

The 16th Red Cross International Humanitarian Law Moot (2018)

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Memorial for the Defendant

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PRELIMINARY MATTER

A. THE CASE IS INADMISSIBLE BEFORE THE COURT

1. The National State has primary responsibility and jurisdiction over the case¹ unless the national jurisdiction is unwilling or unable to carry out the proceeding genuinely.²

A.1. Highland has taken action

2. Highland has the ability to carry out the proceeding. In *Lubanga*, the Chamber considered the detention of Mr. Lubanga as the state has the ability to trial a person within their jurisdiction.³ For this reason, Highland has the power to restrict Admiral Gum's freedom of movement, by confining him to his country resort that is away from the capital city.⁴

A.2. Highland is not genuinely unwilling to prosecute Admiral Gum

3. To establish that Highland is not unwilling to prosecute Admiral Gum requires evidence that the proceeding will be delayed or that the proceeding will not be independent and impartial.⁵ Highland's national jurisdiction did not declare that it collapsed⁶ due to the political unrest caused by Admiral Gum's supporter.⁷

¹ Article 1 of the Rome Statute of the International Criminal Court ("Rome Statute"), 1 July 2002.

² Article 17(1)(a) of the Rome Statute.

³ *Prosecutor v Lubanga*, (ICC-01/04-01/06), Pre-Trial Chamber I, 24 February 2006, ¶33.

⁴ Facts, ¶26.

⁵ Article 17(2)(a)(c) of the Rome Statute.

⁶ *Prosecutor v Gaddafi*, (ICC-01/11-01/11), Pre-Trial Chamber I, 11 October 2013, ¶205.

⁷ Facts, ¶28.

B. STANDARD OF PROOF AND ADMISIBILITY OF EVIDENCE

4. The Prosecution fails to provide “sufficient evidence to establish substantial grounds to believe”⁸ that the crimes charged against Admiral Gum was actually committed.⁹ The evidence must be “concrete, tangible and clear”.¹⁰
5. The news media, medical report and unofficial report are still admissible before the court; however, these reports have low probative value, as they have not been verified. This has been confirmed in *Bemba*.¹¹
6. Although the WikiLeaks document has low probative value, it still provides relevant supporting information. Therefore the court may take this into consideration.¹²

C. THE CONDUCTS OF THE ALLEGED THREE CRIMES DID NOT TAKE PLACE IN THE CONTEXT OF INTERNATIONAL ARMED CONFLICT (“IAC”)

7. International Armed Conflict occurs when one or more States resort to armed force against another State.¹³

⁸ Article 61(7) of the Rome Statute.

⁹ *Lubanga*, Pre-Trial Chamber I, ¶16.

¹⁰ *Prosecutor v Mbarushimana*, (ICC-01/04-01/10), Pre-Trial Chamber I, 16 December 2011, ¶40.

¹¹ *Prosecutor v Bemba Gombo*, (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, ¶50.

¹² *Prosecutor v Kantanga*, (ICC-01/04-01/07-717), Pre-Trial Chamber I, 30 September 2008, ¶137; see also: *Prosecutor v. Salim Jamil Ayyash Mustafa Amine Badreddine Hassan Habib Merhi Hussein Hassan Oneissi Assad Hassan Sabra*, (STL-11-01/T/TC), Decision on The Admissibility of Documents Published on the Wikileaks Website, 21 May 2015, ¶23.

8. There is no armed conflict between Highland and Lowland armed forces before 24 November 2015. Lowland's naval vessels just exercised its naval and the accident happened when Highland police and armed forces carried out law enforcement operations within its territory, without involving Lowland forces.¹⁴ These acts do not constitute an IAC.

D. THE NEXUS ELEMENT TO THE ARMED CONFLICT OF THE THREE CRIMES CHARGE IS NOT SATISFIED

9. The “nexus” element is satisfied if the perpetrator acts in furtherance of or under the guise of the armed conflict.¹⁵
10. First, the accident at the border around Largo was to prevent displaced Lowland residents illegally cross the border.¹⁶ Second, the incident that happened on 23 November 2015 was a consequence of Highland exercising its territorial control against unidentified groups. These accidents were not under the guise of the armed conflict.

