

**P08**

**MEMORIAL FOR THE PROSECUTION**

**PLEADINGS**

**PRELIMINARY MATTERS**

**A. GENERAL SMITH IS UNDER THE JURISDICTION OF ICC IN PURSUANCE OF ARTICLE 12(2)(a) READ WITH ARTICLE 13 & 15 OF THE ROME STATUTE**

**Effective Occupation & Sovereign Activities**

Jurisdiction can be exercised over General Smith [“Smith”] since he perpetrated the crimes in the territory of Panama which is a State Party to ICC Rome Statute<sup>1</sup> [“Rome Statute”]. Panama has *effective occupation*<sup>2</sup> and exercises *sovereign activities*<sup>3</sup> over the territory of Lowlands.

**The case is of sufficient gravity to justify further action under Article 17 (1)(d) read with Article 19 of Rome Statute**

Gravity threshold under Article 17 should exclude only *de minimis* conduct.<sup>4</sup> Several factors concerning sentencing can be useful in deciding gravity.<sup>5</sup>

**B. CRIMES ARE OF SUFFICIENT GRAVITY TO JUSTIFY FURTHER ACTION**

Scale, nature and manner of the crimes are factors of deciding gravity.<sup>6</sup>

---

<sup>1</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art12(2)(a) (Rome Statute)

<sup>2</sup> *Case Concerning the Legal Status of Eastern Greenland (Denmark v Norway)* PCIJ Rep Series A/B No 53

<sup>3</sup> *Island of Palmas Case (Netherlands v United States)* (1928) 2 R.I.A.A [829]-[840]; Malcolm N Shaw, *International Law* (6<sup>th</sup> edn, Cambridge University Press 2008) 511

<sup>4</sup> Margret M. Deguzman, ‘Gravity and the Legitimacy of the International Criminal Court’ [2008-2009] 32 Fordham Int’l LJ [1400]-[1428]

<sup>5</sup> International Criminal Court, Rules of Procedure and Evidence (Rome 03-10 September 2003) U.N. Doc. PCNICC/2000/1/Add.1 (2000), rule 145 (RPE)

<sup>6</sup> *Situation in the Republic of Kenya*, (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09, P-T Ch (31 March 2010), ¶62

*Scale:* International Law determines scale by the number of victims<sup>7</sup> and geographic and temporal scope of the harm caused<sup>8</sup>. 150,000 civilians<sup>9</sup> and the entire region of Lowlands had been affected. Furthermore, the case involves diverse set of crimes.

*Nature:* The question of which crimes are the most serious has been addressed in relation to the application of death penalty.<sup>10</sup> Crimes involving sexual violence are placed at the top of seriousness scale.<sup>11</sup> Presently, CAH of sexual violence are alleged with other crimes.

*Manner:* Rome Statute considers crimes committed in a systematic manner or with a plan as more serious.<sup>12</sup> Since crimes were committed in camps, it is systematic in manner.<sup>13</sup>

### **Position and Role of the perpetrator necessitates further action**

Official position and role of the perpetrator is a consideration in weighing gravity.<sup>14</sup> Smith being the officer in charge of the Midlands Armed Forces [“MAF”] satisfies this standard.

---

<sup>7</sup> *Prosecutor v Jankovic* (Decision on Referral of Case under Rule 11 Bis) ICTY-96-23/2-PT, P-T Ch (July 22 2005), ¶19

<sup>8</sup> *Prosecutor v Ljubicic* (Decision to Refer the Case to Bosnia Herzegovena Pursuant to Rule 11 bis) ICTY-00-41-PT, P-T Ch (12 April 2006), ¶118

<sup>9</sup> Proposition ¶4

<sup>10</sup> Margret M. Deguzman (n 4) [1400]-[1452]

<sup>11</sup> *ibid*

<sup>12</sup> Rome Statute, art 7, 8

<sup>13</sup> Proposition ¶13

<sup>14</sup> *Prosecutor v Rutaganda* (Judgment and Sentence) ICTR-96-3-T, T Ch (6 December 1999), ¶469; RPE, rule 145 2(b)(ii)

## INDICTMENT ONE

### SMITH SHOULD BE TRIED FOR RAPE AND SEXUAL SLAVERY UNDER ARTICLE 7(1)(g)

Evidentiary burden of establishing 'substantial grounds' under Article 61(7) is to demonstrate a clear line of reasoning underpinning specific allegations.<sup>15</sup> There exist substantial grounds to believe that all the elements of the aforesaid crimes are satisfied.

