**TEAM 89**

**Defense**

**Nuremberg Moot Court**

**2018**

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# 1 Inadmissibility

The Defense hereby challenges the admissibility of the case against Mr. Balboa before the ICC, pursuant to Art. 17 of the Rome Statute[1], and considers the appertaining arrest warrant to be unlawful. Should the PTC consider the case to be admissible, the Defense further submits that the evidence upon which the allegations against Mr. Balboa are based, is inadmissible before the Court, as it consists of non-corroborative hearsay evidence, which, if deemed admissible, does not prove the required intent. In any case, the Defense submits that the prerequisites of the crimes pursuant to Arts. 6(c), 7(1)(c), 8(2)(b)(i) and (ii) are not met. Thus, the Defense submits that the OTP has failed in obtaining sufficient evidence to establish substantial grounds to believe that Mr. Balboa is criminally liable for the crimes of which he is being charged with, pursuant to Art. 61(5) and (7).

## 1.1 The case is inadmissible pursuant to arts. 17(1)(a), 17 (2)(b), 17(1)(d), 17(3), 19(2) and 19(4) of the Rome Statute

The Defense submits the case to be inadmissible pursuant to Art. 19(2) and 19(4) of the Rome Statute, as there are no significant grounds to believe that Neckar has not initiated an investigation in the sense of Art. 17(1)(a) of the Statute. The ICC is a court of last resort and as such is subject to the principle of complementarity and must recognise the primary responsibility of States themselves to exercise criminal jurisdiction.[2] As a sovereign state, Neckar has, pursuant to the principle of complementarity, primary jurisdiction to investigate and prosecute the alleged crimes of Mr. Balboa as they have allegedly been committed on its territory. Only insofar as Neckar should prove unwilling or unable genuinely to investigate or prosecute Mr. Balboa, should the case be admissible to the ICC.

### 1.1.1 Unwillingness, art. 17 (2)(b)

There are no sufficient grounds to establish that Neckar has proven unwilling to prosecute Mr. Balboa pursuant to Art. 17(2)(b) of the Rome Statute. The evidentiary standard is not met in this case, as claims regarding the extent to which Neckar is unwilling or unable to prosecute Mr. Balboa is based on assumptions rather than established fact. The statement issued on 10 July[3] by the government of Neckar can under no circumstances amount to a declaration of unwillingness to prosecute individual crimes. A sovereign State must have the right to publicly defend itself against such severe allegations[4], without this being interpreted as a general statement of unwillingness to investigate such allegations. The Defense further disputes that the statement should signify an

[1] Hereinafter all statutory references shall be made to the Rome Statute, unless otherwise provided
[2] Luis Ocampo-Moreno, Paper on some Policy Issues before the Office of the Prosecutor (2003) 2.
[3] Case material para. 14.
[4] Case Material para. 13 and 14.

inability of the judicial branch to investigate such claims. The statement, issued by the government, does not represent the intention or lack of activities of the judiciary. The cyber-attack took place on 11 July[5], and as such the above mentioned statement cannot constitute a declaration of refusal to prosecute Mr. Balboa for this alleged offence, as the attack was committed after the statement was issued.

The state of Neckar has neither refused to prosecute Mr. Balboa, nor has the OTP taken steps to ensure that an investigation into the alleged crimes of Mr. Balboa has not already been instigated by the State. When initiating an investigation under Art. 53(1), the Prosecutor must, pursuant to Art. 54(1)(a) investigate incriminating and exonerating circumstances equally, and in doing so shall, pursuant to Art. 54(1)(b), take appropriate measures to ensure the effective investigation. Ascertaining whether any national authorities are conducting a genuine investigation is an appropriate measure.[6] Further than ensuring that the national authorities are not instigating an investigation, the OTP should seek to encourage genuine national investigations and prosecutions.[7] Insufficient time has been allocated, to make any such genuine effort by the OTP.

