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1. Preliminary Matters

1.1. The Defence accepts that the International Criminal Court (the Court) has prima facie jurisdiction, but submits that jurisdiction should not be exercised in this case. The prosecution must prove Colonel Hermon's guilt beyond reasonable doubt.¹

2. Admissibility

2.1. The case is inadmissible under article 17(1)(b) because Northland initiated a truth and reconciliation procedure. The post-investigation decision not to prosecute Colonel Hermon did not involve "unwillingness" in the sense of an attempt to "[shield] the person concerned from criminal responsibility".² The Court is governed by the principle of complementarity – states have primary jurisdiction over crimes.³

2.2. The purpose behind the Rome Statute is the elimination of impunity.⁴ Impunity does not result from genuine alternative forms of justice. Although some Truth and Reconciliation Commissions (TRCs) are used to achieve impunity, genuine TRCs – like courts – provide accountability and redress; they involve individuals taking responsibility for their crimes.⁵ These have

¹ Rome Statute of the International Criminal Court (entered into force 1 July 2002), art 66 [Rome Statute].

² Ibid, art 17(2).

³ Ibid, preamble; art 1.

⁴ Ibid, preamble.

⁵ Carsten Stahn "Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court" 3 J. Int'l Crim. Just. 695 (2005); Antonio Cassese, Paola Gaeta and John Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford, 2002) at 693; Gregory Gordon "Complementarity and Alternative Justice" 88 Or. L. Rev. 621 (2009).

often been used and have received support from the international community.⁶ The purpose of the Rome Statute is reflected in articles 16, 17, 20 and 53. These provisions exhibit purposeful and creative ambiguity leaving room for the Court to defer to truth and reconciliation procedures involving amnesty in some circumstances.⁷ Deferral is appropriate where it would “serve the interests of justice”⁸, namely, where the truth and reconciliation procedure itself constitutes a genuine alternative form of justice.

2.3. The Northland TRC was a genuine alternative form of justice. Prosecution of perpetrators was possible where they did not cooperate with the TRC.⁹ Although Colonel Hermon was not prosecuted, he suffered the significant sanction of dishonourable discharge from the army.¹⁰

3. Nature of the Armed Conflict

3.1 At all material times, the conflict in Northland was an internal armed conflict, involving armed hostilities “between government authorities and organised dissident armed groups”¹¹ within a state territory.

3.2 The internal conflict between Northland, AFLOR and BAN did not escalate to an international armed conflict. Internationalisation of a conflict requires either direct or indirect intervention by another state,¹² comprising “effective

⁶ Michael Scharf “The Amnesty Exception to the Jurisdiction of the International Criminal Court” 32 Cornell Int’l L.J. 507 (1999).

⁷ Ibid.

⁸ Rome Statute, art 53.

⁹ Moot Problem, at [2.33].

¹⁰ Ibid, at [2.34].

¹¹ *Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) Decision on the Confirmation of Charges, 15 June 2009, at [231].

¹² *Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06) Decision on the Confirmation of Charges, 29 January 2007, at [209].

control”¹³ over the rebels. Southland did not have “effective control” over AFLOR and BAN, as these groups made autonomous military decisions, and Southland’s support was not essential to their activities.

3.3 The ICJ’s “effective control” test should be preferred over the ICTY jurisprudence, as it more accurately describes the level of responsibility required. If “overall control”¹⁴ is the test, state intervention must go beyond “financing, training and equipping or providing operational support”.¹⁵ As Southland did not command AFLOR and BAN’s military operations, but only provided assistance, its actions did not internationalise the conflict.

3.4 Therefore, the first alternate charges of each count against Colonel Hermon are invalid. In the event that the Court finds the indictments to be appropriate, they are nevertheless addressed below.

4. First Count

4.1. Colonel Hermon’s subordinate, Captain Sure, did not commit a crime under articles 8(2)(b)(ii) or 8(2)(e)(i), as the destruction of the villages was a military objective that was not indiscriminate or disproportionate. The destruction of the villages provided a definite military advantage by creating a smokescreen which enabled the troops to escape.¹⁶ The attack was proportionate as it seemed Captain Sure’s troops were facing torture or

¹³ *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) Merits Judgment*, 27 June 1986 at [105]; *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* 26 February 2007 at [400].

