

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

International Criminal Court

MEMORIAL FOR THE PROSECUTION

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

Nathan Fischler & Zhang Wei

(Word Count: 3976)

Team Number: CNIHL1323

MEMORIAL FOR THE PROSECUTION

I. PRELIMINARY MATTERS

1. Nature of Conflict

1.1 There was a non-international armed conflict (NIAC) between the Alphonian government and the Bethuisian People's Movement (BPM).

NIAC is a “protracted armed violence ... within a State.”¹ Two thresholds regarding the level of organization of the armed group and the intensity of the conflict must be met.²

1.1.1 Both parties possessed the requisite organization.

The existence of “command structure” and “internal rules,” the ability to “recruit new combatants” and “undertake organized military operations,” and “issuance of political statements” are indicators of organization.³ One of the parties is the Alphonian government. The other is the BPM militia led by Neil Bing, which was able to recruit, undertake military operations, and issue political statements.⁴

1.1.2 The conflict between the two parties met the requirement.

According to *Limaj* case, “length of the conflict,” “existence of casualties,” “nature of weapons used,” and “increase in the number of armed forces” demonstrate intensity.⁵

¹ *Tadic*, Appeals Chamber, Decision on the Defence Motion or Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, (2Oct1995) para.70.

² *Ibid*, Trial Chamber, IT-94-1-T (7May1997) para.562.

³ *Limaj et al.*, Trial Chamber, IT-03-66-T (30Nov2005) paras.90, and 90-134; *Boskoski & Tarculovski*, Trial Chamber II, IT-04-82-T (10Jul2008) paras.194-206.

⁴ Facts, paras.8, 9, and 11.

⁵ *Limaj et al.*, paras.90, and 134-167.

The clash between the two parties existed from the recruitment of a paramilitary group by the BPM since 2007 to July 2008.⁶ During the time, the clash led to over hundreds of casualties and bombs were used.⁷ Accordingly, the intensity of the conflict met the relevant requirements.

1.2 The conflict escalated into an international armed conflict (IAC) between Alphon and Bethuis.

An armed conflict is considered to be international in characters “if it takes place between two or more States; this extends to the partial or total occupation of the territory of another States, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict ... may become international ... if (i) another State intervenes in that conflict through its troops (direct intervention).”⁸

Bethuis on July 12 2008 sent troops from the People’s Army of Bethuis (PAB) into Kiesh, and gained control over Kiesh and the eastern part of Kebia.⁹ The facts support the existence of an IAC on both accounts (ie “partial occupation” and “intervention”), the IAC between Alphon and Bethuis commenced.

2. Standard of Proof

The Prosecution will provide “sufficient evidence to establish substantial grounds to believe.”¹⁰ General Reed committed the crimes charged. The Prosecution will

⁶ Facts, para.9.

⁷ Ibid, paras.9 and 15.

⁸ *Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/06 (29Jan2007) para.209.

⁹ Facts, para.11.

¹⁰ ICC Statute Art.67(5).

demonstrate “a clear line of reasoning underpinning specific allegations,”¹¹ going beyond “mere theory or suspicion”.¹²

¹¹ *Mbarushimana*, Confirmation of charges, ICC-01/04-01/10 (16 Dec 2011), para.40.

¹² *Lubanga*, note 8, para.39.

II. PLEADINGS

COUNT 1: GENERAL REED BEARS CRIMINAL RESPONSIBILITY JOINTLY WITH ANOTHER PERSON FOR THE WAR CRIME OF EXCESSIVE INCIDENTAL DEATH, INJURY, OR DAMAGE.

1. The Alphonian Armed Forces (AAF) and National Intelligence Agency (NIA) committed the war crime of excessive incidental death, injury, or damage. All five elements of crime under Article 8(2)(b)(iv) are fulfilled.

1.1 The AAF and NIA launched attacks. “Attacks” are defined as “acts of violence against the adversary whether in offence or in defence”.¹³ The AAF launched an attack on Kiesh with artillery and air support from the NIA on 17 and 18 July 2009.¹⁴

1.2 The attacks caused excessive death and damages in comparison with the concrete and direct overall military advantage anticipated.

