



**IN THE CASE  
OF  
THE PROSECUTOR  
V.  
MONA TAMMY**

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**MEMORIAL FOR THE PROSECUTION**

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**ON BEHALF OF:  
THE OFFICE FOR THE PROSECUTION  
TEAM 1305 (P)  
13TH RED CROSS  
INTERNATIONAL HUMANITARIAN LAW  
MOOT COMPETITION  
2016  
(3928 words)**

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## **PLEADINGS**

### **I. PRELIMINARY MATTERS**

#### **A. Evidentiary Burden to Confirm Charges against Defendant.**

1. This case is now before the Pre-Trial Chamber pursuant to Article 61(7) of the Rome Statute of the International Criminal Court (“**Rome Statute**”). At this stage, the Prosecutor only has to prove that “there is sufficient evidence to establish substantial ground to believe” that the defendant had committed each of the crimes charged.
2. There is no need to prove the charges against the defendant beyond reasonable doubt.<sup>1</sup> So long as the charges are established beyond “mere theory or suspicion”<sup>2</sup>, they ought to be confirmed and set for trial.

#### **B. The Case is Admissible before the International Criminal Crime (“ICC”).**

3. This case is clearly admissible before the ICC. Fodava, the state of President Tammy (“**Tammy**”), has itself referred the situation in its territory from August to October 2012 to the ICC.<sup>3</sup> Also, Fodava has not taken any steps to investigate the matter despite having jurisdiction over it.<sup>4</sup> This shows that Fodova is unwilling and unable genuinely to investigate or prosecute Tammy.

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<sup>1</sup> *The Prosecutor v Bahar Idris Abu Garda*, (Trial Judgment) ICC-02/05-02/09 (8 February 2010), (“*Bahar’s Case*”), ¶40.

<sup>2</sup> *Id.*, ¶39.

<sup>3</sup> Facts, ¶ 6.

<sup>4</sup> Article 17(1) of the Rome Statute.

**C. There was a Non-International Armed Conflict (“NIAC”) between the Fodavan Military and the Warriors of Light (“WOL”).**

4. To establish a NIAC, two requirements<sup>5</sup> must be established:

**a. The existence of an organised armed group engaged in an armed conflict with governmental authorities.**<sup>6</sup>

5. A group is deemed to be organised and armed when it has the ability to plan and carry out military operations for a prolonged period of time.<sup>7</sup> A hierarchical system of military organisation similar to those regular armed forces is not required.<sup>8</sup>

6. It is submitted that “Warriors of Light” (“WOL”), consisting of followers from Starlight Path (“SP”) and clergymen from different religions, is an organised armed group. Their fierce attacks on the Fodavan military forces and occupation of Fodavan districts are clear evidence of their military prowess.<sup>9</sup>

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<sup>5</sup> *The Prosecutor v Dusko Tadic*, (Trial Chamber Judgment) IT-94-1-T (7 May 1997), (“*Tadic’s Case*”), ¶ 562.

<sup>6</sup> Article 8(2)(f) of the Rome Statute; *Tadic’s Case*, ¶. 561; ICRC, “*How is the Term "Armed Conflict" Defined in International Humanitarian Law?*”. March 2008, Opinion Paper, 3.

<sup>7</sup> *The Prosecutor v Thomas Lubanga Dylo* (Pre-Trial Chamber) ICC-01/04-01/06 (29 January 2007), (“*Lubanga’s Case*”), ¶234.

<sup>8</sup> Commentary of 1987 Additional Protocol II, ¶4463.

<sup>9</sup> Facts, ¶11.

**b. The armed violence between the parties was protracted.**

7. To determine whether an armed violence is protracted, the emphasis should be placed on its intensity rather than its duration.<sup>10</sup>
8. In October 2011, the Fodavan military engaged with the WOL daily.<sup>11</sup> WOL had gained control over 12 out of 25 districts, and there were violent clashes between the two forces at the other 13 districts<sup>12</sup>. All these incidents conducted for about 1 year and 2 months demonstrate the high intensity of the violence.

**D. The NIAC ended on December 2012.**

9. The NIAC extends beyond the cessation of hostilities until a peaceful settlement is achieved between the Parties<sup>13</sup> or when one of the Parties ceases to exist.<sup>14</sup>
10. It is submitted that the NIAC ended when Tammy was ousted in a *coup d'état*, and left the country with General Rambeck and Colonel Tomass. The three crimes charged thus occurred during the NIAC.

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<sup>10</sup> *Prosecutor v Raumush Haradinaj*, (Trial Chamber I) IT-04-84-T (3 April 2008), ¶49.

<sup>11</sup> Facts, ¶10.

<sup>12</sup> Facts, ¶11.

<sup>13</sup> Commentary of the Common Article 3 of the Geneva Convention 2016, ¶487.

<sup>14</sup> *Id.*, ¶489.

