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THE APPEALS CHAMBER

SITUATION IN THE REPUBLIC OF NORTHEROS

IN THE CASE OF

THE PROSECUTOR v. ARRIX VRAGAR

Public

The Office of the Prosecutor's Submission in the Appeal from the Pre-Trial Chamber's Denial of Confirmation of Charges against the Defendant Arrix Vragar

Source: **Office of the Prosecutor**

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LIST OF ABBREVIATIONS

ABSS	Automated Border Security System
AC	Appeals Chamber
Apartheid Convention	International Convention on the Suppression and Punishment of the Crime of Apartheid
Art./Arts.	Article(s)
CAH	Crimes against humanity
Case	*Prosecutor v. Vragar*, Decision on the confirmation of charges
CEO	Chief Executive Officer
CJEU	Court of Justice of the European Union
Decrees	Four Decrees of the Baleran Regime issued in 2021
ECtHR	European Court of Human Rights
Ed./eds.	Editor/editors
EoC	Elements of Crimes
et al.	*et alii/et aliae* (“and others”)
HRI Report	Situation of Human Rights in Northeros
HRI	Report by Human Rights International titled “Situation of Human Rights in Northeros”
i.e.	*id est* (“in other words”)
Ibid.	*Ibidem* (“in the same place”)
ICC	International Criminal Court
ICJ Rep.	International Court of Justice Reports
ILC	International Law Commission
IUSCT	Iran-United States Claims Tribunal
JICJ	Journal of International Criminal Justice

Morghule	Varmiter Morghule
NGO	Non-governmental organisation
No.	Number
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RS	Rome Statute
SP	State Party
TC	Trial Chamber
UN	United Nations
v.	*versus*
VCLT	Vienna Convention on the Law of Treaties
vol.	Volume
Vragar	Arrix Vragar

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3. *Nottebohm (Liechtenstein/Guatemala)*, Judgment [1955] ICJ Rep.3. **[*Nottebohm*]**
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STATEMENT OF FACTS

1. **Arrix Vragar's ("Vragar") nationalities:** Vragar has the nationality of two states: Pentos and Davos. Although he was born in the former, he has lived in the latter his entire adult life. While Pentos is a State Party ("SP") to the Rome Statute ("RS") since 2002, Davos never ratified this treaty.

2. **The crimes in Northeros and the Automated Border Security System ("ABSS"):** The charged acts occurred in Northeros and Southeros, two neighbouring states, both non-parties to the RS. In 2021, the Baleran Regime of Northeros issued four decrees severely restricting females' rights ("Decrees"). Thousands of people fled Northeros into Southeros. To reduce such displacement, the Southerosi government hired Vragarsoft, a company owned by Vragar, to develop and install the ABSS along the Northerosi border. ABSS automatically shoots upon anyone illegally crossing the border, except if a fail-safe is manually triggered. After ABSS's installation in July 2023, displacement to Southeros reduced substantially.

3. **The Report by Human Rights International ("HRI"):** In February 2024, HRI, a non-governmental organisation ("NGO"), provided the Office of the Prosecutor ("OTP") of the International Criminal Court ("ICC") with a report on the situation in Northeros and Vragar's involvement therein ("HRI Report"). The report was based on public records and interviews with two Vragarsoft employees, who provided information subject to anonymity for security reasons. The OTP received an unredacted version of the HRI Report indicating their identities, which was kept confidential. In April 2024, unknown hackers gained unauthorised access to the unredacted document, which was published a few hours later in Cyberleaks, a website owned and controlled by Vragar. Following these events, the two witnesses disappeared.

4. **Procedural history:** On May 20, 2024, the Pre-Trial Chamber ("PTC") issued an arrest warrant for Vragar. On September 15, 2024, the PTC declined by majority to confirm all charges against Vragar, leading to an appeal by the Prosecution.

ISSUES

- I -

Whether the PTC erred in finding that the ICC lacked jurisdiction over Vragar under art.12(2)(b) RS because he lacked a genuine link to Pentos, a SP to the RS.

- II -

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

- III -

Whether the PTC erred in finding that Vragar cannot be tried for committing an offence against the administration of justice under art.70(1)(c) 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 PTC erred in holding that the ICC lacks jurisdiction over Vragar under art.12(2)(b) RS.

1. The Court's jurisdiction over Vragar is based on his *jus soli* nationality from Pentos, a SP to the RS.

2. Following the rule of interpretation under art.31 Vienna Convention on the Law of Treaties ("VCLT"), art.12(2)(b) RS does not require a genuine link between Vragar and Pentos.

3. Alternatively, Vragar has a genuine link with Pentos given his birth there.

4. The case does not violate the principle of legality.

- II -

The PTC erred in not finding that there are substantial grounds to believe that Vragar aided and abetted the commission of the inhumane act of "gender apartheid" under arts.7(1)(k) and 25(3)(c) RS.

1. The HRI Report is sufficient to establish substantial grounds to believe.

2. The charged conduct constitutes the crime against humanity ("CAH") of gender apartheid as other inhumane acts under art.7(1)(k) RS and, alternatively, gender-based persecution under art.7(1)(h).

3. Vragar bears criminal responsibility under the mode of liability of aiding and abetting and, alternatively, of contribution to a group with a common purpose.

4. Vragar's responsibility is not precluded by mistake of law.

- III -

The PTC erred in finding that Vragar cannot be tried for committing an offence against the administration of justice under art.70(1)(c) RS.

1. Vragar obstructed or interfered with the attendance or testimony of witnesses by publishing the unredacted HRI Report.

2. Vragar is liable under the alternative modes of responsibility of indirect perpetration and ordering.

I. THE PTC ERRED IN HOLDING THAT THE COURT LACKS JURISDICTION OVER VRAGAR

1. The ICC has jurisdiction over Vragar under art.12(2)(b) RS, because: **(1)** the Court should defer to Vragar's *jus soli*-based nationality from Pentos, a SP to the RS; **(2)** art.12(2)(b) does not require a genuine link between the defendant and a SP to the RS; **(3)** alternatively, if the Court rules that genuineness is required, Vragar has an effective connection with Pentos; and **(4)** Vragar's prosecution does not breach the principle of legality. In this memorial, "genuine link" refers to "a social fact of attachment, a genuine connection of existence, interests and sentiments" between a person and the state of his/her nationality.[1]

1. The ICC has jurisdiction over Vragar given his *jus soli*-based nationality of a SP to the RS (Pentos)

2. Art.12(2)(b) RS determines that the ICC has jurisdiction if the defendant is "a national" of a SP to the RS. States have a broad discretion to confer their nationality.[2] Apart from exceptional cases of fraud,[3] abuse of rights,[4] and inconsistency with international law,[5] the granting of nationality at the national level is binding internationally, particularly when such granting was based on a generally accepted criterion.[6] A greatly recognised criterion to confer nationality is *jus soli*: persons born in the territory of a state become its nationals.[7] Therefore, the ICC must presume the validity of a *jus soli*-based nationality.[8] This applies especially if the state treats the individual as its national and the person has never renounced his/her nationality.[9]

3. Vragar is a national of Pentos, given his birth there and the fact that this state adopts the *jus soli* principle.[10] Clearly, his ordinary *jus soli*-based acquisition of Pentosi nationality does not contradict international law and is not tainted by fraud or abuse of rights. Moreover, Vragar never renounced this nationality, and Pentos publicly acknowledged him as its national.[11] Accordingly, the

[1] *Nottebohm (Liechtenstein/Guatemala)*, Judgment [1955] International Court of Justice Reports ("ICJ Rep.") 3, 23.
[2] *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion [1923] Permanent Court of International Justice Ser.B/No.4, 24.
[3] *Esphahanian v. Tejarat*, Final Award, Iran-United States Claims Tribunal ("IUSCT") Case No.157, 29.03.1983, §47.
[4] *Lao Holdings v. Lao*, Decision on Jurisdiction, International Centre for Settlement of Investment Disputes Case No.ARB(AF)/12/6, 21.02.2014, §70.
[5] Convention on Certain Questions Relating to the Conflict of Nationality Law (1930), 179 League of Nations Treaty Series 89, art.1; European Convention on Nationality (1997), European Treaty Series 166, art.3(2).
[6] Jennings, *General Course on Principles of International Law* (1967), 458-460.
[7] Shaw, *International Law* (2021), 661.
[8] Crawford, *Brownlie's Principles of Public International Law* (2019), 496-497.
[9] *Bahgat v. Egypt*, Decision on Jurisdiction, Permanent Court of Arbitration No.2012-07, 30.11.2017, §§216, 231.
[10] Human Rights International, *Situation of Human Rights in Northeros*, 22.02.2024, §13.
[11] *Prosecutor v. Vragar*, Decision on the confirmation of charges, PTC-XV, 15.09.2024, §8.

