

P09

MEMORIAL FOR THE PROSECUTOR

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PRELIMINARY MATTERS

I. JURISDICTION

1. The crimes were committed in Lowland¹ and Highland² in November 2015. The charges are within the subject-matter jurisdiction of the International Criminal Court (“ICC”).³ Additionally, Admiral Gum is a national⁴ of Highland, which is a party to the Rome Statute. Therefore, the ICC has jurisdiction *ratione loci*, *ratione temporis*, *ratione materiae* and *ratione personae*.⁵

II. ADMISSIBILITY

2. The case is admissible, due to Highland’s inaction⁶ towards prosecuting Admiral Gum and the gravity⁷ of his crimes.

1. COMPLEMENTARITY

3. The ICC can exercise complementary jurisdiction when there is inaction of the state towards prosecuting the accused.⁸ This can only be opposed through sufficiently specific evidence with probative value, evincing initiation of domestic investigation.⁹ No investigation or prosecution was initiated in Highland against Admiral Gum. Accordingly, the case is admissible.

¹ Factsheet, ¶14.

² Factsheet, ¶17.

³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 5 [“**Rome Statute**”].

⁴ Rome Statute, art 12(2)(b).

⁵ *Prosecutor v Lubanga* (Appeal against Challenge to Jurisdiction) ICC-01/04-01/06, A Ch I (14 December 2006), ¶21.

⁶ *Prosecutor v Katanga* (Appeal against Challenge to Jurisdiction) ICC-01/04-01/07-1497 OA8, A Ch I (25 September 2009), ¶78 [“**Katanga Jurisdiction**”].

⁷ Rome Statute, art 17(1)(d).

⁸ *Katanga Jurisdiction*, ¶78.

⁹ *Prosecutor v Ruto* (Appeal against Challenge to Jurisdiction) ICC-01/09-01/11-307 OA, A Ch I (30 August 2011), ¶62.

2. GRAVITY

4. Gravity is determined through the scale, nature, manner of the crime's commission, and its impact.¹⁰
5. *Scale* encompasses the number of victims,¹¹ and the geographical and temporal scope of the harm.¹² Nearly 200 people were injured by the Personnel Dispersal System (“PDS”).¹³ Several hundred men, women and children were endangered and died in the attacks on the civilian boats.¹⁴
6. *Nature* refers to the seriousness of the crime.¹⁵ Crimes resulting in physical or psychological suffering,¹⁶ and crimes against children¹⁷ are deemed grave.¹⁸ The attacks by the Highland Armed Forces (“HAF”) were serious, causing permanent hearing loss and blindness to civilians,¹⁹ jeopardizing the lives of several children²⁰ and endangering a protected medical transport and its personnel.
7. *The manner* in which a crime is committed manifests in its policy, mode of execution or vulnerability of the victims.²¹ Crimes against women and children,²² systematic,²³ and indiscriminate²⁴ crimes are considered grave. The systematic nature of the crimes

¹⁰ *Prosecutor v Mbarushimana* (Confirmation of Charges) ICC-01/04-01/10, P-T Ch I (16 December 2011), ¶4.

¹¹ *Prosecutor v Krstic* (Judgment) ICTY-98-33-T, T Ch I (2 August 2001), ¶702 [“**Krstic Trial**”].

¹² *Prosecutor v Ljubic* (Decision Pursuant to Rule 11bis) ICTY-00-41-PT, T Ch I (12 April 2006) ¶18.

¹³ Factsheet, ¶14.

¹⁴ Factsheet, ¶21.

¹⁵ Office of the Prosecutor, ‘Policy Paper on Preliminary Examinations’ (November 2013) ¶63 [“**Policy Paper**”].

¹⁶ *Krstic Trial*, ¶703.

¹⁷ Policy Paper, ¶63.

¹⁸ Margaret M deGuzman, ‘Gravity and the Legitimacy of the International Criminal Court’ (2008) 32 *FILJ* 1400, 1452.

¹⁹ Factsheet, ¶14.

²⁰ Factsheet, ¶21.

