

**NUREMBERG MOOT COURT 2016**

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**TEAM: 14**

**PROSECUTION**

SAMPLE

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The Prosecutor hereby charges Sandheaver with war crimes and crimes against humanity, and requests the Court, pursuant to Article 61(7) of the Rome Statute,<sup>1</sup> to find that there is sufficient evidence to establish substantial grounds to believe that Sandheaver committed these crimes, and confirm the charges.

## **I. THE COURT HAS JURISDICTION**

### **I.A. THE CONDITIONS *RATIONE LOCI*, *TEMPORIS*, AND *MATERIAE* ARE SATISFIED**

In February 2014 an *ad hoc* declaration of Irkania was lodged in accordance with Article 12(3) explicitly accepting the jurisdiction of the ICC for crimes committed on the territory of Irkania during the armed conflict between Irkania and Astor.<sup>2</sup> The conduct forming the basis of these charges occurred on the territory of Irkania providing the Court with jurisdiction *ratione loci* under Article 12(2)(a).<sup>3</sup>

- a) The conduct took place during the armed conflict which began in April 2010 and came to its end in January 2014, providing the Court with jurisdiction *ratione temporis* under Article 11(2) in conjunction with Article 12(3).<sup>4</sup>
- b) The conduct of the accused constitutes crimes against humanity and war crimes, which are crimes within the Court's jurisdiction *ratione materiae* under Article 5 as demonstrated in section.

### **I.B. SANDHEAVER HAS NO IMMUNITY FROM THE COURT'S JURISDICTION**

Only 38 States have ratified the 1969 Convention on Special Missions that grants diplomatic immunity to special missions under Article 31.<sup>5</sup> Olmanea and Astor are not state parties to this treaty. Under customary international law it seems that official *ad hoc* envoys have at the very least immunity from criminal jurisdiction of the host state.<sup>6</sup> However, what is considered a "special mission" and what range of officials taking part in them are potentially granted depend largely on the consent of the

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<sup>1</sup> Hereinafter, all statutory references shall be to the Rome Statute, unless otherwise provided. All references shall be to paragraph numbers, unless otherwise provided.

<sup>2</sup> Case Facts, para 10

<sup>3</sup> Case Facts, paras 5 and 8

<sup>4</sup> Case Facts, paras 2 and 10

<sup>5</sup> Convention on Special Missions, 8 December 1969, *Treaty Series*, vol. 1400, p. 231, Ratification Status available at UN Treaty Database, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=III-9&chapter=3&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=III-9&chapter=3&lang=en), last retrieved 15.6.2016

<sup>6</sup> James Crawford, *Brownlie's Principles of Public International Law*, 8th edition 2012, p. 413-414

sending and hosting States.<sup>7</sup> In general, State practice and case law of domestic courts have shown that two conditions can indicate whether immunity exists for the individual. Firstly, the individual must officially represent the sending state abroad for the mission.<sup>8</sup> Secondly, the host State must have consented to receive the *ad hoc* mission and its members.<sup>9</sup>

It is unlikely that such consent was given for the visit of Sandheaver: firstly, the diplomatic meeting took place in Olmanea, but between authorities of *Irkania* and Astor, not *Olmanea* and Astor.<sup>10</sup> Secondly, granting consent to an *ad hoc* mission is largely a matter of state policy and the domestic courts listen to the opinion of the executive on the matter.<sup>11</sup> Olmanea had only an obligation to take the matter to the ICC under 97(c) and the Supreme Court was the correct court to assess whether decision to surrender was lawful. Considering that the Olmanean Supreme Court ruled in favour of surrender of Sandheaver to the ICC<sup>12</sup>, it is unlikely that the Olmanean executive asserted it had granted such immunity to him.

