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First Annual International Criminal Court Moot Competition: Best Memorial for Prosecution

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**IN THE
INTERNATIONAL CRIMINAL COURT**

Prosecutor

v.

Soldier Nationals of Katonia and Ridgeland

MEMORIAL FOR PROSECUTION

International Criminal Court Prosecutors
University of Connecticut School of Law
Jessica E. Elliott
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Article 98 Agreement, Vineland-Katonia (Aug. 1, 2002)

STATEMENT OF THE FACTS

Civil War in Vineland

The nation of Vineland suffered through four years of devastating civil war between the central government and three ethnic groups that were seeking independence. (R. ¶ 1) In September 2001, the Vineland government and the three ethnic groups finally signed a peace agreement. (R. ¶ 1) The warring parties agreed to form a democratic government, with each ethnic group participating and sharing power. (R. ¶ 1) To support this new government, the United Nations Security Council (the "Security Council") authorized UNVINE to deploy five-hundred military personnel and six-hundred civilian personnel to Vineland to verify cessation of the hostilities, to set up a security zone for civilians and refugees, and to make preparations for the forthcoming elections in the various regions. (R. ¶ 1)

The Secretary-General of the United Nations (hereinafter the "U.N.") invited member States to contribute additional forces and equipment necessary to carry out this mission. (R. ¶ 1) The nations of Katonia and Ridgeland accepted this invitation, deploying soldiers and paratroopers to the UNVINE mission. (R. ¶ 1) However, the peace agreement failed when ANVA, an insurgent group from the northern region of Vineland, broke away from the newly formed government in June 2002. (R. ¶ 1) ANVA was dissatisfied over the number of ANVA seats in the new government, as well as its oil revenue shares from oil deposits in its region. (R. ¶ 2)

Creation of the ICC

On 1 July 2002, the Statute of the ICC entered into force between the States Parties to the Statute and empowered the Court to prosecute and punish persons who committed genocide, war crimes, or crimes against humanity in the territory of States Parties where the competent national courts are either 'unwilling' or 'not available' to exercise their jurisdiction. (R. ¶ 4)

Vineland is one of more than eighty-five Parties to the Statute of the International Criminal Court (hereinafter "Rome Statute.") (R. ¶ 4) At the same time, at the U.N., the Katonia representative was working to prevent the prosecution of its soldiers in the International Criminal Court (hereinafter the "ICC" or

"Court"). (R. ¶ 3) Katonia opposed the creation of the ICC and sought to prevent the future prosecution of any of its soldiers involved in any future conflicts. (See R. ¶ 3) Indeed, Katonia threatened the Security Council that it would not participate in the UNVINE mission or any future U.N. peacekeeping missions unless the Security Council granted it immunity from prosecution by the ICC. (R. ¶ 3)

Retaliatory Attacks on a Civilian Population by Katonia and Ridgeland Soldiers

"On 10 July 2002, unidentified . . . groups in [the] Vineland [northern region] attacked UNVINE peacekeeping forces stationed outside Bridgetown. Ten Katonia soldiers and 15 Ridgeland paratroopers were killed." (R. ¶ 5) In response to the attack, "Katonia and Ridgeland decided to send an additional 200 paratroopers to assist their soldiers. They also launched a retaliatory ten-day aerial bombing in the general area where the attacks occurred. (R. ¶ 6) The bombing campaign destroyed several ANVA training camps and killed many insurgents. (R. ¶ 6)

However, the bombing also inflicted severe damage on non-military targets, including the destruction of thousands of acres of farmland, as well as large quantities of crops and livestock. (R. ¶ 6) Additionally, numerous unexploded bombs littered roads and fields, posing severe danger to civilians on the ground. (R. ¶ 6) The two-hundred additional paratroopers on the ground cordoned off the area of the attacks and "conducted house-to-house raids detaining approximately 50 men and 20 boys." (R. ¶ 6) Many families complained that the paratroopers took personal property from their homes during the searches. (R. ¶ 6) The detainees were taken to a detention compound where they were observed in order to determine if any of them were insurgents. (R. ¶ 6) Some detainees were subjected to torture in an isolated area of the camp. (R. ¶ 6)

"On 20 July 2002, acting on Vineland intelligence reports, Katonia and Ridgeland ordered their paratroopers to bomb ANVA headquarters. (R. ¶ 10) The Human Rights Monitors reported that this bombing destroyed three villages, killing three hundred civilians, including women and children, and seriously injuring 550. (R. ¶ 10)

