

**7th RED CROSS  
INTERNATIONAL HUMANITARIAN LAW  
MOOT**

**International Criminal Court**

**MEMORIAL FOR THE DEFENSE**

**The Johns Hopkins University-Nanjing University Center for  
Chinese and American Studies**

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**MEMORIAL FOR THE DEFENSE**

## **I. PRELIMINARY MATTERS**

### **1. Nature of Conflict**

An armed conflict is considered to be international in character “if it takes place between two or more States” this also “extends to the partial or total occupation of the territory of another State.”<sup>1</sup> Furthermore, internal armed conflict that breaks out on the territory of a State may become international – or, depending upon the circumstances, be international in character alongside an internal armed conflict – if another State intervenes in that conflict through its troops (direct intervention).<sup>2</sup>

International Armed Conflict (IAC) was initiated in Kebia, Alphon in July 2008 between the Alphonian Armed Forces (AAF) and the People’s Army of Bethuis (PAB),<sup>3</sup> with Alphon and Bethuis acting as the two High-Contracting Parties.<sup>4</sup> Kebia was further being occupied by the PAB and the Democratic Kebian Front (DKF).<sup>5</sup> The initial conflict between the AAF and the DKF became international in July with the direct intervention of 2000 PAB troops.<sup>6</sup>

### **2. Standard of Proof**

Under the standard of proof, the onus is on the Prosecution to provide “sufficient evidence to establish substantial grounds to believe that the person committed the crime charged”<sup>7</sup> In addition to these standards, the charges cannot amount to “mere theory or suspicion”<sup>8</sup> but must

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<sup>1</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision, ICC-01/04-01/06-803, para. 209.

<sup>2</sup> *Ibid.*

<sup>3</sup> Facts, para.11.

<sup>4</sup> Four Geneva Conventions, Common Art. 2.

<sup>5</sup> Facts, para. 12.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Mbaushimana*, Confirmation of Charges ICC-01/04-01/10 40, para.40.

<sup>8</sup> *Lubanga*, Confirmation of charges ICC-01/04-01/06-803, para.39.

be tangible, factual and concrete.<sup>9</sup> General Reed shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.<sup>10</sup> The Defense contends that these standards have not been met for any of the three charges presented before the Court.

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<sup>9</sup> *Mbarushimana*, Confirmation of charges, ICC-01/04-01/10 40, para.40.

<sup>10</sup> Rome Statute of the International Criminal Court (*ICCst*), Art. 66(1).

## II. PLEADINGS

### **COUNT 1: GENERAL REED IS NOT LIABLE FOR THE WAR CRIME OF EXCESSIVE INCIDENTAL DEATH, INJURY, OR DAMAGE.**

#### **1. Required Elements of Crime under Article 8 (2) (b) (iv) are not satisfied.**

Elements of Crimes under Article 8(2) (b) (iv) require the establishment of five elements, two of which are not satisfied.

#### **1.1 Element 2 is not satisfied; damages are not clearly excessive in relation to the concrete and direct overall military advantage anticipated.**

The collateral damage of an attack cannot be excessive in relation to the “concrete and direct” military advantage anticipated.<sup>11</sup> The advantage concerned must be substantial and relatively close, as in not being determined by long-term planning.<sup>12</sup>

In this case, the military advantage was to quickly and efficiently recapture Kiesel with limited supply of artillery ammunition by eliminating military objects and military leader, Colonel Bing.<sup>13</sup>

Unavoidable civilian casualties are lawful in order to conduct operations out of military necessity against valid military targets.<sup>14</sup>

In order to avoid excessive damages, military commanders must consider the *jus in bello* proportionality requirement on protecting civilians from the effects of lawful attacks.<sup>15</sup> It

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<sup>11</sup> *Additional Protocol I (API)*, Art 51(5) (b).

<sup>12</sup> *Commentary on the Additional Protocols to the Geneva Conventions*, International Committee of the Red Cross (ICRC Study), para.2209.

