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**NINTH SYMBIOSIS LAW SCHOOL,  
PUNE – INTERNATIONAL CRIMINAL  
TRIAL ADVOCACY COMPETITION  
[SICTA – 2024]**

**April 18, 2024 – April 21, 2024**

**PREVIOUS YEAR'S BEST MEMORIALS**

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**EIGHTH SYMBIOSIS LAW SCHOOL, PUNE – INTERNATIONAL CRIMINAL TRIAL  
ADVOCACY COMPETITION, 2023**

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**BEFORE**  
  
**TRIAL CHAMBER II, INTERNATIONAL CRIMINAL COURT**  
  
**THE HAGUE, THE NETHERLANDS**

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**IN THE MATTER of**

**THE PROSECUTOR.....PROSECUTION**

**v.**

**PAUL ANDERSON.....DEFENCE**

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**DEFENDANT CHARGED WITH**

*War Crime of employing weapons, projectiles or materials or methods of  
warfare listed in Annex to the Statute Under Article 8(2)(b)(xx) of the Rome  
Statute*

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**Word Count: 7479**

**WRITTEN SUBMISSIONS ON BEHALF OF THE PROSECUTION**

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



**Original: English**

**No: ICC-\*/27-\*/17**

**Date: January 27, 2023**

**TRIAL CHAMBER II**

**BEFORE:**

Judge \_\_\_\_\_, Presiding Judge

Judge \_\_\_\_\_, and

Judge \_\_\_\_\_

**SITUATION IN THE REPUBLIC OF TITAN**

**In the case of**

**The Prosecutor v. Paul Anderson**

**Registrar:**

**Source: Office of the Prosecutor**

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AC	Appeals Chamber
AP I	Additional Protocol I
IAC	International Armed Conflict
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
Id.	Ibid
i.e.	Id. Est
IHL	International Humanitarian Law
Int'l	International
¶	Paragraph
Pp.	Pages
PTC	Pre Trial Chamber
Rome Statute	International Criminal Court Statute
TC	Trial Chambers
U.N.	United Nations
v.	Versus
VLR	Victims Legal Representative

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## STATEMENT of FACTS

### ~BACKGROUND~

The Republic is one of the largest countries in the world, comprising many ethnic groups. Titan is located in the eastern region of Europe and is one of the largest countries in the continent, having broken apart from the Republic in 1991. Emerald City is located in Titan, and has often been caught in between tensions between the two countries.

### ~ESCALATION OF TENSIONS~

On February 5, 2022, the Republic openly removed Titan's ambassador and declared an end to all diplomatic relations with Titan. International observers and intelligence agencies noted a significant troop and battleship deployment along the shared borders between Titan and the Republic. This was in relation to the proposal to include Titan as an EU Member. On February 24, 2022, Mr. David Wallace said during a highly publicised public rally that Titan was and still is a crucial component of the Republic and that it was crucial for the “*errors of the 1990s were rectified*” in the interest of Titan's Xula-speaking populace. He noted that the Proposal would work against the Republic's interests in the area and constitute a direct and serious threat to its integrity, national borders, and those of its allies. Thus, he declared a formal offensive against Titan until Titan irrevocably withdrew the Proposal or terminated it. Following the aforementioned public announcement, Republican soldiers attacked Titan from all sides. The government of Titan, for its part, expelled the Republic's ambassador and declared a state of emergency throughout the whole nation.

### ~EFFECT OF TENSIONS~

From March 2022 and September 2022, both sides suffered significant losses. Titan's western allies consistently provided financial support and arms to its armed forces. The conflict in Titan is thought to have resulted in the largest forced emigration of people since the Second World War and at least ten thousand deaths, despite support from the worldwide community. The effects of the refugee crisis brought on by the aforementioned war continue to devastate numerous nations. The government of Titan asked their citizens to serve as the “*eyes and ears*”

of their defence forces through numerous televised events. Several international news outlets had also published in-depth reports on how Titan's military was able to thwart the Republican advance thanks to social media updates and live streams provided by residents.

### ~SIEGE OF EMERALD~

One particular incident relates to airstrikes that occurred on the night of October 14, 2022, when Titan's air force attacked a significant base camp of Republican battalions stationed in Emerald City, resulting in the deaths of about 120 Republican soldiers, countless members of the support staff, and loss of military equipment valued at millions of dollars. Following what became known as the “*Siege of Emerald*”, it was made clear by developments that this attack was specifically planned using data posted by Emerald City citizens on their social media accounts on websites like Twitter, Instagram, and Tik Tok. The Siege of Emerald significantly hampered the Republic's narrative as it advanced against Titan.

According to reports, the claimed strike dealt a severe damage to the morale of the Republican army's men stationed in Titan. David Wallace issued orders to avenge the death of a Republican in Emerald after consulting with the nation's Ministry of Defence. Post this, the accused Paul Anderson is thought to have personally employed and organised attacks utilising vacuum bombs on the Titanian population hiding in Emerald City, allegedly resulting in the deaths of some 600 individuals. The employment of such weapons by the defendant is also alleged to have resulted in extensive devastation and razing of all of the citizens of Emerald City's material possessions as well as irreparable impairment to the area's soil and ecology. According to estimates provided, between October 22, 2022, and October 25, 2022, the accused is accused of using these weapons seven times and destroying almost 70% of Emerald City's habitable zones.

### ~PROCEDURAL HISTORY AND PRELIMINARY MATTER~

1. **November 1, 2022:** The accused was captured along with four other Republican soldiers by Titan's military and all five of these men immediately surrendered before the military.
2. **November 14, 2022:** The government of Titan informed the ICC Prosecutor “*Prosecutor*” of the situation in Titan and requested that the Prosecutor open an inquiry

into any crimes committed on or against Titan's territory by the Republic's seized prisoners. The prosecutor was also given the accused's case and his request to have the case heard by an impartial, independent, and autonomous organisation. The accused also submitted to the jurisdiction of the ICC to be tried in accordance with the provisions and procedure of the *Rome Statute*.

3. **November 29, 2022:** The Prosecutor released a preliminary report with respect to the Situation referred to it on November 14, 2022. By virtue of this report, the Prosecutor's Office announced the conclusion that, in its opinion, the attacks referred to it, via the Situation in Titan, pass the legal standards governing the jurisdiction of the Court with reference to *Article 17 of the Statute*.
4. **Post November 29, 2022:** The Chamber granted leave to the Prosecutor to initiate its investigation in connection with the Situation and the actions of the accused in Emerald City between October 22, 2022, and October 25, 2022.
5. **January 3, 2023:** The Legal Representative of the Victims filed a request pursuant to *Regulation 55 of the Regulations*, requesting the Chamber to consider a legal recharacterization of the facts as war crime pursuant to *Article 8(2)(b)(i) of the Statute*. The VLR has requested this Chamber to allow them to demonstrate how the Pre-Trial Chamber I, in connection with the conclusions given in the Decision on the Confirmation of Charges:
  - (a) failed to appreciate the principles of customary law and treaty protection relating to civilians as non-combatants in the context of the motivations behind the use of social media by the residents of Emerald City;
  - (b) failed to appreciate that there exists sufficient evidence to establish that despite the use of social media by such residents amounting to successful strikes against soldiers of the Republic, such residents did not lose their protected status of a non-combatant and a civilian in the international armed conflict between Titan and the Republic.

**ISSUES PRESENTED****~ ISSUE 1 ~**

**WHETHER THE CHARGE CAN BE RECHARACTERIZED TO INCLUDE WAR CRIME UNDER ARTICLE 8(2)(b)(i) OF THE ROME STATUTE UNDER REGULATION 55 OF THE ICC REGULATIONS?**

**~ ISSUE 2 ~**

**WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(i) OF THE ROME STATUTE?**

**~ ISSUE 3~**

**WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(xx) OF THE ROME STATUTE?**

**~ ISSUE 4 ~**

**WHETHER THE ACTS OF PAUL ANDERSON ARE SHIELDED UNDER THE DEFENCE OF SUPERIOR ORDERS UNDER ARTICLE 33 OF THE ROME STATUTE?**

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## SUMMARY of ARGUMENTS

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### ISSUE 1: WHETHER THE CHARGE CAN BE RECHARACTERIZED TO INCLUDE WAR CRIMES UNDER ARTICLE 8(2)(b)(i) OF THE ROME STATUTE UNDER REGULATION 55 OF THE ICC REGULATIONS?

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The charge against Mr. Paul Anderson can be recharacterized by the Trial Chambers under *Regulation 55 of the ICC Regulations* to include the commission of war crimes under *Article 8(2)(b)(i) of the Rome Statute*. The charge needs to be recharacterized to account for the *mens rea* of Mr. Paul Anderson for intentionally directing attacks on civilian population. The recharacterization of the charge does not go beyond the scope of the facts and circumstances of the trial, and does not affect the fair trial rights of Mr. Paul Anderson.

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### ISSUE 2: WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(i) OF THE ROME STATUTE?

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Mr. Paul Anderson is liable under *Article 8(2)(b)(i) of the Rome Statute* for intentionally attacking civilians and civilian population not taking direct part in hostilities. The attacks were directed against the civilians due to the mere reason that the Titanian civilians posting about the war on social media, which is grossly violative of Rome Statute, AP 1 and customary IHL. Paul Anderson has the requisite *mens rea* to hold him liable for committing the war crime under *Article 8(2)(b)(i) of the Rome Statute*.

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### ISSUE 3: WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(xx) OF THE ROME STATUTE?

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Mr. Paul Anderson is liable under *Article 8(2)(b)(xx) of the Rome Statute* for using thermobaric bombs upon combatants and civilians that have caused them superfluous injuries and unnecessary suffering. He was aware that the use of thermobaric bombs was inherently indiscriminate but he chose to attack the civilian population with the intention to attack them. Furthermore, the use of thermobaric bombs violates the principle of proportionality as it was used after the Titanian forces launched air strikes on them, however, the use of thermobaric



bombs is known to have far worse and graver effects. Lastly, he cannot shield this act under the justification of military necessity.

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**ISSUE 4: WHETHER THE ACTS OF PAUL ANDERSON ARE SHIELDED UNDER THE DEFENCE OF  
SUPERIOR ORDERS UNDER ARTICLE 33 OF THE ROME STATUTE?**

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The actions of Mr. Paul Anderson are not shielded under the defence of “*superior orders*” under *Article 33 of the Rome Statute* as he committed the act the war crimes under *Article 8(2)(b)(i) and 8(2)(b)(xx) of the Rome Statute* wilfully and with requisite intention of the same. Paul Anderson cannot take the justification of superior orders as the acts done by him are in his individual capacity as the military commander of the republican forces and there was no effective control by the superior or specific commands or orders given to him to perform the alleged acts resulting in war crimes. Furthermore, he was aware that these acts are unlawful under the Rome Statute as well as customary IHL but he chose to go ahead with his actions. Therefore, these actions make him individually liable and attribute criminal responsibility under *Article 25 of the Rome Statute*.

## ARGUMENTS *in* DETAIL

### ISSUE 1: WHETHER THE CHARGE CAN BE RECHARACTERIZED TO INCLUDE ARTICLE 8(2)(b)(i) OF THE ROME STATUTE UNDER REGULATION 55 OF THE ICC REGULATIONS?

1. The PROSECUTION submits that the charge against the DEFENDANT can be recharacterised under *Regulation 55 of the ICC Regulations*<sup>1</sup> to include the war crime under *Article 8(2)(b)(i) of the Rome Statute*<sup>2</sup> as the chamber has the powers to recharacterise the charge (1.1.), the recharacterisation does not exceed the facts and circumstances mentioned in the initial charge (1.2.), the recharacterisation of charge does not prejudice the rights of DEFENDANT (1.3.), the recharacterisation does not violate the DEFENDANT’S fair trial rights (1.4.), and the effect of recharacterisation closes potential gaps during the trial process (1.5).

#### 1.1. THE CHAMBER HAS THE POWERS TO RECHARACTERISE THE CHARGE

2. It is submitted that the TC has the power to recharacterize is permissible under *Regulation 55 of the ICC Regulations* from *Article 8(2)(b)(xx) to Article 8(2)(b)(i) of the Rome Statute*. According to *Regulation 55*, the TC has the authority to modify the legal characterisation of facts to accord with the crimes under *Article 6, 7 or 8*, or to accord with the form of participation of the accused under *Article 25 and 28*, without exceeding the facts and circumstances described in the charges and any amendments to the charges.<sup>3</sup>
3. The PROSECUTION submits that *Regulation 55* is imperative to be invoked in the present case as it is still in the Pre-Trial Phase and a recharacterisation would accurately reflect the facts and circumstances accurately. This Regulation is used in order to enhance judicial effectiveness and enable the TC to close any breaches that might develop if the PROSECUTION’S accusations do not correspond to the evidence presented at trial.<sup>4</sup> The main intent is to ensure that there exists no circumstances in which the DEFENDANT is exonerated

<sup>1</sup> Regulations of the Court, International Criminal Court, ICC-BD/01-05-16, 26 May 2004, “*Regulation 55*”.

<sup>2</sup> Rome Statute for the Establishment of the International Criminal Court, 2187 U.N.T.S. 90, July 1 2002, Art. 8(2)(b)(i) “*Rome Statute*”.

<sup>3</sup> Elinor Fry, *Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW, 577-597 (2016).

<sup>4</sup> CARSTEN STAHN et. al., THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT: A CRITICAL ACCOUNT OF CHALLENGES AND ACHIEVEMENTS (Oxford University Press, 2015).

despite having been proven guilty beyond reasonable doubt of a crime falling under the court's purview.<sup>5</sup>

4. It is submitted that *Regulation 55* accords the ICC with the power to alter the legal evaluation of the evidence, even if it differs from how the accused was charged, as the final right stands with the prosecutor of the case at hand to allege a charge.<sup>6</sup> Moreover, as held in the *Lubanga* case,<sup>7</sup> upon the request of victims a recharacterisation was done to include sexual crimes. Similarly, in *casu* victims have specifically requested for a recharacterisation to account the war crimes committed against the civilian population.

## **1.2. RECHARACTERISATION DOES NOT EXCEED THE FACTS AND CIRCUMSTANCES MENTIONED IN THE INITIAL CHARGE**

5. According to *Regulation 55*, the outcome of the Recharacterisation must not exceed the facts and circumstances mentioned in the initial charges.<sup>8</sup> In *Prosecutor v. Laurent Gbagbo*,<sup>9</sup> it was held that the term “*facts and circumstances*” refer to the material facts at hand.
6. In *casu*, the DEFENDANT is charged for the use of weapons that have caused superfluous injury and unnecessary suffering to about 600 people, including civilians. The proposed recharacterisation is to include *Article 8(2)(b)(i)*, which is the war crime of intentionally directing attacks against the civilian population or civilians not taking direct part in hostilities. The failure to include *Article 8(2)(b)(i)* would minimise the scope of the trial by not taking into account all the acts committed by the DEFENDANT as the actions under *Article 8(2)(b)(i)* require *mens rea*. Therefore, since the facts relevant for both charges are similar and form a part of the same chain of transaction, a recharacterisation in the present case reflects the true *mens rea* and criminal responsibility of the DEFENDANT.

## **1.3. RECHARACTERISATION OF CHARGE DOES NOT PREJUDICE THE RIGHTS OF DEFENDANT**

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<sup>5</sup> Sienna Merope, *Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC*, 22 CRIMINAL LAW FORUM 311 (2011).

<sup>6</sup> *supra* note 1.

<sup>7</sup> Prosecutor v. Lubanga, ICC-01/04-01/06, Pre-Trial Chamber Judgment, “*Lubanga*”, ¶¶37, 39, (Jan. 29, 2007).

<sup>8</sup> Kevin Jon Heller, *New Essay on the Legal Recharacterization of Facts at the ICC*, OPINIOJURIS (Dec. 23, 2013), <http://opiniojuris.org/2013/12/23/new-essay-legal-recharacterization-facts-icc/>.

<sup>9</sup> The Prosecutor v. Laurent Gbagbo and Charles BléGoudé, ICC-02/11-02/11, PTC III, ¶140 (6 January 2012).

7. The DEFENDANT may argue that the recharacterisation to include the new charge is a substantive departure from the initial charge, it is submitted that as per the Decision in *Lubanga*, substantive departures are allowed in so far as it does not exceed the facts and circumstances of the initial charge. As submitted above, the recharacterisation of the charge is in accordance with the facts of the present case. Therefore, there is not a substantive departure from the facts and circumstances with which the DEFENDANT is previously charged.
8. It is submitted that the recharacaterisation does not prejudice the rights of the DEFENDANT for the following reasons:
  1. **The proposed recharacterization is not a drastic departure from the mode of liability identified in the confirmation of charges:** The use of inherently indiscriminate weapons to attack civilians is within the scope of *Article 8(2)(b)(xx) of the Rome Statute* as the weapons have been used to intentionally attack civilians and civilians not taking direct part in hostilities. The factual scope of the trial remains the same as the DEFENDANT is being tried on the same facts and the mode of liability continues to be “*individual criminal responsibility*”.
  2. **Substantial Overlap in the types of evidence:** There exists substantial overlap in the types of evidence that is required under *Articles 8(2)(b)(xx) and 8(2)(b)(i) of the Rome Statute* as both the articles concern itself with attack on civilians. The onus rests on the DEFENDANT to prove that there was no crime committed under *Article 8(2)(b)(i) of the Rome Statute* and the DEFENDANT would rely on similar form of evidence such as death toll of victims, oral testimonies of injured civilians, among others. The only additional burden on the DEFENDANT is to prove the *mens rea* under *Article 8(2)(b)(i)*.

#### 1.4. RECHARACTERIZATION DOES NOT VIOLATE THE DEFENDANT’S FAIR TRIAL RIGHTS

9. The DEFENDANT may argue that the fair trial rights guaranteed under *Article 64 of the Rome Statute* which provides for fair and expeditious trial conducted with full respect for the rights of the accused would be violated on account of recharacterisation. However, the PROSECUTION submits that the stage at which the recharacterisation is sought is at the stage where the trial has not commenced. In the *Bemba* case,<sup>10</sup> recharacterisation was done by the TC after three years from when the allegations were confirmed and two years after the

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<sup>10</sup> Prosecutor v. Bemba Gombo, ICC-01/05-01/08, “*Bemba Gombo*”, ¶140.

trial started. Similarly in the *Katanga* case,<sup>11</sup> recharacterisation was done after six months from after the end of the trial proceedings. Furthermore, under *Regulation 55* the DEFENDANT would still be provided with the necessary obligation during the trial to examine any evidence presented against him. The Recharacterisation does not prejudice the right of the DEFENDANT to question inculpatory evidence and introduce exculpatory evidence.<sup>12</sup> Therefore, the recharacterisation does not violate the fair trial rights of the DEFENDANT.

### 1.5. RECHARACTERISATION CLOSES POTENTIAL GAPS DURING THE TRIAL PROCESS

10. The *Rome Statute* ensures that trials that take place before the ICC balance the rights of the victim and the accused. Recharacterisation is utilised in such proceedings to ensure that such balance is maintained and that the accused can only take up those defences in relation to the charge brought out against him. The main intention behind the proposed recharacterisation is to ensure that all the acts of the DEFENDANT that have resulted in the commission of war crimes are accounted for by the TC. The acts of the DEFENDANT are so grave in nature that only through recharcaterisation can a true trial be possible.
11. Therefore, the recharacterisation ensures that potential gaps are closed during the trial process and that the DEFENDANT does not escape the liability imposed on him in any form.

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<sup>11</sup> Prosecutor v. Katanga, ICC-01/04-01/07, Trial Chamber Judgment, “*Katanga*”, ¶¶1217-1218, (Mar. 7, 2014).