¹³ Common Article 2 of the Geneva Convention; see also; *Prosecutor v Tadic*, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ¶70.

¹⁴ *Prosecutor v Brdanin*, (ICTY IT-99-36-T), Trial Chamber II, 1 September 2004, ¶124.

¹⁵ *Prosecutor v Kunarac*, (ICTY IT-96-23 & IT-96-23/1-A), Appeals Chamber, 12 June 2000, ¶58.

¹⁶ Facts, ¶12 & 14.

PLEADING

COUNT ONE: ADMIRAL GUM DOES NOT BEAR RESPONSIBILITY AS THE COMMANDER FOR THE ALLEGED WAR CRIME OF WILLFULLY CAUSING GREAT SUFFERING OR SERIOUS INJURY TO BODY OR HEALTH

A. The alleged war crime of willfully causing great suffering or serious injury to body or health under article 8(2)(a)(iii) of the Rome Statute is not committed

A.1. The Personnel Dispersal System (“PDS”) is subject to weapon review in conformity with International Law

11. Highland has ensured that the use of any new weapons, their means of acquiring or methods of warfare comply with the rules of International Humanitarian Law (“IHL”).¹⁷

12. The PDS has developed for many years and is operated by the specially trained soldiers.¹⁸ Prior to using the PDS, Highland conducted preliminary testing.¹⁹ The Research Institution of the Highland Ministry of Defense, the competent authority to examine the legality of weapon,²⁰ confirmed that the PDS, if used, had no side effects.²¹ This is proves that the PDS complied with the weapon review before installation.

¹⁷ Article 36 of the Additional Protocol I.

¹⁸ Facts, ¶12 & 13.

¹⁹ Facts, ¶13.

²⁰ 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, (2006), p 494.

²¹ Facts, ¶14.

A.2. The nature of PDS is not prohibited

13. The nature of the PDS did not cause superfluous injury and unnecessary suffering;²² however, it forced people to move from the targeted area without any fatal consequences.²³

A.3. The consequences of using PDS was not verified

14. The “Great suffering or serious injury” to body must require a showing of verifiable incapacity.²⁴

15. The news media reported that 200 people were injured and others sustained other serious injuries as a result of panic and trying to escape the weapons.²⁵ This does not amount to a level of great suffering or serious injury.

16. The medical reports on those who encountered the PDS listed that 10 people seemed to suffer permanent hearing loss.²⁶ The term “seemed” is ambiguous and therefore alludes to unconfirmed reports relating to individuals who suffered hearing loss. Additionally, 5 people who claimed that their blindness was caused by something burning on their faces is not sufficient to prove that PDS is the cause of their blindness.

A.4. The HAF did not willfully cause great physical pain, mental pain or suffering or serious injury to body or health

17. In *Delalić*, the Chamber held that willfully causing great suffering or serious injury to body or health constitutes an act that is intentional.²⁷ In this case, HAF only intended to disperse the crowd to prevent the Lowlanders from crossing the

²² Customary International Humanitarian Law (“CIHL”), Rule 70.

²³ Facts, ¶13.

²⁴ *Prosecutor v Kordić*, (ICTY IT-95014/2-T), Trial Chamber, 23 February 2001, ¶243.

²⁵ Facts, ¶14.

²⁶ Facts, ¶14.

²⁷ *Prosecutor v Delalić*, (ICTY IT-96-21-T), Trial Chamber, 16 November 1998, ¶511.

border into Highland. HAF did not have the intention to cause harm to those individuals.

A.5. The use of PDS is justified by state security

18. To justify the security of a state, a party must have good reasons that have a real threat in the future.²⁸
19. First, Highland intelligence spotted that there were Lowland armed forces among the crowd trying to force their way into Highland territory and inciting violence.²⁹ In addition, the Lowland agents intended to use civilians to sabotage Highland's infrastructure including the communication station on peninsula;³⁰ there were also documents from WikiLeaks showing that Lowland have had long term plans to seize the whole peninsula.³¹
20. Second, there were several hundred Lowlanders trying to cross the border into Highland illegally and the number of people was expected to increase thousands more³² if no immediate action is taken.³³
21. These two crucial pieces of evidence establishes that Highland security was under imminent threat, and therefore necessary for HAF to defend their border.³⁴

B. The crime against humanity of other inhumane acts under article 7(1)(k) of the Rome Statute is not committed

22. There was no widespread or systematic conduct that constituted great suffering, or serious physical or mental injury.