### **I.B.2. IN ANY CASE, IMMUNITY DOES NOT PRECLUDE THE COURT'S JURISDICTION**

Firstly, state or diplomatic immunity does not preclude the individual's criminal responsibility over international crimes, but acts merely as a procedural bar from jurisdiction in front of national courts.<sup>13</sup> The *raison d'être* of immunities under international law is to enable international relations by preventing foreign States from exercising jurisdiction in their national courts over high representatives of other States.<sup>14</sup> However, international law does not conclusively provide protection against the jurisdiction of independent international courts.<sup>15</sup> The ICC Pre-trial Chamber established in the *Malawi* and *Chad* decisions that immunity does not bar the jurisdiction of international courts, citing extensively from case law of States and international tribunals since Nuremberg and up to ICJ decisions.<sup>16</sup> Consequently, the Prosecution argues that even if Sandheaver is found to possess some

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<sup>7</sup> Alan Moses, *Khurts Bat v. The Investigating Judge of the German Federal Court* (21 July 2011), 147 International Law Reports 633, p. 653, paras 55-62

<sup>8</sup> Michael Wood, *The Immunity of Official Visitors*, in A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 16, 2012, p. 66

<sup>9</sup> See *supra*, Wood, note 8, p. 69

<sup>10</sup> Case Facts, para 10

<sup>11</sup> See *supra*. Wood, note 8, p.71

<sup>12</sup> Case Facts, para 10

<sup>13</sup> ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, para 60

<sup>14</sup> ICJ, *United States Diplomatic and Consular Staff in Iran (US v. Iran)*, Merits (1980), ICJ Reports 3, para 91

<sup>15</sup> Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, (3rd ed.,2014) p. 556

<sup>16</sup> See ICC, *Prosecutor v. Al-Bashir*, ICC-02/05-01/09 Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, and ICC, *Prosecutor v. Al-Bashir*,

form of limited immunity against national jurisdiction of Olmanea, it would not bar his prosecution in front of the ICC for international crimes.

### **I.C. SANDHEAVER ENJOYS NO AMNESTY FROM THE COURT'S JURISDICTION**

The Prosecution finds that amnesties for international crimes are unlawful by default and international courts such as the SCSL have also come to this conclusion.<sup>17</sup> Furthermore, any peace agreement concluded between the two States is a bilateral agreement and as such can only impose legal obligations on its two parties.<sup>18</sup> Therefore the treaty between Astor and Irkania could only possibly provide for amnesties in the domestic courts of Astor and Irkania: it imposes no binding obligations on third countries nor on the ICC.

## **II. SANDHEAVER IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR WAR CRIMES AND CRIMES AGAINST HUMANITY**

### **II.A.1. SANDHEAVER IS INDIVIDUALLY RESPONSIBLE FOR THE WAR CRIME OF CONSCRIPTING AND USING CHILDREN UNDER FIFTEEN IN HOSTILITIES UNDER ARTICLE 8(2)(e)(vii)**

*Actus reus:* To fulfil the material elements, the perpetrator must have conscripted or enlisted into the national armed forces one or more children under the age of fifteen, or used them to participate in hostilities.<sup>19</sup> The term recruitment can indicate both acts of conscription or enlistment, while the element of compulsion distinguishes the act of conscription.<sup>20</sup> Sandheaver recruited the children under the age of fifteen. The fact that he acted out of lack of volunteers and subjugated the children with beatings, torture and drugs in order to establish control over them, strongly indicates compulsion, which makes the act conscription. Even if the compulsion would not be found, the act would still be enlistment.

The children were initially recruited in Astor where the Court has no jurisdiction.<sup>21</sup> However, the recruitment of child soldiers is a “continuing crime” that begins at recruitment and ceases once the

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ICC-02/05-01/09-151 Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 26 March 2013

<sup>17</sup> SCSL, *Prosecutor v. Kallon and Kamara*, SCSL-2004-15-PT, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, March 2004, para 82

<sup>18</sup> Vienna Convention of Law of Treaties, Article 34

<sup>19</sup> ICC Elements of crimes, Article 8(2)(e)(vii), Elements 1 and 2

<sup>20</sup> ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06 Trial Judgment, 14 March 2012, para 608

