FIS INTERNATIONAL HUMANITARIAN LAW MOOT

SITUATION IN MAPALO (ZENGIN)

(PROSECUTOR v ADUGA BOLO)

AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS'

CONFIDENTIAL BENCH MEMORIAL

Notice to Judges

This Bench Memorial is confidential and is meant to provide guidance to the judges in Memorial Marking as well as in the Oral Phase of the Competition. The author of the Hypothetical Case has provided this guideline however parties may extend arguments beyond what is provided herein, and judges are allowed to exercise their discretion in the determination of whether or not the arguments made outside the bench memorial and sound, persuasive, and relevant to the facts of the case.

Introduction

This matter is in regard to the situation in Mapalo (Zengin). The African Court of Justice and Human Rights (ACJHR) has been seized for confirmation of charges and is therefore likely to exercise its jurisdiction over crimes covered by the Malabo Protocol and committed on the territory of Mapalo in Zengin or by nationals of this State as of 1st January 2018. Therefore, the Pre-Trial Chamber has to determine whether the case against Aduga Bolo is admissible, Whether there are reasonable grounds to believe that war crimes that took the form of intentional attacks against planned protected persons and property were committed and whether Aduga Bolo can be held liable under command responsibility.

Primary Sources of Law

Pursuant to Article 31 of the Malabo Protocol, this Court decides matters in accordance with international law. Primary sources of international law include:

a. The Constitutive Act
b. international treaties, whether general or particular, ratified by the contesting parties;
c. international custom, as evidence of a general practice accepted by law; and
d. general principles of law recognized universally or by the African States.

Treaties may be bilateral (two parties) or multilateral (more than two parties). A bilateral treaty and several multilateral treaties are relevant to this dispute. The rules regarding treaty interpretation are governed by the Vienna Convention on the Law of Treaties.

Customary international law consists of legal principles, doctrines, and rules derived from state practice. A particular practice may rise to the level of customary international law if it is uniform and extensive and if the practice is done with the understanding that it is required by international law (*opinio juris*). When either party argues in favor of the existence of customary international law, you should ask for examples of state practice.

Evidence of state practice may include, for example, official governmental documents (diplomatic correspondence, policy statements, press releases); decisions by the executive, legislative, or judicial branches of government; actions at Conferences of the Parties of various multilateral organizations; language in treaties to which a state is a party; and a state's voting record in the African Union or United Nations (Note that the parties should not point to AU or UN General Assembly resolutions as an independent source of law. The AU or UN General Assembly is only authorized to "discuss" and make "recommendations" about matters within the AU Constitutive Act or UN Charter's scope. Thus, the general view is that these "recommendations" cannot, by themselves, create binding international obligations. Of course, while the resolutions may not create law, they may inform about what the law is; moreover,

votes on resolutions are evidence of state practice, which could lead to the emergence of customary law).

A practice is uniform if the state conduct is substantially similar throughout the world. A practice is extensive if it is generally followed by most states, in particular by those states whose interests are especially affected. *Opinio juris* requires that the state practice must be accompanied by a belief that the practice is obligatory, rather than merely convenient or habitual.

General principles of law recognized universally or by African States are propositions of law so fundamental that they are found in virtually all legal systems. For example, the *non bis in idem* (double jeopardy).

Subsidiary Sources of Law

Subsidiary sources for determining applicable rules include judicial decisions and the teachings of the most highly qualified publicists (scholars). Judicial decisions may include international cases, as well as regional and national cases in which issues of international law are adjudicated. The decisions may be cited for their persuasiveness as evidence of what international law requires; they do not, by themselves, create international law. Similarly, the teachings of highly qualified publicists should be relied upon cautiously, because these scholars may be asserting what the law ought to be, rather than what the law is. International publicists may be helpful in determining state practice, which is relevant to the development of customary international law. Beyond those sources of law specifically identified in Article 31 of the Malabo Protocol, the parties may rely upon aspirational documents or what are referred to as "soft law"; they are not intended to create binding legal obligations in and of themselves. Such documents could, however, represent a codification of customary law or, as evidence of state practice, help create customary law. With that background in mind, let us turn to the particulars

of the case. Please note that the discussion of the legal issues is followed by sample questions you may wish to ask the parties.

Summary of Arguments

1. **Is the case The Prosecutor v Aduga Bolo admissible before the African Court of Justice and Human Rights?**

The arguments should be focused on Article 46H of the Malabo Protocol which is comparable to Article 17 of the International Criminal Court's Rome Statute, but it differs from that of the two ad hoc tribunals, the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Therefore, the jurisprudence of the ICC may be used in the arguments on this issue.

First, a distinction must be drawn that the complementarity principle, is a product of the criminal jurisdiction section of the ACJHR, not the Human Rights section. Because the ACJHR will have two different chambers for criminal and human rights matters, the complementarity principle will only apply to the criminal side and will not apply to the ACJHR's human rights court. Thus, the exhaustion of local remedies rule as a prerequisite for admissibility under the Human rights section of the court does not apply to this case.

