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MEMORIAL FOR THE DEFENDANT

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MAY IT PLEASE THE COURT

This hearing is the confirmation of charges before the trial pursuant to Article 61 of the 1988 Statute of the International Criminal Court (“Rome Statute”).¹

ADMISSIBILITY

This case is not of sufficient gravity to justify further action by the Court.²

1. Although all crimes under the jurisdiction of the International Criminal Court (“ICC”) are of a serious nature, a case is inadmissible if the case does not have sufficient gravity to justify further action by the Court.³
2. The gravity of a case is assessed by the scale, nature, manner and impact of the alleged attacks.⁴ In addition to the quantitative factors, gravity should be assessed by considering the qualitative dimensions of the crime such as the extent of damage caused, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime.⁵
3. Scale is assessed in light of number of direct and indirect victims, the extent of the damage caused by the crimes, or their geographical or temporal spread.⁶ Regarding the use of the Personnel Dispersal System (PDS), only 15 persons reported significant injuries of blindness or hearing loss, while others suffered what can be inferred to be minor injuries in trying to escape. The significant damage to the cargo ship and resulting deaths were collateral losses, caused by a Lowland Armed Force (LAF) military drone being shot down and subsequently crashing into the cargo ship causing fire.

¹ Rome Statute of the International Criminal Court 2187 UNTS 3 (signed 17 July 1998, entered into force 1 July 2002) [Rome Statute], art 61.

² Rome Statute, art 17(1)(d).

³ *Ibid.*

⁴ *Prosecutor v Abu Garda (Decision)* ICC Pre-Trial Chamber I ICC-02/05-02/09-243-Red, 8 February 2010 at [31].

⁵ At [31]—[32].

⁶ ICC-OTP, Policy Paper on Preliminary Examinations (November, 2013), at [62].

4. Nature refers to the specific elements of each offence and the possible legal qualifications of the apparent facts.⁷ Compared to other crimes enumerated in the Rome Statute, the crimes are of a less grave nature.
5. Manner is assessed in light of factors such as the means employed to execute the crime.⁸ Highland's actions were not express plans to target civilians, rather any harm was in fulfilment of security measures and as collateral or incidental damage. Across the engagements, the HAF made use of verbal warning, warning shots, interception and non-lethal modes of engagement. At all engagements, intelligence evidenced the presence of Lowland forces which posed threats to Highland and required military response and affected what measures could be practically taken in the circumstances.
6. Impact is assessed in light of factors such as the sufferings endured by the victims and their increased vulnerability and the terror subsequently instilled.⁹ Beyond the injuries and deaths, the damage did not have any significant and lasting ramifications.

CLASSIFICATION OF THE CONFLICT

The events between Highland and Lowland between 18 November 2015 and 23 November 2015 did not constitute or take place during an international armed conflict (“IAC”).

7. An international armed conflict exists whenever there is a resort to armed force between two or more States.¹⁰ This extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance.¹¹
8. The events on 18 November 2015 did not establish an IAC as there was no use of armed force between Highland and Lowland.¹² To assess whether a situation has reached a threshold to establish “armed force” regard must be had to all of the surrounding

⁷ ICC-OTP, Policy Paper, above n 6, at [63].

⁸ At [64].

⁹ At [65].

¹⁰ *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* ICTY Appeals Chamber IT-94-1, 2 October 1995, at [70]; *Prosecutor v Lubanga (Judgment)* ICC Trial Chamber I ICC-01/04-01/06, 14 March 2012 at [541].

¹¹ At [541].

¹² International Law Association “Final Report on the Meaning of Armed Conflict in International Law” (The Hague Conference, Use of Force, 2010).

circumstances.¹³ The use of the PDS does not constitute armed force as injury was transient and for domestic border security measures. The mere act of LAF soldiers entering Highland does not constitute armed force as there was no harm. Whether LAF soldiers actually entered Highland is not clearly established.

