

ICC MOOT COURT COMPETITION IN THE ENGLISH LANGUAGE

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THE APPEALS CHAMBER

**Case before the International Criminal Court (ICC):
Prosecutor v. Dragone Goodrider of Wessos**

**The Office of the Prosecutor's Submission in the
Appeal from the Pre-Trial Chamber's Decision on Confirmation of Charges
against Defendant Dragone Goodrider of Wessos**

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LIST OF ABBREVIATIONS

TERMS	ABBREVIATION
MOOT PROPOSITION OF ICC MOOT COURT COMPETITION 2021	CASE
CODE OF CRIMINAL PROCEDURE	CrPC
EUROPEAN COURT OF HUMAN RIGHTS	ECTHR
ELEMENTS OF CRIME	EoC
INTERNATIONAL CRIMINAL COURT	ICC
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA	ICTR
INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA	ICTY
INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG)	IMT
MINISTER OF DEFENCE	MoD
OFFICE OF THE PROSECUTOR	OTP
PARAGRAPH	¶
PRIME MINISTER	PM
PRE-TRIAL CHAMBER	PTC
RULES OF PROCEDURE AND EVIDENCE	RPE
READ WITH	R/W
SECTION	§
SPECIAL COURT FOR SIERRA LEONE	SCSL
UNDER ARTICLE	u/A
UNITED STATES	US
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STATEMENT OF FACTS

ABOUT THE STATES

Wessos and Eassos are located adjacent to each other. Eassos has ratified the Statute and Wessos is a non-party to the Statute. Both States are members of the UN and the WHO. Wessos is ruled by an authoritarian regime and has been a secretive country with little involvement in the international community, and has had a strained relationship with the government of Eassos.

ABOUT THE DEFENDANT

General Goodrider [hereinafter referred to as “**the Defendant**”] is a national of Wessos and the MoD. He is the second most powerful official with substantial autonomy in his sphere of authority. He has budgetary and command authority over all agencies and functions of the government relating to national security, Ministers of Transportation, Health, Public Safety, Defence and the Wessos armed forces and police.

THE SPREAD OF THE VIRUS

Wessos had been hit by the H5N8 Avian Influenza which affected poultry and wild birds. The Defendant ordered Dr. Rayder to develop a vaccine against the Influenza. Rayder pointed out that the Institute had never before worked with such a dangerous virus, and requested for an increased funding to upgrade the existing lab facility, including by adding airtight seals, improved air filtration, a shower in the anteroom, and an incinerator for contaminated clothing. He specifically warned the Defendant that “*without these upgrades there was a very high risk that a deadly virus could escape the lab into the general population of Wessos.*” The Defendant dismissed these requests and told Rayder that if he won’t get the job done under these conditions, he’ll be replaced by someone else who will.

After commencement of the development of the virus, Rayder reported to the Defendant that two scientists had failed to report to work as they were experiencing flu-like symptoms. The scientists traveled to their home near the Eassos border from the Lab on a crowded bus, potentially exposing dozens of individuals along the way to quarantine themselves. Goodrider instructed Rayder to continue the work with other scientists until the sick personnel recovered and returned to the Lab.

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Unfortunately, the two scientists had died and more scientists at the Lab started to show symptoms of serious illness.

RAYDER ESCAPED TO EASSOS

Rayder left the Institute with copies of his email correspondence and traveled to Eassos. He provided the government of Eassos copies of the correspondence with the Defendant regarding the development and escape of the deadly virus. The Eassos Ministry immediately forwarded them to the WHO. According to the WHO Report, the spread of the virus resulted in the death of 250,000 citizens of Eassos and severe illness to many more.

COUNCIL MEETING IN WESSOS

The Defendant convened an emergency meeting and prevented the ministers from informing the authorities of Eassos and the WHO. He said “*I don’t give a damn about Eassos. My order stands. Tell no one! Let’s focus on what we can do for Wessos.*” The minutes of this meeting were leaked on 16 April 2020 to the international press by the Secretary of the National Security Council.

PROCEEDINGS BEFORE THE PTC

Eassos couldn’t prosecute the Defendant due to lack of an extradition treaty. Thereafter, Eassos referred the matter to the OTP u/A 14 of the Statute. The Defendant notified the ICC that he would represent himself. On rejection of his request during the proceedings, the Defendant attempted to derail the proceedings of the Court by not cooperating with the counsel appointed by the Court. Further, the Defendant disrupted the Court at several instances by resorting to the use of foul language in the form of anatomical slang, racial slurs and curse words to refer to the Prosecutor and Judges.

The PTC ruled that *firstly*, that the Defendant was lawfully deprived of his rights u/A 61 and 67(1)(d) of the Statute. *Secondly*, that the Defendant may be prosecuted for commission of crimes against humanity, namely other inhumane acts, pursuant to Articles 7(1)(k) and 25(3)(b) of the Statute. *Thirdly*, that the preconditions set forth in Article 12 of the Statute are met in this case.

ISSUES

ISSUE I

WHETHER DEFENDANT DRAGONE GOODRIDER WAS UNLAWFULLY DEPRIVED OF HIS RIGHT TO BE PRESENT AT THE CONFIRMATION HEARING UNDER ARTICLE 61 OF THE ROME STATUTE AND TO REPRESENT HIMSELF UNDER ARTICLE 67(1)(D) OF THE ROME STATUTE?

ISSUE II

WHETHER THE CHARGED OFFENCES CAN BE PROSECUTED AS “OTHER INHUMANE ACTS” UNDER ARTICLE 7(1)(K) OF THE STATUTE AND WHETHER THE PROSECUTION MET ITS DUTY TO ESTABLISH WITH SUFFICIENT EVIDENCE THAT THERE WERE SUBSTANTIAL GROUNDS TO BELIEVE THAT DEFENDANT DRAGONE GOODRIDER ORDERED THE COMMISSION OF SUCH A CRIME UNDER ARTICLE 25(3)(B) OF THE STATUTE?

ISSUE III

WHETHER THE ICC HAS JURISDICTION TO PROSECUTE DEFENDANT DRAGONE GOODRIDER UNDER ARTICLE 12 OF THE ICC STATUTE, CONSIDERING THAT ALL OF HIS ACTIONS RELATED TO THE CHARGES OF OTHER INHUMANE ACTS OCCURRED IN HIS STATE OF NATIONALITY, WESSOS, WHICH IS NOT A PARTY TO THE ICC?

SUMMARY OF ARGUMENTS

I. THAT THE DEFENDANT WAS LAWFULLY DEPRIVED OF HIS RIGHT TO BE PRESENT AT THE CONFIRMATION HEARING UNDER ARTICLE 61 OF THE ROME STATUTE AND TO REPRESENT HIMSELF UNDER ARTICLE 67(1)(D) OF THE ROME STATUTE.

1. The Defendant was lawfully deprived of his right to be present at the confirmation hearing and the right to self-representation u/A 61 and 67(1)(d) of the Statute as these rights are not absolute and can be restricted due to disruptive behavior of the Defendant.
2. The PTC restricted the right to be present in accordance with the procedure established by law as explicit warning was issued to the Defendant, reasonable alternatives were measured and right was restricted to a minimal extent.
3. The Court ensured that the Defendant was provided a fair trial by imposing a stand-by counsel on the Defendant in the interest of justice. The Defendant's right to self-representation was reasonably restricted and the Court appointed counsel acted in the best interest of the Defendant.

II. THAT THE CHARGED OFFENCES SHOULD BE PROSECUTED AS "OTHER INHUMANE ACTS" U/A 7(1)(K) AND THAT THERE IS SUFFICIENT EVIDENCE TO BELIEVE THAT THE DEFENDANT ORDERED THE COMMISSION OF A CRIME U/A 25(3)(B) OF THE STATUTE.

1. The Defendant is liable u/A 7(1)(k) as the act is of similar character to any other act u/A 7(1) of the Statute and was committed with the intent or knowledge to inflict to cause great suffering or serious injury to body or to mental or physical health.
2. The contextual element of widespread and systematic attack against any civilian population pursuant to or in furtherance of a State or organizational policy is satisfied.
3. The Defendant is responsible u/A 25(3)(b) for ordering the crime as he was in a position of authority and instructed another person to commit a crime. The conduct had direct and substantial effect on the crime committed and the Defendant possessed the mental element for ordering.

III. THAT ICC HAS JURISDICTION TO PROSECUTE THE DEFENDANT U/A 12 OF THE ROME STATUTE.

1. The Defendant does not enjoy head of State immunity for international crimes.
2. The ICC has jurisdiction in the present matter u/A 12(2)(a) as conduct and crime u/A 12 are indistinct and mean the same. Moreover, the ICC has objective territorial jurisdiction u/A 12(2)(a) and the effects doctrine is applicable.

