

THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

THE 2023 INTERNATIONAL HUMANITARIAN LAW MOOT COURT COMPETITION

IN THE MATTER BETWEEN

PROSECUTION

V.

Ms LUSHOMO NGALA (DEFENDANT)

MEMORIAL FOR THE PROSECUTION

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INDEX OF ABBREVIATIONS

Malabo Protocol	The Protocol to the amendments on the Protocol To the statute of the African Court of Justice and Human Rights
KAF	Kedibonye Armed Forces
ULF	Uzuri Liberation Front
PLF	People’s Liberation Front
Art. (s)	Article (s)
Charter	The African Charter on Human and Peoples’ Rights
ICTY	Internatonal Criminal Tribunal for the Former Yugoslavia
AP1	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
ICTR	The International Criminal Tribunal for Rwanda
Para	Paragraph

3.0 LIST OF AUTHORITIES

3.1 INTERNATIONAL TREATIES

1. African Charter on Human and Peoples' Rights (Adopted 27 June 1981 at Nairobi, Kenya, entered into force 21 October 1986).
2. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Aug. 12, 1949.
3. Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 34, Aug. 12, 1949.
4. Convention for the Protection of Cultural Property in the Event of Armed Conflict , May 14, 1954.
5. Convention Relative to the Protection of Civilian Persons in Time of War (Entered into force on Aug. 12, 1949).
6. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
7. Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (Adopted in 1998 at Ouagadougou, Burkina Faso, entered into force 2004).

3.2 INTERNATIONAL DECLARATIONS AND RULES

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
2. Rules of the African Court on Human and Peoples' Rights (Adopted 28 September 2020 at Arusha, Tanzania).

3.3 INTERPRETATIVE GUIDELINES OF TREATY MONITORING BODIES

1. General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples' Rights Held From 4 to 18 November 2015 in Banjul.
2. Baccino-Astrada, Alma. Manual on the Rights and Duties of Medical Personnel in Armed Conflicts, Geneva: ICRC, 1982.

3.5 OTHER INTERNATIONAL CASES

1. Prosecutor v. Tihomir Blaskic (Trial Judgement), IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 March 2000.
2. Prosecutor v. Radislav Krstic (Trial Judgement), International Criminal Tribunal for the former Yugoslavia (ICTY), 2 August 2001.
3. Prosecutor v. Radislav Krstic (Trial Judgement), International Criminal Tribunal for the former Yugoslavia (ICTY), 2 August 2001.
4. Island of Palmas Arbitration (The Netherlands v US) (1928) 2 RIAA 829.
5. The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22nd August ,1946 to 1st October, 1946).
6. Prosecutor v. Jadranko Prlić. Case No. IT-04-74-T, Judgement (TC), 29 May 2013.
7. ICTY Tadić Trial Judgement 7 May 1997.
8. ICTY, Jelisić Trial Judgment 14 December 1999.
9. ICTY, Mucic et al. ("Čelebići") Appeals Judgment 20 February 2001..
10. Prosecutor v Vasiljevic, Appeals Chamber Judgment (25 Feb 2004).
11. Prosecutor v Blaskic, Appeals Chamber Judgment (29 July 2004).
12. Ntakirutimana and Ntakirutimana ICTR A. Ch. 13.12.2004.

3.6 BOOKS AND OTHERS

1. Baccino-Astrada, Alma. Manual on the Rights and Duties of Medical Personnel in Armed Conflicts . Geneva: ICRC, 1982.
2. Crawford J, The ILC's Articles on State Responsibility (Cambridge 2002)

3. Dinstein, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge: Cambridge University Press, 2004, esp. 166–72.
4. Israel Ministry of Foreign Affairs, *Summary of IDF operations against Hizbullah in Lebanon* (July 23, 2006).
5. Kai Ambos, "Article 25: Individual Criminal Responsibility", in Otto Triffterer (ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd Edition (2008).
6. Onoria H, 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3 AHRLJ 1.
7. Report of the Special Working Group on the Crime of Aggression, established pursuant to Assembly resolution ICC- ASP/1/Res.1 of 9 September 2002, annex II.
8. Robert Cryer Håkan Friman Darryl Robinson Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 319.

