

# Nuremberg Moot Court

**NUREMBERG MOOT COURT 2018**

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**TEAM: 81**

**PROSECUTION**

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1. The Prosecution hereby charges Balboa with crimes of genocide, crimes against humanity and war crimes and requests the Court, pursuant to Art. 61(7) of the ICC Statute,<sup>1</sup> to find that there is sufficient evidence to establish substantial grounds to believe that Balboa is criminally responsible for these crimes, and confirm all of the charges against him.

## **I. THE MOSEL POLICE OFFICER'S TESTIMONY IS ADMISSIBLE.**

2. Pursuant to Art. 63(2) of the Rules of Procedure and Evidence, due to the ICC's nature as a court without a jury, the Chamber has the authority to assess *all* evidence freely without hindrance from any technical rules.<sup>2</sup> Thus, in contrast to the common law legal system with lay jurors, the hearsay nature of evidence does not automatically render it inadmissible.<sup>3</sup> In *Musema*, the Chamber further explained that hearsay evidence is not inadmissible *per se*, even when it cannot be examined at its source or when it is not corroborated by direct evidence.<sup>4</sup>

### **I.A. THERE IS NO NEED FOR AN IN-DEPTH ASSESSMENT AT THE PRE-TRIAL STAGE.**

3. In *Mbarushimana*, the PTC held that an in-depth assessment as to the admissibility of evidence pursuant to Art. 69(4) was meaningless, due to the limited purpose of the confirmation hearing and the need to protect the accused's right to a trial without undue delay.<sup>5</sup> Thus, the Mosel police officer's testimony doesn't need to go through any strict assessment of admissibility and should be judged admissible at the pre-trial stage.

### **I.B. EVEN UNDER THE THREE PRONG-TEST OF ADMISSIBILITY, THE MOSEL POLICE OFFICER'S TESTIMONY IS STILL ADMISSIBLE.**

4. Even if this Court deems an in-depth assessment necessary, the Mosel police officer's testimony is still admissible. In *Lubanga*, the TC held that to render a piece of evidence admissible, the chamber should ensure that it has *prima facie* relevance, *prima facie* probative value and should weigh the probative value of the evidence against its prejudicial effect.<sup>6</sup> In the present case, the police officer's testimony is *prima facie* relevant because it relates to the existence of forced labor and intent to commit genocide. Thus, the Prosecution will focus on: (i) the testimony is of sufficient probative value; and (ii) its probative value outweighs its prejudicial effect.

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<sup>1</sup> Hereinafter, all statutory references shall be to the ICC Statute, unless otherwise provided.

<sup>2</sup> ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Decision on Defence Motion on Hearsay, 15 August 1996, para. 13.

<sup>3</sup> ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, 29 January 2007, para. 101.

<sup>4</sup> ICTR, *Prosecutor v. Musema*, ICTR-96-13-A, Judgement and Sentence, 27 January 2000, para. 51.

<sup>5</sup> ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, 16 December 2011, paras. 43-44.

<sup>6</sup> ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1399-Corr, Corrigendum to Decision on the admissibility of four documents, 20 January 2011, paras. 26-31.

## **I.B.1. The Mosel police officer's testimony is of sufficient probative value.**

5. In *Musema*, the ICTR held that compared to a final determination of the weight of the evidence, a lower standard of proof should be applied when admitting evidence.<sup>7</sup> Merely some degree of probative value is needed. With respect to a hearsay statement, the probative value will depend upon the context and character of the evidence in question.<sup>8</sup> Specially, the PTC in *Katanga* held that even the information based on *anonymous* hearsay evidence is probative when it corroborates or is corroborated by other evidence.
6. Here, the testimony contained information about the detention centers' living conditions, which was corroborated by the HRO and WHO reports, as well as forced labor at the mines, which was corroborated by the ILO reports.<sup>9</sup> Thus, the testimony demonstrates *prima facie* probative value.
7. Thus, considering the lower standard of proof in determining the admissibility of evidence, the police officer's testimony is of sufficient probative value to be admitted.

