

THE 13TH RED CROSS INTERNATIONAL HUMANITARIAN LAW MOOT

International Rounds

Hong Kong

2015

Prosecutor

v.

General Smith

MEMORIAL FOR THE DEFENDANT

TEAM INDIVIDUAL MOOT NUMBER: D15

PLEADINGS

1. The hearing is the confirmation of charges before trial pursuant to Article 61 of the 1998 Statute of the International Criminal Court (“**ICC Statute**”).¹

PRELIMINARY MATTERS

I. STANDARD OF PROOF

2. The Prosecutor must support each charge with sufficient evidence to establish substantial grounds to believe that General Smith (“**Smith**”) committed the crimes charged.²

II. JURISDICTION

3. The International Criminal Court (“**ICC**”) has jurisdiction over a crime when it has fulfilled all the following elements³:-
 - 3.1. subject matter jurisdiction (jurisdiction *ratione materiae*)
 - 3.2. temporal jurisdiction (jurisdiction *ratione temporis*)
 - 3.3. territorial jurisdiction (jurisdiction *ratione loci*), or jurisdiction over persons (jurisdiction *ratione personae*)
4. Although Smith is charged with a crime against humanity and two war crimes within the jurisdiction of this Court⁴; alleged to have occurred after the entry into force of the ICC Statute, this Court does not have jurisdiction over Smith for the following reasons:-

¹ Instructions, [1].

² ICC Statute, Article 61(5); *Prosecutor v. Lubanga* (2007), ICC, ICC-01/04-01/06, *Decision on the Confirmation of Charges* (“**Lubanga Confirmation**”), [39].

³ *Situation in the Republic of Côte d'Ivoire* (2011), ICC, ICC-02/11, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire*, [22].

⁴ Facts, [25].

4.1. This Court does not have *territorial* jurisdiction in the disputed territory of Lowlands. Although Panema is a State party to the ICC Statute and was in control of Lowlands⁵, it remains that the disputed territory of Lowlands was not under the sovereignty of any State at the material time.

4.2. This Court does not have jurisdiction over Smith as an individual, because Smith is a national of Midlands, which is not party to the ICC Statute.⁶

III. ADMISSIBILITY OF THE CASE AND EVIDENTIARY MATTERS

5. The Pre-Trial Chamber issued an order to join the challenge to admissibility and the request to exclude evidence in the confirmation proceeding.⁷

A. ADMISSIBILITY

6. Midlands challenges the admissibility of the case on the grounds that the case is not of sufficient gravity to justify further action by the Court.⁸

7. Under Article 17(1)(d), cases can only be initiated against the most senior leaders suspected of being the most responsible.⁹

8. In the present case, Colonel Brown (“**Brown**”) was most responsible for the alleged crimes committed as the militia under his control were the direct perpetrators. The impossibility to prosecute Brown¹⁰ does not make Smith the most responsible.

9. The present case is not sufficiently grave to warrant the Court’s intervention¹¹:-

⁵ Facts, [3].

⁶ Facts, [26].

⁷ Facts, [28].

⁸ ICC Statute, Article 17(1)(d), Article 19.

⁹ *Prosecutor v. Lubanga* (2006), ICC, ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo (“*Lubanga Annex*”), Annex I, [50].

¹⁰ Facts, [21].

¹¹ *Lubanga Annex*, [46].

(a) The alleged crimes were not systematic

10. Although the alleged crimes of rape, unlawful displacement of civilians, and destruction of cultural property may have happened on a large scale, these conducts were *not* all systematic.
11. There is no indication that the alleged rapes were organised, or that the destruction of cultural property was a planned objective by the State.

(b) Not all conducts caused a social alarm in the international community

12. Notwithstanding that the sexual crimes and the destruction of cultural properties are a cause of alarm to the international community, the transfer of Lowlands civilians was not because the conduct was lawful and necessary.

B. EXCLUSION OF EVIDENCE

13. The admissibility of evidence is determined by the balance of its probative value and relevance against any prejudice to a fair trial caused by its admission.¹² Generally, courts will only grant anonymity to a witness in exceptional cases¹³, these evidence will be accorded a low probative value¹⁴.
14. Although Witness P fears for the safety of his family, international humanitarian law (“IHL”) does not protect the identity of anonymous witnesses with extensive criminal backgrounds¹⁵ (Witness P has been involved in the criminal destruction and seizure of Lowlands’s cultural properties). More importantly, Witness P had also been disciplined

¹² ICC Statute, Article 69(4).

