

Team Number: _____

Pace Law School
International Criminal Court Moot Competition
2005

Memorial of the Defense Counsel

Submission to the International Criminal Court

September 2005

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TABLE OF ABBREVIATIONS

UN – United Nations

UN Charter – The Charter of the United Nations

SC – Security Council

Statute – Rome Statute of the International Criminal Court

Court – International Criminal Court

SOFA – Status-of-Forces Agreement

SOMA – Status of Mission Agreement

STATEMENT OF FACTS

2001:

September: Peace agreement was signed between central Government of Vineland and three ethnic groups, which sought independence, after four years of continuous fighting.

2002:

January: Security Council authorized UNVINE to deploy 500 military and 600 civilian personnel in order to verify cessation of hostilities, to set up a security zone for civilians and refugees, and to make the preparations for the forthcoming elections.

June: ANVA broke away from the coalition Government.
Katonian vetoed a draft renewing the UN peacekeeping mission in Bosnialand, but agreed to extend the deadline for 15 days pending further negotiation on the question of request for exemption of its soldiers from ICC jurisdiction.

July 1: Statute of the ICC entered into force between the States Parties.

July 10: Unidentified armed groups in Vineland attacked UNVINE peacekeeping forces. Ten Katonian soldiers and 15 Ridgeland paratroopers were killed. According to the neighboring countries' newspapers, attack was financed by "foreign oil companies interested in keeping the UN peacekeepers out of the region."

Katonian and Ridgeland decided to send additional 200 paratroopers to the northern region (just outside the Bridgetown) to assist their soldiers and launched a ten-day aerial bombing of the general area of the attacks. According to reports from reputable NGO's, several ANVA training camps were destroyed and many

insurgents killed. In addition paratroopers from Katonia and Ridgeland conducted house-to-house raids detaining approximately 50 men and 20 boys.

July 12: Consistent with the provisions of Article 16 of the Rome Statute, the Security Council adopted unanimously resolution 1234, which effectively gave a twelve-month exemption from prosecution by the ICC to Vineland peacekeepers taking part in UN peacekeeping operations, starting 1 July 2002.

July 20: Acting on Vineland intelligence reports, Katonia and Ridgeland ordered their paratroopers to bomb ANVA headquarters. Two days later Human Rights Monitors (an NGO) reported that allegedly this bombing had in fact destroyed three villages resulting in civilian casualties. On the same day, ANVA captured three Katonia and two Ridgeland pilots who allegedly engaged in aerial bombing missions that had resulted in civilian fatalities. Some ANVA members wanted to execute the captured pilots immediately. Katonia and Ridgeland issued strong warnings to ANVA that they would face further military action if the captives were not released immediately. Secretary General of the UN sent his special representative (SRSG) to negotiate with ANVA. Options proposed to ANVA by the SRSG were trying the pilots in a neutral third country or at the ICC in The Hague. Katonia and Ridgeland continued to threaten immediate military reprisals.

August 1: Governments of Katonia and Vineland signed an agreement regarding the surrender of persons to the International Criminal Court.

2003:

October: Since there were serious political and legal problems in finding a third country that was at the same time acceptable to ANVA and willing to try the captured soldiers, ANVA surrendered the accused to the ICC through the offices of Secretary General. Vineland issued an official statement that it had no intention to exercise jurisdiction over the accused.

SUBMISSIONS

In view of the above stated facts and in accordance with Articles 67(1)(h) and 69(3) of the Statute, defendants respectfully make the following submissions:

- I. The Court does not have jurisdiction to try the defendants for committing the alleged crimes.
- II. The Court should find no crime was committed within its jurisdiction.
- III. The Court should find referral of the case by ANVA tribunal, through the office of Secretary General in breach of the Statute.
- IV. The Court should dismiss the case as inadmissible.

I. THE COURT DOES NOT HAVE JURISDICTION TO TRY THE DEFENDANTS FOR COMMITTING THE ALLEGED CRIMES.

I. a) Security Council Resolutions 1234 and 1487

1. Acting under Chapter VII of the Charter of the United Nations, the Security Council adopted unanimously resolution 1234 (2002), by which it requested the Court consistent with the Article 16 of the Rome Statute, not to commence or proceed with investigation or prosecution of case 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 UN established or authorized operation, for a twelve month period starting 1 July 2002, unless the SC decides otherwise. The SC also expressed its intention to renew the request every 1 July for a period of twelve months.