Excessiveness lies in the balance between the foreseeable¹⁵ military advantage and expected collateral damage.¹⁶ Advantage must also be substantial and relatively close, not determined by long-term planning.¹⁷ The military advantage of Operation Thunderstorm anticipated the neutralisation of the military facilities listed.¹⁸ The

¹³ Additional Protocol I (API), Art.49; *Kordic and Cerkez*, Appeals Chamber, IT-95-14/2-A (17Dec2004) para.47.

¹⁴ Facts, paras.23-24.

¹⁵ Elements of Crimes (EOC), footnote 36.

¹⁶ API, Arts.51(5)(b) and 57(2)(a)(iii), (b).

¹⁷ *Commentary on the Additional Protocols to the Geneva Conventions*, ICRC, para.2209.

¹⁸ Facts, para.21.

collateral damages to civilians include at minimum 50 deaths and 80 serious injuries, with additional property damage to civilian objects in residential areas.¹⁹ The damage by far outweighs the military advantage anticipated.

1.2.1 The indiscriminate attack on the BAS factory compound caused excessive incidental civilian loss.

Indiscriminate attacks include those that 1) are not directed at a specific military objective; 2) employ a method or means of combat which cannot be directed at a specific military objective; or 3) may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.²⁰

The privately-owned BAS factory which produced civilian materials,²¹ by its nature, purpose or use, was not a valid military objective.²² The military advantage of bombing this civilian facility is marginal compared to the consequences, 15 dead civilians and 30 severely injured.²³

As for the prospect of the factory being used to make an effective contribution to military action, it shall be presumed not to be so used.²⁴ Even so, the attacks were unlawful as they were conducted using indiscriminate means or methods of warfare in

¹⁹ Ibid, paras.25, 27 and 29.

²⁰ API, Art.51(4)(a), (b) and (5)(b).

²¹ Facts, paras.21, and 25.

²² API, Art.52(2).

²³ Facts, para. 25.

²⁴ *Galic*, Trial Chamber, IT-98-29-T (5Dec2003) para.51; API, Art.52 (3).

such a way as to cause indiscriminate damage to civilians.²⁵

The AAF and the NIA were obliged to take all feasible precautions to give effective warning in advance²⁶ or take into consideration the choice of means to minimize the incidental loss.²⁷ The lights of the BAS factory²⁸ indicated the presence of civilians, and no warning was given, nor was there consideration for cancelling the attack. They also failed to employ means and methods of attack²⁹ with higher accuracy than artillery shelling.³⁰ The attacks were expected to cause incidental loss of civilian life and damages to civilian objects.

Alternatively, if the factory was of military use due to the production of explosive devices, it could be reasonably foreseen that the bombardment of such installations could cause the “release of dangerous forces”³¹ and inflict severe losses among the civilian population.

1.2.2 The attacks on the civilian population in residential areas caused excessive collateral damage.

The anticipated military advantage regarding this attack was to kill one individual (Colonel Bing), but caused 75 civilian casualties which constitute a highly disproportionate attack.³²

²⁵ *Zoran Kupre {ki} et al.*, Trial Chamber Judgement, IT-95-16-T (14 Jan 2000) para. 524.

²⁶ API, Art.57(2)(c).

²⁷ *Ibid*, Art.57(2)(a)(i).

²⁸ Facts, para.30.

²⁹ API, Art.5(2)(a).

³⁰ Facts, paras,26 and 29.

³¹ API, Art.56(1).

³² Facts, paras.26-27.

Civilian population is a collection of people “predominantly civilian in nature”³³ and allows “the presence of individual combatants,”³⁴ “visiting their families.”³⁵ The residential neighbourhood represented a concentration of civilians and civilian objects. Instead of avoiding densely populated areas,³⁶ the AAF and the NIA launched attacks.