I. THE DEFENDANT WAS LAWFULLY DEPRIVED OF HIS RIGHT TO BE PRESENT AT THE CONFIRMATION HEARING UNDER ARTICLE 61 OF THE ROME STATUTE AND TO REPRESENT HIMSELF UNDER ARTICLE 67(1)(D) OF THE ROME STATUTE.

¶1. The PTC rightfully removed the Defendant from the Courtroom and appointed a counsel on the ground of disruption in the Court proceedings, in order to maintain the decorum of the Court. The OTP submits that the Defendant was lawfully deprived of his right to be present at the confirmation hearing u/A 61 of the Statute [1.1] and that the Defendant was lawfully deprived of his right to self-representation u/A 67(1)(d) of the Statute [1.2].

1.1 The Defendant was lawfully deprived of his right to be present at the confirmation hearing u/A 61 of the Statute.

¶2. It is submitted that the Defendant's right to be present is not absolute [1.1.1] as the acts of the Defendant constituted disruptive behavior during the proceedings [1.1.2] and the PTC restricted the right to be present in accordance with procedure established by law [1.1.3].

1.1.1 The Defendant's right to be present is not absolute.

¶3. The right of the Defendant to be present at the confirmation hearing is derived from Article 67¹ which enumerates various rights of the accused and is also applicable at the pre-trial stage.² However, the right to be present is not an absolute right. The right u/A 67 is subjected to the restrictions put forth u/A 63(2)³ r/w Rule 170⁴. These provisions highlight that the right to be present at the confirmation hearing is not an absolute right and can be curtailed due to disruptions. This is also practiced in other international tribunals such as ICTY⁵, ICTR⁶ and others,⁷ as well as national jurisdictions such as the US,⁸ Cambodia,⁹ France,¹⁰ Germany,¹¹ Canada¹² and others.¹³ The

¹ Statute, Article 67.

² RPE, Rule 121.

³ Statute, Article 63.

⁴ RPE, Rule 170.

⁵ ICTY RPE, Rule 80; *Delalić* Transcript 11376, ¶17–24&11377, ¶1–10; *Norman* Ruling on Non-Appearance ¶18; *Stanišić* Appeal ¶6; *Mladić* Trial 3730, ¶13–15.

⁶ ICTR RPE, Rule 80.

⁷ STL RPE, Rule 138(B); SCSL RPE, Rule 80(B); *Sesay* Trial ¶1; IMTFE Charter, Article 12; IMTFE RPE, Rule 3; IMT Charter, Article 18(c); Rule 5 IMT RPE.

⁸ *Wainwright* case ¶1385-86; *Allen* case ¶342-343; *William* case ¶1117&1119; *Scully* case ¶63-65; *Snyder* case ¶106; *Davis* case; *Simone* case.

⁹ IR ECCC, Rules 81&37(2).

¹⁰ CrPC. France, Article 322.

¹¹ CrPC. Germany, §231(b).

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same is applicable to the Defendant in the present matter and therefore, he cannot enjoy an absolute right to be present at the confirmation hearing.

1.1.2 The acts of the Defendant constituted disruptive behavior during the proceedings.

¶4. The Defendant can be removed from the Court for disruptive behavior u/A 63(2). Disruptive conduct is defined as any intentional conduct by the Defendant in the Courtroom that substantially interferes with the dignity, order and decorum of judicial proceedings.¹⁴ Disruption is caused when the Defendant fails to acknowledge the authority of the Court,¹⁵ shows disrespect towards the Court¹⁶ and refuses to follow the rules of practice.¹⁷ Such disruption includes intentional and unintentional¹⁸ outbursts caused by the Defendant.¹⁹

¶5. The Court has discretion to restrict the right of the Defendant to be present after a single outburst in order to preserve the integrity and decorum of the Court. In the infamous *Dujail* Trial of Saddam Hussain,²⁰ he and the other Defendants regularly disparaged the Court, provoked the Judges, staged frequent walkouts and boycotts, thereby rendering the trial fruitless.²¹

¶6. In the present matter, the Defendant threatened to make a similar attempt to derail the proceedings of the Court by not cooperating with the counsel appointed.²² Further, the Defendant disrupted the Court at several instances by resorting to foul language in the form of anatomical slang, racial slurs and curse words to refer to the Prosecutor and Judges.²³

¶7. Furthermore, the PTC did not violate any of the Defendant's rights in denying the interim relief and this cannot be an excuse for the Defendant to disrupt the Court. Interim relief is not a right and the PTC has discretion to reconsider its decision every 120 days.²⁴ Thus, the Defendant

¹² Canadian Criminal Code (R.S.C. 1970 c. C34, 8. 577(2)(a)).

¹³ CrPC. Senegal, Article 278&279.

¹⁴ *Norman* Trial ¶28; *Seselj* PTC ¶77; *Allen* case ¶342, *Ananyev* ECtHR ¶44–45; *West* case ¶287; *Foster* case ¶372; Scharf Pg. 156; Report on Courtroom Conduct pg 91.

¹⁵ *Harris* case ¶546.

¹⁶ *Harris* case ¶546; *West* case ¶287.

¹⁷ *Connelly* case ¶1301; *Ananyev* ¶44; *Dougherty* case ¶473.

¹⁸ *Stanišić* Appeal ¶19; Otto pg.1579.

¹⁹ *Milošević* Appeal ¶14; *Stanišić* Appeal ¶6.

²⁰ Case, ¶17.

²¹ Scharf Pg.155.

²² Case, ¶17.

²³ Case, ¶19.

²⁴ RPE, Rule 118(2).

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continuously disrupted the proceedings at several instances and the PTC was therefore justified in removing the Defendant from the confirmation hearing.

1.1.3 The PTC restricted the right to be present in accordance with the procedure established by law.

¶8. The Court in the present matter satisfied the prerequisites before restricting the right to be present. The OTP submits that an explicit warning was duly issued to the Defendant before restricting the right to be present [i], that restrictions were imposed on the right to be present after reasonable alternatives proved to be inefficient [ii] and the Defendant's right to be present was restricted to a minimal extent [iii].

i. Explicit warning was duly issued to the Defendant before restricting the right to be present.

¶9. Article 63(2) r/w Rule 170 provides that the Court shall either remove or ask a person to leave the Courtroom only after giving a warning to such person. Courts from various jurisdictions have also recognized warning as a pre-requisite to restrict the right in question.²⁵ The ICTR in *Seselj*²⁶ held that it is only required to issue a warning and upon finding that disruptive behavior persists, it is not necessary for the Court to issue a further warning to the accused just before restricting the right.²⁷

¶10. The warning safeguard provided is not a license for testing the outer limit of the chambers patience with respect to maintaining decorum and respect for its rules and proceedings.²⁸ Once a warning is issued, the Defendant will be in a position to make an informed decision and the continuation of such disruptive behavior would be an implicit waiver of his rights.²⁹

¶11. In the present matter, the Court duly gave a warning to the Defendant; on 1st September 2020, before the Defendant could address the Court, the PTC gave an explicit warning to the Defendant stating that disruptive behavior will not be tolerated.³⁰ After the warning was issued, the Defendant could reasonably foresee the consequences of his actions. However, ignoring the warning, the Defendant resorted to curse words, racial slurs and anatomical slangs to refer to the Prosecutor and

²⁵ *Seselj* Appeal ¶21; *Mladić* Trial 2013, 9564, ¶15–25; *Allen* case ¶343; *Snyder* case ¶106; *Davis* case ¶256; *Simone* case; *Suhlinger* case ¶246.

²⁶ *Seselj* Appeal ¶24

²⁷ *Wainwright* case ¶1385-86.

²⁸ *Seselj* Appeal ¶24.

²⁹ *Mladić* Trial, 3730, ¶13–15; *Ruto* Appeal ¶51; *Ananyev* ECtHR ¶44; *Colozza* ECtHR ¶28; *Oberschlick* ECtHR, ¶51; *Pfeifer* ECtHR ¶37; *Jones* ECtHR ¶3; *Khalifaoui* ECtHR ¶51; *Sibgatullin* ECtHR ¶46; *Yavuz* ECtHR ¶45; *Battisti* ECtHR; *Hermi* ECtHR ¶74.

³⁰ Case, ¶19.

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Judges.³¹ Therefore, the PTC duly issues a warning but the defendant implicitly waived his right to be present after further disruption.

ii. Restrictions were imposed on the right to be present after reasonable alternatives proved to be inefficient.