²⁸ *Delalić*, Trial Chamber, ¶577.

²⁹ Facts, ¶11.

³⁰ Facts, ¶27.

³¹ Facts, ¶27.

³² Facts, ¶11.

³³ *Kordić*, Appeal Chamber, ¶686.

³⁴ Article 31(c) of the Rome Statute.

23. “[W]idespread” is a large-scale attack and a high number of victims.³⁵ The PDS showed no side effects as confirmed by the Research Institute of the Highland Ministry of Defence.³⁶ It was used only once in the Largo border area in order to disperse the crowd and protect the Highland territorial sovereignty from those illegally crossing the border.³⁷ The 200 individuals were affected due to the panic of escaping³⁸ not from the effect of the PDS.
24. The systematic attack requires a repeated and continuous commission of criminal acts.³⁹ The nature of the systematic attacks is expressed through “patterns of crimes in the sense of non-accidental repetition of similar criminal conduct on a regular basis”.⁴⁰ The PDS was only used once. Highland did not regularly use this weapon.

C. In any event, Admiral Gum is not responsible as the Commander of the Armed Forces under article 28(a) of the Rome Statute

C.1. Admiral Gum did not have effective control over the HAF

25. Effective control of a Commander is the ability to issue orders at the material time.⁴¹ Effective control must exist at the time of the commission of crime or at least when the crimes were about to be committed.⁴²

³⁵ *Situation In the Republic of Côte D’Ivoire*, (ICC-02/11), Pre-Trial Chamber III, 15 November 2011, ¶53.

³⁶ Facts, ¶13.

³⁷ Facts, ¶14 & 10.

³⁸ Facts, ¶14.

³⁹ *Blaskić*, Appeals Chamber, ¶203.

⁴⁰ *Kordić*, Appeal Judgement, ¶94.

⁴¹ *Blaskić*, Appeal Chamber, ¶399.

⁴² *Prosecutor v Halilović*, (ICTY IT-01-48-T) Trial Chamber I, 16 November 2005, ¶58.

26. Admiral Gum was not the one who issued the order to activate the PDS. Colonel Power, not Admiral Gum, is the one who led the specialist army battalion equipped with the PDS.⁴³ The mere participation of Colonel Power by deploying troops to the border in order to control the situation with the police, is not sufficient in itself to establish that Admiral Gums had demonstrated effective control over the different military units participating in the operation.⁴⁴

C.2. Alternatively, Admiral Gum cannot prevent the crime as he was not aware that the PDS would cause such consequence

27. A Commander's duty is to prevent casualty or crime when there is knowledge that the crime is about to commit.⁴⁵ Admiral Gum's knowledge that the PDS might cause harm must be established.⁴⁶ Even though there was an unofficial leaked report about the consequences of PDS, the report conducted by the Research Institution of Highland Ministry of Defence confirmed that PDS has no side effect.⁴⁷ This proves that Admiral Gum acted accordance to the Ministry of Defence's report.

C.3. Admiral Gum had no sufficient time to punish his subordinates under the chaotic situation as he was ousted one month after the incident.

28. As a Commander, Admiral Gum has to punish his subordinates after he was aware of the crime committed.⁴⁸ The news media reports and the medical report is not enough evidence to prove that he was aware of the situation.⁴⁹ In addition,

⁴³ Facts, ¶11.

⁴⁴ *Bemba Gambo*, Trial Chamber III, ¶185.

⁴⁵ *Blaskić*, Appeal Chamber, ¶83.

⁴⁶ Article 28(a) of the Rome Statute.

⁴⁷ Facts, ¶13.

⁴⁸ *Prosecutor v Ntaganda*, (ICC-01/04-02/06), Pre-Trial Chamber II, 9 July 2014, ¶173.