Repeated attacks, considering its cumulative effect “jeopardise[s] excessively the lives and assets of civilians, contrary to the demands of humanity.”³⁷ The air force performed a second strike thirty minutes after the first missile was confirmed to have hit the target building.³⁸ The second strike was carried out with the knowledge that “the attack may be expected to cause excessive incidental damage”³⁹ as more civilians had come to scene of the first strike to help. This led to more than half of the total casualties.⁴⁰

Considering the means and methods used in the course of the two attacks, the status and quantity of victims,⁴¹ the scheduled bombing and shelling incidents constitute indiscriminate attacks by the NIA and the AAF on civilian objectives and population.⁴² The attacks transgress a substantial principle of IHL and cause clearly excessive incidental loss in relation to the concrete and direct overall military advantage anticipated.

³³ *Limaj et al.* para.186.

³⁴ *Galic*, para.50; *Strugar*, Trial Chamber, IT-01-42-A (14July2008) para.282; *Zoran Kupre {ki} et al.*, para.513.

³⁵ ICRC Commentary, para.1922.

³⁶ API, Art.58(2).

³⁷ *Zoran Kupre {ki} et al.*, para.526.

³⁸ Facts, para.27.

³⁹ API, Art.57(2)(b).

⁴⁰ *Ibid*, para.20.

⁴¹ *Kunarac et al.*, Appeals Chamber, IT-96-23 & IT-96-23/1-A (12Jun2002) para.90.

⁴² *Galic*, para.387.

1.3 General Reed knew that the attack would cause incidental death or injury to civilians or damage to civilian objects which were clearly excessive in relation to the concrete and direct overall military advantage anticipated.

The knowledge of the possible collateral damage requires value judgements based on requisite information available.⁴³ General Reed was aware of the list of targets.⁴⁴ Given the use of reconnaissance drones in collecting intelligence,⁴⁵ Reed was conscious of civilian presence in the BAS factory and the dense population around Bing's residence. As a "reasonably well-informed person in the circumstances of the actual perpetrator," Reed "could have expected excessive civilian casualties,"⁴⁶ and thus launched the attacks "wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties."⁴⁷

1.4 The fourth and fifth elements are fulfilled.

The attacks were part of the military campaign conducted by the AAF/NIA during, and in the context of, an IAC between Alphon and Bethuis, and all parties were aware of the circumstances.⁴⁸

2. General Reed bears criminal responsibility as a co-perpetrator of this war crime.

⁴³ EOC, footnote 37.

⁴⁴ Facts, paras.20-21.

⁴⁵ Facts, para.23.

⁴⁶ *Galic*, para.58.

⁴⁷ *Ibid*, 59-60; API, Art.85(3)(b); *Customary IHL Study*, Rule 156.

⁴⁸ See PRELIMINARY MATTERS 1.

The objective elements of co-perpetration require⁴⁹ 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 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.

2.1 The objective elements are fulfilled.

2.1.1 General Reed shared a common goal with other perpetrators to implement an act of criminality.

Co-perpetration involves the division of essential tasks.⁵⁰ Reed, Atom, Ash, and other military staff⁵¹ in charge of Operation Thunderstorm were co-perpetrators of the crime. The control over AAF units and NIA armed drones were held by Reed and Ash, respectively.⁵² The plan included launching attacks on civilian objects and population.⁵³ All perpetrators involved knew that in the ordinary course of the attack,⁵⁴ they would attack the non-military factory and the civilian population at the “Peace Garden”.⁵⁵

⁴⁹ *Lubunga*, paras.343, 346, 349, 351, 361, and 366.

⁵⁰ *Katanga and Chui*. Pre-Trial Chamber I, ICC-01/04-01/07, (30Sept2008) para.521.

⁵¹ Facts, para.18.

⁵² *Ibid*.

⁵³ *Ibid*, para.344.

⁵⁴ *Lubunga*, para.986.

⁵⁵ Facts, para.21.