<sup>13</sup> Facts, para.20.

<sup>14</sup> *Prosecutor v. Stanislav Galic*, Trial Chamber I, IT-98-29-T (5Dec2003) footnote 76.

requires distinction and directing attacks only against military objectives,<sup>16</sup> and feasible precautionary measures.<sup>17</sup>

Two tests should be satisfied for military objectives: by their nature, location, purpose or use make an effective contribution to military action; and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time offers a definite military advantage.<sup>18</sup> All targets that served as objectives in Operation Thunderstorm meet these criteria: The DKF/PAB command centre, BAS factory (which was preparing to manufacture explosive devices),<sup>19</sup> the enemy army barracks, the main communication centre, and Colonel Bing's residence.<sup>20</sup> The ICRC provided a list of categories of military objectives including armed forces, barracks, War Ministries, installations of broadcasting of fundamental military importance, industries for the manufacture of fundamental importance for the conduct of the war including armaments such as weapons, accessories and all other war material,<sup>21</sup> thus proving that all targets listed for Operation Thunderstorm were valid military objects for attack.<sup>22</sup>

General Reed took into consideration the feasible precautions to minimize the expected collateral damage.<sup>23</sup> The feasible precautions are required in terms of the choice of means and methods of attack, effective advance warning, and evacuation of civilian population.<sup>24</sup> However, when element of surprise is necessary,<sup>25</sup> the advance warning does not permit.<sup>26</sup> An advance warning of attack is required in order for the attack to be legal, unless circumstances do not permit it.<sup>27</sup> If

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<sup>15</sup> *Elements of Crimes* (EOC), footnote 36; API, Art. 51 (2).

<sup>16</sup> API, Arts 48, 52 (1), and 57 (2) (a) (i).

<sup>17</sup> Ibid, Arts 57 and 58.

<sup>18</sup> Ibid, Arts 51 and 52 (2).

<sup>19</sup> Facts, para. 25.

<sup>20</sup> Ibid, para. 21.

<sup>21</sup> *The ICRC Study*, p632, footnote 3 I (1), (3), (7), (8) (a).

<sup>22</sup> Facts, para.21.

<sup>23</sup> API, Art 58(c).

<sup>24</sup> API, Arts 57 (2) (a) (ii), (c) and 58 (a) (c).

<sup>25</sup> *The ICRC Study*, para 2223; Customary International Humanitarian Law (CIHL), footnote 86.

<sup>26</sup> Ibid, Art 57 (2) (c); *Amended Protocol II to the CCW*, Art. 3 (11).

<sup>27</sup> Additional Protocol I, Art. 57 (2) (a) (ii).

the element of surprise is a necessity to achieve the military objectives,<sup>28</sup> issuing an advance warning is legally unnecessary and self-defeating.<sup>29</sup>

The attack was launched in consideration of: the location of the civilians,<sup>30</sup> the timing of the attack,<sup>31</sup> weapons' accuracy,<sup>32</sup> aerial surveillance for repositioning,<sup>33</sup> and conducting a civilian evacuation.<sup>34</sup>

### **1.2 Element 3 is not satisfied; General Reed did not know nor could have known that the attack would cause excessive casualties.**

Knowledge of the circumstances requires that the perpetrator assess the possible casualties based on requisite information which enables him to know the excessive damages as a consequence of the attacks.<sup>35</sup> Reed had no control over the NIA,<sup>36</sup> hence no access to updated intelligence about military objectives detected by the drones. He could not have known that attack would cause excessive casualties in either the ordinary course of the attack or unforeseeable circumstances.<sup>37</sup>

### **1.3 Alternatively, under ICC Statute Article 25(3) (a), General Reed bears no criminal responsibility as a co-perpetrator for contributing to the crime.**

Two elements of co-perpetration are required:<sup>38</sup> 1) the existence of an agreement or common plan between two or more persons; and 2) co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime. The subjective

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<sup>28</sup> *Commentary on the Additional Protocols*, ICRC, para 2223; Customary International Humanitarian Law (CIHL), footnote 86.