#### A. Attack was widespread or systematic

An attack can be either widespread or systematic and need not be a part of both as the two conditions are disjunctive.<sup>16</sup>

'*Widespread*' refers to 'large-scale nature of the attack' and 'the number of targeted persons'.<sup>17</sup> Women, children and young boys of entire *civilian population*<sup>18</sup>, in Lowlands is the object of the attack<sup>19</sup>.

'*Systematic*' pertains to 'the organized nature of attacks and to improbability of their random occurrence'.<sup>20</sup> Sexual crimes were committed in camps where the victims were detained<sup>21</sup>, thus the commission was of an organized nature.

'*Attack*' is a course of conduct involving the commission of acts defined in Article 7(1).<sup>22</sup> Sexual crimes defined in Article 7(1) (g), thus constitutes an attack.

---

<sup>15</sup> *Prosecutor v Katanga* (Decision on Confirmation of Charges) ICC-01/04-01/07, P-T Ch I (30 September 2008), ¶65

<sup>16</sup> *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/05-01/08, P-T Ch II (15 June 2009), ¶82

<sup>17</sup> *Prosecutor v Kordic* (Judgment) ICTY-95-14/2-A, A Ch (17 December 2004), ¶94

<sup>18</sup> *Prosecutor v Kunarac* (Judgment) ICTY-96-23 & IT-96-23/1-A, T Ch (22 February 2001) ¶425; *Bemba* (n 16), ¶78

<sup>19</sup> Proposition ¶[11]-[13]

<sup>20</sup> *Prosecutor v Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09, P-T Ch (4 March 2009), ¶81; *Katanga* (n 15), ¶394-397

<sup>21</sup> Proposition ¶[10]-[11]-[13]

<sup>22</sup> *Bemba* (n 16), ¶75

'Policy' criterion will be satisfied if an attack is planned, directed or organized is opposed to spontaneous and isolated acts of violence.<sup>23</sup> Plan can be gathered from historical or political background.<sup>24</sup> Systemic sexual violence was committed to ensure that '*displaced people don't wish to come back*'<sup>25</sup> resulting in Midlands occupying Lowlands.

## **B. Rape and sexual slavery was perpetrated by subordinates of Smith**

*Rape* is physical invasion of a sexual nature, committed on a person under circumstances which are coercive.<sup>26</sup> Circumstances in most cases charged as either war crimes or crimes against humanity will be almost universally coercive and true consent will not be possible.<sup>27</sup>

UN adviser on violence and sexual exploitation, reported that '*no girl or women is safe*' and "every woman or girl she spoke to had either endured sexual assault herself, or knew of someone who had been attacked".<sup>28</sup> Audio-video footage showed that militia raped a 14 year old girl and her mother in front of three teenage boys and their grandparents.<sup>29</sup> Accounts on social media also reported rapes and gang rapes.<sup>30</sup>

*Sexual Slavery* is when perpetrator exercises any or all powers attaching the right of ownership<sup>31</sup> over one or more persons and causes such persons to engage in one or more acts

---

<sup>23</sup> *Prosecutor v Gbagbo* (Decision on the confirmation of charges) ICC-02/11-01/11, P-T Ch I (12 June 2014), ¶215

<sup>24</sup> *Prosecutor v Blaskic* (Judgment) ICTY-95-14-T, T Ch (3 March 2000), ¶204

<sup>25</sup> Proposition ¶11

<sup>26</sup> *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch 1 (2 September 1998), ¶688

<sup>27</sup> *Prosecutor v Kunarac* (Judgment) ICTY-96-23&23/1, A Ch (12 June 2002), ¶130

<sup>28</sup> Proposition ¶18

<sup>29</sup> *ibid* ¶11

<sup>30</sup> *ibid*

<sup>31</sup> Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, art 1(1)

of sexual nature.<sup>32</sup> It subsumes deprivation of liberty, and trafficking of women.<sup>33</sup> Forced marriage and other forced labour involving compulsory sexual activity, including rape also is sexual slavery.<sup>34</sup>

Published materials reported that women interned in Camp W1 were subjected to diverse form of coercion including food in exchange of sexual favours.<sup>35</sup> Local News channel of a Midlands town interviewed women who were brought from Camp W1.<sup>36</sup> Several sources reported that women of Camp W1 were offered as brides to Midlands men.

