

2023 FIS INTERNATIONAL HUMANITARIAN LAW MOOT COURT COMPETITION

Organised by Firdaous Integrated Services (FIS)

In Partnership with

Jomo Kenyatta University of Agriculture and Technology (JKUAT)



SCHOOL OF LAW

Setting Trends in Higher Education, Research, Innovation and Entrepreneurship

THE SITUATION IN UZURI

(Prosecutor V Ms. Lushomo Ngala)

BENCH MEMORIAL (CONFIDENTIAL)

*Any similarities between the names in this moot problem and real people or characters are completely coincidental.

*This bench memorial was prepared by Mr. Swaleh Hemed Wengo (Author of the 2023 FIS International Humanitarian Law Moot Court Competition problem) Mr. Swaleh is a lecturer of law at Prince Sultan University with specialisation on International Humanitarian Law, Human Rights and International Criminal Law. Appreciation goes to Ms. Chitindi Marvellous and Ms. Julide Bartels who both reviewed the draft of the moot problem and provided immense comments before it was released. Lastly, the FIS Board of Directors who immensely contributed to the organisation of the moot competition.

BACKGROUND

The judges of the 2023 FIS Moot Court problem are given a description of the facts and legal concerns in this Bench Memorial: It is "Prosecutor v. Ms. Lushomo Ngala." Please read the problem, which is fictitious and based on a Pre-Trial Chamber confirmation of charges case, in combination with this Bench Memorandum. The issue was purposefully balanced so that all sides would have sufficient data to support compelling arguments. This Memorandum does not cover all of the legal points brought up by the situation. Judges may thus see and hear arguments that are not included in this Memorandum in briefs and oral arguments. Judges shouldn't automatically conclude that an argument is invalid or irrelevant just because it isn't mentioned in this memorandum.

Participants are split into two groups for this year's competition: (1) Counsel for the Defendant, Ms. Lushomo Ngala, who is accused of committing war crimes; and (2) Counsel for the Office of the Prosecutor, which is requesting that the Pre-Trial Chamber Confirm Charges. Each team will create a Brief for each position in line with the competition's regulations, outlining its legal defenses in light of the Pre-Trial Chamber's Confirmation of Charges.

The Pretrial Chamber is requesting responses from all parties and participants on the following three points in response to Pre-Trial Chamber agenda for the Confirmation of Charges:

1. Whether the case against Ms. Lushomo Ngala of war crimes is admissible before the AFCJHR.
2. Whether there are substantial grounds to believe that the following war crimes pursuant to Article 28 D of the Malabo Protocol were committed in Uzuri:
 - a. unlawful confinement,
 - b. intentional attacks against planned protected persons and;
 - c. attacks on protected property
3. Whether there are substantial grounds to believe that Ms Lushomo Ngala is Individually criminally responsible for war crimes pursuant to Article 46B of the Malabo Protocol.

BRIEF FACTS

The Republic of Salima and the State of Kedibonye were neighboring colonies of the Kingdom of Bukada. Salima is a mountainous country known for coal and mineral mining, while Kedibonye is a region of plains with a history of farming and nomadic livestock herding. Uzuri is a Kedibonye enclave that was discovered to have rich silver and gold deposits during Bukada's colonial rule, leading to the migration of Salima residents to work in the mines. During the decolonization process in 1965, Uzuri voted to join Salima despite Kedibonye's claim on the region, leading to a conflict between the two countries in 1969. Salima was able to occupy the territory between the Kedibonye-Salima border and Uzuri, which it refused to return. In 1974, Kedibonye took advantage of a political crisis in Salima to retake the occupied territory and Uzuri, which was under military occupation until 2000. The Uzuri Liberation Front (ULF), a terrorist organization under Kedibonye law, regularly attacked Kedibonye armed forces and launched missile attacks on villages near the border. The Uzuri Reunification and Autonomy Party (URAP) was founded in 1999 to advocate for regional autonomy and a peaceful reunification with Salima. An agreement was reached in 2001 between URAP and Kedibonye government, granting significant autonomy to Uzuri and leaving the URAP to govern it. However, the ULF rejected the agreement and continued sporadic attacks on the local government and surrounding villages, leading to the Kedibonye armed forces establishing checkpoints and closing off the region to search for suspected ULF members with the help of the local police force.

Ms. Lushomo Ngala is the founder and CEO of Asayoroma, a multinational company focused on ICT, AI, and social media. Asayoroma has headquarters in Salima and is actively involved in several projects, including e-governance and smart city initiatives in Kedibonye and Salima. Asayoroma is collecting real-time data from public CCTV cameras, numerous apps, and social media to improve transit, traffic, health services, security, and community news. The data is collected with users' permission and stored on servers in Ife, Kedibonye's capital. Jabulani, the capital of Uzuri, is one of the first cities in Kedibonye where the smart city project is being tested.