The Attempt to Grant Immunity to Katonia Soldiers From Prosecution in the ICC

Amidst carrying out the UNVINE peacekeeping operations in the northern region of Vineland, the Security Council unanimously adopted Resolution 1234 (hereinafter the "Resolution") on July 12, 2002. (R. ¶ 7) The Resolution gives a twelve-month exemption from ICC prosecution to Vineland peacekeepers taking part in U.N. peacekeeping operations. (R. ¶ 7) The Resolution reads:

The Security Council

Acting Under Chapter VII of the Charter of the United Nations,

1. *Requests* consistent with the provisions of Article 16 of the Rome Statute that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting July 1, 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decide otherwise. S.C. Res.1234, ¶ 21, (July 12, 2002).

Since Katonia was prepared to veto U.N. peacekeeping operations if not granted immunity, this resolution was viewed as a concession to Katonia. (R. ¶ 8) Many States Parties to the ICC viewed the Resolution as inconsistent with the Rome Statute and as a modification of Article 16 of the Rome Statute. (R. ¶ 8)

In addition to pushing through the Resolution, Katonia concluded what it called "Article 98 Agreements" with nations in various regions of the world, including Vineland and Ridgeland." (R. ¶ 9) In these bilateral agreements, the parties agreed not to surrender Katonia's soldiers to the ICC without Katonia's consent. (R. ¶ 9)

Capture of Katonia and Ridgeland Soldiers and Attempts to Hold Them Responsible for Crimes Committed During the Reprisal Campaign

On July 20, 2002, the day of the ANVA headquarters bombing, "ANVA captured three Katonia and two Ridgeland pilots whose planes had encountered engine trouble and landed in a nearby marsh." (R. ¶ 11) ANVA believed that these pilots en-

gaged in the bombing missions that resulted in civilian fatalities. (R. ¶ 11) Additionally, after the bombing ended, civilians in the targeted area stormed a local police station, where four Ridgeland military police were stationed as trainers and consultants to the local police force. (R. ¶ 11) Several women recognized the military police officers as the soldiers who had taken their husbands and sons. (R. ¶ 11) As a result, the civilians took the policemen prisoner. (R. ¶ 11a) The soldiers were later handed over to the ANVA insurgents who were already holding the five pilots. (R. ¶ 11b)

In response, Katonia and Ridgeland threatened further military action if the captives were not immediately released. (R. ¶ 12) The Secretary-General of the U.N. stepped in to de-escalate the situation and sent his special representative to negotiate with ANVA. (R. ¶ 12) The Secretary-General's special representative proposed two possible solutions to the ANVA tribunal, which were to either try the pilots in a neutral third country or to in the ICC at the Hague. (R. ¶ 12) Because of the serious political and legal difficulties in finding a suitable third country to try the soldiers, ANVA, under continuing threat of immediate military reprisals by Katonia and Ridgeland, agreed to surrender the soldiers to the ICC. (R. ¶ 12) In an official statement, Vineland asserted that it did not intend to exercise jurisdiction over the accused." (R. ¶ 13)

SUMMARY OF THE ARGUMENT

The ICC should exercise jurisdiction over the accused. Investigating and prosecuting the accused for the crimes committed corresponds with the Court's goal of putting an end to impunity. Exercising jurisdiction over the accused fulfills the jurisdictional requirements of the Rome Statute, is in accordance with international principles of equity, and does not violate any provision of the Resolution or the Rome Statute.

Defendants have committed crimes that violate the Rome Statute and should be prosecuted accordingly. Defendants' actions clearly violate customary norms of international law, as well as specific provisions of the Rome Statute. The ICC should move forward with the prosecution of these defendants so that they can be punished for their crimes. The ICC should take this opportunity to set the precedent that peacekeeping forces are bound by the dictates of international law in order to ensure that they do indeed help bring peace to conflict-ridden regions around the globe.