9. Alternatively, the HAF did not commit acts against Lowland with belligerent intent to constitute an IAC.¹⁴ Belligerent intent may be identified when a situation objectively shows that a State is effectively involved in military operations or other hostile action against another State.¹⁵ The HAF employed the PDS for the normal domestic purpose of border control and not part of a plan to cause harm to Lowland or initiate armed violence.
10. The Highland military base on the peninsula is not a military occupation.¹⁶ There is a military occupation where a State's military exercises control over a territory beyond its internationally recognised frontiers.¹⁷ The peninsula is recognised as Highland's territory under a border delimitation treaty signed between Highland and Lowland. Regardless, the ICC does not have competence to decide on matters relating to boundary delimitation.
11. Armed conflict between the HAF and the LAF on 23 November 2015 through Highland jet fighters engaging with Lowland aerial drones, which might trigger an IAC, did not occur until after the attacks alleged in Counts 2 and 3.
12. The deployment of sea mines on 20 November 2015 does not establish an IAC. Lowland authorities were made aware of the presence, no vessels were harmed, and their placement did not interfere with the rights of Lowland. Their placement on the edge of the contiguous zone did not create a border between Lowland and Highland or prevent Lowland civilian and merchant vessels, with legal right, from entering Highland.

¹³ UK Ministry of Defence *The Manual of the Law of Armed Conflict* 27 (UK Ministry of Defence, 2004) at 29.

¹⁴ ICRC *International humanitarian law and the challenges of contemporary armed conflicts* (32nd International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 8-10 December 2015) at 8.

¹⁵ At footnote 3.

¹⁶ *Prosecutor v Katanga (Judgment)* ICC Trial Chamber II ICC-01/04-01/07-3436, 7 March 2014, at [1179]—[1180].

¹⁷ At [1179]—[1180].

COUNT ONE: ATTACK ON LOWLAND DISPLACED PERSONS ON 18 NOVEMBER 2015 AND THE USE OF PDS ON THE BASIS OF COMMAND RESPONSIBILITY.

The attack on Lowland displaced citizens on 18 November 2015 did not constitute a war crime under Article 8(2)(a)(iii).

13. The conduct by Highland did not fulfil the five elements of the war crime of wilfully causing great suffering.¹⁸
14. The engagement did not take place in the context of and was not associated with an armed conflict. The armed conflict did not play a major part in the perpetrator's decision, ability and manner of the use of PDS on the Lowland civilians.¹⁹ The use of PDS was a means of border control, as demonstrated by the previous attempts to prevent migrant flows from Largo, of which the PDS was a further step. No military goals were sought or achieved by the use of PDS. This was rather a domestic protection of the Highland border, by repelling the forcible entry of illegal migrants onto Highland territory.²⁰
15. The HAF did not possess the mental requirements under Article 30 of the Rome Statute to intentionally cause great physical or mental pain or suffering, or serious injury to body or health, nor were they aware this would occur in the ordinary course of events.²¹ Awareness that the consequence will occur in the ordinary course of events requires that there is a practical certainty of the consequence, and recklessness or any lower form of culpability is not sufficient to meet this test.²² PDS testing had not demonstrated any side-effects and Colonel Power deployed the PDS believing it was safe. The PDS was not used for the direct intent of causing suffering, it was operated by a specially trained team with the intention of using non-lethal and temporary discomfort to protect the border from unlawful entry.
16. Alternatively, if there was an intention to use the PDS to cause suffering or injury (albeit temporary), it was primarily targeted against the LAF soldiers who were identified in the

¹⁸ Rome Statute, International Criminal Court *Elements of Crimes* PCNICC/2000/L.2/Add.2 (2000) [Elements of Crimes], Article 8(2)(a)(iii).

¹⁹ *Katanga*, above n 16, at [1176].

²⁰ *Prosecutor v Kunarac (Judgment)* ICTY Appeals Chamber IT-96-23& IT-96-23/1-A 12 June 2002, at [59].