Insofar as the OTP should argue that Neckar has not taken any actions to investigate the case or prosecute Mr. Balboa, the Defense submits that Neckar has not been granted a sufficient period of time to instigate such proceedings. When deciding whether to initiate an investigation, the OTP shall, pursuant to Art. 53(1) evaluate the information made available to him or her, as well as consider whether the case is admissible. The Defense notes that the case is referred to the OTP by Mosel after the incident at the hospital on 11 July[8]. As the arrest warrant is issued 15 September[9], and the case at the earliest could have been referred 11 July, no more than five weeks could have passed between the matter being referred to the OTP and the arrest warrant being issued. Pursuant to Art. 18(1), the OTP shall, after having carefully examined the evidence notify the State which would normally exercise jurisdiction over the crimes concerned. Pursuant to Art. 18(2) the State concerned, may within one month of receipt of the notification pursuant to Art. 18(1) inform the Court that it is investigating. At the request of the state, the Prosecutor shall defer to the state investigation.

Thus, the Defense concludes that in order for the deadline pursuant to Art. 18(2) to have passed by 15 September, when the arrest warrant is issued, the OTP must have spent no more than one week on the task of evaluation and consideration of the information pursuant to Art. 53(1), including an

[5] Case material, para. 15.
[6] "The Prosecution must also ascertain whether any national authorities are conducting a genuine investigation or trial of the alleged perpetrators of the crimes" ICC Understanding the International Criminal Court, p.35.
[7] Office of the Prosecutor of the International Criminal Court: *Paper on Preliminary Examinations* (2013), para. 101
[8] Case material, para. 15.
[9] Case material, para. 16

assessment of the admissibility of the case pursuant to Art. 53(1)(b), and thus whether the case is being investigated by the state which has jurisdiction over it pursuant to Art. 17(1)(a). Taking into account that this is no easy task, the Defense respectfully submits that said evaluation and consideration can hardly have been effectuated to a degree which the PTC can find satisfactorily thorough.

Considering the above, the Defense submits that a conclusion to the effect that the State of Neckar has been inactive, based on a lack of activity within a short period of time of no more than a week, is invalid.

Due to the quick referral of the case by Mosel, pursuant to Art. 14, as well as the arrest warrant being issued, pursuant to Art. 58(1), merely five weeks after the attack on the hospital took place, any perceived inactivity by the state of Neckar to investigate or prosecute must not be interpreted as unwillingness to do so.

### 1.1.2 Inability, art. 17(3)

The Defense reiterates that Neckar has shown no signs of inability to prosecute Mr. Balboa, nor has the OTP established that Neckar would not genuinely carry out an investigation and prosecution of the alleged offence. As the issued arrest warrant is unlawful[10], it is irrelevant to discuss why Neckar has not arrested Mr. Balboa pursuant of said warrant. The presumption that Neckar should be either unwilling or unable to investigate or prosecute the allegations made against Mr. Balboa, is based on assumptions and speculations, rather than established facts.

### 1.1.3 Gravity 17(1)(d)

Should the PTC be satisfied that no investigation or prosecution is being conducted by Neckar, the case would be inadmissible under Art. 17(1)(d) due to the lack of gravity. Gravity is determined by the systematic or widespread nature of the relevant conduct and by the 'social alarm' it may cause, especially at the international level.[11] The scale of the conduct relevant to the allegations against Mr. Balboa is not comparable to that of other situations considered by the OTP.[12] Although certain NGOs have reacted to the conditions in the detention centres, those NGOs cannot be said to represent society at large, and there is nothing further which suggest that the existence or conditions

[10] As discussed in section 1.2.

[11] ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, para. 46.

[12] Office of the Prosecutor of the International Criminal Court: *Paper on Preliminary Examinations* (2016), paras. 216, 218. Specifically in relation to the hospital incidence, see Office of the Prosecutor's response to communications received concerning Iraq, 10 February 2006, where 4 to 12 victims of willful killing and a limited number of victims of inhumane treatment "was not sufficient to instigate an investigation".

of the detention centres should have caused social alarm. Thus, the Defense submits that the gravity of the case, pursuant to Art. 17(1)(d) is not sufficient to justify further action by the Court.

## 1.2 The arrest warrant is unlawful

The Defense further submits that the OTP, by proceeding to the issuance of an arrest warrant whilst not having been assured that the same matter is not being investigated by Neckar, acted contrary to the spirit of the Statute and notably its underlying principle of complementarity, which requires the OTP to encourage states to conduct investigations themselves.[13] Furthermore, the Defense submits that should the OTP be assured that Neckar is not willing or able to investigate the matter, issuing an arrest warrant is incompatible with the level of necessity stipulated in Art. 58(1)(b), as a summons to appear would suffice.