ARGUMENT

I. THE INTERNATIONAL CRIMINAL COURT SHOULD EXERCISE JURISDICTION OVER THE ACCUSED IN ORDER TO SERVE THE PURPOSE FOR WHICH THE COURT WAS FOUNDED

Exercising jurisdiction over the accused is the only means through which the objective of the ICC will be realized. Accordingly, the Court should exercise jurisdiction over the accused for the following reasons: 1) the crimes were committed on territory subject to the ICC's jurisdiction, 2) Vineland, Katonia, and Ridgeland are unwilling or unavailable to investigate the crimes, 3) the Agreement between Vineland and Katonia does not trump Vineland's obligations to the ICC, 4) equity dictates the use of a neutral forum, and 5) the military actions in which the accused participated were not part of U.N. peacekeeping operations in Vineland.

The ICC's central objective is to "put an end to impunity" by assuring that "the most serious crimes of concern to the international community as a whole [do] not go unpunished." Rome Statute of the International Criminal Court preamble, July 17,

1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002 [hereinafter "Rome Statute"]. To this end, States Parties to the Rome Statute are obligated to cooperate with the ICC in its investigation and prosecution of crimes and in the surrender of persons to the Court under articles 86, 87, 89, and 90. *See id.*, arts. 86-90.

A. Exercising Jurisdiction over the Accused Fulfills the Jurisdictional Requirements of the Rome Statute

The ICC may exercise jurisdiction over specific crimes occurring within the territory of a state party to the Rome Statute. *See id.*, art.12(2)(a). Since ICC jurisdiction is "complementary to national criminal jurisdictions," in order for the ICC to hear a case, the case must not currently be under investigation or prosecution by any state having jurisdiction over the accused, and there must not be any state, with competent national courts and having jurisdiction over the accused, that is willing or available to carry out an investigation and prosecution. *See id.*, arts. 1, 17.

The states having jurisdiction over the Katonian and Ridgeland soldiers have demonstrated that they are unwilling and unavailable to investigate and prosecute the accused. Since the crimes were committed in Vineland territory, the accused are also subject to Vineland jurisdiction. However, Vineland issued an official statement that it would not investigate or prosecute the accused. (R. ¶ 13) Ridgeland and Katonia may also exercise jurisdiction over their accused nationals, but they have remained silent on the issue. As to ANVA jurisdiction, ANVA's military tribunals are not official national tribunals, and are, therefore, not complementary to ICC jurisdiction. Thus, even if ANVA was willing to investigate and prosecute the accused, its courts are not considered complementary to the ICC.

Surrendering the accused to the ICC is consistent with Vineland's obligations to the ICC, as customary international treaty law prescribes that states parties must put forth a good faith effort to abide by the Rome Statute. Customary international law obligates states parties to a treaty to make a good faith effort to "refrain from acts which would defeat [its] object and purpose." Vienna Convention on the Law of Treaties arts. 18, 26, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 [hereinaf-

ter “Vienna Convention”]; see also Norwegian Loans, 1957 I.C.J. 9, 53.

Accordingly, “every treaty in force is binding upon the parties to it” and is binding “upon each party in respect of its entire territory.” Vienna Convention, arts. 26, 29. A “violation of a provision essential to the accomplishment of the object or purpose of the treaty” by a state party to the treaty constitutes a material breach of that treaty. *Id.*, art. 60(3).

Vineland and Katonia, which are not state parties to the Rome Statute, entered into an Article 98 Agreement [hereinafter “Agreement”]. Article 98 agreements are intended to prevent the Court from “proceed[ing] with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court.” *Rome Statute*, art. 98(2). Vineland and Katonia’s Agreement provides that “persons of one party present in the territory of the other shall not, absent expressed consent of the first Party, (a) be surrendered or transferred by any means to the International Criminal Court for any purpose. . . .” Article 98 Agreement art 2(a), Vineland-Katonia, August 1, 2002. In the Agreement, Katonia expressed its intention to investigate and prosecute crimes within the jurisdiction of the ICC. *See id.*, preamble.

In interpreting the role of an article 98 agreement, article 98 of the Rome Statute should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object and purpose*.” Vienna Convention, art. 31(1) (emphasis added); see also *Rome Statute*, art. 98. Thus, article 98 must necessarily be interpreted in light of Rome Statute’s objective of preventing impunity by assuring that crimes are properly investigated and prosecuted. Article 98 agreements can, therefore, only be valid if Katonia promises that it will investigate and prosecute the crimes in question. In this instance, Katonia did not explicitly state that it would investigate and prosecute the alleged crimes committed by the accused. In fact, Katonia’s enduring silence on this issue must be interpreted as foregoing any intention to investigate and prosecute its accused nationals. But, since the plain language of Article 98 does not clarify precisely how arti-

cle 98 operates, its "context" must be derived from "any instrument which was made by one or more parties in connection with the conclusion of the treaty." Rome Statute, art. 31(2)(b).