In November 2021, 18-year-old Madi Saikou died after being chased by local police officers in Uzuri. His death sparked widespread protests and riots in Uzuri, with residents demanding justice. The government of Kedibonye attempted to quell the protests by requesting access to data from social media platform Asadat and the Jabulani smart city project to identify ULF protesters and

sympathizers. With the help of Asayoroma, Kedibonye armed forces and police arrested many Uzuri residents in February 2022. In March 2022, the Kedibonye government contacted Asayoroma to inquire about the implementation of AfrOpt, an artificial intelligence program, to monitor prisoners who were deemed fit to re-enter society. In April and May 2022, the Kedibonye government implemented the AfrOpt program in Uzuri for residents involved in spreading messages of support for the ULF, justifying ULF actions, and campaigning for reunification with Salima. These residents were confined to their homes, which were outfitted with special magnetic locks that could only be opened with a smartphone app. They could leave their house at predetermined times for necessities, with their location constantly tracked by the smartphone app and security cameras throughout Uzuri. Residents who violated the restrictions faced imprisonment.

Salima went to war with Kedibonye in 2022 to reunify Uzuri with Salima. The ULF gained control of much of Uzuri, including its capital, Jabulani, causing civilian casualties. Kedibonye contacted Asayoroma for help in distinguishing civilians from ULF fighters. Asayoroma developed an AI program called Bird Target, which was adapted for the targeting systems of Kedibonye's armoured vehicles. The program was tested in computer simulations with generally positive results and then implemented in September 2022. During the first week of operation, units reported fewer civilian casualties and less damage and destruction of armored vehicles when operating in mountainous terrain outside Jabulani. On September 19, 2022, when Kedibonye's units arrived at Old Town Plaza, the Bird Target software identified civilians as potential threats and the gunners opened fire, killing 37 civilians and injuring 42 others.

Kedibonye armed forces sought alternatives after the Salima airforce destroyed much of their helicopter fleet in July 2022. They learned about an experimental AI program called Adom during secret talks with Asayoroma, which was designed to strike targets autonomously using drones. Adom was made operational in September 2022, and after gathering information on small groups of ULF fighters, it carried out numerous strikes, including one that killed Major Faustino Mbabazi. Adom also struck an abandoned sanatorium and a church where the funeral for Major Faustino Mbabazi was being held. Asayoroma's internal documents revealed that Adom software engineers struggled to distinguish between military and civilian targets, but Ms. Lushomo Ngala ordered them to patch the software to prevent accidental targeting of civilians. Salima referred the situation

to the African Court of Justice and Human Rights, issued an arrest warrant for Ms. Lushomo Ngala, who had already fled to Bukada, and requested her extradition, which was turned down. Ms. Lushomo Ngala was not subjected to any criminal investigation by the Kingdom of Bukada.

Ms. Lushomo Ngala was arrested by Bukada police officers on April 19, 2023, after an arrest warrant was issued by the AFCJHR. She has protested her arrest and denied any wrongdoing. The matter has been brought as a confirmation of charges hearing before the ACJHR, with three main agenda items. All the states are members of the African Union and United Nations and have ratified the Vienna Conventions on Law of Treaties, the four Geneva Conventions, and the International Covenant on Civil and Political Rights. The Republic of Salima and the State of Kedibonye have ratified the Malabo protocol and the two Additional Protocols to the Geneva Conventions, while the Kingdom of Bukada has yet to ratify them. The Malabo Protocol came into force in 2019 after ratification by 46 member states.

SOURCES OF INTERNATIONAL LAW

For judges who might not have prior professional experience or education in this highly specialized field of law, this part serves as an introduction to the International Criminal Law and the fundamentals of public international law. If you have already served as a judge for an international law moot court competition or believe you are well-versed in the general rules of international law that apply to the African Court of Justice and Human & Peoples' Rights (ACJHPR), feel free to jump forward to the next part. There are significant differences between home legal systems and international law. The strict description of the types of legal sources that are permitted before the Court is the most important for the international law moot judge.

General

The Malabo Protocol and The African Charter on Human and peoples' Rights must be used by the ACJHPR before applying any other laws. Second, "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict," are among the things the Court may take into account. In the event that this is unsuccessful, the Court may take into account "where appropriate, general principles of law derived by the Court from national laws of legal systems of the world." The case law of other international criminal tribunals, such as the Nuremberg Tribunal, the International Criminal Tribunal for the former

Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), and the International Residual Mechanism (IRMCT), may be consulted by the ACJHPR in determining custom and general principles. Its applicable laws must be interpreted in a way that respects universally acknowledged human rights.

A strict approach to interpretation can be borrowed from other International Criminal courts and tribunals statutes such as the Rome Statute which outlines in Article 22, that "the definition of a crime will be strictly defined and shall not be enlarged by analogy. Any ambiguity in the definition must be interpreted in favor of the person who is being looked into, charged with, or found guilty.

