

D10H

PRELIMINARY MATTERS

The Respondent accepts that the International Criminal Court (ICC) has jurisdiction over the matter.

The Applicant must prove General Sulphide's guilt beyond reasonable doubt.¹

NATURE OF ARMED CONFLICT

Indictments 3, 4 and 5 require crimes to be committed in an internal armed conflict. However, circumstances surrounding these indictments equate to an international armed conflict. An international armed conflict exists "whenever there is a resort to armed force between two states."² In this case, Bigland's forces infiltrated institutions in Southland's territory, resulting in the death of Southland nationals. Therefore indictments 3, 4 and 5 cannot presently be pursued against General Sulphide.³

The distinction between international and internal armed conflict has lessened in recent years,⁴ therefore in the event that the Court considers the indictments appropriate, the Respondent addresses indictments 3, 4 and 5 below.

SUPERIOR RESPONSIBILITY

The ICC set out the principles of superior responsibility for a military commander in *Bemba*.⁵

First, the Accused must be a military commander.

¹ Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 90, Art 66. [Hereinafter Rome Statute]

² *Prosecutor v Tadic* (Decision on the defence motion for interlocutory appeal on jurisdiction) (2 October 1995) IT-94-1-A para 70 (Appeals Chamber, ICTY).

³ Rome Statute above n1 Art 61(7)(c).

⁴ Kolb, R & Hyde, R *An Introduction to the Law of International Armed Conflicts* (Hart Publishing, Oxford, 2008) p68.

⁵ *Prosecutor v Bemba* (15 June 2009) ICC-01/05-01/08 para 407(ICC). [Hereinafter *Bemba*]

Second, the Accused must have effective command and control over his forces. This means “the material ability to prevent or repress the commission of the crimes or submit the matter to the competent authorities.”⁶

Third, the crimes committed must have resulted from the Accused’s failure to exercise proper control. That is, the Accused’s failure must have increased the risk of the commission of the crime.⁷

Fourth, the Accused must have known or, owing to the circumstances at the time, should have known that his forces were committing, or were about to commit, a crime. The Respondent submits that, despite dicta in *Bemba*, the appropriate interpretation of the Rome Statute is “whether someone, on the basis of the available information, had reason to know” of the crime.⁸

Fifth, the Accused must have failed to take all necessary and reasonable measures to prevent and repress the crime and submit the matter to the competent authorities.

Regarding the duty to prevent, the Accused must ensure that his forces are adequately trained in international humanitarian law.⁹ In this case, efforts were being made to train the troops in international humanitarian law and many of Bigland’s officers were well trained and could ensure their troops complied with the law. However, constraints caused by the escalation of the conflict and minimal resources meant that comprehensive training of the new conscripts was outside of General Sulphide’s material ability.¹⁰

INDICTMENT ONE

General Sulphide’s policy for the conscription of “all able-bodied citizens” does not constitute a war crime under Article 8(2)(e)(vii) of the Statute.

⁶ Ibid, para 415.

⁷ Ibid, para 425.

⁸ Arnold, R. ‘Responsibility of Commanders and Other Superiors’ in Triffterer, O (ed) *Commentary on the Rome Statute of the International Criminal Court* (2 ed, Hart Publishing, Oxford, 2008) p830; Ambos, K. ‘Critical Issues in the *Bemba* Confirmation Decision’ (2009) 22 LJIL 715, 721.

⁹ *Bemba* above n5, para 438.

¹⁰ Ibid, para 443.

This crime requires evidence of actual conscription or enlistment of children under 15.¹¹ There is no evidence that this has occurred.

General Sulphide's policy was to extend conscription to all able-bodied citizens including those under 18. The policy could have been implemented without breaching Article 8(2)(e)(vii).

Alternatively, if the Court finds that children were conscripted, there is no evidence of knowledge, actual or imputed, on General Sulphide's part that the children were under 15.¹² Therefore, General Sulphide could also not have known that his subordinates committed a crime and so cannot be held responsible as a superior.¹³

INDICTMENT TWO

General Sulphide's addresses to Bigland forces in December 2007 did not amount to a denial of quarter under Article 8(2)(e)(x) of the Statute.