¹³ *Prosecutor v. Tadic* (1995), ICTY, IT-94-1-T, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, [60].

¹⁴ *Prosecutor v. Bemba* (2009), ICC, ICC-01/05-01/08, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (“Bemba”)*, [50].

¹⁵ *Supra.*, n.13, [64].

and demoted for wilful disobedience¹⁶, showing a *prima facie* case that he will not be able to be impartial as he has “*an axe to grind*”¹⁷.

15. Therefore, Witness P’s anonymity would prejudice Smith’s case beyond a reasonable degree and cannot be admissible in the present case.

IV. NATURE OF THE ARMED CONFLICT

16. An armed conflict is international if two or more states resort to armed forces.¹⁸
17. Thus, there is no dispute as to the nature of the armed conflict. All three charges occurred in the midst of an international armed conflict.

SUBMISSIONS

V. CHARGE ONE: GENERAL SMITH IS NOT CRIMINALLY RESPONSIBLE AS A MILITARY COMMANDER FOR THE CRIMES AGAINST HUMANITY UNDER ARTICLE 7(1)(g)

18. Sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization under Article 7(1)(g) are not present, thus they have no application to the present case.

A. THE CRIME AGAINST HUMANITY OF RAPE IS NOT ESTABLISHED

(a) The perpetrator had not invaded the body of a person, or any part of the body of the victim with a sexual organ, or with any object or any other part of the body resulting in penetration

19. The concept of ‘invasion’ is intended to be broad enough to be gender-neutral.¹⁹
20. Herein, accounts regarding the rape of women and children had surfaced on social media.²⁰ However, these accounts were posted by private individuals not shown to be

¹⁶ Facts, [22].

¹⁷ *Supra.*, n.15.

¹⁸ *Prosecutor v. Tadic* (1999), ICTY, IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, [70].

¹⁹ Elements of Crime (“EoC”), footnote 15.

present at the scene of the alleged rapes, and therefore do not have much probative value.²¹

21. Further, in regard to the indirect evidence²² of the UN article²³, the methodology used in the compilation of the information was unclear, wherein the sources cited in the report (“*every woman and girl she spoke to*”) were not identified therein.
22. Moreover, the sentence condemning sexual violence following Paula Thisman’s draft report in a draft UN General Assembly resolution was eventually deleted²⁴, and no direct reports of rape were ever made or confirmed by the alleged victims.

(b) The invasion was not committed by force, or by threat of force or coercion

23. Although a coercive environment does not require actual physical force²⁵, the video recording of a violent gang rape²⁶ cannot be deemed to be credible for the following reasons:-
 - 23.1. Video footage may be tampered with, and fabricated or metadata may be changed.²⁷
 - 23.2. There is no indication that the video and social media postings had conformed to an “e-Court Protocol” to ensure their authenticity and accuracy before the confirmation hearing.²⁸

²⁰ Facts, [11].

²¹ *Prosecutor v. Katanga and Chui* (2008), ICC, ICC-01/04-01/07, *Decision on the Confirmation of Charges (“Katanga Confirmation”)*, [222].

²² *Bemba*, [47].

²³ Facts, [18].

²⁴ Facts, [20].

²⁵ *Prosecutor v. Akayesu* (1998), ICTR, ICTR-96-4, *Trial Judgment (“Akayesu”)*, [688].

²⁶ Facts, [11].

²⁷ Ashouri, Bowers, Warden, Working Paper, *An Overview Of The Use Of Digital Evidence In International Criminal Courts*, University of California, Berkeley (2013), pg. 4, 14.

²⁸ *Prosecutor v. Mbarushimana* (2011), ICC, ICC-01/-4-01/10, *Decision amending the e-Court Protocol*, pg. 4.

24. Moreover, there is also contention that these accounts were mere Panema propaganda.²⁹ As such, admitting these evidence will undermine Smith's right to a fair trial.³⁰ In any event, they should only be accorded a low probative value, insufficient for the confirmation of charges.³¹

(c) The conduct was not committed as part of a widespread or systematic attack directed against a civilian population

25. 'Widespread' refers to the large scale nature of the attack and the multiplicity of victims, whereas 'systematic' refers to the organised nature of the acts of violence and the improbability of their random occurrence.³²

26. Even assuming rape had occurred to large numbers of victims, the attacks were not systematic as the Facts don't indicate a planned, organised, or regular pattern of attack.