<sup>29</sup> *Ibid*, Art 57 (2) (c); Amended Protocol II to the CCW, Art. 3 (11).

<sup>30</sup> Facts, para.20.

<sup>31</sup> *Ibid*, para.25.

<sup>32</sup> *Ibid*, para.26.

<sup>33</sup> *Ibid*, para.23.

<sup>34</sup> *Ibid*, para.27.

<sup>35</sup> *Prosecutor. v Galic*, para.58.

<sup>36</sup> Facts, paras.18 and 23.

<sup>37</sup> *Ibid*, paras. 25, 26 and 27.

<sup>38</sup> *Prosecutor v. Lubunga*, Pre-Trial Chamber I, ICC-01/04-01/06 (14Mar2012) paras.343, 346, 349, 351, 361, and 366.

elements include that 1) the suspect is aware of the existing circumstance and the consequence when in ordinary course of events; 2) the suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the crime; 3) the suspect must be aware of the factual circumstances enabling him to jointly control the crime.

The objective elements are not fulfilled because Reed made no essential contribution to the commission of the crime. A contribution is “essential” if the suspect has “the power to frustrate the commission of the crime by not performing [his] tasks.”<sup>39</sup> Reed was in charge of a limited number of AAF units.<sup>40</sup> Without Reed’s contribution as the commander of a portion of the AAF, the operation would have still been able to proceed via other channels, such as other AAF units or the NIA.<sup>41</sup> The Operation Thunderstorm planning committee consisted of differing military staff members and officers, the NIA and the Ministry of Defence.<sup>42</sup> The absence of Reed would not frustrate either the designing or the implementing of the attacks.

The subjective elements are not satisfied because Reed had neither the knowledge nor the intention of the relevant consequences of the events. The “knowledge” and “intent”<sup>43</sup> refer to a volitional element that suggests Reed and other perpetrators 1) know that his and their actions will bring about the crimes; and 2) intend to bring about the crimes.<sup>44</sup> The targets for attacking were legitimate military objects, while Reed had taken feasible measures to minimise collateral damage.<sup>45</sup>

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<sup>39</sup> *Prosecutor v. Lubunga*, paras.342 and 347; *Prosecutor v. Katanga and Ngudjolo Chui*, Pre-Trial Chamber I, ICC-01/04-01/07, (30Sept2008) para.525; G. Werle, “Individual Criminal Responsibility in Article 25 ICC Statute,” 5 (2007) JICJ para.953 and 962.

<sup>40</sup> Facts, para.10.

<sup>41</sup> Ibid, para.23.

<sup>42</sup> Ibid. para.18.

<sup>43</sup> *ICCst*, Art. 30.

<sup>44</sup> *Prosecutor v. Lubunga*, paras.351.

<sup>45</sup> Facts, paras 20, 23, 25, 26, and 27.



Methods and efficiency of communication, such as that between General Reed and NIA Head Perry Ash regarding the cooperative efforts undertaken between drones and ground forces<sup>46</sup> are unclear and, in the cases of the PAB Factory and the Peace Garden, in which the unfortunate happenstance of non-combatants being killed occurred, the reason may be accidental. It must be accepted by the Court that “accidents of this nature are also to be expected on the battlefield itself, and the combatants are not necessarily responsible for them.”<sup>47</sup>

## **II. Count Two – THE WAR CRIME OF INTENTIONALLY DIRECTING ATTACKS AGAINST A HOSPITAL**

### **1. The Required Elements of Crime under Article 8 (2)(b)(ix) are not satisfied.**

The Elements of Crimes for Article 8(2) (c) (iv) require the establishment of five elements, three of which are not satisfied.

