

R11 P

PRELIMINARY ISSUES

Standard of Proof

1. The Prosecution will provide 'sufficient evidence to establish substantial grounds to believe'¹ Stage committed the crimes charged. The Prosecution will demonstrate 'a clear line of reasoning underpinning specific allegations,'² going beyond 'mere theory or suspicion.'³ In determining substantial grounds, the Court must make an assessment of the case before it as a whole.⁴

Jurisdiction

2. The exercise of this Court's jurisdiction is justified by the Prosecutor establishing substantial grounds to believe that Stage committed each crime.⁵

Admissibility

3. A domestic investigation will render a case inadmissible only if it 'covers the same individual and substantially the same conduct as alleged in the proceedings before the Court'.⁶ The Banksian investigation considers only the development/testing of the smallpox/Rash vaccines. No evidence suggests Stage is the subject of investigation.⁷ The investigation is not of the defendant or of the conduct alleged and thus does not preclude admissibility of this case.

¹ Rome Statute of the International Criminal Court (*ICCSt.*) Art.67(5).

² *Mbarushimana*, Confirmation of charges, ICC-01/04-01/10 (16Dec2011) ¶40.

³ *Lubanga*, Confirmation of the charges, ICC-01/04-01/06-803 (29Jan2007) ¶39.

⁴ *Ibid.*

⁵ *ICCSt.* Art.8.

⁶ Above n3 ¶31.

⁷ Facts¶3.20.

Admission of Evidence

4. Admissibility of evidence is determined by balancing its probative value and relevance against any prejudice to a fair trial caused by admission of the evidence.⁸ Evidence adduced by the Prosecution will be demonstrated to be admissible.

SUBSTANTIVE CRIMES AND ATTRIBUTION

5. First Count

- 5.1. Inhuman treatment was committed on Lantanan prisoners of war⁹ by Clever, aided by Stage's subordinate, Talent, for which Stage bears superior responsibility.¹⁰

Substantive Elements

- 5.2. There is sufficient evidence establishing that Clever committed inhuman treatment. Lantanan prisoners were subjected to vaccine trials, amounting to a biological experiment.¹¹ Clever was aware the foreseeable risk¹² to prisoners was significant, as several vaccines had not been animal-trialled.¹³ This amounts to serious endangerment to physical health.¹⁴

- 5.3. Clever had a non-therapeutic intention in performing the trials, as he was aware they were being conducted as part of a weapons development program.¹⁵ His non-adherence to accepted medical standards by testing vaccines that were not based on

⁸ *ICCSt.* Art.69(4).

⁹ *Geneva Convention III*, Art.4.

¹⁰ *Boskoski and Tarculovski*, Judgment, IT-04-82, (10Jul2008) ¶¶18-48.

¹¹ Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), 73.

¹² Sandoz, 'Art 11' in Sadoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols* (1987) ¶493.

¹³ Facts¶3.7.

¹⁴ Elements of Crimes for Article 8(2)(a)(ii) ICC Statute, -3, num.2.

¹⁵ Facts¶3.6.

animal experimentation¹⁶ further evidences non-therapeutic intent.¹⁷ Biological experimentation is not justified by medical reasons or conducted in the subjects' interests if undertaken for non-therapeutic purposes.¹⁸ Clever knew the vaccines were non-therapeutic and acted with 'guilty intent.'¹⁹

5.4. Consent is not a defence to biological experimentation.²⁰ In any case, consent must be 'voluntary' and not obtained under duress.²¹ Smith's statement that a prisoner asserted being 'threatened' establishes substantial grounds to believe that consent was not voluntary.²² The statement was made at a time close to the commission of the offence, in circumstances suggesting it is reliable.²³ While Smith is unavailable for examination,²⁴ the evidence can be interrogated as Moore, to whom the statement was made; is available for examination. Smith's statement is highly probative, and unfairness to the defendant by its admission can be ameliorated. It should be admitted as evidence.

¹⁶ Facts¶3.7.

¹⁷ *K. Brandt and Others Case. (Doctors' Case)*, Cited in UNWCC, *LRTWC*, vol.VII ¶¶49–50; 14AD 296, ¶297.

¹⁸ Elements of Crimes for Article 8(2)(a)(ii) ICC Statute, -3, num. 2; Werle, *Principles of International Criminal Law* (2005), p.308.

¹⁹ *Blaskic*, Judgment, IT-95-14-T (2Mar2000) ¶152.

²⁰ Kittichaisaree, *International Criminal Law* (2001), p.146.

²¹ Nuremberg Code, in "Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10", Vol. 2, pp.181-182. Washington, D.C.: U.S. Government Printing Office, 1949.

²² Facts¶3.7.

²³ *US Federal Rules of Evidence*, R803(5)(b) and (c); *Uniform Evidence Act (Australia)* s66 – in these jurisdictions, statements made while an incident is "fresh in the memory" operate as an exception to the hearsay rule.

²⁴ Facts¶3.19.

