

The 16<sup>th</sup> Red Cross International Humanitarian Law Moot (2018)

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**Memorial for the Prosecutor**

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## PRELIMINARY MATTER

### I. ADMISSIBILITY OF THE CASE

1. If the State has jurisdiction, it can refer the matter to the International Criminal Court (“ICC”).<sup>1</sup> If it is the case of State’s willingness or inability to genuinely carry out the investigation or prosecution is not subject to raise.<sup>2</sup> Highland has implicitly acknowledged that it will not carry out an investigation against Admiral Gum in their domestic court because they have referred the situation to the ICC.<sup>3</sup>
2. Alternatively, the issuance of an arrest warrant of Admiral Gum before the ICC is to ensure that there will be no obstruction to the national court proceeding.<sup>4</sup> Political unrest, caused by Admiral Gum’s supporters, occurred in Highland as a result of Admiral Gum’s surrender.<sup>5</sup>

### II. STANDARD OF PROOF AND ADMISSIBILITY OF EVIDENCE

3. The prosecution will establish “*substantial grounds to believe*”<sup>6</sup> that Admiral Gum shall be responsible for the three crimes.<sup>7</sup> This notion is defined as finding

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<sup>1</sup> Rome Statute, Article 17(1)(a).

<sup>2</sup> *Prosecutor v Lubanga*, (ICC-01-04-01/06), Pre-Trial Chamber I, 10 February 2006, ¶34.

<sup>3</sup> Facts, ¶28.

<sup>4</sup> Rome Statute, Article 58(1)(b)(ii); see also: *Prosecutor v Bemba*, (ICC-01/05-01/08), Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gambo, 10 June 2008, ¶88; *Prosecutor v Lubanga*, (ICC-01/04-01/06), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, ¶101-102.

<sup>5</sup> Facts, ¶28.

<sup>6</sup> Rome Statute, Article 61(7).

<sup>7</sup> *Prosecutor v Kantanga*, (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, ¶63.

- “strong, concrete and tangible”<sup>8</sup> evidence to confirm the charge. In essence, the court must “assess the intrinsic coherence of each item of evidence”.<sup>9</sup>
4. Medical report<sup>10</sup> and news media<sup>11</sup> are admissible before the court as evidence. Further, in *Bemba*, the court takes account all disclosed information referred to the supporting document.<sup>12</sup> In this case there was the unofficial leaked reports,<sup>13</sup> which shall be admissible before this court, as it provides relevant information for the case.<sup>14</sup>
  5. Additionally, the *Extraordinary Chambers in the Court of Cambodia* (“ECCC”) ruled that WikiLeaks evidence is inadmissible before the court since the court found it neither reliable nor authentic.<sup>15</sup>

### **III. THERE WAS AN INTERNATIONAL ARMED CONFLICT (“IAC”) BETWEEN HIGHLAND AND LOWLAND**

6. An IAC occurs when one or more State has resorted to armed force against another State.<sup>16</sup> Highland and Lowland have been involved in disputes for 50 years.<sup>17</sup> The armed conflict began when Highland’s armed forces used the

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<sup>8</sup> *Lubanga*, Pre-Trial Chamber I, ¶34-40.

<sup>9</sup> *Prosecutor v Mbarushimana*, (ICC-01/04-01/10), Pre-Trial Chamber I, 16 December 2011, ¶47.

<sup>10</sup> *Lubanga*, Order on the medical reports, 7 December 2011, ¶6.

<sup>11</sup> *Kantanga*, Pre-Trial Chamber I, ¶63; see also: *Prosecutor v Gadaffi*, (ICC-01/11-01/11), Pre-Trial Chamber I, 31 May 2013, ¶10.

<sup>12</sup> *Bemba*, Pre-Trial Chamber II, ¶36.

<sup>13</sup> Facts, ¶13.

<sup>14</sup> *Kantanga*, Pre-Trial Chamber I, ¶137.

<sup>15</sup> *Prosecutor v Nuon Chea and Khieu Samphan*, ECCC, Case002, 13 June 2013, ¶7-11.

<sup>16</sup> Common Article 2 of the Geneva Conventions. see also; *Prosecutor v Tadic*, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ¶70.

<sup>17</sup> Facts, ¶7.