<sup>12</sup> Mark Klamburg, *Recharacterisation of Charges in International Criminal Trials*, UR FESTSKRIFT TILL CHRISTIAN DIESEN 327 - 345 (2014).

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## ISSUE 2: WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(B)(I) OF THE ROME STATUTE?

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12. The PROSECUTION submits that the DEFENDANT in the present case is liable under *Article 8(2)(b)(i) of the Rome statute* for “**intentionally directing**” attacks against the civilian population or civilian population not taking direct part in the hostilities. The threshold under 8(2)(b)(i) does not require an “**actual**” attack on the civilian population in question.<sup>13</sup> In *casu*, the DEFENDANT directed an attack (2.1), the object of the attack was a civilian population (2.2), the DEFENDANT intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack (2.3), the conduct took place in the context of an IAC, and the DEFENDANT was aware of the same (2.4).

### 2.1. THE DEFENDANT DIRECTED AN ATTACK

13. Under *Article 49(1) of API*,<sup>14</sup> “**attack**” is defined as “*acts of violence against the adversary, whether in offence or in defence.*” In the *Kordic and Cerkez* case,<sup>15</sup> the ICTY Prosecution defined the material elements of unlawful attacks on civilians as “*an attack resulting in civilian deaths, serious injury to civilians, or a combination thereof; and the attack directed at the civilian population or individual civilians*”

14. In *casu*, the DEFENDANT has committed the act of attacking the civilian population as well as directing the attacks. Approximately 600 people, including civilians residing in the Emerald City, have been killed as a result of the vacuum bombs, which satisfy the act of attacking and killing the civilian population.<sup>16</sup> In *Prosecutor v. Milan Martić*,<sup>17</sup> the former president of the Republic of Serbian Krajina ordered an unlawful attack against Zagreb's civilian population resulting in at least two deaths and numerous injuries to civilians and with knowledge and intent, violating the laws and customs governing the conduct of war, a crime recognised by *Articles 3 and 7(1) of the Tribunal Statute*.

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<sup>13</sup> PROFESSOR ANTONIO CASSESE ET.AL., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 762, (Oxford University Press 2002).

<sup>14</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, “**API**”.

<sup>15</sup> *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeals Chamber Judgment, “**Kordić**”, ¶341, (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

<sup>16</sup> *Compromis*, ¶ III(b).

<sup>17</sup> *Prosecutor v. Milan Martić*, IT-95-11-T, Trial Chamber Judgment, “**Martić**”, ¶¶40, 45-46, 67-69, (Int’l Crim. Trib. for the Former Yugoslavia Jun. 12, 2007).

15. The direction to kill is evident from the Republican High Command's order to specifically target and attack the civilian population.<sup>18</sup> These attacks were launched on seven different occasions in places such as hospitals, medical stores, water reservoirs, and shelters.<sup>19</sup> It is common knowledge that these consist mainly of civilians, however, the DEFENDANT still chose to attack these places even though they did not take any part in the hostilities, which represents a clear *mens rea* to attack them. Therefore, the DEFENDANT has made use of the armed force to carry out a military operation during the course of an armed conflict specifically against the civilian population.

## 2.2. THE OBJECT OF THE ATTACK WAS THE CIVILIAN POPULATION

16. According to *Article 50 of the AP I*, "*civilians*" are defined as all persons who are civilians, and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. In case of doubt about whether a person is a civilian, that person shall be considered to be a civilian.<sup>20</sup>
17. Furthermore, according to the ICRC's Interpretive Guidance,<sup>21</sup> all persons who are not members of State armed forces or of organised armed groups belonging to a party to an armed conflict are civilians and, therefore, are protected against direct attack unless and for such time as they directly participate in hostilities. In *casu*, the object of the attack by the DEFENDANT encompassed the civilian population or civilian population not taking direct part in hostilities. The same has been done with a clear intention to target them.
18. According to the *Rome Statute*,<sup>22</sup> treaty law under *Articles 51(2) and 85(3)(a) of the AP I*<sup>23</sup> as well as customary international law, there is an absolute prohibition on the attack of civilians or civilians not taking direct part in hostilities. Civilians are accorded with protected status under customary IHL. When an IAC takes place in an area populated with civilians, this protection kicks in as great care has to be taken by both sides on the armed forces to keep civilian casualties to a minimum at worst. It is pertinent to note that most recent wars take place in civilian populated areas and therefore, upholding the protection

<sup>18</sup> Compromis, Defence Testimonials, Defense Witness-2 at pp. 23.

<sup>19</sup> Compromis, ¶ III(c).

<sup>20</sup> AP I, Art. 50(1).

<sup>21</sup> Nils Melzer, *Interpretive Guidance on the notion of Direct Participation in hostilities under International Humanitarian Law*, ICRC RESOURCE CENTRE, (2009), <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf> [*"ICRC Interpretive Guidance"*].

<sup>22</sup> Rome Statute for the Establishment of the International Criminal Court, 2187 U.N.T.S. 90, July 1 2002, "*Rome Statute*".

<sup>23</sup> AP I, Art. 51(2) & 85(3)(a).



of civilians as non-combatants is of paramount importance. In such a situation, the standards for military necessity are extremely high as viewing civilians as collateral damage would in most cases be construed as a war crime.

19. In this case, the orders of the Republican Ministry of Defence clearly states that “*Titanian blood had to be drawn onto the streets in the broad daylight and it was imperative that a spectacle be made immediately.*”<sup>24</sup> Furthermore, the DEFENDANT also stated that the residents of the Emerald City had to be “*neutralised*” with as much urgency as the drafted soldiers because of their alleged contribution to war efforts through social media.<sup>25</sup> This demonstrates a clear intent by the DEFENDANT to consider the object of the attack as civilian population or civilian population not taking direct part in hostilities.

### 2.2.1. *The civilian population did not take direct part in the hostilities*

20. In the *Blaskic* case,<sup>26</sup> it was held that targeting civilians is an offence in itself when not justified by military necessity. However, the DEFENDANT may argue that the civilian population took a direct part in the hostilities through their contributions on social media. It is submitted that the mere act of posting on social media does not constitute taking a direct part in hostilities.<sup>27</sup>
21. The act of direct contribution in the hostilities, as prescribed by the ICRC Interpretive Guidance requires people to directly participate in hostilities when they commit acts that directly harm the enemy's military capabilities or operations or inflict death, injury, or destruction on them in order to help one of the parties to the conflict. If and as long as civilians engage in such conduct, they are actively taking part in hostilities and no longer have a defence against being targeted by enemy troops.<sup>28</sup>
22. In *casu*, it is submitted that the civilian residents of Emerald City posted certain messages or posts on social media that revealed the position of Republican troops to the Titanian military.<sup>29</sup> While this act can be taken as providing technical assistance to the Titanic military, the act of providing technical assistance does not amount to direct participation as

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<sup>24</sup> *Supra* note 18.

<sup>25</sup> *Id.*

<sup>26</sup> Prosecutor v. Blaškić, IT-95-14-T, Trial Chamber Judgment, “*Blaškić*” ¶286, (Int’l Crim. Trib. for the Former Yugoslavia Mar 3, 2000).

<sup>27</sup> Thomas Zeitzoff, *How Social Media Is Changing Conflict*, 61(9) THE JOURNAL OF CONFLICT RESOLUTION (2017).

<sup>28</sup> Interpretive Guidance, (n.15), 46.

<sup>29</sup> Compromis, ¶ II(i).



it is comparable to providing internet services and other modes of communication in enforcing the civilian's right to free speech during a conflict.<sup>30</sup>

23. Furthermore, it would also serve to expose any wartime atrocities committed by either side in the course of said conflict, which is acknowledged to not constitute direct participation in hostilities.<sup>31</sup> Secondly, in this case the civilians have not caused violent acts in the hostilities through the use of lethal force or weapons and have not caused military harm to the DEFENDANT such as capturing, wounding or killing military personnel; damaging military objects; or restricting or disturbing military deployment, logistics and communication.<sup>32</sup>
24. According to the ICRC Interpretive Guidance,<sup>33</sup> it is stated that the exact point where a civilian can be deemed as directly participating in the hostilities depends on a case to case basis of the “*preparatory measures*” undertaken before the hostile act. The mere act of communicating on social media does not amount to the same as it is done on open access platforms, which could be accessible by the Republic as well. This is not similar to the transmission of information or geo-targeting of locations done by military intelligence, which requires a high level of technical expertise and confidentiality in communication.<sup>34</sup>
25. The act of posting on social media is merely a reactionary measure that does not demonstrate any premeditation or planning by the civilian population. The presence of the words such as “*be safe*”<sup>35</sup> shows that it is for the protection of the civilian community at large to be alert of the guns and possible hostilities and indicative warning for the civilians in the area. Therefore, the civilian population has not taken direct part in hostilities.

### 2.3. THERE HAS BEEN AN INTENTIONALLY DIRECTED ATTACK AGAINST CIVILIAN POPULATION OR CIVILIAN POPULATION NOT TAKING DIRECT PART IN HOSTILITIES

26. It is submitted that the “*intention*”<sup>36</sup> of the DEFENDANT assumes primacy while characterising under *Article 8(2)(b)(i)*. The completion of the crime is irrelevant as the intention is to be accounted for by the court in determining the offence under *Article*

<sup>30</sup> Press Release, Office of the High Commissioner for Human Rights, Protect freedom of expression as a vital ‘survival right’ of civilians in armed conflict: UN expert (Oct. 17, 2022), <https://www.ohchr.org/en/press-releases/2022/10/protect-freedom-expression-vital-survival-right-civilians-armed-conflict-un>

<sup>31</sup> *Id.*

<sup>32</sup> Interpretive Guidance, (n.15), 47.

<sup>33</sup> Interpretive Guidance, (n.15), 65.

<sup>34</sup> Michael Schmitt, *War, Technology and the Law of Armed Conflict*, INTERNATIONAL LAW STUDIES 142, (2006).

<sup>35</sup> Compromis, Annexure 03 at pp.33.

<sup>36</sup> KNUT DORMANN, ELEMENTS OF WAR CRIME UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 246, (Cambridge University Press 2009).

8(2)(b)(i).<sup>37</sup> Intention, which is a type of *mens rea* is a definitive proof of what the DEFENDANT wished to do. There are two grounds to be met for the intention to be visible<sup>38</sup>:

1. **First, there must be a conception of a crime:** In *casu*, the DEFENDANT decided to launch a blanket attack on the civilian population under the garb of not being able to differentiate between them and military personnel. Concurrently, he carried out a premeditated attack to neutralise the civilian population along with the military in Emerald City.
  2. **Second, there must be an unconditioned decision to carry it:** In the present case, the DEFENDANT has anticipated all elements of the crime to be committed and decided to carry it out to full completion. It is submitted that the DEFENDANT has satisfied the objective requirement of taking steps towards the commission of the crime. The standard that has to be met for the same is that of a “*substantial step*” being taken by the DEFENDANT. In *casu*, the order from the Republican High Command instructed the military commanders to cause “*maximum loss to life and assets*” in Titan without causing loss of Republican life. The mandate by the Ministry of Defence also stated that “*Titanian blood had to be drawn into broad daylight to make a spectacle out of the same.*”
27. It is further submitted that the acts of the DEFENDANT satisfies the test laid down by the prosecution in the *Kordic and Cerkez* case<sup>39</sup> which is in specific relation to the “*intention*” of the DEFENDANT to target and attack the civilian population. The DEFENDANT knew of the civilian status of the population or individual persons killed or seriously injured, and the attack was wilfully directed. In the *Blaskic* case<sup>40</sup> the ICTY held that the intent, or *mens rea*, needed to establish the offence of wilful killing exists once it has been demonstrated that the DEFENDANT intended to cause death or serious bodily injury, which, as it is reasonable to assume, he had to understand was likely to lead to death.
28. The DEFENDANT was fully aware of the fact that his attack was to be carried out against civilians and went ahead with it anyway, with the reasoning that the social media posts of

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<sup>37</sup> *Id.*

<sup>38</sup> PROFESSOR ANTONIO CASSESE ET.AL., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 763, (Oxford University Press 2002).

<sup>39</sup> *supra* note 15.

<sup>40</sup> *supra* note 28.

these civilian residents pinpointing the positions and actions of the Republican troops placed him at a military disadvantage.

### 2.3.1. *The DEFENDANT satisfies dolus directus*

29. The term “*dolus directus*” refers to the intention to perpetrate unlawful conduct or engage in a wrongful act.<sup>41</sup> In *casu*, the DEFENDANT has satisfied the *dolus directus* of first degree and second degree:

1. **Dolus Directus of First Degree:** This requires the actor to have the purpose of bringing about the criminal result with the presence of “*will*”. In *casu*, the DEFENDANT is an expert operative of thermobaric weapons who has a comprehensive understanding of the effects and consequences of the use of such weapons, which include a severe, widespread and long-lasting impact on victims and harmful impacts on all major organ systems of the human body.<sup>42</sup> The mechanism of intended attack is such that it causes injury when the blast wave hits, as dependent on the body's alignment to the wave and when it passes through tissue interfaces. This sets up a stress wave that causes damage, particularly at the lobes, along the ribs on the side of the blast, mediastinum and alveoli. The alveoli, if ruptured, leaks fluid into the lungs, which could lead to complete filling or ‘shock lung’ or ‘blast lung’.<sup>43</sup> This represents the acts were done wilfully to intend and cause such harms.
2. **Dolus Directus of Second Degree:** In this, the actor foresees the criminal result as being certain or highly probable as a consequence of his acts. The criminal result is not his primary purpose and may be an undesired lateral consequence of the envisaged behaviour. However, he is deemed constructively to want the consequence as a lateral result. In the alternative, the acts of the DEFENDANT satisfies the *dolus directus* of second degree. The conduct of the DEFENDANT was known to him to destroy mines, caves and other hiding spots.<sup>44</sup> The effect of these weapons on the civilian population travels way beyond human life as they can impact tangible properties, nature and the environment of inhabited areas and cover much wider radius than traditional oxygen-

<sup>41</sup> AARON X. FELLMETH AND MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW (Oxford University Press 2<sup>nd</sup> ed. 2021); *supra* note 39 at 853.

<sup>42</sup> David Andrews, *Thermobaric Munitions and their Medical Effects*, 12(1)JOURNAL OF MILITARY AND VETERANS' HEALTH, (2003).

<sup>43</sup> *Id.*

<sup>44</sup> *supra* note 16.

triggered explosives. This represents that the DEFENDANT foresaw the incidental criminal results.

30. Therefore, as a general rule, criminal liability under the *Rome Statute* only arises if the material elements of a crime are committed “*with intent and knowledge*”,<sup>45</sup> and in this case, the *mens rea* of the DEFENDANT is proved.

#### 2.4. THE CONDUCT TOOK PLACE IN THE CONTEXT OF AN INTERNATIONAL ARMED CONFLICT AND THE DEFENDANT WAS AWARE OF THE SAME

31. According to Customary IHL, IAC occurs when one or more states have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation.<sup>46</sup> There is no formal declaration of war or recognition of the situation required, and any form of difference arising between two States and leading to the intervention of armed forces in an armed conflict is sufficient, even if one of the Parties denies the existence of a state of war. According to the ICTY in the *Tadic* case, “*an armed conflict exists whenever there is a resort to armed force between States*”.<sup>47</sup>

32. In the present situation, the test to determine whether there is an IAC is fulfilled as there is endless evidence of usage of military tactics, weapons and violent military acts leading to severe loss of life and property on both sides.<sup>48</sup> Furthermore, conflict in question also fulfils the degree of violence required to trigger the jurisdiction of customary IHL due to the use of weapons such as missiles and vacuum bombs on the civilian population that has caused widespread destruction.<sup>49</sup>

##### 2.4.1. The Defendant has failed to take necessary precautions to not attack the civilians

33. According to *Article 8 of the Rome Statute*, there exists a list of serious violations of the laws and customs applicable for IAC, and one such violation is *Article 8(2)(b)(i)*, which is “*intentionally directed attack against the civilian population and civilian population not*

<sup>45</sup> WILLIAM A. SCHABAS & NADIA BERNAZ, *ROUTLEDGE HANDBOOK ON INTERNATIONAL CRIMINAL LAW* 233, (Routledge Handbooks 2011).

<sup>46</sup> MAČÁK, KUBO, *INTERNATIONALIZED ARMED CONFLICTS IN INTERNATIONAL LAW* (Oxford University Press 2018).

<sup>47</sup> Prosecutor v. Tadić, IT-94-I-T, Trial Chamber, “*Tadić*”, ¶562, (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

<sup>48</sup> Compromis, ¶¶ II(h), II(i) & II(j).

<sup>49</sup> International Committee of the Red Cross (ICRC), *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper, March 2008.

*taking direct part in hostilities*".<sup>50</sup> The DEFENDANT has failed to take necessary steps or precautions to determine the status of the civilian population and has chosen to attack them despite it being in the context of IAC.

34. According to *Article 57 of AP I*,<sup>51</sup> necessary precautions are required to be taken before attacks are launched to ensure that the civilian population is protected from the process of planning the attack. The requirement under *Article 57* also prescribes refraining from deciding to launch any attack which may cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. However, in the present case, no such precaution has been taken by the DEFENDANT, and the high command of the Republic has explicitly given orders to target the civilian population in the Emerald city specifically.

#### ***2.4.2. The DEFENDANT intentionally performed actions violative of the Principle of Distinction***

35. The "*Principle of Distinction*" under IHL states under *Article 48 of AP I*,<sup>52</sup> in order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives. The PROSECUTION submits that in *casu*, the DEFENDANT, Paul Anderson, being a military commander of over thirteen years, is fully aware of the facts and circumstances in the situation showing the elements of armed conflicts and the presence of civilians in the area.<sup>53</sup> However, he intentionally chose to launch a bomb attack on civilians and civilian property, being fully aware of the fact that this was violative of the principle of distinction under customary IHL.
36. Therefore, the DEFENDANT is liable under *Article 8(2)(b)(i) of the Rome Statute*.

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<sup>50</sup> Rome Statute, Art. 8(2)(b)(i).

<sup>51</sup> AP I, Art. 57.

<sup>52</sup> AP I, Art. 48.

<sup>53</sup> *supra* note 18.

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**ISSUE 3: WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(B)(XX) OF THE ROME STATUTE?**

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**37.** It is submitted that the DEFENDANT is liable under *Article 8(2)(b)(xx) of the Rome Statute* as the DEFENDANT has made use of weapons that have caused superfluous injury and unnecessary suffering (**3.1.**), the weapons used are inherently indiscriminate in violation of laws of IAC (**3.2.**), the acts of the DEFENDANT violate the principles of proportionality under customary IHL (**3.3.**), and the DEFENDANT cannot invoke the justification of military necessity (**3.4.**).

**3.1. THE DEFENDANT HAS MADE USE OF WEAPONS THAT HAVE CAUSED SUPERFLUOUS INJURY AND UNNECESSARY SUFFERING**

**38.** According to the ICJ's advisory opinion in the *Legality of the threat or use of nuclear weapons* case,<sup>54</sup> IHL consists of two cardinal principles, *first*, the protection of the civilian population and establishing the distinction between combatants and non-combatants and *second*, prohibition to cause unnecessary suffering to combatants and using the weapons causing them such harm or uselessly aggravating their suffering. In the application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.<sup>55</sup>

**39.** The term “*superfluous harm and unnecessary suffering*” refers to the impacts of particular weapons that are “*of a nature to cause*” these consequences based on their design. This rule of customary international law is one of the few measures intended to protect combatants from certain weapons that are deemed abhorrent, or that cause more suffering than is necessary for their military purpose.<sup>56</sup> According to the *Shimoda* case,<sup>57</sup> the use of a weapon that inevitably results in the death of those who are already out of the fight and deepens their suffering needlessly is outside the scope of this objective, and is therefore against humanity.