## 1.3 The evidence is inadmissible before the Court

The evidence against Mr. Balboa comprises of both documentary evidence and hearsay. Given the gravity of the allegations, the evidence should be deemed inadmissible in the interest of a fair trial.

### 1.3.1 The witness testimony is hearsay evidence

The testimony of the Mosel police officer is inadmissible. The police officer is not the primary witness, but a secondary, as well as in the case of the reiterated hearsay, a tertiary witness and therefore the evidence given by the police-officer must be considered hearsay evidence.

The Defense further submits that the initial statements made by the escaped detainee workers, to the effect that the forced labor appeared to be part of a plan to eliminate the ethnic minorities of Neckar is pure speculation with no basis in any solid fact or indisputable evidence, and asks that such speculative statements should not be admissible as evidence in the interest of a fair trial.

Though the escaped detainee workers have claimed to be from the ethnic minority of Neckar[14], neither this claim, nor any other claims made by the escaped detainee workers have been given under oath, pursuant to Art. 69(1) of the statute.

### 1.3.2 There is no proof of existence of a mono-ethnicity plan

Only two of the escaped detainee workers claim to have overheard guards speak of a mono ethnicity plan and the nationalism of Neckar, and only one of those escaped detainee workers has claimed to

[13] Art. 18(1)-(2) Office of the Prosecutor of the International Criminal Court:, *Policy Paper on Preliminary Examinations* (2013) para. 100f.
[14] Case material, para. 12.

have overheard a mine guard speak of the passing of a mono-ethnicity plan, at a closed DNP Executive Committee meeting.[15]

With regard to the statements that a supposed closed council meeting and the passing of a mono-ethnicity plan should have taken place, the Defense submits that this is hearsay insofar as the information was given as evidence to PTC by the mine guards, whom the two escaped mine workers supposedly overheard mentioning it. The Defense thus proclaims that it must be considered hearsay of hearsay, as the escaped detainee worker is merely claiming to have heard a guard make such a statement. Due to the fact that this hearsay evidence is being relayed by a witness, even further removed from the actual alleged events, the Defense requests that the PTC declare the evidence inadmissible due to the interest of a fair trial.

### 1.3.3 The facts of the evidence are highly unlikely

As a precaution, the Defense submits that if the PTC should find the hearsay evidence admissible, the above statements must further be considered very unlikely to have any basis in solid fact. As such, it should carry little weight. The Defense disputes the claim that the purportedly overheard conversation between mine guards ever took place. Furthermore, if a mine guard actually had mentioned the passing of a mono ethnicity plan, the guard would not have been present at the closed meeting of the DNP Executive Committee himself, even if such a meeting were to have taken place. The Defense submits that the mere notion that such classified information from a closed meeting of the Executive Committee should be relayed to a guard in a detention facility is preposterous.

## 1.4 Material elements of crime and modes of liability

Should the PTC determine that the case is admissible, the evidence admissible and the arrest warrant lawful, the Defense submits that neither the material prerequisites of war crimes and crimes against humanity nor the specific elements of the crimes have been satisfied in this case.

Further, the Defense submits that the facts of the case suggest that the elements constituting modes of liability in relation to counts 1 and 2 have not been met. Finally the Defense holds, that the submitted evidence does not establish the required *mens rea* pursuant to Art. 30(1).

### 1.4.1 The Accused has not facilitated, aided nor abetted the crime of genocide or crimes against humanity

Pursuant to Art. 25(3)(c), the conduct which aids or abets must have a direct and substantial effect on the commission of the crime.[16] The conduct must to be specifically directed towards the aiding

[15] Case material, para. 13.

[16] Robert Cryer, *An Introduction to International Criminal Law and Procedure* Cambridge University Press (2010), p. 371

and abetting, and in the case of Mr. Balboa, this requirement is not met. The only interest Mr. Balboa has is of economic nature, and Mr. Balboa did not intend to aid and abet in relation to crimes against humanity, as per the required *mens rea*[17]. Furthermore, aiding and abetting is a form of liability in which the accused contributes to the perpetration of a crime that is committed by another person. Facilitation is a mode of accessorial liability, and accordingly, the Prosecution must establish that the crime for which it seeks to make the accused responsible in fact occurred.[18] The crimes of genocide, pursuant to Art. 6(c) and crimes against humanity, pursuant to Art. 7(1)(c), for which Mr. Balboa is accused has in fact not occurred and as such Mr. Balboa cannot be responsible for crimes, which have not been committed.