Treaties

Treaties are agreements made between and among States that bind the parties to act in accordance with the terms of the agreement or refrain from doing. The 1959 Vienna Convention on the Law of Treaties (the "VCLT"), whose main articles are acknowledged as embodying customary international law, defines the rules governing treaty procedure and interpretation.

Pacta sunt servanda is the fundamental rule governing treaties, and it is reaffirmed in Article 26 of the VCLT: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." In other words, once a State ratifies a treaty, it is obligated to abide by it. According to Article 27 of the VCLT, a State is not permitted to use its Constitution, home laws, or domestic court cases as a justification for failing to uphold a treaty duty.

A treaty is generally not binding on a State that is not a party to it, and it does not confer any rights or responsibilities on such a State, according to Article 34 of the VCLT. This rule applies in this situation.

Customary International Law

Customary international law is the second source of international law. A rule of customary international law is one that the community of States treats and regards as a rule of law, regardless of whether it has been codified in a treaty. A rule of customary international law, in contrast to treaty law, is enforceable even if a State has not explicitly agreed to it. The only situation in which

this does not apply is when a State "persistently objects" to the norm and is therefore not subject to its requirements.

The two criteria of *opinio juris*—a sense of legal responsibility or a shared opinion that recurring State activity is the outcome of a mandatory rule—and widespread State practice must both be proven in order to establish that a particular rule has become a norm of customary international law.

The key component of customary international law is "state practice," which is defined as when a sufficient number of States act in a way that is compatible with the customary standard. When a sufficient number of States sign, ratify, and accede to a convention, state practice may be demonstrated. Some commentators debate whether "regional customary international law" can be created by the practices of a small number of States in a specific region or by the practices of States that are particularly impacted by an issue, such as space law or the law of the sea. This possibility appears to have been accepted by the International Court of Justice.

The psychological or subjective component of customary international law is known as *opinio juris*. It demands that the State's activity be motivated by a feeling of duty rather than just practical considerations. Or, to put it another way, *opinio juris* is "a State's conviction that it is following a particular practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to fall on it." By citing treaties, rulings of national and international courts, national legislation, diplomatic correspondence, legal advice from national legal advisers, and the conduct of international organizations, customary international law is demonstrated. Any one of these things could be used to support State practice, *opinio juris*, or both.

General Principles of Law

According to Article 38(1)(c) of the ICJ Statute, the Court may take general legal principles into account as a third source of international law. The vast majority of domestic legal systems contain general principles of law as their guiding principles. Among these are the concepts of good faith, the toxic fruit of the poisonous tree, double jeopardy, and non-retroactivity. The Malabo Protocol codifies a number of fundamental ideas. Others might fill in any gaps.

STANDARD OF PROOF

This is a confirmation of charges hearing. At the confirmation of charges, the Pre-Trial Chamber need not be convinced beyond a reasonable doubt and the Prosecutor only needs to meet the threshold of substantial grounds to believe (*Prosecution v Mbarushimana* (AC-30/05/2012)-§47).

JURISDICTION

This is not a contentious issue; however, teams reserve the rights to challenge the court's jurisdiction. The facts do establish all the jurisdictional parameters are available. The subject matter jurisdiction: the crimes brought are within the court's jurisdiction, the territorial jurisdiction: the state of Kedibonye and Salima have ratified the Malabo protocol and temporal Jurisdiction: The Malabo Protocol came into force in 2019 after depositing instruments of ratification by 46 member states. Considering the crimes are war crimes that are alleged to have been committed on the Kedibonye territory which is a party and committed between 2021 and 2022 when the Malabo protocol had already been ratified. The court then has jurisdiction.

ADMISSIBILITY

The issue of admissibility requires two criterion: The issue of complementarity and the sufficient gravity requirement (Article 46H of the Malabo Protocol).

The complementarity issue:

This issue is not one that is crucial in this case. The facts are clear that Ms. Lushomo Ngala was not subjected to any criminal investigation by the Kingdom of Bukada. Rather Salima launched an investigation into whether Asayoroma was secretly providing weapons and technology to its adversary, Kedibonye. Salima issued an arrest warrant for Ms. Lushomo Ngala on December 10, 2022, for illegal weapons transfer to Kedibonye. Ms. Lushomo Ngala, on the other hand, had already fled to the Kingdom of Bukada. Salima requested that Ms. Lushomo Ngala be extradited to Salima on January 7, 2023. This request was turned down. (Paragraph 28 of Fact Sheet)

Regarding sufficiency of the gravity:

Pursuant to Art.46H(2)(D) of Malabo Protocol, the Court must be satisfied that there is sufficient gravity. This is similar to the ICC Criterion. Thus, both qualitative and quantitative criterion must be fulfilled (See 2009 ICC *Katanga* decision para. 59). Quantitative refers to the number of victims (See *Al Hassan* 2020 decision para 92). Qualitative refers to the nature, scale, manner, and

resulting harm of the crimes (See the situation in Sudan, 2010 decision para 31, and situation in Georgia 2016 decision para. 51).