27. Moreover, Midlands had not implemented any common policy to allow the militia to commit acts of sexual violence against the Lowlands civilians, as required under IHL³³.

(d) The perpetrator did not know or intend for the conduct to be part of a widespread or systematic attack directed against a civilian population

28. The perpetrator must have knowledge that his acts were part of an attack on a civilian population.³⁴

²⁹ Facts, [12].

³⁰ *Prosecutor v. Popovic (2007), et al.*, ICTY, IT-05-88-T, *Decision on Admissibility of Intercepted Communications*, [18].

³¹ *Katanga Confirmation*, [65]

³² *Akayesu*, [580]; UN General Assembly, Report 5 on the International Law Commission to the General Assembly, 51 U.N. GAOR Supp. (No 10) at 94 U.N.Doc. A/51/10 (1996).

³³ EoC, footnote 6; ICC Statute, Article 7(2)(a).

³⁴ *Prosecutor v. Kunarac et al. (2002)*, ICTY, IT-96-23&IT-96-23/1-A, *Appeals Judgment*, [85].

29. However, Smith did not know that the sexual crimes were an essential part of a widespread or systematic attack, and did not intend to further the attack because the following criterion to establish Smith's knowledge is not fulfilled³⁵:-

29.1. although the militia members had targeted sexual crimes towards civilians, Smith had no knowledge that their actions were part of any widespread or systematic attack by the State, nor that they actually happened³⁶; and

29.2. in any event, Smith's reiteration to investigate and punish any alleged offenders is evidence that he never possessed the intention to further the rape incidences as these allegations damage the justness of the Midlands' cause³⁷.

B. THE CRIME AGAINST HUMANITY OF SEXUAL VIOLENCE IS NOT ESTABLISHED

(a) The perpetrator did not commit an act of a sexual nature against persons or cause such persons to engage in an act of a sexual nature by force, or by threat of force or coercion

30. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.³⁸

31. There were accounts alleging that women interning in Camp W1 were subjected to coercion, including the exchange of food for sexual favours.³⁹ However, these accounts on social media do not have known sources, thus are unreliable in their accuracy, and are insufficient to confirm the charge⁴⁰.

(b) Such conduct was not of a gravity comparable to the other offences in Article 7(1)(g) of the Statute, and the perpetrator had no knowledge

³⁵ *Katanga Confirmation*, [417].

³⁶ Facts, [12].

³⁷ Facts, [14].

³⁸ *Prosecutor v. Furundzija*, ICTY, IT-95-17/1, *Trial Judgment*, [272].

³⁹ Facts, [13].

⁴⁰ *Bemba*, [50] to [51].

32. Sexual violence has constituted a broad concept in past international tribunals case laws.⁴¹ However, the ICC Statute has narrowed the scope to only include sexual acts that meet the criteria for the crimes enumerated in Article 7(1)(g).⁴²
33. The mere exchange of sexual favours in exchange for food is not of comparable gravity as they don't fall under any of the Article 7(1)(g) crimes, thus abiding by the *nullum crimen sine lege* principle⁴³.
34. Even if the social media accounts were accurate, the non-tangible presence of coercion indicates that the militia would not have known that their conduct was of a gravity comparable to Article 7(1)(g) offences⁴⁴.

(c) The perpetrator did not commit the crime as part of a widespread or systematic attack directed against a civilian population

35. The reasons given in paragraph 24 to 26 above in relation to the commission of rape shall apply *mutatis mutandis*.

C. GENERAL SMITH IS NOT LIABLE AS A MILITARY SUPERIOR

36. A military superior is liable for the crimes of his subordinates if he has possession, or non-possession, of powers of control over the actions of subordinates.⁴⁵
37. The elements to establish command responsibility are not satisfied:-

(a) Smith does not have effective responsibility and control over the persons involved in the crimes

⁴¹ *Akayesu*, [688]; *Prosecutor v. Kvočka* (2001), ICTY, IT-98-30/1-T, *Trial Judgment*, [559].

⁴² EoC, Article 7(1)(g)-6, [3].

⁴³ ICC Statute, Article 22(1).

⁴⁴ Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005), pg. 151.