**40.** In *casu*, the use of weapons by the DEFENDANT is vacuum bombs, which are also called as fuel-air explosive devices or thermobaric weapons, are not explicitly unlawful; it is only on

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<sup>54</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J Rep. 226 (July 8).

<sup>55</sup> *Id.*

<sup>56</sup> WILLIAM BOOTHBY, *WEAPONS AND THE LAW OF ARMED CONFLICT* 57, (Oxford University Press 2009).

<sup>57</sup> *Ryuichi Shimoda et al. v. The State.*, 32 INTERNATIONAL LAW REPORTS 626–642 (1966).

a technicality.<sup>58</sup> However, its use in particular situations may be unlawful.<sup>59</sup> According to a Report by the Human Rights Watch,<sup>60</sup> thermobaric bombs have devastating effects such as those near the ignition are completely destroyed, and those at the fringe are likely to suffer various serious internal injuries such as crushed ear organs, bursting of eardrums, blindness, ruptured lungs and other internal organs.

41. Article 2 of *The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons*<sup>61</sup> states prohibits any armed force from pursuing a military objective located in any area where there is a concentration of civilians who are likely to be the object of air delivered incendiary weapons and such weapons that are not air-delivered incendiary weapons.<sup>62</sup> In *casu*, it can be held that due to the nature of the use of the weapon and the use of fuel, these forms of weapons can be interpreted to be incendiary weapons, which places liability on the Republic for indiscriminate consequences for the civilian population.

### 3.2. THE WEAPONS USED ARE INHERENTLY INDISCRIMINATE IN VIOLATION OF LAWS OF INTERNATIONAL ARMED CONFLICT

42. Under customary international law, the idea that “*the right of the parties to an armed conflict to choose techniques or means of warfare is not infinite*” is a well-established one.<sup>63</sup> According to Article 51(4)(b) and (c) AP I,<sup>64</sup> “***indiscriminate attack***” refer to those attacks against civilians which employ a method or means of combat which cannot be directed at a specific military objective or those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol. The term “***inherently indiscriminate weapons***” are interpreted by the ICRC Commentary as those weapons that

<sup>58</sup> Matt Montazzoli, *Are thermobaric weapons lawful*, Leiber Institute, West Point: Articles of War (Mar. 23, 2022), <https://lieber.westpoint.edu/are-thermobaric-weapons-lawful/#:~:text=Thermobaric%20weapons%20are%20not%20incendiary,to%20generate%20blast%20and%20pressure.>

<sup>59</sup> Marianne Hanson, *What are thermobaric weapons? And why should they be banned?*, ECONOMIC TIMES, (Mar. 3, 2022) <https://economictimes.indiatimes.com/news/defence/what-are-thermobaric-weapons-and-why-should-they-be-banned/articleshow/89964839.cms?from=mdr>

<sup>60</sup> Press Release, Human Rights Watch, *Chechnya Conflict: Use of Vacuum Bombs by Russian Forces*, (Feb 1, 2000) <https://www.hrw.org/news/2000/02/01/chechnya-conflict-use-vacuum-bombs-russian-forces>.

<sup>61</sup> *supra* note 58.

<sup>62</sup> *Id.*

<sup>63</sup> MALCOLM SHAW, *INTERNATIONAL LAW*, 1190 (Cambridge University Press 6<sup>th</sup> ed. 2017).

<sup>64</sup> API, 51(4)(b) & 51(4)(c).



by their very nature have an indiscriminate effect. Examples of this include bacteriological means of warfare, V2 rockets used at the end of the Second World War, among others.<sup>65</sup>

43. The ICJ has equated the term indiscriminate attack with the act of attacking civilians.<sup>66</sup> It is submitted that even if the thermobaric weapon might be targeted specifically at military installations and personnel, its effects cannot be contained to one area. In all likelihood, many civilians would be killed if such bombs were used in any city. Using explosive weapons in populated areas would result in indiscriminate and disproportionate attacks.<sup>67</sup> Aerial bombs, even if aimed at military objectives, pose a grave threat to civilians because of their wide blast radius. In the present case, the TC must note that the attack has been made in an indiscriminate manner, as defined above and has specifically targeted civilian dwellings and shelters as admitted by the DEFENDANT, which makes the offence all the graver.<sup>68</sup>

44. Far from using weapons whose yield of which cannot be restricted to certain areas, the DEFENDANT has directly targeted civilians in his attack, by claiming that they place him at a military disadvantage, which makes him automatically liable for violation of the principle of distinction.<sup>69</sup>

### 3.3. THE ACTS OF THE DEFENDANT VIOLATE THE PRINCIPLES OF PROPORTIONALITY UNDER CUSTOMARY IHL

45. It is submitted that the rule of proportionality and the precautionary measures to be taken are the burden of the attacker.<sup>70</sup> The rule of proportionality prohibits “*an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.*”<sup>71</sup> Using a vacuum bomb in a populated urban area, for instance, would generally violate the rule. In *casu*, the DEFENDANT failed to take precautionary measures before commencing the attack and instead intentionally targeted areas that he knew were populated by civilians.

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<sup>65</sup> STUART CASEY-MASLEN, *WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW*, (Cambridge University Press 2014).

<sup>66</sup> *supra* note 54.

<sup>67</sup> *supra* note 72.

<sup>68</sup> *Id.*

<sup>69</sup> *supra* note 18 at pp. 24.

<sup>70</sup> Georg Nolte, *Thin or Thick? The Principle of Proportionality and International Humanitarian Law*, 4 L. & ETHICS HUM. RTS. 243 (2010).

<sup>71</sup> *Id.*



46. The actual and intended effects of the same also vary in a high degree as the effects of thermobaric bombs, as established above, are grave and serious in nature with long lasting implications on the human body present near the attack while the conventional weapons used by Titan might result in death and injury, they do not cause superfluous injury and unnecessary suffering. Furthermore, the Titanian forces in their attack solely targeted the military bases of the Republican troops, whereas the DEFENDANT deliberately attacked and directed the attack against the civilian population.<sup>72</sup> Therefore, the principle of proportionality has been violated in the present case.

### 3.4. THE DEFENDANT CANNOT INVOKE THE DEFENCE OF MILITARY NECESSITY

47. The question of military necessity refers to the rules of IHL and the principle that a belligerent may apply only that amount and kind of force necessary to defeat the enemy.<sup>73</sup> The unnecessary or wanton application of force is therefore prohibited. The prerequisite for an act to be considered to have been done in military necessity are not satisfied in the present case as<sup>74</sup> and a failure to fulfil any one of these requirements renders the course of action unjustified by military necessity under international humanitarian law. The same are as follows:

1. **There exists no requirement for the attainment of a known military purpose:** In the present case, even though the Republican military has sustained heavy losses due to the air attacks of the Titan Air Force, the military purpose that the DEFENDANT has set out to achieve is in itself invalid as it deals with civilians being directly attacked using weapons inherently violative of IHL principles.<sup>75</sup> Therefore, in the absence of any valid military objective, the actions of the DEFENDANT cannot be under military necessity.
2. **The acts of the DEFENDANT are not in conformity with IHL:** In *casu*, as established in *Issue 2*, the civilians have not taken direct part in the hostilities and therefore, and covered under the protection afforded to civilians.<sup>76</sup> Therefore, the DEFENDANT cannot under the garb of military necessity attack the civilian population of Titan. Furthermore,

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<sup>72</sup> *supra* note 19.

<sup>73</sup> Nobuo Hayashi, *Contextualizing Military Necessity*, 27 EMORY INT'L L. REV. 189 (2013).

<sup>74</sup> DIETER FLECK, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW*, (Oxford University Press 4<sup>th</sup> ed. 2021).

<sup>75</sup> *supra* note 19.

<sup>76</sup> *supra* note 77.

it is also submitted that the actions of the DEFENDANT are violative of the principle of humanity in that the suffering of civilians they have caused is in no way contributing to the furtherance of the military goal. Therefore, due to the failure to meet both the requirements, the DEFENDANT cannot invoke the justification of military necessity.

**48.** Therefore, the DEFENDANT is liable under *Article 8(2)(b)(xx) of the Rome Statute* for using weapons resulting in superfluous injury and unnecessary suffering.

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**ISSUE 4: WHETHER THE ACTS OF PAUL ANDERSON ARE SHIELDED UNDER THE DEFENCE OF SUPERIOR ORDERS UNDER ARTICLE 33 OF THE ROME STATUTE?**

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**49.** It is submitted that the acts of the DEFENDANT are not shielded by the principle of superior orders under *Article 33 of the Rome Statute*<sup>77</sup> there was no effective control over the acts of the DEFENDANT (**4.1.**), the DEFENDANT was not under a legal obligation to obey the order of the superior (**4.2.**), the DEFENDANT knew that the order was unlawful (**4.3.**) and lastly, there exists individual criminal responsibility on the part of the DEFENDANT (**4.4.**).

**4.1. THERE WAS NO EFFECTIVE CONTROL OVER THE ACTS OF THE DEFENDANT**

**50.** The intent behind the *Rome Statute* is to prosecute such persons who are direct perpetrators of a crime in question and connect the crimes committed by them instead of holding the state responsible for the crimes in question.<sup>78</sup> Therefore, the PROSECUTION, in this case, has attributed criminal liability onto the DEFENDANT, Mr Paul Anderson, for his individual acts committed during an IAC and not the acts committed by the state in general, which would be beyond the purview of the ICC and the *Rome Statute*.

**51.** The DEFENDANT may argue that there existed a superior-subordinate relationship between the head of the state, Mr. David Wallace and the DEFENDANT and that there is effective control over his actions. However, it is submitted that in the present case, there was no effective control over the actions of the DEFENDANT by either Mr. David Wallace or the Ministry. The ad-hoc tribunals have developed the effective control test wherein if the DEFENDANT exercised effective control over the person committing the alleged base crime,

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<sup>77</sup> Rome Statute, Art. 33.

<sup>78</sup> OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 333, (2<sup>nd</sup> ed. Beck/Hert 2008).

is he or she that person's superior.<sup>79</sup> According to the ICTY Appeals Chamber in *Delalic*, effective control depends on the material ability to prevent or to punish criminal conduct.<sup>80</sup>

52. In *casu*, Mr. David Wallace had given rather vague orders to shed Titanian blood, however, the means and methods to achieve the same was not prescribed. The DEFENDANT chose to attack the civilian population who had no role to play in the armed conflict and he also made use of thermobaric bombs which are known to have life endangering effects.<sup>81</sup>

53. The DEFENDANT's action of using Thermobaric weapons can in no way be attributed as a result of the orders given by the Ministry of Defence as the same result could have been achieved using various other means. Furthermore, it is submitted that the DEFENDANT being an expert operator of and having comprehensive knowledge of the use of thermobaric weapons is aware of the effects caused by it. Therefore, the acts of the DEFENDANT are of his own doing and attribute individual criminal responsibility.

#### 4.2. THE DEFENDANT WAS NOT UNDER A LEGAL OBLIGATION TO OBEY THE ORDERS OF THE SUPERIOR

54. The DEFENDANT may argue that he received orders from the High Command and was under a legal obligation to obey the same. In the present case, Mr. David Wallace, after the siege of Emerald, released directives in consultation with the Ministry of Defence to “*avenge the loss of republican lives in Emerald.*” This cannot be ascertained as an executive order or an order binding on the DEFENDANT as it could have been a statement that was made due to the exchanged hostilities during the war and to motivate the republican forces. Moreover, there was no specific order that evidences the acts done by the DEFENDANT which holds him liable under *Article 8(2)(b)(i) and 8(2)(b)(xx)*.

#### 4.3. THE DEFENDANT KNEW THAT THE ORDER WAS UNLAWFUL

55. It is submitted that the DEFENDANT possessed knowledge that the orders were unlawful. The presence of knowledge is a question of fact.<sup>82</sup> Even if the DEFENDANT operated from

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<sup>79</sup> Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18(4) EUROPEAN JOURNAL OF INTERNATIONAL LAW 649-668 (2007).

<sup>80</sup> Prosecutor v. Delalić et al., IT-96- 21-T, Trial Chamber, “*Delalic*”, ¶186 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Prosecutor v. Akayesu (Judgment) ICTR-96-4-T, “*Akayesu*”, ¶¶604-605, 609, 611, 613, 616-617, (Sept. 2, 1998).

<sup>81</sup> *supra* note 18 at pp. 24

<sup>82</sup> ROBERT CRYER ET.AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, (Cambridge University Press, 2007).

the perspective that the orders given by the superior were legal and valid in the context of IAC, being in the Republican armed forces for over 13 years, he is aware of the basic principles under customary IHL and what acts violate international law.<sup>83</sup> The DEFENDANT cannot now claim that he was unaware that the acts were unlawful.

56. The only means to prove whether the DEFENDANT possessed such knowledge is through circumstantial evidence.<sup>84</sup> The circumstantial evidence that can be gathered also points towards the fact that the DEFENDANT knew that the orders were unlawful and exercised unlimited discretion in bringing about the implementation of the order by violating the norms of international law.

57. This can be seen through the fact that the DEFENDANT used thermobaric bombs, considering “anything that moves in the emerald city as military asset”<sup>85</sup> thereby failing to apply the principle of distinction and also stating that persons not part of the enlisted armed forces should also be dispatched with the forces as only this would help further their military objectives and remove their military disadvantage. He has further stated that for the purpose of the war he had to unlearn the IHL norms that were hard-wired in him as a military man.<sup>86</sup> This shows that most of his actions are attributed to him and not the orders that he received.

#### 4.4. THERE EXISTS INDIVIDUAL CRIMINAL RESPONSIBILITY ON THE PART OF THE DEFENDANT

58. Individual responsibility is a fundamental principle of criminal law. It is submitted that the DEFENDANT is liable for individual criminal responsibility as the defence of superior orders cannot be established in the present case. The DEFENDANT satisfies the following requirements under *Article 25 of the Rome Statute*:

1. **Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible:**

The DEFENDANT has committed the crimes under *Article 8(2)(b)(i) and 8(2)(b)(xx) of the Rome Statute* with the requisite *mens rea* for the same. These acts were done without any specific command or order by any superior.

2. **Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted:** The DEFENDANT being a weapons expert knew of the effects of the thermobaric bombs and went ahead to use it resulting in the death of 600 persons

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<sup>83</sup> *supra* note 18.

<sup>84</sup> *supra* note 95.

<sup>85</sup> *supra* note 18 at pp. 24.

<sup>86</sup> *Id.*

including civilian population. He has induced the commission of the war crime onto his own subordinates being a military commander and attacking civilians merely for posting on social media.

**59.** Therefore, there exists individual criminal responsibility on the part of the DEFENDANT under *Article 25 of the Rome Statute*.

## PRAYER

Wherefore, in light of the issues raised, arguments on merit, evidence supplied and authorities cited, it is most humbly and respectfully prayed that:

- i. A Recharacterisation under *Regulation 55 of the Rome Statute's Regulations* is imperative to charge the DEFENDANT for the crimes committed under *Article 8(2)(b)(i) of the Rome Statute*.
- ii. The DEFENDANT is liable under *Article 8(2)(b)(i) of the Rome Statute* for intentionally directing attacks on civilians and civilians not taking direct part in hostilities.
- iii. The DEFENDANT is liable under *Article 8(2)(b)(xx) of the Rome Statute* for use of weapons, projectiles that have caused superfluous injury, unnecessary suffering and which are inherently indiscriminate.
- iv. The DEFENDANT cannot take the defence of “*superior order*” under *Article 33 of the Rome Statute* and bears individual criminal responsibility.

**All of which is respectfully submitted,**

**ON BEHALF OF THE PROSECUTION**

**OFFICE OF THE PROSECUTOR**

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**EIGHTH SYMBIOSIS LAW SCHOOL, PUNE – INTERNATIONAL CRIMINAL TRIAL  
ADVOCACY COMPETITION, 2023**

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**BEFORE**  
**TRIAL CHAMBER II, INTERNATIONAL CRIMINAL COURT**  
**THE HAGUE, THE NETHERLANDS**

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**IN THE MATTER of**  
**THE PROSECUTOR.....PROSECUTION**  
**V.**  
**PAUL ANDERSON .....DEFENCE**

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**DEFENDANT CHARGED WITH**  
*War Crime of employing weapons, projectiles or materials or methods of  
warfare listed in Annex to the Statute Under Article 8(2)(b)(xx) of the Rome  
Statute*

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**Word Count: 7356**

**WRITTEN SUBMISSIONS ON BEHALF of THE DEFENCE**

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



**Original: English**

**No: ICC-\*/27-\*/17**

**Date: January 27, 2023**

**TRIAL CHAMBER II**

**BEFORE:**

Judge \_\_\_\_\_, Presiding Judge

Judge \_\_\_\_\_, and

Judge \_\_\_\_\_

**SITUATION IN THE REPUBLIC OF TITAN**

**In the case of**

**Registrar:**

**Source: Office of the Prosecutor**



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AC	Appeals Chamber
AP I	Additional Protocol I
IAC	International Armed Conflict
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
Id.	Ibid
i.e.	Id. Est
IHL	International Humanitarian Law
Int'l	International
¶	Paragraph
Pp.	Pages
PTC	Pre Trial Chamber
Rome Statute	International Criminal Court Statute
TC	Trial Chambers
U.N.	United Nations
v.	Versus
VLR	Victims Legal Representative

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## STATEMENT of FACTS

### ~BACKGROUND~

The Republic is one of the largest countries in the world, comprising many ethnic groups. Titan is located in the eastern region of Europe and is one of the largest countries in the continent, having broken apart from the Republic in 1991. Emerald City is located in Titan, and has often been caught in between tensions between the two countries.

### ~PROPOSAL TO INCLUDE TITAN IN THE EU~

In 2021, the European Union announced that it was considering an application from Titan to become a Union member (“*Proposal*”). Later that month, the Republic expressed public disapproval of the Proposal. Several countries including the United States publicly declared support to Titan. Following this, Republic was reported to have held closed-door meetings with a coalition of central Asian countries to gather support against the Proposal.

### ~ESCALATION OF TENSIONS~

On February 5, 2022, the Republic openly removed Titan's ambassador and declared an end to all diplomatic relations with Titan. International observers and intelligence agencies noted a significant troop and battleship deployment along the shared borders between Titan and the Republic. On February 24, 2022, Mr. David Wallace said during a highly publicised public rally that Titan was and still is a crucial component of the Republic and that it was crucial for the “*errors of the 1990s were rectified*” in the interest of Titan's Xula-speaking populace. He noted that the Proposal would work against the Republic's interests in the area and constitute a direct and serious threat to its integrity, national borders, and those of its allies. Thus, he declared a formal offensive against Titan until Titan irrevocably withdrew the Proposal or terminated it. Following the aforementioned public announcement, Republican soldiers attacked Titan from all sides. The government of Titan, for its part, expelled the Republic's ambassador and declared a state of emergency throughout the whole nation.

### ~EFFECT OF TENSIONS~

From March 2022 and September 2022, both sides suffered significant losses. Titan's western allies consistently provided financial support and arms to its armed forces. The conflict in Titan is thought to have resulted in the largest forced emigration of people since the Second World War and at least ten thousand deaths, despite support from the worldwide community. The effects of the refugee crisis brought on by the aforementioned war continue to devastate numerous nations. The government of Titan asked their citizens to serve as the “*eyes and ears*” of their defence forces through numerous televised events. Several international news outlets had also published in-depth reports on how Titan's military was able to thwart the Republican advance thanks to social media updates and live streams provided by residents.