ICC should consider Vragar a Pentosi national, assuming the validity of such nationality. Considering that Pentos was a SP to the RS when the charged facts occurred,[12] the ICC has jurisdiction over Vragar under art.12(2)(b).

2. Art.12(2)(b) RS does not require a genuine link between Vragar and Pentos

4. Art.31(1) VCLT outlines the general rule of treaty interpretation, encompassing three elements: **(a)** the ordinary meaning of the terms; **(b)** the context; and **(c)** the treaty's *raison d'être*. Pursuant to this rule, a genuine link is unnecessary to establish the ICC's jurisdiction under art.12(2)(b) RS.

a. The textual interpretation of art.12(2)(b) rejects the genuine link requirement

5. According to the principle of textual primacy, interpretation must be based "above all" on the provision's wording.[13] The ICC has consistently refused to impose additional legal prerequisites that the RS's plain language does not require.[14] Art.12(2)(b) RS only refers to "a national" of a SP, using unqualified wording. Since art.12(2)(b)'s plain language does not demand a genuine link, the ICC cannot render its jurisdiction contingent upon genuineness of nationality.[15] The RS's *travaux préparatoires* confirm this contention, as the drafters never discussed genuine link in connection with art.12(2)(b).[16] Other courts have also rejected genuineness as a limitation to their jurisdiction when their statutory framework—akin to art.12(2)(b) RS—does not require such a criterion explicitly.[17] Moreover, the Black's Law Dictionary,[18] a source the ICC often uses to interpret the RS,[19] does not refer to the genuine link in its definition of "national". Hence, art.12(2)(b)'s ordinary meaning dismisses the genuineness threshold.

b. The contextual interpretation of art.12(2)(b) rejects the genuine link requirement

6. Three contextual elements of art.12(2)(b) are relevant: **(i)** art.36(7) RS on elections of ICC judges; **(ii)** the active personality principle; and **(iii)** international customary law.

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[12] HRI Report, §§1,13.
[13] *Legality of the Use of Force (Serbia and Montenegro/Belgium)*, Judgment [2004] ICJ Rep.279, §100.
[14] *Prosecutor v. Bemba et al*., Judgment pursuant to Article 74 of the Statute, TC-VII, ICC-01/05-01/13-1989-Red, 19.10.2016, §93.
[15] Rastan, "Jurisdiction", in Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 153-155.
[16] Bassiouni & Schabas, *The Legislative History of the International Criminal Court*, vol.II (2016), 134-145.
[17] *Bahgat*, §232; France, *Aboukhalil v. Senegal* (2021), Paris Appeal Court, Répertoire général 19/21625, §§29-37.
[18] Garner, *Black's Law Dictionary* (2010), 1121.
[19] *Prosecutor v. Ntaganda,* Reparations Order, TC-VI, ICC-01/04-02/06-2659, 08.03.2021, footnote 273.

i. Art.36(7) RS informs art.12(2)(b)'s meaning

7. The silence of art.12(2)(b) RS on the genuine link requirement should be interpreted alongside art.36(7) RS, which explicitly recognises this requirement in the context of dual-national candidates for ICC judges.[20] The drafters' refusal to incorporate the genuine link in art.12(2)(b), while explicitly doing so in art.36(7), reveals that the genuine link is intended to be applied exclusively at the ICC judicial elections, and not as a limit for the Court's jurisdiction under art.12(2)(b).[21]

ii. The active personality principle does not require a genuine link

8. The active personality principle determines that states can exercise criminal jurisdiction over their nationals who commit crimes abroad.[22] Since art.12(2)(b) RS is an expression of this principle,[23] the provision should be interpreted in light of how international law regulates the principle and how states apply it.[24] The active personality principle is applied based on formal nationality alone, without requiring genuine ties between the defendant and the forum state.[25] Also, the defendant's dual nationality or long-lasting residence abroad has been consistently deemed immaterial for the principle's application.[26] Accordingly, the ICC should apply the same rationale to art.12(2)(b),[27] concluding that Vragar's Pentosi nationality alone is sufficient to establish the Court's jurisdiction.

iii. The genuine link is not a customary rule

9. Customary law is composed of two cumulative elements: state practice and *opinio juris*.[28] Support for the custom among states must be widespread and consistent, implying that discrepancies in the practice prevent the formation of the custom.[29] After its recognition in the *Nottebohm* case in

[20] Wolman, "Dual Nationality and International Criminal Court Jurisdiction", (2020) 18(5) *Journal of International Criminal Justice* ("JICJ") 1081-1102, 1087.
[21] *Ibid*.
[22] Guilfoyle, *International Criminal Law* (2016), 32.
[23] Ambos, *Treatise on International Criminal Law,* vol.III (2016), 217.
[24] Deen-Racsmány, "The Nationality of the Offender and the Jurisdiction of the International Criminal Court", (2001) 95(3) *American Journal of International Law* 606-623, 610.
[25] Wolman, 1091; Guilfoyle, 33.
[26] United States, *Kawakita v. United States* (1952), Supreme Court, 343 United States Reports 717; Albania, *Criminal Code* (1995), art.6.
[27] Deen-Racsmány, 612; Tsilonis, *The Jurisdiction of the International Criminal Court* (2024), 72.
[28] *North Sea Continental Shelf (Germany/Netherlands)*, Judgment [1969] ICJ Rep.3, §77.
[29] *Ibid*., §§73-74.

1955,[30] the genuine link has been rejected by numerous states,[31] international case-law,[32] the International Law Commission ("ILC"),[33] and scholars,[34] for being an inappropriate legal notion and for not being sufficiently established in international law. Thus, the state practice pertaining to the genuine link requirement lacks consistency, thereby failing to amount to an international custom.

10. Even if the Court concludes that genuine link is binding under customary law, its incorporation into art.12(2)(b) RS remains unwarranted. The genuine link pertains exclusively to state responsibility, especially diplomatic protection and investor-state arbitration.[35] It is inapplicable in criminal jurisdiction, including art.12(2)(b).[36] Consequently, even if the genuine link is deemed customary law, it does not apply at the ICC.

c. The teleological interpretation of art.12(2)(b) rejects the genuine link requirement

11. The RS's object and purpose is to fight impunity and ensure accountability.[37] Requiring a genuine link under art.12(2)(b) would run counter this *raison d'être*, as it would hinder the Court's ability to pursue justice. Criminals falling within the ICC's competence as nationals of a SP to the RS could evade the Court's reach simply because they lack a genuine link with the SP in question.[38] Genuineness of nationality is also antithetical to the current era of globalisation, marked by intense migration and multiple nationalities.[39] Accordingly, basing the ICC's jurisdiction under art.12(2)(b) on a genuine link-based nationality would contradict the RS's *raison d'être*.

3. Alternatively, Vragar has a genuine link with Pentos

12. If the ICC concludes that a genuine link between Vragar and Pentos is necessary to establish jurisdiction under art.12(2)(b) RS, such a link is present. There is no exhaustive binding list of criteria in international law to determine genuineness, for this assessment is always case-specific and

[30] *Nottebohm*, 23.
[31] United Nations ("UN"), Remarks by Hilger (Germany), A/C.6/55/SR.19, 30.10.2000, §66; UN, Remarks by Geete (India), A/C.6/55/SR.19, 30.10.2000, §43; UN, Remarks by Belinga-Eboutou (Cameroon), A/C.6/55/SR.24, 03.11.2000, §66.
[32] *Salem (Egypt/United States)*, Award, II Reports of International Arbitral Awards 1161, 08.06.1932, 1187; *Micheletti v. Cantabria*, Judgment, Court of Justice of the European Union ("CJEU"), Case C-369/90, 07.07.1992, §§10,14; *European Commission v. Malta*, Opinion of Advocate General Collins, CJEU, Case C-181/23, 04.10.2024, §56.
[33] ILC, Draft Articles on Diplomatic Protection with commentaries, 2006, art.4.
[34] Macklin, "Is It Time to Retire Nottebohm?" (2018) 111 *American Journal of International Law Unbound* 492-497; Spiro, "Nottebohm and 'Genuine Link': Anatomy of a Jurisprudential Illusion", (2019) *Investment Migration Working Papers*, IMC-RP2019/1, 1-23.
[35] Staker, "Jurisdiction", in Evans (ed.), *International Law* (2024), 319.
[36] Guilfoyle, 33; Robinson *et al.*, *An Introduction to International Criminal Law and Procedure* (2024), 54.
[37] Rome Statute of the International Criminal Court (1998), 2187 United Nations Treaty Series 3, preamble.
[38] Rastan, 154-155.
[39] ILC, First Report on Diplomatic Protection, A/CN.4/506.Add.1, 20.04.2000, §110.

encompasses a variety of different forms of connection with the state.[40] No international rule determines that a person must reside in a state to maintain a genuine bond with it.[41] Birth in a state's territory may be sufficient,[42] especially if that state continuously treats the individual as its national and the person does not renounce his/her nationality.[43] Vragar established a genuine bond with Pentos at his birth there.[44] He never formally disavowed his Pentosi nationality, and Pentos continues to recognise Vragar as its national.[45] Accordingly, even under the genuineness threshold, Vragar must be considered a Pentosi national, supporting the ICC's jurisdiction in the case.