<sup>21</sup> Case Facts, para 5

child turns fifteen.<sup>22</sup> Recruitment therefore continued in Irkania, when Sandheaver *used* the child soldiers by sending them to attack targets in Irkania.<sup>23</sup>

**Mens rea:** The requisite mental element is that the perpetrator knew or should have known that the recruited persons were under the age of fifteen<sup>24</sup> and still intended to engage in the conduct in accordance with Article 30(1). Sandheaver chose to recruit children under the age of fifteen due to the lack of volunteers in full knowledge of their age and for the *explicit* purpose of using them as soldiers dressed as civilian minors.<sup>25</sup>

#### **II.A.1.a. SANDHEAVER IS INDIVIDUALLY CRIMINALLY RESPONSIBLE AS A DIRECT PERPETRATOR UNDER ARTICLE 25(3)(a)**

To be liable as a direct perpetrator, the person must individually fulfil the requisite elements of Article 25.<sup>26</sup> Sandheaver personally committed the material elements, recruiting the children as the implementing commander and using them by sending them to participate in the hostilities.<sup>27</sup> As discussed above, he possessed the relevant *mens rea*.

#### **II.A.1.b. IN THE ALTERNATIVE, SANDHEAVER IS CRIMINALLY RESPONSIBLE FOR ORDERING THE COMMISSION OF THE CRIME IN THE SENSE OF ARTICLE (25)(3)(b)**

To be liable under Article 25(3)(b) the individual must use his authority to prompt another person to commit the crime<sup>28</sup>, and he must also intend or know with substantial likelihood that his order will result in a commission of the crime.<sup>29</sup> Sandheaver was in a position of authority as the commander of the special unit with a rank of General in the Astorian army and therefore responsible for the implementation of the attack plan.<sup>30</sup> It must therefore be concluded that the recruitment and use of child soldiers could only have been done following the explicit orders of Sandheaver.

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<sup>22</sup> ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Decision on Confirmation of Charges, para. 248, also confirmed by the Trial Chamber in Judgement 14 March 2012, para 618

<sup>23</sup> Case Facts, paras 3-5

<sup>24</sup> ICC, Elements of Crimes (8(2)(e)(vii), Element 3

<sup>25</sup> Case Facts, paras 3 and 5

<sup>26</sup> ICC, *The Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para 488

<sup>27</sup> Case Facts para. 3 and 5

<sup>28</sup> ICC, *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the confirmation of charges, 12 June 2014, paras 242-243

<sup>29</sup> ICTY, *Prosecutor v. Milomir Stakić*, IT-97-24-A, Trial Judgement 31 July 2003, para 445

<sup>30</sup> Case Facts, para 1, and 3-6

## **II.A.2. SANDHEAVER IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR THE WAR CRIMES OF ATTACKING A CIVILIAN POPULATION UNDER ARTICLE 8(2)(b)(i) AND CIVILIAN OBJECTS UNDER ARTICLE 8(2)(b)(ii)**

**Actus reus:** For the act to constitute a crime, the perpetrator must direct an attack on civilian objects<sup>31</sup> or the civilian population as such or individual civilians not taking direct part in hostilities.<sup>32</sup> As the responsible commander Sandheaver directed the suicide bombing attacks against civilian institutions in Irkania<sup>33</sup>. In addition the suicide attacks targeted civilian population deep in the heartland of Irkania killing 1200 civilians.<sup>34</sup>

**Mens rea:** The attacks on the civilian objects must be intentional<sup>35</sup>. In accordance with Article 30, the perpetrator must mean to engage in the conduct and to cause the consequence, or is aware that it will occur in the ordinary course of events. The civil institutions and civilian population were intended targets for the purpose of demoralising and terrorising the civilian population to pressure the Irkanian government.<sup>36</sup>