Personnel Dispersal System (“PDS”) against civilians and Lowland’s armed forces.<sup>18</sup> The situation became more intense during the incident happened on 23 November 2015 between Highland forces and Lowland forces which resulted in many deaths and injuries and lethal weapons were used. Thus, there was IAC between Highland and Lowland since 18 November 2015.

#### **IV. THE NEXUS ELEMENT TO THE ARMED CONFLICT IN THE THREE CRIMES CHARGED IS SATISFIED**

7. In order for a crime to be associated with an armed conflict, the targeted must be protected objects or personnel.<sup>19</sup> The displaced Lowland civilians, fishing vessels and the cargo ship marked with distinctive emblem are the protected persons and objects.<sup>20</sup> However, Highland attacked those protected objects. Thus, Highland’s conduct was associated with the IAC.

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<sup>18</sup> Facts, ¶14.

<sup>19</sup> *Prosecutor v Kunarac*, (ICTY-IT-96-23 & IT-96-23/1-A), Appeals Chamber, 12 June 2000, ¶58.

<sup>20</sup> Facts, ¶14 & 20 & 23.

## PLEADING

### **COUNT ONE: ADMIRAL GUM AS COMMANDER IS RESPONSIBLE FOR THE WAR CRIME OF WILLFULLY CAUSING GREAT SUFFERING AND SERIOUS INJURY TO BODY OR HEALTH**

#### **A. The alleged war crime of willfully causing great suffering and serious injury to body or health under article 8(2)(a)(iii) of the Rome Statute is committed**

##### **A.1. The PDS causes great suffering by its means and method**

###### **A.1.1. The consequences of PDS had negative effects on individuals**

8. The weapon, which its nature causes superfluous injury or unnecessary suffering, is prohibited.<sup>21</sup> The PDS, causing permanent-hearing loss and blindness to people, has the same serious consequences as a blinding laser weapon, is considered to cause superfluous injury and unnecessary suffering to civilian population.<sup>22</sup>

###### **A.1.2. The PDS is an indiscriminate weapon**

9. The PDS cannot distinguish between combatant and civilian,<sup>23</sup> as it affects large number of people in the targeting area of border zone around Largo.<sup>24</sup>

###### **A.1.3. In any event, the PDS failed to fulfill a proper test before its installation**

10. The PDS requires proper testing before its installation or activation.<sup>25</sup> The report by the Research Institute of the Highland Ministry of Defence showing that there

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<sup>21</sup> Additional Protocol I, Article 35(2); see also: ICRC, Article on the Review of New Weapons, 30 November 2011.

<sup>22</sup> Customary International Humanitarian Law (“CIHL”), Rule 86.

<sup>23</sup> CIHL, Rule 1.

<sup>24</sup> Facts, ¶13.

<sup>25</sup> Additional Protocol I, Article 36; see also: U.S Army Developmental Test Commander Test Operations Procedure, (TOP) 3-2-045, 17 September 2007, p 4-7.

is no side effect. However, there was an unofficial report stating that PDS might cause permanent harm to a number of target people.<sup>26</sup>

11. The PDS was not under a complete experiment to confirm that there was no side effect before deploying.

### **A.2. There were great suffering and serious injury to body caused by the PDS**

12. “[G]reat suffering” requires the showing of physical injury.<sup>27</sup> To measure the degree of injury and suffering, three criteria must be fulfilled; degree of pain, degree of permanent disability or injury, and probability of death.<sup>28</sup> In this case, 200 people were injured<sup>29</sup> and 10 people suffered permanent hearing loss and another 5 were blinded caused by the PDS.<sup>30</sup>

### **A.3. The Lowlanders are protected persons**

13. “[C]ivilian” is defined as “anyone who is not or no longer the members of the armed force or organized armed group”.<sup>31</sup> Those Lowlanders, who were the displaced persons seeking for the shelter,<sup>32</sup> constitute as civilian.

14. Furthermore, the suspicion of the presence of small number of lightly armed Lowlanders does not change the status of the whole crowd into combatants.<sup>33</sup> Thus, the victims of the PDS were protected persons.

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<sup>26</sup> Facts, ¶13.

<sup>27</sup> *Prosecutor v Kordić*, (ICTY IT-95-14/2-T), Trial Chamber, 26 February 2001, ¶245.