4. The prosecution of Vragar does not breach the principle of legality

13. In *Abd-Al-Rahman*, the Appeals Chamber ("AC") determined that the legality principle under art.22 RS requires three elements: (i) legal criminalisation at the time of the offence; (ii) accessibility; and (iii) foreseeability.[46] All three elements were met.

14. *First*, Vragar's liable conduct occurred after November 2021, when Pentos was already a SP to the RS and Vragar was one of its nationals.[47] Thus, the RS applied to Vragar's acts,[48] even though Northeros, the *locus criminis*, never ratified the Statute. However, in case the Court determines that the RS was inapplicable to the charged crimes, the first requirement of the legality principle is still fulfilled, since the crimes under the ICC's jurisdiction reflect customary international law,[49] including gender apartheid[50] and gender-based persecution.[51]

15. *Second*, accessibility entails that the crime is precisely defined in a public law.[52] In *Abd-Al-Rahman*, the AC determined that this requirement is fulfilled if the accused is a national of a SP to

[40] *Malek v. Iran*, Interlocutory Award, IUSCT Case No.193, 23.06.1988, §14.
[41] *Nottebohm (Liechtenstein/Guatemala)*, Judgment, Dissenting Opinion by Judge Read [1955] ICJ Rep.34, 44-45.
[42] European Commission, Investor Citizenship and Residence Schemes in the European Union, Documents of the Commission of the European Communities (2019), 5; Hillier, *Sourcebook on Public International Law* (1998), 278.
[43] *Bahgat*, §§216,231.
[44] HRI Report, §13.
[45] Case, §8.
[46] *Prosecutor v. Abd-Al-Rahman*, Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)", AC, ICC-02/05-01/20-503, 01.11.2021, §§85-88.
[47] HRI Report, §§1,13.
[48] RS, art.12(2)(b).
[49] *Abd-Al-Rahman*, §89.
[50] Bennoune, "The International Obligation to Counter Gender Apartheid in Afghanistan", (2022) 54 *Columbia Human Rights Law Review* 1-88.
[51] *Prosecutor v. Abd-Al-Rahman,* Corrected version of 'Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')', PTC-II, ICC-02/05-01/20-433-Corr, 09.07.2021, 69-70; Brown & Grenfell, "The International Crime of Gender-Based Persecution and the Taliban", (2003) 4 *Melbourne Journal of International Law* 1-30, 11.
[52] *Abd-Al-Rahman*, §85; *Jorgic v. Germany*, Judgment, European Court of Human Rights ("ECtHR"), Application 74613/01, 12.07.2007, §100.

the Statute (such as Vragar), since the RS "describes the prohibited conduct clearly and defines the crimes entering into force in July of 2002".[53] Human rights courts have also asserted that convicting individuals for CAH based on customary law is compatible with the accessibility requirement.[54] Thus, the crimes for which charges are being sought were accessible to Vragar.

16. *Third*, foreseeability entails that the defendant knew or should have known that his/her conduct was criminally punishable.[55] This assessment is based on the manifestly unlawful nature of the crimes and the personal circumstances of the defendant,[56] including the possibility of seeking legal advice before committing the offence.[57] It is presumed that all individuals, including nationals of non-SP to the RS, are aware that they will face criminal liability if they engage in actions criminalised under the Statute.[58]

17. Consistent with this presumption, the unlawfulness of Vragar's and the Baleran Regime's acts was plain, as they relate to the widely reported[59] and internationally condemned[60] state-imposed oppression of females in Northeros, affecting countless victims over years.[61] The HRI Report indicates that Vragar was aware of the CAH in Northeros and of ABSS's role therein.[62] This is further corroborated by Vragar's individual circumstances, particularly his position as Vragarsoft's Chief Executive Officer ("CEO") and his key role in the negotiations with Southeros regarding the ABSS, which was created due to the increasing forced displacement from Northeros after the Baleran Regime instituted its discriminatory measures.[63] Considering Vragar's status and experience, he could not have been unaware that his actions could trigger criminal liability. Accordingly, there is no violation of the legality principle.

[53] *Abd-Al-Rahman*, §86.
[54] *Herzog et al. v. Brazil*, Judgment, Inter-American Court of Human Rights, Ser.C/No.353, 15.03.2018, §§306-310; *Penart v. Estonia*, Decision on Admissibility, ECtHR, Application 14685/04, 24.01.2006, 9-10.
[55] Dias, "Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?", (2019) 19 *Human Rights Law Review* 649-674, 663.
[56] *Abd-Al-Rahman*, §85.
[57] *Jorgic*, §113.
[58] *Abd-Al-Rahman*, §89.
[59] HRI Report.
[60] *Ibid.*, §6.
[61] *Infra*, §§31-33.
[62] HRI Report, §10.
[63] *Ibid*., §§8,10,14.

II. THE PTC ERRED IN FINDING THAT THE ALLEGATIONS AND EVIDENCE ARE INSUFFICIENT TO ESTABLISH SUBSTANTIAL GROUNDS TO BELIEVE THAT VRAGAR AIDED AND ABETTED THE COMMISSION OF THE INHUMANE ACT OF "GENDER APARTHEID" UNDER ARTS.7(1)(K) AND 25(3)(C) RS

18. The PTC's non-confirmation of the charges against Vragar should be reversed, since: **(1)** the HRI Report is sufficient to establish substantial grounds to believe; **(2)** the charged conduct constitutes the CAH of gender apartheid as other inhumane acts under art.7(1)(k) RS and, alternatively, persecution under art.7(1)(h); **(3)** Vragar is liable under the alternative modes of liability of aiding and abetting and any other contribution to a group with a common purpose; and **(4)** Vragar's responsibility is not excluded by mistake of law.

1. The HRI Report is sufficient to establish substantial grounds to believe

19. Art.61(7) RS determines that "substantial grounds to believe" is the evidentiary standard to confirm the charges, requiring "concrete and tangible proof demonstrating a clear line of reasoning underpinning the specific allegations".[64] Since art.61(7) entails a lower threshold than the trial, the Prosecution can build its entire case with documentary or summary evidence.[65] The confirmation procedure requires the PTC to exercise restraint "in order to avoid any pre-determination of issues or pre-adjudication regarding the probative value of evidence".[66]

20. The HRI Report is sufficient to establish substantial grounds to believe. Nothing in the RS indicates that a single report cannot meet art.61(7)'s threshold, particularly in a case like the present one, referring to one crime and one mode of liability, with one alternative each. In *Ruto et al.*, the PTC determined that "it is not the amount of evidence presented but its probative value that is essential for the Chamber's final determination on the charges."[67] The ICC has recognised that NGO reports have probative value.[68]

21. In *Abu Garda*, in which the PTC declined to confirm the charges for insufficiency of evidence, the submitted evidence was remarkably flawed, having many inconsistencies and lacking detail and first-hand knowledge.[69] Information about key facts was provided by a single anonymous witness,

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[64] *Prosecutor v. Said*, Decision on the confirmation of charges against Mahamat Said Abdel Kani, PTC-II, ICC-01/14-01/21-218-Red, 09.12.2021, §38.
[65] *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, PTC-I, ICC-01/04-01/10-465-Red, 16.12.2011, §43.
[66] *Said*, §40.
[67] *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC-II, ICC-01/09-01/11-373, 23.01.2012, §68.
[68] *Mbarushimana*, §71; *Prosecutor v. Bemba,* Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, TC-III, ICC-01/05-01/08-2299-Red, 08.10.2012, §§32-36.
[69] *Prosecutor v. Abu Garda*, Decision on the confirmation of charges, PTC-I, ICC-02/05-02/09-243-Red, 08.02.2010, §§168-172.

without any additional corroboration.[70] In contrast, the HRI Report contains a detailed and coherent account of the situation in Northeros and Vragar's role therein.[71] HRI produced the Report based not only on first-hand information from two high-level insiders from Vragarsoft (its Deputy General Counsel and Vragar's Assistant Executive Aid), but also on public documentation from multiple key states.[72] The Report also indicates the sources for each of its findings.[73] Regardless, as determined in *Ruto et al.*, some eventual inconsistency or ambiguity in the Report will not necessarily cast doubt on its overall reliability or bar the PTC from using it.[74] Accordingly, the charges against Vragar were proved with substantial grounds to believe.