⁴⁹ *Prosecutor v Strugar*, (ICTY IT-01-42-T), Trial Chamber II, 31 January 2005, ¶370.

- after the incident, there was no reporting system to put him on notice.⁵⁰ The intelligence did not convey any information to Admiral Gum relating to the situation along the border zone.⁵¹
29. Alternatively, in *Bemba*, the Chamber considered through the period of the crime committed and the presence of the Commander at the crime scenes.⁵² In this case, the crime happened on 18 November 2015⁵³ and there is no fact demonstrates that Admiral Gum was at the Largo border, where the crime was committed.
30. Additionally, 5 days after the incident Highland was intensively enforcing their maritime law. And one month after the incident, Admiral Gum was ousted from his position.⁵⁴ This situation may have obstructed him from fulfilling his duty.

⁵⁰ *Bemba Gambo*, Pre-Trial Chamber II, ¶489.

⁵¹ Facts, ¶15.

⁵² *Bemba Gambo*, Pre-Trial Chamber II, ¶489.

⁵³ Facts, ¶14.

⁵⁴ Facts, ¶26.

COUNT TWO: ADMIRAL GUM DOES NOT BEAR INDIVIDUAL CRIMINAL RESPONSIBILITY FOR ORDERING THE ALLEGED WAR CRIME DIRECTING ATTACKS AGAINST CIVILIAN POPULATION

A. The alleged war crime of directing attacks against civilian population under article 8(2)(b)(i) of the Rome Statute is not committed

A.1. The attack was a legitimate attack

31. The Defence concedes that there was an attack, however it was carried out legitimately. Under the *United Nations Convention on the Law of the Sea* (“UNCLOS”), “a coastal state may take necessary steps in its territorial sea to prevent any passage, which is not innocent”.⁵⁵ Highland was in the position to enforce its jurisdiction under maritime law.⁵⁶ Highland has notified Lowland to recall their boats and forced them to return.⁵⁷ Fishing boats persistence made Highland use necessary steps in order for them to comply with the laws in Highland. Highland used force as the last resort.⁵⁸

32. Further, combatants consist of members of the armed forces.⁵⁹ In this case, some of Lowland’s population has made to the Highland peninsula.⁶⁰ The fact demonstrates Lowland’s armed forces were present after the incident.⁶¹ This suggests that those who made it to the ashore are Lowland armed forces.

⁵⁵ Article 25(1) of UNCLOS, 10 December 1982.

⁵⁶ Facts, ¶20.

⁵⁷ Facts, ¶18 & 20.

⁵⁸ Facts, ¶20.

⁵⁹ Article 43 of the Additional Protocol I.

⁶⁰ Moot Clarifications 70.

⁶¹ Facts, ¶24.

A.2. HAF did not intend the population as an object of the attacks

33. An individual has intent to attack where that person is aware that the consequence will happen in ordinary events.⁶² In this case, HAF intended to prevent all fishing boats from advancing further in Highland water.⁶³ Highland had given prior notification and warning to notify them of their illegal position, satisfying the principle of precautions.⁶⁴ Moreover, the Highland patrol vessels also intercepted those boats⁶⁵ intending to verify whether they are civilian.⁶⁶ However, all necessary steps failed, therefore HAF had no other choice but to use force, in order for the fishing boats to comply with their requests.⁶⁷
34. In addition, a person has intent when he is aware that it will occur in ordinary courses of events.⁶⁸ Awareness means knowledge that a circumstance exists.⁶⁹ Under these circumstances, HAF did not have the knowledge that a circumstance where several of the fishing attempted to turn back.⁷⁰
35. Thus, HAF did not intend the population as an object of the attacks.

B. In any event, Admiral Gum is not criminally responsible for ordering the attack under article 25(3)(b) of the Rome Statute

B.1. *Actus reus* element is not satisfied

⁶² Article 30 of the Rome Statute.

⁶³ Facts, ¶20.

⁶⁴ CIHL, Rule 15.

⁶⁵ Facts, ¶20.

⁶⁶ CIHL, Rule 1.

⁶⁷ Facts, ¶20.

⁶⁸ Article 30(2) of the Rome Statute.