¶12. Article 63(2) provides that the right to be present can be restricted under exceptional circumstances after considering reasonable alternatives. Exceptional circumstances have not been expressly defined under the Statute, but is instead understood as the exhaustion of all other ‘reasonable’ alternatives. What exactly such “reasonable alternatives” are, is left to the discretion of the Court depending on facts and circumstances of each case.³²

¶13. In the present matter, one of the alternative measures adopted by the Court was to appoint a stand-by counsel after the first disruption by the Defendant.³³ The appointment of a stand-by counsel does not interfere with the rights of the accused and the counsel only takes over in cases of persistent disruption caused by the Defendant.³⁴

¶14. Further, the Court declared a recess after the Defendant disrupted the Court for the second time.³⁵ This measure taken by the Court is recognized as a reasonable alternative and is considered to be a cooling off period³⁶ for the accused. After weighing out the reasonable alternatives, the Court found them to be inadequate. Therefore, the PTC was justified in removing the Defendant from the Courtroom to ensure a fair and expeditious trial.

iii. The Defendant’s right to be present was restricted to a minimal extent.

¶15. The PTC restricted the right to be present of the Defendant in accordance w/A 63(2) and provided a video link to the Defendant as specified under this provision. Article 61(2)(a), Rule 134 ter³⁷ and 134 quater³⁸ require explicit waiver for the proceedings to continue in the absence of the Defendant. However, Article 63(2) and Rule 134 bis³⁹, which are the provisions dealing with video

³¹ Case, ¶19.

³² *Allen* case ¶344.

³³ Case, ¶17.

³⁴ *McKaskle* case ¶179.

³⁵ Case, ¶19.

³⁶ *Allen* case ¶342-343.

³⁷ RPE, Rule 134 ter.

³⁸ RPE, Rule 134 quater.

³⁹ RPE, Rule 134 bis.

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technology, require no such waiver. Participation through a video link has been viewed as an alternative form of presence rather than a type of absence.⁴⁰

¶16. In the present matter, the Defendant's right was restricted to a minimal extent as through video conferencing, he could still exercise his participatory right.⁴¹ The PTC did not instruct the Defendant to merely observe or follow up but rather to 'participate' in the proceedings, as required in a fair trial.⁴² Further, the accused was removed for a limited duration as required u/A 63(2). Despite the Defendant's disruptive behavior, he was present for a substantial part of the proceedings and was removed from the Courtroom only after the written and oral submissions.⁴³ Therefore, the PTC reasonably restricted his right.

1.2 The Defendant was lawfully deprived of his right to self-representation u/A 67(1)(d) of the Statute.

¶17. The OTP submits that the Defendant's right to self-representation is not absolute [1.2.1] as the right to self-representation can be restricted due to disruptive behavior of the Defendant [1.2.2] and that the Court ensured that the Defendant was provided a fair trial through the stand-by counsel [1.2.3].

1.2.1 The Defendant's right to self-representation is not absolute.

¶18. The Defendant's right to representation, either by way of self-representation or through a legal counsel is enshrined u/A 67(1)(d). It would be a misunderstanding of the word 'or' in the phrase 'to defend himself in person or through legal assistance of his own choosing' to conclude that self-representation excludes the appointment of counsel to assist the accused or vice versa.⁴⁴ Though, the right to representation is a pre-requisite for fair trial, the right to self-representation is not an absolute right.⁴⁵

¶19. For instance, Regulation 76⁴⁶ empowers the Court to appoint a standby counsel in the interest of justice. Interest of justice entails that the proceedings must be conducted in a timely manner

⁴⁰ *Milan Trial* ¶8; *Stanišić Trial* ¶2437, STL RPE, Rule 104; Kosovo Law, Articles 39(4)&41(12); *Chea Trial* ¶21; Roger pg.466.

⁴¹ *Chea Trial* ¶18.

⁴² *Chea Trial* ¶18.

⁴³ Case, ¶19.

⁴⁴ *Šešelj Trial* ¶29.

⁴⁵ *Milošević Trial* ¶31-33.

⁴⁶ Regulations ICC, Regulation 76.

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without interruptions or disruptions.⁴⁷ Therefore, the right of the Defendant is restricted when he substantially and persistently disrupts the proceedings of the Court.⁴⁸ International tribunals such as ICTY⁴⁹, ICTR⁵⁰ and others,⁵¹ and national jurisdictions such as the US,⁵² Germany⁵³ Australia⁵⁴, Canada⁵⁵, England⁵⁶ and others,⁵⁷ restrict the right to self-representation for a plethora of reasons. This right can be restricted on factors such as complexity and length of the case,⁵⁸ fair trial,⁵⁹ interruptions caused by the Defendant⁶⁰ and potential interruptions in the future.⁶¹

1.2.2 The right to self-representation can be restricted due to disruptive behavior of the Defendant.

¶20. The right of self-representation is a “parallel statutory right” to the right of an accused to be tried in his own presence.⁶² Therefore, if a right to be tried in one’s presence could be restricted on the basis of substantial trial disruption, there is no reason to treat the parallel right to self-representation any differently.⁶³

¶21. The potential disruption to the proceedings caused is a relevant factor in limiting the right to self-representation.⁶⁴ When the Defendant’s disruptive behavior increases to a point where he

⁴⁷ *Norman* Trial 2004 ¶8-12.

⁴⁸ *Milošević* Appeal ¶13; *Norman* Ruling on Non-Appearance ¶14.

⁴⁹ *Seselj* Trial ¶20; *Milošević* Appeal ¶13.

⁵⁰ *Barayagwiza* Trial ¶16; *Krajišnik* Trial ¶24.

⁵¹ *Sesay* Trial ¶1; *Norman* Trial 2004 ¶28; *Croissant* ECtHR ¶1; *Brian* Case.

⁵² *Faretta* case ¶835; *Martinez* case ¶161-62.

⁵³ CrPC. Germany, §140.

⁵⁴ Crimes Act 1914(Cth), §15YF&YG.

⁵⁵ Canadian Criminal Code, §486(2.3).

⁵⁶ Youth Justice and Criminal Evidence Act (England) 1999, §34,36,38.

⁵⁷ NSW Law Commission Report; NSW Act, §294A; NTA Act; NZ Act 23F; CrPC. France Art. 417; Zurich (Switzerland) CrPC, §11; CrPC. Portugal, Article 62,63,64; CrPC. Spain, Article 118; CrPC. Columbia, Article 127; CrPC. Norway, Article 94.

⁵⁸ *Milošević* Trial ¶65.

⁵⁹ *Milošević* Trial 2003 ¶40.

⁶⁰ *Norman* Trial 2004 ¶26; *Milošević* Trial ¶56.

⁶¹ *Norman* Trial 2004 ¶26.

⁶² *Milošević* Appeal ¶13.

⁶³ *Milošević* Appeal ¶13; *Seselj* Appeal ¶22.

⁶⁴ *Krajišnik* Trial ¶24.

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boycotts the proceedings,⁶⁵ the Court can impose a counsel to prevent substantial delay in the proceedings.⁶⁶

¶22. In the present matter, the Defendant intentionally disrupted the Court by resorting to the use of foul language in the form of anatomical slang, racial slurs and curse words to refer to the Prosecutor and Judges.⁶⁷ Therefore, the PTC was justified in assigning a stand-by counsel to the Defendant in preserving the decorum, efficiency, and fairness of the proceedings.

1.2.3 The Court ensured that the Defendant was provided a fair trial through the stand-by counsel.

¶23. The OTP submits that the Court has inherent powers to impose a counsel on the Defendant in the interest of justice [i], the Defendant's right to self-representation was reasonably restricted [ii] and that the Court appointed counsel acted in the best interest of the Defendant [iii].

- i. *The Court has inherent powers to impose a counsel on the Defendant in the interest of justice under Regulation 76.*

¶24. The Defendant has the right to fair trial⁶⁸ and such right cannot be waived.⁶⁹ The ICTR in *Seselj*⁷⁰ held that the right to fair trial includes the legitimate interest to ensure that the trial proceeds in a timely manner without interruptions, adjournments or disruptions. When the right to self-representation becomes an obstacle in achieving fair trial, the Court has the power to impose a counsel.⁷¹

¶25. The Court must make sure that the proceedings are not halted by a foreseeable harm and if there is a possibility of disruption, it shall be prevented through an imposition of a counsel.⁷² Further, fair trial also includes the right to effective representation and inadequate defence through self-representation, including disruptive conduct would nullify this right.⁷³

⁶⁵ *Barayagwiza* Trial ¶24.

⁶⁶ *Seselj* Appeal Decision No.2 ¶19.

⁶⁷ Case, ¶19.

⁶⁸ Statute, Article 64&67.

⁶⁹ *Sesay* Decision to Withdraw Counsel ¶15.

