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INTERNATIONAL HUMANITARIAN LAW

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MEMORIAL FOR THE DEFENCE

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MEMORIAL FOR THE DEFENCE

PRELIMINARY FINDINGS

1. The Non-international Armed Conflict (NIAC) in Kebia commenced on 5 July 2008.

In *Lubanga*[1],the ICC, endorsing the jurisprudence of the ICTY[2], confirmed that two requirements must be satisfied for the existence of NIAC: "organization" of the party and "protraction" of the conflict.

1.1 The "organization" requirement is satisfied.

When deciding "organization", the following list of factors should be considered: the force or group's internal hierarchy, the command structure and rules, the insurance of political statements, the military equipment availability, the ability to plan and carry out military operations, the extent of military involvement.[3]

In this case, the DKF was a paramilitary group supported by Bethuisian government, with a multinational company training its recruits with military skills[4]. Neil Bing, the leader of DKF, had expressed hostility against Alphonian government in television[5]. The DKF took over local government buildings in various part of Kebia[6]. The DKF had "a hierarchical structure with a responsible command and ability to carry out military operations"[7], qualifying as an "organized" armed group.

1.2 The "protraction" requirement is satisfied.

The ICTY has held that the **intensity** of the armed conflict can determine whether it is protracted. In *Lubanga*, the ICC, confirming the *Meksic*[8], held that "intensity" is

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[1] ICC, *Lubanga* Trial Judgement, paras.533,534.
[2] ICTY, *Tadic* Jurisdiction Decision, para.70; endorsed in *Delalic* Trial Judgement, para.183; *Krstic* Trial Judgement, para.481.
[3] ICTY, *Limaj* Trial Judgement, para.90; *Haradinaj* Trial Judgement, para.60. See also *supra* note 1, para. 537.
[4] *Facts*, paras.9,11.
[5] *Ibid*, paras.8,11.
[6] *Ibid*, para.11.
[7] ICC, *Mudacumura* Decision on the Prosecutor's Application under Art.58, para.31.
[8] ICTY, *Mrksic* Trial Judgement, para.407.

determined by the following factors: seriousness of attacks, spread over territory, period of time, extent of government forces, mobilization and the distribution of weapons.[9]

In this case, DKF was a paramilitary group with covert support and weapons supplied by Bethuisian government[10]. Local government buildings were taken over and military compounds were attacked by DKF's units[11]. The conflict lasted for a week and spread in various parts of Kebia.[12] To restore peace, the Alphonian Armed Forces was deployed.[13] Thus the intensity of the conflict suffices to satisfy the requirement of "protraction".

2. The International Armed Conflict (IAC) in Kebia commenced on 12 July 2008 and ended on 20 December 2009.

2.1 The IAC in Kebia commenced on 12 July 2008.

A NIAC may become international, if (i) another State intervenes in that conflict through its troops(direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State(indirect intervention).[14] In this case, Bethuis sent 2000 troops from the PAB to support the DKF on 12 July 2008.[15] The direct intervention of Bethuis rendered the armed conflict international.

Incidentally, the armed conflict was still non-international before 12 July 2008, because the control Bethuis had over the DKF did not suffice to render it a ***"de facto* organ"**[16] of Bethuis, considering that Bethuis failed to "organize, coordinate or plan the military actions"[17] of the DKF.

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[9] *Supra* note 1,para,538.
[10] *Facts*, para.9.
[11] *Ibid*, para.11.
[12] *Ibid*,para.11.
[13] *Ibid*, paras.10,11.
[14] ICTY, *Tadic* Appeal Judgment, para.84;*Supra* note1, para.541.
[15] *Facts*, para.11.
[16] *Supra* note 14(*Tadic*), paras. 117-124.
[17] *Ibid*, para.145.

2.2 The IAC in Kebia ended on 20 December 2009.

The ICTY, in *Tadic*, confirmed that "international humanitarian law applies ... until **a general conclusion of peace** is reached"[18]. In this case, the IAC ended on 20 December 2009 when Alphon and Bethuis reached a ceasefire agreement[19].