⁶⁹ Article 30(3) of the Rome Statute.

⁷⁰ Facts, ¶20.

36. Ordering an attack requires that “a person in a position of authority instructs another person to commit an offence”.⁷¹ In this case, there is no order; Admiral Gum did not instruct the advancing fleet to attack the fishing boats in any form.⁷² Advancing fleet refers to Admiral flagship and frigates.⁷³ There are only facts stating that he ordered the patrol vessels but not the advancing fleet.⁷⁴

B.2. *Mens rea* element is not satisfied

37. The requisite *mens rea* for ordering [the attack] is the awareness of the substantial likelihood that a crime will be committed in the execution of an order.⁷⁵ In this case, Admiral Gum intended to protect the Highland territorial sovereignty; his intention was not to attack the fishing boats.⁷⁶ He had given prior notification that he would do all he could to protect the Highland sovereignty and ordered the patrol to force them back to Lowland.⁷⁷ He has used all the measures to minimize the risk as well as potential harm.

38. The prosecutor may argue that the using of salvo would establish the intent of Admiral Gum.⁷⁸ However, this is not the case. Highland needed reinforcement to stop the boats and applied available measures to stop them.⁷⁹ Therefore, Admiral Gum only intended to protect the Highland territorial sovereignty.

39. Hence, Admiral Gum is not criminally responsible for ordering the attack.

⁷¹ *Prosecutor v Fatmir Limaj Haradin Bala Isak Musliu*, (ICTY IT-03-66-T), Trial Chamber II, 30 Nov 2005, ¶515.

⁷² Facts, ¶20.

⁷³ Moot Clarifications 47.

⁷⁴ Facts, ¶20.

⁷⁵ *Blaskić*, Appeal Chamber, ¶42.

⁷⁶ Facts, ¶18.

⁷⁷ Facts, ¶18 & 20.

⁷⁸ Facts, ¶20.

⁷⁹ Facts, ¶20.

COUNT THREE: ADMIRAL GUM DOES NOT BEAR INDIVIDUAL CRIMINAL RESPONSIBILITY FOR ORDERING THE ATTACK AGAINST CARGO SHIP USING THE DISTINCTIVE EMBLEMS

A. The alleged war crime of directing attack against buildings, material, medical units, transport, and personnel using the distinctive emblems under Article 8(2)(b)(xxiv) of the Rome Statute is not committed

A.1. The display of distinctive emblem on the cargo ship was not compliant with international law

A.1.1. The distinctive emblems were not mark correctly

40. A ship with distinctive emblem shall follow the following: 1) exterior surfaces must be white and 2) one or more red crosses shall be painted or displayed on each side of the hull and horizontal with greatest possible visibility from the sea and air.⁸⁰

41. In this case, the cargo ship was painted light grey with white.⁸¹ Exterior surfaces must be white but not light grey with white.⁸² Also, the cargo ship also failed to display Red Cross emblems on each side of the horizontal of the ship.⁸³

42. Furthermore, a hospital ship shall hoist their national flag, and a white flag with a red cross shall be flown as high as possible.⁸⁴ In this case, the cargo ship did not hoist the Lowland flag as high as possible but hoist them at the fore and aft.⁸⁵

43. Therefore, all the evidence suggests that the ship did not mark the distinctive emblems correctly.

⁸⁰ Article 43(a)(b) of the Geneva Convention II.

⁸¹ Facts, ¶17.

⁸² Facts, ¶17.

⁸³ Facts, ¶17.

⁸⁴ Article 43 of the Geneva Convention II.

⁸⁵ Facts, ¶17.

A.1.2. The cargo ship has lost its protection

44. The protection of a hospital ship ceases when they are used to commit acts that is harmful to the enemy.⁸⁶ In this case, the presence of crewmembers and lightly armed soldiers who boarded life rafts from the cargo ship toward the Highland peninsula imposed harm to Highland security.⁸⁷

A.1.3. Prior notifications are required

45. A hospital ship is solely assigned to treat and transfer the wounded, sick and shipwrecked.⁸⁸ In this case, the cargo ship was ordered to rescue those who were shipwrecked.⁸⁹ The cargo ship has been converted into a hospital ship. A hospital ship must notify the parties to the armed conflict of their names and descriptions ten days before such ship deployed.⁹⁰ As the matter of facts, no notification was made.

