

**6<sup>th</sup> RED CROSS**  
**INTERNATIONAL HUMANITARIAN LAW MOOT**

**International Criminal Court**

**THE PROSECUTOR**

**v.**

**COLONEL CALLEY JONES**

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**MEMORIAL FOR THE DEFENCE**

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**(Word Count: 1995)**

**Team Number: BJIHL 1206**

**MEMORIAL FOR THE DEFENCE**

## **PRELIMINARY FINDINGS**

### **1. The Non-international Armed Conflict (NIAC) in West Drakonia Commenced in September 2010.**

In *Lubanga*, the ICC, confirming *Tadic*,<sup>1</sup> defined NIAC as “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.”<sup>2</sup> Two aspects must be satisfied for the existence of a NIAC: the “organisation” of the parties and the “intensity” of the conflict.<sup>3</sup>

#### **1.1 The organisation requirement was satisfied.**

The “organisation” is determined by factors such as issuance of political statements, military equipment availability, the group’s ability to plan military operations and the level of military involvement.<sup>4</sup>

In this case, the DNA promoted political agenda, held elections and established the Drakonian Democratic Republic.<sup>5</sup> Moreover, artillery, tanks, mortars and grenade launchers were used by DNA militias.<sup>6</sup> Armed men and ammunition were also transported.<sup>7</sup> To restore peace, the Katoland security forces were deployed.<sup>8</sup>

#### **1.2 The intensity requirement was satisfied.**

*Lubanga* confirmed that “intensity” is determined by the following factors: seriousness of attacks, spread over territory, period of time, extent of government

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<sup>1</sup> ICTY, *Tadic* Interlocutory Appeal Decision, para.70.

<sup>2</sup> ICC, *Lubanga* Trial Judgment, para.534.

<sup>3</sup> ICTY, *Delalic* Trial Judgment, para.184.

<sup>4</sup> ICTY, *Limaj* Trial Judgment, para.90; *Haradinaj* Trial Judgment, para.60; *Boskoski* Trial Judgment, paras.199-203.

<sup>5</sup> Moot Problem, para.8.

<sup>6</sup> *Ibid.*, para.24.

<sup>7</sup> *Ibid.*, para.33.

<sup>8</sup> *Ibid.*, paras.26, 33, 28.

forces, mobilisation and the distribution of weapons.<sup>9</sup>

In this case, intense attacks re-established the 2003 Emergency Proclamation.<sup>10</sup> The armed conflict lasted for months.<sup>11</sup> It spread over main towns and villages of West Drakonia.<sup>12</sup> Tanks and artillery were used.<sup>13</sup> Thus the requirements of NIAC were satisfied.

## **2. On December 24<sup>th</sup>, 2010, an International Armed Conflict (IAC) Commenced between Katoland and the FRB.**

IAC is defined as “armed conflicts which may arise between two or more of the High Contracting Parties”.<sup>14</sup> Footnote 34 of the Elements of Crimes (**EoC**) stipulates that an IAC includes a military occupation.

In this case, on December 24<sup>th</sup>, 2010, the FRB launched air strikes on KAF positions around Mesto, and in the following days, Mesto was occupied by FRB forces.<sup>15</sup> Thus an IAC came into existence.

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<sup>9</sup> ICC, *Lubanga* Judgment, para.538.

<sup>10</sup> Moot problem, para.25.

<sup>11</sup> *Ibid.*, paras.24, 46.

<sup>12</sup> *Ibid.*, paras.26, 32.

<sup>13</sup> *Ibid.*, para.24.

<sup>14</sup> Four Geneva Conventions, Common Art.2.

<sup>15</sup> Moot problem, para.46.

## PLEADINGS AND AUTHORITY

### • . WAR CRIME OF OUTRAGES UPON PERSONAL DIGNITY

#### 1. The Required Elements of Crimes Are Not Satisfied.

The crime under EoC Article 8(2)(c)(ii) requires six elements, two of which are unsatisfied.