[18] *Supra* note 2(*Tadic*), para.70.
[19] *Facts*, para.46.

PLEADINGS AND AUTHORITY

I.WAR CRIME UNDER ARTICLE 8(2)(b)(iv)

1.1 The incidental death and injuries are not excessive in relation to the concrete and direct overall military advantage anticipated.

Article 8(2)(b)(iv) reflects the principle of proportionality, which represents a **compromise** between the desire to protect civilians and the demands of military necessity[20]. Although the *Kupreskic Case* agreed that Articles 57 and 58 of AP I should be interpreted to expand the protection accorded to civilians as much as possible[21], the over-emphasis on the protection would lead to much limit to the military effectiveness. Indeed, as Doswald-Beck comments, this principle therefore attempts to 'limit the use of military capabilities whilst preserving a combatant's ability to **win within these rules**'[22].

1.1.1 The military advantage is great.

It is required that "military advantage" should be foreseeable at the relevant time[23], and it should not rely on *ex post* justifications[24]. Moreover, it is noteworthy that the advantage should be considered **as a whole** and not only from isolated or particular part of the attack[25]. The two-day artillery attacks and air strikes were "tactical operations"[26], in which "each attack was essential to the others"[27]. Hence the military advantage of the two-day attack should be considered as a whole.

In this case, the military advantage anticipated of the two-day attack included

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[20] See ANTHONY P. ROGERS, LAW ON THE BATTLEFIELD 14 (1996), at page17.
[21] ICTY, Judgment, *The Prosecutor* v.*ZoranKupreskic and Others*, IT-95-16-T, paras. 522–6
[22] L. Doswald-Beck, The Value of the 1977 Geneva Protocols for the Protection of Civilians, in Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention 153 (M. A. Meyer ed., 1989).
[23] See footnote 36 of *EoC.*
[24] Otto Triffterer(ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, p.339.
[25] Ibid., p.339
[26] *Facts*, para.23-31.
[27] *Supra* note 22, para.157.

acquiring control over the western part of Kiesh[28], capturing the leader of the adversary[29], which would result in a state of chaos in the adversary, as well as cutting off part of ammunition supply[30]. The military advantage was so great that it might lead to the victory of this armed conflict.

1.1.2 The incidental loss or damage was low compared to advantage.

In this case, there were 50 civilians killed and some injured[31]. Facts showed that an ordinary attack in this battle would also cause comparable collateral damage[32]. Thus this amount of incidental loss is not "clearly excessive" in this armed conflict.

In this case, the incidental deaths and injuries in the two-day attack is similar to normal civilian casualties in this armed conflict, whilst Reed could acquire military advantage which was so large that it could have a direct effect on the victory of the war. Thus such amount of civilian casualties is not excessive related to such a big military advantage anticipated.

1.2 The mental elements of Reed are missing.

Pursuant to Art.8(2)(b)(iv) of *EoC*, two elements must be satisfied to establish the requisite *mens rea* of this crime: (a) the perpetrator knew that the attack would cause such civilian casualties; and (b) the perpetrator knew that the civilian casualties would be clearly excessive.[33] In this case, neither of the two elements was satisfied.

1.2.1 Reed did not know such civilian casualties would occur in the ordinary course of events.

In the attack against BAS factory, Reed avoided working hours of BAS factory to spare the workers[34]. The very reason why the workers were killed or injured in the attack is that "they were, **exceptionally** ,working overtime on the set up of the new

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[28] Ibid. para.31
[29] Referred to the attack on Peace Garden, see in ibid. para.26 to 27.
[30] Referred to the attack on BAS factory, see in ibid. para.25.
[31] *Facts*, paras.25,27.
[32] Referring to the artillery attack against Rica, *Facts*, para.19.
[33] EoC, Art.8(2)(b)(iv).
[34] *Facts*. para.25

production line"[35].Thus Reed did not know, in the **ordinary** course of event, there would be such civilian casualties occurring in the two-day artillery attack, in particular, the civilian casualties in the attack against the factory.