<sup>28</sup> ICRC, *Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects*, (1973), p 25.

<sup>29</sup> Facts, ¶14.

<sup>30</sup> Facts, ¶14.

<sup>31</sup> Additional Protocol I, Article 50; see also: CIHL, Rule 5; *Prosecutor v Galić*, (ICTY IT-98-29-T), Trial Chamber I, ¶47.

<sup>32</sup> Facts, ¶11.

<sup>33</sup> Additional Protocol I, Article 50(3).

#### **A.4. The HAF willfully caused great suffering and serious injury to body**

15. The HAF has conducted with intent and knowledge that it will cause great suffering and serious injury to the body.<sup>34</sup> Both prior to and on the day of the incident, the HAF had knowledge that there were displaced Lowlanders attempted to cross the border.<sup>35</sup> Despite knowing the status of the civilian, HAF still activated the PDS to attack the civilian indiscriminately.

#### **A.5. The attack did not justify either military necessity or state security**

16. Any attacks that violate the principle of proportionality cannot be justified by the military necessity<sup>36</sup> as the consequence of the attack is excessive in relation to military advantages anticipated.<sup>37</sup> There was no military advantage resulting from the attack. The situation along Largo border was still under control<sup>38</sup> and there was no harm or imminent threat that is indispensable for HAF to launch the attack.<sup>39</sup> Once displaced Lowlanders arrived the border zone, the PDS was activated pointing towards them at the border zone.<sup>40</sup> As a result, 200 injured, 10 suffered permanent hearing loss, and other 5 were blinded.<sup>41</sup>

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<sup>34</sup> Rome Statute, Article 30; see also: *Prosecutor v Delalić* (ICTY IT-96-21-T), Trial Chamber, 16 November 1998, ¶511; *Prosecutor v Blaskić*, (ICTY IT-95-14-A), Appeal Chamber, 29 July 2004, ¶180.

<sup>35</sup> Facts, ¶11 & 14.

<sup>36</sup> ICRC, Military Necessity: How does Law Protect in War, 19 January 2018.

<sup>37</sup> Additional Protocol I, Article 51(5)(b); see also: *Galić*, Trial Chamber I, ¶58.

<sup>38</sup> Facts, ¶14.

<sup>39</sup> *Kordić*, Appeal Chamber, ¶686.

<sup>40</sup> Facts, ¶14 & Moot Clarifications 35.

<sup>41</sup> Facts, ¶14.

**B. The crime against humanity of other inhumane under article 7(1)(k) of the Rome Statute is committed**

17. “[W]idespread” is defined as the act that was massive, carried out collectively with considerable seriousness over a geographical scope of the attack and the number of targeted persons.<sup>42</sup> The conduct occurred in the Largo border zone. The attack itself targeted thousands of displaced Lowlanders who approached the area.<sup>43</sup> Out of several thousand lowland civilians, 200 were injured with 15 of those suffered serious harm of permanent hearing loss and blindness.<sup>44</sup> Out of this evidence, it shows that the attack was mass targeting large group of Lowlanders along the Largo border.

18. The term “systematic” is defined as an organized and following a regular pattern or methodical plan or policy.<sup>45</sup> The PDS had been developed for many years.<sup>46</sup> Correspondent to the fact that the displaced Lowlanders had attempted to cross the border.<sup>47</sup> Highland deployed the well-trained specialist army battalion along the border equipped with the PDS,<sup>48</sup> this demonstrates their intent to properly plan the attack. By this, Highland had plan to cause harm on displaced Lowlanders by activating the PDS directly against the crowds.

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<sup>42</sup> *Prosecutor v Ruto, Koshey and Sang*, (ICC-01/09-01/11), Pre-Trial Chamber II, 23 January 2012, ¶176-177; see also, *Prosecutor v Jovica Stanišić and Franko Simatović*, (ICTY IT-03-69-T), Trial Chamber I, 30 May 2013, ¶963.

<sup>43</sup> Facts, ¶14.

<sup>44</sup> Facts, ¶14.

<sup>45</sup> *Prosecutor v Jean-Paul Akayesu*, (ICTR-96-4-T), Trial Chamber, 2 September 1998, ¶580; see also, *Prosecutor v Tadić*, (ICTY IT-94-1-T), Trial Chamber, 7 May 1997, ¶648.