2. The charged conduct constitutes the CAH of gender apartheid as other inhumane acts under art.7(1)(k) RS and, alternatively, persecution under art.7(1)(h)

22. The charged acts constitute CAH under art.7 RS: **(a)** the contextual elements are fulfilled; **(b)** the situation in Northeros constitutes gender apartheid; **(c)** this crime can be prosecuted as other inhumane acts under art.7(1)(k) RS; and, alternatively, **(d)** the charged conduct also entails gender-based persecution under art.7(1)(h).

a. The contextual elements are met

23. A CAH encompasses the following contextual elements: **(i)** an attack against a civilian population; **(ii)** a state or organisational policy; and **(iii)** the widespread or systematic nature of the attack. All these elements were fulfilled.

i. There was an attack against a civilian population

24. Art.7(2)(a) RS defines "attack directed against any civilian population" as "a course of conduct involving the multiple commission of acts referred to in [art.7(1) RS] against any civilian population". This entails a quantitative threshold requiring a sequence of events, rather than random or isolated acts.[75] The attack need not be military in nature, but it must involve the commission of any of the acts listed in art.7(1) RS[76] and must have any civilian population as its primary target.[77]

[70] *Ibid*., §176.
[71] HRI Report, §1.
[72] *Ibid*., §2.
[73] *Prosecutor v. Katanga & Ngudjolo*, Decision on the Prosecutor's Bar Table Motions, TC-II, ICC-01/04-01/07-2635, 17.12.2010, §30.
[74] *Ruto et al.*, §86.
[75] *Prosecutor v. Ongwen*, Trial Judgment, TC-IX, ICC-02/04-01/15-1762-Red, 04.02.2021, §2674.
[76] *Prosecutor v. Al Hassan*, Trial Judgment, TC-X, ICC-01/12-01/18-2594-Red, 26.06.2024, §1105.
[77] *Prosecutor v. Ntaganda*, Judgment, TC-VI, ICC-01/04-02/06-2359, 08.07.2019, §667.

25. Through the implementation of the Decrees in 2021, the Baleran Regime established a severe and extensive system of deprivation of the fundamental rights of all women and girls across Northeros.[78] They were prohibited from working as government officials, teachers, doctors or nurses, attending school past the age of eight, driving or using public transport, and holding travel documentation.[79] The Regime enforced the Decrees via public floggings.[80] These actions constitute an attack against a civilian population: (i) given the quantity and nature of the acts perpetrated in Northeros, they cannot be considered as random or isolated acts; (ii) considering the civilian status of the victims, the civilian population was the Baleran Regime's primary target; and (iii) the Regime's conduct entailed multiple acts criminalised under art.7(1) RS, such as torture, the other inhumane act of gender apartheid, and persecution.[81] Therefore, there was an attack as per art.7(2)(a) RS.

ii. The attack occurred following a state policy

26. According to art.7(2)(a) RS, the attack must occur "pursuant to or in furtherance of a [s]tate or organisational policy to commit such attack", namely a state or organisation consciously encouraged the attack.[82] In the present case, the Baleran Regime issued the Decrees as the government of Northeros and the punishment of public flogging was enforced via the official judicial system.[83] It follows that the state of Northeros not only promoted the attack but was also instrumental in its implementation. Thus, the element of state policy is fulfilled.

iii. The attack was widespread or systematic

27. While the term "widespread" refers to the attack's large-scale character and massive scope of victimisation,[84] "systematic" describes the organised and non-random nature of the acts, evidenced by the repetition of similar criminal conduct.[85] A state policy normally proves a systematic attack.[86] Although the qualifiers "widespread" and "systematic" are alternative,[87] both were fulfilled in this case. The temporal, geographic, and personal scope of victimisation of the Baleran Regime's attack evinces its widespread nature: the attack lasted multiple years from 2021 onwards, was implemented

[78] *Infra* §§31-33.
[79] HRI Report §5.
[80] *Ibid*.
[81] *Infra* §§38-45.
[82] *Prosecutor v. Katanga*, Judgment pursuant to Article 74 of the Statute, TC-II, ICC-01/04-01/07-3436-tENG, 07.03.2014, §§1108-1109.
[83] HRI Report, §5.
[84] *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC-II, ICC-01/05-01/08-424, 15.06.2009, §83.
[85] *Ntaganda*, §692.
[86] *Prosecutor v. Harun & Abd-Al-Rahman*, Decision on the Prosecution Application under Article 58(7) of the Statute, PTC-I, ICC-02/05-01/07-1-Corr, 29.04.2007, §62.
[87] *Ongwen*, §2680.

throughout Northeros' whole territory, and affected Northeros' entire population, particularly the females.[88] The attack was also systematic, given the Baleran Regime's coordinated and methodical effort to target as many civilians as possible using the Northerosi state apparatus. As proven above,[89] the attack was carried as part of a state policy. Accordingly, the attack was widespread and systematic.

b. The circumstances in Northeros constitute gender apartheid

28. International practice defines "gender apartheid" by mirroring the definition of apartheid in art.7(2)(h) RS,[90] entailing the following elements: **(i)** the commission of an inhumane act; **(ii)** an institutionalised regime of oppression and systematic domination of one gender group over another; and **(iii)** the intention to maintain such regime. The situation in Northeros fulfils all these elements.

i. The Baleran Regime committed an inhumane act

29. As an element of gender apartheid, "inhumane act" refers to conduct that either corresponds to any of the acts criminalised under art.7(1)(a)-(k) RS or is similar in nature and gravity to these acts.[91] This requirement encompasses most of the list of inhuman acts in art.II International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention"),[92] including "torture or […] cruel, inhuman or degrading treatment or punishment" (art.II(a)(ii)); "any legislative measures and other measures calculated to prevent a [gender] group or groups from participation in the political, social, economic and cultural life of the country" (art.II(c)); and "the deliberate creation of conditions preventing the full development of [a gender] group or groups", particularly by denying to members of such a group the rights to work, education, leave and to return to one's own country, and freedom of movement (art.II(c)).

30. The Baleran Regime perpetrated all these inhumane acts. Considering the severe physical or mental pain and suffering involved, the corporal punishment of public flogging cannot be considered a "lawful sanction" under art.7(2)(e) RS, rather consisting of torture or cruel, inhumane or degrading

[88] HRI Report, §5.
[89] *Supra* §26.
[90] UN, Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls, A/HRC/53/21, 15.06.2023, §95; UN, The phenomenon of an institutionalized system of discrimination, segregation, disrespect for human dignity and exclusion of women and girls, A/HRC/56/25, 13.05.2024, §89.
[91] Elements of Crimes, ICC-PIOS-LT-03-002/15_Eng (2013), art.7(1)(j)(1)-(2).
[92] UN, Recommendations from the Working Group on discrimination against women and girls, A/HRC/WG.11/40/1, 15.02.2024, §10; van den Herik & Silva, "Article 7", in Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (2021) 301, 302.

punishment.[93] The Regime used public flogging "in dozens of cases"[94] to enforce the Decrees, incurring in torture or inhumane acts under art.7(1)(f) and (k) RS.