4.0 STATEMENT OF JURISDICTION

This court has jurisdiction conferred by article 3(1) of the Malabo Protocol to interrogate international criminal cases. Moreover, the charges against Respondent constitute war crimes which are a serious violations of laws and customs of international law¹. This jurisdiction covers such crimes as stipulated under article 28A, if, one or more such crimes appear to have been committed and is referred to the prosecution by a State party.²

Additionally, article 46E (2) (c) of the protocol, grants the court jurisdiction when the victim of the crime is a national of the state instigating the suit in this court³. In this case, the victims are

¹ see Malabo Protocol Article 28D.

² Ibid Art. 46F(I).

³ Ibid Art. 46E(2)(c).

nationals of Salima by extension. Lastly, the court possesses both temporal and complementary jurisdiction as stipulated under article 46E and article 46H of the Malabo Protocol respectively.

5.0 SUBMISSIONS ON MERITS OF THE CASE

5.1 THE ISSUES ARE ADMISSIBLE BEFORE THE COURT

This case is admissible before this court since [i] the complimentary principle has been met, [ii] the issues raised are of sufficient gravity to justify the action of the court and [iii] Ms Lushomo has not been charged for similar Complaints.

I. Complimentary Principle is Satisfied as Bukada failed to extradite and Salima was unable to prosecute.

The complementarity principle dictates that states with jurisdiction ought to investigate and prosecute individuals for crimes committed within their territory and a case will be admissible if the state is willing but unable to prosecute.⁴ Such a finding is based on whether the state is unable to obtain the accused or necessary evidence or testimony to carry out its proceedings.⁵

Firstly, the charges are instigated by Salima, a state with jurisdiction to instigate these claims against the respondent at an international level as the region of Uzuri falls under Salima territory.⁶ Further, Salima has jurisdiction under the personality principle because the civilians attacked constitute the Salima-Uzuri ethnic group.⁷

Secondly, Salima was willing but unable to prosecute Ms. Lushomo as she had eloped to the Kingdom of Bukada, her primary domicile.⁸ Bukada neither extradited nor subjected her to any

⁴ The Malabo Protocol Article 46H (2).

⁵ The Malabo Protocol Article 46H (4).

⁶ Ibid, Art. 46 H (1).

⁷ Facts, para. 1.

⁸ Fact pattern, para. 28

criminal investigations in Bukada.⁹ This frustrated the prosecution as no criminal procedures could be initiated against Ms. Lushomo in her absence.

II. The issues raised are of sufficient gravity to justify the action of the court

Cases must meet the sufficient gravity to justify further action by the court.¹⁰ The charges complained of constitute war crimes, in particular the intentional launching of an attack on protected persons and property.¹¹ Such action are a grave breach of IHL principles and the Malabo Protocol.¹²

li. Ms Lushomo has not been charged for similar Complaints.

A defendant ought not to have been previously tried for the conduct which is the subject of the complaint.¹³ This requirement is met following the inability of Salima to carry out investigations and prosecute Ms. Lushomo, as she had eloped to Bukada.; she was not subjected to any criminal proceedings.¹⁴ Hence, Salima could not initiate any criminal proceedings against Ms. Lushomo in her absence.

5.2 ISSUE II

CRIMES ENCAPSULATED BY ARTICLE 28 D WERE COMMITTED.

The Prosecution maintains the position that war crimes characterized by unlawful confinement, killing of protected persons and destruction of protected property suffice in the case at bay. Prosecution shall first prove that all the common elements have been met [A]. Secondly, the Collective Confinement was Unjustified [B], the Attacks on protected Persons [C] and property is inconsistent with the principles [D].

A. Common Elements are Met

⁹ Ibid

¹⁰ Malabo Protocol, Art. 46 H.

¹¹ Ibid.

¹² Ibid, Art. 28 D.

¹³ Malabo Protocol, Art. 46 H.

¹⁴ Fact pattern, para. 28

I. Uzurian civilians and property are a protected category

II. Uzurians and their property fall under a protected category¹⁵ as they are in the midst of international, or internationalized, conflict to the maximum extent possible.¹⁶ This protection is also extended to soldiers wounded in the battlefield.¹⁷

First, the protected persons in the present case are Uzurians residing within the state of Uzuri which is the subject of armed conflict; a war pitting the KAF and ULF fighters subsisting for 5 years.¹⁸ Further, soldiers killed in the bombing of the Sanitoria are a protected category having been wounded in in the Adom bombing.¹⁹

I. Respondent had knowledge of the protected status.

The perpetrator must be aware that the armed conflict took place within the context of armed conflict for these crimes to suffice which is the case in the present dispute.²⁰ The respondent was aware of the armed conflict unfolding in Uzuri and Salima-Kedibonye boundaries having met with Security Agencies of Kedibonye and the subsequent supply of war technology.²¹ Additionally, the Respondent is the CEO of Asayoroma which runs a social media platform which aired news of the situation in Uzuri.²² As such there was no way she did not know of the existence of armed conflict.