²¹ Rome Statute, art 30(2)(b); *Prosecutor v Bemba (Decision)* ICC Pre Trial Chamber II ICC-01/05-01/08-424, 15 June 2009, at [362].

²² At [360] - [362]; *Prosecutor v Lubanga (Judgment)* ICC Appeals Chamber ICC-01/04-01/06-A-5, 1 December 2014, at [447].

crowd and who are not protected under the Geneva Conventions.²³ Any civilians affected by the PDS were incidental and not the primary target.²⁴

17. Alternatively, the scope of the civilian protection did not extend to cover the migrants crossing from Largo in the situation in question. A State is entitled to take security measures as may be necessary in the circumstances, which can limit the scope of protection afforded to civilians in an IAC.²⁵ The crowd attempted to illegally cross the border into Highland, and were accompanied by LAF troops. The use of the PDS constituted necessary security measures to protect Highland's borders for which civilian protection under the Geneva Convention does not extend.²⁶
18. Alternatively, Admiral Gum did not have command responsibility for the war crimes pursuant to Article 28(a).²⁷ The six elements for command responsibility set out in *Prosecutor v Bemba* are not fulfilled.²⁸ Admiral Gum did not have the intention to cause great suffering for the purposes of the crime.²⁹ It was not foreseeable that subsequent injury would arise as earlier testing showed no negative side-effects and liability cannot be assumed for injuries caused by panic and injuries sustained in fleeing.

Alternatively, the attack on Lowland displaced citizens on 18 November 2015 did not constitute a crime against humanity under Article 7(1)(k).

19. The conduct by Highland did not fulfil the five elements of the crime against humanity of other inhumane acts.³⁰
20. The act did not take place as part of a widespread or systematic attack on a civilian population.³¹ "Attack" is defined in Article 7(2)(a) as requiring a course of conduct involving the multiple commission of acts referred to in Article 7(1).³² Therefore, it is necessary to prove that the use of PDS took place in the context of other crimes of humanity

²³ *Prosecutor v Prlić (Judgment)* ICTY Trial Chamber III IT-04-74-T, 29 May 2013, at [98]—[105].

²⁴ *Katanga*, above n 16, at [802].

²⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 [Geneva Convention IV], art 27.

²⁶ Jean S Pictet *Commentary on Geneva Convention Relation to the Protection of Civilian Persons in Time of War*.

²⁷ Rome Statute, art 28(a), at 207.

²⁸ *Prosecutor v Bemba (Judgment)* ICC Trial Chamber III ICC-01/05-01/08-3343, 21 March 2016, at [170].

²⁹ Rome Statute, art 30(3)(c).

³⁰ Rome Statute, Elements of Crimes, Article 7(1)(k).

³¹ *Ibid.*

³² Rome Statute, art 7(2)(a)

that were directed against the civilian population.³³ There is no evidence of any other acts as listed in Article 7(1) occurring and therefore, there was no attack on the civilian population.

21. Alternatively, the attack was not widespread. “Widespread” requires the attack to affect a large number of people.³⁴ This must be committed on large-scale.³⁵ This can either be in cumulative effects of a series of inhumane acts or a single act which is of “extraordinary magnitude.”³⁶ The use of PDS here only resulted in 200 injured which were largely from the resulting panic rather than the PDS itself. Furthermore, the number of significant injuries (to meet the definition of this crime) was only 15 people and did not meet the requirement of extraordinary magnitude.³⁷
22. The attack was not systematic. “Systematic” requires the attack to be based on a “pattern or methodical plan.”³⁸ These also require that the organisation of the attack is thorough and that substantial resources are expended in the preconceived policy or plan.³⁹ The use of the PDS on 18 November 2015 was not following a preconceived policy or plan necessary for a systematic attack. The development of the PDS was meant as a defensive measure for domestic purposes and crowd control. It was not purposed to cause unnecessary and intentional harm to civilians.
23. The use of PDS does not constitute an inhumane act that is similar in character to the other acts referred to in Article 7(1). Character refers to the nature and gravity of the act.⁴⁰ The use of PDS is not of similar nature and gravity to those crimes found in Article 7(1) such as that of murder, torture and extermination. The Pre-Trial Chamber in *Prosecutor v Muthaura, Kenyatta and Ali* note this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity.⁴¹ The use of PDS here was intentionally created as a non-lethal means to disperse

³³ *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 Pre-Trial Chamber II ICC-01/09-19 at [80].