## **I.B.2. The probative value of the testimony outweighs its prejudicial effect.**

8. The Defence may argue that admitting the police officer's testimony will have a prejudicial effect on the accused, who would have no opportunity to cross-examine the original declarant. However, the lack of the chance to cross-examining the original declarant does not constitute an infringement of the accused's rights.
9. According to Art. 61(5), in a confirmation hearing, the Prosecutor need *not* call the witnesses expected to testify. In short, the accused does not have the absolute right in a confirmation hearing to examine witnesses.
10. Moreover, in *Blaškić*, the ICTY held that the right to cross-examination only applies to a witness testifying before the TC and not to the initial declarant whose statement has been transmitted to this Trial Court by the witness.<sup>10</sup>
11. In the present case, the accused's right to cross-examination was guaranteed by the opportunity to cross-examine the Mosel police officer. The accused did not enjoy the right to cross-examine the original declarant of hearsay evidence. Thus, his right to cross-examination was not infringed.

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<sup>7</sup> ICTR, *Prosecutor v. Musema*, ICTR-96-13-A, Judgement and Sentence, 27 January 2000, para. 56.

<sup>8</sup> ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

<sup>9</sup> Case Facts, paras. 9-12.

<sup>10</sup> ICTY, *Prosecutor v. Blaškić*, IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, 21 January 1998, para. 12.

## **II. BALBOA IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR THE CRIME OF GENOCIDE.**

### **II.A. THE DNP COMMITTED THE CRIME OF GENOCIDE UNDER ART. 6(C).**

#### **II.A.1. The *actus reus* of the crime of genocide is established.**

12. For the act to constitute such a crime, the perpetrator must inflict certain conditions of life that would bring about physical destruction upon one or more persons who belonged to a particular national, ethnical, racial or religious group.<sup>11</sup> In *Akayesu*, an ethnic group is generally defined as a group whose members share a common language or culture.<sup>12</sup> In *Kayishema and Ruzindana*, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion was considered as conditions that would bring about physical destruction.<sup>13</sup>
13. The majority of workers in the mines belonged to ethnic minorities,<sup>14</sup> which fall into the category of “protected groups”.<sup>15</sup> The ethnic minorities were kept under inhumane conditions, including inadequate housing, sanitation facilities and food, and they were also forced to work excessive hours, all of which led to their increased mortality rates.<sup>16</sup> These were conditions that brought about physical destruction. Hence, the *actus reus* element of this crime is established.

#### **II.A.2. The *mens rea* of the crime of genocide is established.**

14. The crime of genocide requires two subjective elements, namely (i) a general subjective element consisting of “intent” and “knowledge” defined in Art. 30 and (ii) a specific intent to destroy in whole or in part the targeted group.<sup>17</sup>
15. ***First, the DNP possessed the general intent required by the crime of genocide:*** According to Art. 30, “knowledge” is defined as awareness that a circumstance exists or a consequence will occur in the ordinary course of events.<sup>18</sup> “Intent” refers to the intention to engage in the conduct as well as the awareness that a consequence will occur in the ordinary course of events.<sup>19</sup>

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<sup>11</sup> Elements of Crimes, Art. 6(c), Elements 1, 2, 4.

<sup>12</sup> ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 513.

<sup>13</sup> ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para. 115.

<sup>14</sup> Case Facts, para. 10.

<sup>15</sup> According to Art. 6 of the ICC Statute, “protected groups” refers to “national, ethnical, racial or religious groups”.

<sup>16</sup> Case Facts, para. 11.

<sup>17</sup> ICC, *Prosecutor v. Omar Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 139.

<sup>18</sup> ICC Statute, Art. 30(3).

<sup>19</sup> Ibid.