#### **1.1 Element 1 is not satisfied in that General Reed did not direct the attack.**

To direct an attack one has to plan, instigate, order, commit, or otherwise aid and abet in the carrying out of said attack.<sup>48</sup> General Reed did not give a predetermined directive regarding the Municipal Hospital, and the attack was ordered by the squad commander in the heat of the moment and in reaction to attack.<sup>49</sup> It cannot be said that General Reed directed the attack.

#### **1.2 Element 2 is not satisfied in that the hospital zone was not an object of the attack.**

The protection to which medical units are entitled would cease when “they are used to commit, outside their humanitarian function, acts harmful to the enemy.”<sup>50</sup> The enemy used their

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<sup>46</sup> Ibid, 23.

<sup>47</sup> *Commentary on the Additional Protocols to the Geneva Conventions*, International Committee of the Red Cross (ICRC Study), para.1605.

<sup>48</sup> *Prosecutor v Blaskic*, Decision, April 1998, para.31.

<sup>49</sup> Facts, 34.

<sup>50</sup> *API*, Art. 13 (1).

positioning inside the hospital to fire at the AAF squad.<sup>51</sup> The hospital zone became a strategic, military position for armed and uniformed armed forces that used this position to instigate battle, thus applying the principle of distinction.<sup>52</sup> Such acts nullified the hospital's status as a protected civilian medical unit. The object of attack was the DKF/PAB/Ventures military unit inside the hospital zone, and not the hospital itself.

### **1.3 Element 3 is not satisfied as General Reed did not intend to attack the hospital or its adjoining college.**

“Intent” means that a person means to engage in the conduct in question and that the person meant to cause the specific consequences that would occur in the ordinary course of events.<sup>53</sup> Element 3 defines a war crime as “intending” to strike a civilian target.<sup>54</sup> This was not the intention of General Reed as the intended target(s) were the hostile DKF/PAB/Ventures forces who had transformed said civilian locale into a hostile fortress that furthermore provoked General Reed's fortress into battle. Furthermore, the consequences of severely damaging the hospital, with most of its medical supplies destroyed,<sup>55</sup> were not intended. The intended consequences were to “eliminate” threats and “spare” non-threatening persons.<sup>56</sup>

The *Rome Statute* stipulates that a crime has only been committed “if the material elements are committed with intent and knowledge.”<sup>57</sup> The material damages caused to the hospital were not the objectives of the Alphonian squad and the nature of the incident being in the heat of the moment is not indicative of any pre-existing knowledge of what was going to occur, while “that person [also] means to engage in the conduct.”<sup>58</sup> As demonstrated by the objective of the Alphonian squad, which was not to engage the hospital in particular but was rather to comb the

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<sup>51</sup> Facts, 34

<sup>52</sup> *Prosecutor v. Kordic and Cerkez*, Appeals Chamber Judgement, IT-95-14/2-A (17Dec2004) para.54.

<sup>53</sup> *ICCst.*, Art. 30(a), Art. 30(b)

<sup>54</sup> EOC (2) (b) (ix) (3).

<sup>55</sup> Facts, 35.

<sup>56</sup> *Ibid*, 33.

<sup>57</sup> *ICCst.*, Article 30(1).

<sup>58</sup> *ICCst.*, Article 30 (2) (a).

area in general,<sup>59</sup> it cannot be said that the squad commander meant to engage in the destruction of the hospital.

## **2. Alternatively, in the event that the Court finds that a crime has been committed, General Reed still does not bear criminal responsibility under Article 25 (3) (b).**

### **2.1 Orders were to avoid civilian casualties; persons *hors de combat* were not harmed**

General Reed ordered that “non-threatening persons should be spared as much as possible.”<sup>60</sup> This order is contrary to the notion that General Reed bears individual criminal responsibility for the incident. Additionally, *Geneva Convention I* Chapter 1, Article 1(2) states that “The wounded and sick shall be collected and cared for”,<sup>61</sup> a provision that the Alphonian troops followed. General Reed’s squad took away twenty five individuals, including enemy combatants, some of whom were wounded, and other patients from Municipal Hospital.<sup>62</sup> The wounded received medical treatment and were ordered into Westwood Prison.<sup>63</sup> Both soldiers who had laid down their arms and those wounded soldiers who bore *hors de combat* status were treated humanely as required by *Geneva Convention IV*.<sup>64</sup> General Reed ordered that non-military personnel be spared and also did not harm the captured enemy combatants or persons *hors de combat*; his intent was not consistent with criminal wrongdoing.