# 2 Count 1: Genocide, punishable under Art.s 6(c) of the Rome Statute.

## 2.1 The prerequisites of genocide are not met and the evidence does not prove intent

Mr. Balboa cannot be held personally liable for the detention of persons pursuant to the Temporary Law. This must ultimately be the responsibility of the state of Neckar. Furthermore, although this law is pursuant of a financial strategy[19], there is no evidence to suggest that it serves to promote a nationalistic mono-ethnicity plan, nor that such a plan indeed exists.

## 2.2 There is no nationalistic or mono-ethnicity plan targeting a minority

The DNP was elected in a free and fair election, where political opponents were able to publicly voice their stance.[20] The Temporary Law, passed after the election, has not been intended to have retroactive effect, in order to punish political opponents. This indicates a functioning judicial branch, which does not pursue political aims, nor retroactively punish political opponents. The Temporary Law is clearly based on the argument that the reason for the lack of economic stability in the country, is the lack of support for the economic strategic policies implemented by the party[21].

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[17] ICTY, *Prosecutor v. Simić, Tadić and Zarić*, IT-95-9-T, Trial Judgment, 17 October 2003, para. 137. Also ICTY, *Prosecutor v. Stakić*, IT-97-24 Trial Judgment 31 July 2003, para. 439; ICTY, *Prosecutor v. Naletilić,* IT-98-34-T, Trial Judgment 31 March 2003, para. 62; ICTY, *Prosecution v. Vasiljević*, IT-98-32, Trial Judgment 29 November 2002, para. 62; ICTY, *Prosecutor v. Kvocka et al.*, IT-98-30/1-T, Trial Judgment 2 November 2001, para. 250-251; ICTY, *Prosecutor v. Krstić,* IT-98-33-T, Trial Judgment 2 August 2001, para. 601; ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23 & 23/1, Trial Judgment 22 February 2001, para. 390; ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Trial Judgment 26 February 2001, para. 376.

[18] ICTY, *The Prosecutor v. Radovan Karadžić,* IT-95-5/18, Trial Judgement, 24 March 2014, para. 574.

[19] Case material, para. 6.

[20] Case material paras. 4 and 5.

[21] Case material, para. 6.

Therefore, the law has the legitimate aim of rectifying the economic situation and does not have any aim of persecuting ethnic minorities.

Although the DNP has stated that the unwillingness of certain parties, political opponents and ethnic minorities to support the DNP platform was the reason for the current economic climate in Neckar[22], this can in no way be seen as a stated support of genocide. A democratically elected government must have the right to criticize an opposition which challenges a strategy for improving the national economy. Furthermore, as the DNP criticizes the entire opposition as well as the Mosel ethnic minority, this statement cannot be said to show that the intent of the Temporary Law was specifically to target this ethnic group. Additionally, the detainment of part of an ethnic group does not in itself suffice to establish genocide.[23]

## 2.3 The detained have not been perceived as members of the ethnic minority group

The Defense does not dispute the fact that the 200,000 people from various ethnic minorities within Neckar constitute an ethnic group, due to a shared common language.[24][25] Nor does the Defense dispute, that some of the detained individuals belongs to this ethnic minority. The group which has been detained under the Temporary Law, consists not only of members of the ethnic minority, but of members of the Neckar ethnic majority as well. The observation by the ILO does not constitute proof that the ethnic minorities of Neckar are being specifically targeted, nor does it stipulate the estimated percentage by which the ethnic minorities constitute the majority of detainees.[26] As such, the ethnic majority could constitute as much as 49 percent of the detainees. This NGO-report is based on limited data and should thus carry little weight.

All detained individuals, have been arrested on suspicion of having violated the Temporary Law. Therefore, although members of the ethnic minority group have indeed been arrested under this provision, the ethnic minority group has not been specifically targeted, nor have any of the detained persons been targeted due to their ethnicity, as evident from the fact that members of the ethnic majority have also been arrested under the Temporary Law. The requirement that the victims, here the detained, must be perceived by the perpetrators to be members of the ethnic minority is not met.[27]

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[22] Case Material para. 5.