16. As the ruling party of Neckar, the DNP possessed knowledge of the deadly conditions in the mines and the resulting increasing mortality rates; yet, it didn't change its way of treating the detainees, demonstrating its general genocidal intent.
17. ***Second, the DNP possessed the specific intent required by the crime of genocide:*** To establish the specific intent, the perpetrator must (i) target a victim because of his membership in a certain protected group and (ii) aim to destroy such a group through committing the atrocities.<sup>20</sup> Considering the difficulty of acquiring direct evidence of the specific intent for genocide, the ICTR has held that circumstantial evidence would provide sufficient evidence.<sup>21</sup> Such circumstantial evidence may include (i) the use of derogatory language toward members of the targeted group, (ii) the number of victims from the group, (iii) the methodical way of planning, (iv) the scale of atrocities, and (v) the systematic manner of killing.<sup>22</sup>
18. In the context of protracted armed conflict with Mosel, the DNP derogatorily claimed the minorities as traitors and Mosel secret agents.<sup>23</sup> Following such derogatory claims, the Temporary Law ("TL") was passed and came into force.<sup>24</sup> Though the TL seems to apply to everyone equally, the ethnic minorities could easily be charged with publicly opposing the government under Art. 3(1) of the TL because they originally opposed the DNP's policies.<sup>25</sup> Also, because the ethnic minorities speak the Mosel language, they could easily be suspected of communicating with the enemy under Art. 4(1) of TL.<sup>26</sup> This prejudice is also evidenced by the fact that the majority of people punished and forced to work in the mines were ethnic minorities, according to the ILO report.<sup>27</sup> Thus, from the targeted nature of the DNP's actions, there are substantial grounds to believe that the DNP targeted the ethnic minorities because of their membership in the ethnic groups. In addition, the DNP proposed a "mono-ethnicity" plan,<sup>28</sup> following which a considerable number of ethnic minorities were detained and forced to work in fourteen mines.<sup>29</sup> The systematic nature of the TL guarantees that more and more ethnic

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<sup>20</sup> ICTY, *Prosecutor v. Jelisić*, IT-95-10-T, Judgement, 14 December 1999, para. 66.

<sup>21</sup> ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Appeals Judgement, 1 June 2001, para. 93.

<sup>22</sup> *Ibid.*; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016 Vol. I of IV, 24 March 2016, para. 550.

<sup>23</sup> Case Facts, para. 5.

<sup>24</sup> Case Facts, para. 7.

<sup>25</sup> Case Facts, para. 5.

<sup>26</sup> Case Facts, para. 3.

<sup>27</sup> Case Facts, para. 10.

<sup>28</sup> Case Facts, para. 13.

<sup>29</sup> Case Facts, para. 10.

minorities would continuously be subject to the deadly condition. Thus, the DNP possessed genocidal intent.

## **II.B. BALBOA IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR AIDING AND ABETTING THE COMMISSION OF THE CRIME UNDER ART. 25(3)(C).**

### **II.B.1. The *actus reus* of aiding and abetting is established.**

19. Under Art. 25(3)(c), a person shall be criminally responsible for a crime if he aids, abets or otherwise assists in its commission.<sup>30</sup> Aiding and abetting genocide refers to all acts of assistance or encouragement that have substantially contributed to the completion of the crime of genocide by the principal offender.<sup>31</sup> In *Krstić*, the ICTY decided that the accused aided and abetted the crime of genocide by permitting the use of resources under his control to facilitate the perpetration of the crime.<sup>32</sup>

20. In the present case, Balboa permitted the ethnic minorities to be detained and forced to work in his mines,<sup>33</sup> in which the inhumane conditions slowly killed the ethnic minorities. Thus, Balboa substantially contributed to the genocide against the ethnic minorities by providing places for the commission of the crime.

### **II.B.2. The *mens rea* of aiding and abetting is established.**

21. In *Musema*, the *mens rea* for aiding and abetting in genocide requires (i) the accused knowingly aided and abetted in the commission of the crime and (ii) he knew that the principal was acting with genocidal intent.<sup>34</sup>

22. As the Chairman of Board and CEO of “High-Tek-Mines” LLC,<sup>35</sup> Balboa was aware that subjecting the ethnic minorities to such inhumane conditions would ultimately lead to their destruction and that his provision of places would substantially contribute to the crime. As the Chairman of the Executive Committee of the DNP,<sup>36</sup> he was also aware of the genocidal intent of the DNP. Thus, Balboa possessed the requisite *mens rea* of aiding and abetting genocide.