### **C. Crimes were committed with requisite *mens-rea***

*Dolus directus of first degree* refers to knowledge by the offender that his acts or omissions will bring about the material elements of the crime. Knowledge of the attack may be inferred from circumstantial evidence<sup>37</sup>, historical and political circumstances when the acts were committed. Here, Colonel Brown [“**Brown**”] considered sexual violence as good policy<sup>38</sup>.

*Dolus directus of Second degree* refers to the intention that the perpetrator must be aware of all the consequences that will occur from his conduct “in the ordinary course of events”<sup>39</sup>. The acts of systemic sexual violence are indicative of the intention of the perpetrators.

### **D. Smith is liable for Command Responsibility under Article 28(a)**

Effective Control: The test of “effective control” is defined as “the material ability to prevent or punish criminal conduct”.<sup>40</sup> De jure position of the accused creates a presumption of

---

<sup>32</sup> International Criminal Court (Kampala, 31 May -11 June 2010) Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), art 7(1)(g)-3 (Elements of Crime)

<sup>33</sup> William Schabas, *The International Criminal Court: Commentary on the Rome Statute* (OUP 2010) 221

<sup>34</sup> Katanga (n 15), ¶431

<sup>35</sup> Proposition ¶13

<sup>36</sup> *ibid*

<sup>37</sup> *Prosecutor v Tadic* (Judgment) ICTY-94-1-T, T Ch I (7 May 1997), ¶657

<sup>38</sup> Proposition ¶14

<sup>39</sup> Rome Statute, art 30

<sup>40</sup> *Prosecutor v Zejnir Delalic* (Judgment) ICTY-96-21-A, A Ch (20 February 2001), ¶ 256

effective control.<sup>41</sup> The official position of the suspect<sup>42</sup> and giving orders<sup>43</sup> is a factor of determining effective control. Smith was officer in charge of the MAF<sup>44</sup> and he ordered Brown's militia to supervise New Troy<sup>45</sup>.

Knowledge: The superior can be held liable for having actual knowledge of the crime.<sup>46</sup> Indicia relevant for gathering knowledge can be, position of superior, number and nature of crimes, availability of reports and geographical proximity<sup>47</sup>. The crimes became common knowledge as they were reported. Smith called a meeting with Brown discuss the same is also indicative of his knowledge.<sup>48</sup>

No reasonable and necessary measures taken: Superior is expected to adopt proportionate<sup>49</sup> and timely<sup>50</sup> measures. Superior's duty would not extinguish if he comes to know that subordinate investigative structure have no genuine intention to investigate.<sup>51</sup> Breach of duty must be such as to be tantamount to acquiescence or toleration of the crimes.<sup>52</sup> Smith acquiesced to the commission of crimes and has not taken proportionate measures despite knowing Brown's unwillingness to investigate the matter.<sup>53</sup>

---

<sup>41</sup> Eleis van Sliedrecht, *Individual Criminal Responsibility in International Law*, (OUP 2012) 198

<sup>42</sup> *Katanga* (n 15), ¶65

<sup>43</sup> *Prosecutor v Strugar* (Judgment) ICTY-01-42-A, A Ch (17 July 2008), ¶256

<sup>44</sup> Proposition ¶6

<sup>45</sup> Proposition ¶[9]-[10]

<sup>46</sup> *Prosecutor v Oric* (Judgment) ICTY-03-68-T, T Ch II (30 June 2006), ¶321

<sup>47</sup> Guenael Mettraux, *The Law of Command Responsibility* (1<sup>st</sup> edn, OUP 2009) 214

<sup>48</sup> Proposition ¶12

<sup>49</sup> *Prosecutor v Hadzihasanovic* (Judgment) ICTY-01-47-T, T Ch (15 March 2006), ¶1777

<sup>50</sup> *Prosecutor v Kordic* (Judgment) ICTY-95-14/2-T, T Ch (26 February 2001), ¶[445]-[446]

<sup>51</sup> US Federal Court of Florida, *Ford v Gracia*, Judgment 3 Nov 2008, 289 F.3d 1283, 52 Fed R. Serv. 3d; Mettraux (n 47) 67