31. The Baleran Regime's severe deprivation of fundamental rights of Northerosi females through the Decrees aimed at excluding this gender group from the political, social, economic and cultural life of Northeros and preventing the development of this group. Mental harm alone and the devastating impact of serious deprivations of socio-economic rights may reach the level of gravity of the acts listed in art.7(1) RS, especially persecution.[95] Decree 1's ban on females holding government positions shut women out of the conduction of public affairs in Northeros, breaching their political rights and non-discrimination.[96] Moreover, their exclusion from multiple professions violates the rights to work and non-discrimination.[97] Although women may work in professions not listed in Decree 1, their lack of access to education and transport renders such possibility illusory.[98]

32. Decree 2's prohibition to receive education after age eight violated the right to education and further entrenched gendered harms, including the decline of girls' future prospects and the increased changes of early and forced marriage, early pregnancy, and gender-based violence.[99] Decree 3's mobility restrictions breached the freedom of movement, severely reducing females' autonomy and ability to reach public spaces, health-care, education, and employment.[100] Lastly, Decree 4's prohibition on the issuance of travel documentation to females breached the right to leave one's own country[101] and ensures females' continuous suffering under the Baleran Regime's gender oppression.

33. Combined, these human rights violations create a nationwide system of female dehumanisation, causing immense harms on the Northerosi population. This system may also trigger long-term transgenerational harm, as it could indoctrinate new generations towards normalising the mistreatment of females.[102] Consequently, the Baleran Regime committed multiple inhumane acts foreseen in art.II Apartheid Convention and whose nature and gravity are equivalent to art.7(1) RS's acts.

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[93] *Al Hassan*, §§1301-1336; *Tyrer v. United Kingdom*, Judgment, ECtHR, Application 5856/72, 25.04.1978, §§33-35.
[94] HRI Report, §5.
[95] *Prosecutor v. Kayishema & Ruzindana*, Judgement, TC-II, ICTR-95-1-T, 21.05.1999, §153; van den Herik/Silva, 302.
[96] UN, Report of the Special Rapporteur on the situation of human rights in Afghanistan, A/79/330, 30.08.2024, §26.
[97] *Boyraz v. Turkey*, Judgment, ECtHR, Application 61960/08, 02.12.2014, §§52-56.
[98] UN Report A/79/330, §88.
[99] *Ibid*., §§33-34.
[100] UN, Concluding comments of the Committee on the Elimination of Discrimination against Women: Saudi Arabia, CEDAW/C/SAU/CO/2, 08.04.2008, §15.
[101] UN, General Comment No.27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, 02.11.1999, §9.
[102] UN Report A/79/330, §16.

ii. The Baleran Regime implemented an institutionalised regime of systematic oppression and domination by one gender group over another

34. The definition of "an institutionalised regime" encompasses a state-sanctioned system created by official laws and enforced by the legal institutions of a state.[103] As noted above,[104] the Baleran Regime established and enforced the gender apartheid in Northeros through state-issued decrees and the official governmental authority, demonstrating the existence of an institutionalised regime.

35. The notion of "systematic oppression and domination by one gender group over another" entails an established regime or structure that a gender group operates to systematically control, subjugate, and exclude another gender group.[105] Art.7(3) RS defines "gender" as "the two sexes, male and female, within the context of society". The nature and scale of the infringements imposed against the Northerosi female population demonstrates that systematic gender discrimination is at the core of the Baleran Regime's government, which is founded on a discriminatory ideology that elevates males and submits women to an inferior position. The Regime's body of discriminatory rules and prohibitions forms a system aimed at controlling, subjugating, and excluding females from Northeros' public life.

36. The Degrees explicitly differentiate between males and females,[106] evincing a two-tiered status in the Northerosi population. Females have a differentiated legal regime applicable only to them (the Degrees), while men have a preferential legal and social treatment. Consequently, the Baleran Regime intended to achieve the oppression and domination of females by males in Northeros via an institutionalised regime. This situation is analogous to Taliban-ruled Afghanistan, which is also described as gender apartheid.[107]

iii. The Baleran Regime intended to maintain the regime of gender oppression and domination

37. The perpetrator must act with the specific intention of maintaining or perpetuating the regime of gender oppression and domination.[108] Such intention can be inferred in the present case from the following circumstances: (i) by issuing and implementing the Decrees, the Baleran Regime was responsible for establishing the system of gender oppression and domination in Northeros; (ii) since Decree 4 was calculated to prevent females from escaping Northeros, it operates as an instrument to

[103] Dugard & Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory", (2013) 24(3) *European Journal of International Law* 867-913, 881.
[104] *Supra* §26.
[105] van den Herik/Silva, 303; Dugard/Reynolds, 904.
[106] HRI Report, §5.
[107] UN Report A/79/330, §19; UN Report A/HRC/53/21, §95.
[108] EoC, art.7(1)(j)(5); Stahn, *A Critical Introduction to International Criminal Law* (2018), 69.

preserve the ongoing system of oppression; and (iii) the use of public flogging against violators of the Decrees aims at suppressing any opposition that could disrupt the implementation of the discriminatory system. Accordingly, with all the material elements met, the circumstances in Northeros constitute gender apartheid.

c. The gender apartheid in Northeros can be prosecuted as other inhumane acts under art.7(1)(k) RS

38. Gender apartheid can be prosecuted as the residual CAH of other inhumane acts under art.7(1)(k) RS,[109] since: (i) gender apartheid entails the infliction of great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; (ii) gender apartheid is similar in character to the acts listed in art.7(1)(a)-(j) RS; and (iii) gender apartheid is not fully encompassed by any of these listed acts.[110]

39. *First*, as previously demonstrated,[111] the gender apartheid in Northeros encompassed inhumane acts, causing great suffering and serious injury to the local population, particularly to females. *Second*, the notion of gender apartheid in general and the situation in Northeros in specific comprise acts whose nature and gravity resemble the acts enumerated in art.7(1)(a)-(j).[112] Particularly, gender apartheid has the same material elements of apartheid under art.7(1)(j), but instead of referring to racial groups, it deals with gender groups.[113] The circumstances in Northeros that constitute gender apartheid also qualify as gender-based persecution under art.7(1)(h).[114] Hence, gender apartheid has the same nature and gravity of the art.7(1)'s acts.

40. *Third*, gender apartheid comprises a different set of harms and protected interests in comparison to all acts enumerated in art.7(1)(a)-(j).[115] Specifically, gender apartheid differs from art.7(1)(j)'s apartheid given its focus on gender.[116] It also differs from art.7(1)(h)'s persecution, because the latter does not require an institutionalised regime of systematic oppression and domination.[117] Therefore, the conduct underlying gender apartheid and its particular impact on the victims are not fully captured by any act listed in art.7(1)(a)-(j) RS, justifying its separate prosecution

[109] UN Report A/HRC/56/25, §87.
[110] EoC, art.7(1)(k); *Ongwen*, §2746.
[111] *Supra* §§31-33.
[112] *Supra* §§29-33.
[113] UN Report A/HRC/WG.11/40/1, §16.
[114] *Infra* §§41-45.
[115] UN Report A/HRC/WG.11/40/1, §§13-19.
[116] *Ibid*., §15.
[117] *Ibid*., §14; UN Report A/HRC/56/25, §90.

under art.7(1)(k). Consequently, the gender apartheid in Northeros can be prosecuted as the CAH of other inhumane acts under art.7(1)(k) RS.

d. Alternatively, the situation in Northeros entails gender-based persecution under art.7(1)(h) RS

41. Since the PTC's practice allows the confirmation of alternative crimes,[118] the Prosecution argues, as an alternative to gender apartheid under art.7(1)(k) RS, that the situation in Northeros could be tried as gender-based persecution under art.7(1)(h), for its material elements were also met: (i) a severe deprivation of fundamental rights contrary to international law; (ii) the targeting of an identifiable group; (iii) a discriminatory intent; and (iv) connection with other acts listed in art.7(1) RS or other crimes under the ICC's jurisdiction.[119]

42. *First*, the rights covered by the notion of "severe deprivation of fundamental rights" include the prohibition of torture and cruel, inhumane or degrading treatment, the right to education, freedom of movement, and equality and non-discrimination.[120] Importantly, persecution does not require physical violence,[121] meaning that the cumulative impact[122] of a series of discriminatory policies involving restrictions on political, social, and economic rights, including the exclusion of specific groups from professions and public services, may suffice.[123] As demonstrated above,[124] the Baleran Regime systematically breached all those indicated fundamental rights in such an acute way as to constitute acts whose nature and gravity are comparable to art.7(1) RS's crimes.[125] The state of deprivation in Northeros is analogous to the socio-economic situation of females in Taliban-ruled Afghanistan[126] and in Ansar Dine-controlled Timbuktu,[127] both of which were considered the CAH of persecution. Accordingly, the Baleran Regime committed a severe deprivation of fundamental rights contrary to international law.