### **II.A.2.a. SANDHEAVER COMMITTED THE ACTS THROUGH ANOTHER PERSON UNDER ARTICLE 25(3)(a)**

Commission through another person requires that perpetrator used his authority in a hierarchical superior-subordinate relationship in an organisation with sufficient subordinates to ensure compliance by others even if one subordinate would refuse, to commit a crime<sup>37</sup>. The compliance with the perpetrators orders must be nearly automatous<sup>38</sup>. Forcing children into an intense, violent and strict training regime is an example of how the automatous compliance is achieved<sup>39</sup>. Critically, the perpetrator must dominate the will of the ones he controls.<sup>40</sup> Sandheaver was in control of the child suicide bombers, who had been subjugated to his will with violent training regime and torture, and finally drugged to ensure absolute obedience in commission of the attacks on the intended by Sandheaver.<sup>41</sup>

<sup>31</sup> ICC, Elements of Crimes, Article 8(2)(b)(ii), Elements 1 and 2

<sup>32</sup> ICC, Elements of Crimes, Article 8(2)(b)(i), Elements 1 and 2

<sup>33</sup> Case Facts, paras 3-6

<sup>34</sup> Case Facts, para 6

<sup>35</sup> ICC, Elements of Crimes Article 8(2)(b)(ii), Element 3

<sup>36</sup> Case Facts, paras 3 and 5

<sup>37</sup> See, *supra*, note 26, *Katanga and Chui* para 511

<sup>38</sup> See, *supra*, note 26, *Katanga and Chui* para 515

<sup>39</sup> See, *supra*, note 26, *Katanga and Chui* para 518

<sup>40</sup> ICC, *Prosecutor v. Chui*, ICC-01/04-02/12, Trial Judgement, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, para 54

<sup>41</sup> Case Facts, paras 3-6

## **II.A.2.b IN THE ALTERNATIVE, SANDHEAVER IS CRIMINALLY RESPONSIBLE FOR ORDERING THE COMMISSION OF THE CRIME UNDER ARTICLE 25(3)(b)**

In accordance with the conditions established in section II.A.1.b., Sandheaver ordered the attacks with the intention to target the civilian institutions. He gave the order in a position of authority as the acting commander of the special unit and with a rank of general.<sup>42</sup>

## **II.A.3. SANDHEAVER IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR THE WAR CRIME OF CAUSING EXCESSIVE INCIDENTAL DEATH, INJURY, OR DAMAGE UNDER ARTICLE 8(2)(b)(iv)**

**Actus reus:** To fulfil the required elements of Article 8(2)(b)(iv), the perpetrator must have launched an attack which caused casualties excessive to the *concrete* and *direct* military advantage achieved.<sup>43</sup> As an example, in *Galić*, the ICTY found that killing approximately 140 to 160 civilians against 40 to 60 soldiers was excessive.<sup>44</sup> The attacks caused 1200 civilians casualties against killing 400 Irkanian soldiers.<sup>45</sup> This is excessive.

**Mens rea:** The requisite *mens rea* entails that the perpetrator knew that the attack would cause incidental death and that such death would be of such an extent as to be clearly excessive in relation to the military advantage. This entails a proportionality assessment.<sup>46</sup> The attack fails such an assessment for two reasons. Firstly, the strategic goal of the operations, the withdrawal of Irkania from the occupied territory,<sup>47</sup> cannot be construed as a *direct* and *concrete* military advantage, as it is likely to depend on unpredictable political elements and long causal chains.<sup>48</sup> Sandheaver could not have possibly foreseen that Irkania would withdraw its troops. Hence, the eventual achievement of his strategic aims bears no relevance to the proportionality assessment, because such assessment had to be made prior to the attacks.<sup>49</sup> Secondly, and in any case, the certainty of incidental deaths inherent in suicide attacks is disproportionate: by their very nature, suicide attacks are indiscriminate and therefore excessive in relation to any military advantage.