²¹ Policy Paper, ¶64.

²² *Krstic Trial*, ¶702.

²³ Rome Statute, art 7(1) & 8(1).

²⁴ *Krstic Trial*, ¶703.

will be proved *infra*. The HAF used PDS²⁵ and fired salvos²⁶ against Lowlanders, including women and children.²⁷ The medical ship and its personnel were attacked without verifying their protected status.²⁸

8. The crime's *impact* is assessed through the victims' suffering.²⁹ This includes direct and indirect harm.³⁰ The PDS left its victims disabled.³¹ HAF's attacks injured and resulted in the deaths of several civilians,³² and medical personnel,³³ signifying their gravity.

²⁵ Factsheet, ¶14.

²⁶ Factsheet, ¶20.

²⁷ Factsheet, ¶21.

²⁸ Factsheet, ¶21.

²⁹ Policy Paper, ¶65.

³⁰ Situation on the Registered Vessels of the Union of Comoros, The Hellenic Republic, and the Kingdom of Cambodia (Review of Prosecutor's Decision not to initiate an investigation) ICC-01/13-32, P-T Ch I (16 July 2015), ¶47.

³¹ Factsheet, ¶14.

³² Factsheet, ¶20.

³³ Factsheet, ¶22.

INDICTMENT ONE

I. THE HAF COMMITTED THE WAR CRIME OF WILFULLY CAUSING GREAT SUFFERING UNDER ARTICLE 8(2)(a)(iii).

1. A nexus existed between HAF's conduct and the International Armed Conflict ("IAC").

9. The original treaty between Lowland and Highland reflects the internationally recognised frontiers of the peninsula.³⁴ Control over territory beyond internationally recognised frontiers,³⁵ notwithstanding armed resistance,³⁶ amounts to an IAC.
10. Alternatively, the use of armed force by one state against another,³⁷ irrespective of retaliation or intensity,³⁸ establishes an IAC. The HAF's use of PDS against Lowland's civilians and armed forces³⁹ as they crossed Highland's border⁴⁰ triggered an IAC.
11. An attack that serves the ultimate goal of the military campaign demonstrates the nexus between the crime and the conflict.⁴¹ The decision to use PDS against distressed Lowlanders entering Highland territory to ensure continued occupation of the peninsula indicates this nexus.

³⁴ Oliver Dorr, *Vienna Convention on Law of Treaties: A Commentary* (Springer 2012) 1321.

³⁵ *Prosecutor v Katanga* (Judgment) ICC-01/04-01/07, T Ch II (7 March 2014), ¶1179 ["**Katanga Trial**"].

³⁶ *Prosecutor v Lubanga* (Confirmation of Charges) ICC-01/04-01/06, P-T Ch I (29 January 2007), ¶209.

³⁷ UNHRC 'Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1' (23 November 2006) UN Doc A/HRC/3/2 pp 59,62 ["**Lebanon Inquiry**"].

³⁸ *Prosecutor v Delalic* (Judgment) ICTY-96-21-T, T Ch I (16 November 1998), ¶184 ["**Delalic Trial**"].

³⁹ Factsheet, ¶14.

⁴⁰ Factsheet, ¶11.

⁴¹ *Prosecutor v Katanga* (Confirmation of Charges) ICC-01/04-01/07-717, P-T Ch I (13 October 2008), ¶282 ["**Katanga Confirmation**"].

2. The HAF was aware of the factual circumstances of the armed conflict and the victims' protected status.

12. The perpetrators need only be aware of factual circumstances of the armed conflict⁴² without legally evaluating its character.⁴³ The HAF was aware of Highland's occupation and used PDS against Lowlanders entering Highland.⁴⁴
13. Civilians are protected during an armed conflict,⁴⁵ unless they take part in hostilities.⁴⁶ The victims were merely displaced civilians from Lowland.⁴⁷ Additionally, a perpetrator cognizant of the victims' allegiance to the adversary⁴⁸ possesses the requisite awareness. The HAF was aware of the nature of the victims.⁴⁹

3. HAF inflicted serious injury and pain on the victims.

14. The perpetrator must inflict mental or physical pain.⁵⁰ The seriousness of an injury is measured temporally through incapacitation of a victim,⁵¹ which need not be permanent.⁵² Lowlanders suffered severe pain and permanent disabilities due to the PDS.⁵³

⁴² *Prosecutor v Bahar Idriss Abu Garda* (Confirmation of Charges) ICC-02/05-02/09, P-T Ch I (8 February 2010), ¶¶95,96 [**"Abu Garda Confirmation"**].