A declaration of quarter must be explicit and indicate that there shall be no survivors.¹⁴ General Sulphide's speeches did not contain an explicit denial of quarter.

There is no denial of quarter that can be implied into his speeches. He did not instruct that there shall be no survivors. There is no indication that he had intention to threaten his adversaries with a policy of no survivors.¹⁵

Furthermore, General Sulphide's words illustrate military necessity, a fundamental principle of the law of armed conflict, which allows "any amount and kind of force to

¹¹ *Prosecutor v Brima, Kamara & Kanu* (Judgment) (20 June 2007) SCSL-04-16-T para 1246 (Trial Chamber II, SCSL).

¹² *Prosecutor v Sesay, Kallon & Gbao* (Judgment) (2 March 2009) SCSL04-15-T para 190, 1703 (Trial Chamber I, SCSL).

¹³ *Bemba* above n5 para 427.

¹⁴ *Trial of S.S. Brigadefuhrer Kurt Meyer* (United Nations War Crimes Commission) (28 December 1945) *Law Reports of Trials of War Criminals IV*, p97; *Trial of Generaloberst Nikolaus Von Falkenhorst* (United Nations War Crimes Commission) (29 July - 2 Aug 1946) *Law Reports of Trials of War Criminals XI*, p18.

¹⁵ Werle, G. *Principles of International Criminal Law* (T.M.C Asser Press, The Hague, 2005) p362.

compel the complete submission of the enemy with the least possible expenditure of time, life and money.”¹⁶ Military necessity must be subject to the laws of war and General Sulphide acknowledges this when he explicitly states that Oxida people must “obey the rules.”

INDICTMENT THREE

General Sulphide is not liable for intentionally carrying out attacks on the civilian population under Article 8(2)(e)(i) of the Statute.

Although General Sulphide ordered his troops to raid the refugee camp, his intention, as evidenced by his instructions, was to uncover Nitrata forces. There was no explicit or implicit direction to attack the civilian population and thus his orders could not have compelled them to do so.¹⁷

Although the soldiers directed an attack, the object of the attack was not civilians.¹⁸ The object of the attack was either Nitrata fighters in the refugee camp,¹⁹ or civilians who had lost their protection by way of their direct participation in hostilities.²⁰ The act of firing on soldiers is an uncontroversial example of direct participation in hostilities.²¹ Because of the situation, it was “reasonable [for the soldiers] to believe, in the circumstances” that the targets were combatants.²²

The unfortunate death of the civilians killed in the refugee camp does not necessarily indicate a war crime has occurred.²³ The attack was not indiscriminate. Sergeant Bromide took precautions by giving civilians a warning to leave the camp, evidencing

¹⁶ *Hostage Case (USA v. List et al)* (American Military Tribunal, Nuremberg, 1948) 11 NMT 1230, 1250; Dinstein, Y *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP, Cambridge, 2004) p16.

¹⁷ Rome Statute above n1 Art 25.

¹⁸ Elements of Crimes for Article 8(2)(e)(i) Rome Statute.

¹⁹ Henckaerts, J-M & Doswald-Beck, L. *Customary International Humanitarian Law: Volume I: Rules* (CUP, Cambridge, 2009) Rule 3, p11.

²⁰ Melzer, N *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC, Geneva, 2009) p41.

²¹ *Ibid*, pg 47; Henckaerts et al above n19 Rule 6, p22.

²² *Prosecutor v Galic* (Judgment) (5 December 2003) IT-98-29-T para 55 (Trial Chamber I, ICTY).

²³ Dormann, K. ‘War Crimes—para 2(b)(i)’ in Triffterer, O *Commentary on the Rome Statute of the International Criminal Court* above n8 p327.

his intention to distinguish between civilians and those directly participating in hostilities.²⁴ Sergeant Bromide's actions were motivated by military necessity.

In relation to superior responsibility, General Sulphide cannot be causally linked to the alleged crime.²⁵ It was clear and unmistakable that his instructions to his soldiers did not extend to targeting civilians. There is no evidence that General Sulphide actually knew of the alleged crime, nor had any reason to know.

INDICTMENT FOUR

General Sulphide is not liable for intentionally directing attacks against a hospital under Article 8(2)(e)(iv) of the Statute.

