Special Court for Sierra Leone (SCSL), The Prosecutor v. Alex Tambe Brima *et al.*, Appeal Judgment, SCSL-2004-16, 22 February 2008, para 198; SCSL, *The Prosecutor v. Issa Hassan Sesay et al.*, Appeal Judgment, SCSL-04-15-A, 26 October 2009, para. 726; Extraordinary Chambers in the Courts of Cambodia (ECCC), *Nuon Chea and Khieu Samphan,* Trial Judgment Case 002/02, para. 741.

[61] *The Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008.*, para. 452.

[62] *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012., para. 269.

[63] Human Rights Council, Situation of Human Rights in Afghanistan, 9 February 2023, A/HRC/52/84, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General. See also Court of Justice of the European Union (CJEU)*, Opinion of the Advocate General Richard de la Tour delivered on 9 November 2023*, Joined Cases C-608/22 and C-609/22 AH (C-608/22) and FN (C-609/22), November 9, 2023.

[64] HRI Report, para. 5.

[65] See II(B).

[66] RS, Article 7(2)(h); ICC Elements of Crimes, ICC-PIOS-LT-03-002/15_Eng (2013) https://www.icc.cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf, Article 7(1)(j).

[67] HRI Report, para.7.

[68] *Ibid,* para. 5.

[69] *Ibid*, paras 8-9.

[70] Ashraph, Sareta, Gissou Nia, Akila Radhakrishnan, Nushin Sarkarati, and Alyssa Yamamoto,"Why the Crimes Against Humanity Treaty Should Codify Gender Apartheid", Just Security, 5 October 2023.

B. The acts are of a similar character to the crimes listed in Article 7(1) of the RS

20. Article 7(1)(k) of the Elements of Crimes (EoC) specifies that the inhumane act must cause great suffering or serious physical or mental injury to the victim and that it must be of a similar character to one of the enumerated acts listed in Article 7(1) of the RS.[71] On the meaning of "character", it is clarified that it "*[…] refers to the nature and gravity of the act*".[72] Contrary to what the PTC XV asserted, the allegations of inhumane acts committed by Mr. Vragar are similar in nature and gravity to the other enumerated crimes.

21. Concerning the nature of the act, case law has illustrated that other inhumane acts consist of serious violations of international customary law or fundamental rights deriving from human rights law,[73] that the assessment is made based on the factual circumstances,[74] and depends on the act's consequences.[75] Concerning the gravity of the act, by referring to the case law of *ad hoc* tribunals, the assessment is done on a case-by-case basis.[76] More precisely, the ICTY considered that an inhumane act exists in case of "*a grave and long-term disadvantage to a person's ability to lead a normal and constructive life*".[77] In this context, it's worth noting the comparability to the material element of the crime of apartheid of Article 7(2)(h) of the RS, requiring the same assessment of similarity between the act and the enumerated acts of Article 7(1) of the RS.[78] The same applies while assessing the level of gravity of the acts. The other inhumane acts of gender apartheid can be comparable in gravity with the crimes of apartheid or persecution, which also encompass the enhancement of discriminatory legislation.[79] Based on this, Mr. Vragar's actions should be regarded as inhumane acts.

22. Through the furniture and the installment of the ABSS, Mr. Vragar allowed the Baleran Regime to pursue its systematic oppression of Northeros women's rights, amounting to gender apartheid. The ABSS practically created a barrier for those trying to escape from gender apartheid in Northeros, forcing them to only choose between remaining subjected to an oppressive regime or risking being killed on Southeros' shores. Also, by designing and

[71] EoC, Article 7(1)(k) (1-2).
[72] *Ibid, fn. 30*. See also *25.The Prosecutor v. Dominique Ongwen,* ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber II,23 March 2016., para. 92.
[73] *Katanga. Decision on the confirmation of Charges*, 2008 para. 448.
[74] *Ibid,* para. 449.
[75] *Prosecutor v. Tadic*, Case No. IT-94-1-T, 7 May 1997, para. 729.
[76] *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, Trial Chamber, 7 June 2001, para. 92.
[77] *Prosecutor v. Kristic´,* IT-98-33-T, 2 August 2001, para. 513.
[78] Mark Klamberg (ed), *Commentary on the Law of the International Criminal* Court, Torkel Opsahl Academic Epublisher, 2017p. 59.
[79] Ambos, 2022, p. 237.