### ~SIEGE OF EMERALD~

One particular incident relates to airstrikes that occurred on the night of October 14, 2022, when Titan's air force attacked a significant base camp of Republican battalions stationed in Emerald City, resulting in the deaths of about 120 Republican soldiers, countless members of the support staff, and loss of military equipment valued at millions of dollars. Following what became known as the “*Siege of Emerald*”, it was made clear by developments that this attack was specifically planned using data posted by Emerald City citizens on their social media accounts on websites like Twitter, Instagram, and Tik Tok. The Siege of Emerald significantly hampered the Republic's narrative as it advanced against Titan.

According to reports, the claimed strike dealt a severe damage to the morale of the Republican army's men stationed in Titan. David Wallace issued orders to avenge the death of a Republican in Emerald after consulting with the nation's Ministry of Defence. Post this, the accused Paul Anderson is thought to have personally employed and organised attacks utilising vacuum bombs on the Titanian population hiding in Emerald City, allegedly resulting in the deaths of some 600 individuals. The employment of such weapons by the defendant is also alleged to have resulted in extensive devastation and razing of all of the citizens of Emerald City's material possessions as well as irreparable impairment to the area's soil and ecology. According to estimates provided, between October 22, 2022, and October 25, 2022, the accused is accused of using these weapons seven times and destroying almost 70% of Emerald City's habitable zones.

**~PROCEDURAL HISTORY AND PRELIMINARY MATTER~**

6. **November 1, 2022:** The accused was captured along with four other Republican soldiers by Titan's military and all five of these men immediately surrendered before the military.
7. **November 14, 2022:** The government of Titan informed the ICC Prosecutor "**Prosecutor**" of the situation in Titan and requested that the Prosecutor open an inquiry into any crimes committed on or against Titan's territory by the Republic's seized prisoners. The prosecutor was also given the accused's case and his request to have the case heard by an impartial, independent, and autonomous organisation. The accused also submitted to the jurisdiction of the ICC to be tried in accordance with the provisions and procedure of the *Rome Statute*.
8. **November 29, 2022:** The Prosecutor released a preliminary report with respect to the Situation referred to it on November 14, 2022. By virtue of this report, the Prosecutor's Office announced the conclusion that, in its opinion, the attacks referred to it, via the Situation in Titan, pass the legal standards governing the jurisdiction of the Court with reference to *Article 17 of the Statute*.
9. **Post November 29, 2022:** The Chamber granted leave to the Prosecutor to initiate its investigation in connection with the Situation and the actions of the accused in Emerald City between October 22, 2022, and October 25, 2022

**ISSUES PRESENTED****~ ISSUE 1 ~**

**WHETHER THE CHARGE CAN BE RECHARACTERIZED TO INCLUDE WAR CRIME UNDER  
Article 8(2)(b)(i) OF THE ROME STATUTE UNDER REGULATION 55 OF THE ICC  
REGULATIONS?**

**~ ISSUE 2 ~**

**WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(i) OF THE  
ROME STATUTE?**

**~ ISSUE 3 ~**

**WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(xx) OF THE  
ROME STATUTE?**

**~ ISSUE 4 ~**

**WHETHER THE ACTS OF PAUL ANDERSON ARE SHIELDED UNDER THE DEFENCE OF  
SUPERIOR ORDERS UNDER ARTICLE 33 OF THE ROME STATUTE?**

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## SUMMARY of ARGUMENTS

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### ISSUE 1: WHETHER THE CHARGE CAN BE RECHARACTERIZED TO INCLUDE WAR CRIME

### UNDER ARTICLE 8(2)(b)(i) OF THE ROME STATUTE UNDER REGULATION 55 OF THE ICC REGULATIONS?

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The Charge cannot be recharacterised to *Article 8(2)(b)(i) of the Rome Statute* under *Regulation 55 of the ICC Regulations*. It is submitted that *Regulation 55* is ultra vires of the *Rome Statute* as it conflicts with the provision of amending the charges and provides excessive discretion to the Trial Chambers to modify the legal characterization of a case. In *casu*, the recharacterisation should therefore be not allowed. *In any event*, the recharacterisation exceeds the facts and circumstances of the case which is a fundamental violation of the requirement under *Regulation 55* and it violates the fair trial rights of the DEFENDANT and prejudices the rights of the DEFENDANT.

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### ISSUE 2: WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(i) OF THE ROME STATUTE?

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The DEFENDANT, Mr. Paul Anderson cannot be held liable under *Article 8(2)(b)(i) of the Rome Statute*. The DEFENDANT did not direct attacks on civilians as the operation was undertaken with a military objective. In *casu*, the defendant's army suffered a threat as all inhabitants and persons in that region had started taking direct part in hostilities. In addition, they were parading as civilians in the town square to deliberately confuse the DEFENDANT's army violating their obligation under Customary International Humanitarian Law to distinguish between civilians and combatants. Moreover, the civilians started using social media by acting as human drones. Therefore, they lose their protected status under customary IHL.

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**ISSUE 3: WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(xx) OF THE ROME STATUTE?**

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The DEFENDANT, Mr. Paul Anderson cannot be held liable under *Article 8(2)(b)(xx) of the Rome Statute*. The weapon used in question is the thermobaric bombs which are not inherently indiscriminate or cause superfluous injury and unnecessary suffering. The use of the weapon is justified in the context of military necessity, and the use of the weapon has been proportional to the attack caused by the Titanian armed forces. A military advantage or superiority of weapon can neither be considered excess or indiscriminate. Furthermore, the use of thermobaric bombs is not inherently lawful or illegal, and state practice shows that several countries around the world continue to use it and do not deem it to be an incendiary weapon.

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**ISSUE 4: WHETHER THE ACTS OF PAUL ANDERSON ARE SHIELDED UNDER THE DEFENCE OF SUPERIOR ORDERS UNDER ARTICLE 33 OF THE ROME STATUTE?**

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The acts of the DEFENDANT, Mr. Paul Anderson are shielded under the defence of superior orders under *Article 33 of the Rome Statute*. Mr. Paul Anderson is a subordinate of Mr. David Wallace, who is the superior. The DEFENDANT was under a legal obligation to obey the orders of Mr. David Wallace and a threat of duress existed. Furthermore, the DEFENDANT was not aware that the orders given to him were unlawful as he presumed it to be legally valid. Lastly, the DEFENDANT does not bear individual criminal responsibility under *Article 25 of the Rome Statute*.

## ARGUMENTS *in* DETAIL

### ISSUE 1: WHETHER THE CHARGE CAN BE RECHARACTERIZED TO INCLUDE THE WAR CRIME UNDER ARTICLE 8(2)(b)(i) OF THE ROME STATUTE UNDER REGULATION 55 OF THE ICC REGULATIONS?

1. It is submitted that the charge against the DEFENDANT cannot be recharacterised under *Regulation 55 of the ICC Regulations* to *Article 8(2)(b)(i) of the Rome Statute* and that the chamber must restrict itself to the initial crime charged by the Prosecutor. In *casu*, the recharacterisation must not be allowed (1.1.), and the recharacterisation violates the fair trial rights of the DEFENDANT (1.2.).

#### 1.1. RECHARACTERISATION UNDER REGULATION 55 MUST NOT BE ALLOWED

2. According to *Regulation 55 of the ICC Regulations*,<sup>87</sup> the Chamber has the authority to modify the legal characterisation of facts in a case if the recharacterisation would likely reflect the facts and circumstances accurately. It is submitted that *Regulation 55* is Ultra Vires of the *Rome Statute* as it empowers the TC with excessive discretion to modify the facts and circumstances of the case and alters the entire nature of the case.<sup>88</sup> Furthermore, it directly conflicts with the *Rome Statute*'s provisions for amending the charges against an accused as it permits the TC to alter the charges confirmed by the PTC in any manner. Thus, *Regulation 55* must not be allowed in this case.

##### 2.1.1. *In arguendo, recharacterisation exceeds the facts and circumstances of the case*

3. It is submitted that there exist no facts and circumstances for a recharacterisation to occur in the instant case. In any event, the recharacterisation must not exceed the existing “*facts and circumstances*” of the case. In *Lubanga*,<sup>89</sup> the AC rejected the recharacterisation allowed by the TC on the grounds that inclusion of sexual crimes altered the fundamental scope of the trial due to it being vastly different from the initial charge. Similarly, in *casu*, recharacterisation is in direct violation of the requirement under *Regulation 55* as the modified charge goes beyond the scope of the facts and circumstances of the case.

<sup>87</sup> Regulations of the Court, International Criminal Court, ICC-BD/01-05-16, 26 May 2004.

<sup>88</sup> Kevin Jon Heller, *New Essay on the Legal Recharacterization of Facts at the ICC*, OPINIOJURIS (Dec. 23, 2013), <http://opiniojuris.org/2013/12/23/new-essay-legal-recharacterization-facts-icc/>.

<sup>89</sup> Prosecutor v. Lubanga, ICC-01/04-01/06, Pre-Trial Chamber Judgment, “*Lubanga*”, ¶¶37, 39, (Jan. 29, 2007).

4. The burden on the DEFENDANT significantly rises as he has to prove the war crime of “*intentionally directing attack on civilians or civilians not taking direct part in hostilities*”. The nature of the two charges are at extreme ends as *Article 8(2)(b)(i)* requires a high standard of *mens rea* with a specific direction to attack the civilian population, while *Article 8(2)(b)(xx)* does not require *mens rea* and is limited to the use of weapons on combatants in IAC. Therefore, this provides scope for going beyond the purview of the facts and circumstances of the case.

## 1.2. RECHARACTERISATION VIOLATES THE FAIR TRIAL RIGHTS OF THE DEFENDANT

5. *Article 64 of the Rome Statute*,<sup>90</sup> guarantees the right to fair trial by stating that the trial must be fair and expeditious, and must be conducted with full respect for the rights of the accused. This obligation provides the DEFENDANT with the necessary opportunity to be aware of the charge and be provided adequate time and resources to defend himself.<sup>91</sup> Despite the change in the nature of charge under *Article 8(2)(b)(i)*, adequate time is not provided to the DEFENDANT to ensure that the defence along with additional evidence is submitted in the appropriate manner.<sup>92</sup> However, through recharacterisation, the TC would extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor.<sup>93</sup> This has been consistently noted as a cause of concern by academics in cases where recharacterisation is involved.<sup>94</sup>
6. The PROSECUTION and the VLR may argue that a recharacterisation is done by the Court to close potential legal loopholes during the trial process. However, it is submitted that the outcome would be that the DEFENDANT would now have to defend an entirely new charge that would require additional facts not present. Therefore, in *casu*, TC must not allow recharacterisation.

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## ISSUE 2: WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(i) OF THE ROME STATUTE?

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7. The DEFENDANT in the present case is not liable under the recharacterised *Article 8(2)(b)(i)* of the *Rome Statute* for “*intentionally directing*” attacks against the civilian population or

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<sup>90</sup> Rome Statute, Art. 64.

<sup>91</sup> Elinor Fry, *Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW, 577-597 (2016).

<sup>92</sup> *Id.*

<sup>93</sup> *supra* note 6.

<sup>94</sup> Sienna Merope, *Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC*, 22 CRIMINAL LAW FORUM 311 (2011).



civilian population not taking direct part in the hostilities. In *casu*, the DEFENDANT directed an attack on combatants and not the civilian population (2.1.), the object of the attack was in furtherance of a military objective (2.2.), and the conduct took place in the context of an IAC and the perpetrator was aware of the same (2.3.).

## 2.1. THE DEFENDANT DID NOT DIRECT ATTACKS ON CIVILIANS

8. Under Article 49(1) of AP I, an attack is defined as “acts of violence against the adversary, whether in offence or in defence, and in whatever territory conducted.”<sup>95</sup> Civilians, in particular are accorded with protected status under customary IHL and measures are taken by both sides to the IAC to ensure no civilian casualties are caused. In *casu*, DEFENDANT has not directed attacks against the civilian population but only on combatants as the attacks done by DEFENDANT by use of weapons was a response to the air attacks done by the Titanian armed forces.<sup>96</sup>

## 2.2. THE OBJECT OF THE ATTACK WAS TO FULFIL A MILITARY OBJECTIVE

9. It is submitted that the nature of warfare has changed significantly, and several factors have contributed to blurring the distinction between civilians and combatants. Military operations have moved away from distinct battlefields and are increasingly conducted inside population centres, such as Gaza City, Grozny or Mogadishu.<sup>97</sup> In any event, a use of a weapon cannot be considered indiscriminate or unlawful only because civilians were incidental to the use of the weapon. Alongside, civilians have become more involved in activities closely related to actual combat. Combatants do not always clearly distinguish themselves from civilians, preferring, for example, to operate as “farmers by day and fighters by night.”<sup>98</sup> Moreover, in some conflicts, traditional military functions have been outsourced to private contractors or other civilians working for state armed forces or organised armed groups.<sup>99</sup> It is also important to note that under Customary International Law, a civilian cannot operate as a Civilian and a Combatant and is prohibited

### 2.2.1. The principle of distinction does not apply

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<sup>95</sup> API, Art. 49 (1).

<sup>96</sup> Compromis, ¶ II(j).

<sup>97</sup> Nils Melzer, *Interpretive Guidance on the notion of Direct Participation in hostilities under International Humanitarian Law*, ICRC RESOURCE CENTRE, (2009), <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf> [“ICRC Interpretative Guidance”].

<sup>98</sup> Christina Farr, *Ethics and War: When combatants hide among civilians*, THE CENTER FOR INTERNATIONAL SECURITY AND COOPERATION, STANFORD UNIVERSITY, (March 14, 2011), [https://cisac.fsi.stanford.edu/news/ethics\\_and\\_war\\_when\\_combatants\\_hide\\_among\\_civilians\\_20110314](https://cisac.fsi.stanford.edu/news/ethics_and_war_when_combatants_hide_among_civilians_20110314).

<sup>99</sup> Nils Melzer, *The ICRC’s Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 103 AMERICAN SOCIETY OF INTERNATIONAL LAW (2009).

10. According to the “*Principle of Distinction*” laid down under *Article 48 of AP I*, in order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.<sup>100</sup>
11. In *Milošević* (Dragomir),<sup>101</sup> the ICTY AC recalled that the principle of distinction requires parties to distinguish at all times “*between the civilian population and combatants, between civilian and military objectives, and accordingly direct attacks only against military objectives.*” The Chamber further found that distinctions between civilians and combatants and between civilian objects or “*zones*” and military objectives shall be made on a case-to-case basis.
12. In *casu*, it is submitted that Social media platforms have been “*weaponized*” by civilians in a number of ways, such as using Google Maps to identify the coordinates of military objectives and, in turn, share them on Twitter or Facebook.<sup>102</sup> The civilians have used Facebook, Twitter and Skype for crowdsourcing in order to gather technical knowledge and assist the Titanian military in the conflict.
13. The residents of Emerald City have acted as human drones and informants to the Titanic armed forces giving them important locations and details about the positions and numbers of Republican forces in the area by the use of social media. This information has led to the failure of Republican military plans and great loss of life.<sup>103</sup>
14. The use of social media by civilians has a direct and proximate nexus<sup>104</sup> in causing tangible harm to the Republican forces, and has triggered the applicability of the direct participation in hostilities principle, which removes them from the protection principle.<sup>105</sup> This has been opinionated by the prosecutor in this case as well. Therefore, the residents of Emerald City are to be treated as combatants as their efforts have led to one side in an IAC gaining a significant advantage over the other. Furthermore, the hostiles were deliberately dressing up as civilians so that distinction cannot be made by DEFENDANT.<sup>106</sup>

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<sup>100</sup> AP I, Art. 48.

<sup>101</sup> Prosecutor v. Milošević, IT-98-29/1-A, Appeals Chamber, “Milošević”, ¶20 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009).

<sup>102</sup> Iphigenia Fisentzou, *Blurred Lines: Social Media in Armed Conflict*, 19 LIM 65 (2019).

<sup>103</sup> Compromis, ¶ II(i).

<sup>104</sup> ICRC Interpretive Guidance (n.15), 48.

<sup>105</sup> ICRC Interpretive Guidance (n.15), 48; ICRC Interpretive Guidance (n.15), 51–53.

<sup>106</sup> Compromis, Witness Testimonials, Defence Witness-2 at pp. 24.

15. It is lastly submitted that the customary Principle of Distinction is not absolute,<sup>107</sup> and it applies as much as the exigencies of war will admit. The Lieber Code acknowledged that enemy civilians may be made to suffer since “*The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.*”<sup>108</sup>

### 2.2.2. *The acts of the civilians satisfy the three-fold test laid down by the ICRC*

16. In the *Mbarushimana Decision on the Confirmation of Charges*,<sup>109</sup> the PTC held that there is no customary or treaty law definition of what constitutes direct participation in hostilities, although useful guidance is provided by the ICRC. According to the ICRC’s Interpretive Guidance, a three-fold test determines whether there was a direct participation by the civilians in the conflict.<sup>110</sup> In *casu*, the civilians have satisfied the threefold test as follows:

1. **There exists a threshold of harm:** The actions of the residents in alerting Titanian Forces of the location and operations of the Republican military have resulted in great losses for the Republicans, thereby fulfilling the threshold of harm required.
2. **There exists a direct causation:** It is also submitted that the losses mentioned were directly caused due to the actions of the civilians on social media, thus fulfilling the direct causation test,
3. **There exists a belligerent nexus:**<sup>111</sup> Lastly, the actions of the civilians have been performed with the common goal in mind to undermine Republican military strategy and cause losses to their troops by involving themselves in the battle, and have objectively inflicted harm and have deliberately misled the DEFENDANT army as hostiles paraded as civilians.

17. Therefore, it is submitted that the use of social media networks satisfies the three-fold test to render a civilian as direct participant in the hostilities, regardless of the temporal and geographical proximity of the act to its eventual effects.

## 2.3. THE CONDUCT TOOK PLACE IN THE CONTEXT OF AN IAC, AND THE DEFENDANT WAS AWARE OF THE SAME

<sup>107</sup> Gabriel Sweney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39(3) INT’L LAW. 733 (2005).

<sup>108</sup> DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS* (Martinus Nijhoff Publishers, 1988).

<sup>109</sup> *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Pre-Trial Chamber, ¶ 274 (Dec. 16, 2011).

<sup>110</sup> ICRC Interpretive Guidance (n.15), 48.

<sup>111</sup> ICRC Interpretive Guidance (n.15), 46.

18. According to customary IHL, IAC occurs when one or more states have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation.<sup>112</sup> There is no formal declaration of war or recognition of the situation required, and any form of difference arising between two States and leading to the intervention of armed forces in an IAC is sufficient, even if one of the Parties denies the existence of a state of war. According to the ICTY in *Tadic*, “an armed conflict exists whenever there is a resort to armed force between States”.<sup>113</sup>
19. In *casu*, the DEFENDANT is aware that the situation is one of IAC and has sufficient awareness and knowledge that civilians cannot be attacked or that any form of direction to attack the civilians cannot be made, as a distinction between civilians and combatants is clearly defined under customary IHL. He is aware of the liability attached to the same and the consequences of such acts, as he has been a commander of the Republican army for thirteen years.<sup>114</sup>
20. This can be evidenced through his witness statement wherein he has stated that IHL norms concerning civilians and combatants have been rooted into every soldier in the Republican Army and that the troops, including himself, had to unlearn the fundamentals of what they have learned as soldiers for the purpose of this war, where it was no longer possible to distinguish between civilians and combatants.<sup>115</sup>
21. Therefore, the DEFENDANT cannot be held liable under *Article 8(2)(b)(i) of the Rome Statute* for intentionally directing attacks against the civilian population or civilians not taking direct part in hostilities.

