

NUREMBERG MOOT COURT 2018

TEAM: N49

DEFENSE

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I. The case is inadmissible and that the arrest warrant was unlawful

1. In case there are uncontested facts render the case inadmissible, the issue regarding the admissibility of the case become a substantive requisite for the issuance of the arrest warrant.¹ Neckar has primary jurisdiction over this case in accordance to the complementary principle.² The OTP, after having received the referral from the Mosel, must notify Neckar in order to confirm whether it was investigating or prosecuting such conducts.³ Its issuance of the arrest warrant shortly after the referral⁴ and without concise statement of facts,⁵ illustrate its omission in informing and encouraging the state to exercise its primary jurisdiction.⁶ Had the OTP notified Neckar about such conduct, Neckar would have taken action to investigate since their action is evident from their issuance of official statement regarding the alleged mono-ethnicity plan after subsequent reports were issued by non-governmental organization.⁷ Consequently, the issuance of the arrest warrant is unlawful thus Mr. Balboa shall be released from the detention center.

II. The testimony of the Mosel police is inadmissible and has no probative value

2. The testimony of the Mosel police is inadmissible as it lacks indicia of reliability⁸ since it is based solely on a triple hearsay.⁹ The Mosel Police testimony is unreliable due to an underlying political motive, since the police belongs to the Mosel, the party involve in the war with Neckar.¹⁰ Furthermore, the source of testimony is also unreliable since the ten detainee escapee were arrested for involving in political issue and criticize the government, thus they had an allegiance toward the Neckar government.¹¹ Moreover, this testimony was obtained from the deceased witnesses who overheard it from the anonymous guard who had heard it from another anonymous guard, thus this statement cannot be reasonably believed and it

¹ ICC, *The Prosecutor V. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Defence Challenge to the Validity of the Arrest Warrant, 28 January 2011, para.10.

² ICC OTP, Policy Paper on Preliminary Examinations, November 2013, para. 100.

³ Rome Statute, article 18 (1).

⁴ Fact, para.16.

⁵ Rome Statute, Article 58 (3). See Supra Note 3, para.7.

⁶ Fact, para.16. Paul Seils, *Handbook on Complementarity, An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, 2016, page.29.

⁷ Fact, para.14.

⁸ ICC, *The Prosecutor v. The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Corrigendum to Decision on the admissibility of four documents, 20 January 2011, para.30.

⁹ ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para. 77.

¹⁰ See *Supra* Note 8, para. 57.

¹¹ ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, para.27 (a).

provides no adequate and available means for the Court to test its reliability, hence this testimony is unreliable.¹²

3. Although it is admissible, it has no probative value, since it is the only testimony relied by the Prosecution with regards to the mono-ethnicity plan. It neither corroborates or is corroborated by other evidence.¹³
4. The three non-governmental reports also lack reliability and probative value since their sources are unknown, there is no means to verify these reports and their creation was not for the purpose of Court proceeding.¹⁴

III.A. Genocide through forced labor under article 6(c) was not established

III.A.1. Forced labor is not a certain condition of life which could lead to physical destruction

5. “Certain conditions of life” refer to the systematic methods which will lead to slow death of the group members.¹⁵ Forced labor itself, in nature, cannot constitute a method of inflicting conditions of life calculated to bring about physical destruction or slow death.¹⁶ The methods inflicted for the purpose of slow death include, but are not limited to, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period.¹⁷ However, in this case the Prosecution’s charge on genocide is limited to forced labor, thus the Defence does not find it necessary to entertain other acts which are not included in the Prosecution’s indictment.¹⁸

III.A.2. The workers in the mine sites do not belong to a particular ethnical group

6. The crime of genocide pertains to the destruction of a race, ethnical, national, or religious group with a particular positive identity, not to the destruction of various people without a particular distinct identity as belong to any of the four protected group.¹⁹
7. The workers in the mine sites must be identified by their ethnical name and not in a negative characteristic as “non-Neckar.”²⁰ The International Labour Organization (ILO) report relied upon by the Prosecution can only prove the presence of various ethnic minorities workers in the fourteen (14) mine sites, but it did not identify a particular ethnical group to whom these

¹² See *Supra* Note 11, para.26.

