MEMORANDUM FOR THE DEFENCE

Team No. 2025-211

Nuremberg Moot Court 2025

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I. ALL REQUIREMENTS FOR THE CONFIRMATION OF CHARGES HEARING FOR MR RHODES TO BE HELD *IN ABSENTIA* HAVE NOT BEEN MET

1. Pursuant to Arts. 60(1) and 61(2)(b) of the Rome Statute ("the Statute"), the Defence respectfully submits: *firstly*, Mr Rhodes is not a person who has "fled or cannot be found" [**I.A.**]; and *secondly*, all reasonable steps have not been taken to secure his appearance and inform him of the charges and hearing [**I.B.**]. Overall, there is no "cause" under Rule 125(1) of the Rules of Evidence and Procedure ("the Rules") to hold a confirmation of charges hearing *in absentia* [**I.C**.].

I.A. Mr Rhodes is not a person who has "fled or cannot be found"

2. Art. 61(2)(b) requires a prior appearance before the Court when "holistically interpreted"[1] with Art. 60(1).[2] The preposition "Upon" in Art. 60(1) makes clear that a first appearance is needed to fulfil the PTC's "critical procedural step"[3] of determining that the person has been informed of their Art. 67 rights.[4] Art. 61(1)'s Spanish translation confirm this: "subject to" applies to "the provisions in paragraph 2 *and* within a reasonable time after the person's *voluntary surrender*".[5] Mr Rhodes' whereabouts are unknown after 31 March 2022.[6] He has not appeared before the ICC following Raspia's referral on 18 April 2022. The PTC cannot satisfy itself pursuant to Art. 60(1).

3. Art. 61(2)(b)'s "ordinary meaning"[7] implies a distinction between "fled" and "cannot be found", as "or" connotes different options.[8] The Defence respectfully submits this distinction is maintained even with a required first appearance, contrary to *Kony*.[9] The ordinary meaning of "fled" implies "wilful evasion"; and "cannot be found" includes reasons short of absconding, e.g., "sickness, abduction, or death"[10], following a first appearance. The *travaux préparatoires* confirm how "cannot be found" is separate from a person who "has never appeared".[11] Therefore, Mr Rhodes is not within the term of "fled or cannot be found" under Art. 61(2)(b), but rather has simply never appeared.

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[1] ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 45; William Schabas, *An Introduction to the International Criminal Court* (6th ed., 2020), p. 213; Vienna Convention on the Law of Treaties ("VCLT"), Arts. 31 and 32.

[2] Michele Marchesiello, "Proceedings before the Pre-Trial Chambers", in Cassese, Gaeta, Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002; online edn), p. 1244.

[3] ICC, *Prosecutor v Kony,* ICC-02/04-01/05, Defence Appeal brief against Pre-Trial Chamber III's "Decision on the criteria for holding confirmation of charges proceedings *in absentia*", 7 February 2025, para. 17, ("*Kony* Defence Appeal Brief of 7 February 2025").

[4] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd Ed., 2016), p. 912, ("William Schabas, 2016"); Rules, Rule 121(1).

[5] Rome Statute, Art. 61(1) (emphasis added) ("Con sujeción a lo dispuesto en el párrafo 2 y dentro de un plazo razonable tras la entrega de la persona a la Corte o su comparecencia voluntaria"); *Kony* Defence Appeal Brief of 7 February 2025, para. 24.

[6] Case Facts, para. 22.

[7] VCLT, Art. 31(1); ICC, *Prosecutor v. Kony,* ICC-02/04-01/05, Decision on the criteria for holding confirmation of charges proceedings *in absentia*, 29 October 2024, para. 32. ("Third *Kony* Decision").

[8] ICC, *Prosecutor v. Kony*, ICC-02/04-01/05, Decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence, 23 November 2023, para. 29. ("First *Kony* Decision").

[9] First *Kony* Decision, para. 30.

[10] *Kony* Defence Appeal Brief of 7 February 2025, paras. 5 and 18.

[11] Preparatory Commission for the International Criminal Court, PCNICC/1999/DP.8/Add.2/Rev.1, Proposal by France concerning the Rules of Procedure and Evidence, 29 June 1999, p. 1.

4. Without an initial appearance, Mr Rhodes' Art. 67 rights will be infringed at this stage of the proceedings,[12] and thereby violate Art. 60's wider purpose – ensuring "recourse to review decisions impacting [his] liberty".[13] Any interpretation of Art. 61(2)(b) that violates other provisions must be dismissed.[14] Mr Rhodes has not exercised his Art. 67 rights: to be informed of charges, select and communicate with counsel, raise defences and present one's own evidence.[15] Therefore, since the arrest warrant has not been executed and Mr Rhodes has not appeared before the ICC, no confirmation of charges hearing can be held.[16]

5. Furthermore, Art. 61(2)(b) does not apply where the suspect's arrest is affected by factors besides the identification of a suspect's location, such as a lack of cooperation.[17] On the facts, Prala's non-cooperation is the reason for Mr Rhodes' non-appearance because it prevents the Court from receiving the assistance needed for apprehending Mr Rhodes in Prala. Therefore, Mr Rhodes does not qualify as a person who has "fled or cannot be found" under Art. 61(2)(b).

