

**THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS
THE 2024 INTERNATIONAL HUMANITARIAN LAW MOOT COURT
COMPETITION**

IN THE MATTER BETWEEN

PROSECUTION

V.

Ms. GENERAL RAHAMA (DEFENDANT)

MEMORIAL FOR THE PROSECUTION

NUMBER OF PAGES :15

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS.....	3
LIST OF AUTHORITIES.....	3
STATEMENT OF JURISDICTION.....	6
<i>i) Material Jurisdiction.....</i>	6
<i>ii) Temporal Jurisdiction.....</i>	7
<i>iii) Complementary Jurisdiction.....</i>	7
THE CASE IS ADMISSIBLE BEFORE THE COURT.....	7
<i>i) Inability of the Domestic Courts to Prosecute the Crimes.....</i>	8
ii) The issues raised are of sufficient gravity to justify the action of the court.....	8
WAR CRIMES UNDER ARTICLE 28D OF THE AMENDMENT PROTOCOL WERE COMMITTED IN THE CONTEXT OF A CONFLICT NOT OF AN INTERNATIONAL NATURE.....	9
<i>(i) The Existence of an Armed Conflict Not of an International Nature.....</i>	9
DISPROPORTIONATE ATTACK ON THE MILITARY INSTALLATION CAUSING DEATHS AND INJURIES TO DAURAN FARMERS.....	11
1) <i>Breach of the Principle of Distinction.....</i>	11
B. PROHIBITED USE OF CLUSTER MUNITIONS LEADING TO THE DEATH OF CHILDREN AND DESTRUCTION OF THE MOSQUE.....	13
<i>(i) Cluster munitions constitute a prohibited category of weapons used in armed conflicts.....</i>	13
<i>(ii) The use of cluster munitions lead to the destruction of protected property.....</i>	14
C. DIRECT AND INTENTIONAL ATTACKS AGAINST CIVILIAN OBJECTS.....	14
<i>The Cyber hacks constitute attacks against civilian objects in armed conflict.....</i>	14
3. GENERAL RAHAMA IS INDIVIDUALLY RESPONSIBLE FOR WAR CRIMES COMMITTED IN AZANIA.....	16
(I) Command responsibility and liability for the Azania Military Installation attack and the cyber-attack on the FIS cluster.....	16
<i>(i) Existence of a superior- subordinate relationship between General Rahama and the Bantuan army</i>	16
<i>(ii) General Rahama failed to take the necessary and reasonable steps to prevent the criminal acts of her subordinates.....</i>	17
<i>(iii) General Rahama had knowledge that the crimes were about to be committed.....</i>	17
(II) General Rahama was part of a Joint Criminal Enterprise (III).....	18

TABLE OF ABBREVIATIONS

¶	Paragraph
Art.	Article
Amendment Protocol	The Protocol to the amendments on the Protocol To the statute of the African Court of Justice and Human Rights
ACJHPR	African Court of Justice and Human and Peoples Rights
CCM	Convention on Cluster Munitions
FIS	Fransisco Integrated Services
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
SOP	Standard Operating Procedure
UN	United Nations
UNSC	United Nations Security Council

LIST OF AUTHORITIES

INTERNATIONAL TREATIES

1. Convention on Cluster Munitions, 30 May 2008.
2. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict May 14, 1954.
3. Geneva Conventions Additional Protocols, 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.
4. Geneva Conventions Additional Protocols, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
5. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Entered into force on Aug. 12, 1949).

6. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human & Peoples' Rights (Malabo Protocol).

INTERNATIONAL DECLARATIONS

1. United Nations General Assembly Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples (United Nations General Assembly [UNGA]), 14th December 1960 (UN Doc A/RES/1514(XV)).

TABLE OF CASES

1. *Kupreškić et al., Case No. IT-95-16-A, Judgment (Appeals Chamber), International Criminal Tribunal for the Former Yugoslavia, 23 October 2001.*
2. *Legality of the Threat or Use of Nuclear Weapons, ICJ GL No 95, ICJ Rep 226, ICGJ 205 (ICJ 1996), 8th July 1996, International Court of Justice (ICJ), United Nations [UN].*
3. *Prosecutor (on the application of Victims) v Katanga (Germain), Decision on the admissibility of the appeal against the 'Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350', ICC-01/04-01/07-3424, Case No ICC-01/04-01/07 OA 14, [2014] ICL 1588 (ICC 2014), 20th January 2014, International Criminal Court (ICC); Appeals Chamber (ICC) .*
4. *Prosecutor (on the application of Victims) v. Ntaganda, ICC-01/04-02/06 (Official Case No), [2015] ICL 1662.*
5. *Prosecutor v Delalić (Zejnil) and ors, Appeal Judgment, Case No IT-96-21-A, ICL 96 (ICTY 2001), 20th February 2001, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY]; Appeals Chamber [ICTY]. .*
6. *Prosecutor v Delalić (Zejnil) and ors, Trial Judgment, Case No IT-96-21-T, ICL 95 (ICTY 1998), 16th November 1998, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY]; Trial Chamber II [ICTY].*
7. *Prosecutor v Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72, OXIO 62, (1996) 35 ILM 32, 2nd October 1995, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY]*
8. *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, [2014] ICL 1588 (ICC)*

