

**Moot Number: K06 D**

**MEMORIAL FOR THE DEFENDANT**

## PLEADINGS AND AUTHORITY

### **I. DR STAGE IS NOT GUILTY OF THE WAR CRIME OF BIOLOGICAL EXPERIMENTS.**

#### **1. The Banksia Personnel Did Not Commit This Crime.**

##### **(1) The experiment did not endanger the prisoners' health any more than the Rash.**

Geneva Conventions (GCs) and Additional Protocol I (AP I) provide that in all circumstances, States must take all possible measures to their fullest possible extent to ensure adequate care for the wounded and sick.<sup>1</sup> Experimental treatment should be allowed if the person cannot be cured through known methods and if it is consistent with generally accepted medical standards.<sup>2</sup>

In this case, there was no known cure for the Rash.<sup>3</sup> Although still at trial stage,<sup>4</sup> the vaccines were the only hope for a cure. The experiments were carried out by professional research teams, and Rash VA proved a success.<sup>5</sup> Taking into account the 20-25% mortality rate of the Rash,<sup>6</sup> the experiment did not endanger the prisoners' health any more than the Rash.

##### **(2) The intent of the experiment was therapeutic and can be justified by medical reasons.**

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<sup>1</sup> GC II, Art.18; AP I, Art.10(2).

<sup>2</sup> AP I, Art.11; J. Pillod *et al.*, *Commentary on the AP I&II* (Nijhoff, 1987), p.152; O. Uhler *et al.*, *Commentary on the Geneva Conventions* (ICRC, 1958), Vol.III, p.141.

<sup>3</sup> Moot Problem, para.2.5.

<sup>4</sup> *Ibid.*, para.3.7.

<sup>5</sup> *Ibid.*, paras.3.6, 3.8.

<sup>6</sup> *Ibid.*, para.2.5.

The law prohibits using prisoners as “guinea-pigs”,<sup>7</sup> while allowing new methods which are justified on medical grounds and dictated solely by a desire to improve the condition of the patient.<sup>8</sup> In addition, the consent of the human subject satisfies generally accepted medical standards.<sup>9</sup>

In this case, Banksia accelerated the testing of the vaccine and sought to cure the prisoners infected by the Rash.<sup>10</sup> After being fully informed of the potential consequences, the prisoners volunteered for the trials and signed the requisite consent forms.<sup>11</sup> Thus, the intent of the vaccine trials was therapeutic and can be justified by medical reasons.

### **(3) The nexus of the trials to the IAC cannot be established.**

The “nexus” element can be satisfied if the perpetrator acted in furtherance of or under the guise of the IAC.<sup>12</sup> Factors such as whether the accused was a combatant and whether the acts were to serve a military goal should be considered.<sup>13</sup>

In this case, the vaccine trials were conducted by Dr Clever’s research team of medical professionals (rather than military forces).<sup>14</sup> Furthermore, the intent of the trials, as stated above, was to develop a vaccine and cure the infected prisoners rather than develop a weapon as in the case of the SPV-1.<sup>15</sup>

## **2. Even Assuming that This Crime Has Been Committed, Dr Stage Bears No Superior Responsibility under Article 28(a).**

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<sup>7</sup> *Supra* note 2, Uhler, *Commentary*, Vol.III, p.141.

<sup>8</sup> *Ibid.*, Vol.1, p.139.

<sup>9</sup> Nuremberg Code, Art.1; A. Cassese *et al.*(eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, 2002), p.393.

<sup>10</sup> Moot Problem, para.3.5.

<sup>11</sup> *Ibid.*, para.3.7.

<sup>12</sup> ICTY, *Kunarac*, Appeal Judgment, para.58.

<sup>13</sup> *Ibid.*, para.59.

<sup>14</sup> Moot Problem, paras.3.6, 3.7.

<sup>15</sup> *Ibid.*, para.3.16.

In *Bemba*, a liable military commander should have effective control over his subordinate forces,<sup>16</sup> and the simple ability to exercise influence should be excluded.<sup>17</sup> In addition, he must have known or, owing to the circumstances, should have known about the alleged acts.<sup>18</sup>

In this case, Dr Stage was no longer in charge of the Banks Institute or Dr Clever's research team,<sup>19</sup> thus the perpetrators were not his subordinates and the effective control is not established. Furthermore, Dr Stage was only informed of the therapeutic test of Rash VA, while information of Rash VB or VC was inaccessible to him.<sup>20</sup> Therefore, Dr Stage is not responsible for this alleged crime.

## **II. DR STAGE IS NOT GUILTY OF THE WAR CRIMES OF ENLISTING AND USING CHILDREN.**

### **1. The Banksia Officials Did Not Commit This Crime.**

#### **(1) The youngsters were not enlisted into the national armed forces.**

According to *Lubanga*, "enlisting" means "to enroll on the list of a military body."<sup>21</sup> In this case, the six youngsters were recruited only on an *ad hoc* basis.<sup>22</sup> They never joined the BAF or PVF militia. Therefore, no enlistment occurred.