I.B. Even if an initial appearance is not required, "all reasonable steps" have not been taken

6. Art. 61(2)(b) entails that "all reasonable steps" be taken to (a) secure the person's appearance [**I.B.1.**]; (b) give notice of charges [**I.B.2.**]; and (c) inform the person that a hearing *in absentia* will be held [**I.B.3.**].[18] The requirements must be "narrowly construed" to protect the accused's rights.[19]

I.B.1. All reasonable steps have not been taken to secure Mr Rhodes' appearance

7. While a successful result is not required, efforts must be "sufficient and adequate".[20] Weight has been given to (a) transmission of arrest warrants to relevant States, (b) efforts that are "protracted over many years", (c) the international community's "unprecedented cooperation", and (d) information campaigns.[21] These requirements are not met in the present case.

8. The arrest warrant has not been (a) "transmitted to relevant States" and (c) the international community has not provided "unprecedented cooperation". Prala's non-response has hindered the warrant's transmission and broadcast. There is no suggestion that Prala has an Art. 87(5) "*ad hoc* arrangement" with the ICC. Without this, the Registry has not "adequa[tely]" taken "all reasonable efforts" as it has not used the Statute's procedure for cooperation with non-State Parties.

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[12] Håken Friman, "Investigation and Prosecution", in Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (1st ed., 2001), pp. 523–528; William Schabas, 2016, p. 1020.
[13] William Schabas, 2016, p. 911; ICC, *Prosecutor v. Lubanga,* ICC-01/04-01/06 OA8, Decision on the admissibility of the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007, 13 June 2007, para. 13.
[14] ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment pursuant to Art. 74 of the Statute, 7 March 2014, para. 46.
[15] Rome Statute, Arts. 67(1)(a)-(d).
[16] Michele Marchesiello, "Proceedings before the Pre-Trial Chambers", in Cassese, Gaeta, Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (1st ed., 2002), p. 1244.
[17] First *Kony* Decision, para. 32.
[18] ibid., para. 36.
[19] ibid., para. 37.
[20] Third *Kony* Decision, para. 35.
[21] ibid., para. 36.

9. The present efforts are not (b) "protracted over many years". A "reasonable period of time after the [warrant's] issuance" must pass where it has yet to be executed.[22] In *Kony,* 19 years passed.[23] In contrast, Mr Rhodes' warrant was only issued on 23 September 2022. As only 2 years have passed, the Registry has had insufficient time to apprehend him. While there is no "set time frame",[24] a "reasonable period of time" should be interpreted consistently. Furthermore, regional armed conflict complicates the search efforts. As such, a longer period of time is need to allow, for instance, Prala to respond to the Registry's request.

10. The (d) information campaigns in the present are insufficient. *Kony*'s media campaigns occurred through 2013 to 2021;[25] with radio broadcasts thrice daily on three radio stations, with listeners in relevant communities: a total of 344 times.[26] In contrast, the present podcast appearances were a one-off instance, paling in comparison as the announcements only happened once per podcast.[27] The information was not repeated persistently to the communities and thus they lacked the intensity and frequency as in *Kony.*[28]

11. Outreach efforts failed to reach a relevant target audience, the rural Pralan population. They are a crucial segment that could have information on Mr Rhodes' whereabouts, as he is rumoured to have fled to there[29] and Raspian religious community members with ties to him live in Prala.[30] *Firstly*, the *Prowling Prala* episode was conducted for 15 minutes in English, which is not understood by rural Pralans, who only understand Pralan.[31] Therefore, only 10 minutes of outreach were conducted in the Pralan language to target an area where Mr Rhodes could be. As the 10-minute segment only provided a summary of the DCC, rural Pralans would not have understood the English segments about the arrest warrant and the OTP's request for an *in absentia* hearing. Rural Pralans are unlikely to have listened to the episode, if it was mainly in English. *Secondly*, the outreach in Pralan newspapers may not have reached rural Pralans. Prala's national newspaper, where the Registry's statements were published, is presumably in Prala's "official language" (English), which rural Pralans are unable to read.[32] Thus, an important audience has been left out by the Registry. Therefore, the Registry's efforts are insufficient to meet the "all reasonable steps" requirement for securing Mr Rhodes' appearance.