2.1.2 General Reed made essential contributions within the common plan.

A contribution is “essential” if the suspect has “the power to frustrate the commission of the crime by not performing [his] tasks.”⁵⁶ Actions that amount to essential contribution include designing the attack, overseeing and ensuring that the implementation of the common plan by the combatants both in communicative and coordinated manner, monitoring the activities of the troops, ordering subordinates to execute the common plan⁵⁷.

Reed was one of the chief commanders who designed Operation Thunderstorm.⁵⁸ His role as the commander of the AAF guaranteed the implementation of the attacks.⁵⁹ The attack could not have been performed without the contribution of Reed.

2.2 The subjective elements are satisfied.

2.2.1 General Reed was aware of the attacks and the relevant consequences, and he and other perpetrators were mutually aware of and accepted the circumstances and consequences resulting from the ordinary course of attacks.⁶⁰

The element of “knowledge” and “intent”⁶¹ refers to the notion that Reed and the other perpetrators 1) knew that their actions would bring be criminal; and 2) intended to

⁵⁶ *Lubunga*, paras.342 and 347; *Katanga and Chui*, para.525; G. Werle, “Individual Criminal Responsibility in Article 25 ICC Statute,” 5 (2007) JICJ paras.953 and 962.

⁵⁷ *Katanga and Chui*, paras.34 and 526.

⁵⁸ Facts, para.18.

⁵⁹ *Ibid*, para.23.

⁶⁰ *Ibid*, paras.350 and 361; *Stakic*, Trial Chamber II, IT-97-24-T (31Jul2003) para.496.

⁶¹ Rome Statute of the International Criminal Court (*ICCst*), Art. 30.

commit crimes.⁶²

On approving the list of targets and the means and methods of attack, Reed was aware of the relevant consequences of excessive damage.⁶³ Considering the concerted military effort, other perpetrators knew the common plan, accepted the outcome of indiscriminate attacks and gave consent to perform the crime regardless of the expected civilian casualties.⁶⁴

2.2.2 General Reed was aware of the circumstances enabling him to jointly control the crime.

Being conscious about the influence of his decision due to the essential nature of his role, Reed refused to cancel or alter the indiscriminate attack on civilian population and objects.⁶⁵

⁶² *Lubunga*, para.351.

⁶³ Facts, para.21.

⁶⁴ *Ibid*, para.20.

⁶⁵ *Ibid*, paras.20, 21, 25-27.

II. GENERAL REED BEARS INDIVIDUAL CRIMINAL RESPONSIBILITY FOR SOLICITING THE WAR CRIME OF ATTACKING PROTECTED OBJECTS

1. The AAF squad committed the war crime of attacking protected objects. All five elements of the crime under Article 8(2)(b)(ix) are satisfied.

1.1 The AAF squad launched an attack.

The AAF squad attacked and caused damage to a civilian object which, as a protected object,⁶⁶ was clearly identified and recognized by both parties.⁶⁷

1.2 The object of the attack was one or more buildings dedicated to Municipal Hospital.

It is prohibited to attack fixed establishments of Medical Service.⁶⁸ The protection of such establishments shall not cease when it is armed in its own defence or is protecting the wounded and sick.⁶⁹ Municipal Hospital has long been recognized as a medical facility in Kebia and was used for medical functions by both parties since the conflict started.⁷⁰ The defending security guards were necessary to protect the establishment.⁷¹

In case of doubt as to whether an object which is normally dedicated to civilian

⁶⁶ GCI, Arts.19 and 56(2); API, Art.21.

⁶⁷ Facts, para.32.

⁶⁸ GCI, Art.19.

⁶⁹ Ibid, Art.22(1).

⁷⁰ Facts, para.32.

⁷¹ GCI, Art.22(1).

purposes, is used for military purpose, it shall be presumed not to be so used,⁷² and the status of the hospital as a protected object remains. Alternatively, if the hospital was of military function, a warning and a time-limit should be given before the protection ceases,⁷³ which the AAF squad failed to achieve.⁷⁴

1.3 The attack was intended to be carried out on a non-military objective.

The squad was specifically sent to the hospital area under instruction to eliminate threats in the area.⁷⁵ The hospital was intended as the object of the attack.