installing the ABSS,[80] he facilitated the violation of the fundamental right of non-refoulement of those escaping toward Southeros. This right is protected by Article 33 of the Refugee Convention of 1951,[81] to which Southeros is a State Party.[82] More precisely, the violation of non-refoulement was especially directed against Northeros' women, which can be regarded as a protraction of the gender apartheid they suffer. Also, since the ABSS is furnished with infrared rifles that automatically strike all trying to cross the border,[83] it caused the murder of many individuals.

23. Due to the adoption of the four Decrees,[84] women found themselves subjected to discriminatory policies aimed at oppressing them because of their gender and leaving no other solution than illegally escaping to Southeros to seek asylum.[85] Conscious of the situation of gender oppression of women in Northeros entailing their right to non-refoulement,[86] Mr. Vragar and Southeros deliberately installed the ABSS to prevent them from crossing the Rocky River.[87] By doing so, not only did they violate the victims' fundamental right to international protection, but they also intentionally caused more than 3,600 deaths.[88] Considering the gravity and the nature of those acts, Mr. Vragar's actions are of a similar character to those listed in Article 7(1), so the material element of Article 7(1)(k) is satisfied. Consequently, the allegations against Mr. Vragar are sufficiently circumstantiated to confirm the charges based on the existence of the inhumane act of gender apartheid.

C. The allegations against Mr. Vragar could be regarded as gender persecution

24. The charges against Mr. Vragar could also amount to the crime of gender persecution under Article 7(1)(g) of the RS, in such a way as it would be opportune to add that charge to the one of the other inhumane acts of gender apartheid. Subsidiarily, should the acts committed by the Defendant not be qualified as the inhumane act under Article 7(1)(k) of the RS in the opinion of the Court, they should alternatively be prosecuted as acts of persecution based on gender under Article 7(1)(g) of the RS. The discriminatory and right-denying four Decrees instated in Northeros can fall under the definition of the CaH of persecution against women under

[80] HRI Report, para. 8.
[81] Convention Relating to the Status of Refugees, U.N.T.S, vol. 189, 28 July 1951, Article 33(1).
[82] HRI Report, para. 3.
[83] *Ibid*, para 9.
[84] HRI Report, para. 5.
[85] *Ibid*, para 7.
[86] *Ibid*, para. 10.
[87] *Ibid*, paras. 7-8.
[88] *Ibid*, paras. 10-12.

Article 7(2)(g) of the RS and 7(1)(h) of the EoC[89] and defined as "*the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity*"[90] in addition to being qualified as gender apartheid.[91] In fact, the material element of the crime of persecution covers a variety of acts and omissions that amount to an infringement of fundamental rights.[92]

25. As argued above, the four Decrees instated by the government of Northeros[93] intentionally and severely deprive its female population of their fundamental rights, their right of non-refoulement, and put its right to life in danger against international law.[94] Those acts fall under the definition of gender-based persecution present in Article 7(2)(g) of the RS.[95] Following ICTY case law, persecution addresses discriminatory conduct that, even with different severity levels,[96] infringe on the basic rights of individuals.[97] As noted by the OTP, to assess the existence of gender persecution, it is necessary to consider the general context in which the violations of fundamental rights take place, taking into account information coming from UN bodies and institutions as well as civil society and organizations.[98] Here, the existence of discriminatory policies against Northeros' women has been assessed both by the UN Human Rights Council[99] and HRI[100].