The prosecution can argue that the quantitative test is met given the widespread scale, multiplicity of victims, and impact on their families, who have to cope with their confinement, deaths and injuries (See *Al Hassan* 2020 decision para 92). Starting with the issue of confinement AfrOpt is regarded to be able to monitor large groups of arrestees (Para 14 of Factsheet). Qualitatively where crimes impact beyond victims over to the population this would indicate gravity, and this was suggested by ICC Pretrial chamber in the 2015 Sudan situation. Quantitatively, the scale and nature of the confinement effectively silence the Uzuri population by suppressing political views that oppose the Kedibonye government. Such an impact on the population makes this crime grave. Additionally, the Bird Target resulted in an attack on civilians using heavy weapons killing 37 persons and injuring 42. In the ICC's 2010 case of Abu Garda, it was held that 12 deaths and a further attempt to kill eight other persons had met the quantitative threshold. The numbers in this case far surpass the numbers in that case. Furthermore, the manner of commission of the crime for the attack on protected person is also grave according to the 2014 Katanga judgement where the ICC held that close-range killing of civilians demonstrated gravity. Finally, the manner in which the Adom drone strikes were used to destroy the buildings was grave. The Adom drones operate without any human agency and had targeting issues. This eventually caused the indiscriminate attack on the church and sanatorium.

The defense on the other hand can argue that there is no evidence on the numbers save for 37 deaths and 42 injuries in relation to the war crime of attack against protected person (Para. 21 of Factsheet). Similarly, only one plaza and two buildings were damaged in relation to the war crime of attacking protected objects and no casualties were reported in relation to confinement. Additionally, Gravity is assessed on a case-by-case basis with the objective of holding those most responsible for the most serious crimes within a situation liable (Situation in Uganda, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application (Int'l Crim. Court Jul. 13, 2006). The alleged conducts were not systematic nor resulted from a plan or an organized policy. The perpetrator's degree of participation and discernable intent outline the qualitative criteria of gravity (Prosecutor v. Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges ¶ 31 (Int'l Crim. Court Feb. 8, 2010) Ms. Lushomo Ngala was a mere developer of the

programmes instigated for development and used by Kedibonye. Ms. Lushomo, after the technological development, gave all available Data to the Kedibonye's armed forces and the commission of the alleged crimes were entirely carried out by the armed forces. Therefore, with low degree of participation in the alleged crimes' commission and no intent, the gravity threshold is not met and the case is inadmissible.

Teams may decide to address both of the two criteria for the purpose of determining whether both the criteria have been met or not. Focus should be made on the criterion of Gravity as it is the most relevant in the instance facts.

COUNTS

In order for teams to argue on whether there are substantial grounds that war crimes of unlawful confinement as well as attacking protected persons and property pursuant to Article 28D of Malabo Protocol, there is need for the teams to classify the conflict so that they determine which specific provisions they will rely on. Whether provisions of war crimes under International Armed Conflict (IAC) or provisions under Non-International Armed Conflict (NIAC).

CLASSIFICATION OF THE ARMED CONFLICT

Armed conflict can be classified as International Armed Conflict (IAC) or Non-International Armed Conflict (NIAC). Teams may classify the conflict in any of the two based on the facts.

International Armed Conflict

An IAC existed in Uzuri because of military occupation of Uzuri by Kedibonye since 1974. A military occupation constitutes an IAC even if there is no armed violence between States. At the material time, Uzuri was under military occupation because (1) Foreign forces were still present in Uzuri, i.e. the local police force under the 'overall control' of Kedibonye Ministry of Interior, being under their supervision, (2) Kedibonye continued to be 'ultimately and overall responsible' over Uzuri given its subsequent measures against the protestors and ULF supporters without express consent of the URAP government (3) the sovereign of Uzuri, Tvir, never consented to the occupation. Although a local government can consent, ending military occupation, the URAP was not such a government with 'authority, credibility or recognition' being representative of only a

minority population. Additionally, an IAC existed at the material times given the resort to armed violence between Salima and Kedibonye since July 2020 with no general conclusion of peace yet.