## **E. Common Elements to the Three Charges**

### **a. The nexus between the crimes and the NIAC**<sup>15</sup>

11. To fulfil this requirement, it is sufficient to prove that the crimes took place in the context of and were as a whole “closely related to” the NIAC,<sup>16</sup> such that the NIAC has played a substantial part in the perpetrators’ ability and decision to commit the crime.<sup>17</sup> Factors to be taken into account include the perpetrator being a combatant; the victim being a non-combatant, that the victim is from an opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of the perpetrator’s official duty.<sup>18</sup>
12. As WOL, the opposition group, gained control over the 12 districts of Fodava by August 2012, Tammy as the Commander-in-Chief reacted by launching a campaign to regain over Tyra.<sup>19</sup> This campaign, aimed at oppressing the SP religion, caused the destruction of the Cave Temples of Tyra, the bombings in Osso’s suburban areas and the murder and cruel treatment of the civilians and the wounded WOL fighters, all of which are the victims from the opposing party. This establishes the nexus between the NIAC and violent incidents giving rise to the charges.

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<sup>15</sup> Elements of Crime (“EOC”), Element 4.

<sup>16</sup> *Tadic’s Case*, *op. cit.*, ¶573.

<sup>17</sup> *The Prosecutor v Dragoljub Kunarac*, (Judgment) IT-96-23& IT-96-23/1-A (12 June 2002) (“*Kunarac’s Case*”), ¶58; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, (Decision on the Confirmation of Charges), ICC-01/04-01/07 (30 September 2008), (“*Katanga’s Case*”), ¶380.

<sup>18</sup> *Id.*, ¶59.

<sup>19</sup> Facts, ¶12.

**c. The awareness of the existence of Armed Conflict<sup>20</sup>**

13. To satisfy the element, the perpetrator is not required to have made a legal evaluation of the character of the armed conflict in coming to the ‘awareness’.<sup>21</sup> It is merely required that the perpetrator made inferences from factual circumstances that some form of armed conflict was occurring.<sup>22</sup> Tammy lead the Fodavan military forces in its campaign to regain control over Tyra from WOL. The emergency meeting<sup>23</sup> and the reporting system of the Fodavan Military<sup>24</sup> shows that Tammy clearly possessed awareness that an armed conflict was occurring.<sup>25</sup>

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<sup>20</sup> EOC, Element 5.

<sup>21</sup> EOC, Article 8 Introduction; *Prosecutor v Dario Kordić and Mario Čerkez*, (Appeals Chamber Judgment) IT- 95-14/2-A (17 December 2005), ¶311.

<sup>22</sup> *Ibid.*

<sup>23</sup> Facts, ¶12.

<sup>24</sup> Clarifications, q20.

<sup>25</sup> Facts, ¶12.

**II. COUNT ONE: TAMMY SHOULD BE TRIED FOR THE WAR CRIME OF  
ATTACKING PROTECTED OBJECTS UNDER ARTICLE 8(2)(e)(iv) OF THE  
ROME STATUTE**

**A. The Elements of Crime (“EOC”) under Article 8(2)(e)(iv) in the Rome Statute are fulfilled.**

14. In order to establish liability under this crime, **five elements** must be fulfilled.

**a. The perpetrator directed an attack.**

15. An attack encompasses any acts of violence against protected objects.<sup>26</sup> There is no necessity to show a distinction between an attack that was carried out in the conduct of hostilities or after the object had fallen.<sup>27</sup>
16. General Rambeck launched an attack on the Cave Temples of Tyra (“**Cave Temples**”) early in the morning on 13 September 2012.<sup>28</sup> There is no necessity to prove the type of attack, as long as the attack had caused destruction on the Cave Temples.<sup>29</sup>

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<sup>26</sup> *The Prosecutor v Ahmad Al Faqi Al Mahdi*, (Trial Chamber) ICC-01/12-01/15 (27 September 2016), (“*Al Mahdi’s Case*”), ¶15.

<sup>27</sup> *Ibid.*

<sup>28</sup> Facts, ¶15.

<sup>29</sup> *Al Mahdi’s Case*, *op. cit.* ¶15.



**b. The object of the attack was a building dedicated to art, historic as well as religion which was not used for military objectives.**

17. The Cave Temples is a UNESCO World Heritage Site.<sup>30</sup> UNESCO's designation of these building reflects their special importance to international cultural heritage.<sup>31</sup> The Cave Temples is a cultural property which is of great importance to the national cultural heritage of Fodava to its people<sup>32</sup> as defined under Article 1(a) of the 1954 Hague Convention.<sup>33</sup> Thus, the Cave Temples is a protected object.
18. A military objective refers to an object which by its nature, location, purpose or use: a) make an effective contribution to military action, and b) whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.<sup>34</sup>
19. The Cave Temples is not a military objective as it is used for Starlight religious activities<sup>35</sup>, and is also located within the municipal district of Tyra<sup>36</sup> and not anywhere near military objectives of WOL.<sup>37</sup> The suspicion that it was a military objective is unfounded as the scouts were not able to verify and confirm it. Thus, it is not proven that the Cave Temples is a military objective.

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<sup>30</sup> Facts, ¶4.

<sup>31</sup> *Al Mahdi*, op. cit., ¶46.