II. confinement occurred within armed conflict

A nexus must be made between the alleged offence and the armed conflict.²³ In this case, the attacks and confinement are attributable to the ULF-Kedibonye war. First, AfrOpt technology was employed in a bid to monitor the activities of ULF sympathizers. Its application led to the mass arrests of Uzurians and as a dire measure afrOpt was further utilized as a detention tool to aid in the

¹⁵ Geneva Convention IV, Article 4.

¹⁶ ICTY, Mucic et al. ("Čelebići") Appeals Judgment 20 February 2001, para. 83.

¹⁷ Malabo Protocol, Art. 28 D.

¹⁸ Fact pattern. Para.

¹⁹ Fcat pattern, para. 25

²⁰ Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 123

²¹ Fact pattern, para. 14

²² Fact pattern, para. 13

²³ Article 8 (1) (e) of the Geneva Convention IV

confinement of supposedly ULF supporters and sympathizers.²⁴ Secondly, Salima had declared war on Kedibonye on July 2022, a war fought at the Salima-Uzuri border aptly termed as an international conflict.²⁵ Locally, the ULF and KAF were in full attack mode with KAF bombing churches and sanatoria, killing dozens of civilians in their wake.²⁶

B. Collective Confinement is Unjustified.

Confinement, even in armed conflict, ought to be taken on an exceptional basis, after detailed examination of each individual case and may not in **any circumstance** (emphasis ours) constitute a collective measure.²⁷

First, the confinement was unspecified therefore a contravention as a clear timeline for which the confinement would subsist was not given to the confined persons.²⁸ The confinement was a fictitious alternative conjured to advance the interests of the Kedibonye government. Granted, the Kedibonye government had an administrative duty in Uzuri. However, the demonstrations by Uzurians against the government were triggered by the death of one Madi Saikou attributable to the local police.²⁹ As such the mass arrests and confinement fail the test of individual determination.

C. Protected Persons were Attacked.

The elements constituting this crime include, a protected status, attacks occurring within the context of armed conflict, factual knowledge of the conflict and the the actual attack already conversed above. To that end the attacks were unnecessary [1] as well as disproportional [2].

I. Attacks on Civilians were Unnecessary

The principle of necessity has three interrelated elements: the duty to use non-violent means wherever possible; the duty to use force only for a legitimate law enforcement purpose; and the duty

²⁴ Fcat pattern, para. 13

²⁵ Fact pattern, para. 16

²⁶ Fact pattern, para. 20

²⁷ *ibid*

²⁸ Geneva Convention II, Art. 78

²⁹ Fact, para. 8

to use only the minimum necessary force that is reasonable in the prevailing circumstances.³⁰ These three requirements were disregarded in the case at hand.

Prosecution submits that firstly, that attacks were carried out wantonly and using violent means thereby depriving protected civilians of life. The attack by KAF soldiers on **unarmed** civilian demonstrators left 37 lifeless bodies in its wake.³¹ Secondly, bombing the main Sanatorium building on October 18, 2022, was an excess use of force as the sanatoria housed *combatants de hors* who posed no threat to KAF. Thirdly, the attack was illegitimate as it killed an unknown number of patients and medical staff, all non-participants in the war.

II. Attacks were the least restrictive measure therefore disproportional.

Warring parties ought to strike a balance between the means used in the war and the intended aim.³² Even when there is a clear military target, it is not possible to attack it if the expected harm to civilians, or civilian property, is excessive in relation to the expected military advantage.³³

First the civilians staging demonstrations outside the Old City Plaza were unarmed.³⁴ Their resort to throwing stones was in an act of self-defence to an otherwise attacking army. Be that as it may that the Bird Target was attacking an armed ULF soldier, the civilians had no knowledge of this. As such the act of killing 37 civilians and injuring many in the cause for the sole purpose of neutralizing one soldier is disproportional. Less non-lethal force such as arresting and detaining the civilian should have been employed to reduce loss of lives.