Non-International Armed Conflict

A non-international armed conflict [“NIAC”] occurs when an armed conflict takes place between a state and an organized armed group and the requisite thresholds, i.e., organization and intensity, are met.

a. Level of Organization of ULF

Since 1974, Kedibonye’s armed forces was regularly attacked by ULF. Vice versa, Kedibonye’s armed forces have directed military operation towards ULF for an extended period. ULF is an organized armed group. A non-governmental armed group is a party to a NIAC if it has a minimum level of organization sufficient to confront the belligerent party with military means. The level of organization of an armed group is assessed by looking at factors such as the existence of a command structure or the ability to plan and carry out sustained military operations, control territory, supply military weapons, and speak with one voice. ULF had a command center, had a pattern of gathering, was able to gain control over large parts of Uzuri, had military-grade weapons, i.e., missiles, and has a common voice in regard to its demand. This indicates ULF’s ability to devise military strategy which is a definitive characteristic of an organized armed group.

b. The threshold of intensity

The level of intensity is weighed through indicative such as the collective nature of fighting, the duration of the conflict, the nature of the weapons used, and the territorial control by opposition forces. In this conflict, Kedibonye has always resorted to its army for the combat of ULF instead of mere police forces, the violence has persisted for almost 50 years, various types of weapons, even novel autonomous weapons, were used, and both parties have alternated territorial control over parts of Uzuri.

COUNT 1: CONFINEMENT

The interpretation of ‘confine’ for Art.28D(a)(vii) and (“the confinement”) turns on the ordinary meaning of the word, along with purpose and context of the said Article. The ordinary meaning of ‘confine’ is ‘to keep somebody/something inside the limits of a particular area’. The purpose of

the war crime of unlawful confinement was to prevent abuses of Art.41-43/78 of the Fourth Geneva Convention (“GCIV”) and arbitrary deprivation of liberty. Art.41/78 prohibit ‘assigned residence’ or ‘internment’ unless substantive and procedural requirements therein are met. Assigned residence encompasses a situation where a person is required to keep to his usual residence. The deployment of AfrOpt requiring people who merely supported ULF to keep to their homes forms ‘assigned residence’ and constitutes ‘confine’ for Art.28D(a)(vii). A similar *modus operandi*-requirement to live at one’s residence and only leave it at designated times for specific purposes or with permission constitutes deprivation of liberty in national human rights jurisprudence.

Prosecution

The Prosecution may argue that confinement of individuals who expressed support for ULF in Kedibonye should be found to be unlawful under Article Art.28D(a)(vii), as there were no reasonable grounds for the confinement necessary for security reasons. The confinees were not suspected of participating in protests, and their right to appeal was not provided. Members of the Kedibonye government acted with intent in confining these individuals, and they were protected under Article 4(1) of GCIV, which is interpreted broadly. People who merely support ULF should not lose their protected status under Article 5(1) of GCIV without serious and legitimate grounds. The members of the Kedibonye government participating in the Meetings knew the factual circumstances of the protected status of the confinees.

Defense

The defense may argue that the unlawful confinement under the Malabo Protocol refers to confinement that violates Articles 27, 42 or 78 of GC-IV, similar to the ICC & ICTY jurisprudence (Same wording as in the treaties establishing these two). Confinement is only allowed if necessary for the security of the Detaining Power. States have broad discretion to determine if civilians pose a threat to national security, but must have serious and legitimate reasons to think so. In the case of the November 2021 violence and rioting in Uzuri, where supporters organized and endorsed violent acts, the government of Kedibonye had serious and legitimate reasons to justify detention and restrict their freedom of action to end subversive activities.

Further they may argue that to be lawful confinement must be followed by procedural safeguards. Procedural safeguards include that confined persons are “entitled to have such action reconsidered

as soon as possible by an appropriate court or administrative board. Continuous confinement is to be considered “at least twice yearly”. Here, the review took place every three months, and was sufficient. The Kedibonye courts performing the reviews were independent and impartial, and human rights compliant. Procedural safeguards were met.

Additionally, they may argue that only persons who are “in the hands of a Party to the conflict [...] of which they are not nationals” will be afforded protection. The arrested Uzuri inhabitants were Kedibonye nationals, thereby not protected under Art.4 GC-IV.

COUNT 2: ATTACKING CIVILIANS

Prosecution

The Prosecution may argue whether the victims of the Old Town Plaza attack were civilian or not. The attack was not directed against a military objective, and the presence of some non-civilians, such as armed forces members, does not deprive the population of its civilian character. The throwing of stones by some civilians did not meet the threshold of harm required to qualify as taking DPH, and the civilians blocking the Old Town Plaza were not taking DPH since there was no evidence of them providing physical cover to the possible ULF soldier, the makeshift barricades were only starting to be erected, and no actual direct harm was caused to the Kedibonye military personnel and armoured vehicles due to the civilians' presence.

ICC jurisprudence requires that the perpetrator intends to direct an attack and intends civilians to be the object of the attack. Although Bird Target identified panicking stone-throwing civilians as potential threats, prior to and during opening fire, the gunners did not take all feasible precautions to verify that the targets were not civilians. It can be inferred that they were aware that civilians would be the primary object of the Attack:

The gunners, who were part of the Kedibonye armed forces, were aware that Bird Target could be hindered by larger groups of individuals, which could affect its accuracy. Despite knowing this, they opened fire without fully verifying the identities of their targets, resulting in 79 civilian casualties. The gunners had sufficient time to take all possible precautions, but failed to do so. The stones thrown by some civilians were not destructive to the personnel inside the armoured vehicles and did not present an urgent lethal situation. Even assuming that some civilians were taking direct

part in hostilities, there were still civilians not taking part, and the gunners failed to distinguish between the two groups.