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[22] Rules, Rule 123(3).
[23] Third *Kony* Decision, para. 40.
[24] ibid., para. 39.
[25] ibid., para. 41.
[26] ICC, *Prosecutor v. Kony*, ICC-02/04-01/05-479-Conf-AnxI, ANNEX I, Public redacted version of the Report on the Registry's implementation of the proposed Plan on outreach activities,11 March 2024, paras. 11–12. ("Registry's Report Annex in *Kony*").
[27] Case Facts, Exhibit 2, p. 8.
[28] Registry's Report Annex in *Kony*, paras. 11–12.
[29] Case Facts, para. 22.
[30] ibid., Exhibit 2, para. 9.
[31] ibid., para. 23.
[32] ibid., para. 23.

I.B.2. All reasonable steps have not been taken to inform Mr Rhodes of the charges

12. Previous PTC decisions emphasise the importance of reaching the "largest relevant audience",[33] communities that could possess information on Mr Rhodes' whereabouts, with a focus on "specific locations"[34] and local "communication preferences".[35] It is fulfilled if "all efforts" were taken to "inform [him] of the [charges'] existence and their availability for consultation", regardless of whether the person actually consulted them.[36] In *Kony,* this entailed multilingual radio campaigns, physical distribution of 800 copies of the summarised DCC, and newspapers with summarised DCC inserts in local languages.[37]

13. However, the Registry has failed to reach the high threshold needed[38] by neglecting local communication preferences. Beyond the segment in *Prowling Prala*, there is no other outreach in the Pralan language. It was not reported that the summarised DCC was distributed via newspapers or linked to the ICC website in local languages, unlike in *Kony.*[39] Additionally, the Registry has failed to implement "publication and advertisement measures in States where the…person is believed to be located".[40] Mr Rhodes is rumoured to be in Prala,[41] but there were no broadcasts in Pralan media.[42]

I.B.3. All reasonable steps have not been taken to inform Mr Rhodes that a confirmation of charges hearing will take place *in absentia*

14. This requirement is assessed following a decision and a date set for the hearing *in absentia.*[43] The Defence will respectfully await the PTC's decision before making submissions on this point.

I.C. Even if "all reasonable steps" have been taken, there is no cause to hold a confirmation of charges hearing *in absentia* under Rule 125(1) of the Rules

15. Even if the above requirements were met, there is no "cause" for a hearing. This decision is "discretionary",[44] balancing competing factors like the right to a fair trial and the ICC's resources.[45] Mr Rhodes' Art. 67 rights should be upheld, having regard to his right to be informed of the charges, be present at the trial, and raise defences,[46] which he is unable to exercise *in absentia*.

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[33] First *Kony* Decision, para. 57.
[34] Third *Kony* Decision, para. 57.
[35]ICC, *Prosecutor v. Kony*, ICC-02/04-01/05, Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence, 4 March 2024, para. 9. ("Second *Kony* Decision").
[36] Second *Kony* Decision, para. 8.
[37] Third *Kony* Decision, para. 48; Registry's Report Annex in *Kony*, paras. 21 and 31.
[38] Second *Kony* Decision, para. 9.
[39] ibid., para. 9.
[40] First *Kony* Decision, para. 57.
[41] Case Facts, Para. 23.
[42] ibid., Exhibit 2, p. 8.
[43] First *Kony* Decision, para. 45; Second *Kony* Decision, para. 10; Third *Kony* Decision, para. 59.
[44] Third *Kony* Decision, para. 58.
[45] ICC, *Prosecutor v. Kony, Otti, Odhiambo and Ongwen,* ICC-02/04-01/05, Decision Severing the Case Against Dominic Ongwen, 6 February 2015, para. 7.
[46] Rome Statute, Arts. 67(1)(a), (d) and (e).

II. MR RHODES' RASPIAN CONVICTION RENDERS THE CASE INADMISSIBLE AND ANY PROSECUTION A VIOLATION OF THE *NE BIS IN IDEM* PRINCIPLE

16. The Defence respectfully submits that Mr Rhodes' prosecution is inadmissible under Art. 17(1)(c) and violates the *ne bis in idem* principle in Art. 20(3). This is because, *firstly*, the conduct "which is the subject of the complaint" is the "same conduct" that formed the basis of the conviction in Raspia [**II.A.**]; *secondly*, the conviction in Raspia is a *res judicata* and a final judgment on the merits [**II.B.**]; and *thirdly*, the exceptions in Arts. 20(3)(a) and (b) are not applicable [**II.C.**].

II.A. There is a sufficient measure of identity of the conduct in the conviction in Raspia and the conduct which is the subject of the complaint

17. The Defence respectfully submits that Mr Rhodes' prior conviction for hate speech concerns "substantially"[47] the "same conduct",[48] committed by the "same person",[49] as the alleged offence of direct and public incitement to commit genocide. The modifier "substantially" leaves a degree of discretion and does not require the conduct to be identical. Therefore, *ne bis in idem* applies if both the offences' *actus reus* have the same underlying facts,[50] and is not dependent on their legal characterisation.[51] This is supported by the Statute's Spanish version, which refers to "*hechos*" (meaning "facts") within Art. 20(3), rather than simply "conduct" (English and French versions). The conduct in the Raspian conviction shows an overlap with the conduct in the OTP's complaint.