9. *Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-99-52-T, Trial Chamber I, Judgment, 2 September 1998.*
10. *Prosecutor v. Kvočka, Case No. ICTY-98-30/1-A, Appeal Judgment, International Criminal Tribunal for the Former Yugoslavia, 28th February 1995, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY].*
11. *Prosecutor v. Ntakirutimana, Case No. ICTR-96-17-A, Appeal Chambers Judgment, International Criminal Tribunal for Rwanda, 13th December 2004.*

BOOKS, ARTICLES AND REPORTS

1. AMW Manual: Harvard Program of Humanitarian Policy and Conflict Research, Manual on International Law Applicable to Air and Missile Warfare, with Commentary (2010)
2. 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.
3. Human Rights Watch, ‘Procedural Report of the Group of Governmental Experts of the State Parties to the CCW, Annex III ‘(December 2003).
4. Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law Vol. 1: Rules* (Cambridge University Press, 2005).
5. Jenny S Martinez, ‘Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond’, (2007) 5 Journal of International Criminal Justice.
6. Michael Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, (Cambridge University Press, Cambridge, 2013).
7. Nils Melzer ed, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross 2016)
8. Ricmars and March, ‘Complementary Jurisdiction and International Criminal Justice’ (2002).

MISCELLANEOUS

1. Mundi J, ‘Wiki Note: Jurisdiction Ratione Materiae’ (jusmundi.com⁴ March 2024) <<https://jusmundi.com/en/document/publication/en-jurisdiction-ratione-materiae#:~:text=The%20ratione%20materiae%20requirement%20refers>> accessed 17 March 2024

STATEMENT OF JURISDICTION

The court's jurisdiction in this case is grounded in the Malabo Protocol as amended by the Protocol on amendments to the Malabo Protocol (hereinafter referred to as the Amendment Protocol). Article 3 of the Amendment Protocol confers both original and appellate jurisdiction to the court, including international criminal jurisdiction. This broad authority enables the referral of matters related to the crimes listed in Article 28A of the Protocol, either by the Assembly of Heads of State or through agreements among member states, as specified in Article 46 F (2).

Furthermore, Article 46 *bis* 2(b) extends the court's jurisdiction to cases involving victims who are nationals of a state party. In this instance, the victims—Dauran farmers¹, children killed by cluster munitions², and the persons harmed by poisoned water³—are all citizens of Azania, a signatory to the Malabo Protocol.⁴ It is in light of the aforementioned crimes that President Fahari initiated the proceedings by presenting the case before the African Union Assembly of Heads of State, which resulted in a resolution directing the matter to the court's Prosecution team on March 29, 2022.⁵

Consequently, the court's jurisdictional mandate encompasses these cases.

The prosecution contends that the court possesses material jurisdiction, temporal jurisdiction, and complementary jurisdiction.

i) Material Jurisdiction

The court's jurisdiction over the subject matter⁶ is firmly established by Article 28(A)(1)(3), which empowers it to prosecute war crimes. The charges against the defendant are rooted in grave violations outlined in the Malabo Protocol. Specifically, the killings of the Dauran farmers,⁷ who are civilians, contravene Article 28D (b)(iv) of the amendment protocol; the use of cluster munitions resulting in the deaths of children constitutes a breach of Article 28D(b)(xxi), as cluster munitions are proscribed means of warfare⁸; and the intentional attacks against civilian objects, exemplified by the attack against the FIS cluster,⁹ violate Article 28D(b)(iii).

¹ Statement of Facts, ¶ 15.

² *ibid.*, ¶ 22.

³ *ibid.*, ¶ 24.

⁴ *ibid.*, ¶ 5.

⁵ *ibid.*, ¶ 26.

⁶ Mundi J, 'Wiki Note: Jurisdiction Ratione Materiae' (jsumundi.com 4 March 2024)

<<https://jsumundi.com/en/document/publication/en-jurisdiction-ratione-materiae#:~:text=The%20ratione%20materiae%20requirement%20refers>> accessed 17 March 2024.

⁷ Statement of Facts, ¶ 15.

⁸ Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39 (CCM) Art.1.

⁹ Statement of Facts, ¶ 23.

These offences fall squarely within the court's purview, as set by the Malabo Protocol, thereby establishing the court's material jurisdiction.

ii) Temporal Jurisdiction

Article 46(E) of the Amendment Protocol stipulates that the court's jurisdiction extends to crimes committed after the Protocol entered into force. The crimes attributed to the defendant occurred between 2020¹⁰ and 2021,¹¹ following the ratification of the Malabo Protocol,¹² thus falling within the court's temporal jurisdiction.

iii) Complementary Jurisdiction

Article 46H of the Amendment Protocol mandates the court to exercise complementary jurisdiction in instances where states fail to prosecute crimes domestically due to an inability or unwillingness to do so.¹³ In this instance, the complementary jurisdiction of the court is invoked due to the inability of the Azanian courts to prosecute the crimes. This incapacity stems from the ransomware attack on the Francisco Integrated Services (FIS) Cluster,¹⁴ which resulted in a systemic breakdown. Thus, the court's complementary jurisdiction is invoked to address the shortcomings of domestic legal processes in Azania.

In conclusion, it is the prosecution's position that the court has jurisdiction over the charges brought against the respondent.