## **III. BALBOA IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR THE CRIME AGAINST HUMANITY OF ENSLAVEMENT.**

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<sup>30</sup> ICC Statute, Art. 25(3)(c).

<sup>31</sup> ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, 1 September 2004, para. 729.

<sup>32</sup> ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Appeals Judgement, 19 April 2004, paras. 137-138, 144.

<sup>33</sup> Case Facts, para. 12.

<sup>34</sup> ICTR, *Prosecutor v. Musema*, ICTR-96-13-A, Judgement and Sentence, 27 January 2000, para. 182.

<sup>35</sup> Case Facts, para. 1.

<sup>36</sup> Case Facts, para. 1.

## **III.A. BALBOA IS CRIMINALLY RESPONSIBLE FOR THE CRIME AGAINST HUMANITY OF ENSLAVEMENT UNDER ART. 7(1)(C).**

### **III.A.1. The *actus reus* of the crime against humanity of enslavement is established.**

23. To establish the *actus reus* of this crime against humanity of enslavement, the perpetrator must exercise powers attaching to the right of ownership over one or more persons.<sup>37</sup> Forced labor is a form of enslavement,<sup>38</sup> and its definitional feature is “involuntariness”.<sup>39</sup> Involuntary servitude is still enslavement even when tempered by humane treatment.<sup>40</sup> Moreover, workers are deemed involuntary if the objective circumstances were coercive due to deplorable living conditions, use or threat of force, psychological abuse or a substantially uncompensated aspect,<sup>41</sup> as there is no possibility of free consent.<sup>42</sup>
24. In this case, first, according to the HRO, ILO and WHO reports, the miners lacked sufficient food, clothing, and medical aid.<sup>43</sup> They had to live in overcrowded and unsanitary conditions.<sup>44</sup> Additionally, according to the ten escapees, some miners were forced to risk their lives working in the border region where an on-going armed conflict existed<sup>45</sup> The deplorable and life-threatening conditions evidenced that the miners were physically abused. Second, physical hardships were imposed on the miners: the excessive working hours leading to more deaths<sup>46</sup> evidenced that coercion and involuntariness existed. Third, the escapees were traumatized when Mosel took them into custody,<sup>47</sup> demonstrating that they were also abused psychologically. Even if they didn’t explicitly express their disapproval, the objective circumstances in Neckar’s mines, including inhuman living conditions, physical hardship, coercion and psychological abuses, were coercive enough to eliminate the possibility of free consent.
25. In conclusion, the miners worked involuntarily, and the forced labor amounted to enslavement.

### **III.A.2. The contextual element for the crime against humanity is fulfilled.**

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<sup>37</sup> Elements of Crimes, Art. 7(1)(c), Element 1. See Also: ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001, paras. 539, 540.

<sup>38</sup> Elements of Crimes, Footnote 11. See also, Werle, Jessberger, *Principles of International Criminal Law* (3rd ed., 2014, pp. 355-356.)

<sup>39</sup> ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, 15 March 2002, para. 359.

<sup>40</sup> ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, IT-96-23-T and IT-96-23/1-A, Appeals Judgement, 12 June 2001, para. 123.

<sup>41</sup> ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, 15 March 2002, paras. 373-374.

<sup>42</sup> ICTY, *Prosecutor v. Krnojelac*, IT-97-25-A, Appeals Judgement, 17 September 2003, para. 194.

<sup>43</sup> Case Facts, paras. 8-11.

<sup>44</sup> Case Facts, para. 8.

<sup>45</sup> Case Facts, paras. 3, 12.

<sup>46</sup> Case Facts, paras. 8, 11.

<sup>47</sup> Case Facts, para. 14.