2. Using the same powers, SC adopted the resolution 1487¹ {¹SC Res.1487, 2003, List of Authorities No. 7}, which renewed the request for a period of another 12 months, starting 1 July 2003.

3. We would like to emphasize that SC resolutions 1234 and 1487 are completely in accord with Article 16 of the Statute and therefore not in breach of article 27. Article 27 provides that the “Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official [capacity] [shall] in no case exempt a person from criminal responsibility under this Statute...”² {² Rome Statute, 2002, List of Authorities No. 6} It is not the question of exemption from criminal responsibility, but simply postponing the investigation or prosecution

in the interest of restoring and maintaining international peace and security. “In practice, Article 16 allows the Council to request the Court not to investigate or prosecute when the requisite majority of its members conclude that judicial action – or the threat of it – might harm the Council’s efforts to maintain international peace and security pursuant to the UN Charter. Article 16 is intended as a vehicle for resolving conflicts between the requirements of peace and justice where the Council assesses that peace efforts need to be given priority over international criminal justice.”³ {³Knoops, 2004, p.266, List of Authorities No. 1}. Prior to adoption of the resolution 1487, at the SC’s 4772 meeting, Secretary-General of the UN stated: “I felt it was reasonable last year to adopt this resolution for 12 months, to give Member States more time to study the Rome Statute, which was only then entering into force, and to digest its implications. I can accept that the Council feels it is necessary to renew the request now for a further 12 months, since the Court is still in its infancy and no case has yet been brought before it.”⁴ {⁴ See List of Authorities No.8, at 3}.

4. SC used its discretion to adopt the aforementioned resolutions *intra vires*, consistent with Chapter VII of the UN Charter and Article 16 of the Statute, because the States not Parties to the Rome statute would have refused to participate in UN peacekeeping operations, therefore hampering the SC efforts to maintain international peace and security. Resolutions mentioned above help achieving these goals and at the same time establish equality between State Parties who used the provision of Article 124 to exempt their forces from the reach of the court for war crimes (in a limited period of time) and States not Parties to the Statute.

5. Having in mind aforementioned resolutions, we respectfully claim the Court has no jurisdiction over defendants at this time.

I. b) Article 98 of the Statute and the Agreement between Government of Katonia and Government of Vineland

6. On the day of August 1, 2002, Governments of Katonia and Vineland had signed an Agreement regarding the surrender of persons to the International Criminal Court pursuant to article 98(2) of the Statute. The Agreement explicitly states that either side to the Agreement shall not transfer or surrender persons of one party present in the territory of another by any means to the ICC for any purpose or to third country, nor expel them to a third country for the purpose of surrender to or transfer to the ICC. In accordance with this agreement, Government of

Vineland issued an official statement that it had no intention to exercise jurisdiction over the accused.

7. Having in mind paragraph 10 of the Preamble of the Statute, which promulgates the principle of complementarity to national criminal jurisdiction as well as articles 15, 17, 18 and 19 which fortifies that principle, defense respectfully claims the agreement mentioned in paragraph 6. is in accordance with the Statute and the principle of complementary jurisdiction of the Court. Usual practice of the UN, when instigating peacekeeping operations is signing a SOFA between the sending state and the host state, which inter alia establishes a concurrent jurisdiction between two parties. Practically, the host state cedes its jurisdiction over serious crimes to the force contributing state. An agreement between the parties pursuant to article 98(2) of the Statute is meant only to ensure the primary jurisdiction of the sending state and not to hamper an investigation or prosecution of the accused in front of the ICC, nor to establish impunity from prosecution. Neither customary international law nor article 27 of the Statute allows an absolute immunity from criminal prosecution. Article 98 focuses exclusively on the exceptional situation in which establishing ICC jurisdiction would contravene a specific international obligation of the state and in no way intends to shield individuals from criminal responsibility. It rather allows the state in such a situation to ensure that jurisdiction is exercised by national court⁵ {⁵G.A. Knoops, p.300}. If the Court decides to cast aside the agreement and to exercise its own jurisdiction, such ruling would be in breach of article 98(2) and the principle of complementarity upon which the whole system of the ICC is created. There is no reason why a State not Party to the Statute should be denied of exercising its jurisdiction as primary, when the same authority of the State Parties is inherent to the Statute. Such a solution would violate the principle of equality of States as determined by international law and would undermine the efforts in creating an efficient and fair system of international justice, not to mention making a permanent damage to international relations. This solution does not negate the possibility of ICC exercising its jurisdiction if the national courts prove to be inefficient to proceed with investigation or prosecution and when in Court's reach. Until present date national courts of Katonia did not have an opportunity to prosecute, because they never had custody over the accused.