D. Protected Property was Attacked and Destroyed.

Prosecution makes a two fold argument; that the planned protected property was not a military objective [I] and that prior warnings were not given therefore violating the Precaution principle [II].

³⁰

https://www.researchgate.net/publication/288205442_An_introduction_to_international_criminal_law_and_procedure

³¹ Fact pattern, para. 21

³² Nachova v. Bulgaria case (No. 43577/98)

³³ API Article 51(5) (b)

³⁴ Facts, para.21

I. Property was not a military objective

Military objectives must by their nature, location, purpose, or use, make an effective contribution to military action, and whose total or partial destruction, capture, or neutralization offers a definite military advantage.³⁵ Therefore, the civilian or military nature of an object depends on the effect this object has on the course of the conflict.³⁶ In the same vein, attacks on protected property inclusive of religious buildings and hospitals is prohibited.³⁷

Firstly, the sanitorium and the church did not make a significant military contribution. Granted, the ULF used the sanitorium to treat their wounded, yet this medical units were not within their control; a crucial component in the definition of a military objective. Further, the church building was not making an active contribution when it was bombed. It was in use for the primary purpose for which it was intended; officiating religious burial rites. Secondly, the sanitoria's primary purpose was provision of medical services to the communities.³⁸ Thirdly, the Sanitoria was not controlled by the ULF at the time of the attack and therefore was not a military objective.³⁹

II. Warnings were not given prior to the attacks.

Military operatives are obligated to give specific advance warnings before attacking persons and objects entitled to specific protection⁴⁰to provide the enemy the opportunity to put an end to the misuse of such personnel and objects in order to avoid the need to attack them.⁴¹ Such warnings should include a time limit within which to redress the situation to the extent that the circumstances permit.⁴² Such warning as has been used by Israeli Forces in the Gaza strip(from 2000-present) include radio broadcasts and phonecalls, dropping of leaflets and specific warnings to civilians in

³⁵ API, Art. 52.

³⁶ Henckaerts, Jean-Marie, and Louise Doswald-Beck, eds. Customary International Law . Vol. 1, The Rules . Cambridge: Cambridge University Press, 2005, part 2.

³⁷ Malabo protocol, Article 28 D (c) (iii).

³⁸ Facts, para. 26

³⁹ Facts, para. 25

⁴⁰ Malabo Protocol, Article 28 D (c) (iii)

⁴¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 11(1), May 14, 1954.

⁴² Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 21, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, reprinted in id. at 461.

targeted areas.⁴³ . No such warning was given by the KAF or the respondent on the impending attack. The respondent cannot claim that they did not have knowledge of civilians residing in the areas of attack as the Adom technology had acquired extensive information showing that civilians inhabited the sanitorium and the churches in the Northern mountains.⁴⁴ In any event, these sanitoria are distinctly noticeable.⁴⁵

Secondly, despite this knowledge the respondent gave a green light for the drones to attack a church during which a priest and his four acolytes were killed, as were an unknown number of local civilians and family members of Major Faustino, as well as an unknown number of PLF fighters.⁴⁶To that end, the respondent and KAF violated the provisos set therein in the Malabo protocol as well as the Geneva Conventions.

ISSUE III

MS. LUSHOMO IS INDIVIDUALLY CRIMINALLY FOR WAR CRIMES IN UZURIA

Persons who commits crimes against the Malabo Protocol are individually responsible.⁴⁷ Individual responsibility arises when a person, aids and abets the commission of an offence and/or participates in a collaboration to commit crimes in the Protocol.⁴⁸ Ms. Lushomo's actions in relation to unlawful confinement amounted to aiding and abetting while her actions in relation to killing of protected persons and destruction of protected property amounted to participation in an extended JCE III.

I. Ms. Lushomo was a Member of an Extended Joint Criminal Enterprise (JCE III).

Five requirements must be met for one to be held responsible under JCE III. There must [i] exist a common plan/ a common purpose between members of the JCE [ii] a crime outside the common purpose occurred [iii] the crimes were a natural and foreseeable consequence of effecting the Common Purpose [iv] the participant in the joint criminal enterprise was aware that the crimes were

⁴³ Israel Ministry of Foreign Affairs, Summary of IDF operations against Hizbullah in Lebanon (July 23, 2006), <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/Summary+of+IDF+operations+against+Hizbullah+in+Lebanon+23-Jul -2006.htm>.

