NUREMBERG MOOT COURT COMPETITION

Defence Counsel

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INTRODUCTION

1. Pursuant to Article 61(7) of the Rome Statute[1], the PTC shall "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". The Defence Counsel ("Defence") respectfully submits that this evidentiary standard is not met in this case.
2. The Defence considers that the case against Mr Sandheaver: (i) does not fall within the jurisdiction of the ICC and (ii) is inadmissible. If the PTC determined the opposite, the Defence indicates that both (iii) the material prerequisites of war crimes and crimes against humanity and (iv) the specific elements of the crimes set down in the arrest warrant have not been satisfied in this case. Moreover, the facts of the case suggest that (v) the elements constituting modes of liability have not been met. The Defence also maintains that (v) the arrest warrant issued was unlawful.
3. The position adopted by the Defence is based on the following submissions:
    a. Due to the fact that Irkania and Astor are not the State Parties of the Rome Statute, the ICC shall exercise its jurisdiction only on condition that at least one of these countries lodged the effective declaration under Article 12(3) ICCSt. In this case Astor did not used this mechanism and the declaration lodged by Irkania has not been effective;
    b. Even if the PTC came to the conclusion that the case falls within its jurisdiction, it must consequently determine that a case is inadmissible, due to Irkania's priority to investigate and prosecute the case (*vide* Article 17(1)(a) ICCSt);
    c. In the event that the Court determined that the case is admissible, the material prerequisites of war crimes and crimes against humanity have not been met in this case, because Astor was acting in necessary, imminent and proportional national-defence that is natural law granted for all the countries;
    d. However, if the PTC considered that the contextual elements have been satisfied, the specific elements of the crimes set below have not been met:
        i. The recruitment of the children under the age of fifteen as soldiers since as the crime committed on the territory of Astor, it falls outside the scope of the territorial jurisdiction of the ICCSt;
        ii. The use of children under the age of fifteen as soldiers on the basis of Article 33(1) ICCSt; and

[1]2187 UNTS 90/37 ILM 1002 (1998)/[2002] ATS 15.

iii. The crimes of rape and sexual violence have not been committed since the women gave their legally relevant consent;

e. According to the modes of liability, the Defence underlines that Mr Sandheaver shall not be found criminally responsible as a military commander for the crimes committed by the 18th Brigade since he discharged all the duties imposed by Article 28(a) ICCSt and there is no nexus between his omission and the crimes committed required under this provision.

f. Additionally, the Defence indicates that the warrant arrest against Mr Sandheaver was unlawful because Mr Sandheaver had diplomatic immunity that has not been waived which is a breach of Article 98 ICCSt.

PROCEDURAL MATTERS

I. Jurisdiction

4. The ICC jurisdiction is based on a system of "automatic jurisdiction", which means that a state which ratified or acceded to the Statute becomes automatically subject to the Court's jurisdiction if the crime set out in Article 5 was committed either on the territory of the State Party (territoriality) or by a national of s State Party (active personality)[2]. From that perspective, the mechanism provided by Article 12(3) – the declaration lodged to the Registrar by a Non-State Party – is an exception broadening the ICC jurisdiction and as *exceptiones non sunt extendendae*, it shall be interpreted restrictively. Consequently, the ICC may exercise its jurisdiction only on condition that the State (acting pursuant to either territoriality or active personality principle) submitted an effective declaration.

5. In February 2014, the government of Irkania decided to lodge a declaration in accordance 12(3) ICCSt although in January 2014 it signed a peace agreement that *inter alia* granted amnesty to the perpetrators who committed atrocities during the conflict between Irkania and Astor. The Defence states that the amnesty granted in the agreement from January is a formal bar for the ICC's jurisdiction and thus, Irkania's declaration shall have no further implications.

6. As far as amnesty granted in paragraph 5 of the peace agreement signed between Astor and Irkania is concerned, it should be emphasized that unlike the SCSL Statute[3], the ICC remains silent on this matter. Therefore, according to Article 21(3) of the Statute, the Court shall apply applicable treaties

[2] Mohamed M. El Zeidy, Ad hoc declarations of acceptance of jurisdiction: the Palestinian situation under scrutiny in Stahn (ed.), The Law and Practice of the International Criminal Court (1st ed., 2015).
[3] 2178 UNTS 138, 145; 97 AJIL 295; UN Doc. S/2002/246, appendix II.

and the principles and rules of international law, including the established principles of the international armed conflict.