⁷⁰ *Seselj* Trial ¶21.

⁷¹ *Norman* Ruling on Non-Appearance ¶23.

⁷² *Prlić* Trial ¶31.

⁷³ *Milošević* Trial ¶32.

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¶26. Imposition of a counsel can be justified as international crimes are involve complex legal and procedural issues. These often fall outside the competence of even a legally qualified Defendant.⁷⁴ The assigned counsel represents the interest of the Court to ensure that the Defendant receives a fair trial and the aim is to obtain efficient representation and adversarial proceedings.⁷⁵

¶27. In the present matter, the PTC imposed a counsel under Regulation 76 as the Defendant was substantially and persistently disrupting the Court.⁷⁶ The Defendant has been charged with serious crimes against humanity and the assigned counsel ensured that he effectively represented his client. Therefore, the PTC is justified in imposing a counsel on the Defendant and the Court balanced the right to fair trial and right to effective representation.

ii. *The Defendant's right to self-representation was reasonably restricted.*

¶28. Absolute rights of the accused would excessively handicap the Judges' ability to conduct the trial.⁷⁷ The accused's right to self-representation can be restricted and must be guided by the proportionality principle.⁷⁸ Such restrictions imposed must be limited to the minimum extent necessary to achieve a certain objective.⁷⁹ Under such circumstances, Courts resort to a balancing approach having a dual effect of protecting the order and decorum of the proceedings while also allowing the accused to enjoy his rights.⁸⁰

¶29. When the Defendant is removed from the Courtroom for disruptive behavior, he forfeits his right to self-representation but not his right to representation itself.⁸¹ In the cases of *Seselj*⁸² and *Ntahobali*,⁸³ the Courts have appointed a stand-by counsel with a strictly defined role to step in only if there is a real risk of misconduct by the accused. On subsequent disruption, the Courts have been justified to revoke the right of self-representation and transform the status of the stand-by counsel

⁷⁴ *Seselj* Trial ¶21.

⁷⁵ *Barayagwiza* Trial ¶21.

⁷⁶ Moot Proposition ¶17.

⁷⁷ *Allen* case ¶342-343.

⁷⁸ *Norman* Ruling on Non-Appearance ¶18; *Zigiranyirazo* Appeal ¶17-21; *Norman* Trial 2004 ¶25; McDermott pg.753.

⁷⁹ *Milošević* Appeal ¶17; *Stanišić* Appeal ¶6; *Norman* Ruling on Non-Appearance ¶18.

⁸⁰ *Seselj* Trial ¶20; *Norman* Trial 2004 ¶25; *Martinez* case 161-62; *Allen* case ¶342-343.

⁸¹ *Mack* case ¶603; *West* case ¶287.

⁸² *Seselj* Trial ¶30

⁸³ *Ntahobali* Trial ¶21.

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into a Court-appointed counsel. The assigned counsel balances the interests of the tribunal and the accused by ensuring that the accused receives a fair trial.⁸⁴

¶30. In the present matter, the Defendant threatened to use his right of self-representation to turn every stage of the proceedings into a circus like Saddam Hussein did at his infamous trial.⁸⁵ The Court appointed a stand-by counsel but the Defendant rejected the Court's authority to assign defence counsel.⁸⁶ After further disruption, the PTC revoked the Defendant's right to self-representation and instructed the defence counsel to take over for the Defendant.⁸⁷ Despite this, the Defendant was allowed to participate in his defence as he was allowed to communicate with his defence counsel.⁸⁸ In order to maintain integrity and decorum of the Court, the only restriction imposed on the Defendant was that he could not address the Court directly. Therefore, the Defendant's right to self-representation was restricted to a minimal extent.

iii. *The Court appointed counsel acted in the best interest of the Defendant.*

¶31. The defence may argue about the possibility of practical difficulties like non-cooperation of the Defendant if a defence counsel is imposed. Though such difficulties are inevitable, the counsel is expected to conduct the defence in lawful interest and ensure that the accused does not abuse his right to representation.⁸⁹ Judges in the international criminal tribunals proceed with the knowledge that the counsel is acting without any instructions from the accused.⁹⁰ In the absence of such instructions, the traditional lawyer-client relationship is omitted and it is for the counsel to act in the best interests of the accused and present the best possible defence.⁹¹

¶32. In the present matter, the Defendant explicitly threatened the Court that he would use his right to self-representation to disrupt the proceedings and it is in the interest of justice that such a Defendant be represented through a counsel. Further, the Defendant expressly denied to cooperate with the counsel.⁹² The Defendant also failed to communicate with the standby counsel for the

⁸⁴ *Barayagwiza* Trial ¶21; *Milošević* Decision on withdrawal of counsel ¶19.

⁸⁵ Case, ¶17.

⁸⁶ Case, ¶17.

⁸⁷ Case, ¶19.

⁸⁸ Case, ¶17.

⁸⁹ *Ntahobali* Trial ¶22.

⁹⁰ *Sesay* Appeal ¶52.

⁹¹ *Milošević* Decision on Withdrawal of Counsel ¶19; *Norman* Trial ¶23; *Milošević* Order ¶1.

⁹² Case, ¶17.

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written submissions.⁹³ However, the counsel acted in the best interest of the accused and provided several objections relating to jurisdiction of the ICC and other matters. Therefore, it is in the interests of the defendant to be represented through an appointed counsel and not by way of self-representation.

II. THE CHARGED OFFENCES SHOULD BE PROSECUTED AS “OTHER INHUMANE ACTS” U/A 7(1)(K) AND THAT THERE IS SUFFICIENT EVIDENCE TO BELIEVE THAT THE DEFENDANT ORDERED THE COMMISSION OF A CRIME U/A 25(3)(B) OF THE STATUTE.

¶33. The OTP submits that the Defendant committed the crime against humanity of other inhumane acts u/A 7(1)(k) [2.1] the Defendant is responsible for ordering the crime u/A 25(3)(B) [2.2] and the evidence is sufficient, relevant and admissible [2.3].

2.1 The Defendant is liable u/A 7(1)(k) of the Statute.

¶34. The OTP submits that the crime qualifies as ‘other inhumane act’ u/A 7(1)(k) of the Statute [2.1.1] and that the contextual element of widespread and systematic attack against any civilian population pursuant to or in furtherance of a State or organizational policy is satisfied [2.1.2].

2.1.1 The crime qualifies as ‘other inhumane act’ u/A 7(1)(k) of the Statute.

¶35. The OTP submits that the act is of similar character to any other act u/A 7(1) of the Statute [i] and the act caused great suffering or serious injury to body or to mental or physical health. [ii] The act was committed with the intent or knowledge to inflict great suffering or serious injury to body or to mental or physical health [iii].

i. The act is of similar character to any other act u/A 7(1) of the Statute.

¶36. Article 7(1)(k) requires that other inhumane acts should be of a character similar to any other act referred to in Article 7(1) of the Statute. To classify a conduct as ‘other inhumane acts’, it is necessary to inquire whether it is already subsumed under any of the other existing ‘inhumane acts’. It should have at least one materially distinct element that is not adequately reflected in other acts u/A 7(1)(a)-(j).⁹⁴ Further, as per the EoC, “character” refers to the nature and gravity of the act.⁹⁵

⁹³ Case, ¶18.

⁹⁴ *Katanga* PTC, ¶461&463.

⁹⁵ EoC, Article 7(1)(k), footnote 30.

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The IMT in the case of *US v. Brandt*⁹⁶ held that biological experiments and acts causing serious physical and mental injury⁹⁷ fall within the ambit of ‘other inhumane acts’.

¶37. The ICTY in *Prosecutor v. Vasiljević*,⁹⁸ held that even an attempt to murder and physical injury falling short of torture⁹⁹ would qualify as an inhumane act. The requisite nature of “other inhumane acts” is met if it causes injury to a human being in terms of physical or mental integrity, health or human dignity and includes any type of severe bodily harm.¹⁰⁰ Further, it has been recognised that a multi-layered crime is not accounted in any provision and can be prosecuted under “other inhumane acts”.¹⁰¹

¶38. In the present matter, a biological experiment was conducted to create a vaccine against the H5N8 Avian Influenza.¹⁰² This experiment led to the spread of the virus in Eassos, in turn causing the death of 250,000 citizens and physical illness to many more.¹⁰³ The crime against humanity, in the case at hand, is of a similar nature to the other acts prescribed u/A 7(1)(a)-(j). *First*, it is similar to the crime of murder¹⁰⁴ as it includes causing death of one or more persons. *Second*, it is similar to torture¹⁰⁵ as severe physical or mental pain and suffering was caused to the citizens of Eassos. Therefore, the crime in the present matter can be considered as a multi-layered crime.