THE CASE IS ADMISSIBLE BEFORE THE COURT

The admissibility of this case before the court rests on two main factors: the inability of the domestic courts to prosecute the crimes due to a collapse in the systems, and the gravity of the matters raised.

i) Inability of the Domestic Courts to Prosecute the Crimes

Article 46H(4) of the Amendment Protocol outlines specific criteria for determining the inability of domestic courts to prosecute crimes, including instances where the judicial system experiences total or substantial collapse. In the case of Azania, the domestic prosecution capabilities were severely

¹⁰ *ibid*, ¶ 15.

¹¹ *ibid*, ¶ 23.

¹² *ibid*, ¶ 5.

¹³ Ricmars and March, 'Complementary Jurisdiction and International Criminal Justice' (2002) 84 845
<<https://international-review.icrc.org/sites/default/files/S1560775500105152a.pdf>> accessed 18 march 2024.

¹⁴ Statement of Facts, ¶ 26.

compromised due to a ransomware attack¹⁵ on the FIS Cluster, leading to a significant breakdown in systems for several weeks.

Moreover, Azania encountered challenges in executing arrest orders against General Rahama, as she was not within the territory of Azania.¹⁶ Arrests had to be conducted in the neighbouring state of Mwari, which is also a signatory to the Malabo Protocol.¹⁷ These circumstances further underscore the state's incapacity to prosecute the crimes domestically. As a result, the intervention of the court is imperative, in accordance with the principle of complementarity.

ii) The issues raised are of sufficient gravity to justify the action of the court

In accordance with Article 46 H (2) (d) of the Amendment Protocol, the matters brought before the court must be of sufficient gravity to warrant the attention of the court. This assessment, as elaborated in the *Katanga Case*,¹⁸ requires considering both quantitative and qualitative factors. Quantitatively, the number of victims is pertinent,¹⁹ while qualitatively, aspects such as the nature, scale, manner, and resulting harm of the crimes are equally crucial.

The prosecution raises significant concerns, including the killing of several Dauran farmers at the Bantu-Daura border through aerial bombing done by Bantu forces,²⁰ the deaths of children, and the destruction of a mosque due to the use of cluster munitions,²¹ as well as 4,000 fatalities resulting from poisoned water consumption.²² These acts, under Article 28D of the Amendment Protocol, constitute war crimes and thus fulfil the gravity threshold.

Moreover, the gravity test articulated in *Prosecutor v. Ntaganda – First Invention of Criteria 15*²³ poses three affirmative questions: (i) whether the conduct in question is systematic or large-scale and causes alarm to the international community; (ii) if the responsible individual falls within the category of most senior leaders; and (iii) if they are among the most responsible.

¹⁵ *ibid*, ¶24.

¹⁶ *ibid*, ¶26.

¹⁷ *ibid*, ¶26.

¹⁸ *Prosecutor (on the application of Victims) v Katanga (Germain)*, Decision on the admissibility of the appeal against the 'Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350', ICC-01/04-01/07-3424, Case No ICC-01/04-01/07 OA 14, [2014] ICL 1588 (ICC 2014), 20th January 2014, International Criminal Court (ICC); Appeals Chamber (ICC) .

¹⁹ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, [2014] ICL 1588 (ICC, ¶92.

²⁰ Statement of Facts, ¶ 15.

²¹ *ibid*, ¶21.

²² *ibid*, ¶24.

²³ *Prosecutor (on the application of Victims) v. Ntaganda*, ICC-01/04-02/06 (Official Case No), [2015] ICL 1662.

Firstly, the situation in Azania captured widespread attention, as demonstrated by the United Nations Security Council's convening of an emergency session.²⁴ This urgent meeting was prompted by the circulation of graphic images depicting the tragic killings of children in Daura, a result of the use of cluster munitions by Tahadhari forces.²⁵ The Security Council, however, faced a significant obstacle in passing a resolution against Bantu. This barrier arose from Changamire's exercise of veto power as a permanent member, owing to its close relations with Bantu.²⁶

Furthermore, the involvement of a high-ranking official, General Rahama, illustrates the gravity of the situation. As the State Governor of Bantu, General Rahama wielded significant authority. This is evidenced by her decisions to deploy troops to the Bantu-Daura border to control entry in and out of Bantu;²⁷ and her approval of Operation 'Sogoli' in the Daura region, which led to the displacement of approximately 300,000 civilians from the combat zone. Additionally, her role in supplying cluster munitions²⁸ to the Tahadhari Forces for an offensive against Azanian Forces further underscores her control over the conduct of the armed conflict.

Therefore, considering the widespread attention the conflict attracted, the severity of the alleged crimes, and the involvement of high-ranking officials like General Rahama, it is evident that the matters presented before the court are of sufficient gravity to warrant its attention.

In light of the above arguments, the case is admissible before the court.

WAR CRIMES UNDER ARTICLE 28D OF THE AMENDMENT PROTOCOL WERE COMMITTED IN THE CONTEXT OF A CONFLICT NOT OF AN INTERNATIONAL NATURE

(i) The Existence of an Armed Conflict Not of an International Nature

According to Article 3 Common to the Geneva Conventions and Article 1 of the Second Additional Protocol, non-international armed conflicts (NIACs) are prolonged armed confrontations that occur within the territory of a state party to the Geneva Conventions, involving the government armed forces and one or more armed groups, or between the armed groups themselves. For an armed conflict to be considered a NIAC, as established in the **Tadic Case**,²⁹ three key criteria must be met.