7. Article 6(5) of the Additional Protocol (II) to the Geneva Conventions states that "at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained"[4]. This language clearly indicates that, contrary to the position of some scholars and authorities, e.g. William Schabas[5], broadly understood amnesty mechanisms implement the general directive set out in the IHL. As examples of the countries that effectively granted amnesties for the perpetrators of atrocity crimes, it may be mentioned Chile (where such amnesty was applied after the Franco-Algerian War in 1962) or India and Bangladesh (that agreed in 1971 not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis). The importance of general amnesties increases, as can be seen most recently in the Minsk agreement (2015) concerning the Ukrainian conflict that was advocated by United Nations Security Council[6]. Thus, it would be incoherent with the norms and tendencies in the IHL to sustain that despite the absence of the statutory provisions, the ICC is not bound by the amnesty.
8. It is worth mentioning that the alternative interpretations lead to the different conclusions, but the same results. Namely, if the peace-agreement as bilateral was found binding for Irkania and Astor, but not the ICC, Irkania would be legally incapable to lodge the declaration under Article 12(3) ICCSt. Paragraph 5 of the peace-agreement if interpreted in accordance with Article 31(1) of the Vienna Convention on the law of treaties[7], prohibits both Irkania and Astor from initiating any investigation concerning the crimes committed during the conflict, both on national and international level. Since the ICC jurisdiction in such a case is not automatic, but depends on the effective act of the Non-State Party, the declarations lodged by Irkania was *per se* a breach of the peace agreement and therefore unlawful. Since unlawful conducts of the Non-State Party shall not have procedural consequences before the ICC, the declaration lodged in February 2014 could not been ineffective.

[4]UN doc. 1125 UNTS 609.
[5]William Schabas, *No Peace without Justice?*, The Amnesty Quandary, Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals, OUP 2012.
[6]UN doc. S/RES/2202 (2015), Security Council Resolution.
[7]United Nations, Treaty Series, vol. 1155, p. 331.

II. Admissibility

9. As a precaution, in the event of the PTC challenging the consequences of the amnesty granted in the peace agreement, the Defence submits that the PTC shall determine the case against Mr Sandheaver as inadmissible by way of complementarity (Article 17 ICCSt). Irkania has priority to investigate and prosecute the crimes committed on its territory and the ICC may exercise its jurisdiction on condition that Irkania is unwilling or unable genuinely to investigate or prosecute the alleged offender. After Mr Sandheaver was arrested in Fianar (Olmaea), Irkania requested his extradition. According to the Black's Law Dictionary warrant of extradition is "an order to surrender a person who is accused or convicted of a crime to the jurisdiction where the crime was originally committed"[8]. Such definition suggests that the request for an extradition is in itself a decisive factor for the evaluation of the State's willingness to prosecute. It is therefore sufficient to conclude that the case should be determined inadmissible.

III. The scope of the jurisdiction

10. If the PTC held that the case against Mr Sandheaver is admissible, the Defence notes that the jurisdiction of the ICC is limited. As specifically evaluated below, the territorial jurisdiction covers exclusively the offences committed on the territory of Irkania, since the ICC is incapable of exercising jurisdiction towards any acts on the territory of Astor. Temporarily, in accordance with Article 24 (1) ICCSt no person shall be criminally responsible for conduct prior to the entry into force of the Statute. Considering that the declaration under Article 12(3) has effects *pro futuro* (the Statute does not prejudge its retroactive character), the jurisdiction covers only the offences committed after February 2014. This statement is not challenged by Article 11(2) ICCSt that provides "the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12(3)". This provision only stresses that the Statute cannot come into force on the basis of *ad hoc* declaration, but exceptionally may be applied with respect to the particular crimes. Thus, in line with the spirit of the Statute and rudimentary principle *nullum crimen sine lege praevia*, the Defence concludes that the ICC jurisdiction covers solely the acts committed after February 2014 which implicates that the alleged offences fall outside the scope of the jurisdiction.