¶39. Moreover, the crimes that have occurred do not explicitly fall under either of the crimes prescribed u/A 7(1)(a)-(j). However, the crime so committed includes elements of the other crimes and therefore falls within the ambit of “other inhumane acts” u/A 7(1)(k). The crime in the case at hand is similar but not same to other crimes u/A 7, thereby not violating the principle of *nullum crimen sine lege*. Hence, the act of the Defendant amounts to an inhumane act u/A 7(1)(k).

⁹⁶ *Brandt* case ¶183; IMT Judgement ¶247.

⁹⁷ *Blaskic* Trial ¶239.

⁹⁸ *Vasiljević* Trial ¶238.

⁹⁹ *Naletilić* Trial ¶233; *Simić* Trial ¶78.

¹⁰⁰ *Tadic* Trial ¶729.

¹⁰¹ *Chea* Summary ¶7,39-41; *Ongwen* PTC ¶ 87-90.

¹⁰² Case, ¶5.

¹⁰³ Case, ¶13.

¹⁰⁴ EoC, Article 7(1)(a).

¹⁰⁵ EoC, Article 7(1)(f).

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ii. *The act caused great suffering or serious injury to body or to mental or physical health.*

¶40. Article 7(1)(k) requires the other inhumane acts to cause great suffering or serious injury to health, or any serious injury to external or internal organs.¹⁰⁶ The suffering inflicted by the act upon the victim does not need to be lasting but must be real and serious.¹⁰⁷ In order to determine whether great suffering or serious injury to body or to mental or physical health was inflicted, the Court has to consider all factual circumstances, which may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim, including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.¹⁰⁸ The fact that an act has long term and irredeemable effects is relevant to the determination of the seriousness of the act.¹⁰⁹

¶41. In the present matter, the Avian Influenza developed by the Defendant, with mortality rate of 34.5%, caused deaths of several hundred thousand citizens and severe illness including respiratory failure symptoms amongst others.¹¹⁰ Further, the virus created panic amongst the citizens of Eassos. The government was forced to impose restriction including strict quarantine protocols and mandatory wearing of masks while stepping out.¹¹¹ This resulted in a grave disadvantage to a person's ability to lead a normal and constructive life and such suffering meets the threshold of 'grave suffering' u/A 7(1)(k).¹¹²

iii. *The act was committed with the intent or knowledge to inflict great suffering or serious injury to body or to mental or physical health.*

¶42. Article 7(1)(k) prescribed for "specific intent" to cause great suffering or serious injury to body or to mental or physical health. Tribunals have recognized both direct and indirect intent¹¹³ to be sufficient for inhumane acts. The required *mens rea* is met where the principal offender, at the time of the act, was aware of the risk he undertook knowing that it would be a part of the attack.¹¹⁴

¹⁰⁶ *Blagojević* Trial ¶645; *Ntagerura* Trial ¶664; *Stakić* Trial ¶516.

¹⁰⁷ *Krnojelac* Trial ¶131.

¹⁰⁸ *Katanga* PTC, ¶449.

¹⁰⁹ *Vasiljević* Trial ¶235; *Blagojević* Trial ¶627.

¹¹⁰ Case, Annex B, ¶3.

¹¹¹ Case, Annex B, ¶3.

¹¹² *Kristić* Trial ¶513; *Akayesu* Trial ¶502.

¹¹³ *Blagojević* Trial ¶628; *Galić* Trial ¶154; *Krnojelac* Trial ¶132.

¹¹⁴ *Kunarac* Appeal ¶102; *Simić* Trial ¶46; *Stakić* Trial ¶626; *Vasiljević* Trial ¶37; *Krnojelac* Trial ¶59&132; *Galić* Trial ¶154; *Blagojević* Trial ¶628; *Kayishema* Trial ¶153.

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¶43. In the present matter, Dr. Rayder warned the Defendant in advance about the repercussions of creating the virus without upgraded equipment.¹¹⁵ After being fully aware of the high degree of risk involved in the creation of the virus, the Defendant chose to move ahead and refused to provide additional funding.¹¹⁶ The Defendant failed to take due care and acted in sheer negligence causing serious injury and death to many.

¶44. According to WHO norms,¹¹⁷ a State party has an obligation to notify WHO about any public health emergency of international concern within their territory in 24 hours of its occurrence. Wessos, being a State party to WHO, is bound by the norm.¹¹⁸ However, the Defendant not only ordered the clean-up of bodies infected by the virus but also to conceal the spread of virus from WHO and Eassos authorities.¹¹⁹ This proves the intent of the Defendant as he was factually aware of the situation at hand but failed to inform necessary authorities in curbing the virus from spreading further.

2.1.2 The contextual element of widespread and systematic attack against any civilian population pursuant to or in furtherance of a State or organizational policy is satisfied.

¶45. The OTP submits that there was an attack directed against any civilian population [i], the attack was widespread and systematic [ii] and that the attack occurred pursuant to or in furtherance of a State or organizational policy [iii].

i. There was an attack directed against any civilian population.

¶46. An “attack” as prescribed u/A 7(2)(a) encompasses any unlawful act¹²⁰ and denotes a course of conduct involving the multiple commission of acts that are not isolated in nature¹²¹ which is determined by considering both the multiplicity of victims and the number of crimes.¹²² Acts, though non-violent¹²³ in nature, amount to an attack if it causes any psychological or physical mistreatment to the civilian population by the commission of any acts mentioned u/A 7(1) of the

¹¹⁵ Case, ¶6.

¹¹⁶ Case, ¶7.

¹¹⁷ IHR, Article 6.

¹¹⁸ Case, ¶3.

¹¹⁹ Case, Annex 2, ¶5&7.

¹²⁰ *Akayesu* Trial ¶581.

¹²¹ *Ntaganda* ¶23; *Katanga* PTC, ¶396.

¹²² *Bemba* PTC ¶107-108.

¹²³ *Akayesu* Trial ¶581.

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Statute.¹²⁴ The commission of a single illegal act¹²⁵ is an attack if it has sufficient nexus with the civilian population even though it is committed several kilometers away.¹²⁶

¶47. The act in the present matter, though is not armed conflict, cannot be isolated and amounts to an attack. The consequences in Eassos can be directly traced back to the escape of the virus from Wessos' scientific laboratory.¹²⁷ The Avian Influenza only affected poultry and wildbirds until the escape of the virus from the laboratory. The citizens of Eassos started showing symptoms only after the two scientists travelled from the Lab through the Bloody Mountain Range near the Eassos border, potentially exposing dozens of individuals along the way.

¶48. Further, a "civilian population" comprises of all persons who have no active part in hostilities as opposed to members of armed forces and other legitimate combatants.¹²⁸ The term population does not mean that the entire population of the State or territory must have been subjected to that attack.¹²⁹ It is sufficient to show that certain individuals were targeted in the course of the attack.¹³⁰

¶49. In the present matter, thousands of citizens of Eassos, including the scientists from Wessos constitute civilians since they do not belong to any armed forces or legitimate combatants. Therefore, the acts of the Defendant in the case at hand amount to an attack directed against a civilian population.

ii. The attack was widespread and systematic.

¶50. Article 7(1) of the Statute requires any of the acts committed under the provision to be a part of widespread or systematic attack. Widespread or systematic character of the attack is a disjunctive requirement and it is sufficient that either of the elements is satisfied.¹³¹

¶51. An attack is "widespread" if it is massive, frequent, carried out collectively with considerable seriousness and directed against a large number of civilian victims.¹³² In this regard, it is required that an attack carried out over a large geographical area or an attack in a small geographical area

¹²⁴ *Kunarac Appeal* ¶86; *Limaj Trial* ¶194.

¹²⁵ *Tadic Trial* ¶688.

¹²⁶ *Akayesu Trial* ¶79,158,236.

¹²⁷ *Case*, ¶9.

¹²⁸ *Bemba PTC* ¶78; *Tadic Trial* ¶635; *Kunarac Trial* ¶423; *Katanga PTC*, ¶1103.

¹²⁹ *Ruto PTC* ¶164.

¹³⁰ *Kunarac Appeal* ¶90.

¹³¹ *Bemba PTC* ¶82; *Akayesu Trial* ¶578.

¹³² *Ruto PTC* ¶176.