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<sup>42</sup> Case Facts, paras 3-6

<sup>43</sup> ICC, Elements of Crimes, 8(2)(b)(iv), Elements 1 and 2 and footnote 36

<sup>44</sup> ICTY, *Prosecutor v. Galić*, IT-98-29-T, Trial Judgement, 5 December 2003, paras. 386-387

<sup>45</sup> Case Facts, para 6

<sup>46</sup> ICC, Elements of Crimes, 8(2)(b)(iv), Elements 1 and 2 and footnote 37

<sup>47</sup> Case Facts, para 5

<sup>48</sup> See, Ian Henderson, *Contemporary Law of Targeting* (1st ed. 2009), p.66

<sup>49</sup> See, *supra* note 33, *Galić*, para 58

### **II.A.3.1 SANDHEAVER DIRECTLY COMMITTED THE CRIMES UNDER ARTICLE 25(3)(a)**

As established in section II.A.1.a., in order to be liable under Article 25(3)(a), the perpetrator must individually meet the required *actus reus* and *mens rea* standards: Sandheaver, as the commander responsible for the military operations, launched an attack that caused excessive civilian deaths and knew of the nature of this attack as excessive in relation to the military advantage.

### **II.A.4. THE COMMON CONTEXTUAL AND *MENS REA* ELEMENTS FOR THE WAR CRIMES ARE FULFILLED**

The conduct took place in the context of and was associated with an armed conflict.<sup>50</sup> An international armed conflict exists whenever two states resort to the use of force, independent of declarations of war.<sup>51</sup> All the war crimes Sandheaver is charged with were part of Astorian army operations during the armed conflict between Astor and Irkania that started in April 2011 and lasted until January 2014.<sup>52</sup>

Sandheaver was aware of the armed conflict.<sup>53</sup> He, as an acting army general, and the Astor soldiers under his responsibility that committed the massacres and rapes in the Irkanian towns had to be aware of factual circumstances establishing the armed conflict as required after having fought in it for over a year.<sup>54</sup>

### **II.A.5. CAUSING THE DEATH CHILD SOLDIERS IN SUICIDE ATTACKS SANDHEAVER COMMITTED THE CRIME AGAINST HUMANITY OF MURDER UNDER ARTICLE 7(1)(a)**

***Actus reus:*** “Killed” (or murder) is used interchangeably with the term “caused death”.<sup>55</sup> By forcibly using the child soldiers for suicide attacks, Sandheaver undeniably caused the deaths of those children. Astorian children are part of “any civilian population” protected by Article 7(1)(a).

***Contextual element:*** The conduct had to be part of a widespread or systematic (disjunctive) attack in furtherance of state policy.<sup>56</sup> The ICC requires a State or organisational “policy”. It must be noted that

<sup>50</sup> See, ICC, Elements of Crimes, Article 8, the second to last Element of each war crime

<sup>51</sup> ICTY, *Prosecutor v. Tadić*. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.70

<sup>52</sup> Case Facts paras 2 and 10

<sup>53</sup> See, ICC, Elements of Crimes, Article 8, the last Element of each war crime

<sup>54</sup> ICC Elements of Crimes, Article 8(Introduction)(C)

<sup>55</sup> ICC, Elements of Crimes, Art. 7(1)(a), footnote 7.

this is not a high threshold. The requirement of “systematic” entails that the acts are of an organised nature, i.e. non-random.<sup>57</sup> According to the elements of a systematic attack, developed in the *Blaškić* case, it has to (1) be “planned”, (2) be committed on a large-scale, (3) be launched using significant resources (4), involve high level political and/or military authority.<sup>58</sup> Sandheaver planned the suicide attacks as a in a military campaign, utilising army resources implementing a plan given from the army high command leading.

**Mens rea:** In order for the mental element to be fulfilled, the perpetrator must possess intent for the underlying offence and be aware that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>59</sup> It is clear that Sandheaver – as a General appointed for the implementation of the special unit – intended to use child soldiers (“decided”).<sup>60</sup>

#### **II.A.5.1 SANDHEAVER DIRECTLY COMMITTED THE CRIME UNDER ARTICLE 25(3)(a)**

As established in section II.A.1.a., in order to be liable under Article 25(3)(a), the perpetrator must individually meet the required *actus reus* and *mens rea* standards: *in casu*, Sandheaver intentionally coerced the child soldiers to commit suicide attacks, causing their deaths.<sup>61</sup>