8. Though Government of Ridgeland did not sign an agreement with the Government of Vineland regarding the surrender of persons to the International Criminal Court, it also did not

have an opportunity to exercise its jurisdiction set forth in the respectable SOFA⁶{⁶see U.N. Doc. A/45/594, List of Authorities No. 4} and SOMA⁷ {⁷see U.N. Doc A/46/185, List of Authorities No. 3}. National courts of Ridgeland, also never had custody over the accused.

9. Court never asked for consent on surrender of the accused from Governments of Katonia and Ridgeland, nor was such consent given by two Governments. Therefore, we move for the Court to decide it has no jurisdiction and to refer the case to national courts of Katonia and Ridgeland in accordance with their authority under the SOFA and obligations under the SOMA in order to try the defendants for committing the alleged crimes.

II. THE COURT SHOULD FIND NO CRIME WAS COMMITTED WITHIN ITS JURISDICTION.

II. a) Brief Overview of the Situation

10. In September 2001, after four years of continuous fighting in Vineland, a peace treaty was signed between the Government and three ethnic groups which sought independence. New, democratic coalition Government was formed and its power shared between the representatives of all ethnic groups. After great peacemaking efforts, new Government accepted the presence of UN peace-building mission, which was to verify cessation of hostilities, to set up a security zones for civilians and refugees, and to make the preparations for the forthcoming elections. To that purpose, the Security Council, acting under Chapter VI of the Charter, authorized UNVINE to deploy civilian and military personnel to Vineland.

11. In June 2002, ANVA broke away from the Government due to dissatisfaction over the number of seats it held in the Government and revenue shares, questions which could easily be dealt with negotiations and seeking for a non-violent solution. Instead, ANVA's choice was to resort to violence and on July 10, 2002 its forces attacked the UNVINE mission without distinguishing themselves from the civilian population. On that occasion, 25 members of UNVINE mission were killed. This attack had a clear intention of spreading fear among the UNVINE members and to cause sustainable damage to peace-building efforts. This assault cannot be regarded as prolongation of hostilities, because ANVA was not fighting for

independence, but for, as credible newspaper sources witness, serving selfish interests of “foreign oil companies interested in keeping the UN peacekeepers out of the region.”

12. This act of violence was certainly a very serious threat to maintaining the law and order in Vineland. In order to restore internal order, UNVINE military forces along with the Government of Vineland led decisive action against ANVA in order to complete the goals of their mission, pursuant to their mandate, and not to let its members to hamper peace-building efforts of UNVINE and new democratic Government. New Vineland institutions are much too frail and can be seriously endangered if the violence reoccurs.

II. b) Qualification of the Situation

13. Article 1(2) of Additional Protocol II clearly states: “This Protocol Shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts [...]”⁸ {⁸ Additional Protocol II, List of Authorities No. 5}. Decisive action of international forces prevented spreading of violence and isolated this attempt of hampering the post-war efforts in building a democratic society in Vineland. ANVA assault against peacekeeping forces was an isolated act of violence which certainly created a situation of internal disturbance, but did not amount to an armed conflict. Therefore, IHL is not applicable to this situation and accordingly there cannot be any grave breaches of the IHL on the side of UNVINE forces – neither crime against humanity nor war crime was committed, pursuant to Article 5 of the Statute, as the Court should determine.

II. c) UNVINE Military Actions

14. Right after the attack against their forces, UNVINE troops destroyed several ANVA training camps and on July 20, 2002, also bombed ANVA headquarters acting on Vineland Government intelligence reports. Peacekeepers were during these events adequately responding to the previous ANVA attack on their forces with the sole purpose of maintaining and restoring peace and security in Vineland. UNVINE used its powers from the mandate entrusted to it by SC, and acted completely in accordance with it.