1.2.2 Reed did not know such civilian casualties would be clearly excessive.

Footnote 37 of EoC requires that a value judgment shall be made by the perpetrator, and the evaluation of the judgment must be based on requisite information available to the perpetrator at the time. The determination of relative value must be that of the "reasonable military commander"[36]. Further, it is held that "the only requirement is that the attacker acts **in good faith** while making the decision"[37].

In this case, **first**, the reliable information was collected as much as possible. Reed got the target list on the basis of records of Alphonian authorities, information collected by drones and informants in Kiesh, and constantly updated information of the location and Colonel Bing's residence[38]. **Second**, Reed made adequate precautions to protect civilians. Reed directed an evacuation to protect civilians.[39] Reed avoided working hours of BAS factory to spare the workers there[40]. Reed used missile to attack Colonel Bing's residence, instead of artillery attacks[41]. Thus Reed took "all feasible precautions"[42] to minimize the civilian casualties.

Therefore, based on all the available information and precautions, it can be inferred that Reed acted in good faith and thus was not aware that the attack would cause "clearly excessive" civilian casualties.

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35 Ibid, para.25.

36 ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign*, para. 50.

37 YORAM DINSTAN, *THE CONDUCT OF HOSTALITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT.* (2004) at para.122..

38 See in *Facts*, para.22

39 Ibid., para.26

40 Ibid. para.25

41 Ibid, paras. 26 to 27.

42 AP I, Art.57(2)(a)(ii).

II. WAR CRIME OF ATTACKING PROTECTED OBJECTS

2.1 The Protection of the Municipal Hospital discontinued at that time.

As both declared in GC and AP, medical establishments should not be attack in any circumstances[43], but the protection shall cease when they are used to commit, outside their humanitarian duties, **acts harmful to the enemy**[44]. The ICRC also sets out some examples, such as using it to **shield military actions**[45]. The ICRC then explained that medical establishments must observe the **neutrality** which they claim for themselves and which is their right under the Convention[46].

In this case, the Municipal Hospital was guarded by Ventures soldiers who were wearing military uniforms and carrying assault rifles.[47] When the squad was approaching, a Ventures soldier first shot at the squad[48]. The Ventures soldiers from the hospital, who were able-bodied and had the will to conduct hostile acts, used the Hospital to attack the squad. The crossfire lasted for more than one hour and there was firing from inside the hospital[49], which further proved that there were comparable amounts of soldiers and ammunition in the Hospital.

2.2 Reed is Not Responsible Under Article 25(3)(b).

The ICC in *Mudacumura* spelled out four elements for establishing responsibility under Article 25(3)(b) pursuant to "ordering", in this case, the last two elements are missing[50].

2.2.1The order did not have a direct effect on commission of this alleged crime.

The ICC and ICTR explained that there must be sufficient evidence to prove that "the

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[43] See in Art.19 GC I, Art.18 GC IV, Art. 12 AP I.
[44] See in Art.21 GCI, Art.19 GCIV, and Art.13 API.
[45] Jean S. Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, pp.200-201.
[46] Ibid.
[47] *Facts*, para.32.
[48] Ibid., para.34.
[49] Ibid.
[50] ICC, *Mudacumura, Decision on the Prosecutor's Application under Article 58*, para.63.

order has a direct effect on the commission or attempted commission of the crime"[51] and "in what capacity the accused supported the act"[52]. In *Kamuhanda,* the ICTR also held that "order has a direct and substantial authority over the perpetrator of the crime"[53].

In this case, all Reed did was sending the squad just to "eliminate the threats", not to attack the Hospital[54]. After the squad was sent, he did nothing to influence this military action, nor did he receive any information from the squad commander[55]. No evidence shows that Reed "had a direct or substantial effect on the omission or attempted commission of the attack", not to mention "how and in what capacity he supported the act". Therefore, Reed did not have the requisite *actus reus* for establishing responsibility under Article 25(3)(b) of the Statute for ordering a crime.