The United Nation's Addendum to the Rome Statute, Rule 9.19, regarding interpretation of article 98, provides that a state party to the Rome Statute contesting jurisdiction must notify the Court that "a request for surrender or assistance raises a problem of execution in respect of article 98, [and] shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court." United Nations Preparatory Commission for the International Criminal Court, U.N. Doc. L.1/Rev.1/Add.1, at Rule 9.19 (2000). Thus, if the Article 98 agreement truly posed a conflict with respect to surrendering the accused to the ICC, Vineland should have notified the Court prior to doing so. However, Vineland did not notify the Court of any conflicts or provide information on the Agreement to the Court.

Furthermore, despite the unfortunate change in political circumstances, Vineland remains bound to its obligation to cooperate in the surrender, investigation, and prosecution of the accused at the ICC. It is well settled that states remain bound to treaties even though political changes, however significant, may have occurred. See Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 3 (holding that despite a change from a Soviet to a democratic government, Hungary was still bound to a treaty dating to Soviet times). Treaties can only be terminated when the fundamental change of circumstances was unforeseen and the existence of the circumstances at the time of signing the treaty constituted an essential basis of the parties' consent. See Vienna Convention, art. 62.

Due to the history of continuous fighting in Vineland (R. ¶ 1), such political change could not have been unforeseen at the time the Rome Statute was signed. Furthermore, given that ICC jurisdiction has positive benefits for state parties in hostile times by ensuring that alleged criminals are appropriately investigated and prosecuted, the signing of the September 2001 peace treaty (R. ¶ 1) cannot constitute an essential basis of Vineland's consent to the Rome Statute.

B. Principles of Equity Call for ICC Jurisdiction

In furtherance of the purpose of the ICC to prevent impunity, principles of equity also necessarily call for the exercise of ICC jurisdiction. Equitable principles of law have long been used to decide international disputes. See generally North Sea Continental Shelf, 1969 I.C.J. 4 (holding that the parties should negotiate the division of the continental shelf, taking into consideration equitable principles); Meuse, 1937 P.C.I.J. (ser. A/B) No. 70 (using principles of equity as a general principle of law in treaty dispute); Cayuga Indian Claims, British and American Claims Arbitration Tribunal, 20 Am. J. Int'l Law 574 (1926) (holding principles of equity may be used to resolve the treaty dispute).

The crimes committed by the accused call for a thorough investigation and prosecution. By threatening not to participate in the UNVINE operation or other peacekeeping operations unless the Security Council granted its soldiers immunity from ICC prosecution (R. ¶ 3), Katonia is attempting to completely escape accountability for its soldiers' actions. As a result of Katonia and Ridgeland's ten-day aerial bombing, thousands of acres of farmland were ruined and large quantities of crops and livestock were destroyed. (R. ¶ 6) Personal property belonging to Vineland civilians was reportedly stolen during the house-to-house raids conducted by Katonia and Ridgeland soldiers. (R. ¶ 6) Then, on July 20, 2002, three villages were unnecessarily destroyed, three hundred civilians were killed, and 550 were seriously injured when Katonia and Ridgeland attempted to bomb ANVA headquarters. (R. at ¶ 10)

Due to the gravity of the injury inflicted on Vineland's civilians and the reluctance of Vineland, Katonia and Ridgeland to prosecute the accused, the ICC should proceed with an investigation and prosecution in order to bring justice to the thousands of innocent victims. Furthermore, as an insurgent group, and a contributor to continuous fighting in Vineland, ANVA courts would not have provided the accused with a fair investigation and trial since ANVA headquarters were the target of the Katonia and Ridgeland bombing operations. Under such circumstances, any investigation and prosecution of the defendants by ANVA's military tribunals would have necessarily been prejudiced.