¹³ ICC, *The Prosecutor v. The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007, para.106.

¹⁴ See *Supra* Note 11, para.27 (a) (d)(e).

¹⁵ ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 116

¹⁶ ICTR, *The Prosecuto v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, September 2, 1998, paras 505-506.

¹⁷ See *Supra* Note 16, para.506.

¹⁸ Fact, para.21.

¹⁹ ICTY, *The Prosecutor v. Milomir Stakic*, IT-97-24-A, Appeal Judgement, 22 March 2006, para.21.

²⁰ ICTY, *The Prosecutor v. Goran Jelisić*, Trial Judgement, 14 December 1999, paras. 71–72.

workers belonged. In *Prosecutor v. Akayesu*, two ethnical groups shared a common language and culture, but they had a distinct particular identity as Hutu and Tutsi.²¹ Thus, these various ethnic minorities in Neckar, although they speak the common language Mosel,²² cannot be said to have a particular identity as a whole.

III.A.3 The democratic Neckar party (DNP) government's genocidal intent is not established

8. For the crime of genocide to occur, the *mens rea* must be formed prior to the commission of the genocidal acts.²³ The existence of genocidal intent can be proven through circumstantial evidences²⁴ or may be inferred by a pattern of purposeful action.²⁵ However, when an inference is made based on the finding of intent, it must be the only reasonable inference from the totality of the evidence.²⁶

The so-called mono-ethnicity plan does not exist

9. The existence of a plan or policy may become an important factor in proving the specific intent.²⁷ The Prosecution relies on the testimony of the Mosel police to prove the existence of a plan for genocide.²⁸ However, there was no indicator of fact regarding any system of ethnic classification or ethnic identification which the ruling government supposedly used to select their victims on account of their membership as ethnic minorities.²⁹

The economic stabilization policy (the Policy) and the Temporary Law were not implemented to target ethnic minorities

10. The Policy classified people based on qualification, not their ethnicity.³⁰ The implementation of the Policy was merely to overcome starvation and improve the economic crisis, which was the intent of the DNP political party prior to coming into power.³¹
11. The freedom of expression is subject to restriction if the State finds it necessary for the protection of national security and public order.³² The Neckar government found it necessary to limit the freedom of expression because the state security was at stake as a result of war and economic crisis. Furthermore, even though the law was temporary, it was meant to be

²¹ See *Supra* Note 16, para. 122-124, 170-172, 701-702, n. 56, n. 57

²² Fact, para.3.

²³ ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para.91.

²⁴ ICTR, *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, (Case No. ICTR-99-52-T), Trial Judgment, 3 December 2003, para 524

²⁵ Wisconsin International Law Journal, 243 (1996).

²⁶ ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para.159.

²⁷ ICTY, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para.980.

²⁸ Fact, para.13.

²⁹ ICTR, *The Prosecutor v. Laurent Semanza*, ICTR-97-20-T, Trial Judgement and Sentence, May 15, 2003, para. 422.

³⁰ Fact, para.6.

³¹ Fact, para.4.

³² International Covenant on Civil and Political Right (ICCPR), Article 19(2). Fact, para.7.

followed, not violated. Thus, it is impossible to target the ethnic minorities based on the enforcement of this law.

The alleged targeted part lacks a particular identity which could form the intent of the perpetrator to target them for the destruction of the whole group

12. The intent must be to destroy at least a substantive part of the particular group.³³ The substantiality can be assessed numerically,³⁴ by its prominence,³⁵ and/or by a geographical approach.³⁶ If more than one group is targeted, each group must be identified with a positive particular identity and the elements of the crime of genocide must be considered in relation to each group separately.³⁷
13. The ethnic minorities workers in the mine sites have no particular positive identity. Although they were reported to constitute the majority of workers, the exact numerical amount was unknown, which makes it impossible to compare their number to their separate overall group. Thus, there is no established to prove that the DNP government intended to inflict force labor on these workers in order to destroy the ethnic minorities in Neckar.³⁸
14. Hence, assessing the evidence in totality, the genocidal intent is not the only reasonable inference drawn from this evidence and these circumstances.