²⁴ Statement of Facts, ¶ 21.

²⁵ *ibid.*

²⁶ *ibid.*, ¶ 4.

²⁷ *ibid.*, ¶ 14.

²⁸ *ibid.*, ¶ 20.

²⁹ *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999 para 70.

Firstly, there must be an armed conflict between state armed forces and internal groups. In the Azanian-Bantu conflict, the armed confrontation arose between the Azanian state forces and the forces from Bantu, which is one of the 24 federal states within Bantu.³⁰ Secondly, the conflict must exhibit a level of intensity that distinguishes it from mere internal disturbances, such as riots or sporadic violence.³¹ Indicators of intensity include the scale, duration, and severity of confrontations, casualties, displacement of civilians, and sometimes intervention by international bodies like the United Nations Security Council.³²

The conflict between Azanian and Bantu forces escalated significantly in intensity. For instance, aerial bombings targeting military installations resulted in the deaths of several Dauran farmers,³³ poisoned water led to the deaths of 4,000 individuals,³⁴ and cluster bombs caused casualties among children at the hands of Tahadhari forces.³⁵ Moreover, the launch of Operation Sogoli prompted the displacement of 300,000 civilians from the Dauran region, due to clashes between Bantu and Azanian forces.³⁶ Additionally, the use of weapons such as cluster munitions³⁷ and Kinzhal hypersonic air-launched ballistic missiles³⁸ resulted in numerous fatalities.

Thirdly, a NIAC requires a certain level of organisation among the internally involved forces. This organisational aspect includes the presence of a commander, coordinated military operations, and the use of weaponry, as elaborated in the *Slobodan Milosevic Trial Chamber case*.³⁹ In the present conflict, General Rahama's leadership of the Bantu forces is evident from her approval of Operation Sogoli⁴⁰ and her engagement of the Tahadhari Forces to counter the Azanian forces. Furthermore, General Rahama and the Bantu forces utilised weapons such as cluster munitions⁴¹ and Kinzhal missiles,⁴² resulting in civilian casualties in Daura. These factors illustrate the organisational structure within the Bantu forces under General Rahama's command.

³⁰ Statement of Facts, ¶ 1.

³¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. icle 1.

³² *ibid.*

³³ Statement of Facts, ¶ 15.

³⁴ *ibid.*, ¶ 24.

³⁵ *ibid.*, ¶ 15.

³⁶ *ibid.*, ¶ 16.

³⁷ *ibid.*, ¶ 20.

³⁸ *ibid.*, ¶ 15.

³⁹ *Prosecutor v. Slobodan Milosevic (Trial Chamber)*, IT-02-54, International Criminal Tribunal for the former Yugoslavia (ICTY), ¶ 14.

⁴⁰ Statement of Facts, ¶ 16.

⁴¹ *ibid.*, ¶ 21.

⁴² *ibid.*, ¶ 16.

Therefore it is the assertion of the prosecution that the armed conflict between the Bantuan and Azanian forces was of a non-international nature.

DISPROPORTIONATE ATTACK ON THE MILITARY INSTALLATION CAUSING DEATHS AND INJURIES TO DAURAN FARMERS

Article 28D (b) (iv) of the Amendment Protocol explicitly prohibits disproportionate attacks, defining them as those causing incidental loss of civilian life or injury, damage to civilian objects, or widespread, long-term, and severe harm to the natural environment, when compared to the specific military advantage sought. This principle aligns with the prohibition against direct attacks to civilians as elaborated in the ICJ Advisory Opinion on the Legality of the threat or use of Nuclear Weapons.⁴³ This prohibition extends to the use of weapons that needlessly cause the suffering of combatants.

The prosecutor contends that the principle of proportionality has been violated due to breaches of the principle of distinction and disregard for the principle of precaution.

1) Breach of the Principle of Distinction

The principle of distinction, as articulated by the International Court of Justice (ICJ) in its Nuclear Weapons Advisory Opinion,⁴⁴ mandates parties involved in armed conflict to unfailingly distinguish between civilians and combatants, as well as civilian objects⁴⁵ and military objectives.⁴⁶ The ICJ further prohibited the use of weapons that are incapable of distinguishing between civilian and military targets. Such weapons, by their very nature, lead to indiscriminate attacks, which constitute direct attacks on civilians under international humanitarian law.⁴⁷ Additionally, despite the fact that the possibility of legitimate civilian casualties' incidental to an attack aimed at military targets may occur, such casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack.⁴⁸

⁴³ Legality of the Threat or Use of Nuclear Weapons, ICJ GL No 95, ICJ Rep 226, ICGJ 205 (ICJ 1996), 8th July 1996, International Court of Justice (ICJ), United Nations [UN] para 78.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ 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, Art. 52(1).

⁴⁷ Legality of the Threat or Use of Nuclear Weapons, ICJ GL No 95, ICJ Rep 226, ICGJ 205 (ICJ 1996), 8th July 1996, International Court of Justice (ICJ), United Nations [UN] para 78.

⁴⁸ *Prosecutor v. Milan MArt. ić*, IT-95-11-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2007, ¶E4.