26. Prosecuting Arrix Vragar under the CaH of persecution under Article 7(1)(h) of the RS would obviate the need to justify the existence and inclusion of a new inhumane act under the ICC's jurisdiction to fit under Article 7(1)(k) of the RS. Persecution is already a well-established CaH with precedents in the Court.[101] Therefore, the charges against Arris Vragar should be amended to either include gender persecution in the crimes that the Defendant stands charged with or replace the crime of "gender apartheid" together in favour of persecution for future

[89] RS, Article 7(1)(g).
[90] *Ibid*, Article 7(2)(g); EoC, Article 7(1)(h).
[91] See II(A).
[92] Ambos, 2022, p. 267.
[93] HRI Report, para 5.
[94] See I(A), para. 18. See also, ICJ, Updated Practitioners Guide no. 6 on migration and international human rights law, 2014, p. 79; UNHCR, Gender-Related Persecution with the context of Article 1A(2) of the 1951 Convention and/or Refugee Convention.
[95] RS, Article 7(2)(g). See also, Ambos, 2022, p. 267.
[96] *Tadic*,1997, paras. 694 and 704
[97] *Prosecutor v. Simic´,* No. IT-95-9-T, Judgement, Trial Chamber, 17 October 2003, para. 58.
[98] OTP, Policy on the Crime of Gender Persecution, 7 December 2022, para. 68.
[99] HRI Report, para 6.
[100] *Ibid*
[101] See *The Prosecutor v. Al Hassan*, ICC-01/12-01/18-461-Corr-Red, Decision on the Confirmation of Charges, Pre-Trail Chamber I, 13 November 2019., para. 228; *The Prosecutor v. Blé Goudé,* ICC-02/11-02/11-186, Decision on the Confirmation of Charges, Pre-Trail Chamber I, 11 December 2014, para. 10;*The Prosecutor v. Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trail Chamber I,13 June 2014, para. 17.

hearings. Such an amendment would be consistent with established precedents of international criminal courts, which opted for multiple convictions in order to ensure that justice could be made for the totality of the criminal conduct of the perpetrators.[102]

27. When it comes to the Chamber, the Representatives of the Victims request that they consider changing the legal characterization of the acts of the discriminatory regime in Northeros into persecution according to Regulation 55 (1) of the Regulations of the Court (RoC).[103] This would include the re-interpretation of the facts and circumstances of a charge of CaH into another in the same category. Regulation 55 (1) of the RoC has been used in the past to change the characterization of the crimes by the Court.[104] In the case of Mr. Vragar, an account of other inhuman acts into one of persecution.

28. On the matter of the Prosecution, amending the charges against Mr. Vragar to include persecution alongside or instead of gender apartheid to facilitate the judgment and legal investigation against the Defendant, since a charge of persecution under Article 7 (1)(g) of the RS, which can more easily be accepted under the jurisdiction of the Chamber and with the same evidence presented. In fact, an authorization to investigate alleged crimes of gender persecution has been authorized by the Court for the situation in Afghanistan.[105] As the case against Mr. Vragar is still in the Pre-Trial stage, the Prosecution may amend or withdraw any charges against the defendant under Article 61 (4) of the RS, requiring to provide Mr. Vragar with reasonable notice of the amendment decision.[106] Should the Chamber and the Prosecution decide not to follow these recommendations to amend the charges against Mr. Vragar, the Representatives of the Victims strongly suggest that "gender apartheid" is admissible as an "other inhumane act" under ICC jurisdiction. Following its precedents,[107] the

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[102] *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Judgment on the appeal of Mr. Ongwen against the decision of the Trial Chamber IX of 4 February 2021 entitled "Trial Judgment", Appeal Chambers,15 December 2022.
[103] ICC, Regulations of the Court, ICC-BD/01-01-04, 26 May 2004, amended on 10 February 2016, https://www.icc-cpi.int/sites/default/files/RegulationsCourt_2018Eng.pdf., Regulation 55 (1).
[104] *The Prosecutor v. Bemba*, ICC-01/05-01/08-2324, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, Trail Chamber III, 24 September 2012, para 4;. *21. The Prosecutor v. Katanga,* ICC-01/04-01/07-3363, Judgment on the appeal of Mr. Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Appeal Chambers, 27 March 2013, para 49.
[105] *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-7-Conf-Exp, Public redacted version of "Request for authorization of an investigation pursuant to Article 15", 20 November 2017., para 112, and 29. *Situation in the Islamic Republic of Afghanistan*, ICC-02/17 OA4, Judgment on the appeal against the decision on the authorization of an investigation, 5 May 2020.
[106] RS, Article 61(4): "*Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges*."
[107] *Gbagbo*, 2014, para. 44.