#### **(2) The youngsters were not used to participate actively in hostilities.**

The ICTR has found "active participation in hostilities" and "direct participation in hostilities" to be synonymous.<sup>23</sup> The Rome Statute's prohibition on children's active

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<sup>16</sup> ICC, *Bemba*, Confirmation of Charges Decision, para.407.

<sup>17</sup> ICTY, *Delic*, Trial Judgment, para.60; ICTY, *Kvočka et al.*, Appeal Judgment, para.144.

<sup>18</sup> ICC, *Bemba*, Confirmation of Charges Decision, para.407; ICTY, *Delalic*, Appeal Judgment, para.241.

<sup>19</sup> Moot Problem, paras.2.12, 3.7.

<sup>20</sup> *Ibid.*, paras.3.5, 3.10.

<sup>21</sup> ICC, *Lubanga*, Trial Judgment, para.608; K. Dörmann *et al.*, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge, 2003), p.377; O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck, 2008), p.492.

<sup>22</sup> Moot Problem, paras.3.11, 3.12.

<sup>23</sup> ICTR, *Akayesu*, Trial Judgment, para.629.

participation in hostilities derives from Article 77(2) of AP I,<sup>24</sup> which obligates parties to the conflict to ensure that children “do not take a direct part in hostilities.”<sup>25</sup> The ICRC Commentary to this article points out that gathering military information is not direct participation and thus outside this provision.<sup>26</sup>

In this case, the youngsters merely gathered information on the positions of the enemy.<sup>27</sup> Therefore their act does not constitute active participation in hostilities.

## **2. Even Assuming that This Crime Has Been Committed, Dr Stage Is Not Liable under Article 25(3)(a).**

### **(1) Dr Stage did not make an essential contribution to the alleged crime.**

A co-perpetrator is required to contribute essentially to the crime.<sup>28</sup> One’s contribution is essential if, without it, the crime could not have been committed.<sup>29</sup> Contributions of lesser significance, even if substantial, do not suffice.<sup>30</sup>

In this case, General Talent planned an intelligence-gathering mission that required youngsters small enough to crawl through pipes.<sup>31</sup> Dr Stage merely suggested one possible way to find such youngsters.<sup>32</sup> In addition, he was not personally involved in the recruitment of volunteers.<sup>33</sup> Although General Talent had referred to the Presidency during the recruitment, the BAF officer only sought confirmation from General Talent himself.<sup>34</sup> Therefore, Dr Stage’s contribution was not essential.

### **(2) Dr Stage neither knew nor should have known that the youngsters were**

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<sup>24</sup> *Supra* note 21, Dörmann, *Elements of War Crimes*, p.376.

<sup>25</sup> See Convention on the Rights of the Child, Art.38(2), which similarly prohibits only “direct” participation.

<sup>26</sup> *Supra* note 2, Pillod, *Commentary*, p.901.

<sup>27</sup> Moot Problem, paras.3.11, 3.12.

<sup>28</sup> ICC, *Lubanga*, Trial Judgment, para.1018; *Lubanga*, Confirmation of Charges Decision, para.346; *Katanga*, Confirmation of Charges Decision, para.521.

<sup>29</sup> ICC, *Katanga*, Confirmation of Charges Decision, para.525.

<sup>30</sup> ICC, *Lubanga*, Trial Judgment, para.999.

<sup>31</sup> Moot Problem, para.3.11.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, para.3.12.

<sup>34</sup> *Ibid.*

**under 15 years of age.**

A co-perpetrator must satisfy the subjective elements of the crime with which he is being charged.<sup>35</sup> Accordingly, the *mens rea* of the co-perpetrator liable for the war crime under Article 8(2)(b)(xxvi) must satisfy the “know or should have known” requirement imposed by the third element of this crime.

In this case, “boot camp” trainees ranged from 12 to 18 years old.<sup>36</sup> Dr Stage merely suggested finding volunteers among these youngsters and therefore could not foresee the exact age of such volunteers.<sup>37</sup> Nor should he have known the age of the six youngsters because, unlike General Talent and the BAF officer, he was not personally involved in the recruitment and the only official proof of age indicated these youngsters were 16 years of age.<sup>38</sup> The element of *mens rea* is thus missing.

### **III. DR STAGE IS NOT GUILTY OF THE WAR CRIME OF EMPLOYING METHODS OF WARFARE LISTED IN THE ANNEX TO THE STATUTE.**

#### **1. The BAF Did Not Commit This Crime.**

##### **(1) The Method of Warfare Adopted Is Not Inherently Indiscriminate or Disproportionate.**

The legality of a method of warfare must be assessed on the basis of not only the weapon used but also the manner in which it is used.<sup>39</sup> Whether such method complies with the principles of distinction and proportionality depends on, for instance, the controllability of its effects, the degree of risk it presents to the civilian population after its military purpose is served, and the expected military advantage

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<sup>35</sup> ICC, *Lubanga*, Confirmation of Charges Decision, para.349; *Katanga*, Confirmation of Charges Decision, para.527.