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directed against a multiplicity of victims.¹³³ The ICC has held that 357¹³⁴ and 5812¹³⁵ civilians satisfies the requirement of “widespread”. In the present case, the attack in question is widespread since it involved nearly 250,000 deaths and many other victims of severe illness.¹³⁶

¶52. Systematic refers to organization and acts that are planned and follow a regular pattern.¹³⁷ In the present matter, the systematic nature of the attack can be understood from the actions of the Wessos government in handling the spread of the virus. The Defendant had authority over the health ministry and the scientific lab as well.¹³⁸ The lab was funded by the State and dealt with a plethora of viruses on regular basis.¹³⁹ Further, Wessos' political structure is highly authoritative and is a secretive country with little involvement in the international community.¹⁴⁰ The administration maliciously concealed the information from WHO about the spread of the virus amongst humans. The escape of the virus at the time of creation of the vaccine shows the systematic nature of the act. Therefore, the Defendant’s acts constitute to both widespread and systematic nature.

iii. The attack occurred pursuant to or in furtherance of a State or organizational policy.

¶53. Article 7(2)(a) requires an attack to be committed in furtherance of a State or organizational policy. A policy to commit an attack u/A 7(1)¹⁴¹ requires that the State or organization to actively promote or encourage such an attack against a civilian population. A State policy further requires it to be planned and organised by persons governing a specific territory,¹⁴² such persons effectively controlling¹⁴³ the implementation of policy and the use of public resources for the same.¹⁴⁴ Such a State policy may be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.¹⁴⁵

¹³³ *Bemba* PTC, ¶83; *Ntaganda* PTC ¶22,24.

¹³⁴ *Bemba* PTC ¶108.

¹³⁵ *Ruto* PTC ¶178.

¹³⁶ Case, ¶13.

¹³⁷ *Kenya* Authorization Decision ¶96.

¹³⁸ Case, ¶12.

¹³⁹ Case, ¶6 and Annex 1, email dated 3rd October 2019.

¹⁴⁰ Case, ¶3.

¹⁴¹ EoC, Article 7 ¶3.

¹⁴² *Katanga* PTC, ¶396.

¹⁴³ *Tadic* Appeal ¶131.

¹⁴⁴ *Katanga* PTC, ¶396.

¹⁴⁵ EoC, Article 7, footnote 6.

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¶54. In the present matter, the Defendant, who is the MoD and the second most powerful official in Wessos,¹⁴⁶ ordered Dr. Rayder to develop the virus in the Institute of Viral Diseases Laboratory which was a State funded lab. The Defendant had control over all operations with regards to the creation of the virus including the measures taken after the virus escaped. Dr. Rayder warned the Defendant about the possibility of the escape of the virus and requested that the equipment including airtight seals, improved air filtration, a shower in the anteroom, and an incinerator for contaminated clothing be upgraded. As the Defendant deliberately failed in providing the necessary equipment,¹⁴⁷ the attack was in furtherance of a State policy.

2.2 The Defendant is responsible for ordering the crime u/A 25(3)(b).

¶55. The OTP submits that all essential elements are satisfied for ordering¹⁴⁸ as the Defendant was in a position of authority [2.2.1], the Defendant instructed another person to commit a crime [2.2.2], the Defendant's conduct had direct and substantial effect on the crime committed [2.2.3] and that the Defendant possessed the mental element for ordering [2.2.4].

2.2.1 The Defendant was in a position of authority.

¶56. Ordering u/A 25(3)(b) of the Statute requires the offender to be in a position of authority.¹⁴⁹ It is not necessary to prove a formal superior-subordinate relationship in order to establish the existence of a position of authority.¹⁵⁰ It is enough that the individual issuing the order exercises a significant influence over the perpetrator, pursuant to which the latter obeys the order of the former.¹⁵¹

¶57. Position of authority under ordering is attributed to superiors in army units, commanders of forces and political party leaders.¹⁵² The Defendant must be in some position of authority that would compel another to commit a crime by following his order.¹⁵³ Unlike superior responsibility,

¹⁴⁶ Case, ¶2&12.

¹⁴⁷ Case, ¶6.

¹⁴⁸ *Karadžić* Trial ¶573; *Kordic* Appeal 28-30.

¹⁴⁹ *Semanza* Appeal ¶361.

¹⁵⁰ *Kordic* Appeal ¶28, *Strugar* Trial ¶331, *Limaj* Trial ¶515, *Šainović* Trial ¶86.

¹⁵¹ *Strugar* Trial ¶331; *Semanza* Appeal ¶361; *Gacumbitsi* Appeal ¶182; *Muvunyi* Trial ¶467.

¹⁵² *Semanza* Appeal ¶363, *Kamuhanda* Appeal ¶76.

¹⁵³ *Semanza* Appeal ¶361.

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ordering does not require effective control as an element and a position of authority of a person can be inferred from the fact that the order was obeyed.¹⁵⁴

¶58. In the present matter, the Defendant is the second most powerful person in Wessos with substantial autonomy in his sphere of authority.¹⁵⁵ He has budgetary and command authority over all agencies and functions of the government relating to national security, Ministers of Transportation, Health, Public Safety, Defence and the Wessos armed forces and police.¹⁵⁶ In addition to this, Dr. Rayder and the National Security Council obeyed the orders of the Defendant. This proves that the Defendant was in a position of authority.

2.2.2 The Defendant instructed another person to commit a crime.

¶59. Ordering requires an action of instruction and excludes ordering by omission.¹⁵⁷ The accused must use his position of authority to issue the order and convince,¹⁵⁸ impel,¹⁵⁹ compel¹⁶⁰ or persuade¹⁶¹ another person to engage in criminal conduct. The order need not be in writing or take any particular form;¹⁶² it can be express or implied.¹⁶³

¶60. In the present matter, the Defendant, through various emails, ordered Dr. Rayder to develop a mutation of the existing virus, H5N8 Avian Influenza.¹⁶⁴ Further, he abused and compelled Dr. Rayder to follow his orders by stating *“If you won’t get the job done under these conditions, I’ll have you replaced by someone else who will.”*¹⁶⁵ During the experiment of creating the virus, Dr. Rayder regularly updated the Defendant on the progress and followed his instructions at every instance.¹⁶⁶ Further, the Defendant ordered the members of the Security Council to take measures after the virus escaped.¹⁶⁷ He also instructed them to conceal any information about the escape from

¹⁵⁴ *Bizimungu* Trial ¶1911.

¹⁵⁵ Case, ¶2.

¹⁵⁶ Case, ¶2&12.

¹⁵⁷ *Blaškić* Appeal ¶176.

¹⁵⁸ *Stakić* Trial ¶445; *Krstić* Trial ¶601.

¹⁵⁹ *Musema* Trial ¶121; *Rutaganda* Trial ¶39.

¹⁶⁰ *Kamuhanda* Trial ¶594.

¹⁶¹ *Bagilishema* Trial ¶30.

¹⁶² *Limaj* Trial ¶515, *Strugar* Trial ¶331; *Blaskić* Trial ¶281; *Brdanin* Trial ¶270.

¹⁶³ *Naletilic* Trial ¶61; *Blaskić* Trial ¶281.

¹⁶⁴ Case, Annex 1 ¶5.

¹⁶⁵ Case, ¶7.

¹⁶⁶ Case, Annex 1.

¹⁶⁷ Case, ¶12.

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Eassos officials and the WHO.¹⁶⁸ Therefore the Defendant was in a position of authority to instructed Dr. Rayder for the commission of the crime.

2.2.3 The Defendant's conduct had direct and substantial effect on the crime committed.

¶61. U/A 25(3)(b) of the Statute, an individual is responsible for ordering whenever the perpetrator reaches the execution phase of a crime in compliance with such individual's order. It is also required that the order has a direct and substantial effect on the commission of the crime.¹⁶⁹ Substantial contribution implies that the act had an effect or a causal relationship¹⁷⁰ with the result¹⁷¹ and includes any assistance which furthers, advances or facilitates the commission of the crime.¹⁷² Such assistance can be by words or acts that encourage or support the commission of the crime.¹⁷³ However, the Prosecution need not prove that the crime would not have been committed in the absence of the accused's contribution.¹⁷⁴

¶62. In the present matter, the Defendant supervised the experiment and due to the order given to Dr. Rayder, the virus was developed.¹⁷⁵ Through various emails exchanged¹⁷⁶ between Dr. Rayder and the Defendant, it can be inferred that the Defendant advanced the commission of the crime¹⁷⁷ even after being warned by Dr. Rayder about the consequences¹⁷⁸ of his order. He actively encouraged the Security Council that the spread of the virus be concealed from Eassos authorities and the WHO.¹⁷⁹ It was the failure of the Defendant to communicate to Eassos that caused the death of 250,000 citizens.¹⁸⁰ Therefore, the substantial effects in Eassos can be directly traced back to the Defendant's conduct of ordering.

¹⁶⁸ Case, Annex 2.