III.A.4. Forced labor was not deliberately inflicted to bring physical destruction of the workers

15. The destruction of the workers, in whole or in part, must be the aim of the infliction of forced labor.³⁹ However, there is no evidence which could draw any connection between the private individual working in the mines and the interim government, or that they deliberately inflicted those alleged conditions of life to destroy the ethnic mine workers,⁴⁰ or that such actions were committed in furtherance of the government genocidal intent.
16. Genocidal intent may be inferred, among other facts, from evidence of other culpable acts systematically directed against the same ethnic minority groups.⁴¹ However, the reported inadequate housing, facilities, and insufficient foods were a consequence of war and starvation. The State was unable to provide adequate housing and support in such a short

³³ ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgment, 19 April 2004, para. 11

³⁴ ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para.97.

³⁵ ICTY, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 702

³⁶ ICTY, *Prosecutor v. Radislav Krstić*, IT-98-33-T, Trial Judgement, 02 August 2001, para.589

³⁷ ICTY, *Prosecutor v. Milomir Stakic*, IT-97-24-T, Trial Judgement, 31 July 2003, para.512.

³⁸ Raphaël Lemkin in Executive Session of the Senate Foreign Relations Committee, Historical Series, 1976, p. 370. In the same vein, the implementing legislation proposed by the Nixon and Carter administrations stated that “substantial part’ means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity”, S EXEC. REP. No. 23, 94th Cong., 2nd Sess. (1976), pp. 34-35.

³⁹ ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Appeal Judgement, 5 July 2001, para. 48.

⁴⁰ See *Supra* Note 35, Para.692.

⁴¹ See *Supra* Note 33, para. 33.

period of time because it suffered economic crisis, and the infrastructure in the mining regions were also destroyed by Mosel.⁴²

III.A.5. The forced labor presents no concrete threat to the existence of the ethnic minorities

17. The crime of genocide requires for its completion a concrete and real threat to the existence of the targeted group.⁴³
18. The WHO report merely reported on the increased of mortality rates and its causes, however no number⁴⁴ of deceased has been reported. Furthermore, the WHO report covered the whole scope of the mining region,⁴⁵ which exceeded the number of mine sites where the ethnic minorities constituted the majority of workers.⁴⁶ Thus, there exists no concrete threat to the existence of the ethnic minorities in Neckar.

III.A.6. Mr. Balboa did not aid and abet genocide under article 25(3)(c)

19. The crime of genocide must in fact occurred for Mr. Balboa to be liable for aiding and abetting the crime, but it did not.⁴⁷ In any event that the court finds that the elements of crime of genocide were established, Mr. Balboa still cannot be held liable as an aider and abettor.
20. Mr. Balboa did not know the genocidal intent behind the Policy,⁴⁸ thus his conduct could not be said to specifically direct to assist the commission of the crime of genocide.⁴⁹
21. The use of the mine sites in Neckar as a places to inflict forced labor is compulsory by the enforcement of the Temporary Law, thus Mr. Balboa had no choice but to obey.⁵⁰ Furthermore, his allowance to use his mine site did not have substantial effect on the perpetration of the crime, since the economic stabilization policy and the Temporary Law were implemented nationwide, thus even without his mine sites, other mine sites could still be used to perpetrate the crimes.⁵¹
22. His mere presence in the meeting could not indicate his knowledge on the genocidal objective of the implementation of the policy.⁵² He had no power or authority to reject the implementation of the Policy and the Temporary Law.⁵³ His knowledge, even drawn at the

⁴² Fact, para.3 & 4.

⁴³ See *Supra* Note 26, para.133.

⁴⁴ ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, para.97.

⁴⁵ Fact, para.11.

⁴⁶ Fact, para.10.