⁴⁵ *Prosecutor v. Bagilishema* (2001), ICTR, ICTR-95-1A-T, *Trial Judgment*, [39].

38. The Prosecution must establish that Smith had effective control over his subordinates at the material time of the crime by being able to issue orders which needed to be followed⁴⁶.
39. In the present case, Smith does not have effective control as the orders he issued to Brown were not followed, despite reiterations to Brown to investigate and punish the offenders.⁴⁷
40. Besides, he was only in charge of the MAF. Therefore, Smith had no effective control over offenders in the militia as his link of control was too remote, whether *de facto* or *de jure*.⁴⁸

(b) Smith did not know that his subordinates would be committing such crimes

41. Smith was not involved in the planning of the rapes and sexual violence, and had been assured that people in the camps were not ill-treated.⁴⁹ Moreover, there was no concrete information available to put him on notice that crimes were actually being committed, thus knowledge cannot be presumed⁵⁰, and liability cannot be established⁵¹.

(c) Smith took all necessary and reasonable measures to prevent or repress the commission of the attacks or to submit the matter to a competent authority

42. Although a duty to take reasonable measures and to punish⁵² the offenders arose when Smith had heard of the accounts of sexual violence, this duty was fulfilled by Smith.

⁴⁶ *Prosecutor v. Blaskic* (2004), ICTY, IT-95-14-A, *Appeals Judgment* (“*Blaskic*”), [69], [399].

⁴⁷ Facts, [14].

⁴⁸ *Prosecutor v. Naletilic* (2003), ICTY, IT-98-34-T, *Trial Judgment*, [72].

⁴⁹ Facts, [12].

⁵⁰ *Prosecutor v. Delalic* (1998), ICTY, IT-96-21-T, *Trial Judgment* (“*Celebici*”), [386]; *Prosecutor v. Halilovic* (2005), ICTY, IT-01-48-T, *Trial Judgment*, [69].

⁵¹ ICC Statute, Article 28(a).

⁵² *Blaskic*, [72].

43. Despite the fact that there were only alleged accounts of sexual crimes, Smith did not “*remain willfully blind*”⁵³ to these accounts, and had ordered Brown to deal with the matter on two occasions⁵⁴. Given that Brown is the commanding officer of the militia, he is a competent authority, able to prevent and repress the commission of the alleged sexual crimes.

VI. **CHARGE TWO: GENERAL SMITH IS NOT CRIMINALLY RESPONSIBLE FOR THE UNLAWFUL DEPORTATION, TRANSFER, OR CONFINEMENT OF THE CIVILIAN POPULATION**

A. **DEPORTATION, TRANSFER, AND CONFINEMENT**

44. Deportation and transfer is only unlawful when it is carried out by force⁵⁵, which is not restricted to physical force⁵⁶. On the other hand, confinement⁵⁷ of protected persons may be ordered if the security of the Detaining Power makes it absolutely necessary.⁵⁸ Note that a State has the authority to determine what activities are deemed prejudicial to its security.⁵⁹

(a) The deportation and transfer was lawful

45. In the present case, the transfer of civilians to Panema was not done forcibly as Colonel Brown had arranged safe passage for their transfer⁶⁰. Also, the deportation of the

⁵³ *Celebici*, [387].

⁵⁴ Facts, [12], [14].

⁵⁵ *Prosecutor v. Krnojelac* (2002), ICTY, IT-97-25-T, *Trial Judgment*, [475].

⁵⁶ *Prosecutor v. Krstic* (2001), ICTY, IT-98-33-T, *Trial Judgment*, (“*Krstic*”), [529].

⁵⁷ PCNICC/1999/DP.5 (1999); Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003), pg. 12.

⁵⁸ 1949 Geneva Convention IV (“GC IV”), Article 42.

⁵⁹ *Celebici*, [574].

⁶⁰ Facts, [8].

women to Midlands was lawful as they had moved to Midlands on their own accord⁶¹, in accordance with IHL⁶².

46. In any event, forceful displacement of persons can be justified if the security of the population or imperative military reasons so demands.⁶³
47. Herein, the transfer of civilians into larger settlements and camps, *inter alia*, was to prevent support to the town's armed resistance⁶⁴. Thus, Midlands has "*serious and legitimate reasons*"⁶⁵ to believe that the evacuation was for imperative military reasons.
48. Further, although some were told that they should have fled to Panema, the transfer was also done to ensure the security of Lowlands civilians⁶⁶. Hence, the displacement is justified under IHL⁶⁷.