##### 1.1 Detainees were not humiliated, degraded or violated.

The European Court of Human Rights (**ECtHR**) defined “degrading” as humiliating and debasing the person concerned.<sup>16</sup> Additionally, it must be a gross humiliation of the victim publicly or drive one to act against one’s will.<sup>17</sup> As for *mens rea*, the perpetrator must know that the act or omission could have such effect.<sup>18</sup> Additionally, Additional Protocol II (**AP II**) provides that men and women shall be separately detained within the limits of capabilities.<sup>19</sup> The ICRC reported that because female involvement in conflicts is low, it is hard to always provide separate facilities for women.<sup>20</sup>

In this case, based on the circumstances, fair treatment was provided as much as possible and no ill-treatment occurred according to the declaration of NCC spokesmen. Furthermore, as the multiple threats to Katoland’s security required immediate measures,<sup>21</sup> separate and spacious detention facilities in Argus and Corti thus could not be obtained in such a short time.

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<sup>16</sup> ECtHR, *Raninen v. Finland* case, para.55.

<sup>17</sup> European Commission of Human Rights, *Greek* case, para.1339.

<sup>18</sup> ICTY, *Foca* Trial Judgment, para.514.

<sup>19</sup> AP II, Art.5(2)(a)

<sup>20</sup> ICRC, *Women and War* (Geneva, 2008), p.22.

<sup>21</sup> Moot problem, para.31.

## **1.2 The act did not constitute an outrage upon personal dignity.**

In *Aleksovski*, the ICTY considered two elements to determine severity of suffering: the victim's temperament or sensitivity (subjectivity) and the act's general acceptability (objectivity).<sup>22</sup> Additionally, the ICTY confirmed that mere inconvenience or discomfort to victims is not enough; rather, the acts should be "physical and psychological abuse and outrages that any human being would have experienced as such".<sup>23</sup>

In this case, although the detention reportedly did not separate genders and was overcrowded,<sup>24</sup> which might cause inconvenience and discomfort, no sufficient evidence shows the violations reached the requisite levels. Furthermore, the reports were only released by NGOs<sup>25</sup> and cannot exclude reasonable doubt.

## **2. Jones Is Not Responsible under Article 28(a).**

In *Bemba*, "effective control" is an element of responsibility<sup>26</sup> and must be obtained by modality, manner or nature by a commander over his forces or subordinates.<sup>27</sup> In *Hadzihasanovic*, simply exercising influence is insufficient.<sup>28</sup> *Blaskic* held that the commander must have effective control over his personnel, and whether the personnel had control is irrelevant.<sup>29</sup> Furthermore, effective control must have existed when the crime was committed.<sup>30</sup>

In this case, the KAF and KESA, rather than Jones, were in charge of the detention.<sup>31</sup> Appointed as Vice-Chairman of the NCC,<sup>32</sup> Jones welcomed the assistance of the KAF and KESA,<sup>33</sup> but did not have effective control over them. Additionally, after

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<sup>22</sup> ICTY, *Aleksovski* Judgment, para.56.

<sup>23</sup> ICTY, *Aleksovski* Appeal Judgment, para.28.

<sup>24</sup> Moot problem, paras.27, 29.

<sup>25</sup> *Ibid.*, paras.30, 32.

<sup>26</sup> ICC, *Bemba* Decision on Confirmation of Charges, paras.410, 411.

<sup>27</sup> *Ibid.*, para.441.

<sup>28</sup> ICTY, *Hadzihasanovic* Trial Judgment, paras.80, 795.

<sup>29</sup> ICTY, *Blaskic* Appeal Judgment, para.60.

<sup>30</sup> ICTY, *Holilovic* Appeal Judgment, para.59; *Bagosora et al.* Judgment and Sentence, para.2012.

<sup>31</sup> Moot problem, paras.26, 29.

<sup>32</sup> *Ibid.*, para.19.

<sup>33</sup> *Ibid.*, para.25.

approaching Corti, Jones and the KAF issued separate statements.<sup>34</sup> Thus, Jones lacked control at the time.

## **• . WAR CRIME OF ATTACKING OBJECTS OR PERSONS USING THE DISTINCTIVE EMBLEMS OF THE GENEVA CONVENTIONS**

### **1. The Required Elements of Crimes Are Not Satisfied.**

The crime under EoC Article 8(2)(e)(ii) requires four elements, two of which are unsatisfied.