<sup>46</sup> Facts, ¶13.

<sup>47</sup> Facts, ¶11 & 14.

<sup>48</sup> Facts, ¶12.

## **C. Admiral Gum is responsible as the commander under article 28(a) of the Rome Statute**

### **C.1. Admiral Gum has effective control over the HAF**

19. The term “effective control” is defined as authority over the armed force.<sup>49</sup> In which a commander has *de jure* and *de facto* power over his subordinate.<sup>50</sup> Admiral Gum was the head of the HAF.<sup>51</sup> He deployed a specialist army battalion equipped with the PDS and put Colonel Power in charge.<sup>52</sup> As a result, PDS was activated and cause serious harm to the crowd who approached the border. Thus, it clearly shows the command structure between Admiral Gum and the HAF who were equipped and activated the PDS.<sup>53</sup>

### **C.2. Admiral Gum should have known about the nature of PDS but he failed to prevent**

20. It requires knowledge of a commander<sup>54</sup> in order to prevent his subordinate from committing the crime.<sup>55</sup> Admiral Gum is the head of HAF, and he should have known that PDS may have side effect as it have not under a complete experiment. PDS was developed for many years and once it was activated all the HAF personnel withdrew.<sup>56</sup>

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<sup>49</sup> *Bemba Gambo*, Pre-Trial Chamber, ¶413.

<sup>50</sup> *Bemba Gambo*, Pre-Trial Chamber, ¶414; see also: *Prosecutor v Blegojević*, (ICTY IT-02-60-T), Trial Chamber, 17 January 2005, ¶319.

<sup>51</sup> Facts, ¶8.

<sup>52</sup> Facts, ¶12.

<sup>53</sup> *Prosecutor v Strugar*, (ICTY IT-01-42-T), Trial Chamber II, 31 January 2005, ¶365.

<sup>54</sup> Rome Statute, Article 28(a).

<sup>55</sup> *Prosecutor v Ntaganda*, (ICC-01/04-02/06), Pre-Trial Chamber II, 9 June 20014, ¶173.

<sup>56</sup> Facts, ¶12 &14.

### **C.3. Admiral Gum had knowledge that the crime was committed but failed to punish**

21. As a Commander, Admiral Gum has the duty to punish his subordinate.<sup>57</sup> Admiral Gum's knowledge can be referred from the circumstantial evidence.<sup>58</sup> The awareness of Admiral Gum might consider through media report.<sup>59</sup> There are the news media and the medical reports about the result after the use of PDS<sup>60</sup> that could put him on notice about the crime committed.
22. In any event, if Admiral Gum was in the situation that might obstruct him from conducting further action or investigation he still has the duty to report the situation to the competent authority.<sup>61</sup> However, he failed to do so in this case.

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<sup>57</sup> *Galić*, Trial Chamber I, ¶720; see also: *Ntaganda*, Pre-Trial Chamber II, ¶173.

<sup>58</sup> *Prosecutor v Kordić*, Trial Chamber, ¶427.

<sup>59</sup> *Delalić*, Trial Chamber, ¶386.

<sup>60</sup> Facts, ¶14.

<sup>61</sup> *Prosecutor v Halilović*, (ICTY IT-01-48-T), Trial Chamber, 16 November 2005, ¶97.

## **COUNT TWO: ADMIRAL GUM IS INDIVIDUALLY RESPONSIBLE FOR THE WAR CRIME OF DIRECTING THE ATTACK AGAINST CIVILIANS ABOARD THE FISHING BOATS**

### **A. The war crime of directing an attack against a civilian population under article 8(2)(b)(i) of the Rome Statute is committed**

#### **A.1. There was an attack**

23. An “attack” is defined as an act of violence against the adversary whether in offence or in defence.<sup>62</sup> On 23 November 2015, the firing of salvos, which result in deaths and thrown into sea, constitutes an act of violence.<sup>63</sup>

24. In addition, indiscriminate attack is amounted to direct attack.<sup>64</sup> An attack is indiscriminate when it cannot direct at a specific military object and the effect cannot be limited.<sup>65</sup> In this case, firing salvos to the fishing boats was constituted as indiscriminate attack since it affects civilians and children.<sup>66</sup>

#### **A.2. The object of the attack was civilians**

25. “[C]ivilians” are those who are not member of armed forces.<sup>67</sup> In this case, the people on the fishing boats were not the member of armed force or combatants; they were men, women and children who are the protected civilians.<sup>68</sup>

26. In case of doubt, a person shall be considered to be a civilian.<sup>69</sup> Both Highland and Lowland personnel were not aware of the identity or information aboard the

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<sup>62</sup> Additional Protocol I, Article 49.