### **2.2 The squad commander was under duress.**

Duress results “from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one

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<sup>59</sup> Facts, para.33.

<sup>60</sup> Ibid.

<sup>61</sup> Geneva Convention (I) Chapter 1, Article 1(2)

<sup>62</sup> Facts, para. 34.

<sup>63</sup> Ibid.

<sup>64</sup> Geneva Convention (IV), Art. 3(1).

sought to be avoided.”<sup>65</sup> Proper grounds for excluding criminal responsibility include defensive operation in the case which is 1) essential to survive; 2) essential to accomplish a military mission; 3) against an imminent and unlawful use of force.

When the Ventures opened fire on the AAF squad,<sup>66</sup> the latter was put under threat to life. Also the mission of the AAF squad was to eliminate potential threat in the area; the attack from the enemy army satisfies the requirement.<sup>67</sup> The DKF/PAB/Ventures usage of the hospital constitutes an abusive and unlawful practice.<sup>68</sup> Given that the DKF/PAB/Ventures forces at the hospital were formidable, the reaction was proportionate to the degree of danger posed to the squad in that the DKF/PAB/Ventures had the strength and means demolish the Alphonian squad.

### **III Count 3 – THE WAR CRIME OF TORTURE OR INHUMAN TREATMENT**

#### **1. The Required Elements of Crime under Article 8 (2) (a) (ii) are not satisfied.**

The Elements of Crimes under Article 8(2) (a) (ii) requires five elements are satisfied, three of which are not satisfied.

##### **1.1 Element 1 is not satisfied as neither severe mental or physical pain was inflicted on Professor Mange or any prisoner.**

Inhuman treatment necessitates an intention to willfully cause great suffering or serious injury to body or health.<sup>69</sup> The intent and will of Warden Wall and Dr. Malade was to enhance and protect Professor Mange's health. They put the health and well-being of the detainees as their primary mission.<sup>70</sup> Westwood Prison had an obligation to examine Professor Mange in order to establish his competence, the autonomy, and motivation of his protest and to establish his medical

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<sup>65</sup> *ICCst*, Art 31(d).

<sup>66</sup> Facts, para.34.

<sup>67</sup> *Ibid*, para. 33.

<sup>68</sup> *Ibdi*, para. 34.

<sup>69</sup> *Prosecutor v. Kordic and Cerkez*, para.245.

<sup>70</sup> Facts, paras.41-42.

condition, a function carried out by Dr. Malade.<sup>71</sup> Due to Professor Mange's health condition, he was placed under medical supervision<sup>72</sup> to ensure safety and health by administering pain killers and sedatives.<sup>73</sup> The alternative not to artificially feeding Professor Mange was to allow him to die an excruciating and painful death resulting from starvation.

## **1.2 Given the circumstances, artificially feeding a detainee is ethical.**

Hunger striking is not believed to be an appropriate form of protest when other options, notably judicial, administrative, or diplomatic, are available.<sup>74</sup> There is no evidence that Professor Mange pursued other avenues before undertaking his hunger strike.

Force-feeding does not constitute torture, inhuman or degrading treatment if there is a medical necessity to do so.<sup>75</sup> In the event of a hunger strike, all authorized measures of medical intervention are lawful in order to protect the health, welfare and life of the subject in question.<sup>76</sup> Professor Mange's right to physical integrity and the obligation of Westwood Prison to protect his health and welfare were in conflict.<sup>77</sup> Professor Mange created a situation in which it was not possible to preserve his life without medical intervention.<sup>78</sup> Furthermore, hunger strikers must agree to be artificially fed.<sup>79</sup> It must be assumed that Professor Mange gave complicit agreement to receiving artificial feeding, as there is no evidence to suggest that he refused it.