C. Proceeding with an Investigation and Prosecution Does Not Violate the Rome Statute or the U.N. Security Council Resolution 1234

Finally, proceeding with an investigation or prosecution of the accused at the ICC does not violate the Resolution or the Rome Statute. The Resolution is consistent with U.N. Security Council powers under article 16 of the Rome Statute, and provides that the ICC may not proceed with an investigation or prosecution for a period of twelve months “over acts or omissions relating to a *United Nations established or authorized operation*.” S.C. Res. 1234, ¶ 21 (emphasis added). Article 16 of the Rome Statute permits the Security Council to request the Court not to commence or proceed with an investigation or prosecution of any action taken under Chapter VII of the Charter of the United Nations [hereinafter the “U.N. Charter”]. See Rome Statute, art. 16.

In January 2002, the U.N. authorized the UNVINE peacekeeping operation [hereinafter the “Operation”] in Vineland consisting of deploying five-hundred military personnel and six-hundred civilian personnel to “verify cessation of hostilities, to set up a security zone for civilians and refugees, and to make preparations for the forthcoming elections in the various regions.” (R. ¶ 1) Katonia and Ridgeland deployed soldiers and paratroopers to assist with the Operation. (R. ¶ 1) The crimes committed occurred during attacks subsequent to the Operation, which were unilaterally undertaken by Katonia and Ridgeland without U.N. authorization. Acting solely on Vineland intelligence reports, Ridgeland and Katonia launched a ten-day aerial attack, bombing ANVA headquarters acting. (R. ¶ 6, 10) The crimes committed were in no way related to the UNVINE peacekeeping operation.

Furthermore, consistent with U.N. powers under the Rome Statute, the Resolution provides only for a twelve-month delay in ICC prosecution, rather than pure immunity. See S.C. Res. 1234, ¶ 21; Rome Statute, art. 16. Therefore, granting the accused immunity from ICC prosecution runs contrary to the Resolution, destroys U.N. credibility, and defeats the purpose of the ICC. Katonia’s conduct – threatening to not participate in UNVINE or any other peacekeeping missions unless its soldiers are granted immunity from ICC prosecution – should not go unpun-

ished. (R. ¶ 3.) Granting Katonian soldiers immunity from ICC prosecution weakens the effectiveness of future U.N. peacekeeping operations because other countries will seek similar immunities from prosecution by threatening to veto peacekeeping operations. Setting this type of precedent effectively destroys the credibility of the U.N. Security Council and future international peacekeeping operations.

Accordingly, investigating and prosecuting the accused at the ICC is the only means through which the objectives of the ICC can be advanced. Failure to do so will contravene the very purpose of the Rome Statute and will undermine the credibility of the ICC, the U.N. and the stability of the international system.

II. DEFENDANTS HAVE COMMITTED CRIMES WHICH VIOLATE THE ROME STATUTE AND SHOULD BE PROSECUTED ACCORDINGLY

The Defendants have subjected the people of Vineland to horrific acts of violence, including a lengthy aerial bombing and the unlawful detention of civilians without any procedural safeguards to ensure that innocent, non-insurgent detainees are released, wantonly destroyed the lives and property of innocent civilians. (R. ¶ 6) The Defendants' actions clearly violate customary norms of international law as well as specific provisions of the Rome Statute. The ICC should move forward with the prosecution of these Defendants so that they can be punished for their crimes. This is an opportunity for the ICC to set a precedent that peacekeeping forces are bound by the dictates of international law, in order to ensure that such forces do indeed help bring peace to conflict-ridden regions around the globe.

A. Defendant Pilots Have Committed War Crimes in Violation of Article 8 of the Rome Statute by Conducting a Bombing Campaign Which Failed to Distinguish Between Military and Civilian Objectives

Defendants' ten-day aerial bombing reprisal campaign constituted an attack against civilians and amounted to a war crime in violation of international law, specifically article 8 of the Rome Statute. Under principles of international law, par-

ties to a conflict must distinguish between combatants and non-combatants. The International Court of Justice has identified this requirement as one of the "cardinal principles contained in the texts constituting the fabric of humanitarian law." Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 78. Furthermore, the Rome Statute specifically criminalizes attacks against civilians, providing that the "Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy of a large-scale commission of such crimes." Rome Statute, art. 8(1). Attacks against civilian populations are forbidden both in conflicts that are of international character and those that are not. See Rome Statute, arts. 8(2)(b)(i), 8(2)(e)(i). Accordingly, it is not necessary at this juncture to characterize the nature of the conflict in which the actions in question occurred. It is sufficient to note that under either characterization, the Defendants have violated the terms of the Rome Statute.