⁴³ *Abu Garda Confirmation*, ¶¶95,96.

⁴⁴ Factsheet, ¶14.

⁴⁵ Geneva Convention relative to the Protection of Civilian Persons in Times of War (adopted 12 August 1949) 75 UNTS 287 art 2.

⁴⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, *and relating to the Protection of Victims of International Armed Conflicts* (adopted June 8 1977) 1125 UNTS 3 (Protocol I) art 51(3) [**"Protocol I"**].

⁴⁷ Factsheet, ¶14.

⁴⁸ International Criminal Court, *Elements of Crime* (International Criminal Court 2011) art 8(2)(a)(i) [**"Elements of Crime"**].

⁴⁹ Factsheet, ¶11.

⁵⁰ *Elements of Crime*, art 8(2)(a)(iii).

⁵¹ *Delalic Trial*, ¶507.

⁵² *Delalic Trial*, ¶536.

⁵³ Factsheet, ¶14.

15. Intent and knowledge are established by a perpetrator's recklessness.⁵⁴ The recklessness of the HAF is evident from the use of PDS against civilians without the requisite testing.⁵⁵

II. ALTERNATIVELY, THE HAF COMMITTED THE CRIME AGAINST HUMANITY OF OTHER INHUMANE ACTS UNDER ARTICLE 7(1)(k).

1. HAF directed a widespread and systematic attack against a civilian population.

16. The primary object of the attack must be a civilian population.⁵⁶ Mere presence of combatants amongst civilians does not change the population's character.⁵⁷ Lowlanders were the primary object of PDS while they crossed the border.⁵⁸

17. The widespread nature of the attack is established by its scale.⁵⁹ Even a single victim is sufficient.⁶⁰ The PDS was directed against several thousand displaced Lowlanders,⁶¹ injuring nearly 200.⁶²

18. A systematic attack refers to its organization.⁶³ Admiral Gum deployed the personnel involved in the attack⁶⁴ and supervised their operations,⁶⁵ indicating its systematic nature.

⁵⁴ *Prosecutor v Blaskic* (Judgment) ICTY-95-14-T, T Ch I (3 March 2000), ¶152 [**"Blaskic Trial"**].

⁵⁵ Protocol I, art 36; Protocol on Blinding Laser Weapons Additional to Convention on Certain Conventional Weapons (adopted 30 July 1998) 1380 UNTS 370 (Protocol IV) art 3.

⁵⁶ *Prosecutor v Kunarac* (Judgment) ICTY-96-23&23/1, T Ch I (12 June, 2002), ¶421 [**"Kunarac Trial"**].

⁵⁷ Kunarac Trial, ¶421.

⁵⁸ Factsheet, ¶14.

⁵⁹ Blaskic Trial, ¶206.

⁶⁰ *Prosecutor v Nahimana* (Judgment) ICTR-96-11A, A Ch I (28 November 2008), ¶924.

⁶¹ Factsheet, ¶14.

⁶² Factsheet, ¶14.

⁶³ *Prosecutor v Kenyatta* (Investigation Authorization) ICC-01/09, P-T Ch II (31 March 2010), ¶96 [**"Kenya Investigation"**].

⁶⁴ Factsheet, ¶14.

⁶⁵ Factsheet, ¶14.

2. The HAF knew their conduct was a part of the widespread or systematic attack in furtherance of an organizational policy.