[8] thelawdictionary.com [access: 09.06.2016]

MATERIAL ELEMENTS OF CRIMES AND MODES OF LIABILITY

IV. Material prerequisites of war crimes and crimes against humanity

11. In the event the PTC nonetheless found the case against Mr Sandheaver admissible, the Defence submits that the material prerequisites are not satisfied since Astor was acting in necessary, imminent and proportional national-defence.
12. In accordance with Grotius the right to self-defence is a natural law and may be exercised by everyone whose right is in danger[9]. The UN Charter states a right to self-defence in Article 51[10]. Under the UN Charter the self-defence of the State is justifiable if the violation of this State's rights is imminent and concerns its sovereignty[11]. All the countries, including UN non-members "have a right to defend, with lethal force, their existence as organic entities, so states have the right to defend with military force their existence as sovereign entities"[12]. What is more, the self-defence is also allowable when the attack is predictable and the actions taken up by a state are supposed to be proportionate to it[13]. As widely recognized in literature, national self-defence is similar to the personal self-defence and the elements of these institution are the following: necessity, imminence, and proportionality[14]. On the basis of the *Caroline* incident, the doctrine asserts that "the use of force by one nation against another is permissible as a self-defence action only if force is both necessary and proportionate"[15].
13. In the case Astor decided to conduct the attacks in order to reconquer the occupied zones what suggests that its territorial integrity was interrupted by Irkanian troops. The Defence highlights that "distinguishing a strictly bounded territory from an external world fixes the territorial scope of

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[9] David Rodin, War and self-defence, Published to Oxford Scholarship Online: January 2005, p. 110.
[10] The Charter of the United Nations, article 51 *Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*
[11]The Charter of the United Nations, article 2(4) *Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.*
[12]David Rodin, War and self-defence, Published to Oxford Scholarship Online: January 2005, p. 110.
[13]John Yoo, Point of Attack: Preventive War, International Law, and Global Welfare, Published to Oxford Scholarship Online: April 2014, p. 84.
[14]Ibid.
[15] M.A. Rogoff, E. Collins Jr, *The Caroline Incident and the Development of International Law*, 16 Brooklyn Journal of International Law 493(1990), p. 498.

sovereignty"[16]. Therefore, the vital condition of the self-defence is satisfied since Irkania unlawfully and directly attacked Astor's sovereignty. A premise of necessity has a different meaning in international law than in domestic law, namely the state may conduct the war until its complete victory to ensure that its territorial integrity will not be interrupted again[17]. Therefore, the scope of self-defence extended temporarily at least to December 2012 when Irkania decided to withdraw their military units from the occupied zones.

14. The government of Astor decided to make all the possible military efforts to defend its sovereignty. Although at first sight, the attacks conducted by Astor against civilian population seem to be an excess, it is necessary to underline that: (i) civilian institutions were not the only targets (the plan of attacks covered also military aims); (ii) the attacks against military troops were insufficient to force Irkania to withdraw its units; (iii) the Irkanian occupation lasted despite an arms and ammunition embargo imposed against both States by the SC. If even the UN measures are not respected, the more radical solutions should be legitimated and determined proportionate. Therefore, the premises of the national self-defence are satisfied.
15. Taking into account the significant similarities between personal and national self-defence, the Defence holds that the fulfilment of the established conditions should almost automatically exclude criminal responsibility for the alleged acts considering that in the majority of legal systems lawfulness is in issue in self-defence[18]. In the event the PTC did not share this argument, the Defence underlines that the conviction that the offences are legitimated by the national self-defence and therefore they are not unlawful, must have consequences for the fulfilment of *mens rea* requirements. The deep ignorance of the illegality of acts, justified by this conviction, is a classic example of a mistake of law. In accordance with Article 32(2) ICCSt such a mistake may be a ground for excluding criminal responsibility if it negates the mental element required by such a crime. At least partially, this provision excludes the possibility of the commission of the alleged crimes due to the lack of subjective elements.

V. Specific elements of a war crime provided by Article 8(2)(b)(xxvi)

16. As a precaution, the Defence intends to demonstrate that also on the level of substantive law, it is impossible to impose criminal liability on Mr Sandheaver. Therefore, the Defence addresses the

[16]John Agnew, *Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politic*, 95 Annals of the Association of American Geographers, (2005), p. 437; Austen L. Parrish, Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Group Rights, American Indian Law Review Vol. 31 (2007), p. 294.
[17]David Rodin, War and self-defence, Published to Oxford Scholarship Online: January 2005 p. 112.
[18] *Compare e.g.* Appellate Division, S v. De Oliveira, 1993(2) SACR 59 (A) 63i-64b; The Supreme Court of Appeal of South Africa, Director of Public Prosecutions, Gauteng v Pistorius, Judgment, (96/2015) [2015] ZASCA 204, 3 December 2015, p. 29.

specific elements of particular crimes set out in the arrest warrant, starting with the war crime provided by Article 8(2)(b)(xxvi) ICCSt.