#### **II.B. SANDHEAVER IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR CRIMES COMMITTED BY THE 18<sup>th</sup> BRIGADE ON 13<sup>th</sup> OF NOVEMBER**

##### **II.B.1.a WAR CRIMES OF RAPE UNDER ARTICLE 8(2)(b)(xxii)-1 WERE COMMITTED BY 18<sup>th</sup> BRIGADE**

**Actus reus:** Soldiers of 18<sup>th</sup> Brigade committed acts of rape and sexual violence in the two Irkarian towns “as intended acts of warfare” fulfilling the first element of the crime.<sup>62</sup> Secondly, that acts have to be committed by force, or by threat of force or coercion.<sup>63</sup> The acts were committed by foreign soldiers who were simultaneously committing massacres, i.e. killing multiple people.<sup>64</sup> Evidently, fear

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<sup>56</sup> ICC, Elements of Crimes, Art. 7, introduction, para. 3; Elements of Crimes, Art. 7(1)(a), Element 2

<sup>57</sup> ICTY, *Prosecutor v. Blaškić*, Judgement, IT-95-14-T 3 March 2000, para. 203; ICTR *Prosecutor v. Nahimana et al.*, ICTR-99-52-A A. Ch., 28 November 2007, para 920.

<sup>58</sup> These applied criteria were also used in ICTY, see *supra*, note 55, *Blaškić*, para. 203.

<sup>59</sup> Elements of Crime Article 7(1)(a), element 3.

<sup>60</sup> Case Facts, para 3

<sup>61</sup> Case Facts, paras 3-6

<sup>62</sup> Case Facts, para. 8. Fulfilling the Elements of Crime 8(2)(b)(xxii)-1, Element 1, definition of rape

<sup>63</sup> Elements of Crime 8(2)(b)(xxii)-1, Element 2

<sup>64</sup> Case Facts, para 8

of violence and a “coercive environment”<sup>65</sup> were present in these circumstances, negating the possibility that the acts were consensual. Hence, the Prosecution is not required to prove the non-consent of the victims.<sup>66</sup>

**Mens rea:** In addition to fulfilling the Article 30 conditions, as established in II.A.1.a, the perpetrators must have been aware of the factual circumstances establishing the armed conflict.<sup>67</sup> The massacres and rapes of and sexual were perpetrated by the 18<sup>th</sup> Brigade soldiers as “intended acts of warfare”<sup>68</sup>, therefore fulfilling the *mens rea* elements for the crimes.

**Contextual element:** The existence of an armed conflict of which the attack in Irkania is part was established in II.A.4.

### **II.B.1.b WAR CRIMES OF WILFUL KILLING UNDER 8(2)(a) WERE COMMITTED BY THE 18<sup>th</sup> BRIGADE**

**Actus reus:** Killing one or more protected person fulfils the material element of wilful killing as a war crime under 8(2)(a).<sup>69</sup> Civilians are protected persons under IHL.<sup>70</sup> The soldiers massacred an unknown number of civilians in the two Irkanian towns.<sup>71</sup>

**Mens rea:** Conditions for *mens rea* the same as in II.B.1.a: The massacres against the civilian population were perpetrated by the 18<sup>th</sup> Brigade soldiers as “intended acts of warfare”<sup>72</sup> in the two Irkanian towns, fulfilling the *mens rea* element for the crimes.

**Contextual element:** Armed conflict exists as established in II.A.4.

### **II.B.2.a CRIMES AGAINST HUMANITY OF RAPE UNDER ARTICLE 7(1)(g) WERE COMMITTED BY THE 18<sup>th</sup> BRIGADE**

**Actus reus:** The conditions and conduct fulfilling the conditions for rape the same as established under war crimes of rape in II.B.1.a.<sup>73</sup>

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<sup>65</sup> A “coercive environment” negates the consensual element, see ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 102