18. Mr Rhodes was convicted under para. 2 of the domestic hate speech law.[52] The *actus reus* is (a) "in a manner suited to causing a disturbance to public peace", (b) violates a group's human dignity by (c) insulting, maliciously maligning or defaming them. In contrast, the *actus reus* of "direct and public incitement to commit genocide" involves: (i) "directly [inciting] another to [(ii)] commit a crime…through…[any] means of audiovisual communication" in a (iii) "public" manner.[53]

19. As both offences concern communication, the relevant underlying facts are Mr Rhodes' remarks on Babblr and his address to the nation,[54] which concern the same "incident". Mr Rhodes' statements between 7 November 2020 and 10 December 2021 had the dual result of violating Adrelans' dignity, and to allegedly incite Raspians to "neutralise" "barbarism".[55] His provocative

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[47] ICC, *Prosecutor v Ruto et al*, ICC-01/09-01/11-307, Judgment on the appeal of the Republic of Kenya against the decision of PTC II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, para. 40.
[48] Within the context of Art. 20(3) of the Rome Statute.
[49] ICC, *Prosecutor v Lubanga,* ICC-01/04-01/06-8-US-Corr, Decision on the Prosecutor's Application for a warrant of arrest, 24 February 2006, para. 31 ("*Lubanga* Art. 58 Decision").
[50] Gaiane Nuridzhanian, "The Principle of *ne bis idem* in International Criminal Law" (1st ed., 2024), p. 128
[51] ICC, *Prosecutor v Al-Senussi*, ICC-01/11-01/11-565, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of PTC I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 24 July 2014, para. 119.
[52] Clarification on Points of Fact, Clarification 3; Case Facts, para. 26.
[53] ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, TC Judgment, 2 September 1998, para. 554.
[54] ibid.
[55] Case Facts, para. 17 and Exhibit 1.

televised address has (a) "disturbed the public peace" by rallying his supporters to (ii) "remove" Adrelans by "any means necessary", which targets the very existence of Adrelans. It also (b) "violates their human dignity" and (c) defames the group through various statements, such as calling them a "plague". This conduct constitutes the very *actus reus* required to convict under the domestic hate speech law, which would then again be re-examined by the Court.

20. Therefore, there is necessarily an overlap of time (7 November 2020 to 10 December 2021), space (in Raspia and online), victims (Adrelans) and the alleged perpetrator (Mr Rhodes). Thus, the conduct in the Raspian conviction and the conduct which is the subject of the OTP's complaint are sufficiently identical, giving rise to *ne bis in idem* effects.

II.B. The conviction in Raspia is a *res judicata* and is a final judgment on the merits

21. Mr Rhodes has "been tried" under Art. 17(1)(c) because the Raspian proceedings amount to a final judgment on the merits "on conviction or acquittal" as required by Art. 20(3), which require finality of domestic proceedings before a case can be declared inadmissible.[56]

22. Ordinarily, *res judicata* is satisfied "after all rights of appeal have been exhausted or after expiry of the time-limits".[57] Insisting on the time limits' expiration (a) "protect[s] the right of defense" "to prevent a flawed ruling…from becoming final" and (b) "so that a party may turn to a higher court for revision of a judgment that was unfavorable to that party's interests."[58]

23. However, where a State has no time limits for lodging an appeal, the guarantees for defendants secured by the *ne bis in idem* principle would be lost if the Court allows prosecution on the technical basis that there remains a possibility, however slight or fanciful, that a party may lodge an appeal. Rather, where a losing party has decided not to appeal or after a long effluxion of time without any appeal being lodged, it can be inferred that they do not seek to prevent the "ruling…from becoming final", and no longer need the right of appeal to be "protect[ed]". In these cases, the Court should treat a domestic judgment as "final" where there is no real prospect of a party lodging an appeal. This standard can be approached consistently across cases and promotes legal certainty. Applying this standard is necessary so that a nation's unique legal framework does not defeat the *ne bis in idem* principle if, e.g., the defendant does not exercise a right to appeal because their impecuniosity prevents them meeting legal costs or a requirement to pay security for the costs of an appeal, or national law may severely restrict grounds of appeal for the defendant.