2.2.2 Reed did not have the *mens rea* for establishing liability under Art.25(3)(b).

As for *mens rea* for establishing liability for "ordering", Article 30 of the ICCSt. states that 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 *Blaskic,* the Appeal Chamber considered that the knowledge of any kind of risk, however low, does **not suffice** for the imposition of criminal responsibility[56], because there is always a possibility that violations could occur[57]. Thus, a standard of "**substantial likelihood**" was employed by the Appeal Chamber[58]. The ICC, in *Mudacumura,* considered that "the person is at least aware that the crime will be committed **in the ordinary course of events as a consequence of the execution**"[59], which is an interpretation of "substantial likelihood".

In this case, Reed only ordered the squad to eliminate the threats, and he mentioned

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[51] ICC *Mudacumura* decision on the Prosecutor's application under Art.58; ICTR, Appeals Chamber, *Kamuhanda v. The Prosecutor*, "Judgement", 19 September 2005, ICTR-99-54AA, para. 75.
[52] ICTR, *Akayesu* Judgement para.642.
[53] *Kayishema and Ruzindana,*Appeal Judgement, para. 186.
[54] *Facts*, para.33
[55] Ibid., paras.33, 34.
[56] ICTY, *Blaskic* Appeal Judgment, para.41.
[57] Ibid.
[58] Ibid., para.42. See also ICTY, *Kordic* Appeal Judgement,para.28; ICTR, *Akayesu* Trial Judgment, para.483.
[59] ICC, *Mudacumura*, Decision on the Prosecutor's Application under Art.58, para.63.

nothing about the Hospital[60]. Moreover, the squad was sent to that area to eliminate threats, and to spare non-threatening persons.[61] Thus it can be inferred that Reed did not intend to cause any illegitimate consequences. Further, the targets were clearly limited to the threatening combatants, instead of the Hospital. In the ordinary course of events, Reed did not know that the Hospital would be attacked. Therefore Reed did not have the *mens rea* of this crime pursuant to "ordering".

Incidentally, both "soliciting" and "inducing" basically refer to a situation where a person is influenced by another to commit a crime[62]. The trial chamber of ICTY holds that "instigating" has basically same meaning[63]. In *Kordic,* the Appeal Chamber holds that the requisite *mens rea* for "instigating" can be analogous to that of "ordering" [64]. Thus, the requisite *mens rea* of "inducing" and "soliciting" can be analogous to that of "ordering". Therefore, either the *mens rea* of "inducing" or "soliciting" is not satisfied based on the absence of the *mens rea* of "ordering".

In the light of the foregoing, Reed is not responsible under Article 25(3)(b).

III. WAR CRIME OF TREATMENTS IN WESTWOOD PRISON

3.1 Treatments in Westwood Prison do not constitute the war crime of torture.

3.1.1The severity of pain or suffering did not reach the threshold of torture.

(a)The severity of solitary confinement did not reach the threshold of torture.

The expression "severe pain or suffering" conveys the idea that "only acts of substantial gravity may be considered to torture"[65]. In *Selmouni* v. *France,* the Court held that the 'severity' of the pain or suffering is, 'in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental **effects**'[66].

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[60] *Facts*, para.33.
[61] Ibid.
[62] Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, p.753
[63] ICTY, *Kordic*, Trial Judgment, para.387.
[64] Ibid., Appeal Judgment, para.30-32.
[65] ICTY, *Delalic* Trial Judgment, paras.468-469.
[66] ECtHR, *Selmouni*v.*France*, Judgmentof28July 1999,Reportsof JudgmentsandDecisions,1999-V, para. 100.