[23] ICTY, *Prosecutor v. Milomir Stakic*, Case No. IT-9724-T, Judgement (TC), 31 July 2003, para. 519.

[24] ICTR, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgement (TC), 21 May 1999, para. 98: "An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)."

[25] Case material, para. 3.

[26] Case material, para. 10.

[27] ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998, para. 712:

## 2.4 The conditions at the detention facilities were not calculated to bring about the physical destruction of the ethnic minority group, in whole or in part

Besides conditions being calculated to bring about the physical destruction of the targeted group in whole or in part, for the conditions of genocide to be met, the conditions must also be inflicted on the group deliberately.[28] The aim of the perpetrator in such cases must be to ultimately seek their physical destruction.[29] The ICTY has previously[30] referred to the impossibility of enumerating in advance the 'conditions of life' that would come within the prohibiting and that "intent and probability of the final aim alone can determine in each separate case whether an act of Genocide has been committed or not"[31]. As stipulated above[32], the purpose of the rehabilitation of detainees in the mines were to further the strategy of stabilizing the economy of Neckar, by utilizing unskilled workers. Bearing this in mind, the physical destruction of the detainees could not have been the aim of the rehabilitation as their destruction would actively go against furthering this strategy. Although the NGO-reports[33] may indicate that the conditions in the detention facilities are regrettable[34], these conditions have not been calculated to bring about the destruction of the detainees at large, nor the detainees belonging to the ethnic minorities specifically.

## 2.5 Mr. Balboa did not intend to destroy the ethnic group, in whole or in part

As discussed above[35], the evidence that Mr. Balboa in any way had intended the destruction of the ethnic minority, is based on hearsay evidence of a supposed mono-ethnicity plan.

The Defense reiterates, that the Temporary Law applies individuals in opposition to the implementation of a policy for financial stabilization and the government per se and does not target the ethnic minority. Thus, Mr. Balboa has not in his conduct shown any intent to destroy the ethnic minorities of Neckar in whole or in part. Furthermore, there is no evidence suggesting that the Accused was aware that the physical destruction of that group, in whole or in part, would occur in the ordinary course of events.

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[28] ICTY, *Prosecutor v. Radoslav Brđanin*, IT-99-36-T, Judgement (TC), 1 September 2004, para. 692

[29] ICTY, *Prosecutor v. Milomir Stakić*, IT-97-24-T, Judgment (TC), 31 July 2003, para. 518; UN Doc. A/C.6/217 (Belgian proposal); UN Doc. A/C.6/SR.82 (Soviet amendment); Akayesu Trial Judgement, para. 505

[30] ICTY, *Prosecutor v. Radoslav Brđanin*, IT-99-36-T, Judgement (TC), 1 September 2004, para. 906

[31] Nehemiah Robinson, *The Genocide Convention: a Commentary* (Institute of Jewish Affairs, New York, 1960), p. 64

[32] As discussed in section 2.2.

[33] Case material, paras 9, 10 and 11.

[34] The Defense respectfully reminds that human rights violations do not constitute genocide and as such is outside the ambit of the ICC.

[35] In section 1.3.1

# 3 Count 2: Crimes against humanity, punishable under Arts 7(1)(c) of the Rome Statute.

## 3.1 The prerequisites for Crimes against humanity are not met and the labor carried out by the detainees does not constitute slavery

Due to the detainees at the mines being detained for the purpose of rehabilitation, the Defense argues that this does not constitute slavery. As noted in the *Kunarac* Trial Judgement not all labor or service by protected persons, including civilians, in armed conflicts, is prohibited.[36]

In line with the *Krnojelac* Trial Judgement[37], the Defense argues that the Prosecution have not established that a decision was taken to force the detainees to work. In *Krnojelac* the Trial Chamber determined that it must be established that is a plan to keep detainees imprisoned for the primary purpose of using them as labor. Furthermore, the Accused must be responsible for or involved in a plan to keep any detainees at the detention facility for the primary purpose of being used for forced labor.[38] The Defense argues that the Prosecution has neither proven the existence of any such plan, nor that the Accused is responsible for or involved in a plan of keeping the detainees at the mine for the sole purpose of exploiting their labor. In fact the Temporary Law clearly states that the purpose of the detention is rehabilitation.[39]