1.4 The contextual elements are satisfied.

The IAC involved Alphonian forces DKF/PAB/Ventures forces. General Reed sent in the squad with knowledge of the security staff outside the hospital.⁷⁶

2. General Reed bears individual criminal responsibility for soliciting the commission of the war crime.

Soliciting means “urging, advising, commanding, or otherwise inciting another to commit a crime.”⁷⁷ As general commander,⁷⁸ Reed was in a position of authority to convince another to commit an offence.⁷⁹ His squad had an implicit⁸⁰ intent to violently

⁷² API, Art.52(3).

⁷³ API, Art.13(1).

⁷⁴ Facts, para.34.

⁷⁵ API, Art.52(3).

⁷⁶ Facts, para.32.

⁷⁷ *Black's Law Dictionary*, 9th, ed., 2009.

⁷⁸ Facts, para.10.

⁷⁹ *Stakic*, para.445; *Krstic*, Trial Chamber, IT-98-33-T (2Aug2001) para.601.

eliminate the enemy soldiers in the hospital zone.⁸¹ Reed's reminder⁸² to the squad commander suggests that he incited an act of violence against a protected object "with the awareness of the substantial likelihood that a crime will be committed in the execution of that order."⁸³ Knowledge of the situation suffices for the imposition of criminal responsibility for soliciting the commission of the crime.

⁸⁰ *Blaskic*, Trial Chamber, IT-95-14-T (3Mar2000) para.281.

⁸¹ Facts, para.34.

⁸² *Ibid*, para.33.

⁸³ *Kordic and Cerkez*, note 8, para.30; *Blaskic*, Appeals Chamber, IT-95-14-A (29Jul2004) paras.41-42; *Limaj et al.*, para.515; *Bradjanin*, para.270.

III. GENERAL REED BEARS SUPERIOR RESPONSIBILITY FOR THE WAR CRIME OF INHUMAN TREATMENT

1. Jackson Wall committed the war crime of inhuman treatment. All five elements of the crime under Article 8(2)(a)(ii)-2 are satisfied.

1.1 Jackson Wall inflicted severe physical or mental pain or suffering upon the detainees.

“Inhuman treatment” refers to a deliberate act which causes serious mental or physical suffering or injury, constitutes a serious attack on human dignity and/or was committed against a protected person.⁸⁴ Degree of suffering is calculated in terms of the nature, context, duration, and physical and mental effects of the treatment.⁸⁵ Solitary confinement⁸⁶ and inadequate medical treatment for detainees⁸⁷ are amount to inhuman treatment.

1.1.1 Solitary confinement bears serious psychological consequences.⁸⁸ The act of putting Professor Mange in solitary confinement caused grave injury to his human dignity and that cut him off completely from the outside world.⁸⁹ The use of solitary

⁸⁴ *Aleksovski*, Appeals Chamber, IT-95-14/1-A (24Mar2000) para.26; *Kordic and Cerkez*, note 6, para.256; *Blaskic*, note 72, para.665.

⁸⁵ *A v. United Kingdom*, Judgment 23 Sept. 1998, Eur. Ct. H.R., para.20; General Comment of the Human Rights Committee 20/44 of 3 April 1992, para.4.

⁸⁶ *Customary IHL*, Rule 90, footnote 26.

⁸⁷ *Ibid*, footnote 27.

⁸⁸ Denmark, ICCPR, A/56/40 vol. I (2001) 34 para 73 (13).

⁸⁹ Commentary to the Fourth Geneva Convention, para.598; Commentary to the Third Geneva Convention, para.627.

confinement “should be restricted to short, temporary periods”⁹⁰ no longer than “a maximum of thirty consecutive days”⁹¹ and only when proved absolutely necessary for the security of the Detaining Power.⁹²

Mange was kept in solitary confinement one month longer than the maximum of three months allowed under the Alphonian Emergency Decree,⁹³ three months longer than the maximum of the provision of GCIV.