Both parties should address the *non bis in idem* principle and its exceptions. The parties should show that the decision of the Criminal Court of Chatu was or was not for the purpose of shielding him from criminal responsibility for crimes within the jurisdiction of the Court. The determination of shielding will be vital, and jurisprudence of the Human Rights courts and regional courts can be used in this determination though a line should be drawn not to convert the court into a human rights court. (*The El Sennusi Admissibility decision*).

Similarly, the parties should establish whether the proceedings were or were not conducted "independently or impartially in accordance with the norms of due process recognized by

international law" and "in a manner which […] was inconsistent with an intent to bring Aduga Bolo to justice". (*The Saif Al Islam decision* on admissibility may be invoked).

The question on immunity is also a vital issue to be addressed by the teams. The parties should address Article 46A*bis* of the Malabo Protocol which provides that 'no charges shall be commenced before the Court against senior state officials based on their functions, during their tenure of office'.

The prosecution should base their arguments on The Report on the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs on the discussion of the individuals covered under Article 46Abis and use the Vienna Convention on the Law of Treatise on treaty interpretation to convince the judges that Aduga Bolo does not fall within the immunity established under Article 46Abis.

The defense should argue that Article 46Abis covers Aduga Bolo as he was a state official acting in such capacity and thus his immunity does stand. They should also utilize treaty interpretation provisions under the Vienna Convention on the Law of Treatise to interpret Article 46Abis to cover Aduga Bolo.

2. **Whether there are reasonable grounds to believe that, in the context of the said armed conflict, war crimes which took the form of intentional attacks against planned protected persons and property in Article 28D of the Malabo Protocol were committed in the territory of Zengin from February 2018?**

The parties must establish the existence of an armed conflict. This would require them to classify the conflict for the purpose of determination of the provisions under Article 28D of the Malabo Protocol to be used. Either as an International Armed Conflict or Non-International Armed Conflict.

Similarly, the mental elements of the alleged war crimes must be established or challenged. The parties must show that there was or not the intention to attack protected persons and property. Additionally, the object of the attack was protected person and property. The facts regarding the attack on AirLinesVision, n ° ALV22 and the attack on the ICRC building are relevant. The interpretation of the Geneva Conventions and additional protocols are to be relied upon by the parties as far as whether in this situation there exist protected persons and property.

3. **Are the facts presented capable of justifying the incorporation of responsibility of Aduga Bolo as a commander on the basis of Article 46B (3) of the Malabo Protocol**

The elements of Command Responsibility need to be addressed by the parties. As a mode of liability, command responsibility assigns criminal responsibility to high-ranking members of the military as well as militia for the crimes committed by their subordinates. At the most basic conceptual level, the individual criminal responsibility of such high-ranking individuals is attributed to their inactivity and requires both that they hold a superior-subordinate relationship with the direct perpetrators and that they knew or had reason to know that the crimes were being or had been committed. These requirements have been codified in various ways in international legal instruments, as forms of military discipline in international humanitarian law, into a mode of individual criminal responsibility that is applicable to military leaders as well as leaders of military-like organisations.

Unlike the ICC, the Malabo Protocol under Article 46B(3) does not distinguish between the status or organisational belonging of the superior. Whereas ICC Art. 28 distinguishes between the liability of military commanders and other superiors, the legal provision in the Malabo Protocol refers only to a superior (the Malabo Protocol has similarities with the jurisprudence of the adhoc tribunals which have applied the superior status to those in the military or military-

like organisations, including paramilitary organisations and armed resistance groups, as well as civilian organisations and therefore their jurisprudence become more relevant than the ICC).

The control requirement is also absent, as is that of causation: instead, the two modes of control under ICC Art. 28(a) effective command and control (*de jure* control) or effective authority and control (*de facto* control) over the subordinates have also been developed through jurisprudence of the *adhoc* tribunal and thus applicable in this case.

Turning to the acts that the superior is required to have failed to fulfil, the ACJHR adopt the same standard as the ICC and the *Adhoc* tribunals that of necessary and reasonable measures but applies it only to the superior's failures to prevent or punish (the ICC adopts repress). There is no requirement for the superior to submit the matter to the competent authorities. Finally, liability can be established through two forms of mens rea the more purposive standard where the superior knew […] that the subordinate was about to commit such acts or had done so as well as a standard of culpable failure where the perpetrator had reason to know. This standard deviates from ICC Art.28, which requires that the perpetrator should have known.

The parties may also opt to rely on the Hague Convention of 1907, the 1929 Geneva Conventions, and the 1949 Additional Protocols which have established a general duty of the commanders-in-chief of fleets and armies to ensure that their forces act in conformity with the general principles of the respective Conventions, although they do not establish any sanction or consequence for the failure to do so.

Prayers

This is a confirmation of charges hearing thus prayers should reflect the aspect of referral or non-refferal of the matter for trial.