24. In the present case, the trial in the District Court culminated in a decision on the merits to convict Mr Rhodes, which was upheld on appeal by the Appeals Court of Brolin.[59] The fact that the

[56] ICC, *Prosecutor v Gaddafi*, ICC-01/11-01/11-695, In the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I, 9 March 2020, para. 61.
[57] ECJ, *Kapferer v. Schlank & Schick GmbH*, Case 234/04, Judgment, 16 March 2006, para. 20.
[58] IACtHR, *Herrera-Ulloa v. Costa Rica*, Judgment, 2 July 2004, para. 158.
[59] Case Facts, para. 21.

sentence was reduced by the Appeals Court does not affect the conviction because determining the sentence is a separate decision that necessarily follows after a conviction. Since then, the Raspian Prosecutor has decided not to appeal to the Supreme Court. There is no suggestion that Mr Rhodes has a right of appeal. Assuming *arguendo* that such a right exists, in the three years since that judgment,[60] Mr Rhodes has not and will not appeal the judgment further because his sentence is fully completed and his liberty is no longer restricted. In these circumstances, there is no real prospect of any appeal to the Supreme Court and thus the Appeals Court judgment should be treated as "final".

25. The PTC judgment in *Gaddafi* is distinguishable to the present case. Despite being tried and convicted by a first instance national court, the PTC held that there was no final judgment because (a) Mr Gaddafi was tried and convicted *in absentia* by the first instance court; (b) the decision of the intermediate appellate court could be subject to appeal; and (c) under a unique Libyan national law, "once the person is arrested, his trial should start anew".[61] All three bases are distinguishable because (a) Mr Rhodes was detained during his trial in the District Court and appeal in the Appeals Court and was thus *in presentia*, not *in absentia*; (b) there is no real prospect of any further appeal to the Supreme Court and, unlike Mr Gaddafi who had a motivation to appeal his death sentence, Mr Rhodes has no incentive to appeal because he has completed his sentence; and (c) there is no suggestion that Raspian law requires a fresh trial to begin, nor would such a provision be applicable given that Mr Rhodes' trial was *in presentia*.

II.C. The exceptions to the *ne bis in idem* principle in Art. 20(3) are not applicable in this case

26. Art. 20(3)(a) creates an exception to the *ne bis in idem* principle if the earlier proceedings "[w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court". Whenever the ICC determines the status of domestic judicial proceedings, "it should accept *prima facie* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise."[62]

27. There is no "compelling evidence" that the proceedings had the "subjective" purpose of "shielding" Mr Rhodes from criminal responsibility.[63] When charging Mr Rhodes, the new government was motivated to "uphold Raspia's human rights obligation not to detain persons indefinitely without charge or trial",[64] consistently with an intent to bring Mr Rhodes to justice.

28. The Appeals Court's reduced sentence does not show that the proceedings were for the

[60] ibid., para. 21. The judgment of the Appeals Court was made on 31 March 2022.
[61] ICC, *Prosecutor v. Gaddafi*, ICC-01/11-01/11-662, Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", 5 April 2019, para. 48.
[62] ICC, *Prosecutor v Gombo,* ICC-01/05-01/08-962-Corr, Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 19 October 2010, para. 66.
[63] Dionysios Spinellis, "Global report the *ne bis in idem* principle in 'global' instruments", *International Review of Penal Law*, 73 (2002), p. 1160.
[64] Case Facts, para. 20.

purpose of "shielding". The sentence was not nominal nor derisory but rather involved a deprivation of liberty in imprisonment for three months. The reduction can be explained by the fact that the Appeals Court identified an error of law or concluded that the District Court's sentence was manifestly excessive, having regard to the circumstances of offending.

29. Art. 20(3)(b) also creates an exception where the earlier proceedings (1) "were not conducted independently or impartially in accordance with the norms of due process recognized by international law" and (2) "were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

30. This exception is not applicable. *Firstly*, a principle that judges lack independence or impartiality merely because they were appointed by a party when they were President or otherwise exercising executive power is antithetical to the common practice of international and national courts. In interstate disputes, it is common practice for a judge of the nationality of a State party to be appointed as an *ad hoc* judge.[65] A general principle can be derived from the national practice[66] in the United States, South Africa, South Korea and Brazil where judges have participated in proceedings that involve determining guilt or sentence of the President that appointed them.[67]

31. *Secondly*, a perception by the Prosecutor that certain judges are "loyal" to a former political figure is insufficient to demonstrate that the proceedings lacked impartiality. Objective bias is determined from "a reasonable observer, properly informed,"[68] not the losing party on appeal. The reasonable observer "presume[s]" that judges, "by virtue of their experience and training," will decide cases "relying solely and exclusively on the evidence" and excluding outside influences.[69]

32. There is no evidence to rebut that presumption. Besides the fact that the judges were appointed by Mr Rhodes (which, as explained above, is insufficient), the evidence does not identify what would lead the judges to decide Mr Rhodes' appeal other than on its merits, let alone a logical conclusion between that matter and the feared deviation from the judicial function. There is no evidence that the judges were instructed by Mr Rhodes; that Mr Rhodes, who is no longer in power, can remove them

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[65] Statute of the ICJ, Arts. 31(2)–(3).