Common Article 3 of the Fourth Geneva Convention mandates the humane treatment of civilians-persons not taking part in hostilities.⁴⁹ Additionally, Protocol I to the Geneva Conventions prohibits indiscriminate attacks on civilians which include those that cannot be directed at specific military targets and those whose effects cannot be controlled.⁵⁰

In the current case, the launch of Kinzhal hypersonic air-launched ballistic missiles at the Dauran-Bantu border was conducted indiscriminately, resulting in civilian casualties without any impact on military personnel.⁵¹ Despite Bantu intelligence indicating that the targeted installations, housing Azania Special Forces, were merely 500 metres away from civilian grazing lands,⁵² The Bantuan forces proceeded with the missile launch. The Kinzhal missiles, which by their nature have a reported range of 1,500-2,000 kilometres,⁵³ inflicted casualties solely among Dauran farmers, therefore defeating the claim of the purported military advantage sought.⁵⁴

3) *Disregard for the Principle of Precaution*

This principle mandates constant care to protect civilian populations and objects, requiring all feasible precautions to avoid or minimise incidental harm to civilians and civilian property during military operations.⁵⁵ Article 57 of Protocol I outlines these precautions, including selecting means and methods of attack to minimise civilian casualties and refraining from launching attacks if civilian harm would be excessive compared to the expected military advantage. The importance of these precautions was underscored in the ICTY *Kupreškić case*,⁵⁶ affirming their customary nature.

In the Bantu-Dauran border incident, Bantu intelligence indicated that the military installation housing Azanian Special Forces was located 500 meters from habitual grazing lands of Dauran farmers.⁵⁷ Despite this knowledge, the Bantu forces launched an attack without evident precautionary measures, resulting in the deaths of several Dauran farmers and none of the

⁴⁹ Geneva Conventions Additional Protocols, 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, 1125 UNTS 3, Art.50.

⁵⁰ Geneva Conventions Additional Protocols, 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, 1125 UNTS 3, Art.51.

⁵¹ Statement of Facts, ¶ 15.

⁵² Geneva Conventions Additional Protocols, 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, 1125 UNTS 3, Art.51.

⁵³ Kh-47M2 Kinzhal | Missile Threat', Missile Threat (Center for Strategic and International Studies, last updated 19 March 2022) <<https://missilethreat.csis.org/missile/kinzhal/>> accessed 22 April 2024.

⁵⁴ Statement of Facts, ¶ 15.

⁵⁵ 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, 1125 UNTS 3, Art.58.

⁵⁶ *Kupreškić et al.*, Case No. IT-95-16-A, Judgment (Appeals Chamber), International Criminal Tribunal for the Former Yugoslavia, 23 October 2001.

⁵⁷ Statement of Facts, ¶ 15.

apparently targeted Azanian military personnel.⁵⁸ This failure to mitigate harm to civilians constitutes a breach of the obligation to take feasible precautions during military operations, considering all pertinent circumstances, including humanitarian and military factors.⁵⁹

B. PROHIBITED USE OF CLUSTER MUNITIONS LEADING TO THE DEATH OF CHILDREN AND DESTRUCTION OF THE MOSQUE

(i) Cluster munitions constitute a prohibited category of weapons used in armed conflicts

Article 1 of the CCM prohibits the use, and direct or indirect acquisition of cluster munitions. Additionally, Article 28D (b)(xxi) of the Malabo Protocol provides for the war crime of employing weapons or projectiles that may cause unnecessary harm to civilians or which are by their nature indiscriminate. Cluster munitions have the potential to be indiscriminate as they cannot be directed at specific targets and as result they fail to distinguish between combatants and civilians.⁶⁰ They are susceptible to disproportionate attacks⁶¹ since they can cause damage to civilians and civilian objects that may be in excess of the tactical and direct military advantage sought.⁶²

General Rahama supplied cluster munitions to the Tahadhari group to deploy against the Azanian military forces, thus violating the CCM.⁶³ Verified drone footage presented by President Fahari displayed that the missile launched by the Tahadhari group dispersed bomblets that lead to the death of children and destruction of a mosque.⁶⁴ In conclusion, the use of cluster munitions was not only a violation of Article 1 of CCM but also an indiscriminate act which is a violation of the principles of IHL and the Malabo Protocol.

(ii) The use of cluster munitions lead to the destruction of protected property

It is an established CIL principle⁶⁵ that any hostility directed against historic monuments, works of art, and places of worship which make up the cultural or spiritual heritage of people is prohibited.⁶⁶

⁵⁸ Statement of Facts, ¶15.

⁵⁹ International Committee of the Red Cross (ICRC), 'Rule 15. Precautions in Attack', Customary IHL Database, <<https://ihl-databases.icrc.org/en/customary-ihl/v1/>> Rule15.

⁶⁰ Human Rights Watch, 'Procedural Report of the Group of Governmental Experts of the State Parties to the CCW, Annex III (December 2003) 3 <<https://www.hrw.org/legacy/background/arms/clusters0704/clusters0704.pdf>> accessed 17 March 2024.

⁶¹ *ibid.*, 2.

⁶² 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, Art.51(5)(b).

⁶³ Statement of Facts, ¶ 20.

⁶⁴ Statement of Facts, ¶ 22.

⁶⁵ Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law Vol. 1: Rules* (Cambridge University Press, 2005) Rule 38.

⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Art.16.

The destroyed mosque constituted a civilian object as it was not making any active contribution to the military action of the Azanian forces at the time of the attack.⁶⁷ Therefore, its destruction violated CIL and the principle of distinction.