(b) The confinement of persons were lawful

49. As for *confinement*, PAF members, civilian men, and suspected individuals were taken to Camp Z, whereas women were taken to Camp W1 as prisoners of war⁶⁸ ("POWs"). Hence, they may be evacuated to camps⁶⁹ and be subjected to internment⁷⁰.
50. IHL allows for a State to decide if a civilian threatens its security.⁷¹ The confinement of certain civilians and POWs was absolutely necessary to "*reduce the opportunities for guerrilla warfare impacting upon MAF supply lines*"⁷².

⁶¹ Facts, [13].

⁶² GC IV, Article 35.

⁶³ *Krstic*, [524].

⁶⁴ Facts, [10].

⁶⁵ *Celebici*, [576].

⁶⁶ Facts, [10].

⁶⁷ GC IV, Article 49(2).

⁶⁸ 1949 Geneva Convention III ("GC III"), Article 4(1), Article 4(4).

⁶⁹ GC III, Article 19.

⁷⁰ *Ibid.*, Article 21.

⁷¹ *Celebici*, [583].

⁷² Facts, [8].

B. GENERAL SMITH IS NOT INDIVIDUALLY RESPONSIBLE FOR THE WAR CRIME STATED IN ARTICLE 8(2)(A)(VII) UNDER ARTICLE 25(3)(B)

(a) Smith did not order the unlawful displacement and confinement of persons

51. In Akayesu, “*ordering implies a superior-subordinate relationship*” whereby “*the person in a position of authority uses it to convince (or coerce) another to commit an offence.*”⁷³

52. Therefore, Smith is not liable as he did not order Colonel White to conduct the transfers or confinements unlawfully. In fact, Smith did not want to damage the justness of the Midlands’ cause in any way.⁷⁴

(b) Smith did not solicit or induce the unlawful displacement and confinement of persons

53. Smith did not give any specific instructions as to how the transfer and confinement were to be carried out. Thus, there is nothing to suggest that his actions had influenced others to commit a crime.

VII. CHARGE THREE: GENERAL SMITH IS NOT CRIMINALLY RESPONSIBLE THROUGH ANOTHER FOR DESTROYING OR SEIZING CULTURAL PROPERTY

A. THE PERPETRATOR DID NOT DESTROY OR SEIZE THE ENEMY’S PROPERTY

(a) The perpetrator did not destroy any cultural property of a hostile party

54. Notwithstanding that the museum and archaeological site that was largely destroyed and shelled in the battle for Old Troy⁷⁵ is recognised as a cultural property⁷⁶, there is nothing to suggest that the MAF is responsible for the destruction.

⁷³ Akayesu, [483].

⁷⁴ Facts, [14].

⁷⁵ Facts, [17].

⁷⁶ 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Convention”), Article 1(a), Article 1(b).

(b) The perpetrator did not seize any cultural property of a hostile party

55. 'Seizure' is the removal of a possession from an entitled person, for a significant period of time, and against that person's will or without his agreement.⁷⁷
56. Despite Smith's orders for the protection of the historical artefacts, investigations later revealed that most of the artefacts were destroyed in the shelling.⁷⁸
57. Nevertheless, Witness P claims that Smith had ordered the seizure of the historical artefacts that were taken back to Midlands.⁷⁹ For reasons in paragraphs 12 to 14, any information and evidence given by Witness P's is inadmissible.
58. Hence, there is insufficient evidence to indicate that the destruction or seizure of the cultural property was committed by the MAF.

(c) The perpetrator was not aware that the cultural property was protected under the international law of armed conflict

59. The perpetrator is not required to make a value judgement to conclude that the property is in fact protected under the international laws of armed conflict.⁸⁰
60. At the outset, even if Smith was aware that the archaeological site was a World Heritage⁸¹, he was not aware that the cultural property was under special or enhanced protection. This is due to the fact that the registration of the archaeological site and the museum for special protection⁸² was still pending due to Midlands' objection, whereas the request for enhanced protection was postponed with a conditional grant⁸³.

(d) Alternatively, the destruction or seizure of the cultural property is justified by military necessity

⁷⁷ Werle, Jessberger, *Principles of International Criminal Law* (2014), OUP, pg. 468, [1258].

⁷⁸ Facts, [17].

⁷⁹ Facts, [22].