[66] Rome Statute, Art. 21(1)(c).

[67] See, e.g., Supreme Court of the United States ("SCOTUS"), *Trump v. United States*, 603 US 593 (2024), 1 July 2024 (Gorsuch, Kavanaugh and Barrett JJ, who were appointed by President Trump, determined Trump's immunity from criminal liability); SCOTUS, *United States v. Nixon*, 418 US 683 (1974), 24 July 1974 (Blackmun and Powell JJ, who were appointed by President Nixon, determined that Nixon must deliver subpoenaed materials to a federal court); Constitutional Court of South Africa, *Secretary, Judicial Commission of Inquiry v. Zuma* [2021] ZACC 18 (Khampepe ADCJ, Jafta, Mhlantla and Theron JJ, Pillay and Tlaletsi AJJ, who were appointed by President Zuma, sentenced Zuma to imprisonment); Constitutional Court of South Korea ("CCSK"), *Case on the Impeachment of the President*, 4 April 2025 (Kim Hyungdu, Jeong Jeong-mi, Jeong Hyeong-sik and Kim Bok-hyeong JJ, who were appointed by President Yoon, upheld Yoon's impeachment); CCSK, *Case on the Impeachment of the President*, 10 March 2017 (Justices Seo Ki-seog and Cho Yong-ho, who were appointed by President Park Geun-hye, upheld Park's impeachment); Supreme Federal Court of Brazil, Habeas Corpus *Petition by Luiz Inácio Lula da Silva*, 4 May 2018 (Lúcia CJ, Toffoli and Lewandowski JJ, who were appointed by President Lula da Silva, determined a petition to stay Lula's detention).

[68] ICC, *Prosecutor v. Al Bashir*, ICC-02/05-01/09-76-Anx2, Annex 2: Notification of the decision on the request for excusal of a Judge, 19 March 2010, p. 5.

[69] ibid., p. 6.

or reduce their remuneration; or that the judges were influenced by outside pressure.

33. Therefore, the exceptions to the *ne bis in idem* principle in Art. 20(3) are not applicable.

III. THERE ARE NO SUBSTANTIAL GROUNDS TO BELIEVE THAT MR RHODES IS LIABLE FOR DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

34. The Defence respectfully submits that there are no "substantial grounds" to believe that the elements of direct and public incitement of genocide under Art. 25(3)(e) ("Art. 25(3)(e) liability"), in particular "direct incitement" or the special *mens rea* requirement, have been met. To date, the ICC has not considered Art. 25(3)(e) liability.[70] As such, the ICTR's and ICTY's case law,[71] including *Akayesu*,[72] should be considered for the *actus reus* terms of "direct", "public", "incitement", and the special *mens rea* requirement.

35. The evidentiary threshold against which the PTC shall assess the evidence, that of "substantial grounds to believe",[73] is a "relatively high…standard".[74] The charges must be "sufficiently compelling…going beyond mere theory".[75] "Substantial" has been interpreted as meaning "real" rather than "imaginary".[76] The OTP must offer a clear line of reasoning.[77]

III.A. There are no substantial grounds to believe Mr Rhodes engaged in "direct incitement"

36. "Direct" must be "more than mere vague or indirect suggestion", one that "specifically provoke[s]" another to engage in genocide.[78] "Incitement" has been defined broadly as, *inter alia*, to "directly provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audiovisual communication."[79]

37. It is therefore necessary to consider on a case-by-case basis, in light of the culture of Raspia and the specific circumstances of the present case,[80] whether acts of incitement can be viewed as direct or not, "by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof."[81]

III.A.1. Babblr posts on 7 November 2020, 14 January, 11 September and 20 October 2021

38. With respect to aforementioned Babblr posts, even when taking the Prosecution's case at its

[70] Richard Wilson, *Incitement on Trial* (1st ed., 2017) p. 41. As such, the Defence will consider the relevant case law of other international courts and tribunals, see Art. 21(1)(b), Rome Statute.
[71] ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 79: Art. 21(1)(b) includes, "the case law of other international courts… as a means of interpretation."
[72] ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, TC Judgment, 2 September 1998, para. 554. ("*Akayesu,* TC (1998)").
[73] Rome Statute, Art. 61(7).
[74] Kai Ambos, *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (4th ed., 2022), p. 1805.
[75] ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, 7 February 2007, para. 37-39. Applied in ICC, *Prosecutor v Katanga et al*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 14 October 2008, para. 39
[76] Kai Ambos, 2022, p.1805.
[77] ibid.
[78] *Akayesu,* TC (1998), para. 557.
[79] ibid., para. 555.
[80] ibid.
[81] ibid., para. 558.