Additionally, the Attack had a sufficiently close nexus with the IAC as it took place during the war between Kedibonye and Salima to retake control over Uzuri. The Kedibonye armed forces were sent to retake control of Uzuri (including Jabulani) from ULF, which was supported by Salima with weapons such as RPGs and by virtue of sharing same goal with Salima- unification of Uzuri with Salima. Salima's declaration of war against Kedibonye in July 2020 was the reason why the gunners were sent to retake control of Uzuri, they were aware of the IAC.

Defense

Defense arguments may be first that Civilians are people who are not members of a party's armed forces or participants in a *levée en masse*. They lose protection if they directly participate in hostilities, which involves causing harm to the enemy. The target of the attack in question was lawful since it was directed at a ULF soldier, who was a military objective. The crowd also lost its protected status because they directly caused harm to the Kedibonye armed forces by throwing stones at the armored vehicles.

The ULF soldier was a legitimate target and the crowd in the square did not have protected status because they directly took part in hostilities. They threw more than 100 stones at the armoured vehicles and caused harm to the Kedibonye armed force, as evidenced by the injury sustained by Lt. Kamau Zongo. Therefore, there was a direct causal link and the attack was directed against lawful targets.

The "belligerent nexus" was met as the act was specifically designed to cause harm in support of ULF, evidenced by the spread of ULF pamphlets and pro-ULF slogans. The crowd could also be regarded as *levée en masse* as they spontaneously took up arms to resist the invading forces upon receiving ULF pamphlets. In either case, they would not be considered civilians.

Further, the subjective elements of the crime require: firstly, that the perpetrator meant to engage in the attack, and secondly, that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In other words, such an attack must have been conducted intentionally in the knowledge of, or when it is impossible to know, that civilians [...] were being targeted. Even if the targeted persons were protected, the gunners were not aware of their

civilian status as Bird Target identified them as potential threats. Given that they primarily on Bird Target's targeting system, there was no awareness.

COUNT 3: ATTACKING PROTECTED OBJECTS

Prosecution

The prosecution may argue first, the Kedibonye soldiers 'directed an attack': By launching Adom and its missile- and bomb-equipped drones during military operation, the Kedibonye soldiers launched an attack: where an unmanned aerial vehicle fires weapons under the decision-making of a computer software, the notion of attack encompasses the launching of the vehicle. Adom plainly fits this; Alternatively, Adom was an indiscriminate weapon without human limitations on its targets/mode of attack, hence, launching it supports an inference of directing an attack against protected objects.

The Attacks were against buildings dedicated to religion and hospitals, which were not military objects and did not offer any definite military advantages. The Church did not contribute to military action and the Sanitorium did not make any contribution to military actions. The Attacks resulted in unknown numbers of deaths of local civilians, patients, medical staff, ULF fighters, and wounded ULF fighters who were *hors de combat*. Intentional attacks against such objects are prohibited, even if they are in the vicinity of military activities or installations controlled by the ULF.

Defense

The defense may argue that to establish the war crime, it is required is that the perpetrator directed an attack. All violence directed against the protected objects is required and is not limited to the conduct of hostilities. Here, the attack was not "directed against" the concerned buildings, but "the military installation or use in its immediate vicinity", which includes ULF command centres and munition stockpiles.

Additionally, Based on the jurisprudence of ICC and ICTY/ICTR, the object of attack should be dedicated to the specified categories, which were not military objectives. The concerned buildings did not fall into the protected categories, and cannot qualify as buildings dedicated to religion, hospitals, or places where the sick and wounded are collected, historical monuments and art.

(i) St Eligus Church

St Eligus church is not a building “dedicated to religion”, and there was no evidence indicating its religious nature, except for the fact that it was used to hold a “burial” ceremony for once. Despite the presence of a priest and four acolytes, there is no evidence that it was used for “religious practices” frequently, and it was reasonable to infer that it had lost its religious significance, as it was among “abandoned churches and chapels”. The fact that it was near the churches and chapels where ULF fighters frequently met also indicates military purposes.

(ii) Mountainview Sanitorium

The protection for hospitals is based on the Geneva Conventions, which protect hospitals as civilian objects. However, the enhanced protection of hospitals would cease if they were used to commit hostile acts, outside of their humanitarian function. There were no substantial grounds to believe that Mountainview Sanitorium enjoyed enhanced protection as a “hospital”, given its possible use for military function. The sanitorium also did not fall into the category of historical monument, despite sharing the unique architectural style and origin as other sanitoria in the north of Uzuri, as the assessment is on a case-by-case basis. The fact that the sanitorium was “abandoned and dilapidated” further suggested that it had lost its historical significance.