³⁴ *Prosecutor v Tadić (Judgment)* ICTY Trial Chamber IT-94-1-T, 7 May 1997, at [648].

³⁵ At [648]; *Prosecutor v Jean-Paul Akayesu (Judgement)* ICTR Trial Chamber ICTR-96-4-T, 2 September 1998, at [580].

³⁶ *Prosecutor v Blaškić (Judgement)* ICTY Trial Chamber IT-95-14-T, 3 March 2000, at [206].

³⁷ *Prosecutor v Limaj (Judgement)* ICTY Trial Chamber IT-03-66-T30, November 2005, [209]—[210].

³⁸ *Tadić*, above n 34, at [648].

³⁹ *Akayesu*, above n 35, at [580].

⁴⁰ Elements of Crimes, at footnote 30.

⁴¹ *Prosecutor v. Muthaura, Kenyatta and Ali (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* ICC Pre-trial Chamber ICC-01/09-02/11, 23 January 2012 at [269]

crowds, and its effects are not comparable to acts which have constituted other inhumane acts.⁴²

24. Alternatively, Admiral Gum did not have command responsibility for the crime against humanity pursuant to Article 28(a).⁴³ The six elements for command responsibility set out in *Prosecutor v Bemba* are not fulfilled.⁴⁴ Admiral Gum did not have the intention to cause great suffering for the purposes of the crime.⁴⁵ The PDS was deployed as a standard means of crowd control and in accordance with legitimate right to security. It was not foreseeable that subsequent injury would arise as earlier testing showed no negative side-effects and liability cannot be assumed for injuries caused by panic and injuries sustained in fleeing.

COUNT TWO: ATTACKS ON FISHING VESSELS ON 23 NOVEMBER 2015 AND THE DEATHS OF CIVILIAN MIGRANTS ON THE BASIS OF INDIVIDUAL CRIMINAL RESPONSIBILITY

The HAF conduct in respect of the fishing vessels did not constitute a war crime under Article 8(2)(b)(i).

25. The conduct directed at fishing vessels by Highland did not fulfil the five elements of the war crime of attacking civilians.⁴⁶

26. First, there was no attack. When assessing “attack”, what matters is the consequences of the act, and particularly whether injury, death, damage or destruction are intended or foreseeable consequences thereof.⁴⁷ The consequences were not intended or foreseeable. Highland actions employed recognised legal means to compel the flotilla to turn back. Following interception attempts, salvos were fired in front of the flotilla when it was clear there would not be compliance. There was no intention to destroy vessels or harm civilians.

27. The conduct did not take place in the context of and was not associated with the international armed conflict.⁴⁸ The intervention by Highland against the flotilla was a legitimate act by a

⁴² At [277]; *Prlić*, above n 23, at [79]—[80].

⁴³ Rome Statute, art 28(a).

⁴⁴ *Bemba*, above n 28, at [170].

⁴⁵ Rome Statute, art 30(3)(c).

⁴⁶ Rome Statute, Elements of Crimes, Article 8(2)(b)(i).

⁴⁷ *Prosecutor v Ntaganda (Decision)* ICC Pre-Trial Chamber II ICC-01/04-02/06, 9 June 2014 at [46].

⁴⁸ *Bemba*, above n 28, at [142].

nation's naval forces to prevent persons from illegally entering its territory. Highland's intervention against the flotilla did not serve a goal of nor was it connected to any military campaign.⁴⁹ The intervention was part of Highland's broader campaign to prevent illegal migration and to maintain the integrity of its coastal borders.