Therefore, solitary confinement is not in itself torture inhuman treatment[67]. In a similar case, the detainees were held incommunicado with eyes blindfolded and hands tied together for similar period of time, resulting in limb paralysis, leg injuries, substantial weight loss and eye infection[68], which constituted torture. In this case, however, Mange was only put in solitary confinement, with no degrading measures. Moreover, no evidence in this case shows that solitary confinement caused mental or physical pain or suffering on Mange. Therefore, the severity of solitary confinement did not reach the threshold of torture.

(b)The severity of force feeding did not reach the threshold of torture.

The severity of pain shall not depend wholly on the sensibility of the victim, because it would cause unfairness to the accused[69]. "The manner and method used"[70] is crucial when assessing the severity of the acts.

In this case, Mange, together with other hunger strikers, was sent to infirmary[71] and received great health care and medical supervision[72]. In addition, the procedure was conducted by Dr. Malade and drugs were administered to "prevent motion sickness and pain".[73]Thus the force feeding was conducted in a manner with great care to minimize pain or suffering of the detainees. Hence the severity of force feeding did not reach the threshold of torture.

3.1.2 Treatments in Westwood Prison were legal sanctions.

(a)Treatment of solitary confinement was legal sanction.

The ICTY, referring to the Torture Convention[74], confirmed that 'pain or suffering arising only from, inherent in or incidental to lawful sanctions are not included'[75].

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[67] ICTY, *Krnojelic* Trial Judgment, para.183.
[68] *Weinberger v. Uruguay*, Communication No. 28/1978, Report of the Human Rights Committee, UN Doc. A/36/40, pp. 114 ff.
[69] ICTY, *Aleskovski* Trial Judgment, para.56.
[70] ICTY, Krnojelic Trial Judgment,para.182.
[71] *Facts*, para.40.
[72] Ibid, para.42.
[73] Ibid, para.41.
[74] UN Doc. A/RES/39/46 of 10 December 1984. See alsoArt.2(2) of *The Inter-American Convention to Prevent and Punish Torture*.
[75] ICTY, *Delalic* Trial Judgement, para.459; ICTY, *Furundzija* Appeal Judgement, para.111.

Moreover, removal from association with other prisoners for security, **disciplinary** or protective reasons should not constitute inhuman treatment or degrading treatment or punishment[76].

In this case, Thomas Mange had been protesting arrest and advocating freedom ever since the first day of his detention[77]. As a professor and speech maker[78], Mange's protest was provocative and there was "collective pressure" in the prison forcing detainees to misbehave, which would disrupt the order in the Prison. Thus to maintain discipline in the prison, Mange had to be kept in solitary confinement. Therefore, the mental or physical pain or suffering arose only from lawful measures.

(b)Treatment of force feeding was legal sanction.

As demonstrated above, the pain or suffering arise only form, inherent in or incidental to lawful sanctions should be excluded from consideration. According to the jurisprudence of European Court of Human Rights, 'force feeding' should not be regarded as torture, inhuman or degrading treatment if :(a) there is **a medical necessity** to do so, and (b) the **manner** in which the detainee is force-fed is not inhuman or degrading[79].

In this case, after a medical examination by doctor, Mange's health condition was deteriorating and he was suffering from arrhythmias after more than 10 days of hunger strike[80]. However, serious arrhythmias could cause sudden death. It remained the responsibility of the Prison to maintain Mange's life and health[81]. Thus there was medical necessity to do so.

Meanwhile, Mange and other hunger-strikers were taken in infirmary and received concordant great medical care. The force-feeding was conducted with medical care and in good faith to save Mange and the other detainees' lives, which was humane and considerate.

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[76] ECiHR, *Krocher and Moller v. Switzerland*, Report, 16 December 1982, § 62.
[77] *Facts*, para.38
[78] Ibid, para37.
[79] ECiHR ,*Nevmerzhitsky v. Ukraine* Judgment, 5 April 2005, para.94.
[80] *Facts*, para.38 to 40.
[81] GC IV, Art.91; ICTY, *Vojislav Seselj, Urgent Order to the Dutch Authorities Regarding Health and Welfare of the Accused*, para.8.