The Prosecution may argue that Lushomo Ngala is a direct or indirect perpetrator of the crimes, but in any case, the perpetrator must have satisfied the requisite *mens rea* for the crime. To establish the crime, the mental elements of "intent" and "knowledge" must be met, and the attack must have been intentionally directed against the protected objects. Neither Lushomo Ngala, Asayoroma staff, nor Kedibonye forces satisfied these mental elements. None of the individuals involved, including Lushomo Ngala, Asayoroma staff, or Kedibonye forces, were aware of the protected status of the buildings targeted in the attacks. The decision to launch the attacks was made by the AI system Adom, without human input, and the individuals would not have been aware that the buildings were not military objectives as they displayed signs associated with ULF military targets. As a result, there was a lack of the mental element required for committing the crime.

INDIVIDUAL CRIMINAL RESPONSIBILITY

Article 46B of the Malabo Protocol provides for individual criminal responsibility. The article is read together with Article 28N in determining which mode of responsibility can an accused person be charged.

Prosecution

Unlawful Confinement

The prosecution can argue that there was commission of the crime by a group with common purpose. Members who participated in the Meetings were all acting with a common purpose or intent to commit a criminal goal which was confinement of people who had merely supported ULF. The intent can be inferred from the Members' collective decision to deploy AfrOpt at the Meetings. The Accused, founder and CEO of Asayoroma, provided AfrOpt to the Kedibonye government, promising that the software would be ready for use by April 2022 during the 11 March meeting. As AfrOpt formed the means of the confinement, the Accused's assistance had a bearing on the commission of the crime.

Additionally, the accused has intention and knowledge. For intention, The Accused must have known of the intention during the 11 March meeting when she enabled the provision of the AfrOpt. As knowledge can be inferred from the circumstances, it can be inferred in the present case that the Accused knew of the Kedibonye government's intention to confine people who had merely supported ULF.

Attacking Protected Persons

The Prosecution can argue the Accused aided, abetted or otherwise assisted with the commission of the crime. The Appeal Chamber in the Bemba Case considered 'aiding', 'abetting' and 'otherwise assisting' as a single mode of liability. The *actus reus* is fulfilled when the person's assistance facilitates or furthers the commission of the crime, it need not be a *conditio sine qua non* or have a substantial effect on the principal offence's commission. By directing Asayoroma's software engineers to adapt Bird Target and integrate it with the targeting systems of the gunners' armoured vehicles, the Accused facilitated the Attack by enabling the gunners to primarily rely on the targeting system rather than actively obtaining situational awareness.

Additionally, the accessory must have intent regarding the principal offence. The Accused must at least be aware that attack against civilians will occur. Although the Accused must be aware of the essential elements of the crime, i.e. the type of crime, she did not need to know all the details and factual circumstances of the Attack. The intent may be established from the circumstances, including her prior behaviour. The Accused was aware that Bird Target would be linked to the targeting systems on board of the armoured vehicles for distinguishing civilian.

Attacking Protected Objects

The prosecution can argue that the accused is liable as an indirect perpetrator as she shared a common plan and contributed to it: First, after secret talks with the Members, the Accused developed, programmed and patched Adom so that it could be deployed by the Kedibonye soldiers to support their ground forces operating in Uzuri. A common plan to deploy Adom could be inferred.

Second, the common plan included an element of criminality but need not be specifically directed at the commission of a crime: it suffices that the Accused and the Members were aware of the risk that implementing their common plan of deploying Adom would result in attack against protected objects and accepted that risk.

Third, they had joint control over the crime due to the essential nature of their contributions to the commission of the crime: The Accused's essential contributions were to supply the Adom weapon systems; The Members' essential contributions were ordering the operationalisation and deployment of Adom.

The Accused had the requisite knowledge: In August 2022, prior to Adom's operationalisation, the Accused was informed by her staff that Adom was incapable of reliably differentiating between intended military targets and civilian objects; In September 2022, albeit knowing that patching was insufficient to prevent Adom from making erroneous targeting decisions, the Accused did not stop developing Adom. Instead, she merely asked her software engineers to monitor and continue patching if needed.

Defense

Unlawful Confinement

The defense can argue that the accused did not contribute to the crime. Liability under Art.28N requires significant contribution to the criminal purpose. In other words, it must have “a bearing on the occurrence of the crime and/or the manner of its commission”. Lushomo Ngala optimized AfrOpt “to monitor larger groups which may pose a security threat”. It was not mentioned in her meeting with the Government that AfrOpt was to be used in Uzuri. Further, evidence is required to show that the suspect and co-perpetrator performed their essential contributions in a coordinated manner, which is simply absent in Lushomo Ngala’s case. There was no evidence that Lushomo Ngala exchanged information with the government since their meeting on 11 March 2022.