⁴⁷ ICTY, *The Prosecutor v. Radovan Karadžić, IT-95-5/18-T*, Trial Judgement, 24 March 2016, para.574.

⁴⁸ See *Supra* Note 33, para.140.

⁴⁹ ICTY, *Prosecutor v. Nikola Sainovic, Case No. IT-05-87-A, Appeal Judgement*, 23 January 2014, paras.1618.

⁵⁰ Fact, para.7.

⁵¹ Fact, para.6 & 10.

⁵² See *Supra* Note 33, para.23.

⁵³ Fact, para.5.

maximum, cannot be inferred to know that the ultimate objective of the Policy was the destruction of members of ethnic minorities.⁵⁴

III.B. Crime against humanity of enslavement under article 7(1)(c) was not committed

III.B.1. The DNP government did not exercise the powers attaching to the right of ownership over those who worked in the mines

23. To establish the alleged crime that victims were enslaved, the perpetrator must exercise the powers attaching to the right of ownership over the victims.⁵⁵ Powers attaching to right of ownership is the use, enjoyment and disposal of a person regarded him or her as property, by placing that person in a situation of dependence which entails deprivation of any form of autonomy.⁵⁶
24. Making Neckar people working in the mine is a compulsory forced labor which does not deprive autonomy of miners since Neckar was encountering starvation and economic instability caused by Mosel's blockade of goods.⁵⁷ Without doing so Neckar's economy would collapse that would affect its citizens. Besides, the detainees were kept in detention center since they broke Neckar temporary law.⁵⁸ Moreover, International Humanitarian Law does not prohibit all labor by protected persons in armed conflicts.⁵⁹ Civilians deprived of their liberty in the context of a non-international armed conflict can nevertheless be made to work under certain circumstances.⁶⁰
25. In any events, the court considered the acts as forced labor; however, it is only one factor to be taken into consideration as enslavement.⁶¹ As to prove it, the prosecutor must illustrate that the perpetrator intentionally exercised any or all of the powers attaching to the right of ownership.⁶²

III.B.2. Compulsory labor was not a widespread or systematic attack directed against a civilian population

26. An act is considered "widespread" when it affects the large-scale nature of the attack and the number of its victims.⁶³ Since Neckar was in conflict and experiencing starvation and

⁵⁴ See *Supra* Note 33, para.23.

⁵⁵ ICC, Elements of Crimes, 7(1)(c), Element 1.

⁵⁶ ICC, *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the statute, 7 March 2014, para. 975.

⁵⁷ Fact, para. 4.

⁵⁸ Fact, para. 7.

⁵⁹ ICTY, *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002, para. 359.

⁶⁰ ICTY, *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002, para. 360.

⁶¹ ECCC, *Prosecutor v. KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgment, 3 February 2012, para.129.

⁶² ECCC, *Prosecutor v. KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgment, 3 February 2012, para.121.

⁶³ ICTY, *Prosecutor v. Dragoljub Kunarac*, IT-96-23-T&IT-96-23/1-T, Trial Judgment, 22 February 2001, para. 428.

economic instability;⁶⁴ therefore, the likelihood of people dying would exist. Besides, regarding the nature of the mining, it is considered as most hazardous work since the workers encounter high toll of death, injury and disease.⁶⁵ Therefore, number of the workers died in the mines would be more than other sectors due to the nature of mining sectors.

27. “Systematic” refers to an organized plan whose scheme is advanced by a common policy that creates patterns which result in a non-accidental repetition of similar criminal conduct on a regular basis.⁶⁶ The Temporary Law and Policy were not schemes constituted non-accidental repetition attack on the civilian population since the underlying purposes of the Temporary Law was made primarily in relation to political purpose to stop the opposition party from criticizing the DNP’s policy that it had a utopian ideology⁶⁷ while to the Policy had was the principles of Neckar’s government that guided it to overcome the starvation and economic instability.⁶⁸ Besides, the Temporary law and the Policy were created by two different entities; therefore, “systematic” in this sense could not be established. Additionally, the incidents include unsanitary conditions, and the lack of food and housing⁶⁹ happened not because of the Temporary Law and Policy but it was due to the fact that Neckar was engaged in conflict and encountered starvation and economic instability.⁷⁰