## **1.4 Assigned Residence.**

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<sup>71</sup> UN Detention Unit, "Voluntary Protest Fasts- Information for Detainees," "Following your meeting with the UNDU senior management"

<sup>72</sup> Ibid, para.40.

<sup>73</sup> Ibid, para.41.

<sup>74</sup> UN Detention Unit, "Voluntary Protest Fasts- Information for Detainees," "During your initial meeting with the UNDU senior management", 3.

<sup>75</sup> *Prosecutor v Vojislav Seselj*, Trial Chamber I, IT-03-67-T (6Dec2006) para,12.

<sup>76</sup> Ibid, para.13.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid, para.9.

<sup>79</sup> UN Detention Unit, "Voluntary Protest Fasts- Information for Detainees," "GUIDELINES FOR THE MANAGEMENT OF HUNGER STRIKERS", 20.

Prisoners may be placed in assigned residence where “the security of the Detaining Power makes it absolutely necessary.”<sup>80</sup> Considering that a hunger strike constitutes a serious threat to health and welfare,<sup>81</sup> inspiring or pressuring other detainees to participate in the strike constitutes a security risk for the Detaining Power.<sup>82</sup> Professor Mange was appropriately placed in assigned residence as he represented a threat to the security of Westwood Prison as well as to the health and safety of the other detainees.

### **1.5 Element 2 is not satisfied as Professor Mange was not under the protection of the Geneva Convention.**

Protected persons under the Geneva Convention are those who do not enjoy normal diplomatic protection and are not subject to the allegiance and control of the State in whose hands they may find themselves.<sup>83</sup> Due to his Alphonian nationality, Professor Mange found himself in a position where he enjoyed diplomatic protection from Alphon and remained subject to their allegiance, control and domestic law. Protected persons are civilians who do not enjoy the normal diplomatic protection of their State.<sup>84</sup> Professor Mange remained under the jurisdiction of domestic law.

As an Alphonian national inciting violence against the State,<sup>85</sup> Professor Mange has forfeited his protection under the Geneva Convention based because he was in Alphonian territory, engaged in activities hostile to the security of the State.<sup>86</sup> Such an individual shall not be entitled to claim such rights and privileges under the Geneva Convention.

### **2. Alternatively, General Reed bears no liability for inhuman treatment on the basis of superior responsibility.**

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<sup>80</sup> Geneva Convention IV, Art. 42.

<sup>81</sup> UN Detention Unit, “Voluntary Protest Fasts- Information for Detainees”, “Following your meeting with the UNDU senior management”, 12.

<sup>82</sup> Facts, paras.37, 39 and 45.

<sup>83</sup> *Prosecutor v. Tadic*, Appeals Chamber Judgement, IT-94-1-A (15July1999) para.168.

<sup>84</sup> *Prosecutor v. Blaskic*, Trial Chamber Judgement, IT-95-14-T (3Mar2000) para.145.

<sup>85</sup> Facts, para.37.

<sup>86</sup> Geneva Convention IV, Art.5.

Although the status as the Superior is a necessary condition for the imposition of command responsibility, the existence of such a position cannot be determined by reference to formal status alone.<sup>87</sup> From the *Bemba* case,<sup>88</sup> five elements are required for command responsibility: 1) the suspect must be either a military commander or a person effectively acting as such; 2) the suspect must have effective command and control, or effective authority and control over the forces who committed the crime(s); 3) the crime(s) committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them; 4) the suspect either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit the crime(s); 5) the suspect failed to take the necessary and reasonable measures within his power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.