17. This provision covers conscripting or enlisting children under the age of fifteen years into the national armed forces and using them to participate actively in hostilities. The Statute itself differentiates between "conscripting or enlisting" children under the age of fifteen years, which are two forms of recruitment[19], and "using" them as distinct war crimes constituted by different set of material elements[20]. The interpretative directive *nullum crimen sine lege certa* implicates that it is necessary to clearly separate these two crimes. This argument is supported by the word "or" emphasizing the alternative between them.
18. Returning for a moment to the problem of jurisdiction, the Defence highlights that the jurisdiction based on the territoriality principle is not unlimited. It shall not extend to the atrocities committed on the territory of the country that is not a Party to the Statute or has not accepted the ICC jurisdiction (vide Article 12(2) ICCSt). It implicates that in this case the crimes committed on the territory of Astor are *in abstracto* situated outside the scope of the charges that potentially could be confirmed by the PTC.
19. The statement of facts leaves little doubt that children under the age of fifteen were used during the attacks in Irkania, but as Astorian special unit recruited and trained on the territory of Astor. The permanent nature of the crime of enlisting and conscripting does not influence the distinction between recruitment of children and using them to participate actively in hostilities. The alternative introduced by the wording "or" accepts, of course, the possibility of multiplying these basis of criminal liability, but only when the alleged perpetrator first recruited (enlisted or conscripted) the children and then used them during hostilities. The fulfilment of the material elements of the war crime of using children under the age of 15 to participate actively in hostilities cannot in any case prejudge that the crime of conscripting and enlistment has been committed. Therefore, criminal liability for recruiting the children under the age of fifteen years into the national armed forces is excluded due to the lack of ICC jurisdiction.
20. Simultaneously, the Defence holds that the criminal liability for the war crime of using children under the age of fifteen years to participate actively in hostilities is also not possible, for the following reasons: (i) the absence of personal nexus to that crimes and (ii) the fulfilment of the conditions set out in Article 33(1) ICCSt.

[19] ICC, Prosecutor v. Lubanga, ICC-01/04-01/06-803, Decision on the confirmation of charges, 29. January 2007, para. 246.
[20] Ibid, para. 248 and footnote 321.

21. It is a core principle of criminal law that nobody shall be criminally liable in the lack of some form of personal nexus[21]. This personal nexus shall not be anticipated. In this case, the language of the letter of facts differs in respect of distinct atrocities. Addressing recruitment, it is stated that "General Sandheaver was appointed for the implementation of the measures envisaged, *inter alia* for the recruitment process" and that "lacking volunteers for the unit, he decided to recruit children under the age of fifteen as ordinary soldiers". In the event of the war crime of using children to participate in hostilities, the letter of facts uses the passive voice and does not suggest that Mr Sandheaver was personally linked to this crime, e.g. that he was present during the attacks or gave any commands. With the requisite degree of certainty, it is not sufficient to establish substantial grounds to believe that Mr Sandheaver committed the crime in any of the modes of liability provided by Article 25(3) ICCSt.
22. In accordance with Article 33(1) ICCST "the fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (i) the person was under a legal obligation to obey orders of the Government or the superior in question; (ii) the person did not know that the order was unlawful, and (iii) the order was not manifestly unlawful", subject to paragraph 2 ("for the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful"). The Defence holds that on the basis of this provision criminal liability of Mr Sandheaver for the war crime of using children under the age of fifteen years to actively participate in hostilities shall be excluded.
23. Although it was Mr Sandheaver's decision to recruit children under the age of fifteen as ordinary soldiers, it was simultaneously the execution of the order given by the army high command of Astor rooted in the state's policy. In this context, it should be emphasized that the government of Astor demanded **all the possible military efforts** to be taken in order to reconquer the occupied zones and the army high command decided to **establish a special unit with the purpose to attack critical military and civil institutions**. These measures may themselves raise questions concerning the risk of excessing national self-defence which could lead to the commission of the war crimes. Mr Sandheaver was appointed for the implementation of these hazardous measures. As a general, he remained under the authority of the army high command. The decision to recruit children resulted from the absence of volunteers. It was, therefore, the only way of discharging the legal

[21] ICC, Prosecutor v. Bemba, ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute, 21. March 2016, para. 211.

obligation imposed on Mr Sandheaver. If the only possible way to execute the order is in particular circumstances unlawful, the whole order should be considered as unlawful.