19. The perpetrator must know that his conduct constituted a part of the attack against civilians.⁶⁶ The Special Battalion was deployed to adopt any means to prevent incursions by Lowlanders,⁶⁷ indicating their knowledge.
20. To establish a nexus, the aim and consequences of the conduct⁶⁸ must occur within the perpetrator's official duties and promote the policy underlying the ultimate goal of the military campaign.⁶⁹ The HAF's attack aimed at preventing Lowlanders from entering Highland.⁷⁰
21. Planning, directing or organizing attacks establishes organizational policy.⁷¹ This includes use of public resources⁷² and involvement of state forces.⁷³ The deployment of the Specialised Battalion to attack civilians⁷⁴ establishes such a policy.

3. The HAF inflicted serious injuries on Lowlanders.

22. Long-term incapacitation is a serious injury.⁷⁵ Seriousness is also indicated through violations of customary international law,⁷⁶ such as causing permanent blindness and hearing impairment.⁷⁷ HAF's attack resulted in permanent hearing loss for 10 people and blindness for 5 people, amounting to serious injuries.⁷⁸

⁶⁶ *Prosecutor v Kordic and Cerkez* (Judgment) ICTY-95-14/2-A, A Ch I (17 December 2004), ¶99 [**“Kordic Appeals”**].

⁶⁷ Factsheet, ¶12.

⁶⁸ *Prosecutor v Semenza* (Judgment) ICTR-97-20-T, T Ch III (15 May 2003), ¶326.

⁶⁹ *Prosecutor v Bemba* (Judgment) ICC-01/05-01/08, T Ch III (21 March 2016), ¶143 [**“Bemba Trial”**].

⁷⁰ Factsheet, ¶13.

⁷¹ Kenya Investigation, ¶85.

⁷² Bemba Trial, ¶160.

⁷³ Bemba Trial, ¶160.

⁷⁴ Factsheet, ¶12.

⁷⁵ Delalic Trial, ¶507.

⁷⁶ Katanga Confirmation, ¶448.

⁷⁷ Protocol I, art 35 & 36; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR).

⁷⁸ Factsheet, ¶14.

23. *Mens rea* is established through *dolus directus* of the second degree, and knowledge.⁷⁹ Means and methods of warfare causing superfluous or unnecessary suffering are prohibited.⁸⁰ Blinding laser weapons cause unnecessary suffering.⁸¹ Despite being aware of the severe burning sensation caused by PDS,⁸² the HAF employed the PDS to clear the border area,⁸³ signifying their intent and knowledge.

4. The acts were of similar character as other crimes against humanity.

24. Character of an act is determined through gravity, contingent on the nature and physical effect of the crime.⁸⁴ Long-term consequences indicate the seriousness of injuries.⁸⁵ HAF's use of PDS caused permanent physical damage to Lowlanders,⁸⁶ establishing its gravity.

III. ADMIRAL GUM IS RESPONSIBLE FOR THE CRIMES AS A COMMANDER UNDER ARTICLE 28(a).

1. Effective command and control.

25. Effective command and control is evinced by the official position of the commander,⁸⁷ his power to issue orders,⁸⁸ and authority to deploy troops.⁸⁹ Admiral Gum, the head of the HAF,⁹⁰ deployed the Specialised Battalion⁹¹ and issued orders to them, establishing the requisite control.⁹²

⁷⁹ Katanga Confirmation, ¶455.

⁸⁰ Tadic Interlocutory, ¶127.

⁸¹ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004) 60.

⁸² Factsheet, ¶13.

⁸³ Factsheet, ¶14.

⁸⁴ *Prosecutor v Blagojevic* (Judgment) ICTY-02-60-T, T Ch I (17 January 2005), ¶627.

⁸⁵ *Prosecutor v Vasiljevic* (Judgment) ICTY-98-32-A, A Ch I (25 February 2004), ¶165.

⁸⁶ Factsheet, ¶14.

⁸⁷ *Prosecutor v Hadzihasanovic* (Judgment) ICTY-01-47-A, A Ch I (22 April 2008), ¶21 [**“Hadzihasanovic Trial”**].