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**ISSUE 3: WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(xx) OF THE ROME STATUTE?**

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22. It is submitted that DEFENDANT is not liable under *Article 8(2)(b)(xx) of the Rome Statute* as the DEFENDANT’s use of weapons have not caused superfluous injury and unnecessary suffering (3.1.), the weapons used are not inherently indiscriminate in violation of laws of

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<sup>112</sup> MALCOLM SHAW, INTERNATIONAL LAW, 1190 (Cambridge University Press 6<sup>th</sup> ed. 2017).

<sup>113</sup> Prosecutor v. Tadić, IT-94-1-T, Trial Chamber, “*Tadić*”, ¶562, (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

<sup>114</sup> Compromis, Witness Testimonials, Defence Witness-2 at pp. 23.

<sup>115</sup> *Id.*

IAC (3.2.), the acts of the DEFENDANT are covered under the principles of proportionality under customary IHL (3.3.), and the DEFENDANT can invoke the defence of military necessity (3.4.).

### 3.1. SUPERFLUOUS INJURY AND UNNECESSARY SUFFERING HAS NOT BEEN CAUSED

23. The term “*superfluous harm and unnecessary suffering*” refers to the impacts of particular weapons that are “*of a nature to cause*” these consequences based on their design.<sup>116</sup> This rule of customary IHL is one of the few measures intended to protect combatants from certain weapons that are deemed abhorrent, or that cause more suffering than is necessary for their military purpose, even though much of IHL is focused on shielding civilians from the effects of IAC.<sup>117</sup>

24. According to *Shimoda*,<sup>118</sup> the use of a weapon that inevitably results in the death of those who are already out of the fight and deepens their suffering needlessly is outside the scope of this objective and is, therefore, against humanity. In *casu*, it is submitted that the use of thermobaric bombs does not cause superfluous harm or unnecessary suffering and hence, is not unlawful as it only constitutes a superior weapon and not one that causes additional harm.

25. It is submitted that the thermobaric bomb is not covered under Protocol III of the Convention of Certain Conventional Weapons (“*CCCW*”),<sup>119</sup> and is thus not incendiary weapon. Although on a prima facie basis, thermobaric bombs may appear to be incendiary weapons, their nature and characteristics of the same are inherently different. They are not “*mainly designed to set fire to or to inflict burn injuries*”<sup>120</sup> despite the fact that they rely on a chemical reaction. Instead, the primary purpose of thermobaric is to produce pressure and explosion, which halts aggression and causes quick death to those in its vicinity. Since burns to people are an unintended consequence, thermobaric cannot be classified as incendiary weapons.

### 3.2. THE USE OF THERMOBARIC BOMBS IS NOT INHERENTLY INDISCRIMINATE

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<sup>116</sup> GRO NYSTUEN, STUART CASEY-MASLEN AND ANNIE GOLDEN BERSAGEL, *NUCLEAR WEAPONS AND INTERNATIONAL HUMANITARIAN LAW*, (Cambridge University Press 2014).

<sup>117</sup> *Id.*

<sup>118</sup> Ryuichi Shimoda et al. v. The State., 32 *INTERNATIONAL LAW REPORTS* 626–642 (1966)

<sup>119</sup> “Protocol III” to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, “*CCCW*”, Geneva, October 10, 1980.).

<sup>120</sup> Matt Montazzoli, *Are Thermobaric Weapons Lawful?*, LIEBER INSTITUTE WEST POINT, (Mar 23, 2022) <https://lieber.westpoint.edu/are-thermobaric-weapons>

26. It is submitted that the use of thermobaric bombs does not satisfy the threshold for inherently indiscriminate weapons. The nature of inherently indiscriminate weapons is such that by their nature they are incapable of complying with the principles of distinction and proportionality.<sup>121</sup>
27. However, in this case as the weapons themselves are employed and recognized by several countries, compliance of the principles of distinction and proportionality shall have to be decided on a case-to-case basis. Consequently, since it has already been submitted that the residents of Emerald City have been stripped of their protection as civilians and are now treated as combatants, the use of thermobaric weapons in this situation is not unlawful.
28. It must be noted here that there is currently no legislation in place preventing the use of the weapons in question, i.e. vacuum bombs.<sup>122</sup> Furthermore, it is stated in the *Rome Statute* that the list of weapons that are to be banned under *Article 8(2)(b)(xx)* will be attached in an annex to the article which would serve as a comprehensive list of references. However, no such annex has been included in the statute to this date, which consequently proves that the use of vacuum bombs during IAC is not prohibited.<sup>123</sup>
29. It is submitted that efforts to ban these weapons have not yet produced a clear prohibition. The CCCW addresses incendiary weapons, but states have managed to avoid an explicit ban on thermobaric bombs. State practice is indicative of the same as countries like Russia, United States, United Kingdom, Ukraine, China, Syria employ thermobaric weapons but do not consider them to be inherently indiscriminate weapons.<sup>124</sup> Therefore, a different standard cannot be applied in this case to particularly target the DEFENDANT's use of thermobaric bombs.
30. Furthermore, it is submitted that in the *Legality of the threat or use of nuclear weapons advisory opinion*,<sup>125</sup> that in IAC at a very early stage certain types of weapons were prohibited because of their indiscriminate effect and acknowledged that the use of such weapons seem scarcely reconcilable with the IAC's requirement for discrimination, but declined to rule that the effects of nuclear weapons were so indiscriminate as to make their use unlawful.

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<sup>121</sup> *Id.*

<sup>122</sup> Marianne Hanson, *What are thermobaric weapons? And why should they be banned?*, ECONOMIC TIMES, (Mar. 3, 2022) <https://economictimes.indiatimes.com/news/defence/what-are-thermobaric-weapons-and-why-should-they-be-banned/articleshow/89964839.cms?from=mdr>

<sup>123</sup> *supra* note 34.

<sup>124</sup> *supra* note 29.

<sup>125</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶¶76 and 78, (Jul. 8).



31. It is highly unlikely that thermobaric weapons are inherently unlawfully indiscriminate given that the ICJ did not declare nuclear weapons to be so, despite their particularly dreadful traits, such as the potential to bring devastation to generations to come. Thus, the use of thermobaric bombs is in no way comparable to the same. Moreover, as held in the *Nuclear weapons advisory opinion*, a weapon cannot be declared illegal unless it is prohibited, which is absent in the present case.

### 3.2.1. *The expert-witness testimony cannot be relied upon*

32. The expert-witness of the PROSECUTION, Mr Umberto Eco, has provided an opinion regarding the nature of thermobaric bombs. However, the effects of the thermobaric bombs, as described by him, are no different from the effects caused by other conventional weapons used in IAC and do not cause superfluous injury or unnecessary suffering of any kind.<sup>126</sup> In any event, experts are not independent despite them providing Scientific Evidence as they cannot be said to be completely independent and neutral as they are appointed by the party and are acquainted with the party's case. They receive remuneration, and their opinions are construed in such a way that it furthers the argument of the party that appoints them.<sup>127</sup>

### 3.3. THE ACTS OF THE DEFENDANT ARE COVERED UNDER THE PRINCIPLE OF PROPORTIONALITY

33. According to the principle of proportionality, an attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportional to the military advantage in protecting combatants and civilians.<sup>128</sup> In other words, the attack is proportional if the benefit stemming from the attainment of the proper military objective is proportional to the damage caused to innocent civilians harmed by it.

34. It is submitted that due to their actions to aid Titan's military, the "*civilian*" population of Emerald City is no longer able to enjoy the protection given to them by IHL principles and are treated as combatants and lawful targets. In *Public Committee against Torture in Israel*

<sup>126</sup> *Id.*

<sup>127</sup> CAROLINE FOSTER, SCIENCE & THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL COURTS & TRIBUNALS: EXPERT EVIDENCE, BURDEN OF PROOF AND FINALITY, 110 (Cambridge University Press 1st ed., 2011); *MethanexCorp. v. United States of America*, 44 I.L.M. 1345 (2005).

<sup>128</sup> OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 333, (2<sup>nd</sup> ed. Beck/Hert 2008); *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Chamber Judgment, "*Kupreškić*", ¶521, (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

v. *the Government of Israel*,<sup>129</sup> the principle of proportionality was held to be applicable in every case in which civilians are harmed at such time as they are not taking a direct part in hostilities. A manifestation of this customary principle can be found in API,<sup>130</sup> pursuant to which indiscriminate attacks are forbidden. In *casu*, however, as has already been submitted above, the principle of proportionality would not be applicable as the targets in question are all lawful military targets and there is no collateral damage to be assessed under the principle.

### 3.4. THE DEFENDANT CAN INVOKE MILITARY NECESSITY

35. In *Blaskic*,<sup>131</sup> it was held that military necessity refers to rules of IHL and the principle that a belligerent may apply only that amount and kind of force necessary to defeat the enemy. The unnecessary or wanton application of force is therefore prohibited. The prerequisite for an act to be considered to have been done in military necessity is as follows:

1. **There exists urgency:** In the present case, the use of thermobaric weapons was a reactionary measure by the DEFENDANT after the air strikes and the participation of civilians in the war effort proved to be costly both in terms of loss of life and resources. Therefore, the DEFENDANT was not left with any other alternative but to make use of the thermobaric weapons to prevent additional loss to their military.<sup>132</sup>
2. **There exists a requirement for the attainment of a known military purpose:** In *casu*, it is seen that the Republican troops have sustained heavy losses due to air and ground attacks by Titan's forces, and it is submitted that this move was made by them in great need to strengthen their military position and gain an advantage. Since it has already been submitted that the residents of Emerald City fall under the bracket of combatants, the action taken by the DEFENDANT is a lawful one with the purpose of military necessity for the attainment of a known military purpose.<sup>133</sup>
3. **It is in conformity with IHL:** In the present case, the defence of military necessity can be invoked because the act in itself is not violative of the principles of IHL, i.e., the principles of distinction and proportionality as firstly, the civilians present in the area

<sup>129</sup> Public Committee against Torture in Israel v. the Government of Israel, HCJ 769/02, 11 December 2005.

<sup>130</sup> DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, (Oxford University Press 4<sup>th</sup> ed. 2021).

<sup>131</sup> Prosecutor v. Blaškić, IT-95-14-T, Trial Chamber Judgment, "*Blaškić*" ¶286, (Int'l Crim. Trib. for the Former Yugoslavia Mar 3, 2000).

<sup>132</sup> Compromis, ¶ III(b).

<sup>133</sup> Kosuke Onishi, *Rethinking the Permissive Function of Military Necessity in Internal Non-International Armed Conflict*, 51 ISR. L. REV. 235 (2018).



of attack are under the bracket of combatants, owing to their role in assisting combat operations.<sup>134</sup>

**36.** Therefore, it can be concluded that the DEFENDANT cannot be held liable under *Article 8(2)(b)(xx) of the Rome Statute*.

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**ISSUE 4: WHETHER THE ACTS OF PAUL ANDERSON ARE SHIELDED UNDER THE DEFENCE OF SUPERIOR ORDERS UNDER ARTICLE 33 OF THE ROME STATUTE?**

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**37.** *In any event*, it is submitted that the acts of the DEFENDANT are shielded under the defence of Superior Order provided under *Article 33 of the Rome Statute* as there was a superior-

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<sup>134</sup> Georg Nolte, *Thin or Thick? The Principle of Proportionality and International Humanitarian Law*, 4 L. & ETHICS HUM. RTS. 243 (2010).

subordinate relationship between Mr. David Wallace and the DEFENDANT (4.1.), the DEFENDANT was under a legal obligation to obey the order of the superior (4.2.), the DEFENDANT did not know that the order was unlawful (4.3.), the alleged base crime was not committed by the DEFENDANT (4.4.), and lastly, there exists no individual criminal responsibility on the part of the DEFENDANT (4.5.).

#### **4.1. THERE EXISTS A SUPERIOR-SUBORDINATE RELATIONSHIP**

38. The primary requirement for superior responsibility is the superior-subordinate relationship between the Superior and the perpetrator committing the base crime.<sup>135</sup> The superior order under consideration must have emanated from either a government or a superior. In order for such a command to be considered to originate from a superior, the order must first be officially from a member of a governmental authority who must act within his or her authority, failing which the act would be ultra vires.<sup>136</sup> In *casu*, the superior is Mr. David Wallace, the head of the state of Republic, and the subordinate is the DEFENDANT, Mr. Paul Anderson.
39. The relationship between the superior and the subordinate does not necessarily have to be proximate; superiors high up in the line of command may be held responsible under *Article 28 of the Rome Statute*.<sup>137</sup>
40. In the present case, it is submitted that the orders came from Mr. David Wallace through the Ministry of Defence and then to the DEFENDANT, Mr. Paul Anderson. The Ministry of Defence of the Republic is second only to the head of state when it comes to military matters. It is, therefore, reasonable to state that there are several levels of hierarchy between DEFENDANT and the Ministry of Defence and even if there is no proximate link between the DEFENDANT and Mr. David Wallace, there exists an established hierarchy from which the superior orders flow. Furthermore, the DEFENDANT has been asked to carry out the mission as a strategic significance of emerald city for both the Republic and Titan is well established.

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<sup>135</sup> Volker Nerlich, *Superior Responsibility under Article 28 ICC Statute*, 5 J. INT'L CRIM. JUST. 665 (2007).

<sup>136</sup> *supra* note 50.

<sup>137</sup> Rome Statute; Art. 28.

41. It is submitted that it is not necessary that the superior-subordinate relationship is of a *de jure* nature as observed in the *Limaj*.<sup>138</sup> The ad-hoc tribunals have held that it suffices if the superior in question is a *de facto* superior of the person responsible for the base crime.<sup>139</sup>
42. The *Rome Statute* points in the same direction, as per *Article 28*, it is submitted that even though Mr Wallace is presumably several levels above the DEFENDANT in the chain of command, he was the *de facto* commander in chief of the Republican military. Thus, Mr. David Wallace is the *de facto* superior of the DEFENDANT, who is alleged to be responsible for the base crimes.

#### 4.2. LEGAL OBLIGATION TO OBEY THE ORDER OF THE SUPERIOR

43. According to the commentary on *Article 33 of the Rome Statute*, the person obeying the order must be under a legal obligation to obey orders in domestic law.<sup>140</sup> The Statute refers back to the domestic legal order within which both the superior or the government, as the case may be and the offender were acting.<sup>141</sup>
44. In *casu*, Mr. David Wallace, after the siege of Emerald, released directives in consultation with the Ministry of Defence to “*avenge the lives of republican lives in Emerald*.”<sup>142</sup> This directive was issued to each and every military commander deployed in and around Emerald City. Since the order came from the High Command and was of an “*executive nature*”, there was a legal obligation to be bound by the order and no other alternative existed.

##### 4.2.1. Threat of Duress

45. It is submitted that there existed a threat of duress to the DEFENDANT. As observed in *Erdemovic*, superior orders may be issued without being accompanied by any threats to life or limb.<sup>143</sup> In these circumstances, if the superior order is manifestly illegal under

<sup>138</sup> Prosecutor v. Limaj et al., IT-03-66-T, Trial Chamber Judgment, “*Limaj*” ¶¶171-173 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

<sup>139</sup> Prosecutor v. Halilović, IT-01-48, Appeals Chamber, “*Halilović*” ¶111, (Int’l Crim. Trib. for the Former Yugoslavia Oct. 16, 2007); Prosecutor v. Blagojević and Jokić, IT-02-60, Appeals Chamber, “*Blagojević and Jokić*” ¶226 (Int’l Crim. Trib. for the Former Yugoslavia May 9, 2007); Prosecutor v. Kunarac et al., IT-96-23-T & IT-96-23/1-T, Trial Chamber, “*Kunarac et al.*” ¶407, (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); Prosecutor v. Aleksovski, IT-95-14/1-T, Trial Chamber Judgment, “*Aleksovski*” ¶43, (Int’l Crim. Trib. for the Former Yugoslavia Jun. 25, 1999).

<sup>140</sup> ROBERT CRYER ET.AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, (Cambridge University Press, 2007).

<sup>141</sup> PROFESSOR ANTONIO CASSESE ET.AL., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 906, (Oxford University Press 2002).

<sup>142</sup> Compromis, ¶ III(j).

<sup>143</sup> Prosecutor v. Dražen Erdemović, IT-96-22-A, Appeal Chamber Judgement, “*Erdemović*” (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

international law, the subordinate is under a duty to refuse to obey the order. If, following such a refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised, and superior orders lose any legal relevance.

46. In the present case, the DEFENDANT was acting on the strict orders and mandate given by the Republican Defence Ministry, the disobedience of which will have serious consequences.<sup>144</sup> This satisfies the threshold of threat of duress.

### 9.3. THE DEFENDANT DID NOT POSSESS KNOWLEDGE THAT THE ORDERS WERE UNLAWFUL

47. It is submitted that the DEFENDANT did not possess the knowledge that the orders were unlawful. The presence of knowledge is a question of fact.<sup>145</sup> The DEFENDANT operated from the perspective that the orders given by the superior were legal and valid in the context of IAC. The DEFENDANT primarily followed orders to further the military goal, such as the use of vacuum bombs which are not at all unlawful under domestic laws nor are internationally banned weapons.<sup>146</sup>
48. The only means to prove whether DEFENDANT possessed such knowledge is through circumstantial evidence.<sup>147</sup> In the present case, the circumstantial evidence can be gathered from the public notice given by the Government of Titan for its civilian population to take direct part in hostilities by acting as its eyes and ears, which was acknowledged by the prosecutor's witness statement wherein it is stated that such civilians would have lost protection under the principles of IHL.
49. Furthermore, DEFENDANT fully believed and verified that the attack was directed against combatants and civilians taking direct part in hostilities which can be evidenced through the Siege of Emerald, wherein the Republican battalion was attacked by the Titanian forces only through the help, and intel received from the civilian population transmitting information on social media.<sup>148</sup> Lastly, it is submitted that the PROSECUTION cannot use the standard of manifest unlawfulness or manifest illegality as the *Rome Statute* only classifies this in the cases of genocide or crimes against humanity.<sup>149</sup>

### 9.4. THERE WAS NO BASE CRIME COMMITTED BY THE DEFENDANT

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<sup>144</sup> Compromis, Witness Testimonials, Defence Witness-2 at pp. 23.

<sup>145</sup> ROBERT CRYER ET.AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, (Cambridge University Press, 2007).

<sup>146</sup> *Supra* note 65 at 808.

<sup>147</sup> *Id.*

<sup>148</sup> Compromis, ¶ III(i).

<sup>149</sup> Rome Statute, Art. 33.

**50.** As argued in **Issues 2 and 3**, there exists no base crime that is committed by the DEFENDANT. However, in case Chambers believes that there exist base crimes that are being committed, it is only committed by the Superior, Mr. David Wallace and not the DEFENDANT.