28. Alternatively, civilians were not the intended object of the attack.⁵⁰ Highland measures were directed to target open water to dissuade the flotilla from continuing forward and to turn to back. The HAF made no attempt to directly target the ships or cause injury. There were recognised non-lethal steps taken to communicate to the flotilla, and to seek its cooperation, despite its clear trajectory towards the territorial seas of Highland in compliance with international practice.⁵¹ The measures used were chosen for purpose to prevent death and injury from occurring. Subsequent endangerment of those in the water was created by unlawful interference by Lowland vessels.

Alternatively, Admiral Gum is not individually criminally responsible for the attack pursuant to Article 25(3)(b).⁵²

29. There is no evidence that Admiral Gum personally ordered the Highland frigates to engage with the flotilla.⁵³

30. Alternatively, Admiral Gum did not know, nor was he aware, that ordering salvos in front of the flotilla would cause fishing vessels to capsize and result in death.⁵⁴

31. Alternatively, Admiral Gum did not believe that the flotilla contained civilians such that individual civilians not taking part in hostilities were the intended object of attack.⁵⁵ Admiral Gum had evidence that the flotilla belonged to the LAF.⁵⁶ Intelligence to Admiral Gum suggesting that the LAF were planning to enter the peninsula through the Blue Sea, previous

⁴⁹ At [142]—[144].

⁵⁰ *Katanga*, above n 16, at [804]—[807].

⁵¹ Secretary-General "Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident" (September, 2011), at [111]; *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (Notice of Prosecutor's Final Decision under Rule 108(3))* ICC Pre-Trial Chamber I ICC-01/13, 29 November 2017, Annex 1, at [313].

⁵² Rome Statute, art 25(3)(b).

⁵³ *Ntaganda*, above n 47, at 145.

⁵⁴ Rome Statute, art 30(2)(b); *Bemba*, above n 21, at [362].

⁵⁵ Rome Statute, art 32(1).

⁵⁶ E van Sliedregt *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague, TMC Asser Press, 2003) at 303.

LAF tactics of dressing as civilians, the presence of LAF vessels, and inaction by Lowland to prevent the flotilla's movement cumulatively demonstrate the perceived combatant nature of the flotilla.

COUNT THREE: ATTACK ON THE LOWLAND CARGO SHIP ON 23 NOVEMBER 2015 ON THE BASIS OF INDIVIDUAL CRIMINAL RESPONSIBILITY

The attack on the Lowland cargo ship did not constitute a war crime under Article 8(2)(b)(xxiv).

32. The attack on the cargo ship by Highland did not fulfil the four elements of the war crime of attacking an object using the distinctive emblems of the Geneva Conventions.⁵⁷
33. There was no attack as harm was not intended or foreseeable.⁵⁸ Warning shots were fired across the bow of the cargo ship in conformity with international law and did not cause harm.⁵⁹ This was the only conduct directed at the cargo ship.
34. The HAF did not intend that the cargo ship to be the object of attack.⁶⁰ Damage to the cargo ship was collateral as a result of a LAF drone, destroyed by HAF fighter jets, crashing into the vessel resulting in fire and deaths, and not foreseeable. Alternatively, damage to the cargo ship was incidental such that the cargo ship was not the primary target of attack.⁶¹ On the facts this was the primary source of harm, there is no evidence that other alleged attacks resulted in injuries or death.
35. There is no clear evidence that frigate gunfire directly hit the cargo ship during the engagement. No orders were directed except for warning shots. If the cargo ship was hit by stray fire, then it was a misfire and unintended.
36. The cargo ship was not using the Red Cross in conformity with international law such that it was protected.⁶² The cargo ship was acting on behalf of the LAF or was used as cover by

⁵⁷ Rome Statute, Elements of Crimes, Article 8(2)(b)(xxiv).

⁵⁸ *Ntaganda*, above n 47, at [46].

⁵⁹ Secretary-General Report, above n 51, at [111]; *Comoros*, above n 51, at [313].