5.5. Talent is liable for aiding Clever in the commission of the crime.²⁵ Talent's instruction that prisoners could be 'accessed' for clinical tests²⁶ was a substantial contribution made for the purpose of facilitating commission of the crime.²⁷

Criminal Responsibility

5.6. Stage bears superior responsibility under Article 28 of the Statute for failing to prevent the crime of inhuman treatment committed by Talent, his subordinate.²⁸

5.7. Stage exercised effective control²⁹ over Talent by virtue of his control over Banksia's military institutions; evidenced by Stage's direction over war-plans,³⁰ discussions with commanding officers³¹ and the centrality of the 'President's war council' to Banksian military strategy.³²

5.8. Stage possessed information which clearly indicated³³ that Talent was about to commit a crime. The memo, in conjunction with knowledge Stage had from his work at the Banks Institute,³⁴ amounts to information enabling him to conclude that Lantanan prisoners were to be subjected to biological experimentation. Talent's statement that there were Rash-infected prisoners, in a discussion about acceleration

²⁵ ICCSt. Art.25(3)(c).

²⁶ Facts¶3.6.

²⁷ *Tadic*, Appeal Judgement, IT-94-1 (19Jul1999) ¶229.

²⁸ *Bemba*, ICC-01/05-01/08 (15Jun2009), ¶¶404-443.

²⁹ Ibid ¶¶412-418, *Kayishema et al*, Judgment, ICTR 95-1-T (21May1999) ¶¶213-16.

³⁰ Facts¶3.4.

³¹ Facts¶3.11.

³² Facts¶3.14.

³³ Mettraux, *The Law of Command Responsibility*, p.195.

³⁴ Facts¶¶2.9-2.12.

of vaccine-testing for military reasons, was information which would ‘compel the conclusion’³⁵ that biological experimentation would occur.

5.9. The memo is admissible. Anonymity does not *prima facie* preclude the conduct of a fair trial.³⁶ The Court’s burden to provide adequate protection for witnesses³⁷ is highest at the pre-trial stage.³⁸ The witness has a real fear for their safety, and witness protection is inappropriate given that Stage remains in control of the organs of state. This is an ‘exceptional circumstance’ justifying derogation from human rights standards.³⁹ There is no reason to believe the witness is untrustworthy or ‘has an axe to grind.’⁴⁰ The unfairness to the defendant resulting from anonymity of the witness is outweighed by the high probative value of the memo. It should be admitted as evidence.

5.10. As Stage failed to take any measures to prevent Talent from conducting the vaccine-trials, he bears superior responsibility for his failure to prevent a crime under Article 8(2)(a)(ii) of the Statute.⁴¹ The charge should be confirmed.

³⁵ *Delalic*, IT-96-21-T (16Nov1998) ¶387-‘consciously disregarded’ analogous to ‘willful blindness’, see Vetter, ‘Command Responsibility of Non-Military Superiors in the International Criminal Court’, 25(1) *Yale Journal of International Law*, 125 (2000).

³⁶ *Doorson v. The Netherlands*, EuCtHr, 20524/92 (8Dec1994).

³⁷ *ICCSt. Arts.57(3)(c), 64(2)(e), 64(6)(e), 68; ICC Rules of Procedure and Evince, R76(4), 81(4).*

³⁸ *Blaskic*, Decision on Protective Measures for Victims and Witnesses, IT-95-14-T, (5 Nov1996) ¶24.

³⁹ *Tadic*, Decision on Protective Measures for Victims and Witnesses, IT-94-1-T (10 August 1995) ¶61.

⁴⁰ *Ibid*¶64.

⁴¹ above n28 ¶¶437-438.

6. Second Count

6.1. There is sufficient evidence to establish Stage's liability as a co-perpetrator of the war crime of enlisting children. Children under the age of fifteen years were enlisted into the BAF⁴² to undertake surveillance duties, amounting to active participation in hostilities.⁴³

6.2. The crime of enlisting children by means of joint perpetration requires the existence of a common plan and a coordinated essential contribution of each perpetrator.⁴⁴ Stage, Talent and the BAF officer were all engaged in the war against Lantana, amounting to a common plan.

6.3. Stage made an essential contribution⁴⁵ to the plan as he had control of enlistment of children, by reason of his leadership of Banksian armed forces. Stage was involved in developing war-plans;⁴⁶ engaged in discussions of attacks with commanding officers⁴⁷ and directed the 'President's war council.'⁴⁸ Stage had an essential role in, and control over, the war, and was aware of his control.⁴⁹

6.4. Co-perpetration requires that that 'all the co-perpetrators' be 'mutually aware of, and mutually accept, the likelihood that implementing the common plan would result in'⁵⁰ children under the age of 15 years being enlisted into active military service. Stage visited PVF boot-camps where children under fifteen were trained and would have awareness of media criticism of participation of under-fourteen year olds.⁵¹

⁴² Facts ¶3.12.

⁴³ above n3 ¶¶261-263.

⁴⁴ Above n3 ¶¶343-348.

⁴⁵ Ibid ¶346.

⁴⁶ Facts ¶3.4.

⁴⁷ Facts ¶3.11.

⁴⁸ Facts ¶3.14.

⁴⁹ Above n3 ¶365.