Mange did not pose essential security risks.⁹⁴ A security risk “cannot simply refer to an individual’s political attitude towards the State.”⁹⁵ Given his state of incarceration, it would have been impossible for Mange to carry out material and/or direct harm to the State of Alphon.

1.1.2 Force-feeding is an involuntary and unjustifiable act.⁹⁶ Mange suffered from physical pain⁹⁷ for 17 days, two hours per day, and was exposed to the risk of irreversible neurological disorder.⁹⁸ Strikers are granted treatment in accordance with internationally accepted standards of medical ethics.⁹⁹ Prison’s physicians are obliged to maintain “primary obligation to the individual patient,”¹⁰⁰ and provide information

⁹⁰ Luxembourg, ICCPR, A/48/40 vol. I (1993) 30 para.144.

⁹¹ GCIV, Art.119.

⁹² GCIV, Art.42.

⁹³ Ibid, para.10.

⁹⁴ GCIV, Art.42.

⁹⁵ *Delalij*, Pre-Trial Chamber, IT-96-21-T (16Nov1998) para.567

⁹⁶ “WMA Declaration of Malta on Hunger Strikers,” Principles. para.2.

⁹⁷ Facts, para.44.

⁹⁸ Ibid, para.41.

⁹⁹ “WMA Declaration of Malta on Hunger Strikers,” Introduction.

¹⁰⁰ Ibid, para.5.

on the probable consequences of the strike.¹⁰¹ Failure to fulfil these duties¹⁰² violated the rights of the hunger strikers and added unnecessary mental burden and suffering on the victims.

The above proved also applies in relation to prisoners of war from the PAB and the DKF under Article 130 of GCIII.¹⁰³

1.2 Such persons were protected under one or more of the Geneva Conventions of 1949.

Prisoners of war (POWs) and civilians are protected respectively under GCs III and IV.¹⁰⁴ The detainees who went on hunger strike include members of the PAB, DKF, as well as civilians suspected of presenting terrorism and security threats.¹⁰⁵

POWs of the PAB and the DKF were “members of the armed forces of a Party to the conflict¹⁰⁶” and members of “organized resistance movements¹⁰⁷.” As the Bethuisian National Assembly recognised the province of Kebia in its Constitution as part of Bethuis, civilians of the province can be regarded as nationals of the Bethuis,¹⁰⁸ therefore enjoyed a protected status¹⁰⁹. Furthermore, GCIV is still applicable in

¹⁰¹ UN Detention Unit, “Voluntary Protest Fasts—Information for Detainees”, para.10.

¹⁰² Facts, paras.40-41.

¹⁰³ Commentary to the Third Geneva Convention, para.627.

¹⁰⁴ GCIII, Art.5.

¹⁰⁵ Facts, para.38.

¹⁰⁶ GCIII, Art.4(A)(1).

¹⁰⁷ Ibid, Art.4(A)(2).

¹⁰⁸ *Convention on Certain Questions relating to the Conflict of Nationality Laws*. The Hague, 12 April 1930, Arts.1, 2, and 3.

¹⁰⁹ GCIV, Art.4.

circumstances when victims possessing the same nationality with the perpetrators¹¹⁰. The civilian suspects are qualified as persons protected either as Alphonian or Bethuisian nationals¹¹¹.

1.3 conduct took place in the context of and was associated with an international armed conflict.

PAB POWs were captured by the AAF in the Westwood Prison as a result of the “resort to armed force between States.”¹¹²

1.4 3rd and 5th elements of this crime are fulfilled.

Wall, as the warden of Westwood Prison, knew the identities of detainees. Also, given the delegation sent by ICRC,¹¹³ Wall had the knowledge that they were under the protection of the Conventions. He was also aware of the existence of an armed conflict since the detainees put under internment were involved in the IAC.

2. General Reed bears superior responsibility for the commission of the war crime of inhuman treatment by his subordinate.

2.1 Existence of a superior-subordinate relationship.

A superior-subordinate relationship is based on one person being “formally or legally appointed to carry out a military commanding function”¹¹⁴ or “exercising effective

¹¹⁰ *Tadic*, para.169; *Blaskic*, note 72, para.174; *Aleksovski*, para.151.