A.2. The HAF did not intend for the cargo ship with the Red Cross emblems to be the object of the attack.

A.2.1 In the event of the engagement with the frigates.

46. Intent is established when a person means to engage in the conduct.⁹¹ The HAF did not intend to cause damage to the cargo ship, instead they exercised their duty to protect the Highland territory sea.⁹² There is no fact to suggested that HAF

⁸⁶ Article 34 of the Geneva Convention II.

⁸⁷ Facts, ¶23 & 24.

⁸⁸ Article 22 of the Geneva Convention II.

⁸⁹ Facts, ¶21.

⁹⁰ Article 22 of the Geneva Convention II.

⁹¹ Article 30 of the Rome Statute.

⁹² Facts, ¶21.

intended to attack cargo ship. Also, the fact that more frigates were fired and resulted to hit the cargo was unavoidable or incidental losses.⁹³

A.2.2. In the event of the engagement with the aerial drones.

47. The sovereignty of the coastal not only extends to the sea but also the air space over the territorial sea.⁹⁴ A drone crashing on the cargo was unforeseeable accident⁹⁵ and HAF was acting reasonably to avoid threat from the aerial drones except to order fighter jets to destroy the drones.⁹⁶

48. HAF did not intend the cargo ship with distinctive emblems to be the object of the attack.

B. In any event, Admiral Gum is not responsible for ordering of the attack of the commission under article 25(3)(b) of the Rome Statute

B.1. *Actus reus* element is not satisfied

49. Ordering requires a person in a position of authority to prompt another to commit the crime.⁹⁷ There was no instruction or ordering to attack the cargo ship. The warning shots were to prevent Lowland forces and its submarines vessels entering Highland territorial waters.⁹⁸ Further, the fire jet was to stop the drones heading towards the Highland frigates.⁹⁹

⁹³ Facts, ¶21.

⁹⁴ Article 2(2) of UNCLOS.

⁹⁵ Facts, ¶21 & 22.

⁹⁶ Article 31(d) of the Rome Statute.

⁹⁷ *Prosecutor v. Laurent Gbagbo*, (ICC-02/11-01/11), Confirmation of Charges, 12 June 2014, ¶243.

⁹⁸ Facts, ¶21.

⁹⁹ Facts, ¶22.

B.2. *Mens rea* element is not satisfied

50. The requisite *mens rea* for ordering is the awareness of the substantial likelihood that a crime will be committed in the execution of an order.¹⁰⁰ In this case, Admiral Gum only intended to protect the peninsula. The damage was unavoidable as the presence of the submarine beneath the cargo ship and the aerial drones have violated the air space boundary of Highland.¹⁰¹
51. Therefore, Admiral Gum has a legitimate reason to use necessary force in order to protect the territory sea of Highland.
52. The cargo ship also carried Lowland armed forces, which alludes to the confrontation between Highland and Lowland forces on the peninsula.¹⁰² This can also be traced back to the documents from WikiLeaks suggesting that the Lowland Government deliberately intended to seize the Highland Peninsula.¹⁰³ Admiral Gum therefore did not intend to attack the cargo ship but protect the peninsula.
53. Therefore, Admiral Gum is not criminally responsible for ordering the commission under Article 25(3)(b).

¹⁰⁰ *Blaskić*, Appeal Chamber, ¶42.

¹⁰¹ Facts, ¶21 & 22.

¹⁰² Facts, ¶23 & 24.

¹⁰³ Facts, ¶27.

PRAYER OF RELIEF

The counsels of Defense respectfully request the Honorable Court to dismiss the following charges against Admiral Gum as he is not criminally responsible for:

1. War crime under Articles 8(2)(a)(iii), 8(2)(b)(i) and 8(2)(b)(xxiv), and
2. Crime against humanity under Article 7(1)(k) of the Rome Statute.

**RESPECTFULLY SUBMITTED,
COUNSELS OF DEFENSE**