<sup>63</sup> Moot Clarifications 50 & Facts, ¶20&21.

<sup>64</sup> *Galić*, Appeal Chamber, ¶132.

<sup>65</sup> Additional Protocol I, Article 51(4).

<sup>66</sup> Facts, ¶21.

<sup>67</sup> Additional Protocol I, Article 50(1).

<sup>68</sup> Facts, ¶21.

<sup>69</sup> CIHL, Rule 6.

fishing boats<sup>70</sup>, therefore those persons aboard the fishing boats were considered as civilian.

### **A.3. The attack was not justified on the ground of state security or military necessity**

27. To justify an act on grounds of security, parties must have a good reason for believing that the activity represents a real threat to its present or future security.<sup>71</sup>
28. Under the law of the sea, all vessels grant with the right to travel through foreign territorial seas as long as it does not prejudice to state's security or peace without require prior notification or authorization.<sup>72</sup> Activities that prejudice to security or peace of the coastal state include any threat or use of force against the coastal state, exercise with weapons of any kind or any act aimed at collecting information.<sup>73</sup> However, in this case the fishing boats were packed with civilians, their activities do not fall under any of the criteria above.<sup>74</sup> Therefore, the fishing boats did not cause any threat or harm to Highland security.
29. In addition, an act of perpetrator may be exculpated if the act was a military necessity.<sup>75</sup> Attacking a civilian population is an absolute prohibition.<sup>76</sup> Further, the casualties resulted from the attack was excessive in relation to military advantage anticipated.<sup>77</sup> Since there were a number of people who died and several hundreds were thrown into the sea.<sup>78</sup>

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<sup>70</sup> Facts, ¶19.

<sup>71</sup> *Delalić*, Trial Chamber, ¶577.

<sup>72</sup> United Nations Convention on the Law of Sea (“UNCLOS”), Article 17. 10 December 1982.

<sup>73</sup> UNCLOS, Article 19.

<sup>74</sup> Facts, ¶17.

<sup>75</sup> *Strugar*, Trial Chamber II, ¶280.

<sup>76</sup> Additional Protocol I, Article 51.

<sup>77</sup> CIHL, Rule 14.

<sup>78</sup> Moot Clarifications 50 & Facts, ¶20&21.

#### **A.4. The HAF intended the fishing boats to be the primary target**

30. A person has intent if that person directly engages in the conduct.<sup>79</sup> A person must have the knowledge of facts that would make the conduct illegal with an act.<sup>80</sup> In this case, the fact that the advancing fleet opened the attack towards all the fishing boats while several of them were attempting to return to Lowland territory is a manifestation of intent.<sup>81</sup> Also, when the firing of salvos continues for the second time, it further shows intent of the HAF to attack on civilian population.<sup>82</sup>

31. Direct attack demonstrates the intention of perpetrator.<sup>83</sup> Direct attack is amount to indiscriminate attack.<sup>84</sup> In this case, firing salvos to the fishing boats was constituted as indiscriminate attack. Therefore, it established intention of the HAF.<sup>85</sup>

#### **B. Admiral Gum is criminally responsible for ordering the attack under article 25(3)(b) of the Rome Statute**

##### **B.1. *Actus reus* element is satisfied**

32. Ordering requires a person in a position of authority to prompt another individual to commit the crime.<sup>86</sup> An order does not require to be in a direct form;<sup>87</sup> its existence may be proven through direct or circumstantial evidence.<sup>88</sup>

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<sup>79</sup> Rome Statute, Article 30(2)(a).

<sup>80</sup> Barar Elewa Mohamed, *The Concept of mens rea in international criminal law: The case for a unified approach*, Studies in international and comparative criminal law: volume 12, 2013, p 388-389.