¹⁴ *Prosecutor v Tadić* (IT-94-1-A) Appeal Decision, 15 July 1999, at [131].

¹⁵ *Ibid.*, at [137].

¹⁶ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (entered into force on 7 December 1978), art 52(2) [Additional Protocol I]; Moot Problem, at [2.26].

execution, whereas it could not be certain that civilians would be physically harmed in the attack. As no crime was committed, Colonel Hermon cannot be liable as a superior under article 28.

4.2. The defences of self-defence¹⁷ or duress¹⁸ apply to Captain Sure's actions.

4.3. In the case of self-defence, Captain Sure acted reasonably to defend himself against a perceived unlawful use of force by the enemy. The specific circumstances of each case must be considered.¹⁹ This was not a mere defensive operation; this seemed to be an extraordinary situation in which Captain Sure's troops were surrounded and facing imminent torture and execution at the hands of BAN. His response was reasonable and proportionate to the degree of danger posed.

4.4. In the case of duress, Captain Sure acted reasonably and necessarily to avoid the threat of imminent death and of continuing and imminent serious bodily harm at the hands of the enemy.²⁰ Captain Sure did not intend to cause a greater harm than that which he sought to avoid.²¹ Captain Sure did not have a moral choice.²²

4.5. Both self-defence and duress are justifications,²³ and therefore exculpate Captain Sure. A superior cannot be held responsible where the criminal responsibility of the primary actor is excluded on the basis of a justification,²⁴

¹⁷ Rome Statute, art 31(1)(c).

¹⁸ Ibid, art 31(1)(d).

¹⁹ *Kordić et al.* (IT-95-14/2-T) Judgment, 26 February 2001, at [452].

²⁰ *Prosecutor v Erdemović* (IT-96-22-T) Sentencing Judgment, 29 November 1996, at [18].

²¹ Ibid, at [17]; Moot Problem, at [2.24].

²² *Erdemović*, at [17].

²³ Cassese, Gaeta and Jones, above n 5, at 953.

²⁴ Ibid, at 952; Chantal Meloni *Command Responsibility in International Criminal Law* (Asser Press, The Hague, 2010), at 153.

thus Colonel Hermon cannot be liable.

4.6. Alternatively, Colonel Hermon cannot be liable on superior responsibility under article 28. Colonel Hermon exercised proper control over his subordinates, and took the necessary measures to prevent and repress the crimes. Colonel Hermon correctly sought legal advice and was led to believe that the action was lawful.²⁵

4.7. Further, Colonel Hermon is excused by mistake of fact within the meaning of article 32(1) of the Rome Statute.²⁶ He did not know that Captain Sure's forces were about to commit crimes, as the information that he received from Captain Sure was that the surrounding forces were BAN. In the circumstances as Colonel Hermon perceived them, the attack was proportionate and undertaken in furtherance of a military objective. Therefore the mental element of article 28 is negated.

5. Second Count

5.1. Colonel Hermon is not guilty as an accessory to the starvation of civilians, nor wilful killing. The Defence accepts the liability of the principal, Air Chief Marshall Pike under article 8(2)(b)(xxv), or under article 8(2)(c)(i).

5.2. Colonel Hermon cannot be liable, as he is accused of failing to close the canals, or the continuing diversion of water. This is an omission, and there is no accessorial liability for omissions in the Rome Statute.²⁷ It was considered

²⁵ *US v List, et al ("Hostages Case")* XITWC Nuremberg Military Tribunals (Washington: GPO, 1950); *US v Medina*, CM 427162 (ACMR, 1971); Additional Protocol I, arts 86(2) and 87(1).

²⁶ William Schabas *An Introduction to the International Criminal Court* (3rd ed, CUP, Cambridge, 2007), at 229–230.