<sup>52</sup> Yves Sandoz and others, *Commentary on the Additional Protocols to the Geneva Conventions* (Martinus Nijhoff Publications 1987) ¶3541

<sup>53</sup> Proposition ¶14

**NATURE OF THE ARMED CONFLICT AND PERPETRATOR'S AWARENESS  
THERE TO**

An armed conflict, international in character, exists whenever there is a resort to armed forces between two or more States.<sup>54</sup> It extends to partial occupation of the territory of another State, irrespective of the occupation meeting with armed resistances.<sup>55</sup> International Armed Conflict ["IAC"] includes military operations.<sup>56</sup> MAF invaded Panama<sup>57</sup> and assisted by Militia, had effective occupation of most of the Lowlands. Once re-enforced, the PAF retaliated fiercely.

Perpetrator was the officer-in-charge of MAF.<sup>58</sup> Officially ordering the deportation, victims being Lowlands civilians and acts helping the ultimate military goal to deport civilians eastwards and capture Lowlands satisfies the *nexus* test.<sup>59</sup> It can be geographically and temporally remote from the actual fighting.<sup>60</sup> Detention in a camp operated by the adverse party anyway proves the sufficient nexus.<sup>61</sup> The only requirement is of the awareness of the factual circumstances that established the existence of an armed conflict.<sup>62</sup> Smith was the officer-in-charge of MAF and was aware of all the hostilities that were taking place in Lowlands,<sup>63</sup> making him aware of such circumstances.

---

<sup>54</sup> *Prosecutor v Tadic* (Opinion and Judgment) ICTY-94-1-T, T Ch I (7 May 1997), ¶70

<sup>55</sup> *Prosecutor v Lubanga* (Decision on the confirmation of charges) ICC-01/04-01/06, P-T Ch I (29 January 2007), ¶209

<sup>56</sup> Elements of crime, footnote 34

<sup>57</sup> Proposition ¶4

<sup>58</sup> *ibid* ¶6

<sup>59</sup> *Kunarac Appeal* (n 27), ¶59

<sup>60</sup> *ibid*

<sup>61</sup> *Prosecutor v Delalic* (Judgment) ICTY-96-21-T, T Ch I (16 November 1998), ¶196

<sup>62</sup> Elements of Crime, Introduction to Article 8

<sup>63</sup> Proposition ¶14

## INDICTMENT TWO

**GENERAL SMITH SHOULD BE TRIED UNDER ARTICLE 8(2)(a)(vii).**

**A. Perpetrator has unlawfully deported, transfer and confined one or more persons.**

Deportation is unlawful when displacement of civilian population has been forced,<sup>64</sup> the victim having no real choice.<sup>65</sup> It's prohibited regardless of the perpetrator's motive.<sup>66</sup> It's not necessary for victims to cross an international border.<sup>67</sup> Involuntary deportation of Lowlands people to camps by militia<sup>68</sup>, fleeing of over 50000 people eastwards, coercive marriage of Lowlands women and influx<sup>69</sup> of Midlanders into the occupied territory, all constitute deportation.<sup>70</sup>

No blanket power can detain entire civilian population without having an assessment that each civilian in possess a particular risk.<sup>71</sup> Internment must be never used collectively.<sup>72</sup> Mere fact that person is a national of an adversary isn't a justified security threat.<sup>73</sup> Atrocities committed violate customary procedures,<sup>74</sup> rendering their confinement unlawful. Continued confinement

---

<sup>64</sup> *Prosecutor v Kronjelac* (Judgment) ICTY-97-25-T, T Ch II (15 March 2002), ¶475 :

<sup>65</sup> *Prosecutor v Simic* (Judgment) ICTY-95-9-T, T Ch II (17 October 2003), ¶125

<sup>66</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 49 (GC IV)

<sup>67</sup> Schabas (n 33) 221

<sup>68</sup> Proposition ¶10

<sup>69</sup> *ibid* ¶8

<sup>70</sup> GC IV, art 49; Jean-Marie Henckaerts and others, *Customary International Humanitarian Law – Volume I Rules*, (3<sup>rd</sup> edn, Cambridge University Press 2009) 60

<sup>71</sup> *Delalic Appeal*(n 40), ¶[322]-[327]