¹⁶⁹ *Mudacumura* PTC ¶63, *Kamuhanda* Appeal ¶75–6; *Nahimana* Appeal ¶481; *Boškoski* Appeal ¶160.

¹⁷⁰ *Stakić* Trial ¶445; *Strugar* Trial ¶332; *Semanza* Trial ¶382.

¹⁷¹ *Tadić* Trial ¶688.

¹⁷² *Bemba*, Trial ¶94.

¹⁷³ *Tadić* Appeal ¶689, *Delalić* Trial ¶325-329, *Naletilić* Trial ¶726.

¹⁷⁴ *Kordić* Appeal ¶27; *Gacumbitsi* Appeal ¶129; *Oric* Trial ¶274.

¹⁷⁵ Case, ¶5.

¹⁷⁶ Case, Annex 1.

¹⁷⁷ Case, ¶7.

¹⁷⁸ Case, ¶6.

¹⁷⁹ Case, Annex 2.

¹⁸⁰ Case, ¶13.

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2.2.4 The Defendant possessed the *mens rea* for ordering.

¶63. Pursuant to Article 30(1) of the Statute, the intent and knowledge envisaged in this provision are generally applicable to the elements of all crimes and modes of liability. They apply to ordering u/A 25(3)(b) of the Statute as the latter provision does not include any mental element in its definition.¹⁸¹ The accused must either intend to commit the crime¹⁸² or, alternatively, when giving an order, be aware of the “substantial likelihood” that a crime will be committed as a result.¹⁸³

¶64. A person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility.¹⁸⁴ This requires an awareness of a higher likelihood of risk and a volitional element.¹⁸⁵

¶65. Ordering with such awareness is accepting the commission of the crime.¹⁸⁶ The *mens rea* of the accused for ordering need not be explicit, it may be inferred from the circumstances.¹⁸⁷ It is not necessary that an order is illegal on its face for a person to become liable for making it.¹⁸⁸

¶66. In the present matter, Dr. Rayder warned the Defendant that the virus would fall under Risk Group 4 classification, which is much more infectious and deadly compared to other viruses. He requested the Defendant to provide additional funding to the laboratory by upgrading the facilities by adding airtight seals, improved air filtration, a shower in the anteroom, and an incinerator for contaminated clothing.¹⁸⁹ Dr. Rayder also stressed that without these upgrades, there would be a high degree of risk that the deadly virus could escape the lab into the general population of Wessos.¹⁹⁰ This indicates that the Defendant was aware of the high degree of risk involved in the development of this deadly virus.¹⁹¹ Despite such knowledge, the Defendant ignored taking necessary measures in creating and curbing the virus. The Defendant willfully concealed the spread

¹⁸¹ Cassese pg. 933; Otto pg. 851.

¹⁸² *Kordi* Appeal ¶29.

¹⁸³ *Strugar* Trial ¶331; *Blaskic* Trial ¶42&345.

¹⁸⁴ *Strugar* Trial ¶282.

¹⁸⁵ *Blaškić* Appeal ¶41-42.

¹⁸⁶ *Ntaganda* PTC ¶145.

¹⁸⁷ *Strugar* Trial ¶333; *Galić* Trial ¶171.

¹⁸⁸ *Blaškić* Appeal ¶42; *Strugar* Trial ¶282.

¹⁸⁹ Case, ¶6.

¹⁹⁰ Case, ¶6 and Annex 1, Mail Dated 3rd October, 2019.

¹⁹¹ Case, ¶6.

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of the virus due to high tensions and lack of diplomatic relations between the two States.¹⁹² This can be corroborated by the Defendant's Statement where he said "*I don't give a damn about Eassos. My order stands. Tell no one! Let's focus on what we can do for Wessos.*"¹⁹³ Therefore, it can be inferred that the defendant had the requisite *mens rea* for ordering the commission of the crime.

2.3 The evidence is sufficient, relevant and admissable.

¶67. The WHO reports, e-mails and the minutes of the meeting constitute to sufficient evidence in establishing the charged offences against the Defendant. The evidences at hand are *prima facie* relevant as they significantly help the chamber in reaching a conclusion about the existance or non-existence of material facts.¹⁹⁴ As proven above, the evidence shows that the Defendant ordered an act against humanity and it is therefore, pertinent that such evidence is admissable. The Court has discretion to admit *prima facie* evidence even if there are discrepancies regarding its procurement as these are minor issues and do not compromise the integrity of the proceedings.¹⁹⁵

III. ICC HAS JURISDICTION TO PROSECUTE THE DEFENDANT U/A 12 OF THE ROME STATUTE.

¶68. The ICC enjoys territorial jurisdiction in the present matter over the alleged crimes. The government of Eassos referred the matter to OTP on 1 June 2020 u/A 14 of the Statute.¹⁹⁶ The OTP submits that the Defendant does not enjoy immunity for international crimes [3.1] and the Defendant must be prosecuted u/A 12 of the Statute [3.2].

3.1 The Defendant does not enjoy immunity for international crimes.

¶69. Article 27 of the Statute ensures that no immunity is provided to head of States and government officials. They are not exempt from criminal liability for their acts.¹⁹⁷ The Statutes of other tribunals like ICTY,¹⁹⁸ ICTR,¹⁹⁹ SCSL,²⁰⁰ IMT²⁰¹ and IMTFE²⁰² also eliminate immunity for

¹⁹² Case, ¶3.

¹⁹³ Case, Annex 2.

¹⁹⁴ *Katanga* Trial ¶ 34.

¹⁹⁵ *Ruto* Trial ¶15.

¹⁹⁶ Case, ¶14.

¹⁹⁷ Statute, Article 27.

¹⁹⁸ ICTY Statute, Article 7(2).

¹⁹⁹ ICTR Statute, Article 6(2).

²⁰⁰ SCSL Statute, Article 6.

²⁰¹ IMT Charter, Article 7&8.

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heads of State. Unlike domestic jurisdictions, international Courts deal with international crimes and do not act on behalf of a particular State but rather on behalf of international community as a whole.²⁰³ Hence, there is no State practice or *opinio juris* to establish head of State immunity in relation to international crimes.²⁰⁴ The international tribunals in the past have prosecuted head of States including President Milosevic of Serbia,²⁰⁵ PM Kambanda of Rwanda,²⁰⁶ President Charles Taylor of Liberia²⁰⁷ and Al-Bashir of Sudan.²⁰⁸

¶70. In the present matter, the Defendant is the MoD and is the second most powerful person in Wessos.²⁰⁹ However he cannot claim immunity for his acts in official capacity as they amount to severe crimes against humanity which is an international crime.

3.2 The Defendant must be prosecuted u/A 12 of the Statute.

¶71. The OTP submits that conduct and crime u/A 12 are indistinct and mean the same [3.2.1], the ICC has objective territorial jurisdiction u/A 12(2)(a) [3.2.2] and the effects doctrine is applicable [3.2.3].

3.2.1 Conduct and crime u/A 12 are indistinct and mean the same.

¶72. Article 12(2)(a) empowers the Court to exercise jurisdiction if it is accepted by the State on whose territory the conduct in question occurred or, by the State of registration of the aircraft or vessel, if the crime was committed on a vessel or aircraft.²¹⁰

¶73. Article 13 and 14, which are trigger mechanisms for Article 12 in case of State referral, use the words one or more crimes committed and no reference is made to conduct in question.²¹¹ Furthermore, the usage of the term 'conduct' across various provisions of the Statute such as

²⁰² IMTFE Charter, Article 6.

²⁰³ *Al-Bashir* Appeal ¶115.

²⁰⁴ *Al-Bashir* Appeal ¶116.

²⁰⁵ *Milošević* Preliminary Motions ¶26-30.

²⁰⁶ *Kambanda* Trial.

²⁰⁷ *Taylor* Appeal.

²⁰⁸ *Al-Bashir* Appeal.

²⁰⁹ Case, ¶2.

²¹⁰ Statute, Article 12.

²¹¹ Cassese pg.619.

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Articles 17(1)(c), 22(1), 24, 30(2), 90(1), 101(1) and 108 indicates that the term conduct refers to the *actus reus* element of the crime subject to the jurisdiction *ratione materiae* of the Court.²¹²

¶74. The Court at different instances has construed conduct in question as crimes in question while dealing with the connection between crimes charged and the State territory.²¹³ The PTC had rightly noted in the *Myanmar* case that “*there is no apparent reason why the threshold for territorial jurisdiction would be different based on whether the location of the conduct/crime is on land or vessel/aircraft.*”²¹⁴

¶75. *Travaux préparatoires* confirms that the phrase crime in question was replaced by conduct in question and this was only to include both acts as well as omissions.²¹⁵ Moreover, the *travaux préparatoires* failed to provide an explanation for treating two similar concepts differently.²¹⁶ Therefore, conduct and crime in Article 12(2)(a) of the Statute have the same functional meaning.²¹⁷ The distinction between the usage of 'conduct' for State territory and 'crime' is illusory at best as there is no real or logical justification for treating both differently.