Accordingly, the treatments in the Prison were lawful and shall not be regarded as torture, inhuman or degrading treatment.

3.1.3The purposive element was missing.

Element 2 of Article 8(2)(a)(ii)-1 stipulates a list of purposive requirements, i.e., obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind. The ICTY, in *Brdjanin Case*, stated that "in the absence of such purpose, even the very severe infliction of pain does not qualify as torture"[82]

In this case, as demonstrated above, the act of solitary confinement and was merely for the concern of maintaining order and discipline in the prison, and the act of force feeding was only to keep hunger strikers healthy and alive. The purposes are all humane and lawful. Therefore, no evidence indicates that the measures taken showed humiliating or degrading manner towards the detainees. Thus, the purposive element was missing.

3.2 Treatments in Westwood Prison do not constitute War Crime of Inhuman Treatment.

If one compares the elements of torture and inhuman cruel treatment in the Elements of Crimes, "the element of purpose is the only distinguishing feature"[83]. " The *ad hoc* Tribunals refer to 'severe' pain or suffering for the crime of torture and 'serious' pain or suffering for the crimes of inhuman/cruel treatment"[84] ,in which it is consistently indicated that "the degree of suffering required to prove cruel or inhuman treatment was not as high as that required to meet a charge of torture"[85]. Nevertheless, the Elements of Crimes refers for both crimes to "severe" pain or suffering. Thus the

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[82] ICTY, *Brdjanin* Trial Judement, para.486.

[83] Otto Triffterer(ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, p.308.

[84] See for example ICTY *Prosecutor v. Delalic,et al.*,para.543.

[85] For example, *Prosecutor v. Delalic et al*., para.510; *Prosecutor v. Kvocka et al*., Case No.IT 98-30/1-T, Judgment, Trial Chamber, 2 Nov. 2001, para. 161; *Prosecutor v. Brdjanin*, para. 483; *Prosecutor v. Naletilic and Martinovic*, para.246.

Elements of Crimes raises the threshold severity of "inhuman treatment" to that of "torture".

On the basis that the severity of pain or suffering did not reach the threshold of war crime of torture, it did not reach that of war crime of inhuman treatment either.

3.2 Reed Is Not Responsible Under Article 28

3.2.1 There was no "effective control".

In *Bemba*, "effective control" is an element of superior responsibility[86] and must be obtained by modality, manner or nature by a commander over his forces or subordinates[87]. The standard of it requires commander to have material capability to prevent or punish criminal acts[88].

In this case, it was Jackson Wall who was in charge of all operations in the prison[89], and he only made consultations, not asking for instructions. The evidence only shows that Reed had the capacity of receiving reports and offering consultations. Thus no evidence showed that Reed had the effective control in Westwood Prison.

3.2.2 Reed neither knew nor had reason to know.

The ICTY, in *Delalic*, held that a superior can be held criminally responsible only if some specific information was **in fact** available to him which would provide notice of offences committed by his subordinates[90]. Moreover, the information should **actually exist** and a superior is not liable under the provision that he neglect a duty to acquire such knowledge[91].

In this case, Wall made the decision to put Mange in solitary confinement without giving notice to Reed in any forms[92]. No information could enable Reed to conclude

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[86] ICC, *Bemba Decision on Confirmation of Charge*s, paras.410, 411.
[87] Ibid, para.441.
[88] *Prosecutor v. Delalic(Celebici)*, Case No. IT-96-21-T, Judgment, para.378.
[89] *Facts*, para.41
[90] ICTY, *Delalic*, Trial Judgment para.393.
[91] Ibid, paras.388-393; *Blaskic* Appeal Judgment, para.62.
[92] *Facts*, para.38.

in the circumstances that Wall was going to commit such a crime[93].Thus neither Reed knew nor had reason to know the alleged crime would be committed.

[93] API Art.86(2).