<sup>72</sup> Schabas (n 33) 222

<sup>73</sup> *Delalic Appeal*(n 40), ¶327

<sup>74</sup> GC IV, art 43; Jean-Marie Henckaerts (n 70) 463.

of the internally displaced persons and no return schemes even after Panama Armed Forces' ["PAF's"] surrendered<sup>75</sup> violates accepted practices.<sup>76</sup>

**B. Such persons were protected under one or more of the Geneva Conventions.**

Protected persons are those who find themselves in the hands of an occupying power of which they are not nationals,<sup>77</sup> and it encompasses persons finding themselves on the territory controlled by occupying power.<sup>78</sup> The Lowlands people qualified as *protected persons* after MAF acquired control over Lowlands<sup>79</sup>. Being unarmed, they didn't fall under the enumerated derogations.<sup>80</sup>

**C. Perpetrator was aware of factual circumstances that established such protected status.**

Perpetrator only needs to know that the victim belonged to the adverse party. In evaluating such status, complete legal evaluation of the same is not required.<sup>81</sup> MAF and the militia are the sole occupying forces with only civilians left in Lowlands. Smith led the invasion, and had tasked Colonel White<sup>82</sup> ["White"] to deport civilians. Thus, he knew about their protected status.

**D. General Smith should be charged for the said war crime under Article 25(3)(b).**

"Ordering", "Soliciting" and "Inducing" refer to a conduct by which a person is influenced by the other to commit a crime.<sup>83</sup> The following elements needs to be proved.<sup>84</sup>

---

<sup>75</sup> Proposition ¶15

<sup>76</sup> UNHCR 'UNHCR's Operational Experience with Internally Displaced Persons' (Division of International Protection Geneva 1994), principle 28

<sup>77</sup> GC IV, art 4

<sup>78</sup> *Delalic Trial* (n 61), ¶246

<sup>79</sup> Jean Pictet and others, *Commentary on IV Geneva Convention* (ICRC 1958) 47

<sup>80</sup> GC IV, art 5

<sup>81</sup> *Katanga* (n 15), ¶297

<sup>82</sup> *Ibid* ¶8

<sup>83</sup> *Gbagbo* (n 23), ¶243

<sup>84</sup> *Prosecutor v Sylvestre Mudacumura* (Decision on the Prosecutor's Application under Article 58) ICC-01/04-01/12, P-T Ch II (13 July 2002), ¶63

The person is in a 'position of authority': Smith is the commander in chief of the MAF. He himself tasked White to carry out the said unlawful deportation. His authority can be inferred from the fact that he accepted PAF's surrender and made a call on the future of all captives.

The person instructs another person in any form to commit a crime which in fact occurs or is attempted: There is no requirement that an order be given in any particular form.<sup>85</sup> Hence, Smith tasking White to deport Lowlands civilians qualifies as an order under this section. Physical presence is not required.<sup>86</sup> Orders can be through an intermediary, and need not give the order directly to the physical perpetrator.<sup>87</sup>

The order had a direct effect on the commission of the crime: Direct effect would include if the orders are acted upon.<sup>88</sup> White immediately acted upon Smith's orders to unlawfully deport citizens. Also, White was an immediate subordinate to Smith, and by the Militia statute, Brown was subservient to Smith<sup>89</sup>; hence, Smith's proven authority over the direct perpetrators supports the conclusion.<sup>90</sup> The *superior-subordinate* relationship between the person giving the order and the person executing it<sup>91</sup> is distinct from the superior-subordinate relationship characterised by effective control,<sup>92</sup> and is informal.<sup>93</sup>

The person is at least aware that that the crime will be committed in the ordinary course of events as a consequence of the execution of or implementation of the order: Smith being informed of the allegation of crimes is an indicator to the fulfilment of this element.<sup>94</sup> Reports by various NGOs and other international organisations to the accusations towards forces under

---

<sup>85</sup> *ibid*

<sup>86</sup> *Prosecutor v Milosevic* (Judgment) ICTY-98-29/1-A, A Ch (12 November 2009), ¶290

<sup>87</sup> *Prosecutor v Dordevic* (Judgment) ICTY-05-87/1-T, T Ch II (23 February 2011), ¶1871

<sup>88</sup> *Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor) ICC-01/04-02/06, P-T Ch II (9 June 2014), ¶149

<sup>89</sup> Proposition ¶7

<sup>90</sup> *Mudacumura* (n 84), 66

<sup>91</sup> *Blaskic* (n 24), ¶474

<sup>92</sup> *Prosecutor v Gacumbitsi* (Judgment) ICTR-2001-64-A, A Ch (7 July 2006), ¶182

<sup>93</sup> *Kordic Appeal* (n 17), ¶28

<sup>94</sup> *Mudacumura* (n 84), ¶67

his authority concerning the commission of crimes would serve as an indicator.<sup>95</sup> As the commander-in-chief, Smith was aware of the crimes which he himself ordered and intended the resultant consequences.