**9.4.1. *In arguendo, the Superior should be liable for the alleged base crime***

**51.** According to *Article 28(b) of the Rome Statute*, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control as a result of his or her failure to exercise control properly over such subordinates.<sup>150</sup> In comparison to *Article 30(1) of the Rome Statute*, the requisite mental element in respect of the base crime is slightly lowered because no intent is required.<sup>151</sup> Furthermore, the jurisprudence of the ICTY indicates that general knowledge of the base crime is sufficient; it is not required that the superior be aware of the exact details of the base crime.<sup>152</sup>

**4.4.2. *There existed effective control over the subordinate***

**52.** The ad-hoc tribunals have developed the effective control test wherein if the DEFENDANT exercised effective control over the person committing the alleged base crime, is he or she that person's superior.<sup>153</sup> According to the ICTY AC in *Delalic*, effective control depends on the material ability to prevent or punish criminal conduct.<sup>154</sup> Furthermore, it is submitted that the Ministry of Defence maintains effective control over the troops stationed in and around Emerald City, as can be seen when orders were directly given by the Ministry immediately after the Siege of Emerald.<sup>155</sup>

**53.** It is also submitted that as per the statement of the DEFENDANT and the effective control test, it is reasonably assumed that disobedience of orders during a time of war would amount to treason against the Republic, and would therefore result in the gravest of punishments.<sup>156</sup>

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<sup>150</sup> Rome Statute, Art. 28(b).

<sup>151</sup> G. Werle and E Jessberger, “*Unless Otherwise Provided*” *Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law*, 3 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 35-55 (2005).

<sup>152</sup> Prosecutor v. Krnojelac, IT97-25-T, Trial Chamber Judgment, “Krnojelac”, ¶90, (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002); Prosecutor v. Hadzihasanovic and Kubura, Case No. IT-01-47-A, Appeal Chamber, ¶199 (Int’l Crim. Trib. for the Former Yugoslavia April 22, 2008).

<sup>153</sup> *Supra* note 50 at 1049.

<sup>154</sup> Prosecutor v. Delalić et al., IT-96- 21-T, Trial Chamber, “*Delalic*”, ¶186 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

<sup>155</sup> Compromis, ¶ III(j).

<sup>156</sup> Compromis, Witness Testimonials, Defence Witness-2 at pp. 23.

54. The DEFENDANT, in his witness statement, clearly implies that disobedience of orders, especially in a time when the situation was grave, would lead to serious consequences and by his statement, it can also be understood that the DEFENDANT has been privy to incidents where the Republican High command has dealt with disobedience most harshly in the past.

#### **4.4.3. The Superior has not exercised control properly**

55. A superior will only be held criminally responsible under the concept of superior responsibility if he or she failed to exercise control properly over his or her forces or subordinates.<sup>157</sup> Failure to exercise control properly may only result in criminal liability if the superior is under a duty to act.<sup>158</sup> The application of “*but-for-test*,”<sup>159</sup> which helps to determine actual causation of the event, is relevant as it helps in determining if the acts of DEFENDANT would take place had the superior exercised control properly.<sup>160</sup>

56. In *casu*, the orders given as per Mr. David Wallace and the Ministry of Defence were that “*Titanian blood had to be drawn onto the streets in broad daylight and it was imperative that a spectacle be made immediately*”.<sup>161</sup> It is submitted that this order is inherently vague in nature, and does not specifically state the means of methods of carrying out such an objective, as would be expected with an order of such gravity and magnitude.

57. This presents a reasonable implication that the Ministry did not maintain strict and effective command over any of its subordinate officers. It can be seen from the actions of the DEFENDANT that free rein was granted to him and most likely other commanders as well. This satisfies the criterion of the *but-for-test* as shifts the liability onto the superior.

#### **4.4.4. The superior was aware of the crimes committed by his subordinates**

58. Article 28 of the Rome Statute makes a distinction between military and non-military commanders in terms of the knowledge they must possess about the alleged crimes committed by the subordinates.<sup>162</sup> The PTC in *Bemba* observed that heads of state often act as commanders-in-chief of the armed forces, even if they do not hold a military title or rank<sup>163</sup> and that they must therefore be considered de jure military commanders. In the present case, the President of Republic, Mr. David Wallace, is a military commander.

<sup>157</sup> G.R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE JOURNAL OF INTERNATIONAL LAW 99 (2000).

<sup>158</sup> Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93(3) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 573 (1999).

<sup>159</sup> *supra* note 50 at 382.

<sup>160</sup> The Tokyo Judgement, (Int’l Mil. Trib. for the Far East Nov 4, 1948).

<sup>161</sup> Compromis, Witness Testimonials, Defence Witness-2 at pp. 23.

<sup>162</sup> Rome Statute, Art. 28.

<sup>163</sup> Nora Karsten, *Distinguishing Military and Non-military Superiors: Reflections on the Bemba Case at the ICC*, 7(5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 983, November (2009).

59. According to *Article 30(3) of the Rome Statute*, knowledge means “*awareness that a circumstance exists or a consequence will occur in the ordinary course of events*”.<sup>164</sup> As to the evidentiary method which is used to prove actual knowledge, the ICTY has stated that knowledge may be established by circumstantial evidence but it may not be presumed.<sup>165</sup> If knowledge is not real, but only possible, proof that it exists can only be based on facts not on mere presumptions. It is submitted that the principle of Constructive Knowledge or the “*Should-have-known*” principle can be applied here.<sup>166</sup>
60. Under the commentary for *Article 86(1) of the AP I*,<sup>167</sup> it is stated that the superior does not have to have actual knowledge of the unlawful conduct being planned or perpetrated by his subordinates, but he has sufficient, relevant information of a general nature that would enable him to conclude that such an act would be committed by his subordinate.
61. In *casu*, it is submitted that being the superior of the DEFENDANT, the Ministry of Defence was fully aware of the DEFENDANT’s proficiency and expertise in the use of thermobaric weapons. Furthermore, it is also submitted that the DEFENDANT was in possession of thermobaric weapons during the time of conflict, and it is mentioned nowhere that he acquired them specifically for this particular attack.
62. It is reasonably assumed that the weapons came from the stockpile of the Republican Military, which was under the effective control of the Ministry of Defence. Therefore, it is submitted that the Ministry of Defence, on conveying orders that required mass destruction of life and property, would reasonably be aware that the DEFENDANT would employ the use of those weapons that he was most proficient in, i.e., that the DEFENDANT was about to allegedly commit a war crime under *Article 8 of the Rome Statute*.
- 4.4.5. The superior failed to take all necessary and reasonable measures to prevent or repress the acts**
63. A superior who simply ignores information which clearly indicates the likelihood of criminal conduct on the part of his subordinates is seriously negligent in failing to perform his duty to prevent or suppress such conduct by failing to make a reasonable effort to obtain the necessary information that will enable him to take appropriate action.<sup>168</sup> In *Rutaganda*, the ICTR Trial Chamber stated the general principle that “*an accused may participate in*

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<sup>164</sup> Rome Statute, Art. 30(3).

<sup>165</sup> *supra* note 65 at 414.

<sup>166</sup> *Id.*

<sup>167</sup> AP I, Art. 86(1).

<sup>168</sup> *Supra* note 65 at 807.



*the commission of a crime either through direct commission of an unlawful act or by omission, where he has a duty to act”.*<sup>169</sup>

**64.** It is submitted that the superior did not take any necessary or reasonable measures to prevent the commission of the alleged crime or repress the same. Mr. David Wallace did not reprimand the DEFENDANT for any of the actions done as he was the one who gave him such orders. Mr. David Wallace was aware that submitting the matter to competent authorities for investigation or PROSECUTION would also bring about his liability. Therefore, Mr. David Wallace failed to do the same.

#### **4.5. THERE EXISTS NO INDIVIDUAL CRIMINAL RESPONSIBILITY ON THE PART OF THE DEFENDANT**

**65.** It is submitted that the defence of “*superior orders*” if accepted by the Chambers, absolves the liability imposed on the DEFENDANT as *Article 33* is a justification for individual criminal responsibility under the *Rome Statute*.<sup>170</sup> As submitted above, the actions of the DEFENDANT in using thermobaric bombs were not unlawful as per any of the provisions of the *Rome Statute*, customary IHL and corresponding conventions and were performed on the orders of the Republican Ministry of Defence. Therefore, in light of this, it is Mr. David Wallace who faces individual criminal responsibility under *Article 25 of the Rome Statute*.

**66.** According to *Article 28 of the Rome Statute*, as far as superiors are concerned, they are not barred from invoking their official capacity,<sup>171</sup> they may eventually even be criminally responsible for the international crime of a subordinate when they fail to exercise control properly, which has been established in (4.4.2.). Furthermore, Mr. David Wallace is also liable for “*omission*” and it goes as far as to cover negligence for not duly realising that the forces were committing or about to commit an international crime.

**67.** Mr David Wallace satisfies the threshold for individual criminal responsibility under *Article 25(3)(a)* for the following reasons:

##### **1. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible:**

In the present case, Mr David Wallace, has, indirectly, by supplying the DEFENDANT, who is an expert on the use of thermobaric weapons with the same and giving such an order to destroy as much property as possible, indirectly committed the crime in

<sup>169</sup> Prosecutor v. Rutaganda, ICTR-96-3-T, Trial Chamber I, “*Rutaganda*”, ¶93, (Dec. 6, 1999).

<sup>170</sup> *supra* note 50 at 333.

<sup>171</sup> Rome Statute, Art. 28.



question by acting through the DEFENDANT and can be held individually responsible for the same.

2. **Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted:** In the context of IAC, Mr. Wallace has issued all the major orders and directives in the attacks against the Titanian civilian population.
  3. **For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission:** Mr Wallace supplied such large-yield weapons as thermobaric bombs in a known civilian battle-zone, directly to the hands of a subordinate who was known to be an expert operator of said thermobaric weapons. Furthermore, he issued orders which leaned towards mass destruction to the same subordinate.
68. Therefore, it is submitted that Mr David Wallace must be held liable as the perpetrator under *Article 25(3) of the Rome Statute* as he is individually responsible for the alleged crimes for which DEFENDANT is being prosecuted.

## PRAYER

Wherefore, in light of the issues raised, arguments on merit, evidence supplied and authorities cited, it is most humbly and respectfully prayed that:

- v. A Recharacterisation under *Regulation 55 of the Rome Statute's Regulations* should not be allowed as it goes beyond the facts and circumstances of the case.
- vi. The DEFENDANT cannot be held liable under *Article 8(2)(b)(i) of the Rome Statute* for intentionally directing attacks on civilians and civilians not taking direct part in hostilities.
- vii. The DEFENDANT cannot be liable under *Article 8(2)(b)(xx) of the Rome Statute* for use of weapons, projectiles that have caused superfluous injury, unnecessary suffering and which are inherently indiscriminate.
- viii. The DEFENDANT is shielded under the defence of “*superior order*” under *Article 33 of the Rome Statute* and does not bear individual criminal responsibility.

All of which is respectfully submitted,

ON BEHALF OF THE DEFENCE

COUNSEL FOR THE DEFENCE

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**EIGHTH SYMBIOSIS LAW SCHOOL, PUNE – INTERNATIONAL CRIMINAL TRIAL  
ADVOCACY COMPETITION, 2023**

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**BEFORE**  
  
**TRIAL CHAMBER II, INTERNATIONAL CRIMINAL COURT**  
  
**THE HAGUE, THE NETHERLANDS**

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**IN THE MATTER of**  
  
**THE PROSECUTOR.....PROSECUTION**

**v.**

**PAUL ANDERSON.....DEFENCE**

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**DEFENDANT CHARGED WITH**  
  
*War Crime of employing weapons, projectiles or materials or methods of  
warfare listed in Annex to the Statute Under Article 8(2)(b)(xx) of the Rome  
Statute*

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**Word Count: 6194**

**WRITTEN SUBMISSIONS ON BEHALF of THE VICTIMS**

Cour  
Pénale  
Internationale

International  
Criminal  
Court



**Original: English**

**No: ICC-\*/27-\*/17**

**Date: January 27, 2023**

## TRIAL CHAMBER II

**BEFORE:**

Judge \_\_\_\_\_, Presiding Judge

Judge \_\_\_\_\_, and

Judge \_\_\_\_\_

### SITUATION IN THE REPUBLIC OF TITAN

**In the case of**

**Registrar:**

**Source: Office of the Prosecutor**

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AC	Appeals Chamber
AP I	Additional Protocol I
IAC	International Armed Conflict
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
Id.	Ibid
i.e.	Id. Est
IHL	International Humanitarian Law
Int'l	International
¶	Paragraph
Pp.	Pages
PTC	Pre Trial Chamber
Rome Statute	International Criminal Court Statute
TC	Trial Chambers
U.N.	United Nations
v.	Versus
VLR	Victims Legal Representative

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## STATEMENT of FACTS

### ~BACKGROUND~

The Republic is one of the largest countries in the world, comprising many ethnic groups. Titan is located in the eastern region of Europe and is one of the largest countries in the continent, having broken apart from the Republic in 1991. Emerald City is located in Titan, and has often been caught in between tensions between the two countries.

### ~ESCALATION OF TENSIONS~

On February 5, 2022, the Republic openly removed Titan's ambassador and declared an end to all diplomatic relations with Titan. International observers and intelligence agencies noted a significant troop and battleship deployment along the shared borders between Titan and the Republic. This was in relation to the proposal to include Titan as an EU Member. On February 24, 2022, Mr. David Wallace said during a highly publicised public rally that Titan was and still is a crucial component of the Republic and that it was crucial for the “*errors of the 1990s were rectified*” in the interest of Titan's Xula-speaking populace. He noted that the Proposal would work against the Republic's interests in the area and constitute a direct and serious threat to its integrity, national borders, and those of its allies. Thus, he declared a formal offensive against Titan until Titan irrevocably withdrew the Proposal or terminated it. Following the aforementioned public announcement, Republican soldiers attacked Titan from all sides. The government of Titan, for its part, expelled the Republic's ambassador and declared a state of emergency throughout the whole nation.

### ~EFFECT OF TENSIONS~

From March 2022 and September 2022, both sides suffered significant losses. Titan's western allies consistently provided financial support and arms to its armed forces. The conflict in Titan is thought to have resulted in the largest forced emigration of people since the Second World War and at least ten thousand deaths, despite support from the worldwide community. The effects of the refugee crisis brought on by the aforementioned war continue to devastate numerous nations. The government of Titan asked their citizens to serve as the “*eyes and ears*”

of their defence forces through numerous televised events. Several international news outlets had also published in-depth reports on how Titan's military was able to thwart the Republican advance thanks to social media updates and live streams provided by residents.

### ~SIEGE OF EMERALD~

One particular incident relates to airstrikes that occurred on the night of October 14, 2022, when Titan's air force attacked a significant base camp of Republican battalions stationed in Emerald City, resulting in the deaths of about 120 Republican soldiers, countless members of the support staff, and loss of military equipment valued at millions of dollars. Following what became known as the “*Siege of Emerald*”, it was made clear by developments that this attack was specifically planned using data posted by Emerald City citizens on their social media accounts on websites like Twitter, Instagram, and Tik Tok. The Siege of Emerald significantly hampered the Republic's narrative as it advanced against Titan.

According to reports, the claimed strike dealt a severe damage to the morale of the Republican army's men stationed in Titan. David Wallace issued orders to avenge the death of a Republican in Emerald after consulting with the nation's Ministry of Defence. Post this, the accused Paul Anderson is thought to have personally employed and organised attacks utilising vacuum bombs on the Titanian population hiding in Emerald City, allegedly resulting in the deaths of some 600 individuals. The employment of such weapons by the defendant is also alleged to have resulted in extensive devastation and razing of all of the citizens of Emerald City's material possessions as well as irreparable impairment to the area's soil and ecology. According to estimates provided, between October 22, 2022, and October 25, 2022, the accused is accused of using these weapons seven times and destroying almost 70% of Emerald City's habitable zones.

### ~PROCEDURAL HISTORY AND PRELIMINARY MATTER~

10. **November 1, 2022:** The accused was captured along with four other Republican soldiers by Titan's military and all five of these men immediately surrendered before the military.
11. **November 14, 2022:** The government of Titan informed the ICC Prosecutor “*Prosecutor*” of the situation in Titan and requested that the Prosecutor open an inquiry

into any crimes committed on or against Titan's territory by the Republic's seized prisoners. The prosecutor was also given the accused's case and his request to have the case heard by an impartial, independent, and autonomous organisation. The accused also submitted to the jurisdiction of the ICC to be tried in accordance with the provisions and procedure of the *Rome Statute*.

12. **November 29, 2022:** The Prosecutor released a preliminary report with respect to the Situation referred to it on November 14, 2022. By virtue of this report, the Prosecutor's Office announced the conclusion that, in its opinion, the attacks referred to it, via the Situation in Titan, pass the legal standards governing the jurisdiction of the Court with reference to *Article 17 of the Statute*.
13. **Post November 29, 2022:** The Chamber granted leave to the Prosecutor to initiate its investigation in connection with the Situation and the actions of the accused in Emerald City between October 22, 2022, and October 25, 2022.
14. **January 3, 2023:** The Legal Representative of the Victims filed a request pursuant to *Regulation 55 of the Regulations*, requesting the Chamber to consider a legal recharacterization of the facts as war crime pursuant to *Article 8(2)(b)(i) of the Statute*. The VLR has requested this Chamber to allow them to demonstrate how the Pre-Trial Chamber I, in connection with the conclusions given in the Decision on the Confirmation of Charges:
  - (a) failed to appreciate the principles of customary law and treaty protection relating to civilians as non-combatants in the context of the motivations behind the use of social media by the residents of Emerald City;
  - (b) failed to appreciate that there exists sufficient evidence to establish that despite the use of social media by such residents amounting to successful strikes against soldiers of the Republic, such residents did not lose their protected status of a non-combatant and a civilian in the international armed conflict between Titan and the Republic.

**ISSUES PRESENTED****~ ISSUE 1 ~**

**WHETHER VICTIMS OF WAR CRIMES UNDER ARTICLES 8(2)(b)(i) AND 8(2)(b)(xx) ARE ENTITLED TO CERTAIN RIGHTS UNDER INTERNATIONAL LAW?**

**~ ISSUE 2 ~**

**WHETHER THE CHARGE CAN BE RECHARACTERIZED FROM ARTICLE 8(2)(b)(xx) TO ARTICLE 8(2)(b)(i) OF THE ROME STATUTE UNDER REGULATION 55 OF THE ICC REGULATIONS?**

**~ ISSUE 3 ~**

**WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(i) OF THE ROME STATUTE?**

**~ ISSUE 4 ~**

**WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(xx) OF THE ROME STATUTE?**

**~ ISSUE 5 ~**

**WHETHER THE ACTS OF PAUL ANDERSON ARE SHIELDED UNDER THE DEFENCE OF SUPERIOR ORDERS UNDER ARTICLE 33 OF THE ROME STATUTE?**

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## SUMMARY of ARGUMENTS

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### ISSUE 1: WHETHER VICTIMS OF WAR CRIMES UNDER ARTICLES 8(2)(b)(i) AND 8(2)(b)(xx)

#### ARE ENTITLED TO CERTAIN RIGHTS UNDER INTERNATIONAL LAW?

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Under Article 68 of the Rome Statute, the victims of a crime under the jurisdiction of the ICC are given the chance to participate in the trial. The Victims' Legal Representative, AHO, falls under the definition as it satisfies the definition of victim under *Rule 85 of the ICC Rule of Procedure and Evidence*. The victim has suffered significant harm, which comes under the crimes committed under the jurisdiction of the ICC. Furthermore, the victims are required to be appropriately remedied.

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### ISSUE 2: WHETHER THE CHARGE CAN BE RECHARACTERIZED TO INCLUDE WAR CRIMES

#### UNDER ARTICLE 8(2)(b)(i) OF THE ROME STATUTE UNDER REGULATION 55 OF THE ICC

#### REGULATIONS?

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The charge against Mr. Paul Anderson can be recharacterized by the Trial Chambers under Regulation 55 of the ICC Regulations to include the commission of war crimes under *Article 8(2)(b)(i) of the Rome Statute*. The charge needs to be recharacterized to account the *mens rea* of Mr. Paul Anderson for intentionally directing attacks on civilian population. The recharacterization of charge does not go beyond the scope of the facts and circumstances of the trial and does not affect the fair trial rights of Mr. Paul Anderson.