Additionally, Contribution shall be made with either (i) the aim of furthering criminal activity or (ii) the knowledge of the intention of the group to commit the crime. Lushomo Ngala was not aware the crime would be committed as she only knew that the Government intended to use AfrOpt for monitoring prisoners, and at most, for monitoring “larger groups which may pose a security threat”. No criminal intention was thus shown to her.

Attacking Protected Persons

The defense can argue that the accused is not liable for aiding and abetting. The *actus reus* of aiding and abetting is constituted by acts or omissions specifically directed to assist, encourage, or lend moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime. Merely providing the means to commit a crime is not sufficient. Assistance of Lushomo Ngala, if any, provided no significant commission of the crime. Lushomo Ngala’s role was only limited to developing the software and it ended once the findings of the Bird Target’s simulations were handed over to the Kedibonye armed forces. The decision to deploy Bird Target was made entirely by Kedibonye government, which Lushomo Ngala had no influence over. Further, the crimes could probably be committed anyway with or without Lushomo Ngala. Without her provision of Bird Target, which helped distinguish civilians from ULF fighters, the crime would be committed in an even worse manner. Hence, there was no “demonstrable relationship” between Lushomo Ngala’s assistance and the perpetrators’ conduct.

Additionally, Lushomo Ngala had no direct intent to cause the crime in Old Town Plaza. First, she developed the militarized version of Bird Target to help distinguish civilians from ULF fighters. She even tested the software in computer simulations and disclosed to Kedibonye armed forces all its relevant information, including the issue in identifying potential threats in larger groups, which

can be inferred as acts to prevent rather than causing crimes. Similarly, her lack of knowledge of the specific facts underlying the crime, such as the material time of its deployment and where it would be used, further suggested her lack of intention.

Attacking Protected Objects

The defense can argue that the accused is not individually liable as an indirect perpetrator. Indirect perpetration calls on the culprit to exert dominant control. The Asayoroma staff were not interchangeable subordinates that she could change them easily. Secondly, software engineers were needed for the creation and patching of the Adom program. These individuals were professionals and could not be easily replaced. So, "any subordinate who does not cooperate may simply be replaced" is not an option in this circumstance. Second, despite Lushomo Ngala's explicit instructions, there was no "automatic compliance," as recommended by software experts who expressed concerns about the patch and provided continuous updates and recommendations to her.

Similarly, the Kedibonye forces were not "simple tool[s] or instrument[s] for the conduct of the crime," as Lushomo Ngala claimed to have done, as she was the founder and CEO of Asayoroma, a worldwide corporation with no involvement in the armed forces. Instead, the Kedibonye forces took the initiative and are accountable for their own criminal actions. Hence, there was no proof that Lushomo Ngala was in control of a "structured and hierarchical apparatus power," driven by functional automatism, in which the crime would have been committed.

Additionally, Lushomo Ngala's mental state did not meet the requirements for indirect perpetration. The factors include "the necessary intent and knowledge as well as any *lex specialis*," which are similar to those that apply to direct perpetration. The perpetrator must also be aware of the factual circumstances that give her the power to direct the crime in order for the crime to be considered to have been indirectly committed. There was no need to take this criterion into account as Lushomo Ngala did not have any authority over the forces of the Kedibonye. Due to the aforementioned factors, Lushomo Ngala also held the false idea that Adom would choose the right targets and should be absolved of criminal liability.

QUESTIONS JUDGES MAY ASK ORALISTS

1. Based on the role of Ms Lushomo Ngala and the incidents seems isolated don't you think the case lacks sufficient gravity?
2. Were there no other more senior perpetrators in the Kedibonye government who should be charged than Ms. Lushomo Ngala?
3. How do you prove that Lushomo ngala had intention to commit the alleged crimes?
4. How do you determine that there was effective control in the occupation of Uzuri by the Kedibonye forces?
5. Uzuri had large amount of autonomy how then can it be effective controlled for it to amount to International Armed Conflict?
6. How is the confinement by the government linked to the accused?
7. The confinement was enforced by the Kedibonye government how then is the accused charged for it?
8. Would the confinement happen without the Afropt technology provided by the accused?
9. Is it an international armed conflict at the time of the killing of the people on the town plaza considering the Kedibonye military had lost control of the Uzuri region?
10. Isn't blocking an act that is included as part of civilians participating directly in hostilities? (Reference to the ICRC Guidance on the Interpretation of actively participation in hostilities)
11. What about the civilians throwing stones at the armoured vehicles, isn't that active participation?
12. What criteria should be met for one to be held accountable as an aider or abettor?
13. Wasn't Ms Lushomo Ngala aware of the defect that the Adom of differentiating military targets?