### INDICTMENT THREE

#### **GENERAL SMITH SHOULD BE TRIED UNDER ARTICLE 8(2)(b)(xiii)**

##### **A. Smith destroyed and seized certain property of a hostile party (i.e. Panema) which was protected from such destruction and seizure**

Smith destroyed and seized 'protected property': It is especially forbidden for an occupying Power<sup>96</sup> to destroy or seize the enemy's property unless such destruction or seizure is imperatively demanded by the necessities of war.<sup>97</sup> An occupying power must administer all public institutions including museums in such a manner as to preserve them and all seizure or destruction with an intention to damage institutions of arts and sciences, historic monuments, or works of art or science is forbidden and subject to legal proceedings.<sup>98</sup> It is prohibited to make such property the object of reprisals.<sup>99</sup> Any form of theft, pillage or misappropriation of cultural property is forbidden.<sup>100</sup> In the present matter, the archaeological site and museum holding prized artefacts on the outskirts of Old Troy<sup>101</sup> were protected<sup>102</sup>. Thus, its

---

<sup>95</sup> *ibid*

<sup>96</sup> GC IV, art 53

<sup>97</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, art 23(g) (The 1907 Hague Regulations); *Blaskic* (n 24), ¶206

<sup>98</sup> *ibid*, art 56

<sup>99</sup> Additional Protocol I of 1977 to the Geneva Conventions of 1949, art 53 (AP I); Dieter Fleck, *The Handbook of International Humanitarian Law* (OUP 2013) 440; Andrew Clapham, *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 499

<sup>100</sup> The Hague Convention of 1954 for the Protection of Cultural Property (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240, art 4(3) (The Hague Cultural Property Convention); Jean-Marie Henckaerts (n 70) 132

<sup>101</sup> Proposition ¶16

<sup>102</sup> The Hague Cultural Property Convention, art 1

destruction<sup>103</sup>, seizure and taking away of the historical artefacts back to Midlands as prizes of war<sup>104</sup> constituted a serious war crime<sup>105</sup> due such property being on the 'World Heritage List'<sup>106</sup>.

*The concerned property was under 'general protection':* There is no difference in the levels of protection afforded to cultural property under 'general' and 'special' or 'enhanced' protection. The basic protection is the same-- the object cannot be destroyed, captured or neutralized.<sup>107</sup> Thus, the fact that Panama could not get the concerned cultural property registered as 'cultural property under special protection' under Article 8 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>108</sup> does not deprive the said property of its general protection under the same Convention.

*The property belonged to Panama:* It is required that that the property in question 'belongs to individuals or entities aligned with or with allegiance to a party to the conflict, adverse or hostile to the perpetrator'<sup>109</sup>. Herein, the aforesaid cultural property by virtue of its location in Lowlands, an area under the effective control of Panama, belonged to Panama.

#### **B. Smith was aware of the factual circumstances that established the protected status of such property**

Being a top-notch official of the Government of Midlands, Smith was very well aware of the fact that the concerned museum and archaeological site in Lowlands was on the 'World Heritage List' and that Panama had sought to get it registered as 'cultural property under special protection'. Hence, he had absolutely no reason to believe that such property was not protected.