⁴⁴ Facts, para. 26

⁴⁵ Facts, para.24

⁴⁶ Ibid, para. 25

⁴⁷ Malabo Protocol, article 46 B (1).

⁴⁸ Malabo Protocol, article 28 N (ii) & (iii).

a possible consequence of the execution of the Common Purpose. [v] In that awareness, the participant nevertheless acted in furtherance of the Common Purpose.⁴⁹ Ms. Lushomo met all the requirements.

i. There was a common plan/purpose between Ms. Lushomo and the Kedibonye Government to interfere with the territorial integrity of Salima.

A common plan can manifest and be inferred from the fact that a plurality of persons act in unison to fulfil a certain course of action.⁵⁰ The plan need not be previously arranged.⁵¹ The common purpose between Ms. Lushomo and KG had not been planned earlier but manifested in their actions to fulfil the plan. The KG felt aggrieved by Uzurian's unification with Salima and had successfully, using force, occupied the territory of Uzuri.⁵² The ULF fought the KAF for more than *forty* years for the independence of Uzuri.⁵³

The collaboration with Ms. Lushomo was therefore to implement their common purpose; eradicate the ULF members and quench their support. To fulfill this common purpose, Ms. Lushomo's provided Bird Target and Adom Technology that were used in the war against ULF.⁵⁴ In that light, there was a common purpose between Ms. Lushomo and KG to interfere with territorial integrity of Salima by killing ULF members and quenching their support from Uzurians.

ii. War crimes outside the planned war against the ULF occurred in Uzuri.

For this requirement to be met, two conditions must be met. First, the spin-off crime was a violation of the IHL.⁵⁵ Second, it occurred outside the common purpose.⁵⁶ These two conditions were met in the case at bay.

⁴⁹ *Prosecutor v. Stakić*, Appeals Chamber Judgment (22 Mar 2006), para 87.

⁵⁰ *Prosecutor v Tadic*, Appeals Chamber Judgment (15 July 1999), paras 227.

⁵¹ *Prosecutor v Tadic*, Appeals Chamber Judgment (15 July 1999), paras 227.

⁵² United Nations Charter, article 2(4).

⁵³ Facts, para 4-5.

⁵⁴ Facts, para 28.

⁵⁵ Elliot Winter 'The Accountability of Software Developers for War Crimes Involving Autonomous Weapons: The Role of The Joint Criminal Enterprise Doctrine' (2021) 83 *University of Pittsburgh Law Review* 51, 66.

The result of the actions of KAF, alerted by Bird Target was the killing of unarmed 37 civilians, and causing serious body injury to other unarmed 42 civilians.⁵⁷ Further, Adom AI developed by Ms. Lushomo and deployed by KAF killed an unknown number of civilians as well as killing *combatants de hors*.⁵⁸ Additionally, Adom AI destroyed the Church and Mountain View Sanatorium.⁵⁹

The war crimes occurred outside the common purpose. The common purpose was to attack and kill members of the ULF, a liberation movement that sought the self-determination and independence of Uzuri.⁶⁰ To make attacks more accurate, the Government sought the help of Ms. Lushomo to help with technological weapons that would reduce civilian casualties.⁶¹ However, despite having the technological weapons, the war crimes still occurred. We therefore submit that there were war crimes that occurred outside the common purpose of the contracting parties.

iii. The war crimes were a natural and foreseeable consequence of effecting the attacks against the ULF.

The crime outside the common purpose must have been “foreseeable that such a crime might be perpetrated by one or other members of the group.”⁶² Two conditions; the accused person knowledge of the common purpose/plan by the accused person and the crime perpetrated being predictable, have been met.

Ms. Lushomo was aware of the common purpose/common plan having been contracted by KG to make weapons and AI systems that would help KAF identify ULF members and distinguish them from civilians. This shows that she was aware that the systems were to be used for military

⁵⁶ Ibid.

⁵⁷ Facts, para 21.

⁵⁸ Facts, para 25 and 26.

⁵⁹ Ibid.

⁶⁰ Facts, para 4.

⁶¹ Facts, para 18 and 22.

⁶² *Prosecutor v. Ntakirutimana*, Appeals Chamber Judgment (13 Dec 2004), para 467.

purposes, specifically, in Uzuri. The secret meetings between Ms. Lushomo and the Government also indicates knowledge of the common purpose.