¶76. In the present matter, the conduct of the Defendant of ordering the crime and the subsequent escape of the virus constitutes a part of the attack.²¹⁸ The escape of the virus from Wessos to Eassos caused the death of over 250,000 and caused serious injury to several citizens of Eassos.²¹⁹ Hence, the crime has taken place in Eassos.

3.2.2 The ICC has objective territorial jurisdiction u/A 12(2)(a).

¶77. Article 12(2)(a) provides that the Court may exercise its jurisdiction if the State on the territory of which the conduct in question occurred is a State party to the Statute.²²⁰ Objective territoriality empowers the State to assert territorial jurisdiction if the crime is initiated abroad but completed in the State's territory.²²¹ The Court can exercise jurisdiction if at least one legal element of a crime (such as *actus reus*) within the jurisdiction of the Court or part of such a crime is committed on the

²¹² *Myanmar* Decision ¶49.

²¹³ *Al-Bashir* PTC ¶36; *Callixte* PTC ¶16-17; *Congo Participation* Decision ¶85; *Kenya Authorization* Decision ¶178.

²¹⁴ *Myanmar* Decision ¶48-49.

²¹⁵ Bureau Discussion Paper pg.208–209&212; Saland pg.205.

²¹⁶ *Myanmar* Decision ¶48.

²¹⁷ *Myanmar* Decision ¶48.

²¹⁸ Refer to Issue II, 2.1.2,(i).

²¹⁹ Case, ¶13.

²²⁰ Statute, Article 12.

²²¹ *Myanmar* Decision ¶56.

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territory of a State Party,²²² irrespective of the nationality of the offender.²²³ This principle also finds itself in national legislations of various States such as Australia,²²⁴ Argentina,²²⁵ China,²²⁶ Czech Republic,²²⁷ Colombia,²²⁸ Estonia²²⁹ and others²³⁰ and in various international legislations.²³¹

¶78. A State can exercise jurisdiction if one or part of the constituent elements of the crime takes place within its territory.²³² The objective territorial jurisdiction is equally applicable to manslaughter, a crime of negligence or any other crime, irrespective of whether the State territory was the intended location of the consequence or not.²³³

¶79. In light of Article 31 of the VCLT,²³⁴ a treaty must be interpreted in accordance with its objects and purposes and the main purpose of the ICC is to end impunity.²³⁵ The jurisdiction of the Court is limited to the most serious crimes of concern to the international community, specifically genocide, crimes against humanity, war crimes and aggression. The purpose of the Statute will be defeated if the jurisdiction of the Court requires all the elements of a crime to take place within the territory of State party.²³⁶

¶80. In the present matter, the alleged crime of humanity is of “other inhumane acts” u/A 7(1)(k). An essential element of this provision is that there must be great suffering, or serious injury to body or to mental or physical health.²³⁷ The escape of the virus from Wessos to Eassos caused the death of over 250,000 and caused serious injury to several citizens of Eassos.²³⁸ Eassos is a State party to

²²² *Myanmar* Decision 2018 ¶64; *Lotus* case ¶23-30.

²²³ *Afghanistan* Decision ¶ 50.

²²⁴ Australia Code, §14.1, ¶2(b).

²²⁵ Argentina Code, Article 1(1).

²²⁶ China CrPC., Article 6(3).

²²⁷ Czech Code, §4(2)(b).

²²⁸ Colombia Code, Article 14.

²²⁹ Estonia Code, §11.

²³⁰ Georgia Code, Article 4(2); Germany Code, §9(1); NZ Crimes Act, §7; Romania Code, Article 8(4); Switzerland Code, Article 8(1); Afghanistan Code, Article 15(1); Tanzania Code, §7; Timor-Leste Code, Article 6.

²³¹ Draft Convention, Article 3; Extradition Convention, Article 7(1); Model Treaty, Article 4(f); Bribery Convention, Article 4(1); Corruption Convention, Article 17(1)(a); African Union, Article 13(1)(a); EU Directive 2011, Article 17(1)(a); EU Directive 2017, Article 19(1)(a).

²³² *Lotus* case ¶23; Afghanistan Code, Article 15(1); Australia Code, §14.1, ¶2(a); Colombia Code, Article 14; Czech Code, §4(2)(a); Tanzania Code, §7; Timor-Leste Code, Article 6.

²³³ *Lotus* case ¶23,37,83.

²³⁴ VCLT, Article 31.

²³⁵ Statute, Preamble ¶5; *Congo* Judgement ¶33.

²³⁶ *Myanmar* Decision 2018 ¶69-70.

²³⁷ EoC, Article 7(1)(k).

²³⁸ Case, ¶13.

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the Statute and a constituent element of the crime occurred in Eassos.²³⁹ Therefore, ICC has jurisdiction over the said crimes and denying such jurisdiction because a part of a crime within the Court's jurisdiction was committed on the territory of a non-State party would not be in line with the object and purpose of the Statute.

3.2.3 The effects doctrine is applicable.

¶81. Article 12(2)(a) encompasses the effects doctrine which enables a State to assert territorial jurisdiction when a crime takes place outside the territory but produces effects within the territory of the State.²⁴⁰ For jurisdiction to be adopted under the effects doctrine, the effects in question must be direct, intended, foreseeable and substantial.²⁴¹

¶82. The doctrine of effects jurisdiction is widely followed as noted from various decisions of the ICJ,²⁴² SCSL,²⁴³ and criminal law jurisdictions of countries like US²⁴⁴, Argentina²⁴⁵, Canada²⁴⁶, France,²⁴⁷ China²⁴⁸ and England²⁴⁹. The Assembly of State Parties²⁵⁰ also extensively endorsed the doctrine's inclusion under Article 12(2)(a) by suggesting that conduct encompasses both conduct in question and its consequence.²⁵¹ Further, majority of State parties were inclined towards the Korean proposal which empowered ICC to exercise jurisdiction if the victim of the conduct belonged to a State party.²⁵²

¶83. In the present matter, as previously established, the act of the Defendant was substantial²⁵³ and intended²⁵⁴ as he had the knowledge of the consequences of his act. These consequences of the

²³⁹ Case, ¶3.

²⁴⁰ *Lubanga Appeal* ¶21.

²⁴¹ *Alcoa case* ¶796; *Butte case* ¶102-03.

²⁴² *Lotus case* ¶23; *Congo ICJ* ¶46.

²⁴³ *Taylor Appeal* ¶ 698.

²⁴⁴ *Alcoa case* ¶434-444; *Noriega case* ¶1514.

²⁴⁵ Argentina, Penal Code, Article 1(1).

²⁴⁶ CrPC. Canada, §6(2); *Libman case* ¶212-213.

²⁴⁷ *Yahoo case*.

²⁴⁸ CrPC. China, Article 6.

²⁴⁹ *Wallace case* ¶20; *Stonehouse case* 263.

²⁵⁰ Report of Special Working Group ¶38; *Myanmar Decision* ¶50.

²⁵¹ Report of Special Working Group ¶38-39.

²⁵² Scharf 2001 pg. 77.

²⁵³ Refer to Issue II, 2.1.2, (ii).

²⁵⁴ Refer to Issue II, 2.1.1, (iii)&2.2.4.

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Defendant's acts were directly felt in Eassos. The Defendant could reasonably foresee the escape of the virus due to repeated warnings given by Dr. Rayder.²⁵⁵ As the Avian Influenza spread across Eassos, causing death and serious illness to its citizens, a direct link can be drawn between the consequences and the crime committed by the Defendant.²⁵⁶ Therefore, the effects doctrine is applicable in the present matter.

²⁵⁵ Case, Annex 1.

²⁵⁶ Refer to Issue II, 2.1.2, (i).

SUBMISSIONS

Having presented all the arguments, the Prosecution respectfully requests the ICC to uphold the findings of the Pre-Trial Chamber

and:

- I. Maintain that the Defendant was lawfully deprived of his right to be present at the Confirmation Hearing u/A 61 of the Rome Statute and to represent himself under Article 67(1)(d) of the Rome Statute.
- II. Reaffirm that the Defendant can be held criminally responsible for “Other Inhumane Acts” u/A 7(1)(K) and that he ordered the commission of a crime u/A 25(3)(B).
- III. Confirm the ICC jurisdiction over the case u/A 12(2)(a) of the Rome Statute.

COUNSEL FOR THE PROSECUTION