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### ISSUE 3: WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(i) OF

#### THE ROME STATUTE?

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The DEFENDANT, Mr. Paul Anderson is liable under *Article 8(2)(b)(i) of the Rome Statute*. The DEFENDANT directed attacks specifically against civilians under the garb of being unable to differentiate civilians from combatants. The DEFENDANT has not given due regard to the protected status of civilians under customary IHL. The attacks were directed against the civilians due to the mere reason that the Titanian civilians posting about the war on social media, which is grossly violative of Rome Statute, AP 1 and customary IHL. The DEFENDANT



has the requisite *mens rea* to hold him liable for committing the war crime under *Article 8(2)(b)(i) of the Rome Statute*.

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**ISSUE 4: WHETHER PAUL ANDERSON CAN BE HELD LIABLE UNDER ARTICLE 8(2)(b)(xx) OF THE ROME STATUTE?**

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The DEFENDANT, Mr. Paul Anderson is liable under *Article 8(2)(b)(xx) of the Rome Statute*. The weapon used in question is the thermobaric bombs which are inherently indiscriminate and have caused superfluous injury and unnecessary suffering to the victims. The use of the weapon is not justified in the context of military necessity, and the use of the weapon has been not proportional to the attack caused by the Titanian armed forces. Furthermore, the weapon has been used in places consisting of civilian population, representing the *mens rea* to use the harmful weapon on civilians.

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**ISSUE 5: WHETHER THE ACTS OF PAUL ANDERSON ARE SHIELDED UNDER THE DEFENCE OF SUPERIOR ORDERS UNDER ARTICLE 33 OF THE ROME STATUTE?**

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The acts of the DEFENDANT, Mr. Paul Anderson are not shielded under the defence of superior orders under *Article 33 of the Rome Statute*. Even if the DEFENDANT was under a legal obligation to obey the orders of Mr. David Wallace, the DEFENDANT was aware that the orders were unlawful in nature. Furthermore, there existed no effective control over the acts of the DEFENDANT as the acts for which he is charged for were all done by him, representing his intention to deliberately attack civilian population. Lastly, the DEFENDANT bears individual criminal responsibility under *Article 25 of the Rome Statute*.

## ARGUMENTS *in* DETAIL

### Issue 1: Whether Victims of War Crimes under Articles 8(2)(b)(i) and 8(2)(b)(xx) Are Entitled To Certain Rights Under International Law?

1. The preamble to the *Rome Statute* places emphasis on “victims” by stating that “*during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.*”<sup>172</sup> In *casu*, the victims are the civilians of the Republic of Titan represented by the AHO who have suffered the war crimes under Article 8(2)(b)(i) of the Rome Statute. In *lieu* of this, the victims of war crimes are entitled to participate in the trial (1.1), and they must be remedied appropriately (1.2.).

#### 1.1. THE VICTIMS OF WAR CRIMES ARE ENTITLED TO PARTICIPATE IN THE TRIAL

2. Under Article 68 of the *Rome Statute*, the participation rights in a trial are given under two criteria, first, they must satisfy the definition of “*victim*” and second, they must have a “*personal interest*” in participating in the proceedings.<sup>173</sup> In *Ali Kushayb*, it was held that victims may participate at the trial stage in the case if they suffered from any crimes committed against them.<sup>174</sup>

#### 2.1.1. AHO satisfies the definition of “*victim*”

3. Under the Victims Declaration, “*victims*”, are defined as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights due to the acts or omissions that are in violation of criminal laws operative within Member States.<sup>175</sup> In *Mokom*,<sup>176</sup> it was held that individuals who have suffered direct or indirect harm as a result of one of the crimes being prosecuted can participate in a trial. In order to establish that

<sup>172</sup> Rome Statute of the International Criminal Court preamble., July 17, 1998, 2187 U.N.T.S. 90, “*Rome Statute*”.

<sup>173</sup> Rome Statute, Art. 68.

<sup>174</sup> Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman, ICC-02/05-01/20-440, “*Ali Kushayb*”, July 9, 2021.

<sup>175</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, U.N. Doc. A/RES/ 40/34/Annex (Nov. 29, 1985).

<sup>176</sup> Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka, “*Mokom case*”.

AHO has claims in the present case, the test laid down in the Democratic Republic of Congo<sup>177</sup> which are as follows:

*3.1.1.1. AHO is a Legal Person*

4. According to Rule 85(b) of the ICC Rules of Procedure and Evidence,<sup>178</sup> “*victims*” include legal persons such as organisations or institutions which is dedicated to education, religion, charitable purpose and humanitarian purpose etc that has sustained direct harm to any of their properties. In *casu*, AHO is a non-profitable venture under the aegis of the UNHRC,<sup>179</sup> which satisfies the requirement of legal personality.

*4.1.1.1. AHO has suffered Harm*

5. Although the term “*harm*” in itself is not defined anywhere in the Statute or Rules of Procedure and Evidence, it is submitted that the AC has interpreted the “*harm*” to denote hurt, injury, loss or damage.<sup>180</sup> In *casu*, AHO has suffered direct harm resulting from the actions of the DEFENDANT in that their offices in Emerald city have been destroyed as a result of the bombing by the DEFENDANT ‘s air force. It is also submitted that more than 600 people were killed on account of the actions of the DEFENDANT.<sup>181</sup> This satisfies the threshold of physical and mental suffering.

*5.1.1.1. A crime within the jurisdiction of the Court is established*

6. In *casu* the harm suffered by the applicants, i.e., the destruction of their lives and property as a direct consequence of the crime committed by the DEFENDANT under *Article 8(2)(b)(i) of the Rome Statute* which deals with directing attacks on civilians and civilian property.

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177 The Situation in the Democratic Republic of Congo, Decision on the application for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS, ICC-01/04-101-tEN-Corr, at ¶9( January 17, 2006).

178 International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000), Rule 85, “*Rules of Procedure and Evidence*”.

179 Compromis, ¶ VIII(b).

<sup>180</sup> Lubanga, Appeals Chamber, ¶31.

<sup>181</sup> Compromis, ¶ III.

*6.1.1.1. The harm was caused as a result of the event constituting the crime within the jurisdiction of the Court*

7. The causal relationship or nexus between the crime and harm is established if the victims convincingly show that the injury, they have experienced is a direct result of the conduct of crimes under the jurisdiction of the ICC. In *casu*, AHO submits that the harm to the victims is clearly a result of Paul Andersons's actions/omissions. This is evidenced through the investigation that revealed that the DEFENDANT exercised enormous control over the active use of vacuum bombs in multiple instances leading to deaths.<sup>182</sup>

*7.1.1. In the alternative, the victim has a "personal interest" in the proceedings*

8. The Rome Statute places victims at the "heart of international criminal law." In accordance with *Article 68 of the Statute*, the Court shall permit the presentation and consideration of the opinions and concerns of the victims at stages of the proceedings decided to be suitable by the Court when the personal interests of the victims are impacted.<sup>183</sup> In *casu*, the causal link between harm and crime has already been established. The sufferings of the victims are a result of the crime perpetrated by the DEFENDANT. Therefore, the AHO has personal interest in the proceedings.

**1.2. THE VICTIMS OF WAR CRIMES MUST BE REMEDIED APPROPRIATELY**

9. According to the *OCHCR Instrument*<sup>184</sup> under *Principle VII*, remedies for gross violations of IHRL and serious violations of IHL include the victim's right to equal and effective access to justice, adequate and prompt reparation for harms suffered and access to information concerning violations and reparation mechanisms.

*1.2.1. The victims are entitled to reparations, compensation, restitution and rehabilitation*

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<sup>182</sup> Compromis, ¶III.

<sup>183</sup> Art 68, Para 3, Rome Statute.

<sup>184</sup> General Assembly Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, (16 December 2005).

**10.** It is submitted by AHO that the victims in the present situations are entitled to receive just and fair compensation for the losses of life and property suffered by them as prescribed under *Article 75<sup>185</sup> of the Rome Statute*. The victims, being civilians have been the object of targeted military-grade attacks through the use of weapons like thermobaric bombs that cause great physical and psychological suffering not to mention widespread destruction of property. Henceforth, the victims are eligible to receive reparations from the DEFENDANT and means for restitution and rehabilitation provided from the Court's trust fund.<sup>186</sup> The decision of determining the degree of damage caused and the appropriate remedy for the same lies with the court.<sup>187</sup>

***1.2.2. The Court Has the Power To Order Directly Against the Convicted Person***

**11.** The ICC is founded on the principle of Individual Criminal Responsibility. This provides the Court with absolute power under *Article 75 of the Statute* to issue a judgment which prescribes the convicted individual to comply with specific fines and remedies to be paid to the victims for the purposes of restitution, remedy and compensation. According to the General Assembly, victims are entitled to be paid in monetary and other forms of compensation, for the harm or loss suffered on account of them becoming victims of a crime of such magnitude.<sup>188</sup> The AHO submits that Mr. Paul Anderson must, on account of crimes committed by him, make fair compensation and reparations to the victims as he held major responsibility during the occurrence of the events that caused the victims' suffering.

***1.2.3. In the alternative, the Trust Fund Maintained by the Court Should Alternatively be used for Remediating the Victims***

**12.** The ICC on receiving proof of commission of a crime under its jurisdiction by an individual or a group of individuals, has the power to transfer money and other property for the utilization of the victims or the relatives of victims who faced death or heavy losses due to the commission of the crime, through its trust fund. The purpose of this trust fund is to provide compensation to the victims of abovementioned crimes in case the DEFENDANT

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<sup>185</sup> Rome Statute, Art. 75.

<sup>186</sup> Rule 98, the Rules of Procedure and Evidence.

<sup>187</sup> *Supra* note 21.

<sup>188</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, U.N. Doc. A/RES/ 40/34/Annex (Nov. 29, 1985).

does not have the resources to provide compensation on his own. In *casu*, the victims receiving compensation as quickly as possible is of paramount importance as it would greatly assist them in rebuilding their lives.

13. Therefore, it is submitted that the DEFENDANT or alternatively, the trust fund, should provide the victims with suitable compensation for the losses suffered.

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**Issue 2: Whether the Charge can be Recharacterized from Article 8(2)(b)(xx) to Article 8(2)(b)(i) of the Rome Statute under Regulation 55 of the ICC Regulations?**

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14. The VLR submits that the charge against the DEFENDANT can be recharacterised under *Regulation 55 of the ICC Regulations*<sup>189</sup> to include the war crime under *Article 8(2)(b)(i) of the Rome Statute*<sup>190</sup> as the chamber has the powers to recharacterise the charge (2.1.), the recharacterisation does not exceed the facts and circumstances mentioned in the initial charge (2.2.), the recharacterisation of charge does not prejudice the rights of DEFENDANT (2.3.), and the recharacterisation does not violate the DEFENDANT’S fair trial rights (2.4.).

### 9.1. THE CHAMBER HAS THE POWERS TO RECHARACTERISE THE CHARGE

15. It is submitted that the TC has the power to recharacterize is permissible under *Regulation 55 of the ICC Regulations* from *Article 8(2)(b)(xx) to Article 8(2)(b)(i) of the Rome Statute*. According to *Regulation 55*, the TC has the authority to modify the legal characterisation of facts to accord with the crimes under *Article 6, 7 or 8*, or to accord with the form of participation of the accused under *Article 25 and 28*, without exceeding the facts and circumstances described in the charges and any amendments to the charges.<sup>191</sup>

16. The VLR submit that *Regulation 55* is imperative to be invoked in the present case as it is still in the Pre-Trial Phase and a recharacterisation would accurately reflect the facts and circumstances. This Regulation is used in order to enhance judicial effectiveness and enable the TC to close any breaches that might develop if the PROSECUTION’S accusations do not correspond to the evidence presented at trial.<sup>192</sup> The main intent is to ensure that there exists no circumstances in which the DEFENDANT is exonerated despite having been proven guilty beyond reasonable doubt of a crime falling under the court's purview for the crime committed.<sup>193</sup>

17. It is submitted that *Regulation 55* accords the ICC with the power to alter the legal evaluation of the evidence, even if it differs from how the accused was charged, as the final

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<sup>189</sup> Regulations of the Court, International Criminal Court, ICC-BD/01-05-16, 26 May 2004, “*Regulation 55*”.

<sup>190</sup> Rome Statute for the Establishment of the International Criminal Court, 2187 U.N.T.S. 90, July 1 2002, Art. 8(2)(b)(i) “*Rome Statute*”.

<sup>191</sup> Elinor Fry, *Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW, 577-597 (2016).

<sup>192</sup> CARSTEN STAHN et. al., THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT: A CRITICAL ACCOUNT OF CHALLENGES AND ACHIEVEMENTS (Oxford University Press, 2015).

<sup>193</sup> Sienna Merope, *Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC*, 22 CRIMINAL LAW FORUM 311 (2011).

right stands with the prosecutor of the case at hand to allege a charge.<sup>194</sup> Moreover, as held in the *Lubanga* case,<sup>195</sup> upon the request of victims a recharacterisation was done to include sexual crimes. Similarly, in *casu* victims have specifically requested for a recharacterisation to account the war crimes committed against the civilian population.

## 9.2. RECHARACTERISATION DOES NOT EXCEED THE FACTS AND CIRCUMSTANCES MENTIONED IN THE INITIAL CHARGE

18. According to *Regulation 55*, the outcome of the Recharacterisation must not exceed the facts and circumstances mentioned in the initial charges.<sup>196</sup> In *Laurent Gbagbo*,<sup>197</sup> it was held that the term “*facts and circumstances*” refer to the material facts at hand.
19. In *casu*, the DEFENDANT is charged for the use of weapons that have caused superfluous injury and unnecessary suffering to about 600 people, including civilians. The proposed recharacterisation is to include *Article 8(2)(b)(i)*, which is the war crime of intentionally directing attacks against the civilian population or civilians not taking direct part in hostilities. This constitutes a material fact, that would form the basis of the Conviction.
20. The failure to include *Article 8(2)(b)(i)* would minimise the scope of the trial by not taking into account all the acts committed by the DEFENDANT as the actions under *Article 8(2)(b)(i)* require *mens rea*. Therefore, since the facts relevant for both charges are similar and form a part of the same chain of transaction, a recharacterisation in the present case reflects the true *mens rea* and criminal responsibility of the DEFENDANT.

## 9.3. RECHARACTERISATION OF CHARGE DOES NOT PREJUDICE THE RIGHTS OF DEFENDANT

21. The DEFENDANT may argue that the recharacterisation to include the new charge is a substantive departure from the initial charge, it is submitted that as per the Decision in *Lubanga*,<sup>198</sup> substantive departures are allowed in so far as it does not exceed the facts and circumstances of the initial charge. As submitted above, the recharacterisation of the charge is in accordance with the facts of the present case. This can further be observed through the

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<sup>194</sup> *Supra* note 1.

<sup>195</sup> Prosecutor v. Lubanga, ICC-01/04-01/06, Pre-Trial Chamber Judgment, “*Lubanga*”, ¶¶37, 39, (Jan. 29, 2007).

<sup>196</sup> Kevin Jon Heller, *New Essay on the Legal Recharacterization of Facts at the ICC*, OPINIOJURIS (Dec. 23, 2013), <http://opiniojuris.org/2013/12/23/new-essay-legal-recharacterization-facts-icc/>.

<sup>197</sup> The Prosecutor v. Laurent Gbagbo and Charles BléGoudé, ICC-02/11-02/11, PTC III, ¶140 (6 January 2012).  
<sup>198</sup> *Supra* note 9.



fact that there exists evidence to show that hospitals, reservoirs, medical stores and shelters, which have a concentration of civilians were attacked. Therefore, there is not a substantive departure from the facts and circumstances with which the DEFENDANT is previously charged.

#### **9.4. RECHARACTERIZATION DOES NOT VIOLATE THE DEFENDANT’S FAIR TRIAL RIGHTS**

- 22.** The DEFENDANT may argue that the fair trial rights guaranteed under *Article 64 of the Rome Statute* which provides for fair and expeditious trial conducted with full respect for the rights of the accused would be violated on account of recharacterisation. However, the VLR submits that the stage at which the recharacterisation is sought is at the stage where the trial has not commenced. In the *Bemba* case,<sup>199</sup> recharacterisation was done by the TC after three years from when the allegations were confirmed and two years after the trial started.
- 23.** Similarly in the *Katanga*,<sup>200</sup> recharacterisation was done after six months from after the end of the trial proceedings. Furthermore, under *Regulation 55* the DEFENDANT would still be provided with the necessary obligation during the trial to examine any evidence presented against him. The Recharacterisation does not prejudice the right of the DEFENDANT to question inculpatory evidence and introduce exculpatory evidence.<sup>201</sup> Therefore, the recharacterisation does not violate the fair trial rights of the DEFENDANT.

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### **Issue 3: Whether Paul Anderson can be held liable under Article 8(2)(b)(i) of the Rome Statute?**

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<sup>199</sup> Prosecutor v. Bemba Gombo, ICC-01/05-01/08, “*Bemba Gombo*”, ¶140.

<sup>200</sup> Prosecutor v. Katanga, ICC-01/04-01/07, Trial Chamber Judgment, “*Katanga*”, ¶¶1217-1218, (Mar. 7, 2014).

<sup>201</sup> Mark Klamburg, *Recharacterisation of Charges in International Criminal Trials*, UR FESTSKRIFT TILL CHRISTIAN DIESEN 327 - 345 (2014).

24. The VLR submits that the DEFENDANT in the present case is liable under *Article 8(2)(b)(i) of the Rome statute* for “*intentionally directing*” attacks against the civilian population or civilian population not taking direct part in the hostilities. The threshold under 8(2)(b)(i) does not require an “*actual*” attack on the civilian population in question.<sup>202</sup> In *casu*, the DEFENDANT directed an attack in the context of IAC(3.1), the object of the attack was civilian population (3.2), and the DEFENDANT had the *mens rea* for the same (3.3).

### 3.1. THE DEFENDANT DIRECTED AN ATTACK IN THE CONTEXT OF IAC

25. According to *Article 8 of the Rome Statute*, there exists a list of serious violations of the laws and customs applicable for IAC, and one such violation is *Article 8(2)(b)(i)*, which is “*intentionally directed attack against the civilian population and civilian population not taking direct part in hostilities*”.<sup>203</sup> The DEFENDANT has failed to take necessary steps or precautions to determine the status of the civilian population and has chosen to attack them despite it being in the context of IAC.

26. According to *Article 57 of AP I*,<sup>204</sup> necessary precautions are required to be taken before attacks are launched to ensure that the civilian population is protected from the process of planning the attack. The requirement under *Article 57* also prescribes refraining from deciding to launch any attack which may cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

27. However, in the present case, no such precaution has been taken by the DEFENDANT, and the high command of the Republic has explicitly given orders to target the civilian population in the Emerald city specifically. In *casu*, the DEFENDANT has committed the act of attacking the civilian population as well as directing the attacks. Approximately 600 people, including civilians residing in the Emerald City, have been killed as a result of the vacuum bombs, which satisfy the act of attacking and killing the civilian population.<sup>205</sup> In *Prosecutor v. Milan Martić*,<sup>206</sup> the former president of the Republic of Serbian Krajina ordered an unlawful attack against Zagreb's civilian population resulting in at least two

<sup>202</sup> PROFESSOR ANTONIO CASSESE ET.AL., *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 762, (Oxford University Press 2002).