Secondly, she had capacity to foresee war crimes resulting from the use of her systems. Instability of autonomous weapons is in reality a red flag for a foreseeable risk.⁶³ Bird Target and Adom AI were unstable autonomous weapons as evidenced by an internal memo in Asaroyoma clearly showing that it was unstable in view of more than fifty people.⁶⁴ The system would take longer to identify threats and it would be overloaded.⁶⁵ On the Adom AI, the engineers had alerted Ms. Lushomo, times without number, of the ineffectiveness of the system and its apparent difficulty to distinguish between civilian and military objectives.⁶⁶ She was therefore aware of possible risks of killing of civilians and destruction of protected property. On that basis, we submit that the war crimes were a natural and foreseeable consequence of implementing the common purpose.

iv. Ms. Lushomo was aware that war crimes were a possible consequence of the execution of the common purpose.

The accused person must have been aware that the crime was a possible consequence of the executing the common purpose.⁶⁷ This could happen if the accused person was aware of deficiencies of autonomous weapons that may cause them to violate the IHL.⁶⁸ Ms. Lushomo was aware of such possibility.

Internal memos in Asaroyoma informed her that Bird Target was not stable when dealing with a population bigger than fifty people and it would take longer to identify targets and may be overloaded.⁶⁹ In such an instance, its actions would be very unstable. The same happened for Adom

⁶³ Elliot Winter 'The Accountability of Software Developers for War Crimes Involving Autonomous Weapons: The Role of The Joint Criminal Enterprise Doctrine' (2021) 83 University of Pittsburgh Law Review 51, 72.

⁶⁴ Facts, para 18.

⁶⁵ Ibid.

⁶⁶ Facts, para 27.

⁶⁷ *Prosecutor v. Ntakirutimana*, Appeals Chamber Judgment (13 Dec 2004), para 467.

⁶⁸ Elliot Winter 'The Accountability of Software Developers for War Crimes Involving Autonomous Weapons: The Role of The Joint Criminal Enterprise Doctrine' (2021) 83 University of Pittsburgh Law Review 51, 77.

⁶⁹ Facts, para 18.

AI. Software engineers under Ms. Lushomo had informed her that the system found it difficult to distinguish between civilian and military objectives.⁷⁰ The Adom AI could not make a predictable judgement when a target was not clearly a civilian or military objective.⁷¹ In that case, it would be apparent that she was aware of the risk.

v. Despite that awareness, Ms. Lushomo acted in furtherance of the common purpose.

Acting in furtherance need not involve commission of a specific crime but may take form of assistance in, or contribution to, the execution of the common plan or purpose.⁷² Ms. Lushomo's actions amounted to assistance in execution of the common plan. She supplied the KAF with the Bird Target and Adom AI.⁷³ Though intended for extermination of ULF members, the above were used in the killing of protected persons and destruction of protected property.⁷⁴ Her actions acted in furtherance of the common purpose.

Further, the "need not be necessary or substantial, it should at least be significant."⁷⁵ This can happen when "the action of the accused ...contribute[s] to the efficiency, effectiveness, and smooth running of the plan".⁷⁶ The role of Ms. Lushomo was to make it easier and more efficient for KAF to eradicate members of the ULF. This would be done through supply of weapons that would help the government identify ULF members and kill them.⁷⁷ Therefore, her contribution was significant in that it made the war against ULF more efficient.

II. Ms. Lushomo was an aider and an abettor to the unlawful confinement.

Aiding and abetting consists of all acts that are 'specifically directed to assist, encourage or lend moral support to the perpetration of a specific crime and where this support has a substantial effect upon the perpetration of the crime.'⁷⁸ Three requirements must be met for aiding and abetting to

⁷⁰ Facts, para 27.

⁷¹ Facts, para 27.

⁷² *Prosecutor v Tadic*, Appeals Chamber Judgment (15 July 1999), para 227.

⁷³ Facts, para 18 and 22.

⁷⁴ Facts, para 21, 25 and 26.

⁷⁵ *Prosecutor v. Milutinovic*, Trial Chamber Judgment (26 Feb 2009) para 104 (quoting *Prosecutor v. Brđanin*, Appeals Chamber Judgment (3 Apr 2007), para 430.)

⁷⁶ *Prosecutor v. Milutinovic*, Trial Chamber Judgment (26 Feb 2009) para 105.

⁷⁷ Facts, para 18 and 22.