²⁷ William Schabas, "General Principles of Criminal Law" 6 *Eur. J. Crime Crim. L. & Crim. Jus.* 400 (1998) at 412.

and expressly rejected at the Rome Conference²⁸ and is contrary to state party practice.²⁹ It has no legal basis at customary international law.³⁰ The Rome Statute is a detailed code which was the product of international negotiation³¹ and, given the circumstances, its text and context must prevail.³²

5.3. The ICTY has allowed liability for omissions of accomplices. However, it is an ad hoc institution, which "mold[s] its Rules and procedures to fit the task at hand".³³ This difference means its jurisprudence is not applicable here.

5.4. Even applying the ICTY jurisprudence, Colonel Hermon is not culpable. He had no legal duty to act, no ability to prevent the starvation, and there was no sufficient causal nexus between his actions and the deaths, all of which the ICTY requires to find liability for omissions as an accessory.³⁴ Further, Colonel Hermon lacked the mens rea of intent to "facilitate" the crime.³⁵

²⁸ M Cherif Bassiouni *The Legislative History of the International Criminal Court: An Article by Article Evolution of the Statute* (Ardsley, New York: Transnational, 2005) Vol 2 at 195.

²⁹ For example, French law rejects accessorial liability for omissions.

³⁰ Gideon Boas, "Omission Liability at the International Criminal Tribunal: A Case for Reform" in Shane Darcy and Joseph Powderly, *Judicial Creativity and the International Criminal Tribunals* (Oxford University Press, Oxford, 2010) at 223.

³¹ Håkan Friman, "Inspiration from the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court" 2 L. & Prac. Int'l Cts. & Tribunals 373 (2003).

³² Vienna Convention on the Law of Treaties (entered into force 23 May 1969), arts 31 and 32.

³³ *First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc A/49/150 (1994) at [75].

³⁴ *Prosecutor v Milutinović* (IT-05-87-T) Trial Judgment, 26 February 2009, at [90].

³⁵ Rome Statute, art 25(3).

5.5. Colonel Hermon is nevertheless excused from liability by the defence of superior orders.³⁶ He was under a legal duty to obey his commander, and was unaware of the illegality of the order issued. Further, the order that the canal must remain open was both proportionate and necessary to alleviate the effects of the drought in other parts of Northland,³⁷ and so was not manifestly unlawful.

6. Third Count

6.1. Colonel Hermon is not guilty as an accessory to wilful killing or murder. The Defence accepts the primary liability of Brigadier Smooth for the massacre in Rustica under article 8(2)(a)(i), or under article 8(2)(c)(i).

6.2. Colonel Hermon cannot be liable for his actions, as he buried the bodies at Rustica after the commission of the crime. The Rome Statute does not provide for *ex post facto* aiding and abetting.³⁸ The *travaux préparatoires* support the idea that the silence in the Rome Statute amounts to it being “intentionally excluded”³⁹ following state negotiations. A similar analysis to that in paragraphs 5.2 and 5.3 above applies here; the Rome Statute ought to be applied as intended by the states parties.

6.3. If *ex post facto* aiding and abetting is recognised, Colonel Hermon is nevertheless not guilty. The ICTY jurisprudence requires a prior agreement between the principal and the accomplice.⁴⁰ The agreement between Colonel Hermon and Brigadier Smooth was made only after the massacre was

³⁶ Rome Statute, art 33.

³⁷ Moot Problem, at [2.14].

³⁸ William Schabas *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, Oxford, 2010), at 435.

³⁹ *Ibid.*

⁴⁰ *Prosecutor v Blagojević* (IT-02-60-T) Trial Chamber Judgment, 17 January 2005, at [731].

completed. Therefore, there is no causal link between Colonel Hermon's actions and the crime, and he cannot be held personally responsible for it.

7. Prayer for Relief

7.1. The Defence accordingly respectfully requests this Honourable Court to adjudge that Colonel Hermon is not criminally responsible for war crimes under articles 8(2)(b)(ii), 8(2)(e)(i), 8(2)(b)(xxv), 8(2)(c)(i) and 8(2)(a)(i) of the Rome Statute.