<sup>36</sup> Moot Problem, para.2.13.

<sup>37</sup> *Ibid.*, para.3.11.

<sup>38</sup> *Ibid.*, para.3.12.

<sup>39</sup> ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977* (Geneva, 2006), p.17.

weighed against the health hazard it imposes.<sup>40</sup>

In this case, the SPV-1 is not lethal if the vaccine is provided soon after infection, as witnessed by the six BAF human carriers who were vaccinated on their return.<sup>41</sup> Banksia used the SPV-1 against Lantana to “provoke some chaos” and had supplies of the vaccine at its disposal.<sup>42</sup> As soon as Lantana agreed to withdraw its forces, Banksia agreed to provide the vaccine.<sup>43</sup> The effect of the employment of the SPV-1 was thus limited and controllable. Moreover, the SPV-1 was used only as a last resort, without which the entire country could have fallen into enemy hands.<sup>44</sup> The magnitude of such expected military advantage satisfies the requirement of proportionality.

## **(2) Non-Bacteriological Methods of Warfare Are Not Included in the Current Annex.**

Terms in a treaty shall be interpreted according to their ordinary meaning.<sup>45</sup> The definition of a crime shall be strictly construed and, in case of ambiguity, interpreted in favor of the accused.<sup>46</sup> A plain reading of the 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (**1925 Protocol**) concludes that biological weapons which are non-bacteriological are not covered. The current annex to the Rome Statute, based on the 1925 Protocol, should be bound by this understanding.<sup>47</sup> Customary international law has indeed evolved to prohibit all biological weapons since 1925,<sup>48</sup> but the choice of the drafters of this annex to adopt the 1925 Protocol as its legal basis and to copy its wording against this backdrop bears evidence of their intention to criminalize

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<sup>40</sup> *Ibid.*, pp.18-19.

<sup>41</sup> Moot Problem, para.3.16.

<sup>42</sup> *Ibid.*, paras.3.5, 3.16.

<sup>43</sup> *Ibid.*, para.3.17.

<sup>44</sup> *Ibid.*, paras. 3.15, 3.16.

<sup>45</sup> Vienna Convention on the Law of Treaties, Art.31(1).

<sup>46</sup> Rome Statute, Art.22(2).

<sup>47</sup> Moot Problem, para.4.2.

<sup>48</sup> See, for example, *Question of Chemical and Bacteriological (Biological) Weapons*. UNGA, A/RES/2603(XXIV)A.

only bacteriological weapons.

In this case, Banksia used only the SPV-1 against Lantana.<sup>49</sup> The SPV-1 is a smallpox virus.<sup>50</sup> Viruses and bacteria are two distinct life forms.<sup>51</sup> The use of the SPV-1 is thus outside Article 8(2)(b)(xx) of the Rome Statute.

## **2. Even Assuming that This War Crime Has Been Committed, Dr Stage Is Not Liable under Article 25(3)(c) .**

Article 30 of the Rome Statute has excluded the concept of *dolus eventualis* from its framework and requires the perpetrator to at least foresee that the consequence of his conduct will of necessity occur.<sup>52</sup> Furthermore, under Article 25(3)(c), the accused must act “for the purpose of facilitating the commission of such a crime”, a subjective requirement that goes beyond mere knowledge that his act will assist the offence.<sup>53</sup>

In this case, Dr Stage ordered an “all out” counter-attack and, upon enquiry from General Talent, consented to the employment of “all possible means of last resort” without pinpointing the use of the SPV-1.<sup>54</sup> This is consistent with his previous circumspection towards the use of the SPV-1.<sup>55</sup> Therefore, Dr Stage had neither foreseen that the SPV-1 would of necessity be employed nor purposefully facilitated its employment, and thus cannot be held liable under Article 25(3)(c).

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<sup>49</sup> Moot Problem, para.3.16.

<sup>50</sup> *Ibid.*, paras.2.10, 3.17.

<sup>51</sup> World Health Organization, *Public Health Response to Biological and Chemical Weapons: WHO Guidance* (Geneva, 2004), pp.42-44.

<sup>52</sup> ICC, *Lubanga*, Confirmation of Charges Decision, paras.364-369; *Lubanga*, Trial Judgment, para.1011.

<sup>53</sup> *Supra* note 9, Cassese, *Commentary*, p.889; *Supra* note 21, Trifflerer, *Commentary*, p.757.

<sup>54</sup> Moot Problem, paras.3.15, 3.16.

<sup>55</sup> *Ibid.*, para.3.5.



## **PRAYER**

The Defence submits that there is insufficient evidence to establish substantial grounds to believe that Dr Andrew Stage committed any of the war crimes under Article 8(2)(a)(ii), Article 8(2)(b)(xxvi) and Article 8(2)(b)(xx) of the Rome Statute. The Defence thereby respectfully requests this Honourable Court to decline to confirm the three charges against Dr Andrew Stage.

**RESPECTFULLY SUBMITTED**

Counsel for the Defence