III.B.3. The DNP government did not knew or intended the forced labor to be part of widespread and systematic attack directed against a civilian population

28. The perpetrator must know that there is an attack on a civilian population and that he knows that his acts are part of that attack.⁷¹ Since making people working in the mines was not a crime there was no reason for them to know their action was an attack.
29. In any events, the compulsory work constitutes forced labor, the DNP government could not know that it was part of widespread or systematic since they were just following orders and playing their roles in accordance with the Temporary Law and the Policy.⁷² Moreover, they did not intend the forced labor as a part of attack. If so, they would not provide houses, sanitation facilities, and food to the mineworkers.⁷³

⁶⁴ Fact, para. 4.

⁶⁵ International Labor Organization, *Mining: A hazardous work*, Available at: [http://www.ilo.org/safework/areasofwork/hazardous-work/WCMS_124598/lang--en/index.htm]

⁶⁶ ICC, *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-717, Decision on confirmation of charge, 30 September 2008, para. 397.

⁶⁷ Fact, para. 5 and 6.

⁶⁸ Fact, para. 4.

⁶⁹ Fact, para. 11.

⁷⁰ Fact, para. 3.

⁷¹ ICTY, *Prosecutor v. Dragoljub Kunarac*, IT-96-23&IT-96-23/1-A, Appeal Judgment, 12 June 2002, para. 99.

⁷² Fact, para. 6 and 7.

⁷³ Fact, para. 11.

III.B.4. Mr. Balboa is not criminally responsible for facilitating the commission of a crime in the sense of article 25(3)(c)

30. *Actus Reus*: The aider and abettor must carry out an act which consists of practical assistance, encouragement, or moral support to the principal offender.⁷⁴ Mr. Balboa only chaired the meeting for the adoption of the Policy which its purpose was to overcome the starvation and economic instability for his nation. Further, he was not in a position to prevent people to work in the mine sites since it is subject to the Policy and Temporary law. Therefore, it cannot be assumed that his act was an encouragement for the commission of the crime.
31. *Mens Rea*: The *mens rea* of aiding and abetting requires that the aider and abettor must be aware of the essential elements of the crime committed by the principal.⁷⁵ Neckar was engaged in conflict which led to starvation and economic instability.⁷⁶ The only way to solve this crisis is to ensure that all people have job to support themselves as well as state economic since there is no provision prohibit all kind of labor by protected persons in armed conflicts,⁷⁷ which including working in the mine sites. Moreover, the detainees who worked in the mine sites due to violation of the Temporary was completely lawful, therefore, there is no sufficient evidence to establish Mr. Balboa's intention to assist the crime of enslavement.

III.C. Mr. Balboa is not responsible for the war crimes of attacking civilian population under article 8(2)(b)(i) and civilian objects under article 8(2)(b)(ii)

III.C.1. The crimes were not committed in context of, and associated with the armed conflict

III.C.1.a. International armed conflict was no longer existed since 2016

32. If there is "a general close of military operation or a general conclusion of peace", international armed conflict is terminated.⁷⁸ Following, the war causing Neckar's regional infrastructures destroyed⁷⁹; there was neither new destruction nor new military operation commenced by both parties, thus general close of military operation is concluded.

III.C.1.b. The nexus requirement for the war crimes in not sufficient

High-Tek IT Corporation is not under the command responsible of Neckar

⁷⁴ ICTY, *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002, para. 88.

⁷⁵ ICTY, *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002, para. 90.

⁷⁶ Fact, para. 4.

⁷⁷ ICTY, *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002, para. 359.

⁷⁸ ICTY, *Prosecutor v. Gotovina*, IT-06-90-T, Judgment, 15 April 2011, paras. 1694.

⁷⁹ Fact, paras.4.