<sup>81</sup> Facts, ¶20.

<sup>82</sup> Facts, ¶20.

<sup>83</sup> *Blaskić*, Appeal Chamber, ¶103.

<sup>84</sup> *Galić*, Appeal Chamber, ¶132.

<sup>85</sup> Facts, ¶20.

<sup>86</sup> *Prosecutor v Laurent Gbagbo*, (ICC-02/11-01/11), Confirmation of Charges, 12 June 2014, ¶243.

<sup>87</sup> *Galić*, Trial Chamber I, ¶168.

33. In this case, Admiral Gum led the HAF, and it is explicitly shown that Gum ordered to intercept the boats and force them to return.<sup>89</sup> He then continued to observe the operation in his helicopter while more salvos were fired.<sup>90</sup> Therefore, it is reasonable to infer that the firing salvos could only have been done in accordance with the orders of Admiral Gum.

## **B.2. *Mens rea* element is satisfied**

34. The requisite *mens rea* for ordering is that the accused person has the awareness of the substantial likelihood that a crime would be committed in the execution of an order.<sup>91</sup> In this case, Admiral Gum was aware that civilians were aboard the fishing boats, and still went ahead with his intention to kill by firing salvos with the power to strike and destroy as many anti-shipping missiles as possible.<sup>92</sup> Furthermore, Admiral Gum's intention can be drawn from his statement that "Highland would do all it could to protect its territorial sovereignty" which can be inferred that it includes attacking civilian population.<sup>93</sup>

35. Therefore, Gum is criminally responsible for ordering HAF to commit the war crime of directing an attack against civilians.

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<sup>88</sup> *Strugar*, Trial Chamber II, ¶331.

<sup>89</sup> Facts, ¶20.

<sup>90</sup> Facts, ¶20.

<sup>91</sup> *Blaskić*, Appeal Chamber, ¶42.

<sup>92</sup> Michael J. Armstrong and Michael B. Powell, *A Stochastic Salvo Model Analysis of the Battle of the Coral Sea*, Centre for Security and Defence Studies, Canada, April 2005, p 3.

<sup>93</sup> Facts, ¶18.

**COUNT THREE: ADMIRAL GUM IS INDIVIDUALLY RESPONSIBLE FOR WAR CRIME OF DIRECTING AN ATTACK AGAINST CARGO SHIP USING THE DISTINCTIVE EMBLEMS**

**A. The war crime of intentionally attacking against transport using the distinctive emblems of the Geneva Conventions under article 8(2)(b)(xxiv) of the Rome Statute is committed**

**A.1. There was an attack on the cargo ship using the distinctive emblems**

36. An “attack” is defined as an act of violence against the adversary whether in offence or in defence.<sup>94</sup>

37. The damage of the cargo ship was resulted from the Highland fighter jets and frigates firing in which it is illustrated by its violent consequence<sup>95</sup>, is constituted as the attack<sup>96</sup>.

**A.1.1. The display of the distinctive emblems on the cargo ship was in accordance with the international law.**

38. A ship with the distinctive emblems shall follow the rules that, (1) all 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.<sup>97</sup>

39. In this case, the cargo ship was painted light grey on the hull and white on the superstructure. It is required only that the surfaces to be white which does not include the hull; therefore, the cargo ship has marked correctly.<sup>98</sup> The cargo ship also displayed the emblems correctly. The cargo ship also displayed 10m x 10m

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<sup>94</sup> Additional Protocol I, Article 49.

<sup>95</sup> *Prosecutor v Tadić*, 1995, ¶120&124.

<sup>96</sup> Facts, ¶22 & 23.

<sup>97</sup> Geneva Convention II, Article 43(a)(b).

<sup>98</sup> Facts, ¶17.

amidships on each side of its hull which could be seen clearly from the sea and air.<sup>99</sup>

40. In addition, a hospital ship shall hoist their national flag, and a white flag with a red cross shall be flown as high as possible.<sup>100</sup> The cargo ship has hoisted the Lowland flag as well as the Red Cross flag on its fore and aft.<sup>101</sup> Therefore, the cargo ship was marked correctly.