<sup>203</sup> Rome Statute, Art. 8(2)(b)(i).

<sup>204</sup> AP I, Art. 57.

<sup>205</sup> Compromis, ¶ III(b).

<sup>206</sup> *Prosecutor v. Milan Martić*, IT-95-11-T, Trial Chamber Judgment, “*Martić*”, ¶¶40, 45-46, 67-69, (Int’l Crim. Trib. for the Former Yugoslavia Jun. 12, 2007).

deaths and numerous injuries to civilians and with knowledge and intent, violating the laws and customs governing the conduct of war, a crime recognised by *Articles 3 and 7(1) of the Tribunal Statute*.

### 3.2. THE OBJECT OF THE ATTACK WAS CIVILIAN POPULATION

28. According to *Article 50 of the AP I*, “*civilians*” are defined as all persons who are civilians, and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. In case of doubt about whether a person is a civilian, that person shall be considered to be a civilian.<sup>207</sup>
29. In this case, the orders of the Republican Ministry of Defence clearly states that “*Titanian blood had to be drawn onto the streets in the broad daylight and it was imperative that a spectacle be made immediately.*”<sup>208</sup> Furthermore, the DEFENDANT also stated that the residents of the Emerald City had to be “*neutralised*” with as much urgency as the drafted soldiers because of their alleged contribution to war efforts through social media.<sup>209</sup> This demonstrates a clear intent by the DEFENDANT to consider the object of the attack as civilian population or civilian population not taking direct part in hostilities.
30. Furthermore, these attacks were launched on seven different occasions in places such as hospitals, medical stores, water reservoirs, and shelters.<sup>210</sup> It is common knowledge that these consist mainly of civilians, however, the DEFENDANT still chose to attack these places even though they did not take any part in the hostilities, which represents a clear *mens rea* to attack them. Therefore, the DEFENDANT has made use of the armed force to carry out a military operation during the course of an armed conflict specifically against the civilian population.

### 3.3. THE DEFENDANT HAD THE MENS REA FOR THE SAME

31. It is submitted that the “*intention*”<sup>211</sup> of the DEFENDANT assumes primacy while characterising under *Article 8(2)(b)(i)*. The completion of the crime is irrelevant as the

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<sup>207</sup> AP I, Art. 50(1).

<sup>208</sup> *Supra* note 18.

<sup>209</sup> *Id.*

<sup>210</sup> Compromis, ¶ III(c).

<sup>211</sup> KNUT DORMANN, *ELEMENTS OF WAR CRIME UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY* 246, (Cambridge University Press 2009).

intention is to be accounted for by the court in determining the offence under *Article 8(2)(b)(i)*.<sup>212</sup> Intention, which is a type of *mens rea* is a definitive proof of what the DEFENDANT wished to do. There are two grounds to be met for the intention to be visible<sup>213</sup>, **First, there must be a conception of a crime:** In *casu*, the DEFENDANT decided to launch a blanket attack on the civilian population under the garb of not being able to differentiate between them and military personnel. Concurrently, he carried out a premeditated attack to neutralise the civilian population along with the military in Emerald City.

**32. Second, there must be an unconditioned decision to carry it:** In the present case, the DEFENDANT has anticipated all elements of the crime to be committed and decided to carry it out to full completion. It is submitted that the DEFENDANT has satisfied the objective requirement of taking steps towards the commission of the crime. The standard that has to be met for the same is that of a “*substantial step*” being taken by the DEFENDANT. In *casu*, the order from the Republican High Command instructed the military commanders to cause “*maximum loss to life and assets*” in Titan without causing loss of Republican life. The mandate by the Ministry of Defence also stated that “*Titanian blood had to be drawn into broad daylight to make a spectacle out of the same*.”

**33.** Therefore, as a general rule, criminal liability under the *Rome Statute* only arises if the material elements of a crime are committed “*with intent and knowledge*”,<sup>214</sup> and in this case, the *mens rea* of the DEFENDANT is proved.

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#### Issue 4: Whether Paul Anderson can be held liable under article 8(2)(b)(xx) of the Rome Statute?

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**34.** It is submitted that the DEFENDANT is still liable under *Article 8(2)(b)(xx) of the Rome Statute* as the DEFENDANT has made use of weapons that have caused superfluous injury and unnecessary suffering (**4.1.**), the weapons used are inherently indiscriminate in violation of laws of IAC (**4.2.**), the acts of the DEFENDANT violate the principles of

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<sup>212</sup> *Id.*

<sup>213</sup> PROFESSOR ANTONIO CASSESE ET.AL., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 763, (Oxford University Press 2002).

<sup>214</sup> WILLIAM A. SCHABAS & NADIA BERNAZ, ROUTLEDGE HANDBOOK ON INTERNATIONAL CRIMINAL LAW 233,(Routledge Handbooks 2011).

proportionality under customary IHL (4.3.), and the DEFENDANT cannot invoke the justification of military necessity (4.4.).

#### 4.1. THE DEFENDANT HAS MADE USE OF WEAPONS THAT HAVE CAUSED SUPERFLUOUS INJURY AND UNNECESSARY SUFFERING

35. According to the ICJ's advisory opinion in the *Legality of the threat or use of nuclear weapons* case,<sup>215</sup> IHL consists of two cardinal principles, *first*, the protection of the civilian population and establishing the distinction between combatants and non-combatants and *second*, prohibition to cause unnecessary suffering to combatants and using the weapons causing them such harm or uselessly aggravating their suffering. In the application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.<sup>216</sup>

36. The term “*superfluous harm and unnecessary suffering*” refers to the impacts of particular weapons that are “*of a nature to cause*” these consequences based on their design. This rule of customary international law is one of the few measures intended to protect combatants from certain weapons that are deemed abhorrent, or that cause more suffering than is necessary for their military purpose.<sup>217</sup> According to the *Shimoda* case,<sup>218</sup> the use of a weapon that inevitably results in the death of those who are already out of the fight and deepens their suffering needlessly is outside the scope of this objective, and is therefore against humanity.

37. In *casu*, the use of weapons by the DEFENDANT is vacuum bombs, which are also called as fuel-air explosive devices or thermobaric weapons, are not explicitly unlawful; it is only on a technicality.<sup>219</sup> However, its use in particular situations may be unlawful.<sup>220</sup> According to a Report by the Human Rights Watch,<sup>221</sup> thermobaric bombs have devastating effects such

<sup>215</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

<sup>216</sup> *Id.*

<sup>217</sup> WILLIAM BOOTHBY, *WEAPONS AND THE LAW OF ARMED CONFLICT* 57, (Oxford University Press 2009).

<sup>218</sup> Ryuichi Shimoda et al. v. The State., 32 INTERNATIONAL LAW REPORTS 626–642 (1966).

<sup>219</sup> Matt Montazzoli, *Are thermobaric weapons lawful*, Leiber Institute, West Point: Articles of War (Mar. 23, 2022), <https://lieber.westpoint.edu/are-thermobaric-weapons-lawful/#:~:text=Thermobaric%20weapons%20are%20not%20incendiary,to%20generate%20blast%20and%20pressure.>

<sup>220</sup> Marianne Hanson, *What are thermobaric weapons? And why should they be banned?*, ECONOMIC TIMES, (Mar. 3, 2022) <https://economictimes.indiatimes.com/news/defence/what-are-thermobaric-weapons-and-why-should-they-be-banned/articleshow/89964839.cms?from=mdr>

<sup>221</sup> Press Release, Human Rights Watch, *Chechnya Conflict: Use of Vacuum Bombs by Russian Forces*, (Feb 1, 2000) <https://www.hrw.org/news/2000/02/01/chechnya-conflict-use-vacuum-bombs-russian-forces.>

as those near the ignition are completely destroyed, and those at the fringe are likely to suffer various serious internal injuries such as crushed ear organs, bursting of eardrums, blindness, ruptured lungs and other internal organs.

38. Article 2 of *The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons*<sup>222</sup> states prohibits any armed force from pursuing a military objective located in any area where there is a concentration of civilians who are likely to be the object of air delivered incendiary weapons and such weapons that are not air-delivered incendiary weapons.<sup>223</sup> In *casu*, it can be held that due to the nature of the use of the weapon and the use of fuel, these forms of weapons can be interpreted to be incendiary weapons, which places liability on the Republic for indiscriminate consequences for the civilian population.

#### 4.2. THE WEAPONS USED ARE INHERENTLY INDISCRIMINATE IN VIOLATION OF LAWS OF INTERNATIONAL ARMED CONFLICT

39. According to Article 51(4)(b) and (c) AP I,<sup>224</sup> “**indiscriminate attack**” refer to those attacks against civilians which employ a method or means of combat which cannot be directed at a specific military objective or those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol. The term “**inherently indiscriminate weapons**” are interpreted by the ICRC Commentary as those weapons that by their very nature have an indiscriminate effect. Examples of this include bacteriological means of warfare, V2 rockets used at the end of the Second World War, among others.<sup>225</sup>

40. It is submitted that the use of thermobaric bombs does not satisfy the threshold for inherently indiscriminate weapons. The ICJ has equated the term indiscriminate attack with the act of attacking civilians.<sup>226</sup> The nature of inherently indiscriminate weapons is such that by their nature they are incapable of complying with the principles of distinction and proportionality.<sup>227</sup>

41. It is submitted that even if the thermobaric weapon might be targeted specifically at military installations and personnel, its effects cannot be contained to one area. In all likelihood, many civilians would be killed if such bombs were used in any city. Using explosive

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<sup>222</sup> *Supra* note 58.

<sup>223</sup> *Id.*

<sup>224</sup> AP I, 51(4)(b) & 51(4)(c).

<sup>225</sup> STUART CASEY-MASLEN, *WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW*, (Cambridge University Press 2014).

<sup>226</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J Rep. 226 (July 8).

<sup>227</sup> *Id.*

weapons in populated areas would result in indiscriminate and disproportionate attacks.<sup>228</sup> Aerial bombs, even if aimed at military objectives, pose a grave threat to civilians because of their wide blast radius. In the present case, the TC must note that the attack has been made in an indiscriminate manner, as defined above and has specifically targeted civilian dwellings and shelters, as admitted by the DEFENDANT, which makes the offence all the graver.<sup>229</sup> It is further submitted that the acts of the defendant have caused irreparable damage to the victims of the crime, i.e, civilian residents of Emerald City

#### **4.3. THE ACTS OF THE DEFENDANT VIOLATE THE PRINCIPLES OF PROPORTIONALITY UNDER CUSTOMARY IHL**

- 42.** It is submitted that the rule of proportionality and the precautionary measures to be taken are the burden of the attacker.<sup>230</sup> The rule of proportionality prohibits “*an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.*”<sup>231</sup> Using a vacuum bomb in a populated urban area, for instance, would generally violate the rule. In *casu*, the DEFENDANT failed to take precautionary measures before commencing the attack and instead intentionally targeted areas that he knew were populated by civilians, causing them unnecessary pain and suffering.
- 43.** The actual and intended effects of the same also vary in a high degree as the effects of thermobaric bombs, as established above, are grave and serious in nature with long lasting implications on the human body present near the attack while the conventional weapons used by Titan might result in death and injury, they do not cause superfluous injury and unnecessary suffering. Furthermore, the Titanian forces in their attack solely targeted the military bases of the Republican troops, whereas the DEFENDANT deliberately attacked and directed the attack against the civilian population.<sup>232</sup> Therefore, the principle of proportionality has been violated in the present case.

#### **4.4. THE DEFENDANT CANNOT INVOKE THE DEFENCE OF MILITARY NECESSITY**

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<sup>228</sup> *Supra* note 72.

<sup>229</sup> *Id.*

<sup>230</sup> Georg Nolte, *Thin or Thick? The Principle of Proportionality and International Humanitarian Law*, 4 L. & ETHICS HUM. RTS. 243 (2010).

<sup>231</sup> *Id.*

<sup>232</sup> *Supra* note 19.



44. The question of military necessity refers to the rules of IHL and the principle that a belligerent may apply only that amount and kind of force necessary to defeat the enemy.<sup>233</sup> The unnecessary or wanton application of force is therefore prohibited. The prerequisite for an act to be considered to have been done in military necessity are not satisfied in the present case as<sup>234</sup> and a failure to fulfil any one of these requirements renders the course of action unjustified by military necessity under international humanitarian law.
45. This is primarily for two reasons, first, there cannot be an attainment of military purpose by attacking civilians by using such hazardous and indiscriminate weapons especially during an IAC and second, military necessity is not justified when the attacks are directed against civilians, which violates the principles of customary IHL.
46. Therefore, the DEFENDANT is liable under *Article 8(2)(b)(xx) of the Rome Statute* for using weapons resulting in superfluous injury and unnecessary suffering.

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**Issue 5: Whether the acts of Paul Anderson are shielded under the defence of Superior Orders under Article 33 of the Rome Statute?**

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47. It is submitted that the acts of the DEFENDANT are not shielded by the principle of superior orders under *Article 33 of the Rome Statute*<sup>235</sup> there was no effective control over the acts of the DEFENDANT (5.1.), the DEFENDANT knew that the order was unlawful (5.2.) and there exists individual criminal responsibility on the part of the DEFENDANT (5.3.).

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<sup>233</sup> Nobuo Hayashi, *Contextualizing Military Necessity*, 27 EMORY INT'L L. REV. 189 (2013).

<sup>234</sup> DIETER FLECK, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW*, (Oxford University Press 4<sup>th</sup> ed. 2021).

<sup>235</sup> Rome Statute, Art. 33.



### 5.1. THERE WAS NO EFFECTIVE CONTROL OVER THE ACTS OF THE DEFENDANT

48. The intent behind the *Rome Statute* is to prosecute such persons who are direct perpetrators of a crime in question and connect the crimes committed by them instead of holding the state responsible for the crimes in question.<sup>236</sup> Therefore, the PROSECUTION, in this case, has attributed criminal liability onto the DEFENDANT, Mr Paul Anderson, for his individual acts committed during an IAC and not the acts committed by the state in general, which would be beyond the purview of the ICC and the *Rome Statute*.
49. The DEFENDANT may argue that there existed a superior-subordinate relationship between the head of the state, Mr. David Wallace and the DEFENDANT and that there is effective control over his actions. However, it is submitted that in the present case, there was no effective control over the actions of the DEFENDANT by either Mr. David Wallace or the Ministry. The ad-hoc tribunals have developed the effective control test wherein if the DEFENDANT exercised effective control over the person committing the alleged base crime, is he or she that person's superior.<sup>237</sup> According to the ICTY Appeals Chamber in *Delalic*, effective control depends on the material ability to prevent or to punish criminal conduct.<sup>238</sup>
50. In *casu*, Mr. David Wallace had given rather vague orders to shed Titanian blood, however, the means and methods to achieve the same was not prescribed. The DEFENDANT chose to attack the civilian population who had no role to play in the armed conflict and he also made use of thermobaric bombs which are known to have life endangering effects.<sup>239</sup>
51. The DEFENDANT's action of using Thermobaric weapons can in no way be attributed as a result of the orders given by the Ministry of Defence as the same result could have been achieved using various other means. Furthermore, it is submitted that the DEFENDANT being an expert operator of and having comprehensive knowledge of the use of thermobaric weapons is aware of the effects caused by it. Therefore, the acts of the DEFENDANT are of his own doing and attribute individual criminal responsibility.

### 5.2. THE DEFENDANT KNEW THAT THE ORDER WAS UNLAWFUL

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<sup>236</sup> OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 333, (2<sup>nd</sup> ed. Beck/Hert 2008).

<sup>237</sup> Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18(4) EUROPEAN JOURNAL OF INTERNATIONAL LAW 649-668 (2007).

<sup>238</sup> Prosecutor v. Delalić et al., IT-96- 21-T, Trial Chamber, "*Delalic*", ¶186 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Prosecutor v. Akayesu (Judgment) ICTR-96-4-T, "*Akayesu*", ¶¶604-605, 609, 611, 613, 616-617, (Sept. 2, 1998).

<sup>239</sup> *Supra* note 18 at p. 24

52. It is submitted that the DEFENDANT possessed knowledge that the orders were unlawful. The presence of knowledge is a question of fact.<sup>240</sup> Even if the DEFENDANT operated from the perspective that the orders given by the superior were legal and valid in the context of IAC, being in the Republican armed forces for over 13 years, he is aware of the basic principles under customary IHL and what acts violate international law.<sup>241</sup> The DEFENDANT cannot now claim that he was unaware that the acts were unlawful.
53. The only means to prove whether the DEFENDANT possessed such knowledge is through circumstantial evidence.<sup>242</sup> The circumstantial evidence that can be gathered also points towards the fact that the DEFENDANT knew that the orders were unlawful and exercised unlimited discretion in bringing about the implementation of the order by violating the norms of international law.
54. This can be seen through the fact that the DEFENDANT used thermobaric bombs, considering “*anything that moves in the emerald city as military asset*”<sup>243</sup> thereby failing to apply the principle of distinction and also stating that persons not part of the enlisted armed forces should also be dispatched with the forces as only this would help further their military objectives and remove their military disadvantage. He has further stated that for the purpose of the war he had to unlearn the IHL norms that were hard-wired in him as a military man.<sup>244</sup> This shows that most of his actions are attributed to him and not the orders that he received.

### 5.3. THERE EXISTS INDIVIDUAL CRIMINAL RESPONSIBILITY ON THE PART OF THE DEFENDANT

55. Individual responsibility is a fundamental principle of criminal law. It is submitted that the DEFENDANT is liable for individual criminal responsibility as the defence of superior orders cannot be established in the present case. The DEFENDANT satisfies the requirements under *Article 25 of the Rome Statute* which are as follows:

3. The DEFENDANT has committed the crimes under *Article 8(2)(b)(i) and 8(2)(b)(xx) of the Rome Statute* with the requisite *mens rea* for the same. These acts were done without any specific command or order by any superior.
4. The DEFENDANT being a weapons expert knew of the effects of the thermobaric bombs and went ahead to use it resulting in the death of 600 persons including civilian

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<sup>240</sup> ROBERT CRYER ET.AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, (Cambridge University Press, 2007).

<sup>241</sup> *Supra* note 18.

<sup>242</sup> *Supra* note 95.

<sup>243</sup> *Supra* note 18 at p. 24.

<sup>244</sup> *Id.*

population. He has induced the commission of the war crime onto his own subordinates being a military commander and attacking civilians merely for posting on social media.

**56.** Therefore, there exists individual criminal responsibility on the part of the DEFENDANT under *Article 25 of the Rome Statute*.

## PRAYER

Wherefore, in light of the issues raised, arguments on merit, evidence supplied and authorities cited, it is most humbly and respectfully prayed that:

- ix. A Recharacterisation under *Regulation 55 of the Rome Statute's Regulations* is imperative to charge the DEFENDANT for the crimes committed under *Article 8(2)(b)(i) of the Rome Statute*.
- x. The DEFENDANT is liable under *Article 8(2)(b)(i) of the Rome Statute* for intentionally directing attacks on civilians and civilians not taking direct part in hostilities.
- xi. The DEFENDANT is liable under *Article 8(2)(b)(xx) of the Rome Statute* for use of weapons, projectiles that have caused superfluous injury, unnecessary suffering and which are inherently indiscriminate.
- xii. The DEFENDANT cannot take the defence of “*superior order*” under *Article 33 of the Rome Statute* and bears individual criminal responsibility.
- xiii. The victims be provided with reparations, restitution and compensation as deemed fit by the Chamber.

All of which is respectfully submitted,

॥ वसुधैव कुटुम्बकम् ॥

ON BEHALF OF THE VICTIMS

LEGAL REPRESENTATIVE OF THE VICTIMS