⁵⁰ Above n3 ¶361.

⁵¹ Facts ¶2.13.

6.5. When suggesting Talent find volunteers amongst ‘boot-camp’ trainees⁵² Stage accepted the likelihood that the trainees used would be children under the age of fifteen, as the pipes were only large enough to accommodate children.⁵³ Both the BAF officer and Talent accepted the likelihood that children under the age of fifteen would be enlisted into military service, the former by expressing reluctance to use children for the mission; the later by overriding those concerns by reference to presidential direction rather than to age.⁵⁴

6.6. No defences are available. In its ordinary meaning⁵⁵ ‘enlisting’ presupposes consent. Parental consent cannot nullify the *actus reus* of the offence. Self-defence is not available as the imminent attack by Lantana was not unlawful.⁵⁶

6.7. As there is sufficient evidence to establish substantial grounds to believe Talent committed a crime under Article 8(2)(b)(xxvi) of the Statute, the Court should confirm the charge.

7. Third Count

7.1. It is a crime to use a weapon of warfare which is inherently indiscriminate.⁵⁷ Biological agents are prohibited in the Geneva Protocol,⁵⁸ annexed to the Statute.⁵⁹ Widespread state practice confirms the *opinio juris* of States that biological weapons

⁵² Facts¶3.11.

⁵³ Clarifications, No.6.

⁵⁴ Facts¶3.12.

⁵⁵ *Vienna Convention on the Law of Treaties*, Art.31(1).

⁵⁶ *Kordic and Cerkez*, Judgment, IT-95-14/2 (26Feb2001) ¶¶449-450.

⁵⁷ *ICCSt.* Art.8(2)(b)(xx).

⁵⁸ *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, Geneva (17June1925)

⁵⁹ Facts¶4.2.

are inherently indiscriminate.⁶⁰ Furthermore, an attack directed at a civilian population is an inherently indiscriminate method of warfare.⁶¹

7.2. Talent and the six BAF soldiers⁶² were co-perpetrators of the crime. The common plan⁶³ was to launch an attack using SPV-1. Talent made an essential contribution⁶⁴ by ordering the attack; the soldiers by undertaking it.⁶⁵ All parties knew that in the ordinary course of the attack⁶⁶ biological weapons would be used and that the attack was directed at civilians.⁶⁷

7.3. Stage bears individual responsibility for aiding Talent. A person is responsible for aiding a crime when they carry out an act which: (i) has a substantial effect upon the perpetration of that crime⁶⁸ and (ii) was made for the purpose of aiding commission of that crime.⁶⁹ By ordering an 'all-out counter attack',⁷⁰ Stage made a contribution which had a direct effect on the commission of the attack.⁷¹

⁶⁰ E.g. US Department of Air Force, AF Pamphlet 110-31, ¶6-3; Australian Defence Force, *Law of Armed Conflict – Commander's Guide*, ¶¶3-1ff; *Manual on the Application of the Rules of International Humanitarian Law by Armed Forces of the USSR*, Appendix to Order of the USSR Defence Minister, no.75 (1990), ¶6; Canadian military manual, Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, ¶¶5-2ff.

⁶¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (AP I)*, 8 June 1977, Art.51(4).

⁶² Facts¶3.16.

⁶³ Above n3 ¶¶343-348.

⁶⁴ *Lubunga*, Judgment, ICC-01/04-01/06 (14March2012) ¶994.

⁶⁵ Facts¶3.16

⁶⁶ *Lubunga*, Judgment, above n62 ¶1012.

⁶⁷ Facts¶3.16.

⁶⁸ *Tadic*, IT-94-1-T, Opinion and Judgment (7May1997) ¶¶691-692.

⁶⁹ ICCSt., Art.25(3)(c); W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), pp.435-36.

⁷⁰ Facts¶3.15.

⁷¹ *Kayishema et al*, Judgment, ICTR 95-1-T (21May1999) ¶¶186, 199; *Bagilishema*, Judgment, ICTR-95-1A-T (7Jun2001) ¶33.

7.4. Stage made the order for the purpose of authorising an attack using SPV-1. Stage confirmed with Talent that ‘all means of last resort’ should be put into action.⁷² Stage was aware from their earlier conversation that SPV-1 was a ‘means of last resort’.⁷³ Therefore he intended⁷⁴ ‘all means of last resort’ to include SPV-1.

7.5. Self-defence is not a defence as the imminent attack by the Lantanan military was not unlawful.⁷⁵

7.6. As there is sufficient evidence to establish substantial grounds to believe Talent aided in the commission of a crime under Article 8(2)(b)(xx) of the Statute, the Court should confirm the charge.

PRAYER FOR RELIEF

The Prosecution requests this Court to adjudge and declare that Stage is criminally responsible under the Statute for:

- War crimes under Article 8(2)(a)(ii), 8(2)(b)(xxvi) and 8(2)(b)(xx).

**Respectfully submitted,
The Prosecution**

⁷² Facts¶3.16.

⁷³ Facts¶3.5.

⁷⁴ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, pp.435-36.

⁷⁵ *Kordic*, above n56.