highest, it is clear from the "meaning of the words used in the specific context"[82] of the 5 November 2020 terrorist attacks that none of these posts unambiguously call for the commission of any of the acts listed under Art. 6.[83]

39. Even when considering what the posts may have implied,[84] they must be viewed in light of the legitimate fear generated in the aftermath of 72 bomb attacks in the space of 12 months. The Resistance carried out attacks in which 216 people had lost their lives and 2,000 had been injured. The first of the posts by Mr Rhodes were made just two days after the first attack, where there had been a significant loss of civilian life.[85] The post's content and its surrounding context make it clear that Mr Rhodes was specifically referring to the terrorists that had carried out the attacks.[86] As such, not only is there a "reasonable possibility",[87] but the speech can only sensibly be construed in the context of that conflict as being aimed at bolstering the war effort,[88] as opposed to incitement to commit genocide.[89] Such messaging "for the mobilization of civil defence for the protection of a nation and its people" is lawful speech,[90] and thus no substantial grounds can be established.

40. The OTP may argue that Mr Rhodes' references to "terrorists" were euphemistic, and were understood as meaning the Adrelan by Raspians,[91] thereby constituting "implicit incitement" and sufficiently direct for the purposes of Art. 25(3)(e) liability.[92] However, there is no evidence to support this hypothesis. Had Mr Rhodes stated that all the Adrelan were "terrorists", it would still not be enough. Mere equation is insufficient.[93]

41. Therefore, the Defence respectfully submits that the PTC cannot conclude there are substantial grounds to believe that the aforementioned Babblr posts represented a direct incitement to commit genocide, in the presence of a reasonable, alternative explanation.[94]

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[82] ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, AC Judgement, 28 November 2007, para. 701 ("*Nahimana*, AC (2007)").
[83] ibid., para. 692; Rome Statute, Arts. 6(a)–(e).
[84] ICTR, *Nahimana*, AC (2007) paras. 692, and 702.
[85] Case Facts, para. 15.
[86] UN doc. MTDSG Ref. I-1 (1945), Art. 51 (Charter of the United Nations); Steven Ratner, "Self-Defense Against Terrorists: The Meaning of Armed Attack" in Schrijver and van den Herik (eds.), *Counter-terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (1st edn, 2013) pp. 334-355 ("Steven Ratner, 2013"); UN doc. 75 UNTS 287 (1946), Arts. 3 and 33 (Geneva Convention relative to the protection of civilian persons in time of war); ICRC, *Commentary on Convention (IV) relative to the Protection of Civilian Persons in Time of War* (1st ed., 1958), para. 4538; Hans-Peter Gasser, "Prohibition of terrorist acts in international humanitarian law", *11th Round Table on Current Problems of International Humanitarian Law* (9-14 September 1985), p. 207.
[87] ICTY, *Prosecutor v Šešelj*, ICTY-03-67-T, TC Judgment, 31 March 2016, para. 318 ("*Šešelj*, TC (2016)").
[88] ibid.
[89] ibid.
[90] ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, TC Judgment, 3 December 2003, para. 1025.
[91] *Nahimana*, AC (2007), para. 701; *Akayesu,* TC (1998), para. 557.
[92] William Schabas, *Genocide in International Law* (2nd ed., 2009) pp. 331-332; ICTR, *Prosecutor v. Muvunyi,* ICTR-2000-55A-T, Judgment, 12 September 2006, para. 502; ICTR, *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, TC Judgment, 1 December 2003, para. 853; ICTR, *Prosecutor v. Niyitegeka*, ICTR-96-14-T, TC Judgment, 16 May 2003, para. 431; and *Nahimana*, AC (2007), paras. 698–700.
[93] *Nahimana*, AC (2007), para. 743.
[94] ibid., para. 746.

III.A.2. Babblr Post on 10 June 2021 and the televised address on 10 December 2021

42. With respect to Babblr post 10 June 2021 and the televised address, there is no other evidence[95] available to indicate incitement to commit genocide; and it is clear the post and televised address had a "limited",[96] if any impact, upon readers or listeners as there was no outbreak of general violence. This lack of violence in the aftermath of these statements[97] may be explained from the fact that their contents were not "specifically urging another individual to take immediate criminal action",[98] and were rather "merely making a vague or indirect suggestion".[99]

43. The Defence respectfully submits that the aforementioned acts were insufficient to establish substantial grounds that Mr Rhodes had incurred Art. 25(3)(e) liability, the Defence concedes that they have attracted other forms of criminal liability, such as hate speech.[100]