15. Moreover, in Certain Expenses case, International Court of Justice held that, presupposing peacekeeping forces are engaged with the consent of the host state, they do not constitute an enforcement action⁹ {⁹ Knoop, 2004, p.37, List of Authorities No. 1}. Since the efforts of UNVINE in annihilating threats for building of lasting peace were not only undertaken

with the consent, but with active support of the Vineland Government, which provided intelligence information, peacekeeping forces were not in breach of their mandate; hence, no crime was committed. Consequently, the Court should find there was no crime committed on the side of UNVINE and that use of force in this case was completely justified.

II. d) Actions of Military Police Members

16. Prior to the bombing of ANVA headquarters, UNVINE forces conducted house-to-house raids. The goal of the searches was to find possible suspects for preceding ANVA attack on UNVINE members and obtaining operative information regarding the display of brute force against the peacekeepers. These pieces of information were crucial in not only identifying the perpetrators, but also in preventing further violence. The death toll of the ANVA attack proved that this organization was posing a serious and immediate threat to the UNVINE mission. We feel the members of UNVINE mission were entitled to act accordingly in addressing this peril and protect themselves from additional ANVA actions.

17. ANVA hostile act endangered the aim of the peace-building mission, because efforts in rebuilding of institutions and providing the safe environment for refugees and civilians cannot be successful if the forces which should ensure the whole process are targeted, thus enhancing the feeling of insecurity among the population. Members of the military police, taking part in the raids were at all time, as well as all members of UNVINE mission, respecting and following the provisions of Declaration of Minimum Humanitarian Standards¹⁰ {¹⁰ see Sassoli and Bouvier, 1999, p.519, List of Authorities No. 2} and Human Rights principles. That is one of the main reasons why, at the time of their incarceration, they were stationed as trainers and consultants to the local police force. In fact, their presence during searches gave better guarantees for protecting the rights of the suspects than it would have been the case if the raids had been performed by local police members. Ergo, we move for the Court to establish the measures taken by the UNVINE members were not overstepping the boundaries of the mandate assigned to them by the SC.

II. e) Mens Rea Consideration

18. The only intent of the defendants was to serve in their units the best they can for the benefit of their countries and the peace-building mission. They respected the chain of command, meeting their obligation to obey the orders and to fulfill the task of UNVINE mission. Their every action was aimed in preserving the peace and providing a secure environment for civilians

and to the best possible extent providing everything necessary for the fulfillment of the peace agreement.

19. During the UNVINE military actions described in paragraphs 14 and 15, the UNVINE pilots received an order to attack ANVA headquarters, along with information specifying where the headquarters are positioned and proceeded with the mission as they were ordered. Their intent was to destroy the ANVA headquarters, thus annihilating the threat to UNVINE forces, the threat to UNVINE mission and the threat of the new spread of violence in Vineland. They never intended to direct their attack against civilian population in any case whatsoever.

20. During the searches, the intent of the UNVINE forces was to get information on possible suspects, finding and interviewing them in order to find who is responsible for the attack and getting operative data on ANVA structure, so further hostile actions against peace-building mission would be effectively prevented.

21. Since the intent of the peacekeepers was directed on ensuring the international peace and security, which is the necessary condition for the post-war peace-building, the Court should find the peacekeepers were acting in accordance with their mandate. Subsequently, the Court should determine that there was no crime committed within its jurisdiction.

III. THE COURT SHOULD FIND REFERRAL OF THE CASE BY ANVA THROUGH THE OFFICE OF SECRETARY GENERAL IN BREACH OF THE STATUTE.

22. Under articles 58, 89, 92 of the Statute, Court may issue an arrest warrant, request surrender or provisional arrest from a State Party. To our knowledge, no warrant was issued nor request made to the Government of Vineland to this date. Under article 13, the Court may exercise its jurisdiction when the case was referred to the Prosecutor by a State Party, Security Council or the Prosecutor has initiated an investigation in accordance with article 15. ANVA Tribunal has transferred the captives to the ICC through the office of Secretary General, although there was not any outstanding warrant for the arrest of defendants; this situation raises questions that need to be addressed.

23. ANVA could not refer a case to the Court. On the other hand Special Representative of the Secretary General overstepped the boundaries of his mandate when suggested the case to be referred to the Court and acted ultra vires in helping with surrender of the captives to the Court. Even if he had the consent of the Secretary General, the procedure itself could not be regarded as a referral of case to the Prosecutor by the Security Council. Since there is no outstanding warrant for the arrest of the defendants, Court is not in a position to exercise jurisdiction over the accused. We move for the Court to find the procedure established by the Statute was not followed and respectfully ask for Court to dismiss the case based on unlawful arrest made by civilian population and the inability of ANVA to refer the case to the Prosecutor under the Statute.