26. The conduct must be part of an (i) “attack” that is (ii) widespread or systematic and (iii) directed against a civilian population.<sup>48</sup>
27. ***The forced labor practice constituted an “attack”:*** An “attack” need not involve any violent force at all.<sup>49</sup> In the context of a crime against humanity, an attack encompasses any mistreatment of the civilian population,<sup>50</sup> including legislation.<sup>51</sup>
28. The DNP policy forced “non-qualified” people to work in the mining sector, while the TL sentences or rehabilitates its offenders. Forced labor was used as a practical form to enact the DNP policy and the TL.<sup>52</sup> This forced labor practice was an attack because it involved the severe mistreatment of Neckar civilians: they faced high risk of dying because of deplorable living conditions in the mines.<sup>53</sup>
29. ***The forced labor practice was both “widespread” and “systematic”:*** The term “widespread” refers to the large-scale nature of the attack and the number of victims,<sup>54</sup> while “systematic” refers to “the organized nature of the acts and the improbability of their random occurrence.”<sup>55</sup>
30. As an enactment to the DNP policy and the TL, the forced labor practice was a series of organized acts through which a large number of people were forced to work in overcrowded mines. The forced labor, considering the large-scale influence it had on Neckar people through State policy and legislation, constituted both a widespread and a systematic attack.
31. ***The forced labor practice was “directed against a civilian population”:*** Civilians are all persons who are not members of the armed forces.<sup>56</sup> In case of doubt, persons shall be considered to be civilians.<sup>57</sup> A civilian population refers to a sizeable group of people not taking direct part in

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<sup>48</sup> Elements of Crimes, Art. 7(1)(c), Element 2.

<sup>49</sup> Christopher K. Hall, Kai Ambos, *Art. 7 para. 1* in Triffterer (ed.3), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Articles by Articles* (3rd ed., 2016), p. 166.

<sup>50</sup> ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016–Vol. I of IV (TC), 24 March 2016, para. 473; ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001, note 30, para. 416; ICTY, *Prosecutor v. Stakić*, IT-97-24-T, Judgement, 31 July 2003, para. 623.

<sup>51</sup> Christopher K. Hall, Kai Ambos, *Art. 7 para. 1* in Triffterer (ed.3), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Articles by Articles* (3rd ed., 2016), p. 166., footnote 70.

<sup>52</sup> Case Facts, paras. 6, 7.

<sup>53</sup> Case Facts, paras. 9, 11.

<sup>54</sup> ICTR, *Prosecutor v. Augustin Ndindiliyimana, Fran çois-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-A, Appeals Judgement, 11 February 2014, para. 260.

<sup>55</sup> *Ibid.*, paras. 260, 262.

<sup>56</sup> Additional Protocol I, Art. 50(1).

<sup>57</sup> ICC, *Prosecutor v. Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 279.

hostilities.<sup>58</sup> The presence of some individual members of the armed forces within the civilian population does not deprive the population of its civilian character.<sup>59</sup>

32. In this case, the victims of the forced labor practice were all “non-qualified people” working in the mines, like minor offenders, DNP’s political opponents charged under the TL Art. 3(1), and people suspected of communicating with Mosel enemies charged under the TL Art. 4(1).<sup>60</sup> Since these people were not members of the armed forces, they constituted civilians.

33. The Defense may argue that the people charged under the TL Art. 4(1) had communicated with Mosel enemies, and therefore lost their protection as civilians because they took a direct part in the hostilities. However, no evidence proves these communications had a nexus to the hostilities. At the same time, the people charged did not receive a fair trial to examine the evidence. In case of doubt, they shall be considered civilians. Moreover, even if certain miners had conveyed military intelligence and lost their protection as civilians, others didn’t. Thus, the whole group of miners still had their civilian character and could not become targets of the attack.

34. Consequently, the forced labor practice itself constituted an attack against civilians.

### **III.A.3. The *mens rea* of the crime against humanity of enslavement is established.**

35. To establish the *mens rea* element, the perpetrator needs to: (i) intend to commit the underlying offence, and (ii) know the existence of the attack and that his acts comprise part of the attack.<sup>61</sup>

36. Shortly after the DNP Executive Committee’s closed meeting, the DNP policy deciding to involve “non-qualified people” to mining sector was implemented. To maximize its effect, minor offenders were forced to work in mines.<sup>62</sup> This demonstrated that the DNP Executive Committee possessed the knowledge and intention to adopt the forced labor practice.