44. Under Raspia's domestic law, it is clear Mr Rhodes' statements violated the human dignity of Ardelans by insulting their faith. However, hate speech alone is insufficient for present purposes, as "other persons need to intervene before…violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them.'[101] This approach has been endorsed in the literature, such that, "the only correct legal conclusion is that international criminal jurisprudence… may only be interpreted as criminalizing forms of incitement to violence, which are incitement to commit crimes where ensuing violence occurs."[102]

45. This raises the issue of the other two offences Mr Rhodes has been charged with, the crimes against humanity of persecution and torture.[103] The Defence respectfully submits there is insufficient evidence to establish substantial grounds to believe that Mr Rhodes committed the crimes against humanity of persecution or torture, as the shared *actus reus* of those crimes remain unsatisfied.[104] *Šešelj* provided that the "mere use of an abusive or defamatory term is not sufficient to demonstrate persecution."[105] The OTP must provide sufficient evidence to the PTC to establish Mr Rhodes' actions were "part of a widespread or systematic attack directed against any civilian population."[106] However, there is no evidence to suggest that Mr Rhodes or Raspia has targeted "civilians…en masse" who were not engaged in fighting or presented a danger to Raspian soldiers.[107]

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[95] *Šešelj*, TC (2016), para. 328.
[96] ibid.
[97] ICTR, *Prosecutor v. Nyiramasuhuko et al.,* ICTR-98-42-A, TC Judgment, 24 June 2011, para. 5986 ("*Nyiramasuhuko,* TC (2011)").
[98] Audrey Fino, "Defining Hate Speech: A Seemingly Elusive Task", *Journal of International Criminal Justice*, 18(1) (2020), p. 31 ("Audrey Fino, 2022") (citing *Nyiramasuhuko,* TC (2011), para. 3338).
[99] ibid.
[100] *Nahimana*, AC (2007), para. 692.
[101] ibid.
[102] Audrey Fino, 2020, p. 44.
[103] Case Facts, para. 2.
[104] Rome Statute, Art. 7(1)(h); Audrey Fino, 2020, p. 44.
[105] *Šešelj*, TC (2016), para. 283.
[106] ICTY, *Prosecutor v. Kunarac, et al.*, IT-69-23/IT-96-23-1, AC Judgment, 12 June 2002, para. 85.
[107] *Šešelj*, TC (2016), para. 193.

46. As a result, there are no substantial grounds to believe either the Babblr post on 10 June 2021 or the televised address incurred Art. 25(3)(e) liability in the absence of any other evidence. While it is conceded that the statements constituted hate speech, the present evidence is insufficient to justify a trial.

III.B. There are no substantial grounds to believe Mr Rhodes possessed the special *mens rea* for Art. 25(3)(e) liability

47. The Defence respectfully submits that there is insufficient evidence to establish substantial grounds to believe that Mr Rhodes possessed the special *mens rea* required for Art. 25(3)(e) liability. The special *mens rea* is "the intent to directly and publicly incite others to commit genocide. Such intent in itself presupposes that the perpetrator possesses the specific intent for genocide."[108]

48. "[W]hen based on circumstantial evidence, any finding that the accused had genocidal intent must be the only reasonable inference from the totality of the evidence."[109] There is insufficient evidence to establish substantial grounds to believe Mr Rhodes meets the *mens rea* Art. 25(3)(e) liability. Genocidal intent cannot be reasonably inferred from the totality of the evidence.[110] Indeed, there is sufficiently compelling evidence to draw the inference[111] that Mr Rhodes' posts and speech were intended to bolster morale as part of an on-going war-effort during a full-blown terrorist insurgency. Therefore, the PTC must find that there are no substantial grounds to believe Mr Rhodes possessed the special *mens rea* requirement for Art. 25(3)(e) liability.

IV. CONCLUSION

49. The Defence respectfully submits that (a) the requirements for the confirmation of charges hearing against Mr Rhodes to be held *in absentia* have not been met; (b) Mr Rhodes' conviction in Raspia renders the case inadmissible before the Court and any prosecution is a violation of the *ne bis in idem* principle; and (c) there are no substantial grounds to believe that Mr Rhodes is criminally liable for the crime of direct and public incitement to commit genocide.

Respectfully submitted,

Counsel for the Defence

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[108] *Prosecutor v. Mugenzi and Mugiranez*, ICTR-99-50-A, AC Judgment, 4 February 2013, para. 135. See also *Akayesu,* TC (1998), para. 560.

[109] ICTR, *Prosecutor v. Ngirabatware*, MICT-12-29-A, AC Judgment, 18 December 2014, paras. 58-59.

[110] ICTR, *Prosecutor v. Ngirabatware*, ICTR-99-54-T, TC Judgment, 21 February 2013, para. 60: "If there is another conclusion which is also reasonably open from the evidence, and which is consistent with the non-existence of that fact upon which the guilt of the Accused depends, the conclusion of guilt beyond reasonable doubt cannot be drawn."

[111] ibid.