Chamber should consider ruling in favour of an adjournment requesting the prosecution to amend their charges from "gender apartheid" to persecution under Article 61 (7)(c).

D. Mr. Vragar had the necessary *mens rea* for aiding and abetting the commission of the acts

29. Contrary to what the PTC XV considered,[108] the circumstances that led Mr. Vragar to create and install the ABSS are sufficient to establish the mental element for aiding and abetting the commission of the inhumane act against the victims. Article 25(3)(c) of the RS requires that the act is made "*for the purpose of facilitating*" the commission of the main crime, setting up the peculiar *mens rea* for complicity, which is higher than mere knowledge.[109] However, this only applies to the act of facilitation and not to the main crime,[110] so it is sufficient to establish that the Defendant wanted to help[111] in perpetrating inhumane acts against the women escaping from Northeros by furnishing the ABSS. Also, in line with the case law of the *ad hoc* tribunals, this subjective threshold can be inferred from the factual circumstances.[112] Therefore, the alleged acts do not have to constitute a *conditio sine qua non* for the realization of the crime,[113] but by putting into practice those acts, the subject must have wanted to further the commission.[114] Case law of the Court shows that preparatory acts such as training and providing the equipment necessary for the commission of the crime fall under Article 25(3)(c) of the RS[115] and that assistance can take place "*before, during or after*"[116] the crime. Considering the available facts, there are reasons to believe that Mr. Vragar wanted to help with the commission of an inhumane act. He was well aware of the situation of systematic violation of fundamental rights by the State of Northeros that was raised by the Human Rights Council.[117] Similarly, he was conscious that since the adoption of the Decrees, Southeros was facing a migration crisis that led it to contact his company to design the ABSS.[118] Following Southeros' requests, the system was created by Mr. Vragar in order to prevent Northeros' women from entering the territory of his commissioner,[119] and to achieve Southeros' objective,

[108] ICCMCC Decision, para.17(b).
[109] Ambos, 2022, p.1125.
[110] *Ibid*; *18, The Prosecutor v. Bemba and others*, ICC 01/05/-01/13-1989-Red, Judgment pursuant to Article 74 of the Statute, Trial Chamber VII,19 October 2016, para. 97.
[111] *The Prosecutor v. Mbarushimana,* ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, Pre-Trail Chamber I, 16 December 2011, para. 281.
[112] See, for example, *Tadic*, 1997, para. 689.
[113] *Ongwen,* 2016, para. 43.
[114] *Goudé*, 2014, para 167; *19.The Prosecutor v. Thomas Lubanga,* ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, TC I, 14 March 2012, para 997.
[115] *Goudé*, 2014, para. 170.
[116] *Bemba et al, 2016*, para. 96.
[117] HRI Report, para. 6.
[118] *Ibid*, paras. 7-8.
[119] *Ibid.*

he equipped the ABSS with autonomous rifles that killed the victims.[120] Consequently, not only was he fully aware that through the ABSS, Southeros would have perpetrated a mass violation of fundamental rights amounting to an inhumane act started in Northeros, but he also wanted to facilitate the commission of those crimes as it was part of the contractual relation between them.[121]

30. The factual circumstances of this case make it evident that Mr. Vragar necessarily had the *mens rea* required by Article 25(3)(c) of the RS. He conceived and installed the ABSS as part of his contractual obligation with Southeros aimed at developing a system able to impede the entry of individuals, especially women, seeking international protection into the territory of the contracting State. Therefore, Mr. Vragar should be tried for aiding and abetting the commission of an inhumane act against the women of Northeros.

III. THE PTC ERRED IN PROCEDURE AND IN LAW CONSIDERING THAT MR. VRAGAR IS NOT RESPONSIBLE FOR OBSTRUCTING AND INTERFERING WITH THE ADMINISTRATION OF JUSTICE

31. The PTC XV erroneously deliberated that Mr. Vragar could not be tried for committing an offence against the administration of justice under Article 70(1)(c) of the RS because there are no substantial grounds to believe that he committed the acts.[122] The PTC erred in considering that it could be competent to judge this issue. The proceeding under Article 70 of the RS should be judged by a different Chamber composed of a single judge (**A**). However, there is sufficient evidence to establish substantial grounds to believe that Mr. Vragar obstructed or interfered with the administration of justice (**A**) because of the publication of the witnesses' names on his platform, Cyberleaks.