### **III.B. BALBOA IS INDIVIDUALLY CRIMINALLY RESPONSIBLE UNDER ART. 25(3)(C).**

37. Under Art. 25(3)(c), a person shall be criminally responsible for a crime if he aids, abets or otherwise assists in its commission, and if he intends to facilitated the commission of the crime.<sup>63</sup>

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<sup>58</sup> G. Mettraux, *International Crimes and the ad hoc Tribunals* (2005), p. 166.

<sup>59</sup> Additional Protocol I, Art. 50(3). See also Knut Dürmann, *Art. 8 para. 2(b)(i)* in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Articles by Articles* (3rd ed., 2016), p. 356.

<sup>60</sup> Case Fact, paras. 6, 7.

<sup>61</sup> Elements of Crimes, Art. 7(1)(c), Element 3.

<sup>62</sup> Case Facts, para. 6.

<sup>63</sup> ICC Statute, Art. 25(3)(C); ICC, *Prosecutor v. Blé Goudé* No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 167.

Aiding and abetting requires ‘practical assistance, moral support or an omission which has a substantial effect on the perpetration of the crime.’<sup>64</sup> Presence of a high ranking officer during the commission may indicate moral support that has substantial effect.<sup>65</sup> If a high ranking officer could have controlled, prevented, or modified the commission but failed to do so, his lack of objection meets the substantial requirement.<sup>66</sup>

38. Balboa is chair to the DNP Executive Committee, his objection had a substantial effect to preventing the adoption of the DNP policy and the forced labor practice, but he failed to protest. Moreover, by participating in the closed meeting that formulated the DNP policy, and by providing his solely owned mines for forcing miners to work, he lent substantial moral support and practical assistance to the forced labor practice. Therefore, he aided and abetted the forced labor practice and intended to do so.

#### **IV. BALBOA IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR COMMITTING THE WAR CRIME OF ATTACKING CIVILIANS AND CIVILIAN OBJECTS UNDER ART. 8(2)(B)(I) AND ART. 8(2)(B)(II).**

##### **IV.A. THE ELEMENTS OF THIS CRIME ARE SUFFICIENTLY ESTABLISHED.**

39. This crime requires that the conduct must have taken place in the context of and be associated with an international armed conflict (“IAC”) (the contextual element) (IV.A.1.);<sup>67</sup> the perpetrator directed an attack against civilians and civilian objects (*actus reus*) (IV.A.2.-IV.A.5); and the perpetrator intended to direct such an attack (*mens rea*) (IV.A.6).

##### **IV.A.1. The contextual element for the war crimes is fulfilled.**

40. The conduct must have taken place in the context of and be associated with an international armed conflict (“IAC”).<sup>68</sup> An IAC exists, where a state uses armed force against another state or its territory, whether through its armed forces or others, including private actors.<sup>69</sup> In *Kunarac*, the ICTY held that a conduct has nexus to an IAC if the crime “was committed as a part of or in

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<sup>64</sup> ICTY, *Prosecutor v. Furundžija*, No. IT-95-17/1-A, Judgement, AC, 21 July 2000, paras. 117; ICTR, *Prosecutor v. Ndahimana*, No. ICTR-01-68-A, Judgement, AC, 16 December 2013, para. 147.

<sup>65</sup> ICTR, *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgement, 2 September 1998, para. 484; ICTY, *Prosecutor v. Brđjanin*, No. IT-99-36-A, Appeals Judgement, 3 April 2007, para. 273.

<sup>66</sup> ICTY, *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgement, 10 December 1998, paras. 217, 218.

<sup>67</sup> Elements of Crimes, Arts. 8(2)(b)(i) and 8(2)(b)(ii), Element 5.