#### **1.1 Protected objects or persons were not attacked.**

##### **1.1.1 Protection no longer existed.**

AP II declares that medical personnel cannot carry out tasks incompatible with their humanitarian mission,<sup>35</sup> and that when they cease their humanitarian function and commit hostile acts, their protection ends.<sup>36</sup> The ICRC confirmed this rule<sup>37</sup> and further explained that medical units are not protected by the emblem *per se*, but by their humanitarian function.<sup>38</sup> Moreover, the improper use of the emblem is prohibited.<sup>39</sup>

In this case, the Drak militias used medical vehicles to evacuate the town and transport armed men and ammunition, as well as conduct attacks.<sup>40</sup> The function of the ambulances thus changed to military use, and the protection ended.

##### **1.1.2 There was no attack.**

Additional Protocol I (**AP I**) defines “attack” as acts of violence against enemies in

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<sup>34</sup> *Ibid.*, para.28.

<sup>35</sup> AP II, Art.9(1)

<sup>36</sup> *Ibid.*, Art.11(2)

<sup>37</sup> Jean-Marie Henckaerts and Louise Doswald-Beck(ed.), *Customary International Humanitarian Law*, Vol. I (Cambridge, 2009), Rule.29, pp.98-102.

<sup>38</sup> *Ibid.*, Rule.30, pp.102-104.

<sup>39</sup> *Ibid.*, Rule.59, pp.207-209.

<sup>40</sup> Moot problem, para.33.

offence or in defence.<sup>41</sup> The ICRC has confirmed this definition as customary international law.<sup>42</sup>

In this case, following instructions to determine ambulance use, Katoland forces only searched and confiscated items.<sup>43</sup> Thus no attack occurred.

## **1.2 There was no intention to attack protected objects or persons.**

Under Article 30 of the Rome Statute, a person has intent where, in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

In this case, Drak militias using ambulances with protected emblems for transportation killed two Katoland soldiers.<sup>44</sup> The subsequent instructions only sought to stop the transportation of Drak militias and weapons.<sup>45</sup> The target of the instruction was limited to enemy units. Thus there was no intention to attack protected objects or persons.

## **2. Jones Is Not Responsible under Article 25(3)(b).**

In *Mudacumura*, the responsibility of “ordering” requires authority and the order’s direct effect on the commission of the crime.<sup>46</sup> In *Akayesu*, the ICTR found evidence must show how and in what capacity the accused supported the act.<sup>47</sup> Furthermore, the accused’s knowledge cannot be “presumed”; solid evidence must prove it.<sup>48</sup>

In this case, solid evidence showing Jones’ knowledge of the alleged crime cannot be provided. Furthermore, although Jones held an executive position,<sup>49</sup> no evidence shows how and in what capacity he supported the act. Thus he cannot be responsible.

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<sup>41</sup> AP I, Art.49.

<sup>42</sup> Claude Pillod (et al.), *Commentary on the AP I&II* (Nijhoff, 1987), para.4783 and fn.19.

<sup>43</sup> Moot problem, para.34.

<sup>44</sup> *Ibid.*, para.33.

<sup>45</sup> *Ibid.*, para.34.

<sup>46</sup> ICC, *Mudacumura* Decision on the Prosecutor's Application under Art.58, para.63.

<sup>47</sup> ICTR, *Akayesu* Judgment, para.642.

<sup>48</sup> ICTY, *Kordic* Judgment, para.427.

<sup>49</sup> Moot problem, para.19.



## **Ž . WAR CRIME OF ATTACKING CIVILIAN POPULATION**

### **1. The Required Elements of Crimes Are Not Satisfied.**

The crime under EoC Article 8(2)(e)(i) requires five elements, three of which are unsatisfied.

#### **1.1 There was no attack.**

In addition to the definition above,<sup>50</sup> “attack” is a technical term relating to a specific military operation and “combat action”.<sup>51</sup>

In this case, an unidentified and untraced virus caused damage to the system.<sup>52</sup> No military operation or combat action involving parties to the conflict took place. Therefore no attack was launched.