24. The fact that the use of children under the age of fifteen as soldiers is not a crime under the national law of Astor inhibited the recognition of the unlawful character of the order. Bearing in mind that the legal system is built on the postulate "every man is presumed to know the law"[22], the Defence is of the view that this particular circumstances justify the exception from the rule *ignorantia legis non excusat*. If a State is the party of the Statute, it automatically becomes the part of this country's domestic system. Astor is a non-party State and the jurisdiction in this case was initiated on the *ad hoc* basis. Therefore, there can be no presumption of the knowledge of ICCSt norms. The letter of facts gives no information concerning the treaties the party of which is Astor. Thus, on the international law level, nothing shall suggest that Mr Sandheaver should have known that the use of children under the age of fifteen as soldiers is a war crime. Moreover, it is necessary to admit that under the Statute only orders to commit democide and crimes against humanity are manifestly unlawful (Article 33(2) ICCSt). The Statute accepts then the possibility that the mistake of law reflects in discharging of criminal liability for the war crime. The Defence holds that this is an example of Mr Sandheaver case.

VI. Specific elements of a rape as a war crime and a crime against humanity

25. According to the arrest warrant, Mr Sandheaver is seen criminally responsible for the rape as a war crime and crime against humanity under Article 28(a), that is as military commander. The Defence declines such charges for the reasons set out below. The Defence questions the ICC statement held in the *Bemba* case that "the victim's lack of consent is not a legal element of the crime of rape under the Statute"[23]. The forms of impact on the victim's will set out in the Elements of Crimes (Article 7(1)(g) and Article 8(2)(b)(xxii)-1), namely force, threat of force, coercion, etc. do not exist independently. These factors suggest that the will of the victim has been overcome or that victim's submission to the act has been non-voluntary[24]. Such observation justifies the thesis that the victim's free and genuine consent to sexual penetration mandatorily excludes the commission of any crime against sexual freedom[25]. Otherwise, the PTC would deny the Ulpian rule – *volenti non fit iniuria*. Since the middle of the 20th century, in the context of the crimes against sexual freedom dominates the concept of sexual freedom as a individual good. This implicates that a sane person in

[22]Annemieke van Verseveld, Mistake of Law. Excusing Perpetrators of International Crimes (1st ed., 2012), p. 1.
[23]ICC, Prosecutor v. Bemba, ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute, 21. March 2016, para. 104.
[24]ICTY, Prosecutor v. Kunarac et al., IT-94-23-1-T, Judgement, 22. February 2001, para. 457.
[25] Ibid., para. 453.

adequate age can freely dispose of this good and consent any sexual acts. Only after negating the free and genuine consent, a sexual act may be considered unlawful. Therefore, the Defence upholds its argument that since all the sexual acts charged were consented by the women in Irkania, they were voluntary and did not constitute any crime.

26. Additionally, in accordance with the letter of facts the sexual acts were perpetrated in order to terrorize and humiliate the inhabitants of Irkania. Regardless of the despicable character of such acts, they do not fulfill the material requirements of the crime of rape. The causal link should be exactly reverse. It is not the sexual acts that shall cause significant humiliation, but the humiliating acts shall be conducted with the purpose to overcome the victims' will or force their consent (on the subjective level) and as a consequence shall lead to the sexual penetration (on the objective level). Such causal nexus cannot be concluded in this case which strengthens the position that the material elements of rape as a war crime and crime against humanity have not been satisfied.

VII. Criminal responsibility as a military commander under Article 28(a) ICCSt

27. The responsibility under Article 28(a) depends on the fulfillment of six conditions, namely: (i) crimes within the jurisdiction of the Court must have been committed by forces; (ii) the accused must have been either a military commander or a person effectively acting as a military commander; (iii) the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes; (iv) the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; (v) the accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and (vi) the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them[26]. The Defence submits that the conditions (iii), (v) and (vi) have not been satisfied in this case.