⁸⁸ Hadzihasanovic Trial, ¶21.

⁸⁹ Bemba Trial, ¶188.

⁹⁰ Factsheet, ¶8.

2. Failure to exercise proper control.

26. A superior's action or inaction must increase the risk of occurrence of the crime.⁹³ Admiral Gum's failure to regulate the use of PDS resulted in commission of the crime.

3. Knowledge of commission of the crimes.

27. A superior must have been aware of the crimes owing to the circumstances⁹⁴ and may not claim ignorance⁹⁵ due to his negligent discharge of duties.⁹⁶ He has a duty to inquire into the commission of the crime.⁹⁷ Admiral Gum must have been aware of the possibility of occurrence of the crime owing to the indiscriminate nature of the untested PDS before its use.

4. Failure to prevent the commission of the crime.

28. A superior is obligated to prevent the commission of crimes,⁹⁸ and is not relieved of this duty by adhering to other obligations.⁹⁹ Admiral Gum failed to prevent the commission of the crime which resulted in serious injuries to 15 civilians.¹⁰⁰

⁹¹ Factsheet, ¶14.

⁹² Factsheet, ¶12.

⁹³ Bemba Confirmation, ¶¶422,425.

⁹⁴ *Prosecutor v Kayishema and Ruzidana* (Judgment) ICTR-95-1-T, T Ch II (21 May 1999), ¶227.

⁹⁵ Bemba Confirmation, ¶432.

⁹⁶ Blaskic Trial, ¶152.

⁹⁷ Bemba Confirmation, ¶433.

⁹⁸ Bemba Trial, ¶203.

⁹⁹ *Prosecutor v Oric* (Judgment) ICTY-95-14-T, T Ch I (3 July 2008), ¶336.

¹⁰⁰ Factsheet, ¶14.

INDICTMENT TWO AND THREE

I. THE COMMON ELEMENTS FOR THE WAR CRIMES OF ATTACKING CIVILIANS UNDER ARTICLE 8(2)(b)(i) AND ATTACKING MEDICAL TRANSPORTS UNDER ARTICLE 8(2)(b)(xxiv).

1. An IAC existed between Highland and Lowland.

29. Use of armed force¹⁰¹ against the territory, civilian population or objects of another state;¹⁰² or employing traditional means of warfare against another state's military vessels¹⁰³ constitutes an IAC.
30. Use of armed force need not be 'intense'¹⁰⁴ or pursuant to a declaration or recognition of war¹⁰⁵ to trigger an IAC. A unilateral use of armed force is sufficient.¹⁰⁶
31. The laying of mines,¹⁰⁷ firing at ships,¹⁰⁸ supposed law enforcement operations,¹⁰⁹ the operation of submarines in territorial waters without a state's consent,¹¹⁰ and the use of drones¹¹¹ are all considered adequate uses of force.

¹⁰¹ Lubanga Trial, ¶541.

¹⁰² Hans-Peter Gasser, 'International Humanitarian Law: An Introduction' in Hans Haug (ed), *Humanity for All: The International Red Cross and Red Crescent Movement* (Henri Dunant Institute, Geneva 1993) 22 ["Gasser"].

¹⁰³ Wolff Heintschel von Heinegg, 'The Difficulties of Conflict Classification at Sea: Distinguishing incidents at sea from hostilities' (2016) 98 ILRRC 449, 452 ["Heinegg"].

¹⁰⁴ Jean Pictet, *Commentary on Geneva Convention (IV) relative to the Protection of Civilians in Times of War* (ICRC 1958); Office of the Prosecutor, 'Situation in the Republic of Korea: Article 5 Report' (June 2014).

¹⁰⁵ Jean Pictet, *Commentary on Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea* (AP de Heney tr, ICRC 1960) 28.

¹⁰⁶ Noam Zamir, *Classification of Conflicts in International Humanitarian Law* (1st edn, Edward Elgar Publishing 2017) 56; Lebanon Inquiry, pp 59,62 (November 23, 2006).