A. The proceeding under Article 70 of the RS should be judged by a single judge specially appointed by the Court

32. Even though there is sufficient evidence to establish substantial grounds that Mr. Vragar obstructed or interfered with the administration of justice, the Representatives of the Victims are concerned that a specific Chamber consisting of one judge should have been appointed to have jurisdiction over the specific charge of offences against the administration of justice under Article 70 of the RS against Mr. Vragar.
33. Regulation 66 *bis* of the RoC specifies that in case of an application concerning offences against the administration of justice under Article 70 of the Statute, the President of the PTC

[120] *Ibid*, paras. 9-10.
[121] *Ibid*, para. 8.
[122] ICCMCC Decision, para 17(c).

Division should constitute a Chamber composed of one judge that exercises the PTC's functions and powers for charges under Article 70.[123] Otherwise, the Court should have ruled on the joinder of charges with the main crime pursued under Articles 25(3)(c) and 7(1)(k) of the RS.[124] As Mr. Vragar is charged with obstructing or interfering with witnesses under Article 70 (1) (c) and no joinder of charges has been declared, Regulation 66 *bis* of the RoC should have been invoked by the President of the PTC Division.

34. Yet, when deciding on *Prosecutor v. Arrix Vragar*, the PTC XV comprised two panels of judges of the PTC, which dealt with all Mr. Vragar's charges together, including those under Article 70 (1) (c), without declaring that they were not competent in this proceeding. This deviation from the prescribed procedure can invalidate PTC XV's future decisions on the culpability of Mr. Vragar for offences against the administration of justice despite existing evidence for his responsibility in the publication of the witnesses' names. Proceedings on offences against the administration of justice have been conceived by the drafters of the RS as an essential instrument for ensuring the Court's main objective of ending impunity[125] and respecting the fundamental principle of fairness of trial.[126]

35. Therefore, the President of PTC XV should constitute a single judge Chamber with full competences over Mr. Vragar's charge of offences against the administration following Regulation 66 *bis*. The continuation of the procedures against Mr. Vragar is vulnerable to being partially dismissed due to the omission of Regulation 66 *bis* of the RoC, facilitating impunity for some of Mr. Vragar's actions and against the interests of the victims. Additionally, maintaining charges of such a different legal nature as aiding and abetting crimes against humanity and offences against the administration under the jurisdiction of the same Chamber can be regarded as an obstacle to applying the proper amount of attention and effort to every specific charge against Mr. Vragar. Keeping charges under Article 7 and Article 70 of the RS under the same Chamber can result in reduced time for Legal Representatives to dedicate to

[123] RoC, Reg. 66*bis*(1). See for example *Situation in the Central African Republic*, ICC-01/05-T2-Conf-Exp-Eng, Transcript, 30 August 2013.
[124] RoC, Reg 66*bis*(6). See for example 26. *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on Defense request for stay of proceedings with prejudice to the Prosecution, Trial Chamber VI, 28 April 2017, para 30.
[125] *Proposal Submitted by the United States on Offences against the Integrity of the Court,* UN Doc. A/AC.249/WP41, 13 September 1996; *Working Paper Submitted by Australia and the Netherlands*, UN Doc. A/AC.249/L.2, pp. 26–27.
[126] Till Gut, *Counsel Misconduct Before the International Criminal Court: Professional Responsibility in International Criminal Defence*, Oxford: Hart Publishing, 2012; Steven William Kayuni, "Quis Custodiet Ipsos Custodes (Who is Guarding the Guardians)? – Decision Processes in the ICC's Offences Against the Administration of Justice", The Law and Practice of International Courts and Tribunals 15, 2016, p. 347.

each charge, both in oral pleadings and written submissions, consequently making the judge's decisions based on less information.