¹¹¹ GCIV, Art.4; *Blaskic*, note 72, para.172; *Kordic and Cerkez*, note 6, para.147.

¹¹² *Tadic*, para.70; *Lubanga*, note 2, para.209.

¹¹³ Facts, para.39.

¹¹⁴ *Bemba*, Chamber II, ICC-01/05-01/08 (15June2009) para.408.

control over a group of persons through a chain of command.”¹¹⁵ The following are factors needed for effective control:¹¹⁶ 1) the suspect’s official position; 2) power to issue/give orders; 3) capacity to ensure compliance with orders issued; 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 was the *de jure* commander of several AAF units.¹¹⁷ Reed appointed Wall as warden of Westwood Prison, demonstrating his ability to change the command structure, thus indicating that Reed had the “material ability to prevent and repress the commission of the crimes or submit the matter to the competent authorities.”¹¹⁸ Reed was given the specific authority to prevent and control inhuman treatment in the prison.¹¹⁹

2.2 General Reed should have known that the subordinate was committing or about to commit the crimes.

Reed was negligent in failing to acquire knowledge.¹²⁰ Given the international and media attention, governmental pressure, and the letter sent by Wall, Reed was aware of the hunger strike in the prison and that measures should be taken in response to the situation.¹²¹ All consultations should have been reported to Reed. The Superior bears the responsibility to “discover and obtain all information within his powers, which

¹¹⁵ Ibid, para.409.

¹¹⁶ Ibid, para.417.

¹¹⁷ Facts, para.10.

¹¹⁸ *Bemba*, para.415; *Delalic et al*, Appeals Chamber, IT-96-21-A (20Feb2001) para.256; *Bagilishema*, Appeals Chamber, ICTR-95-1A (3Jul2002) para.51.

¹¹⁹ Facts, para.39.

¹²⁰ *Bemba*, para.432.

¹²¹ Facts, para.39.

includes properly supervising his subordinates.”¹²² Reed had general information to put him on notice of crimes committed¹²³ and had sufficient information “to justify further inquiry or investigation.”¹²⁴

2.3 General Reed also failed to take all necessary and reasonable measures within his power to prevent or repress the commission of crime or submit the matter to the competent authorities for investigation and prosecution. Failure to fulfil any one of the duties would constitute the command responsibility.¹²⁵ Reed had the duty to prevent the commission of crime when he and should have known his subordinates were about to commit a crime.¹²⁶ He bore the responsibilities to stop the crimes,¹²⁷ punish those responsible¹²⁸ and bring the perpetrators to justice.¹²⁹

Despite the statement of a military spokesman to indicate potential criminal wrongdoing in the hospital and the consultations his staff made with Wall,¹³⁰ Reed took no measures to investigate, prevent or repress acts of criminality.

¹²² *Belalic et al.* para.382.

¹²³ *Bemba*, para.434; *Delic*, Trial Chamber I, IT-04-83-T (15Sept2008) paras.65-66; *Blaskic*, note 72, para.618.

¹²⁴ *Ibid*; *Limaj et al.*, para.525; *Kordic and Cerkez*, note 8, para.437.

¹²⁵ *Bemba*, para.435-436;

¹²⁶ *Ibid*, para.437; *Delic*, para.72.

¹²⁷ Additional Protocol I, Art. 87; *Ibid*, para. 439; *Hadzihasanovic, and Kubura*, IT-01-47-T, (15Mar2006) para.127.

¹²⁸ *Bemba*, para.439; *Kordic and Cerkez*, note 8, para.446.

¹²⁹ *Ibid*, para.442; *Ibid*.

¹³⁰ Facts, paras.39 and 42.

PRAYER

The Prosecution respectfully requests this Honourable Court to adjudge and declare that General Reed is criminally responsible under the Rome Statute for:

War crimes under Article 8(2)(a)(iv), 8(2)(b)(ix), 8(2)(a)(ii).

Respectfully submitted,

The Prosecution