(iii) The use of cluster munitions led to the death of protected persons

The prohibition of violence to life and civilians including children is a principle of customary international law that applies to conflict situations.⁶⁸ This protection of civilians is founded on the principle of distinction.⁶⁹

The use of cluster munitions in the Daura region led to the death of several children.⁷⁰ General Rahama had knowledge of the presence of civilians in the area as evidenced by her directions in the SOP that were intended to minimise civilian harm.⁷¹ The Defence may claim that the SOP was issued to prevent civilian harm through provision of advance notices; however, there is no evidence that these warnings were actually issued. To the contrary, the cluster munitions deployed failed to distinguish between children and combatants thus leading to their deaths.⁷²

C. DIRECT AND INTENTIONAL ATTACKS AGAINST CIVILIAN OBJECTS

The Cyber hacks constitute attacks against civilian objects in armed conflict

The Tallinn Manual⁷³ defines a cyber-attack as a ‘cyber operation whether offensive or defensive that is reasonably expected to cause injury or death to persons or damage and destruction to objects.’⁷⁴ These attacks encompass both activities that release kinetic force on the object and those that do not.⁷⁵ As such, cyber-attacks which do not involve release of direct physical force may constitute attacks and the established principles of IHL apply to all kinds of warfare and weapons.⁷⁶

⁶⁷ Statement of Facts, ¶ 21.

⁶⁸ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Art. 3 Common Art. icle 3, Geneva Conventions (1949).

⁶⁹ Nils Melzer ed, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross 2016) 101.

⁷⁰ Statement of Facts, ¶ 21.

⁷¹ *ibid.*

⁷² *ibid.*, ¶ 22.

⁷³ In an attempt to investigate how current international law norms and principles can be applied to cyberwarfare, the Tallinn manual was developed as part of a project that brought together professional and academic experts in the field, primarily from NATO and NATO allied military circles, with observers from the ICRC, the United States Cyber Command, and the Center of Excellence.

⁷⁴ Michael Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, (Cambridge University Press, Cambridge, 2013) 106.

⁷⁵ *Prosecutor v Tadić, Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72, OXIO 62, (1996) 35 ILM 32, 2nd October 1995, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY] ¶ 120, 124.

⁷⁶ Legality of the Threat or Use of Nuclear Weapons ICJ Rep 226 (n22) 86.

For an act to qualify as a cyber-attack, it must result in collateral damage⁷⁷ that is reasonably foreseeable.⁷⁸ Additionally, where the cyber operation results in foreseeable collateral damage that is not the requisite harm of the object of the attack, the act still qualifies as an attack.⁷⁹ As such, a cyber-attack need not result in the intended destructive effect for it to qualify as an attack.⁸⁰

In the present case, the cyber hacks conducted against the FIS computer server cluster constitute attacks against a civilian object- the FIS cluster.⁸¹ The cluster hosting both civilian networks and the computing networks for the Midona nuclear facility does not render it a dual-use object which would then be classified as a military object. To the contrary, the Prosecution argues that an entire computer network does not qualify as a military object for the mere reason that one individual server in the cluster such as the Midona nuclear facility qualifies as such.⁸²

Secondly, the attacks resulted in both direct and indirect collateral damage to the people of Daura.⁸³ The cyber-operation led to temporary disruption of operations at the Midona nuclear facility which then led to the flow of radioactive heavy water into local drinking supplies. This led to the death of approximately 4000 people in Daura.⁸⁴ Additionally, the ransomware cyber-operation also impacted Daura's hospitals and banking system.⁸⁵ The temporary loss of patient medical data led to delays in patient treatment and death and the blocked transmission of transaction data slowed down business in the Daura region for several weeks. As such, the consequential effects of the cyber-operations in Daura qualify as attacks against civilian objects which are prohibited in the context of armed conflict.

3. GENERAL RAHAMA IS INDIVIDUALLY RESPONSIBLE FOR WAR CRIMES COMMITTED IN AZANIA

Individuals who violate the Malabo Protocol bear personal responsibility for the offences committed.⁸⁶ Individual criminal responsibility may arise through among others; organizing,

⁷⁷ Michael Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, (Cambridge University Press, Cambridge, 2013) 107

⁷⁸ *ibid.*

⁷⁹ *ibid.*,129.

⁸⁰ AMW Manual:Harvard Program of Humanitarian Policy and Conflict Research, Manual on International Law Applicable to Air and Missile Warfare, with Commentary (2010) Rule 1 (e).

⁸¹ Statement of Facts,¶ 23.

⁸² Michael Schmitt (ed.),*Tallinn Manual on the International Law Applicable to Cyber Warfare*, (Cambridge University Press, Cambridge, 2013) 148.

⁸³ Statement of Facts,¶ 24.

⁸⁴ *ibid.*

⁸⁵ *ibid.*,¶25.

⁸⁶ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human & Peoples' Rights (Malabo Protocol) (adopted 27 June 2014, last signature 2 April 2019) AU Doc, Art.46B (1).

inciting, facilitating, aiding and abetting and/ or collaborating with other persons to commit a crime.⁸⁷ General Rahama's actions with regard to the attack on the Dauran farmers and the cyber-attack on the FIS impute command responsibility liability while her actions with regard to the use of cluster munitions amount to an extended Joint Criminal Enterprise (JCE III).