Article 8(2)(e)(iv) infers that there must be a physical attack on the building. The Respondent submits that this crime is directed at large scale attacks such as aerial bombardments which result in the destruction of, or serious damage to, the building.²⁶ In this instance, General Sulphide's order was not to damage the hospital building rather it was to locate the Nitrata forces inside, therefore the crime is not satisfied.²⁷

The mental element of the crime requires that the damage or destruction was committed intentionally against protected institutions.²⁸ The soldiers did not possess the mental element of the crime because they intended to locate Nitrata fighters rather than attack the hospital itself.

The majority of soldiers fired on the people in the hospital in the mistaken belief that they were acting in self defence.²⁹ Although they were not actually under attack, a

²⁴ Ibid, p326.

²⁵ *Bemba* above n5 para 425.

²⁶ Arnold, A 'War Crimes-para 2(b)(ix)' in Triffterer, O *Commentary on the Rome Statute of the International Criminal Court* above n8 p375; Hague Convention IV Respecting the Laws and Customs of War on Land (1907) 205 CTS 227, Art 27.

²⁷ Elements of Crimes for Article 8(2)(e)(iv) Rome Statute, Element 2.

²⁸ *Prosecutor v Blaskic* (Judgment) (3 March 2000) IT-95-14-T para 185 (Trial Chamber, ICTY).

²⁹ Rome Statute above n1 Art 31(c).

subjective belief of attack is sufficient to exclude liability under Article 32 of the Statute.³⁰

General Sulphide does not bear superior responsibility for this act. The raid was led by a well trained officer, who could ensure his troops met the requirements of international law, therefore, sufficient steps to prevent the commission of the crime were taken.

INDICTMENT FIVE

General Sulphide is not liable for intentionally directing attacks against a hospital marked with the distinctive emblems of the Geneva Conventions under Article 8(2)(e)(ii) of the Statute.

Bigland had neither signed nor ratified Additional Protocol III. Additionally, recognition of the Red Crystal had not reached the status of customary international law at the time of the attack.³¹ Therefore, Bigland does not have a duty to abide by the principles in Additional Protocol III, including the duty to disseminate information about the Red Crystal.

Individual liability is not possible in this instance because General Sulphide instructed his troops to unearth Nitrata fighters, not to attack a building marked with a distinctive emblem.

Moreover, the fact that Bigland was not bound by the Protocol means that General Sulphide does not carry the obligation to inform his forces about the new emblem and thus negates his superior duty to prevent. In addition, the Protocol entered into force only after the conflict had begun which meant that it was not possible to disseminate the information. When the circumstances pose difficulties for dissemination, the lack of training in the Protocol is justified.³²

³⁰ Eser, A 'Grounds for Excluding Criminal Liability' in Triffeterer, O *Commentary on the Rome Statute of the International Criminal Court* above n8 p882.

³¹ *North Sea Continental Shelf case (Federal Republic of Germany v Denmark)*[1969] ICJ Rep 3.

³² *Prosecutor v Oric* (Judgment) (30 June 2006) IT-03-68-T para 563.

INDICTMENT SIX

General Sulphide does not have superior responsibility for causing death in the killing of two soldiers and a civilian by Sergeant Bromide under Article 8(2)(c)(i) or Article 8(2)(e)(i) of the Statute.

It is conceded that Sergeant Bromide's acts equate to war crimes under the Statute.

However, General Sulphide has no superior responsibility. He was in custody at the time of the offence therefore General Sulphide had no way of exercising effective control over Sergeant Bromide.³³ General Sulphide is not responsible for Sergeant Bromide's personal interpretation of General Sulphide's presumed intentions. General Sulphide also had no means of knowing that the crimes were being committed. Sergeant Bromide's acts were not based on any of General Sulphide's orders or policy prior to the incident.

PRAYER FOR RELIEF

The Respondent, thus, respectfully requests this Honourable Court to adjudge and declare that Commander Sulphide is not criminally responsible under the Rome Statute for:

- War crimes under Article 8(2)(e)(vii), 8(2)(e)(x), 8(2)(e)(i), 8(2)(e)(iv), 8(2)(e)(ii) and 8(2)(c)(i).

**Respectfully submitted,
The Respondent**

³³ *Bemba* above n5 para 415.