Articles 8(2)(b)(i) and 8(2)(e)(i) of the Rome Statute define the war crime of attacking civilians. Pursuant to article 9, the Court has promulgated an "Elements of Crimes" addendum to the Rome Statute to assist with the interpretation of articles 6, 7, and 8. The addendum provides five elements which help to define the crime of attacking civilians, with four of those elements being common to both articles 8(2)(b)(i) and 8(2)(e)(i). The common elements include:

1. the perpetrator directed an attack;
2. the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities;
3. the perpetrator intended the civilian population as such or individual civilians not taking part in hostilities to be the object of the attack;
4. the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Rome Statute, arts. 8(2)(b)(i), 8(2)(e)(i) (describing the "Elements of the Crime").

Element 4 is the only Element that is not common to definitions found in articles 8(2)(b)(i) and 8(2)(e)(i). In article 8(2)(b)(i), Element Four provides that the "conduct took place in the context of and was associated with an international armed conflict." Rome Statute, art. 8(2)(b)(i). In article 8(2)(e)(i), however, Ele-

ment 4 dictates that the “conduct took place in the context of and was associated with an armed conflict not of an international character.” Accordingly, the crime of attacking civilians applies uniformly regardless of whether the conflict was of an international character or not.

There can be no question that Elements 1 and 5 have been satisfied by Defendants’ aerial bombing campaigns. Defendants’ attack targeted a civilian population, resulting in the death and injury of an unknown number of civilians, as well as extensive damage to civilian property, crops, and livestock. “Attack” is defined in article 49 of Additional Protocol 1 to the Geneva Convention as “acts of violence against the adversary, whether in offense or in defense.” In this case, a bombing campaign would most certainly qualify as an “act of violence.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Additional Protocol 1, art. 49(1), Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 135. Furthermore, Defendants were most certainly aware of the existence of an armed conflict as their conduct occurred as part of a reprisal campaign in response to an armed attack against their own soldiers.

Element 2 has likewise been satisfied by Defendants’ actions. “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3), and (6) of the Third Geneva Convention and in Article 43 of [the] Additional Protocol.” *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-A, Judgment, ICTY Appeals Chamber, ¶ 48 (Dec. 17, 2004); *see also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War III art. 4(A)(1), (2), (3), (6) Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 135, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Additional Protocol 1, art. 43, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 135. Furthermore, if there is any doubt as to whether an individual is a civilian, that person “shall be considered a civilian.” *Id.* Article 4(A)(2) of the Geneva Convention applies to insurgent groups including:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias

or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War III art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 135.

Therefore, members of insurgency movements cannot claim civilian status if they fall within the above definition. See Kordic, IT-95-14/2-A at ¶ 50. "The civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character." Id.

Accordingly, although the Defendants may have suspected the existence of insurgent fighters hidden among the civilian population, they cannot indiscriminately attack the civilian population as a whole in the hope of killing some insurgents. The women and children killed most certainly did not fall within the above definition. Furthermore, the unexploded bombs that now litter the terrain of the northern region of Vinaland will indiscriminately maim and kill any individual that is unfortunate enough to be within the vicinity when they explode. International law prohibits nations from using weapons that fail to distinguish between civilians and military targets. See generally Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226. As noted above, international law places an absolute restriction on attacking civilians as civilians can never be a legitimate target, despite the growing complexities of fighting an insurgency.

The Defendants' bombing also satisfies Element 3 of the war crime of attacking civilians in that the civilian population was the object of Defendants' attack. Article 30 of the Rome Statute states: "[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime

within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.” Rome Statute, art. 30(1). Under article 30, the “intent” requirement is satisfied if a person means to engage in the conduct and when that person means to cause that consequence or is aware that it will occur in the ordinary course of events. See Rome Statute, art. 30(2). The “knowledge” requirement is satisfied when the defendant is aware that a “circumstance exists or a consequence will occur in the ordinary course of events.” Rome Statute, art. 30(3).

In response to the attack against peacekeeping forces, Katonia and Ridgeland bombed the general area of the attacks. They did not limit their bombing to known and legitimate military targets. The ten-day aerial campaign was designed to affect civilian populations and, therefore, meets the intent requirement. Even if the Defendants did not plan to attack civilians, they had to be aware that a general area bombing campaign would result in the victimization of the civilians. Furthermore, the Defendants had the requisite knowledge that a civilian population existed in the areas that they chose to bomb indiscriminately.