(I) Command responsibility and liability for the Azania Military Installation attack and the cyber-attack on the FIS cluster

A commander may be held responsible for ordering his subordinates to carry out unlawful conduct in the context of an armed conflict.⁸⁸ For command responsibility liability to be invoked, the following three elements must be met; the existence of a superior -sub-ordinate relationship, the superior's failure to take the necessary and reasonable steps to prevent the criminal acts of his subordinates and lastly the superior knew or had reason to know that the crime was about to be committed or had been committed.⁸⁹ These three requirements have been met with regards to the attack on the Azania Military Installation that led to the death of Dauran farmers and the cyber-attack on the FIS cluster.

(i) Existence of a superior- subordinate relationship between General Rahama and the Bantuan army

A superior- subordinate relationship exists when a person is in 'formal status' or 'effective authority and control' such as a commander.⁹⁰ The existence of a position of command emanates from 'actual possession or non- possession of powers of control over subordinates.'⁹¹ In the present case, a superior-subordinate relationship exists between General Rahama and the Bantu army. General Rahama as the state governor of the Bantu state is in charge of the military affairs of the state and therefore exercises effective control over the army. This superior- subordinate relationship subsisted both during the attack on the Azanian Military Installation and the cyber-attack against the FIS cluster.

(ii) General Rahama failed to take the necessary and reasonable steps to prevent the criminal acts of her subordinates

⁸⁷ *ibid*, Art.28 N (ii) & (iii).

⁸⁸ Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law Vol. I: Rules* (Cambridge University Press, 2005) Rule 152.

⁸⁹ *Prosecutor v Delalić (Zejnil) and ors*, Appeal Judgment, Case No IT-96-21-A, ICL 96 (ICTY 2001), 20th February 2001, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY]; Appeals Chamber [ICTY], ¶ 346.

⁹⁰ *ibid*, 370.

⁹¹ *Prosecutor v Delalić (Zejnil) and ors*, Trial Judgment, Case No IT-96-21-T, ICL 95 (ICTY 1998), 16th November 1998, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY]; Trial Chamber II [ICTY] ¶ 370.

A commander should take reasonable measures to prevent and suppress violations.⁹² In both attacks, General Rahama did not take any reasonable precautionary measures to prevent the commission of war crimes. In the attack against the Azania military installation, she did not take precautionary measures despite knowing that the installation was 500 meters from grazing lands that Dauran farmers habitually grazed their flocks.⁹³ Similarly, in the case of the cyber-attack, no reasonable measures were taken to ensure the safety of civilians and no advance warnings were given as per the requirements of the Tallinn Manual.⁹⁴

(iii) General Rahama had knowledge that the crimes were about to be committed

A superior's knowledge of whether a crime has been committed or is about to be committed should not be presumed but it can be inferred from circumstantial evidence.⁹⁵ In both attacks, it is plausible that General Rahama as the commander of the Bantu forces had an opportunity to look at the intelligence assessments and give proper advice to her army on whether to proceed with the attack or halt the operation. This can be inferred from her approval of "Operation Sogoli" which suggests her active participation in military tactics advanced against Azania.⁹⁶ As such, the launch of the attack despite the intelligence assessments is proof of her approval and knowledge of the attacks.

(II) General Rahama was part of a Joint Criminal Enterprise (III)

For collective criminality under a JCE III to apply, the following elements must be present; 'existence of a common plan or purpose between members of the JCE, crimes outside the common purpose have occurred, these crimes were a natural and foreseeable consequence of effecting the common purpose and lastly that the participant in the joint criminal enterprise was aware that the crimes were a possible consequence of the execution of the common purpose, and in that awareness, he nevertheless acted in furtherance of the common purpose.'⁹⁷ These requirements under JCE III have been met by General Rahama.

(i) There existed a common plan between General Rahama and General Vuta

⁹² Jenny S MArt. inez, 'Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond', (2007) 5 Journal of International Criminal Justice, 661-663.

⁹³ Statement of Facts, ¶ 15.

⁹⁴ Michael Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, (Cambridge University Press, Cambridge, 2013) Rule 58.

⁹⁵ *Prosecutor v Delalić (Zejnil) and ors*, Trial Judgment, Case No IT-96-21-T, ICL 95 (ICTY 1998), 16th November 1998, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY]; Trial Chamber II [ICTY] ¶ 386.

⁹⁶ Statement of Facts, ¶ 16.

⁹⁷ *Prosecutor v. Milomir Stakic* (Appeals Chamber Judgment), Case No. IT-97-24-A (ICTY 2006), 22nd March 2006, ¶ 87.

For a common plan or purpose to be achieved, there needs to be a plurality of persons.⁹⁸ The plan need not be pre-arranged but may be performed extratemporaneously by persons acting in unison to further a particular joint criminal enterprise.⁹⁹ Participation in the crime may be in the form of assistance in, or contribution to, the execution of the common plan or purpose.¹⁰⁰ Further the common purpose may involve violations of the Geneva conventions or customs of war not justified by military necessity and carried out unlawfully.¹⁰¹

In the present case, the supply of cluster munitions by General Rahama to the Tahadhari forces indicates her knowledge of the plan to launch an offensive, and her active participation in the crime.¹⁰² Additionally, she entered into a contract with General Vuta with terms and obligations, which were fulfilled by both parties in the fight against the Azanian forces.¹⁰³ As such, there was a common purpose between these two parties to launch an attack against Azania.