<sup>66</sup> ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para 105

<sup>67</sup> Elements of Crime 8(2)(b)(xxii)-1, Element 3

<sup>68</sup> Case Facts, para 8

<sup>69</sup> ICC, Elements of Crimes, 8(2)a, Elements 1 and 2

<sup>70</sup> Additional Protocol I to Geneva Conventions of 1969, Article 48 and 51, Articles reflect customary international law, see ICRC Customary International Law Study, rule 6

<sup>71</sup> Case Facts, para 8

<sup>72</sup> Case Facts, para 8

<sup>73</sup> See, ICC, Elements of Crimes, 7(1)(g), Elements 1 and 2

**Mens rea:** The general conditions and conduct fulfilling the conditions for rape are the same as established under war crimes of rape in II.B.1.a. In addition, the perpetrator must know that the conduct took place in or intended in context of widespread and systematic attack.<sup>74</sup> The rapes and massacres were intended as a “method of warfare” to terrorise, therefore they were clearly intended to be part of the attack.<sup>75</sup>

**Contextual element:** These conditions were established in II.A.5. The massacres, rapes and sexual violence were committed in two different Irkanian towns. Geographically, but also quantitatively in terms of victims, the criterion of “widespread” has certainly be met. The general policy of the Astorian military was to “terrorize and demoralize”<sup>76</sup> the civilian population. The acts themselves were committed with the intention to “terrorize and humiliate the inhabitants” of Irkania.<sup>77</sup> This intention is thus perfectly consistent with the general policy of the Astorian military. Therefore the atrocities committed by the 18<sup>th</sup> Brigade on 12 November 2013 can be regarded as a continuation of the attack policy of Astor as implemented by Sandheaver.

#### **II.B.2.b CRIMES AGAINST HUMANITY OF MURDER UNDER ARTICLE 7(1)(a) WERE COMMITTED BY THE 18<sup>th</sup> BRIGADE**

**Actus reus:** The conditions and conduct fulfilling the conditions for rape the same were established under war crimes of wilful killing in II.B.1.b.<sup>78</sup>

**Mens rea:** The conditions and conduct fulfilling the conditions for rape are the same as established under war crimes of wilful killing in II.B.1.b.<sup>79</sup>

**Contextual element:** The contextual element conditions were established in II.A.5, and the nexus between them and the conduct (with the substitution of killing instead of rapes) in II.B.2.a.

#### **II.B.2. SANDHEAVER BEARS COMMAND RESPONSIBILITY UNDER ARTICLE 28(a) FOR THE CRIMES COMMITTED BY THE 18<sup>TH</sup> BRIGADE**

**Sandheaver effectively acted as a military commander and had effective authority and control over his subordinates who committed crimes under the Court’s jurisdiction:** Before being assigned to command the 18<sup>th</sup> Brigade, Sandheaver had been in the military for thirteen years, two of which as the

<sup>74</sup> ICC, Elements of Crimes, 7(1)(g), Elements 4

<sup>75</sup> Case Facts, para 8

<sup>76</sup> Case Facts, para 3

<sup>77</sup> Case Facts, para 8

<sup>78</sup> ICC, Elements of Crimes, 7(1)(a), Element 1

<sup>79</sup> ICC, Elements of Crimes, 7(1)(a), Element 1

General of the 10<sup>th</sup> Brigade.<sup>80</sup> Therefore, Sandheaver was already an experienced commander. He had effective authority and control over the soldiers of the 18<sup>th</sup> Brigade: as the appointed commander, all military decisions regarding the 18<sup>th</sup> Brigade came directly from Sandheaver. Even though Sandheaver incidentally lost communication on 12 November 2013<sup>81</sup>, this does not relieve him of his normal effective authority and control as a military commander over his soldiers.