⁸⁰ *EoC*, footnote 30.

⁸¹ Facts, [16].

⁸² 1954 Convention, Article 8.

⁸³ Facts, [16].

61. The total or partial destruction and seizure of cultural property is justifiable where military necessity imperatively requires so.⁸⁴ Cultural property under general protection will lose its protected status if it offers the adversary “a definite military advantage” at the time of the attack.⁸⁵

62. The destruction of the cultural property is proportionate and justified⁸⁶ because its destruction will “destroy the military potential”⁸⁷ of the PAF, and provide the MAF with the strategic geographical location of Old Troy⁸⁸.

B. GENERAL SMITH IS NOT INDIVIDUALLY RESPONSIBLE FOR THE WAR CRIME STATED IN ARTICLE 8(2)(B)(XIII) UNDER ARTICLE 25(3)(A)

63. The concept of perpetration in Article 25(3)(a) is distinguished between direct, co-perpetration, and perpetration by means.

(a) Direct perpetration

64. Smith did not physically carry out all the elements of the offence individually.⁸⁹

(b) Co-perpetration

65. The objective elements and the subjective elements to establish co-perpetration are not satisfied⁹⁰:

(i) Objective elements:-

⁸⁴ *Prosecutor v. Strugar* (2005), ICTY, IT-01-42-T, *Trial Judgment*, [295].

⁸⁵ *Prosecutor v. Kordic* (2001), ICTY, IT-95-14/2-T, *Trial Judgment*, [89]; The Hague Regulations, *Article 27*.

⁸⁶ *Katanga Confirmation*, [313]; *Prosecutor v. Galić* (2003), ICTY, IT-98-29-T, *Judgment and Opinion*, [51].

⁸⁷ Muller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law* (2013), pg. 164.

⁸⁸ Facts, [14], [17].

⁸⁹ *Katanga Confirmation*, [488].

⁹⁰ *Lubanga Confirmation*, [343], [346], [349], [351], [361], [366].

66. In the present case, there was no agreement or common plan between Smith and any other persons.

67. Consequently, although Smith had tasked Major Adams to protect the historical artefacts, they do not have sufficient joint control as to frustrate the crime themselves because other Midlands soldiers may also commit the crime.

(ii) Subjective elements:-

68. The subjective elements of intention⁹¹ cannot be proven. Smith had no knowledge of the relevant events in paragraph 59 above that will result in the crimes regarding the destruction or seizure of cultural property.

(c) Perpetration by means

69. Although the objective elements can be established⁹², perpetration through another person is not possible if Smith's conduct do not indicate a concrete intent to bring about the objective elements of the crime and if there is insufficient probability that such would be a result of his activities⁹³

70. Furthermore, the subjective element of the crime is not satisfied for reasons in paragraph. 63 above.

⁹¹ ICC Statute, Article 30.

⁹² *Katanga*, [495], [500], [511], [515]; *Prosecutor v. Al Bashir*, ICC, ICC-02/05-01/09, *Public Redacted Version of the Prosecutor's Application under Article 58*, [248].

⁹³ *Katanga*, [537]; *Prosecutor v. Al Bashir*, ICC, ICC-02/05-01/09, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, [213].

PRAYER FOR RELIEF

The Defence respectfully requests for the *dismissal* of the charges under the ICC Statute against General Smith for the following reasons:-

1. This Court is unable to exercise jurisdiction over Smith because Midlands is not a party to the ICC Statute, and Smith is not a national of any state party to the ICC Statute.
2. This case is inadmissible as the gravity of the case is not sufficient to justify any action from this Court pursuant to Article 17(1)(d) and Article 19.
3. In any event, and any evidence or information from Witness P shall be excluded as it is prejudicial and inconsistent with Smith's rights to a fair and impartial trial under Article 69.
4. There are insufficient grounds to confirm the charges against Smith, thus indicating:-
 - 4.1. Smith is not responsible as a military superior for the crimes against humanity of rape and sexual violence under Article 7(1)(g).
 - 4.2. Smith is not individually responsible for the ordering of the war crime of unlawful deportation, transfer, and confinement under Article 8(2)(a)(vii).
 - 4.3. Smith is not responsible for committing the war crime of destruction and seizure of cultural property under Article 8(2)(b)(xiii).

RESPECTFULLY SUBMITTED,

AGENTS FOR THE DEFENDANT.