Although the satellite images may prove the existence of armed guards, this does not constitute proof of the exercise of control over the detained subjects to an extent that constitutes slavery. The ICTY Trial Chamber has previously been satisfied that working detainees were under armed supervision, without concluding that this in and of itself constituted proof of slavery.[40] In order for a detention facility to effectively detain people, such a measure is in fact the norm rather than the exception and should not be viewed as an extraordinary circumstance which proves the intent of exerting control over the inmates which would amount to the crime of slavery. A general claim that inmates were forced to work cannot be established, but must be assessed on an individual basis, in line with the established practice of the ICTY.[41]

As established in *Krnojelac*, in order to assert that labor is carried out as an element of slavery, the OTP must provide direct evidence that those who could not or were unwilling to work were forced

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[36] ICTY, Prosecutor v. *Kunarac*, Kovac and Vukovic, IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001, para. 542.
[37] ICTY, Prosecutor v. *Krnojelac*, IT-97-25-T, Judgement, 15 March 2002.
[38] Ibid. para. 369-370.
[39] Case material para. 7.
[40] ICTY, Prosecutor v. *Krnojelac*, IT-97-25-T, Judgement, 15 March 2002, para. 373-374.
[41] "Whether a particular detainee was forced to work is to be assessed on an individual basis, as to whether he had no real choice as to whether he had to work." ICTY, Prosecutor v. *Krnojelac*, Judgement, IT-97-25-T, 15 March 2002, para. 372.

to do so.[42] Although the beliefs and fears of the detainees, in particular in the context of the general inhumane conditions and atmosphere in the detention facilities, are of course relevant to a determination of whether they worked voluntarily, "a reliance solely on such unsupported conclusions expressed by the witnesses would not be safe"[43]. Evidence which establishes the victim's subjective state of mind and relates to the facts indicating that he was forced to work[44] was further rejected as being sufficient to establish forced labor. The detainees' personal conviction that they were forced to work must be proven with objective and not solely subjective evidence[45]. Were the witness testimony of the Mosel police officer be admitted as evidence, the Defense argues that this does not constitute proof of conditions of slavery.

Further, the ICTY Trial Chamber has previously rejected arguments by the Prosecution, that the conditions of a detention facility in and of itself constitute an environment which is coercive as to negate any possibility of consent by detainee workers.[46]

Thus, the Defense submits, that although the NGO-reports may indicate that the conditions in the detention camp are unsatisfactory, the Prosecution has not satisfied the burden of proof for the allegations brought against the Accused. There is no indication that the Accused should have satisfied the *actus reus* for such a crime, as he has not exercised any or all of the powers of ownership over one or more persons pursuant to Art. 7(1)(c).

### 3.1.1 Mens rea

Should the PTC find that the elements of the *actus reus* are present, there is no substantial evidence proving the intent to exercise the powers attached to the right of ownership over the people of Neckar. Mr. Balboa and the DNP have created a policy to help the country thrive economically, through making citizens help where they can. Thus, some work in IT, some in manufacturing, and some again in the mines.[47] The people of Neckar have been working in mines for decades, and the Accused had no intent of exercising powers relating to the right of ownership over the people. As for the fellons under the Temporary Law, making them work during their atonement is not unproportional.

[42] ICTY, Prosecutor v. *Krnojelac*, IT-97-25-T, Judgement, 15 March 2002, para. 375-376.
[43] Ibid., para. 377.
[44] Case Material, para. 12
[45] ICTY, Prosecutor v. *Krnojelac*, IT-97-25-A, Appeals Judgement, 17 September 2003, para. 195.
[46] Ibid., para. 192.
[47] Case material para. 6

# 4 Count 3: War crime punishable under Art.s 8(2)(b)(i), 8(2)(b)(ii)) of the Rome Statute.

## 4.1 Perpetrator-by- means: Art. 25(3)(a) og (b)

The Defense contests that war crimes pursuant to Art. 8(2)(b)(i) and 8(2)(b)(ii) of the Statute for which Mr. Balboa is accused have in fact occurred. The Defense does not contest that Mr. Balboa could be criminally liable for the offence of ordering, soliciting or inducing a criminal act. However, the prerequisites of war crimes are not met and as such the act does not fall within the scope of the Court's jurisdiction.