<sup>68</sup> Elements of Crimes, Art. 8(2)(b)(i) and (ii), Element 4.

<sup>69</sup> Michael Cottier, *Art.8 para. 2 (b)(i) in Triffterer(ed.), Rome Statute of the International Criminal Court: A Commentary* (3rd ed., 2016), p. 312.

the context of the perpetrator's official duties.”<sup>70</sup> In *Karemera et al*, several indicators were considered when deciding whether crimes were committed as a part of or in the context of the perpetrator's official duties, including: (i) the perpetrator had *de facto* authority and effective control, or alternatively, the perpetrator had actual control over the Party in power in a multi-party system; and (ii) the perpetrator had the ability to prevent crimes or punish subordinates.<sup>71</sup>

41. In this case, though Balboa committed the cyberattack through a private actor, namely the High-Tek IT Corporation, he was Chairman of the governing party of Neckar and therefore exercised *de facto* military authority. The attack was against a hospital in another country, giving rise to an IAC. Consequently, the attack bears a nexus to the IAC and the contextual element was met.

#### **IV.A.2. The cyberattack constituted an “attack” under Art. 8.**

42. Attacks are characterized by their violent consequences.<sup>72</sup> In the *Nuclear Weapons* case, the ICJ stated that “[t]he advancement of new weapons technology does not escape scrutiny...The consequences rather than form of weaponry being the primary consideration.”<sup>73</sup> Thus, the existence of civilian deaths flowing from a cyberattack would be enough to classify the cyberattack as an attack.<sup>74</sup>

43. In the present case, the cyberattack, in which Balboa’s team shut down all medical equipment at the hospital, resulted in the deaths of the 10 escapee workers and 35 other innocent patients.<sup>75</sup> Therefore, this cyberattack constituted an “attack” under Art. 8.

#### **IV.A.3. Civilians and civilian objects were the objects of the cyberattack.**

44. Civilians are all persons who are not members of the armed forces.<sup>76</sup> According to Additional Protocol I, in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.<sup>77</sup> Additionally, all objects, “which are not military objectives”, are civilian objects.<sup>78</sup> According to customary international law, hospitals are presumed to be civilian objects.<sup>79</sup>

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<sup>70</sup> ICTY, *Prosecutor v. Kunarac et al*, IT-96-23-A, Appeals Judgement, 12 June 2002, para. 59.

<sup>71</sup> ICTR, *Prosecutor v. Karemera et al*, ICTR-98-44-A, Judgement, 29 September 2014, paras. 158-278.

<sup>72</sup> ICTY, *Prosecutor v. Tadić*, IT-94-1, Appeals Judgement, 15 July, 1999, paras. 120,124.

<sup>73</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, paras. 226, 986.

<sup>74</sup> Michael N. Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare* (2013), pp. 106-107.

<sup>75</sup> Case Facts, para. 15.

<sup>76</sup> ICRC, *Customary IHL*, rule 5.

<sup>77</sup> Additional Protocol I, Art. 50(1).

<sup>78</sup> *Ibid.*, Art. 52(1).

<sup>79</sup> ICRC, *Customary IHL*, rule 5.

45. In this case, no evidence shows the 10 escapee workers were members of any armed forces; thus, they should have been considered civilians. Even if the ten escapee workers were not civilians, their presence at the hospital would not deprive the 35 other innocent patients of their civilian character.<sup>80</sup> Consequently, civilians and civilian objects were the objects of the cyberattack.

#### **IV.A.4. The civilians were not taking direct part in hostilities at the time of the attack.**

46. Attacks on civilians are only permitted “unless and for such time as” civilians were taking direct part in hostilities.<sup>81</sup> According to the ICRC, a conduct constitutes a direct participation in hostilities when three elements are fulfilled: (i) the threshold of harm (whether the civilians caused enough harm), (ii) direct causation (whether their participation has a causal link to the harm), and (iii) belligerent nexus (whether they have a connection to the adverse party).<sup>82</sup>

47. The escapee workers were sick and traumatized at the time of the attack,<sup>83</sup> they were not capable of inflicting harm on Neckar’s military objects. Thus, the threshold of harm is not met, and there is no “direct causation” or “belligerent nexus” to begin with.