43. *Second*, an identifiable group for the purposes of persecution can be defined based on neutral criteria such as geography or residence, with no need to refer to specific personal characteristics.[128]

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[118] *Prosecutor v. Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, PTC-I, ICC-02/11-01/11-656-Red, 12.06.2014, §203.
[119] EoC, art.7(1)(h).
[120] *Al Hassan*, §§1201,1554; OTP, *Policy on the Crime of Gender Persecution* (2022), §24.
[121] Grey et al., "Gender-based Persecution as a Crime Against Humanity: The Road Ahead", (2019) 17(5) *JICJ* 957-979, 974.
[122] *Ntaganda*, §994.
[123] *Al Hassan*, §1202; *Prosecutor v. Kupreskic et al*., Judgement, TC, IT-95-16-T, 14.01.2000, §§615(c), 630-631.
[124] *Supra* §§30-32.
[125] *Ntaganda*, §994.
[126] *Situation in Afghanistan*, Prosecution's application under article 58 for a warrant of arrest against Haibatullah Akhundzada, PTC-II, ICC-02/17-224-Red, 23.01.2025, §16.
[127] *Al Hassan*, §1580.
[128] *Ibid*., §1206.

For instance, in *Al Hassan*, the targeted group was Timbuktu's entire population.[129] Similarly, the identifiable group in Northeros was the whole population: although females were the primary target, every Northerosi resident was forced to comply with the Decrees under the penalty of flogging.[130]

44. *Third*, the persecutory act must be committed with intent to discriminate the targeted group on any ground enumerated in art.7(1)(h) RS or other grounds universally prohibited under international law.[131] Gender is one of the grounds that art.7(1)(h) recognises.[132] Particularly regarding gender-based persecution, discriminatory intent is proven "if male and female members of the group are targeted in different ways or for different forms of violence depending on their gender".[133] As previously shown,[134] the Baleran Regime's Decrees contain rules directed specifically towards females, depriving them of a series of fundamental rights, while the rights of their male counterparts remain intact. Even the flogging, which is applied to men and women, has a gendered component, since this punishment is enforced upon those who refuse to comply with the Regime's gender ideology.[135] Accordingly, a discriminatory intent is established.

45. *Fourth*, the persecution must be connected with other acts listed under art.7(1) RS or other crimes within the Court's jurisdiction.[136] The underlying acts of the Baleran Regime's persecution also constitute the inhumane act of gender apartheid under art.7(1)(k).[137] Moreover, the use of public flogging to enforce the Decrees amounted to acts of torture or other inhumane acts under art.7(1)(f) and (k).[138] Accordingly, the persecution was interrelated with other acts under art.7(1) RS, warranting the confirmation of this crime under art.7(1)(h).

3. Vragar has criminal responsibility for the charged crimes

46. Considering that the PTC's practice allows the confirmation of alternative forms of responsibility,[139] the Prosecution argues that Vragar's conduct entailed two alternative modes of liability *vis-à-vis* the Baleran Regime's crimes: **(a)** aiding and abetting and **(b)** any other contribution to a group with a common purpose.

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[129] *Ibid*., §§1559-1560.
[130] HRI Report, §5.
[131] EoC, art.7(1)(h)(3).
[132] OTP, *Policy on Gender-Based Crimes* (2023), §65.
[133] *Al Hassan*, §1567.
[134] *Supra* §36.
[135] UN Report A/HRC/56/25, §91.
[136] *Al Hassan*, §§1209-1210.
[137] *Ibid*., §§1576-1577; *supra* §§39-40.
[138] *Al Hassan*, §1578; *supra* §30.
[139] *Abd-Al-Rahman* Confirmation, §29.

a. Vragar is responsible under the mode of liability of aiding and abetting

47. Pursuant to art.25(3)(c) RS, aiding and abetting has the following elements: **(i)** the defendant assisted the commission of the crimes; **(ii)** he/she acted for the purpose of facilitating such commission; and **(iii)** he/she was aware that the crimes would occur.

i. Vragar assisted the commission of the Baleran Regime's crimes

48. Aiding and abetting requires that the defendant contributes to the commission of the crime by the principal perpetrator.[140] Pursuant to a textual interpretation of art.25(3)(c)'s plain wording, any degree of contribution is pertinent, with no need to prove a causal effect on the commission of the crime or to reach a specific threshold, such as a significant or substantial impact on the offences.[141] Moreover, corporate executives can be held criminally responsible for a contribution they offered within their business transactions.[142]

49. Through the ABSS, Vragar provided material assistance to the commission of the crimes by the Baleran Regime (the principal perpetrator).[143] Some Northerosi persons attempting to flee the Regime's system of gender subjugation were indiscriminately shot dead by ABSS.[144] The latter also had a deterrent effect: the number of attempts by Northerosi persons to cross into Southeros reduced significantly following ABSS's deployment.[145] Consequently, ABSS became a component of the Regime's system of gender subjugation, as it killed or threatened to kill those attempting to escape Northeros. The result was that ABSS had the anticipated effect of trapping females inside Northeros.

50. Although ABSS is operated by Southeros, Vragar is accountable for this ABSS-related assistance to the Baleran Regime's crimes given his position as Vragarsoft's CEO. Besides developing and installing the System, this company trains the Southerosi personnel operating it and continuously service the ABSS to ensure its regular operation.[146] Vragar was also personally involved in the System's design and development.[147] Considering that no specific threshold is necessary for an

[140] *Prosecutor v. Vasiljevic*, Judgment, TC-II, IT-98-32-T, 29.11.2002, §70.
[141] *Prosecutor v. Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", AC, ICC-01/05-01/13-2275-Red, 08.03.2018, §1327.
[142] United Kingdom, *Tesch et al. (Zyklon B Case)* (1946), British Military Court, Case No.9; Netherlands, *van Anraat* (2007), Court of Appeal of the Hague, ECLI:NL:GHSGR:2007:BA6734.
[143] HRI Report, §8.
[144] *Ibid*., §9,12.
[145] *Ibid*., §12.
[146] *Ibid*., §10.
[147] *Ibid*.

assistance under art.25(3)(c) RS, Vragar's involvement as Vragarsoft's CEO in the establishment and operation of ABSS is sufficient to render art.25(3)(c) applicable.

ii. Vragar acted with the purpose of facilitating the crimes

51. Art.25(3)(c) RS requires that the defendant lent his/her assistance for the purpose of facilitating the commission of the crime.[148] This purpose element is considered proven if the defendant had knowledge of the crime and still decided to deliberately take part in it through his/her contribution.[149] The defendant can act with more than one purpose and still be held liable under art.25(3)(c), as long as one of these purposes was to assist in the crimes.[150]

52. Vragarsoft's Deputy General Counsel, Varmiter Morghule ("Morghule"), attested that Vragar was aware of the crimes in Northeros.[151] It is also reasonable to assume that he knew or should have known about these crimes because: (i) the situation in Northeros received international public condemnation;[152] (ii) Vragarsoft is doing business with Southeros precisely with regards to the increased displacement from Northeros following the Baleran Regime's crimes; and (iii) Vragar was personally involved in the negotiations with Southeros regarding the ABSS.[153]

53. Vragar also had advance knowledge that ABSS would cause civilian deaths and would prevent females from escaping the Baleran Regime's gender subjugation.[154] He still accepted Southeros' offer to develop, install, and assist in the operation of ABSS. In fact, Morghule stated that "the whole point" of the System was to trap females in Northeros.[155] Therefore, Vragar deliberately decided to take part in the Baleran Regime's crimes via its ABSS-related actions.