28. Article 28(a)(ii) imposes three distinct duties upon commanders – preventing the commission of crimes, repressing the commission of crime and submitting the matter to the competent authorities for investigation and prosecution. The failure to discharge any of these duties may attract criminal liability. *"The purpose of them is, first and foremost, the prevention of crimes of subordinates that are about to be committed, and in the second place, the punishment of subordinates who have already committed crimes"*[27]. Since the alleged acts were committed during a total breakdown of

[26]ICC, Prosecutor v. Bemba, ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute, 21. March 2016, para. 170.
[27]ICTY, Prosecutor v. Orić, IT-03-68-T, Trial Judgment, 30 June 2006, para. 326.

communication between Mr Sandheaver and his forces on 12 November 2013 and Mr Sandheaver was informed about them several days after the commission, undoubtedly, the obligation to prevent has not arisen[28].

29. The Defence is of the view that Mr Sandheaver discharged the other obligations, namely to repress the commission of crime or submit the matter to the competent authorities. In the Halilović case, the ICTR characterized the essence of this duty – "the superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process. He has a duty to exercise all measures possible within the circumstances; lack of formal legal competence on the part of the commander will not necessarily preclude his criminal responsibility. The duty to punish includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities"[29].
30. The particular circumstances delimit the scope of the obligation. Mr Sandheaver has taken an important step by contacting the army high command promptly. He asked for permission to inform the competent Prosecutor. These conducts indicate the genuine and decisive conduct in response to the atrocities he has been informed about. It could be argued that Mr Sandheaver could react more actively and inform the Prosecutor regardless of the high command's rejection and the threat degradation. Yet, such arguments would be unilateral. The jurisprudence highlights that disregard or non-compliance with orders or instructions of the accused will always indicate a lack of effective control[30]. The army's high command not only rejected Mr Sandheaver's request, but more importantly "pointed out the positive military outcome for the army of Astor". Such declaration immediately reduced Mr Sandheaver's authority understood as "power or right to give orders and enforce obedience"[31]. After Mr Sandheaver's superiors challenged his reaction to the atrocities, his further actions could not influence his subordinates. Therefore, taking account of these factors, Mr Sandheaver discharged his obligation.
31. Although, it is itself sufficient to exclude the criminal liability, the Defence indicates that due to the lack of information about the recruitment and training of the 18th Brigade, it is impossible to determine that there is sufficient evidence to establish substantial grounds to believe that the crimes were committed as a result of the failure to exercise control properly. In this context, the jurisprudence referred to the rules of conduct adopted in the organization in question or the

[28]ICTR, Prosecutor v. Nahimana et al., ICTR-99-52-A, Appeals Judgment, 28 November 2007, para. 721.
[29]ICTY, Prosecutor v. Halilović, IT-01-48-T, Trial Judgment, 16 November 2005, para. 100.
[30]ICC, Prosecutor v. Bemba, ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute, 21. March 2016, para. 190.
[31] ICC, Prosecutor v. Bemba, ICC-01/05-01/08-424, Decision on Charges, 15 June 2009, para. 413.

behaviour of the accused that increased the risk of new crimes being committed[32]. The letter of facts lacks such information. Therefore, in the absence of the factual grounds, the Defence submits that the criminal liability under Article 28(a) ICCStas a military commander is not attributable in this case.

THE UNLAWFULLNESS OF THE ARREST WARRANT

32. Mr Sandheaver was arrested during a diplomatic meeting between authorities of the Republic of Irkania and the Republic of Astor in the capital of Olmaea which is signatory of the Rome Statute. There is no doubt that immunities shall not bar the ICC from exercising its jurisdiction over such a person (*vide* Article 27 ICCSt). However, they are a bar for the surrender (Article 98 ICCSt).
33. Extradition of Mr Sandheaver was requested by the Prosecutor of the ICC and Irkania. It should be noted that this proposal shall not take place. Diplomatic immunity assured for Mr Sandheaver is an obligation binding both Irkania and Olmaea. This obligation has complex basis. Irkania shall have respected this institution due to the peace agreement signed in January 2014 which granted amnesty for the perpetrators of both sides. Obligation for Olmaea arises directly from the Statute, since the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender. The immunity of Mr Sandheaver has not been waived, therefore, the arrest should be considered unlawful.

CONCLUSIONS

34. For all the reasons mentioned above, the Defence submits that in the absence of factual and legal basis, the Pre Trial Chamber shall decline to confirm all the charges against Mr Sandheaver.

[32]ICTY, Hadžihasanović and Kubura, IT-01-47-A, Appeal Judgment, 22 April 2008, para. 30.