For the reasons stated above, the Defendants should be held criminally responsible for war crimes in violation of article 8 of the Rome Statute for the bombing campaigns, which victimized civilians and failed to distinguish the civilian populous from military targets.

B. Defendant Military Police Officers Have Committed Crimes Against Humanity and War Crimes in Violation of Article 7(1)(e) of the Rome Statute by Indiscriminately Detaining Civilians Without Adequate Procedural Safeguards

The Defendant military police officers’ unlawful detainment of males from the conflict zone constitutes a crime against humanity in violation of article 7(1)(e) of the Rome Statute. In their reprisal campaign, paratroopers from Katonia and Ridgeland conducted house-to-house searches and detained several men and boys for observation to determine whether they were insurgents. These actions cannot be justified under interna-

tional law and, therefore, the Defendants should be held criminally responsible for this conduct.

Article 7(1)(e) criminalizes, as a crime against humanity, imprisonment or other severe deprivation of physical liberty. The Elements of Crimes addendum to the Rome Statute characterizes the crime as one with five elements:

1. the perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty;
2. the gravity of the conduct was such that it was in violation of fundamental rules of international law;
3. the perpetrator was aware of the factual circumstances that established the gravity of the conduct;
4. the conduct was committed as part of a widespread or systematic attack directed against a civilian population;
5. the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Rome Statute, art. 7(1)(e).

There is no question that Defendants' conduct satisfied Element 1 of the above definition. Likewise, the satisfaction of Elements 4 and 5 has been established above in Section II(A). As such, since Elements 2 and 3 can also be established, the Defendants can be held criminally culpable for their unlawful detainment of civilians in connection with their reprisal campaign in the northern region of Vineland.

The Defendants' conduct violates fundamental rules of international law. International law provides that, "the confinement of civilians during armed conflict may be permissible in limited cases, but will be unlawful if the detaining party does not comply with the provisions of article 42 of the Geneva Convention IV." Kordic, IT-95-14/2-A at ¶ 69; see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War IV art. 42, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 135. Article 42 provides that, "the internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." See Geneva Convention Relative to the Protection of Civilian Persons in Time of War IV art. 42, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 135; see also Kordic, IT-95-14/2-A at ¶ 69. Further, article 43 of the Geneva Convention IV provides that, "[a]ny pro-

tected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.” See *id.* art 43; see also *Kordic*, IT-95-14/2-A at ¶ 70. International courts have interpreted articles 42 and 43 to provide that, although an initial detainment may be lawful, the internment “clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV.” *Kordic*, IT-95-14/2-A at ¶ 70.

The Defendants’ conduct clearly violates these established principles of international law. Defendants cannot justify the internment of all male members of a society as a measure “absolutely necessary” to the security of their forces. There are surely less restrictive means of ensuring security, such as, establishing a police force to patrol civilian areas and conducting intelligence operations to clearly identify the insurgents embedded within the civilian population. Further, even if the Defendants establish that the detainment of civilians was necessary for security purposes, it still violates international principles since there is no evidence that Defendants implemented any procedural safeguards to protect the rights of the detainees. The detainees were not reviewed by any administrative board, but rather, observed indefinitely to determine if they were truly a threat to the security of Katonia and Ridgeland.

Similarly, Element 3 of the crime of unlawful detainment is satisfied in that the Defendants were aware of the factual circumstances that established the gravity of the conduct. Defendants knew, or should have known, that, by detaining individuals without any evidence of their insurgency membership, some non-insurgent innocent civilians would be unjustifiably held. This is not a case of mistaking certain individuals as members of ANVA, but rather a case of instituting a policy that failed to discriminate between members of ANVA and innocent civilians.

For the reasons stated above, the Defendants should be held criminally responsible under article 7(1)(e) of the Rome

Statute for the crime against humanity of imprisonment or other severe deprivation of physical liberty.

CONCLUSION

For the foregoing reasons, the International Criminal Court should exercise jurisdiction over the accused. Further, the ICC should hold the Defendants criminally responsible for attacking civilians, a war crime in violation of article 8 of the Rome Statute, and for imprisoning or otherwise severely depriving civilians of physical liberty, a crime against humanity under article 7(1)(e) of the Rome Statute.