---

<sup>103</sup> Proposition, ¶ 17

<sup>104</sup> *ibid* ¶22

<sup>105</sup> Jean-Marie Henckaerts, 'New rules for the protection of cultural property in armed conflict' 30-09-1999 Article, International Review of the Red Cross, No. 835 <<https://www.icrc.org/eng/resources/documents/misc/57jq37.htm>> accessed 15 January 2015

<sup>106</sup> Proposition ¶16

<sup>107</sup> Jean-Marie Henckaerts (n 105)

<sup>108</sup> Proposition ¶16

<sup>109</sup> *Katanga* (n 15), ¶324

### **C. The destruction and seizure was not justified by military necessity**

Attack against cultural property is considered to be a *lex specialis* with regard to attacks against civilian objects.<sup>110</sup> Civilian objects are all objects that are not military objectives<sup>111</sup> and it is forbidden to attack them unless they become so.<sup>112</sup>

The protection accorded to cultural property itself may not be lost simply because of military activities or military installations in the immediate vicinity of the cultural property.<sup>113</sup>

Herein, the museum and the archaeological site were purely civilian objects as their destruction and seizure did not offer a 'definite military advantage'<sup>114</sup> and hence, such an act cannot even be remotely justified on the ground of military necessity.

### **D. Smith bears individual criminal responsibility under Article 25(3)(a)**

Under Article 25(3)(a) of the ICC Statute, the '*perpetrator behind the perpetrator*' liability is based on *control over a hierarchical organisation*<sup>115</sup> comprising sufficient fungible subordinates ensuring automatic compliance with the leader's will.<sup>116</sup> The combination of co-perpetration based on joint control and indirect perpetration through other persons is a mode of liability that is best suited to cases of 'senior leaders'.<sup>117</sup> In this form of participation, the '*perpetrator-by-means*' holds a superior position<sup>118</sup>.

---

<sup>110</sup> *Kordic Trial* (n 50), ¶361

<sup>111</sup> AP I, art 52(1); *Blaskic Trial* (n 24), ¶180

<sup>112</sup> The 1907 Hague Regulations, art 27 & 56

<sup>113</sup> *Prosecutor v Strugar*, (Judgment) IT-01-42-T, T Ch (31 January 2005), ¶310

<sup>114</sup> AP I, art 52(2)

<sup>115</sup> Antonio Cassese, *Cassese's International Criminal Law* (3<sup>rd</sup>edn, OUP 2008) 178; Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (OUP 2013) page 159

<sup>116</sup> *Katanga* (n 15), ¶ 511

<sup>117</sup> *Ibid*, ¶492

<sup>118</sup> Gerhard Werle, *Principles of International Criminal Law* (TM. Asser Press 2005) 123

Herein, Smith was the commander-in-chief of the MAF<sup>119</sup> and thus, he had control over the crimes committed by his troops 'as a result of his authority over his military organisation'<sup>120</sup>. The protected cultural property was destroyed under his command and he even allowed the historical artefacts to be taken back to Midlands as war booty, with some the most valuable ones being taken to his own property as well.<sup>121</sup> The testimony of 'Witness P' is admissible in this regard as the anonymity of witness does not *prima facie* preclude the conduct of a fair trial<sup>122</sup>. At the pre-trial stage, the Court's burden to provide adequate protection for witnesses<sup>123</sup> is the highest<sup>124</sup>. Since the witness has a real fear for his safety and there is no reason to believe that he is untrustworthy<sup>125</sup>, therefore, his testimony should be admitted on account of its high probative value. Hence in the light of this, Smith is criminally responsible under Article 25(3)(a) of the Rome Statute.

---

<sup>119</sup> Proposition ¶6

<sup>120</sup> *Prosecutor v Bemba* (Decision on the Prosecutor's Application for a Warrant of Arrest) ICC-01/05-01/08, P-T Ch III (10 June 2008), ¶78

<sup>121</sup> *Ibid* ¶22

<sup>122</sup> *Doorson v The Netherlands* App no 20524/92 (ECtHR, 8 December 1994), ¶36

<sup>123</sup> Rome Statute, arts 57(3)(c) & 64(2)(e) and 68; RPE, rule 76(4) & 81(4)

<sup>124</sup> *Prosecutor v Blaskic* (Decision on Protective Measures for Victims and Witnesses) IT-95-14-T, T Ch (05 November 1996), ¶24

<sup>125</sup> *Prosecutor v Tadic* (Decision on Protective Measures for Victims and Witnesses) IT-94-1-T, T Ch (10 August 1995), ¶64

**PRAYER**

The Prosecutor respectfully submits that there are 'substantial grounds to believe' that General Smith is liable to be tried under Articles 7(1)(g), 8(2)(a)(vii) and 8(2)(b)(xiii) of the Rome Statute.

**Counsels for the Prosecution**