¹⁰⁷ *Oil Platforms Case (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161, pp 64,72; Nikolas Sturchler, *The Threat of Force in International Law* (1st edn, Cambridge University Press 2007) 63; Yves Sandoz et al, *Commentary on the Additional Protocols to the Geneva Conventions* (Martinus Nijhoff 1987) 1881 ["Sandoz Commentary of APs"].

¹⁰⁸ *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, p 19.

¹⁰⁹ Gasser, p 22; *Maritime Boundary Dispute (Guyana v Suriname)* (2007) 30 RIAA.

¹¹⁰ Heinegg, p 455.

32. A dispute pertaining to sovereignty over the peninsula subsisted between Highland and Lowland for over 50 years.¹¹² In any event, HAF's act of laying landmines¹¹³ with the objective of preventing Lowland Armed Forces from entering the peninsular region constitutes sufficient force to constitute an IAC.
33. The existence of the IAC is further evidenced by the HAF's attacks through patrol vessels, frigates and fighter jets on a flotilla of civilians¹¹⁴ and a ship marked with the Red Cross emblem.¹¹⁵ Lowland also used force against Highland through the discharge of objects¹¹⁶ from its submarine in Highland territorial waters, and the deployment of its drones in Highland airspace.¹¹⁷

2. A nexus existed between the armed conflict and the crimes.

34. A nexus exists when the conflict affects the ability, decision, or manner of committing the crime.¹¹⁸ The crime should be committed during the conduct of hostilities as a means of warfare.¹¹⁹
35. The attacks on the flotilla and the cargo ship were conducted in the context of a territorial conflict between Highland and Lowland. Admiral Gum's forces attacked Lowland vessels that sought to enter Highland. Therefore, the attacks were influenced by the IAC.

¹¹¹ UNHRC 'Report on Ensuring Use of Remotely Piloted Aircraft or Armed Drones in Counter-terrorism and Military Operations in accordance with International Law including International Human Rights and Humanitarian Law' (24 March 2014) UN Doc A/HRC/25/L32.

¹¹² Factsheet, ¶7.

¹¹³ Factsheet, ¶15.

¹¹⁴ Factsheet, ¶¶21, 22.

¹¹⁵ Factsheet, ¶23.

¹¹⁶ Factsheet, ¶21.

¹¹⁷ Factsheet, ¶22.

¹¹⁸ Bemba Trial, ¶142.

¹¹⁹ *Prosecutor v Ntaganda* (Confirmation of Charges) ICC-01/04-02/06-309, P-T Ch II (14 June 2014), ¶46 [“Ntaganda Confirmation”].

3. The perpetrators were aware of the factual circumstances of the armed conflict.

36. Admiral Gum ordered and oversaw the planting of the naval mines¹²⁰ and the resort to armed force against the Lowland flotilla,¹²¹ the drones¹²² and the cargo ship,¹²³ by the HAF. Thus, the perpetrators were sufficiently aware.

II. THE SPECIFIC ELEMENTS FOR THE WAR CRIME UNDER ARTICLE 8(2)(b)(i).

1. The perpetrators directed the attack.

37. An attack under Article 8¹²⁴ is any act of violence against the adversary in offence or defence.¹²⁵ The act of directing an attack is punishable regardless of the result,¹²⁶ for the intended or foreseeable consequences of injury, death, damage or destruction.¹²⁷

38. The Highland fleet fired multiple salvos at the flotilla, which resulted in the boats capsizing, leading to several deaths.¹²⁸ This constitutes an attack, as the death and endangerment of civilians were foreseeable consequences of Highland's conduct.

2. The object of the attack was civilians.

39. There is an absolute prohibition on attacking civilians¹²⁹ not taking a direct part in hostilities¹³⁰ during naval warfare.¹³¹ Military necessity is not a defence.¹³²

¹²⁰ Factsheet, ¶15.

¹²¹ Factsheet, ¶20.

¹²² Factsheet, ¶22.

¹²³ Factsheet, ¶21.

¹²⁴ Abu Garda Confirmation, ¶65.