#### **IV.A.5. In any case, the attack violated the principle of distinction.**

48. Art. 8(2)(b)(i) is a reflection of the principle of distinction in attack in an international armed conflict.<sup>84</sup> The indiscriminate nature of this attack violated the principal of distinction and thus cannot be excused.

49. As submitted above, the cyberattack was indiscriminate,<sup>85</sup> because it did not distinguish between civilian and military targets. Even if the attack on the ten escapee workers was permissible, the deaths of 35 innocent patients still violated the principal of distinction.<sup>86</sup>

#### **IV.A.6. The *mens rea* of the war crimes is established.**

50. *Balboa was aware of the IAC*: In an IAC, the perpetrator has to be aware of the factual circumstances establishing the international character of the armed conflict.<sup>87</sup>

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<sup>80</sup> Ibid.

<sup>81</sup> Additional Protocol I, Art. 51(3).

<sup>82</sup> ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, pp. 46–64.

<sup>83</sup> Case Facts, para. 14.

<sup>84</sup> ICRC, *Study on Customary International Humanitarian Law*, rule 1; ICTY, *Prosecutor v. Galić*, IT- 98-29-A, Appeals Judgement, 30 November 2006, para. 87.

<sup>85</sup> UN doc. A/Res/5370 (1999), p. 10. (General Assembly Res.).

<sup>86</sup> ICRC, *How Does Law Protect in War: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd ed.), Chapter 9, II. 6. C.

<sup>87</sup> Elements of Crimes, Arts. 8(2)(b)(i), 8(2)(b)(ii), Element 5.

51. In this case, Balboa, as the Chairman of DNP, ordered the attack on a hospital within the territory of Mosel. He must know the factual circumstances that an attack on a hospital in another country established an IAC.

52. ***Balboa intended the attacks:*** A person has intent in relation to a conduct, if he means to engage in the conduct,<sup>88</sup> because existence of intent and knowledge can be inferred from relevant facts and circumstances.<sup>89</sup> Under this count, in addition to the standard *mens rea* requirement, there must also be a concrete intent.<sup>90</sup> In *Katanga*, concrete intent was fulfilled when the attack was launched solely on civilians.<sup>91</sup>

53. In this case, the object of the attack was solely civilians at the hospital. This renders Balboa's conduct to be concretely intentional.

#### **IV.B. BALBOA IS CRIMINALLY RESPONSIBLE UNDER ART. 25(3)(A) AND ART. 25(3)(B) FOR ORDERING THE CYBERATTACK.**

54. Art. 25(3)(a) states that the perpetrator is liable if he "commits such a crime...through another person...", while Art. 25(3)(b) states that the perpetrator is responsible if he "orders, solicits or induces the commission of such a crime which in fact occurs or is attempted".<sup>92</sup>

55. In this case, Balboa directly ordered the cyberattack.<sup>93</sup> He knew that the attack would cause the deaths of people in the hospital, and he intended the consequences. Thus, Balboa is liable under Art. 25(3)(a) and (b).

#### **V. PRAYER FOR RELIEF**

On the basis of the evidence provided, the Prosecution respectfully requests the Court to find that the Mosel police's testimony is admissible and there are substantial grounds to believe that Mr. Balboa is liable to be tried under Arts. 6(c), 7(1)(c), 8(2)(b)(i), and 8(2)(b)(ii).

Respectfully submitted,

Counsel for the Prosecution

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<sup>88</sup> ICC Statute, Art. 30(2)(a).

<sup>89</sup> Elements of Crimes, General introduction, para. 3.

<sup>90</sup> ICC, *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, 8 February 2010, para. 93; *Katanga and Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, para. 271.

<sup>91</sup> ICC, *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, para. 272.

<sup>92</sup> ICC Statute, Arts. 25(3)(a) and (b).

<sup>93</sup> Case Facts, para. 15.