#### **A.1.2. Notification is not mandatory**

41. A hospital ship shall notify to the armed conflict parties ten days before deployed.<sup>102</sup> In this case, the cargo ship was not on duty of humanitarian assistance.<sup>103</sup> However, the incident happened randomly, which in need of cargo ship assistance to help the civilian population in the sea.<sup>104</sup> Therefore, the cargo ship is not required to provide prior notification.

#### **A.1.3. The cargo ship was not misused**

42. A protection of a hospital ship is ceased unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.<sup>105</sup> In this case, the cargo ship has provided humanitarian assistance by helping those who were shipwrecked in the sea.<sup>106</sup>

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<sup>99</sup> Facts, ¶17.

<sup>100</sup> Geneva Convention II, Article 43.

<sup>101</sup> Facts, ¶17.

<sup>102</sup> Geneva Convention II, Article 22.

<sup>103</sup> Facts, ¶17.

<sup>104</sup> Facts, ¶21.

<sup>105</sup> Geneva Convention II, Article 34.

<sup>106</sup> Facts, ¶23.

43. The protection of the ship is not deprived by the fact that the crews are armed for the purpose of maintenance the order or for their own defence.<sup>107</sup> In this case, the presence of the lightly armed soldiers and the crews in the cargo ship did not cease its protection.<sup>108</sup>

## **A.2. HAF intended the cargo ship with the distinctive emblems to be an object of the attack.**

44. Intent can be established if the person means to cause that consequence or is aware that it will occur in the ordinary events.<sup>109</sup> In this case, HAF was aware of the protected status of the cargo ship in providing rescuing service but they still decided to launch the attack which cause the damage of the cargo ship by their consequence. Thus, HAF's intention to attack the cargo ship was established.

## **B. Admiral Gum is criminally responsible for ordering the attack under article 25(3)(b) of the Rome Statute**

### **B.1. *Actus reus* element is satisfied**

45. The objective element of "ordering" an attack "requires that a person in a position of authority instructs another person to commit an offence".<sup>110</sup> In this case, Admiral Gum possessed the power to lead the HAF and HAF followed his instructions and carried out the order without delay.<sup>111</sup>

46. In addition, there were separate two attacks where Admiral Gum ordered the fighter jet to destroy the drones<sup>112</sup> and to firing the frigates<sup>113</sup> which resulted the

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<sup>107</sup> Geneva Convention II, Article 35(1).

<sup>108</sup> Facts, ¶23.

<sup>109</sup> Rome Statute, Article 30(2)(b).

<sup>110</sup> *Prosecutor v. Fatmir Limaj Haradin Bala Isak Musliu*, (ICTY IT-03-66-T), Trial Chamber II, 30 Nov 2005, ¶515.

<sup>111</sup> Facts, ¶8 & 21.

<sup>112</sup> Facts, ¶22.

damage of the cargo ship.<sup>114</sup> This can be inferred that Admiral Gum ordered to attack the cargo ship.

## **B.2. *Mens rea* element is satisfied**

47. A person has intent when that person is aware that a consequence will occur in the ordinary course of events.<sup>115</sup> Regardless, the presence of the cargo ship marked with the distinctive emblems. Admiral Gum still ordered the fighter jets and frigates to attack, which resulted in the damages sustained of the cargo ships.<sup>116</sup> It is reasonable to infer that Admiral Gum intended to carry out the attacks as he knew the cargo ship would sustain damages.
48. Admiral Gum is criminally responsible for ordering the commission of the war crime of attacking against transport using the distinctive emblems of Geneva Conventions under article 8(2)(b)(xxiv).

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<sup>113</sup> Facts, ¶21.

<sup>114</sup> Facts, ¶22 & 23.

<sup>115</sup> Rome Statute, Article 30.

<sup>116</sup> Facts, ¶21& 22.

## **PRAYER OF RELIEF**

The Prosecution, thus, respectfully requests this Honorable Court to adjudge and declare that Admiral Gum is responsible for:

1. War crime under Article 8(2)(a)(iii) or crime against humanity under article 7(1)(k);
2. War crime under article 8(2)(b)(i); and
3. War crime under article 8(2)(b)(xxiv) of the Rome Statute.

**RESPECTFULLY SUBMITTED**  
**COUNSELS FOR THE PROSECUTION**