54. Even if Vragar acted with the goal of furthering Southeros' border control, this does not exclude the fact that he also acted with the purpose of assisting the Baleran Regime's crimes. The ABSS's excessive use of force, in breach of Southeros' *non-refoulement* obligations,[156] evinces that

[148] *Al Hassan*, §1227.
[149] *Bemba et al.*, §§884-893.
[150] Ventura, "Aiding and Abetting", in De Hemptinne *et al.* (eds.), *Modes of Liability in International Criminal Law* (2019), 217.
[151] HRI Report, §10.
[152] *Ibid*., §6.
[153] *Ibid*., §10.
[154] *Ibid*.
[155] *Ibid*.
[156] *Alhowais v. Hungary*, Judgment, ECtHR, Application 59435/17, 02.02.2023, §§119-145; Georgoula, "Building Walls at Sea: An Assessment of the Legality of the Greek Floating Barrier", (2022) 34(1) *International Journal of Refugee Law* 54-81, 80.

the System's goal exceeds being an ordinary lawful tool of border control, rather functioning as a deliberate instrument to push women back into the arms of their persecutors.

iii. Vragar was aware of the crimes

55. The *mens rea* of aiding and abetting requires that the defendant was aware that the crime would occur in the ordinary course of events.[157] It is not necessary that the defendant knew all the details of the crime, but only its essential elements.[158] As demonstrated above,[159] Vragar was aware of the crimes in Northeros. Consequently, the mode of liability of aiding and abetting under art.25(3)(c) RS should be confirmed.

b. Alternatively, Vragar is responsible under the mode of liability of any other contribution to a group with a common purpose

56. As an alternative to aiding and abetting, Vragar can also be held liable under art.25(3)(d) RS, whose material elements are: (i) a group with a common purpose; (ii) an intentional contribution by the defendant; and (iii) such contribution was made "with the aim of furthering the criminal activity or criminal purpose of the group" or "in the knowledge of the intention of the group to commit the crime."[160]

57. *First*, art.25(3)(d) RS requires that the perpetrators of the crime belonged to a group acting with a common purpose.[161] A group of persons organised into a political or administrative structure may constitute a "group" under art.25(3)(d).[162] The group's collective decisions and actions may be used to prove the existence of a common purpose involving the commission of crimes.[163] Given its role as the official government of Northeros, the Baleran Regime constitutes a "group" under art.25(3)(d). The Regime's shared criminal purpose is evinced by their collective efforts towards establishing and continuously enforcing a system of gender subjugation right after they assumed power in Northeros. Gender discrimination is an integral part of their governing platform.

58. *Second*, art.25(3)(d) RS does not require a minimum threshold *vis-à-vis* the defendant's contribution: any form of assistance is sufficient, provided that it furthers the group's crimes.[164]

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[157] *Bemba et al.*, §98.
[158] *Al Hassan*, §1228.
[159] *Supra* §52.
[160] RS, art.25(3)(d).
[161] *Katanga*, §1624.
[162] *Ibid*., §1626.
[163] *Ibid*., §1627.
[164] *Prosecutor v. Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, PTC-II, ICC-02/04-01/15-422-Red, 23.03.2016, §44.

However, the contribution must be intentional, i.e., the defendant intended to engage in the relevant conduct that contributed to the group's criminal conduct.[165] As already established,[166] Vragar deliberately engaged in his ABBS-related conduct that advanced the Baleran Regime's crimes.

59. *Third*, both alternatives under art.25(3)(d) RS were fulfilled: (i) Vragar acted deliberately, with the purpose and knowledge that he was furthering the Baleran Regime's criminal activity through the ABBS;[167] and (ii) when rendering such contribution, he was aware that the Regime was committing crimes in Northeros.[168] Accordingly, the mode of liability under art.25(3)(d) RS should also be confirmed.

4. Vragar's responsibility is not excluded by mistake of law

60. Mistake of law under art.32(2) RS only applies if the mistake negates the crime's mental element.[169] This occurs when the defendant misunderstands a legal element of the crime that is required as part of its *mens rea*.[170] Unawareness of the criminalisation of a conduct in the RS does not exclude criminal responsibility.[171] As Vragarsoft's CEO, Vragar had access to the company's legal team,[172] entailing that any potential mistake of law was the result of negligence.[173] All required mental elements were demonstrated above regarding Vragar.[174] In *Al Hassan*, the Trial Chamber ("TC") determined that mistake of law cannot be applied in a situation like Northeros, dealing with severe gender discrimination and acts of flogging.[175] Thus, art.32(2) does not apply in the case.

III. THE PTC ERRED IN FINDING THAT VRAGAR CANNOT BE TRIED FOR COMMITTING AN OFFENCE AGAINST THE ADMINISTRATION OF JUSTICE UNDER ART.70(1)(C) RS

61. The PTC's decision refusing to confirm the charges against Vragar should be reversed, since: **(1)** Vragar committed an offence against the administration of justice under art.70(1)(c) RS; and **(2)** he bears criminal responsibility for such offence.

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[165] *Katanga*, §1638.
[166] *Supra* §53.
[167] *Supra* §§52-54.
[168] *Supra* §55.
[169] RS, art.32(2).
[170] *Abd-Al-Rahman* Confirmation, §76; *Abu Garda*, §94.
[171] RS, art.32(2).
[172] HRI Report, §8.
[173] Cassese, *International Criminal Law* (2003), 25.
[174] *Supra* §§52-55.
[175] *Al Hassan*, §§1771-1774.

1. The publication of the unredacted HRI Report constituted an offence against the administration of justice under art.70(1)(c) RS

62. Vragar's actions fulfilled both the *actus reus* and the *mens rea* of art.70(1)(c) RS: **(a)** he obstructed or interfered with the attendance or testimony of witnesses; and **(b)** he acted with intent under art.30 RS.

a. Vragar obstructed or interfered with the attendance or testimony of witnesses

63. Art.70(1)(c) RS describes the *actus reus* as "obstructing or interfering with the attendance or testimony of a witness". The term "witness" is defined broadly, encompassing "a person who knows or is believed to know information that may be relevant to the proceedings before the Court, regardless of whether or not such person has been previously contacted by either party".[176] Since art.70(1)(c) does not define "obstructing or interfering", these terms should also be construed broadly,[177] as to cover "any conduct"[178] seeking to: (i) dissuade a witness from testifying; (ii) influence the nature of a witness' evidence; or (iii) expose a witness to threats, intimidation or injury by a third party.[179] As a conduct crime, art.70(1)(c) refers to the defendant's intentional actions of obstructing or interfering, not requiring that his/her conduct had any actual effect on the witnesses or their testimony.[180] The decisive factor is the perpetrator's expectation.[181]

64. In *Margetić*, the TC explained that the *actus reus* may be committed by disclosing the identity of protected witnesses through an online publication.[182] This unauthorised revelation of protected witnesses' identity is likely to discourage them from testifying in the future before the ICC and, if they do testify, their evidence may be affected and given in fear.[183] The protective measures referred to here do not require a judicial order, and can also constitute OTP's measures during its investigations.[184]

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[176] *Bemba et al.* Appeal, §721; *Specialist Prosecutor v. Gucati & Haradinaj*, Appeal Judgment, Appeals Panel, KSC-CA-2022-01, 02.02.2023, §168.
[177] *Bemba et al.*, §45.
[178] *Prosecutor v. Gicheru*, Decision on the confirmation of charges against Paul Gicheru, PTC-A, ICC-01/09-01/20-153-Red, 15.07.2021, §47.
[179] *Prosecutor v. Margetić*, Judgement on allegation of contempt, TC-I, IT-95-14-R77.6, 07.02.2007, §68.
[180] *Bemba et al.*, §48; *Specialist Prosecutor v. Gucati & Haradinaj*, Trial Judgment, Trial Panel II, KSC-BC-2020-07, 18.05.2022, §99.
[181] *Bemba et al.*, §44; *Gicheru*, §45.
[182] *Margetić*, §71.
[183] *Ibid.*, §69.
[184] *Gucati/Haradinaj*, §183.

65. In April 2024, the online platform Cyberleaks, which is owned and controlled by Vragar, published the unredacted version of the HRI Report.[185] This version had been illegally hacked from the OTP's system a few hours prior, by unknown actors.[186] The unauthorised release in Cyberleaks disclosed online the identity of two witnesses that had been kept confidential by the OTP for their protection.[187] Considering that nothing is posted in Cyberleaks without Vragar's approval,[188] the publication of the unredacted HRI Report must be attributed to him. The release reversed the effect of the existing protective measures, exposing the witnesses to danger and undermining their confidence in the ICC's ability to protect them.[189] Indeed, the whereabouts of the two witnesses in question is now unknown, despite the OTP's attempts to locate them.[190] It follows that the lack of evidence linking Vragar to the hacking of the OTP's system is legally immaterial, given his undeniable subsequent involvement in the publication of the unredacted HRI Report. Thus, the *actus reus* under art.70(1)(c) RS is present.

b. Vragar acted with intent

66. In *Bemba et al.*, the AC ruled that the term "intentionally" in art.70(1) RS refers to the basic intent criterion under art.30.[191] This element is fulfilled if the defendant "means to engage in the conduct" or "means to cause th[e] consequence or is aware that it will occur in the ordinary course of events."[192] This requires "virtual certainty" that the consequence in question would arise from the conduct.[193] This will be the case if the defendant was aware of the protective measure and decided to release the identity of the protected witness anyway.[194] Awareness may be demonstrated with circumstantial evidence.[195]