¹²⁵ Protocol I, art 49.

¹²⁶ Katanga Confirmation, ¶799.

¹²⁷ Ntaganda Confirmation, ¶46.

¹²⁸ Factsheet, ¶¶20,21.

¹²⁹ Protocol I, art 50.

¹³⁰ Katanga Confirmation, ¶266.

¹³¹ Tadic Interlocutory, ¶¶70,184.

¹³² Katanga Trial, ¶800.

40. Salvos were repeatedly fired at the flotilla of fishing vessels packed with civilians¹³³ to forcefully halt their advance. Thus, they were the object of the attack.

3. The perpetrators intentionally directed the attack.

41. The mental element under Article 30 should be satisfied.¹³⁴ The perpetrator must intend to engage in the conduct, intend for the civilians to be the object of his attack, and be aware of their civilian status.¹³⁵ This may be inferred through the methods of warfare employed, the number and status of victims, and the nature of the attack.¹³⁶

42. The HAF was aware of the civilian nature of the flotilla.¹³⁷ Pursuant to Admiral Gum's orders of interception and authorization of use of force¹³⁸ salvos were fired at the flotilla, after the patrol ships had withdrawn. This satisfies the mental element.

III. ADMIRAL GUM'S RESPONSIBILITY UNDER ARTICLE 25(3)(b) FOR SOLICITING THE CRIME UNDER ARTICLE 8(2)(b)(i).

43. Soliciting includes the advising, commanding or inciting of another to commit a crime.¹³⁹ It must have a direct effect on its commission.¹⁴⁰

44. Admiral Gum ordered Highland forces to force the flotilla to return to Lowland. He pre-emptively disclaimed any responsibility¹⁴¹ for harm that may be caused to the fishing boats, indicating his awareness of the possible resort to violence. This objective

¹³³ Factsheet, ¶17.

¹³⁴ Katanga Trial, ¶271; Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court- Sources and Commentary* (1st edn, Cambridge 2003) 131 [**"Dormann"**].

¹³⁵ Katanga Trial, ¶808.

¹³⁶ Katanga Trial, ¶807.

¹³⁷ Factsheet, ¶17.

¹³⁸ Factsheet, ¶20.

¹³⁹ Kai Ambos, *Treatise on International Criminal Law: Volume 1* (1st edn, OUP 2013) 163.

¹⁴⁰ Kai Ambos, 'Article 25: Individual Criminal Responsibility' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck Hart Nomos 2015) 1003.

¹⁴¹ Factsheet, ¶18.

was achieved when the advancing fleet fired salvos¹⁴² under the command of his flagship.

IV. THE SPECIFIC ELEMENTS FOR THE WAR CRIME UNDER ARTICLE 8(2)(b)(xxiv).

1. The medical transport was using a distinctive emblem under the Geneva Conventions.

45. Any ship exclusively devoted to medical transportation¹⁴³ under the control of a party to the conflict, is protected for the duration of such devotion.¹⁴⁴ The Red Cross emblem and the national flag of the authorizing state assist in their identification.¹⁴⁵ Their protection is not contingent on notification to the adversary¹⁴⁶ and is not revoked if personnel are lightly armed.¹⁴⁷
46. The function of medical ships,¹⁴⁸ such as transportation of medical equipment and the rescue of shipwrecked civilians,¹⁴⁹ protects them from attacks.
47. The cargo ship was engaged in medical transportation, having Lowland and Red Cross emblems and flags on it. Thus, it was a protected object.

2. An ‘attack’ was directed at the transport.

48. The intended or foreseeable consequences of an action determine its characterization as an attack.¹⁵⁰ A Highland frigate directed gunfire at the cargo ship, causing it to list.¹⁵¹

¹⁴² Factsheet, ¶20.

¹⁴³ Protocol I, art 8(g).

¹⁴⁴ Sandoz Commentary on APs, p 263.

¹⁴⁵ Protocol I, art 23(1).

¹⁴⁶ Protocol I, art 23(4).