33. To held State liable for acts committed by individuals or private military group, so as to establish nexus, two degree of control test were imposed in *Tadic* case: (i) the State must issue instructions or publicly give retroactive consents to that action⁸⁰, or (ii) the State must wield overall control on that group by coordinating general plan of military activities.⁸¹ Herein, beside Mr. Balboa's order, there is no fact indicating that Neckar government neither gave any instruction or consent to those hackers nor help coordinating the alleged crimes.

Hackers still retain their civilian status

34. Status of perpetrator as a combatant is the indicator to prove the nexus of the crimes to the armed conflict.⁸² As High-Tek IT Corporation was neither integrated nor under command responsible to the Neckar forces, thus the status of those hackers remain civilians.⁸³

Mr. Balboa was not in an official duty to order the alleged crimes

35. If the perpetrator commits the crime as a part or in context of his official duty, the nexus to armed conflict is established.⁸⁴ If the perpetrator is not belonged to the armed forces, he is liable only when he is a public official, a person holding public power, or *de facto* representing the government to assist the warfare.⁸⁵ Mr. Balboa only used authority as a majority shareholder and CEO⁸⁶ to order hackers from his Corporation to commit the conducts⁸⁷, and such conducts neither supported nor contributed any war efforts for Nekcar, hence the nexus is not established.

III.C.2. Cybercrime do not constitute war crimes

Cyber is not a form of "attack"

36. The crimes encoded in the Rome Statute are exhaustive.⁸⁸ The Cybercrime is not stipulated in the Rome Statute, thus upholding the *nullum crimen sine lege* principle,⁸⁹ the Court has no jurisdiction to try such conduct.⁹⁰ Further, the Court fully embraced the general principle *in dubio pro reo*,⁹¹ thus the term "attack" in the element of the war crime shall not be interpreted to cover the act of hacking using the computer technology. "Serious violations of the laws and customs applicable in armed conflict" are only the crimes enshrined under article 2, and 3 of

⁸⁰ ICTY, *Prosecutor v. Tadic*, IT-94-1-A, Judgment, 15 July 1999, para 118, 119.

⁸¹ ICTY, *Prosecutor v. Tadic*, IT-94-1-A, Judgment, 15 July 1999, para 131.

⁸² ICTY, *Prosecutor v. Kunarac*, IT-96-23 &IT-96-23/1-A, Judgment, 12 June 2002, para 59.

⁸³ ICRC, *The Montreux Document on Private Military and Security Companies*, 2 May 2011, p. 14.

⁸⁴ ICTY, *Prosecutor v. Kunarac*, IT-96-23 &IT-96-23/1-A, Judgment, 12 June 2002, para 59.

⁸⁵ ICTY, *Prosecutor v. Kayishema et al*, ICTR-95-1, Judgment, 21 May 1999, para 175.

⁸⁶ Fact, para 1.

⁸⁷ Fact, para 15.

⁸⁸ Report of the International Law Commission on the work of its forty-sixth session, 1994, p. 38, para 1.

⁸⁹ Rome Statute, 1 July 2002, article 22(1).

⁹⁰ Rome Statute, 1 July 2002, article 5.

⁹¹ Rome Statute, 1 July 2002, article 22(2).

ICTY statute, and in the draft Code of Crimes against the Peace and Security of Mankind.⁹² However, both of the statutes did not cover any crimes related to cybercrime which is a new crime emerged in international law.

37. Alternatively, even war crime is to be interpreted as the grave breaches of the Geneva Conventions of 1949 and its Additional Protocols, the meaning of the term “attacks” intended by the drafter of AP I only means “combat action”⁹³ and “a technical term relating to specific military operation”.⁹⁴ Hence, any attack launched without connection to military operation, and physical force is beyond the purpose of the drafters.⁹⁵ Cybercrime in the present case was neither launched as a method of warfare nor related to any specific military operation against Mosel.⁹⁶ It was a pure non-kinetic conduct committed by civilian hackers pursuant to Mr. Balboa’s order for his private purpose.