***Sandheaver knew that his subordinates had been committing such crimes:*** A superior can be said to fulfil the requirement that he knew or should have known<sup>82</sup> about the commission of the crimes by his subordinates: either *before* or *after* the commission of such crimes.<sup>83</sup> Sandheaver was notified of the events after they had taken place, which made him aware of the crimes committed.<sup>84</sup>

***Sandheaver failed to take all necessary and reasonable measures to repress the commission of the crimes or to submit the matter to the competent authorities for investigation and prosecution:*** There are three distinct duties on commanders and each of them entails a separate form of liability.<sup>85</sup> (i) preventing the commission of crimes; (ii) repressing them; or (iii) submitting the matter to the competent authorities for investigation and prosecution. In addition, the notion of “repression” also includes the obligation to punish the forces after the commission of the crime.<sup>86</sup> The commander must take all necessary and reasonable measures to repress the crimes or to submit them to the competent authority.

What kind of measures are expected depends on the disciplinary authority the commander holds: if he does not hold the disciplinary power to punish his subordinates, he must propose a sanction to a superior power who does have the capability to do so, or submit the matter to a judicial authority.<sup>87</sup> The commander needs to take “all necessary and reasonable measures” and this must be assessed *in concreto* and on a case-by-case basis.<sup>88</sup> *In casu*, Sandheaver neither took the measures to repress by punishment his subordinates, nor did he submit the matter to a competent authority to further investigate or prosecute. He submitted the matters to his army high command, but they refused to

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<sup>80</sup> Case Facts, para 1

<sup>81</sup> Case Facts, para 7

<sup>82</sup> This ‘should have known’ criterion used by the ICC is a broader approach regarding the *mens rea* than the ‘had reason to know’ criterion used by the *ad hoc* tribunals: see *supra* note 69 *Bemba Gombo*, para. 434

<sup>83</sup> ICTY, *Prosecutor v. Čelebići*, IT-96-21, Appeal Judgement, 20 February 2001, paras. 223 and 241

<sup>84</sup> Case Facts, para 9

<sup>85</sup> See *supra*, *Bemba Gombo*, note 64, para. 201; ICTY, *Prosecutor v. Blaškić*, IT-95-14

Appeal Judgement, 29 July 2004, paras 78-85. ICTY, *Prosecutor v. Orić*, IT-03-68, Trial Judgement., 30 June 2006, para 325-326

<sup>86</sup> See *supra*, *Bemba Gombo*, note 64, para. 206. The ICTY Statute actually refers to the term “to *punish*” instead of “to repress”.

<sup>87</sup> See *supra*, *Bemba Gombo*, note 64, para. 207

<sup>88</sup> See *supra*, *Bemba Gombo*, note 64, para 190; See *supra*, note 82, paras 72 and 417

conduct any further investigation or prosecution.<sup>89</sup> This shows that the army high command is not an adequate superior authority, *in casu*. Referral to a non-functioning or inadequate authority does not fulfil the commander's obligations.<sup>90</sup> Hence, Sandheaver should have submitted the matter to the competent prosecutor. Fearing being degraded to a lower rank, he did not do so<sup>91</sup>. This is not a sufficient ground to refuse to fulfil a commander's duties. Therefore, Sandheaver failed to make sure that the offenders under his effective control are brought to justice, and he failed his duty to maintain "an environment of discipline and respect for the law."<sup>92</sup>

***The causality requirement only applies to the failure to prevent crimes:*** Logically, there cannot be a causation requirement between the commission of the crimes and the subsequent failing of the superior to *punish* his subordinates of such crimes, because it happens after the commission.<sup>93</sup> Therefore this requirement does not need to be addressed any further in this case.

### **III. Prayer for relief**

On the basis of the evidence provided, the Prosecution asks the Court to find that the Court has jurisdiction in this case, and to confirm the charges of crimes against humanity and war crimes.

Respectfully submitted,  
Counsel for the Prosecution

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<sup>89</sup> Case Facts, para 9

<sup>90</sup> See *supra*, *Bemba Gombo*, note 64, para. 208; *Boškoski and Tarčulovsk*, ICTY A. Ch., 19 May 2010, para. 234

<sup>91</sup> Case facts, para 8

<sup>92</sup> See *supra*, note 82, *Orić*, para 336

<sup>93</sup> See *supra*, note 82, *Orić*, para 338; See *supra*, note 80 *Čelebići*, para 400