In this case, the Defense accepts that General Reed bears the status of *de jure* commander as assigned by the Alphonian government, yet "simple exercise of powers of influence over subordinates does not suffice" to prove criminal responsibility.<sup>89</sup> Reed had no effective control over Jackson Wall "at the time of the commission of the crime,"<sup>90</sup> or "when the crimes were about to be committed."<sup>91</sup>

"Effective control" requires "more a matter of evidence than of substantive law."<sup>92</sup> Certain factors may contribute to the existence of Reed's superior position:<sup>93</sup> 1) the suspect's official position; 2) power to issue/give orders; 3) capacity to ensure compliance with orders issued; 4) position within military structure and actual tasks carried out; 5) capacity to order forces/units

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<sup>87</sup> *Bagilishema*, (Trial Chamber), June 7, 2001, para. 39

<sup>88</sup> *Prosecutor v. Bemba*, Pre-Trial Chamber II, ICC-01/05-01/08 (15June2009) para.407.

<sup>89</sup> *Prosecutor v. Hadzihasanovic, and Kubura*, Judgment, IT-01-47-T, (15Mar2006) paras.80 and 795.

<sup>90</sup> *Prosecutor v. Bemba*, para.418; *Prosecutor v. Hahlovic*, Appeals Chamber, IT-01-48-T (16Nov2005) para.59; *Prosecutor v. Bagosora et al*, Judgment and Sentence, ICTR-98-41-T (18Dec2008) para.2012.

<sup>91</sup> *Prosecutor v. Bemba*, para.419.

<sup>92</sup> *Prosecutor v. Hahlovic*, para.58; *Prosecutor v. Blaskic*, Appeals Chamber, IT-95-14-A, (29July2004) para.69.

<sup>93</sup> *Prosecutor v. Bemba*, para.417.

under his command to engage in hostilities; 6) capacity to make changes to command structure; 7) power to promote, replace, remove, or discipline any forces; 8) authority to send forces into hostilities and withdraw them therefrom. General Reed did not prove to be able to give orders, ensure compliance with Wall, or promote, replace, remove, or discipline him. In order to determine whether General Reed had reason to know that his subordinate had committed or was about to commit inhuman acts, the Court must ascertain if he had sufficiently alarming information to alert him to the risks of inhuman acts being committed, that is of placing prisoners in assigned residence not arbitrarily but for a prohibited purpose, such as punishment.<sup>94</sup>

Alternatively, if the Court finds that the elements of the crime charged in the third count were satisfied, General Reed had no intention or knowledge of the commission of the crime(s). The actual knowledge is affected by the considerations on the number of illegal acts, the scope, the time, the type and number of force involved, the means of available communication, the *modus operandi* of similar acts, the location of the commander at the time and the geographical locations of the acts.<sup>95</sup> Due to the limited means of communication, the geographical distance,<sup>96</sup> and the lack of “organised structure with established reporting and monitoring systems”,<sup>97</sup> General Reed, however, was unaware of any of the information required except the occurrence of the hunger strike in the prison.<sup>98</sup> Given that it was Reed’s staff that was consulted, Reed had resorted to all means to monitor the situations in the prison, yet his subordinates intentionally withheld such information from General Reed. Failure to acquire such knowledge is not on its own a separate offence and does not prove criminal wrongdoing on the part of General Reed.<sup>99</sup>

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<sup>94</sup> Geneva Convention IV, Art. 42., *Compare Krnojelac*, (Appeals Chamber), September 17, 2003, para. 155

<sup>95</sup> *Prosecutor v. Bemba*, para.431.

<sup>96</sup> Facts, para.15.

<sup>97</sup> *Prosecutor v. Hadzihasanovic, and Kubura*, para.94.

<sup>98</sup> Facts. para.39.

<sup>99</sup> *Prosecutor v. Blaskic*, (Appeals Chamber), July 29, 2004, para. 62



### **III. PRAYER FOR RELIEF**

The Defense respectfully requests this Honourable Court to adjudge and declare that General Arthur Reed is not criminally responsible under the Statute for war crimes under Article 8(2)(b)(iv), Article 8(2)(b)(ix) and Article (2)(b)(ix).

Respectfully submitted,  
The Defense