The cyber operation is not the only cause of the damages

38. ICRC denoted that cyber operations are not considered as "attack", if its effect is reversible.⁹⁷ Shutting down the medical equipment and turning off the electricity supply at the first place were reversible as it could have been turned on; hence cybercrime was not the only cause of the unfortunate deaths.

In any event, the cyber operation was proportionate

39. As those 10 escapee workers were detained under Temporary Law for publicly criticizing the government, or communicating with the enemy,⁹⁸ in addition to the fact that they provided information of Nekcar to Mosel’s Police and Media, thus confirming them as Mosel secret agent and making them as the legitimate targets. Hacking into the computer of the hospital to turn off the medical equipment and electricity supply primarily aimed to target only those 10 escapees who were being treated. As the damages at the first place were reversible, and patients could have been sent to other hospitals.

⁹² Report of the International Law Commission on the work of its forty-sixth session, 1994, p. 39, paras. 8 and 9.

⁹³ ICRC, Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949, (1987), paras. 1180.

⁹⁴ ICRC, Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949, (1987), paras. 4783.

⁹⁵ Michael N. Schmitt, “Attack” as a Term of Art in International Law: The Cyber Operations Context, International Conference on Cyber Conflict, 4th International Conference on Cyber Conflict, (2012), p. 290.

⁹⁶ Fact, paras. 15.

⁹⁷ ICRC, 31st International Conference of the Red Cross and Red Crescent, IHL and the Challenges of Contemporary Armed Conflicts, Report 31IC/11/5.1.2, 2011, p. 37.

⁹⁸ Fact, paras. 12.

III.C.3. Mr. Balboa is not responsible for ordering the commission of the crime under article 25(3)(b)

40. *Actus Reus*: to be liable under this mode of liability, the perpetrator must order his subordinates to commit the crime.⁹⁹ However, Mr. Balboa ordered the hackers to only hack in to a computer system, and to turn off the medical equipment and the electricity supply.¹⁰⁰
41. *Men Rea*: criminal liability for ordering requires the perpetrator to commit the crimes with intent and knowledge.¹⁰¹ The perpetrator must mean to cause that consequence, and aware the crime will be committed in the ordinary course of event.¹⁰² However, Mr. Balboa did not mean to cause the unfortunate deaths of other 35 patients, since shutting down the medical equipment and turning off the electricity aimed and substantially affected only to the 10 escapees who were being treated.¹⁰³ Since damages at the first place were reversible, and the patients could have been sent to other hospitals, Mr. Balboa could not have foreseen such tragedy.

III.C.4. In the alternative, Mr. Balboa is not responsible for commission of the crimes through another person under article 25(3)(a)

42. *Actus Reus*: liability under this article requires the indirect perpetrator to exercise control over the organization which consists of subordinates belong to “a same structure, acting collectively and systematically”.¹⁰⁴ His order must be ensured by automatic compliance.¹⁰⁵ Mr. Balboa did not wield control over the High-Tek IT Corporation, since he is just a major shareholder and CEO¹⁰⁶, not the sole-decision-maker. High-Tek IT is not a pure hacking Corporation; hence, there is no other employee within the Corporation to comply with his order beside his hacker team.
43. *Men Rea*: perpetrator is held responsible only when elements of intent and knowledge under article are satisfied.¹⁰⁷ This has been established above in the mode of liability of order.

⁹⁹ ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, paras.145.

¹⁰⁰ Fact, paras. 15.

¹⁰¹ Rome Statute, 1 July 2002, Article 30.

¹⁰² O. Triffterer (ed.), *Commentary on the Rome Statute* (1999), p. 533.

¹⁰³ Fact, paras. 15.

¹⁰⁴ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, paras. 1403.

¹⁰⁵ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, paras. 1408.

¹⁰⁶ Fact, paras. 1.

¹⁰⁷ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, paras. 1403.

PRAYER FOR RELIEF

The Defense respectfully submits that there is no sufficient evidence to establish “substantial grounds to believe” that the three crimes were committed. We respectfully request the court to discharge all the charges.

**Respectfully submitted,
Counsels for the Defense**