⁷⁸ *Prosecutor v Vasiljevic*, Appeals Chamber Judgment (25 Feb 2004), para 102.

occur: (i) there must be acts specifically directed to assist or encourage the perpetration (ii) the acts must have a substantial effects upon the crime⁷⁹ (iii) the actor must have awareness of the intended crime or probability of a crime occurring and is willing to facilitate the commission of the crime.⁸⁰

i. Her Acts were specifically directed to assist the perpetration of unlawful confinement.

Providing a perpetrator with weapons amounts to aiding and abetting.⁸¹ This extends to providing other means of the commission of the crime.⁸² Ms. Lushomo supplied Kedibonye's government with AfrOpt that was used in the unlawful confinement of Uzurians.⁸³ This action was specifically directed to facilitate the commission of a war crime: unlawful confinement.

ii. Ms. Lushomo's actions had substantial effects upon the war crime of unlawful confinement in Uzuri.

Contribution is substantial and essential if without it, the crime would have been frustrated.⁸⁴ The government did not have capacity to house all the persons it had arrested.⁸⁵ The Government needed a system that would make it possible to monitor all the arrested civilians, whose only mistake was to support ULF.⁸⁶ Ms. Lushomo solution gave them the capacity to effect the unlawful confinement. Without the AfrOpt, the government would have the capacity to monitor all the unlawfully confined citizens. Without AfrOpt, the whole plan of unlawful confinement would have been frustrated. On that basis, her contribution was substantial.

iii. An aider and an abettor is required to have the awareness that a certain crime will occur or there is a possibility that a crime will be committed and is willing to facilitate it

⁷⁹ *Prosecutor v Vasiljevic*, Appeals Chamber Judgment (25 Feb 2004), para 102.

⁸⁰ *Prosecutor v Blaskic*, Appeals Chamber Judgment (29 July 2004), para 50.

⁸¹ *Prosecutor v. Ntakirutimana*, Appeals Chamber Judgment (13 Dec 2004), para 530.

⁸² Tim McFarland and Tim McCormack, 'Mind the Gap: Can Developers of Autonomous Weapons Systems be Liable for War Crimes?' (2014) 90 *International Law Studies* 361, 376.

⁸³ Facts, para 14.

⁸⁴ *Prosecutor vs. Lubanga Dyilo* ICC Pre-Trial Chamber (29 Jan 2007) paras 347-348.

⁸⁵ Facts, para 12.

⁸⁶ Facts, para 12 and 13.

Kedibonye Herald had already announced to the world that the Government had an intention to arrest large swaths of people.⁸⁷ Ms. Lushomo facilitated this by giving the government information of ULF supporters in Asadat and gave the government access to data from Jabulani city project.⁸⁸ This information was used to arrest the Uzurian citizens. Which were widely reported.⁸⁹ Later, the government sought more facilitation in their plan: AfrOpt. This was the system that was to be used to monitor large groups of people who had been arrested.⁹⁰ Ms. Lushomo was aware of the planned arrest of Uzurians. She also witnessed the arrests.⁹¹ She was therefore aware that the AfrOpt was to be used to monitor the large groups of people who had been arrested. Even though the defence may argue that the government had not informed Ms. Lushomo of the intended use of AfrOpt in Uzuri, she could infer from the prevailing circumstances. There was a probability of a crime occurring even if she did not know the specific crime.

Despite that awareness, Ms. Lushomo readily gave the information of Asadat users and later, facilitated the crime of unlawful confinement by supplying AfrOpt that was used to monitor arrested ULF supporters.

⁸⁷ Facts, para 10.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Facts, para 13 and 14.

⁹¹ Facts, para 10.

6.0. PRAYERS

Reasons wherefore, the Applicant herein seeks the following orders:

1. That the case be confirmed and remitted to trial.

A declaration that the Court has jurisdiction and the case is admissible.

2. A finding there is sufficient grounds under Article 28 D of the protocol pointing to the commission of war crimes and subsequent trial on those grounds.

3. A finding that the respondent and KAF violated the law of armed conflict by unlawfully confining, attacking, killing Uzurian civilians and destroying protected property.

4. An order for compensation in liquidated damages to Uzurian for property destroyed by aerial strikes.

5. An order for adequate compensation for all non-material damage suffered by the protected Uzurian persons and if necessary the cessation of all military operation sby the KAF in Uzuri.

6. A finding that the respondent is individually responsible for war crimes and crimes against humanity contrary to the protocol and Geneva conventions.