67. Vragar knew or should have known about the protective measures at the time he authorised the HRI Report's release, since the published document bore the OTP's log-in markings[196] and clearly indicated its confidential character.[197] Given the nature of his conduct,[198] one must conclude that he

[185] OTP, *Report Relating to the Hacking and Publication of Confidential Information and the Resulting Disappearance of Witnesses*, 13.05.2024, §3.
[186] *Ibid.*
[187] *Ibid*., §5.
[188] HRI Report, §17.
[189] *Margetić*, §71.
[190] OTP Report, §5.
[191] *Bemba et al.* Appeal, §677.
[192] RS, art.30(2).
[193] *Ongwen*, §2695.
[194] *In the Case Against Hartmann*, Judgment, AC, IT-02-54-R77.5-A, 19.07.2011, §128.
[195] *Ibid.*
[196] *Ibid.*
[197] HRI Report, first page.
[198] *Ongwen*, §2865.

meant to disclose the identity of two confidential witnesses, ultimately aiming towards obstructing or interfering with their attendance or testimony. Such an outcome was virtually certain to Vragar when he authorised the release of the unredacted HRI Report. Moreover, any claim that Vragar acted to promote public debate is misplaced, since protective measures granted to witnesses—such as those the OTP took in this case—constitute valid limitations of the right to free expression.[199] The unreasonableness of this argument is further evinced by the fact that a redacted version of the Report was already available to the public in HRI's website.[200] Accordingly, the requisite *mens rea* was fulfilled.

2. Vragar bears criminal responsibility for the offence

68. Considering that art.25(3) RS is fully applicable to art.70,[201] two alternative modes of responsibility apply in this case: **(a)** indirect perpetration under art.25(3)(a) RS; and **(b)** ordering under art.25(3)(b).

a. Vragar is liable pursuant to indirect perpetration

69. Indirect perpetration, referred to as commission "through another person" in art.25(3)(a) RS, entails two material elements: (i) the subjugation of the will of the direct perpetrators by the defendant; and (ii) the mental elements under art.30 RS.

70. *First*, art.25(3)(a) requires that the defendant exercises control over the direct perpetrators of the crime to such an intense degree that the will of these direct perpetrators becomes irrelevant, justifying the attribution of their actions to the defendant as his/her own.[202] This tight control is often carried out through a hierarchically structured organisation: the leaders of the organisation use the apparatus of power therein to subordinate the lower members to their will, so as to steer them towards the perpetration of the crimes, leaving them with no option but to commit the offences.[203] In this sense, the leadership approaches the lower members of the organisation as interchangeable or fungible tools at their disposal for the commission of the crimes, ensuring the "automatic compliance" with

[199] *Prosecutor v. Jovic*, Judgment, TC-III, IT-95-14/IT-95-14/2-R77, 30.08.2006, §23.
[200] OTP Report, §2.
[201] *Bemba et al.* Appeal, §680.
[202] *Ongwen*, §2783.
[203] *Ntaganda*, §778.

the leadership's orders.[204] Corporations can consist of an organisation for the purposes of indirect perpetration under art.25(3)(a) RS.[205]

71. Vragar exerted the requisite degree of control over the employees that published the unredacted HRI Report in Cyberleaks, to the effect that the will of these individual employees was irrelevant in the execution of Vragar's order to make such publication. This is because Vragarsoft/Cyberleaks has an internal hierarchical structure,[206] given its division into different branches and teams[207] and the existence of a responsible leadership and established hierarchy,[208] with Vragar at the top.[209] Moreover, Vragar's control over Vragarsoft/Cyberleaks is evinced by his *de jure* position as founder and CEO,[210] granting him the highest rank of authority within the company.[211] He also had *de facto* ultimate control over the company's activities and staff,[212] especially the power to approve all publications in Cyberleaks.[213] Besides issuing directions and ensuring their compliance, Vragar's expertise and position meant that he had significant specific responsibilities in the company,[214] including personally leading teams as well as negotiating and contracting with foreign governments.[215]

72. There was automatic compliance with Vragar's orders inside Vragarsoft/Cyberleaks, as demonstrated by the company's large size,[216] having more than 120 employees,[217] and the assumed interchangeable character of the lowest level employees.[218] If an employee would not fulfil Vragar's order to release the HRI Report, another staff member would certainly carry it out.[219] It was also certain that disobedience would be punished,[220] as illustrated by the fact the insider witnesses in the HRI Report had to remain anonymous for security reasons.[221] Accordingly, Vragar subjugated the will of his employees that released the unredacted HRI Report.

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[204] *Prosecutor v. Katanga & Ngudjolo*, Decision on the confirmation of charges, PTC-I, ICC-01/04-01/07-717, 30.09.2008, §§516-517.
[205] Lanza, *Indirect Perpetration and Organisationsherrschaft* (2021), 166-167.
[206] *Ongwen*, §2856.
[207] *Ntaganda,* §814; HRI Report, §§3,10,18.
[208] *Ruto et al.*, §197.
[209] HRI Report, §§14-15.
[210] *Katanga/Ngudjolo*, §541(i); HRI Report, §§14-15.
[211] *Ntaganda,* §814.
[212] *Katanga/Ngudjolo*, §541(ii); HRI Report, §15.
[213] HRI Report, §17; OTP Report, §§3,6.
[214] *Prosecutor v. Ntaganda,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, PTC-II, ICC-01/04-02/06-309, 09.06.2014, §120; *Katanga/Ngudjolo*, §542(iv).
[215] HRI Report, §10.
[216] *Katanga/Ngudjolo*, §545.
[217] HRI Report, §15.
[218] *Katanga/Ngudjolo*, §546.
[219] *Ibid.*
[220] *Ongwen*, §2856.
[221] HRI Report, §2.

73. *Second*, turning to the *mens rea*, for a defendant to be criminally responsible as indirect perpetrator, he/she must satisfy the subjective elements under art.30.[222] As demonstrated above,[223] Vragar fulfilled these elements. Accordingly, the mode of liability of indirect perpetration under art.25(3)(a) RS should be confirmed.

b. Alternatively, Vragar is liable pursuant to ordering

74. Vragar can be held liable for ordering under art.25(3)(b) RS, as its four material elements were met.[224] *First*, there must exist a position of authority between the person who orders the commission of the crime (the defendant) and the person who actually perpetrates it.[225] As the CEO of Vragarsoft/Cyberleaks, Vragar held a position of authority *vis-à-vis* the employees that released the unredacted HRI Report.[226] *Second*, the defendant must have instructed, persuaded or coerced another person to commit the offence.[227] The order may be implicit and proven through circumstantial evidence.[228] In the present case, Vragar instructed or otherwise instigated the Cyberleaks' employees under his authority to release the HRI Report.[229]

75. *Third*, the order must have a direct effect on the commission of the crime.[230] Although a causal relationship between the instruction and the perpetration of the offence must be demonstrated, it is not required to prove that the crime would not have been committed without the defendant's order.[231] Considering that nothing can be published in Cyberleaks without Vragar's authorisation,[232] his involvement had a direct effect in the publication of the HRI Report. *Fourth*, the defendant intended the commission of the crime pursuant to his/her order or was at least aware that the crime would be committed in the ordinary course of the order's implementation.[233] As already proven,[234] Vragar fulfilled this *mens rea*. Therefore, the mode of liability of ordering under art.25(3)(b) RS should also be confirmed.

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[222] *Ongwen*, §2785.
[223] *Supra* §67.
[224] *Ntaganda* Charges, §145.
[225] *Ibid.*; *Prosecutor v. Akayesu*, Judgment, Chamber I, ICTR-96-4-T, 02.09.1998, §483.
[226] *Supra* §71.
[227] *Ntaganda* Charges, §145.
[228] *Prosecutor v. Blaskic*, Judgment, TC, IT-95-14-T, 03.03.2000, §281.
[229] *Supra* §72.
[230] *Ntaganda* Charges, §145; *Gbagbo*, §244.
[231] *Prosecutor v. Kordic & Cerkez*, Judgment, TC, IT-95-14/2-T, 26.02.2001, §387.
[232] HRI Report, §17.
[233] *Blaskic*, §278.
[234] *Supra* §67.

SUBMISSIONS

Having presented all arguments, the OTP respectfully requests the AC to:

1. **Accept** this appeal; and
2. **Reverse** the Impugned Decision.

Respectfully submitted,

OFFICE OF THE PROSECUTOR