#### **1.2 The alleged attack did not target civilians.**

Military objectives are defined by their nature, location, purpose or use provide an effective contribution; attacking them provides a definite military advantage.<sup>53</sup> *Strugar* listed logistical support buildings and military transportation as military objects.<sup>54</sup> Additionally, *Kupreskic* confirmed civilian protection ceases when it’s unavoidable.<sup>55</sup>

In this case, the Bargo station supplies electricity to an FRB military base with 8,000 troops and an adjoining airfield, located only 10 km from the border.<sup>56</sup> Its location, purpose and use provide an “effective contribution” and attacking it offers a definite military advantage. Thus, despite the unavoidable damage to civilians,<sup>57</sup> the attack did not target civilians.

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<sup>50</sup> See above, Count II 1.1.

<sup>51</sup> *Supra* note 42, paras.1880, 4783.

<sup>52</sup> Moot problem, paras.40, 42.

<sup>53</sup> *Supra* note 37, Rule.8, pp.29-32.

<sup>54</sup> ICTY, *Strugar* Trial Judgment, para.278.

<sup>55</sup> ICTY, *Zoran Kupreskic* Trial Judgment, paras.522-523.

<sup>56</sup> Moot problem, para.39.

<sup>57</sup> *Ibid.*, para.42.

### **1.3 The element of “intent” is missing.**

“Intentionally directing” in the Rome Statute is the same as “willfully” in AP I,<sup>58</sup> and encompasses the concepts of “wrongful intent” or “recklessness”, whereas “ordinary negligence” or “lack of foresight” are not covered.<sup>59</sup> The ICTY confirmed this in *Galic*.<sup>60</sup> *Blaskic* stated that intention exists where one acts with knowledge or the possibility of knowing that civilians are being targeted.<sup>61</sup>

In this case, the Bargo Station shutdown by unidentified persons partly affected civilians.<sup>62</sup> Neither “intent” nor “recklessness” can be inferred from existing evidence. Instead, the alleged operations were aimed at re-establishing authority over West Drakonia,<sup>63</sup> and did not constitute intent to attack civilians.

## **2. Jones Is Not Responsible under Article 25(3)(d).**

The ICC established that five elements constitute this individual responsibility, two of which are missing.

### **2.1 There is no group with a common purpose.**

*Mbarushimana* stated that the alleged crime must be carried out by a group of persons acting with a common purpose that includes an element of criminality.<sup>64</sup>

In this case, the core aim of KAF’s operation in Bargo was to re-establish Katoland’s control over West Drakonia,<sup>65</sup> without any evidence supporting the intention to cause other damage. Furthermore, the exact perpetrator of the cyber-attack is unknown.<sup>66</sup>

### **2.2 Jones did not contribute to the alleged attack.**

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<sup>58</sup> AP I, Art.85.

<sup>59</sup> *Supra* note 42, para.3474.

<sup>60</sup> ICTY, *Galic* Trial Judgment, para.54.

<sup>61</sup> ICTY, *Blaskic* Trial Judgment, para.180.

<sup>62</sup> Moot problem, para.40.

<sup>63</sup> *Ibid.*, para.20.

<sup>64</sup> ICC, *Mbarushimana* Decision on Confirmation of Charges, para.271.

<sup>65</sup> Moot problem, paras.20, 25, 38.

<sup>66</sup> *Ibid.*, para.43.

The ICC found that contributions to the alleged crimes must be “significant”.<sup>67</sup> When assessing the contribution, it considered whether the person created or executed the plan.<sup>68</sup> In *Sang*, the Court required that the contribution result in the commission of the crimes.<sup>69</sup>

In this case, Jones neither executed an “attack” nor created a criminal plan. Additionally, even assuming Katoland is responsible, the KESA, rather than Jones, would be liable. The KESA was in charge of cyber activities<sup>70</sup> and, as shown earlier, Jones has no effective control over it.

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<sup>67</sup> *Supra* note 64, para.276.

<sup>68</sup> *Ibid.*, para.284.

<sup>69</sup> ICC, *Ruto, Kosgey and Sang* Decision on Confirmation of Charges, para.354.

<sup>70</sup> Moot problem, para.20.

**PRAYER**

Based on the rules and evidence stated above, the Defendant respectfully requests this Honorable Court to adjudge and declare that Colonel Calley Jones is not criminally responsible under the Rome Statute.

**RESPECTFULLY SUBMITTED,**

Counsel for the Defence