⁶⁰ *Katanga*, above n 16, at [804]—[807].

⁶¹ *Katanga*, above n 16, at [802] and [1104].

⁶² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 [Geneva Convention I], art 38; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 [Geneva Convention II], art 41; Protocol Additional to the

LAF submarines such that this was an act of perfidy and a misuse of the emblem.⁶³ This is demonstrated by the cumulative circumstances of LAF presence on board, the identification of submarines underneath the vessel, its ordering by Commander Gonzalez, and aerial drone retaliation to the warning shots. Alternatively, the vessel was participating in hostilities and became a legitimate target.⁶⁴

37. Alternatively, the cargo ship's actions were unlawful and detracted from its protected status. The cargo ship was not innocently employed in its normal role,⁶⁵ and intentionally interfered with Highland maritime activities by entering their territorial sea and disobeying orders to stop.⁶⁶

38. Alternatively, the cargo ship did not conform with the legal requirements for ships using the Red Cross emblem.⁶⁷ The Red Cross emblems were displayed on the cargo ship's grey hulls. If the emblem did not include a white background it would not meet the standard of the distinct emblem. While the ship may be protected by other provisions, it would not appropriately meet the elements of this particular charge.

39. Alternatively, the defensive HAF conduct was justified and in conformity with international law of the sea.⁶⁸ The HAF used measures appropriate to the circumstances, given the presence of the LAF threat, including the submarine and numerous underwater drones.

40. Alternatively, the LAF acted in self-defence.⁶⁹ Submarines were identified, and had been escorted into Highland's territorial sea by the cargo ship, and Lowland drones unlawfully entered the airspace of Highland and headed towards Highland frigates. These vessels and aircraft posed a direct and real threat to Highland vessels and required military action in self-defence.⁷⁰

Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977, 8 June 1977, art 8(1).

⁶³ San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994 [San Remo Manual], rules 110 and 111; Protocol I, art 37.

⁶⁴ *Prosecutor v Mbarushimana (Judgment)* ICC Pre-Trial Chamber I ICC-01/04-01/10-465-Red, 16 December 2011, at [148].

⁶⁵ San Remo Manual, rule 48(a).

⁶⁶ San Remo Manual, rule 47(c)(ii), 48(c); Geneva Convention II, arts 9, 22, 30 and 34; Protocol I, art 81.

⁶⁷ Geneva Convention I, art 38.

⁶⁸ San Remo Manual, rules 47 and 52; see also rule 67(a)-(f).

⁶⁹ Rome Statute, art 31(1)(c).

⁷⁰ Rome Statute, art 31(1)(c).

Alternatively, Admiral Gum is not individually criminally responsible for the attack pursuant to Article 25(3)(b).⁷¹

41. Admiral Gum did not know, nor was he aware, that the crime would be a consequence of his order.⁷² Admiral Gum only issued warning shots across the bow of the cargo ship. Regarding the drone crash, the risks of the cargo ship taking such collateral damage were low and did not meet the required standard of likelihood.⁷³
42. Alternatively, Admiral Gum had strong reason to believe that the cargo ship was acting on behalf of the LAF.⁷⁴ Admiral Gum was acting under a mistake of fact as to the protected nature of the vessel.⁷⁵

PRAYER

The Defendant respectfully requests that this Court declare that Admiral Francis Gum is not criminally responsible for; crimes against humanity under Article 7(1)(k); and war crimes under Articles 8(2)(a)(iii), 8(2)(b)(i) and 8(2)(b)(xxiv) of the Rome Statute, and decline to confirm the charges.

**RESPECTFULLY SUBMITTED
AGENTS FOR THE DEFENDANT**

⁷¹ Rome Statute, art 25(3)(b).

⁷² Rome Statute, art 30(2)(b); *Bemba*, above n 21, at [362].

⁷³ *Ibid.*

⁷⁴ Memorial for the Defendant at [36a].

⁷⁵ Rome Statute, art 32(1)