(ii) Crimes outside the common purpose occurred

For this element to be satisfied there needs to be a violation of IHL falling outside the scope of the common plan or purpose.¹⁰⁴ The common purpose was to launch an offensive against the Azania military group seeking to gain military advantage.¹⁰⁵ While it is evident that General Rahama issued an SOP to minimise civilian harm, the use of cluster munitions still led to the death of several children and destruction of the mosque outside of the common purpose.¹⁰⁶ We therefore submit that there were crimes that occurred outside the common purpose.

(iii) General Rahama was aware that these crimes were a natural and foreseeable consequence of effecting the common purpose

⁹⁸ *Prosecutor v Tadić, Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72, OXIO 62, (1996) 35 ILM 32, 2nd October 1995, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY]¶ 227.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ United Nations Security Council Res. 827, Statute of the International Criminal Tribunal for the Former Yugoslavia, Art.VII(1) (May 25, 1993).

¹⁰² Statement of Facts,¶ 20.

¹⁰³ Statement of Facts,¶19.

¹⁰⁴ 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 <<https://lawreview.law.pitt.edu/ojs/lawreview/Art.icle/download/822/510> > accessed 19 March 2024.

¹⁰⁵ Statement of Facts,¶ 19.

¹⁰⁶ *ibid.*

This element entails an objective test,¹⁰⁷ which requires that the crimes be objectively foreseeable consequences of furthering the common purpose.¹⁰⁸ General Rahama has a reputation of investing in weapons with the use of AI and is the state governor of a state that prides in military and technological capabilities.¹⁰⁹ Accordingly, she ought to have foreseen the potential detriments of using cluster munitions in warfare and should have opted for alternative weapons. Further, the issuance of an SOP with directions on how to minimise civilian harm demonstrated her knowledge of the risks posed by using cluster munitions.¹¹⁰

(iv) General Rahama was aware that the crimes were a possible consequence of the execution of the common purpose

This criterion requires that the accused must have willingly assumed the risk and possible consequences of the crime committed.¹¹¹ General Rahama was aware of the possibility of the indiscriminate deployment of cluster munitions by autonomous weapons. This can be inferred from the directions used in the SOP which mandated that the weapons be dispersed only in areas clear of civilians and civilian objects.¹¹² Her actions are a confirmation of her awareness the deficiencies in the autonomous use of cluster munitions could have resulted in crimes.

(v) Despite that awareness, General Rahama acted in furtherance of the common purpose.

The accused person's participation or contribution to the furtherance of the common purpose need not be necessary or substantial¹¹³ or a *sine qua non* for the commission¹¹⁴ of the crime.¹¹⁴ However, it must entail some level of assistance or contribution to furtherance of the act. General Rahama, supplied cluster munitions to be used in the launch of an offensive against the Azania military.¹¹⁵ While she may not have directly deployed the cluster munitions, she provided assistance and

¹⁰⁷ 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, 68 <https://lawreview.law.pitt.edu/ojs/lawreview/Art_icle/download/822/510> accessed 19 March 2024.

¹⁰⁸ *Prosecutor v Tadić, Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72, OXIO 62, (1996) 35 ILM 32, 2nd October 1995, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY] ¶228.

¹⁰⁹ Statement of Facts, ¶ 3.

¹¹⁰ Statement of Facts, ¶ 20.

¹¹¹ *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-17-A, Appeal Chambers Judgment, International Criminal Tribunal for Rwanda, 13th December 2004, ¶ 467.

¹¹² Statement of Facts, ¶ 20.

¹¹³ *Prosecutor v. Dusko Tadic (Appeal Judgement)* (n29) ¶ 227.

¹¹⁴ *Prosecutor v. Kvočka*, Case no. ICTY-98-30/1-A, Appeal Judgment, International Criminal Tribunal for the Former Yugoslavia, 28th February 1995, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY] ¶¶ 97,104,187.

¹¹⁵ Statement of Facts, ¶20.

furthered the common purpose by supplying the cluster munitions. As such, her contribution was significant and indispensable to the launch of the attack.

PRAYERS

The Prosecution respectfully prays that Pre Trial Chamber IV be pleased to grant the following orders:

1. That the Chamber has the jurisdiction over the present case and that the case is admissible.
2. A confirmation of charges presented by the Prosecution against General Rahama and her committal to the Trial Chamber for a trial of the charges confirmed.
3. A finding that there are substantial grounds to believe that the following war crimes were committed pursuant to Article 28 D of the Amendment Protocol and a subsequent trial on those grounds.
4. An order for reparations, pursuant to Article 45 of the Malabo Protocol, be made through the Trust Fund to Dauran citizens who suffered for economic damage as a result of the cyber-attack and the mosque for damage suffered from the cluster munitions attack.
5. An order for compensation, pursuant to Article 45 of the Amendment Protocol, in respect of the families of the Dauran farmers who died as a result of the Azania military installation attack and the 4000 who died as a result of the cyber-attack.
6. A finding that General Rahama is individually criminally responsible under Article 46B of the Amendment Protocol with regards to war crimes and crimes against humanity contrary to the Amendment Protocol and the 1949 Geneva Conventions .

Respectfully submitted,

Counsel for the Prosecution