B. There is sufficient evidence to establish substantial grounds that Mr. Vragar obstructed or interfered with the administration of justice

36. The PTC XV's Decision to deny the confirmation of charges on Mr. Vragar's offence against the administration of justice is justified by considering that since there is no evidence linking him to the hacking of the OTP's system, the publication of the unredacted version of the HRI Report is not sufficient *per se* to be regarded as an obstruction or interference with the administration of justice.[127] Under Rule 163 of the Rules of Procedure and Evidence (RPE),[128] the evidentiary threshold set up in Article 61(7) also applies to proceedings concerning offences against the administration of justice under Article 70 of the RS.[129] Based on the evidence provided by the OTP and HRI, there are substantial grounds to believe that the objective (**a)** and subjective (**b**) elements of the offence under Article 70(1)(c) of the RS are met.

a. Mr. Vragar obstructed and interfered with the testimony of the two insider witnesses

37. By referring to Article 70(1)(c) of the RS, an offence against the administration of justice can be qualified in case of obstruction or interference with the attendance and testimony of the witnesses in front of the Court. Issues relating to witnesses and their testimony are essential for the proceedings, and as it has been noted by the International Bar Association (IBA), they also bring a fair trial dimension.[130] The material scope of the acts of obstruction and interference has been defined as including any form of threat, use of physical force, or other forms of intimidation against the witnesses aimed at preventing their testimony.[131] The Court has also addressed this issue by considering that Article 70(1)(c) of the RS includes "*any conduct that may have an impact or influence on the testimony to be given by the witnesses*."[132] More precisely, the acts of disclosing and publicizing witnesses' protected identities to the

[127] *Ibid*.
[128] ICC Rules of Procedure and Evidence, ICC-PIOS-LT-03-004/19_Eng (2019) https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf., Rule 163(1): "*Unless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply mutatis mutandis to the Court's investigation, prosecution and punishment of offences defined in Article 70."*
[129] *17. The Prosecutor v. Bemba and others,* ICC-01/05-01/13, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 11 November 2014., para. 25.
[130] ICC & ICL Programme, *Offences against the administration of justice and fair trial considerations before the International Criminal Court*, Discussion Paper Series, August 2017, p. 8.
[131] United Nations, Report of the Preparatory Committee on the Establishment of an International Criminal Court–Volume II/Compilation of Proposals, 19 September 1996, A/51/22[VOL-II] pp. 210–213; See Klamberg, 2017, p. 544.
[132] *Bemba* et al., 2014, para 30; *Bemba* et al., 2016, para 43.

general public constitute an offence against the administration of justice.[133] Following the evidentiary threshold for the Confirmation of Charges provided by Article 61(7) of the RS, there is sufficient evidence for considering that Mr. Vragar obstructed or interfered with the attendance of the two insiders through the publication of their names on Cyberleaks.

38. The unredacted version of the HRI Report hacked from the OTP's database was published on Cyberleaks[134] on 5 April 2024.[135] As a consequence, Varmiter Morghule and Syrix Shreaker, the two insiders who bravely shared with HRI the inhumane acts committed by Mr. Vragar and who were the key witnesses in the case against him, disappeared.[136] Since their testimony in front of the Court would be central to proving Mr. Vragar's responsibilities in the commission of inhumane acts against the women trying to escape from Northeros' oppression, their disappearance can only be regarded as a direct interference with their attendance and, therefore, with the administration of justice. The fact that the OTP hasn't been able to link Mr. Vragar or his company to the hacking of its database[137] does not constitute an impediment to qualifying the material element of the offence under Article 70(1)(c) of the RS. It is the publication of the witnesses' names that caused the interference with the administration of justice: the Defendant deliberately chose to make this intimidating act to discourage them from testifying. The hacking only constitutes a means by which Mr. Vragar has been able to act to impede the witnesses' attendance in front of the Court. Therefore, the evidence collected by the OTP is sufficient to believe that he obstructed the testimony.

b. Mr. Vragar intended to prevent the witnesses from testifying by means of the publication

39. Based on Rule 163 of the RPE, the general standard of Article 30 of the RS provides the *mens rea* required for committing an offence under Article 70 of the RS.[138] Accordingly, there is sufficient evidence to establish substantial grounds to believe that Mr. Vragar knew and wanted[139] to interfere with the testimony of the insiders *via* the publication of their names in the ordinary course of events.[140] Concerning the offences against the administration of justice,