24. If we even suppose that Prosecutor initiated the investigation proprio motu, that still leaves an open question of the arrest made by the civilian population. Since the Court may request only from a State Party to make the arrest, as already stated above, the capture of the defendants was unlawful. They were taken to ANVA, only to be executed by its members. In view of the fact that the ANVA tribunal is not valid judicial body, therefore not an institution of Vineland, it could not transfer the captives to the Court. For that reason we respectfully ask the Court to establish that defendants were unlawfully incarcerated and transferred to the Court. If the Court finds the arrest was lawful, that would bring to acknowledgment of the ANVA goals and resorts as legitimate and desirable, thus impairing the global endeavor in maintaining the peace and security of the mankind. We feel there is no need to emphasize the danger of such decision.

IV. THE COURT SHOULD DISMISS THE CASE AS INADMISSIBLE.

25. For all the reasons stated above, we move for the Court to dismiss the case as inadmissible.

LIST OF AUTHORITIES

1. Geert-Jan Alexander Knoops, *The prosecution and defense of peacekeepers under international criminal law*, Transnational Publishers, Inc, 2004.
2. Marco Sassoli and Antoine A. Bouvier in co-operation with Laura M. Olson, Nicolas A. Dupic and Lina Milner, *How does law protect in war? Cases, Documents and teaching materials on contemporary practice in International Humanitarian Law*, ICRC, 1999.
3. Model agreement between the United Nations and member States contributing personnel and equipment to United Nations peace-keeping operations, U.N. Doc. A/46/185, 23 May 1991.
4. Model status-of-forces agreement for peace-keeping operations, U.N. Doc. A/45/594, 9 October 1990.
5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.
6. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, entered into force on 1 July 2002.
7. Security Council Resolution 1487, S/RES/1487 (2003), 12 June 2003.
8. Security Council, 4772nd meeting, 12 June 2003, New York, U.N.Doc. S/PV.4772
9. The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, U.N. Treaty Series No.993.

LIST OF CITATIONS

1. Geert-Jan Alexander Knoops, *The prosecution and defense of peacekeepers under international criminal law*, Transnational Publishers, Inc, 2004.

Page 266, paragraph 2, full citation:

“In practice, Article 16 allows the Council to request the Court not to investigate or prosecute when the requisite majority of its members conclude that judicial action – or the threat of it – might harm the Council’s efforts to maintain international peace and security pursuant to the UN Charter. Article 16 is intended as a vehicle for resolving conflicts between the requirements of peace and justice where the Council assesses that peace efforts need to be given priority over international criminal justice.”³

Page 300, paragraph 1, paraphrased in text, full as follows:

“Neither customary international law nor article 27 of the ICC Statute allows such absolute immunity from criminal prosecution. Article 98 focuses exclusively on the exceptional situation in which an ICC request could contravene a specific and international obligation of the requested state; in no way intends to shield individuals from criminal responsibility. Rather, it allows the requested state in such a situation to ensure that jurisdiction is exercised by another (national) court.”⁵

Page 37, paragraph 1, paraphrased in text, follows in full:

“In the *Certain Expenses* case, International Court of Justice held that, presupposing peacekeeping forces are engaged with the consent of the host state, they do not constitute an enforcement action.”⁹

2. Part of the speech of the Secretary General at the 4772nd meeting, cited in full:

“I felt it was reasonable last year to adopt this resolution for 12 months, to give Member States more time to study the Rome Statute, which was only then entering into force, and to digest its implications. I can accept that the Council feels it is necessary to renew the request now for a further 12 months, since the Court is still in its infancy and no case has yet been brought before it.”⁴

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10. Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003.
11. Edward M. Wise, Ellen S. Podgor, Roger S. Clark, *International criminal law, Cases and materials*, Lexis Nexis, 2004.
12. Ellen S. Podgor, *Understanding international criminal law*, Lexis Nexis, 2004.
13. Jordan J. Paust, M. Cherif Bassiouni, Michael Scharf, Jimmy Gurule, Leila Sadat, Bruce Zagaris, Sharon A. Williams, *International Criminal Law Documents Supplement*, Carolina Academic Press, 2000.