¹⁴⁷ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949) 75 UNTS 85 art 35.

¹⁴⁸ Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995) 241 [“**San Remo Manual Commentary**”].

¹⁴⁹ Protocol I, art 8(f); American Society of International Law, ‘German War Trials: Judgment in case of Lieutenants Dithmar and Boldt’ (1922) 16 AJIL 708, 720.

¹⁵⁰ Ntaganda Confirmation, ¶46.

¹⁵¹ Factsheet, ¶23.

Its crewmembers and soldiers, who then boarded life rafts, were subjected to strafing.¹⁵²

3. The perpetrators intended the transport to be the object of the attack.

49. The perpetrator must intend to direct an attack against protected objects, knowing that the signs of protection were legally used.¹⁵³ Medical vessels are presumed to be protected, unless proved to the contrary.¹⁵⁴ The attacking party must gather and assess relevant information before attacking them.¹⁵⁵

50. Admiral Gum, the head of the armed forces, and the HAF must have been aware that the Red Cross symbol on the cargo ship indicated protection. Awareness of the medical function of the ship is evinced by the intention to attack it *before* it reached the shipwrecked.¹⁵⁶ The gunfire was deliberately aimed at the ship without adequate precautionary attempts to ascertain its status.¹⁵⁷

51. Even if the position of the ship above the submarine had made it a military objective, loss of protection is limited temporally to the duration of harmful conduct.¹⁵⁸ The life rafts did not constitute a military objective, but were nevertheless attacked.

¹⁵² Factsheet, ¶23.

¹⁵³ Dormann, p 350.

¹⁵⁴ Louise Doswald-Beck, 'San Remo Manual on International Law Applicable to Armed Conflict at Sea' (1995) 309 IRRC 583, art 58.

¹⁵⁵ San Remo Manual Commentary, p 146.

¹⁵⁶ Factsheet, ¶21.

¹⁵⁷ Louise Doswald-Beck, 'San Remo Manual on International Law Applicable to Armed Conflict at Sea' (1995) 309 IRRC 583, art 46.

¹⁵⁸ Stuart Casey-Maslen, 'Geneva Conventions I and II' in Andrew Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 816.

V. ADMIRAL GUM'S RESPONSIBILITY UNDER ARTICLE 25(3)(b) FOR ORDERING THE CRIME UNDER ARTICLE 8(2)(b)(xxiv).

1. Admiral Gum was in a position of authority and issued orders that had a direct effect on the crime's commission.

52. The perpetrator's instructions should have a direct effect on the commission of the crime.¹⁵⁹ Admiral Gum was the head of all the armed forces in Highland.¹⁶⁰ He ordered the shots to be directed at the cargo ship and ordered armed forces to prevent the life rafts from reaching the shore. This resulted in damage to the cargo ship and strafing of the life rafts.¹⁶¹

2. Admiral Gum possessed the mental element for ordering.

53. The perpetrator must be aware that the crime would occur in the ordinary course of events, consequent to the implementation of the order.¹⁶² Admiral Gum's authorization of force¹⁶³ demonstrates that he was privy to possibility of resort to violence in pursuance of his orders.

¹⁵⁹ Ntaganda Confirmation, ¶145.

¹⁶⁰ Factsheet, ¶8.

¹⁶¹ Factsheet, ¶23.

¹⁶² Ntaganda Confirmation, ¶145.

¹⁶³ Factsheet, ¶20.

PRAYER FOR RELIEF

The Prosecution submits that the charges against Admiral Gum must be confirmed under the Rome Statute for the following reasons:

1. The ICC has jurisdiction over the case;
2. The case is admissible;
3. There are substantial grounds to believe that Admiral Gum is liable under:
 - 3.1 Article 8(2)(a)(iii) or 7(1)(k) as a commander under Article 28(a);
 - 3.2 Article 8(2)(b)(i) for soliciting under Article 25(3)(b); and
 - 3.3 Article 8(2)(b)(xxiv) for ordering under Article 25(3)(b).

Respectfully Submitted,
Counsels for the Prosecution.