[133] Open Society Justice Initiative, Witness Interference in Cases before the International Criminal Court, November 2016, p 4.
[134] A division of Vragarsoft Corp. owned and controlled by Mr. Vragar. See OPT Report, para. 3.
[135] *Ibid*.
[136] *Ibid*, para. 5.
[137] *Ibid*, para. 6.
[138] *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*, ICC-01/09-01/15-1-Red 10-09-2015 1/19 EK PT, Decision on the "Prosecution's Application under Article 58(1) of the Rome Statute", Pre-Trial Chamber II,10 March 2015, para 20.
[139] RS, Article 30(2).
[140] *15. The Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 363.

the Court has repeatedly affirmed that it is a conduct offence rather than a result offence,[141] so it is sufficient to prove that he acted for the purpose of intimidating the witnesses. Mr. Vragar's intent was undoubtedly to hamper the testimony against him using his platform, Cyberleaks, as a pretext, and where he uses the right to freedom of expression as a defense whilst silencing critical insiders. However, the ICTY case law illustrates that the disclosure of protected witnesses' names by the press is condemned as contempt to the Court.[142] There, many famous journalists have been found responsible for consciously revealing to the general public the identities of witnesses as a strategy to interfere with the pending proceedings.

40. The existence of Mr. Vragar's knowledge and willingness to obstruct the witnesses' testimony is evident firstly by the position he holds in Cyberleaks. Not only does he own the platform through Vragarsoft Corp., but he also directly controls its publications,[143] so it is evident that he knew about the publication of the unredacted version of the Report and its consequences. Also, considering the stage of the proceeding against him, he already knew that the OTP was investigating his crimes,[144] so he decided to publish the names as a strategy to avoid being condemned for his inhumane acts, conscious of the intimidating effect that he could have on them. In fact, the two insiders were two of his employees who knew him personally[145] and who testified to HRI about his influential power and fortune,[146] leaving no doubt about the fear that they perceived in knowing that he had been informed about their testimony.

41. In conclusion, the evidence available to the Court leaves no doubt about Mr. Vragar's responsibility in obstructing and interfering with the attendance of the insider witnesses in front of the Court. He intentionally committed an offence against the administration of justice under Article 70(1)(c) of the RS by publishing the hacked version of the HRI Report on his platform, Cyberleaks.

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[141] *Gicheru*, 2015, para. 19. See also *Bemba et al*., 2014, para. 30.
[142] See for example *Prosecutor v Josip Jović* (First Amended Indictment), IT- 95- 14 and IT- 95- 14/ 2- R77, (19 May 2006), para 3; *Prosecutor v Ivica Marijačić and Markica Rebić (Judgment)* (Third Amendment), IT-95- 14- R77.2 (10 March 2006), para. 1-7; *Florence Hartmann*, (Judgment), IT- 02- 54- R77.5- A, (19 July 2011) (Hartmann Appeal Judgment), para. 160.
[143] Report of the Office of the Prosecutor of the ICC Relating to the Hacking and Publication of Confidential Information and the Resulting Disappearance of Witnesses, Appendix C to Decision on Confirmation of Charges (13 May 2024)., para. 3.
[144] ICCMCC Decision, para. 6.
[145] HRI Report, paras. 8 and 16.
[146] *Ibid*, paras. 15-16.

SUBMISSIONS

Having presented all the arguments, the Victims' Counsel respectfully requests the Appeals Chamber to

I. Dismiss the PTC XV's Decision, and

II. Declare that:

a. The PTC erred in holding that the Court does not have jurisdiction.

b. The PTC erred in holding that there are no substantial grounds to believe that the Defendant is responsible for aiding and abetting the commission of the other inhumane act of gender apartheid according to Articles 25(3)(c) and 7(1)(k) of the RS.

c. The charges are amended to also include the inhumane act of gender persecution under Article 7(1)(g) of the RS.

d. A single judge of the PTC should be appointed for the proceeding under Article 70(1)(c) of the RS.

e. The PTC erred in holding that the Defendant cannot be tried for obstructing or interfering with the administration of justice according to Article 70(1)(c) of the RS.

Respectfully submitted,

VICTIMS' COUNSEL

On behalf of the victims