## 4.2 The Defense does not find the necessary nexus for the alleged crime to fall within the jurisdiction of war crimes to be present.

### 4.2.1 The conduct was not associated with an international armed conflict

Although the Defense does not dispute that the conduct took place in the context of an armed conflict,[48] the particular action was not associated with this international armed conflict. Not all violations of international humanitarian law amounts to war crimes.[49]

The ICC Chamber has previously defined, that it can be established that a crime has taken place in the context of, or in association with an armed conflict only where "the alleged crimes were closely related to the hostilities."[50] and that this means that the armed conflict "must play a substantial role in the perpetrator's decision, in his ability to commit the crime or in the manner in which the conduct was ultimately committed."[51] This definition has been reiterated by the PTC[52] and the ICTR trial chamber has further defined that "a nexus exists between the alleged offence and the armed conflict when they are closely related. The existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the offence, his or her decision to commit it, the manner in which it was committed, or the purpose for which it was committed[...]"[53]

The Defense contests that there should exist a nexus between the alleged offence and the armed conflict, as these are not closely related. Nothing suggests that the existence of an armed conflict has played a substantial part in Mr. Balboa's ability to commit the alleged offence, as he, due to his

[48] Case material para. 3
[49] ICTY, *Prosecutor v. Tadić*, IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.
[50] ICC, *Prosecutor v. Lubanga,* ICC-01/04-01/06-803-T, Decision,7 February 2007,para. 288.
[51] Ibid., para. 287.
[52] ICC, *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-716-Conf., Decision on the confirmation of charges, 30 September 2008, para. 380.
[53] ICTR, *Prosecutor v. Nyiramashuko et al.*, ICTR-98-42, Trial Judgment, 21 June 2011, paras. 6153-6154.

position as majority shareholder and CEO of "High-Tek" IT Corporation, has been in a position to order, solicit or induce a criminal act. Whether an armed conflict existed or not, Mr. Balboa would still be in this position of power, as a private individual, and has used no official nor military channels to further the act. Thus, it cannot be concluded that any substantial part of the ability to commit the alleged crime has been present due to the existence of an armed conflict. Nor does the manner in which the alleged crime was committed, suggest that the existence of an armed conflict has played a substantial role. The alleged attack was not carried out by military personnel using conventional arms, but was carried out by privately employed individuals[54], using means which would be available to them even in the absence of the existence of a war.

As the sole owner, Chairman of the Board and CEO of "High-Tek-Mines" LLC[55], it must be assumed that Mr. Balboa has acted out of concern for the profits of his company and therefore out of personal interest, in trying to limit the damage accrued by his company from the resulting negative press and attention drawn to his company by possible further statements by the escaped mine-workers. Nothing suggests, that the existence of the armed conflict has in any way played a substantial role in Mr. Balboa's decision to commit the alleged war crime or the purpose for which it was committed. As has been established above, and in case-law[56] the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. The Defense contests that any of these contextual common elements, prerequisite under Arts. 8(2)(b)(i), 8(2)(b)(ii)) of the Rome Statute, are met and thus, there are no substantial grounds to believe that Mr. Balboa is criminally liable for war crimes.

# 5 Relief Sought

In view of all the above-stated arguments, it is submitted that the case against Mr. Balboa is inadmissible, that his arrest warrant is unlawful and that the OTP has not presented sufficient evidence to establish substantial grounds to believe that the Defendant is responsible for any of the proposed charges. In the absence of factual and legal basis, the Defense respectfully requests the PTC, in accordance with Art. 61(7)(b) of the Rome Statute, to decline confirming the charges brought against Mr. Balboa and to order his immediate and unconditional release.

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[54] Case material, para. 15

[55] Case material, para. 1.

[56] ICTY, *Prosecutor v. Kunarac* et al. IT-96-23&
IT-96-23/1-A, Appeal judgment, 12 June 2002, para. 58. See also ICTY, *Vasiljević* Trial Judgment, 29 November 2012, para. 25.