<sup>32</sup> R. O'Keefe, *The protection of Cultural Property in Armed Conflict*, (1st edn, Cambridge University Press, 2006) 104.

<sup>33</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), ("*Hague Convention*").

<sup>34</sup> *Bahar's Case*, Op. Cit., ¶58.

<sup>35</sup> Facts, ¶13.

<sup>36</sup> Clarifications, q13.

<sup>37</sup> *Id*, q46.

20. The special protection awarded to cultural property itself may not be lost simply because of military activities occurring in the immediate vicinity of the cultural property.<sup>38</sup> There is lack of any concrete finding from the Fodava military scouts that there were weapons located in the Cave Temples. The fact that the WOL fighters counter-fired shows that they were defending themselves demonstrates that there are no firing positions or heavy weapons in the Cave Temples.<sup>39</sup>
21. Special care must be taken in military operations to avoid damage to protected objects unless they are military objectives.<sup>40</sup> General Rambeck did not take all feasible precautions in the choice of means of attack to avoid and minimize damage on the Cave Temples<sup>41</sup>. Instead, the Cave Temples were completely destroyed by the attack from General Rambeck forces.<sup>42</sup> In addition, General Rambeck's suggestion to attack the Cave Temples rather than to attack WOL fighters evinces a clear intention to destroy the Cave Temples.

**c. The perpetrator intended such building to be the object of the attack.**

22. To prove intention, the perpetrator must act within a direct intent to damage or destroy the property in question.<sup>43</sup> The destruction must have been committed intentionally to institutions identified as dedicated to religion at the time of the acts.<sup>44</sup>
23. General Rambeck's action showed that there was a deliberate attack on the Cave Temples. He failed to find out what actually went on inside the Cave Temples. And yet, to prevent the WOL fighters from being motivated by the Starlight Faith,<sup>45</sup> General Rambeck still suggested to Tammy to attack the Cave Temples.

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<sup>38</sup> *Prosecutor v Pavle Strugar*, (Trial Judgment) IT-01-42-T (31 January 2005), ("*Strugar's Case*"), ¶310.

<sup>39</sup> *Id.*, ¶193.

<sup>40</sup> Customary International Humanitarian Law, Rule 38.

<sup>41</sup> Article 7 of the Rome Statute.

<sup>42</sup> Facts, ¶4.

<sup>43</sup> *Strugar's Case*, *Op. Cit.*, ¶311.

<sup>44</sup> *The Prosecutor v Tihomir Blaskic*, (Trial Chamber) IT-95-14-T (3 March 2000), ("*Blaskic's Case*") ¶185.

<sup>45</sup> Facts, ¶15.

**d. The conduct took place in the context of and was associated with NIAC and Rambeck was aware of the factual circumstances that established its existence.**

24. NIAC is ongoing when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups<sup>46</sup> as submitted above.<sup>47</sup>

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<sup>46</sup> 1977 Additional Protocol II to the Geneva Convention of 12 August 1949, (“*Additional Protocol II*”)

<sup>47</sup> §§ C&D of the Preliminary Matters in Prosecution’s Submission.

**B. Tammy bears individual criminal responsibility for the war crime under Article 25(3)(a) of the Rome Statute.**

25. Tammy, the Head of the Government, is liable for the attack of the Cave Temples under Article 27 of the Rome Statute. A person with an official capacity is not exempted from criminal responsibility under the Rome Statute.
26. Tammy cannot avail to the defence of intoxication under Article 31(1)(b) as she knew that Arbola Root has intoxicating effect, and hence voluntarily intoxicated herself.<sup>48</sup>
27. To prove that Tammy is liable as a commander, it is sufficient to prove that the principals to a crime includes those individual who, in spite of their absence from the scene of the crime, controlled or masterminded its commission because they decided how the offence will be committed.<sup>49</sup> It is also necessary to show that Tammy has a shared intent to commit the offence, regardless of the level of their contribution to a crime.
28. There are four elements to prove that Tammy is a co-perpetrator:
  - i. **There is an existence of an agreement or common plan between two or more persons.**
29. The agreement to attack the Cave Temples was made between General Rambeck, a legal advisor, one religious advisor and Tammy.<sup>50</sup>

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<sup>48</sup> Facts, ¶3.

<sup>49</sup> *The Prosecutor v Thomas Lubanga*, (Trial Chamber) ICC-01/04-01/06 (14 March 2012). (“*Lubanga’s Case*”), ¶920.

<sup>50</sup> Facts, ¶14.

**ii. The co-ordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.<sup>51</sup>**

30. The agreement made by Tammy upon the suggestion of General Rambeck shows that Tammy is aware that the plan will cause the destruction of the Cave Temples.<sup>52</sup> Essential contribution is proven when the crimes resulted from the execution of the common plan arising from mutual attribution.<sup>53</sup> Being the Commander-in-Chief, she is responsible for the attack on the Cave Temples as a co-perpetrator.

**iii. In implementing their common plan, the consequence will occur in the ordinary course of events.<sup>54</sup>**

31. Tammy is aware that the attack on the Cave Temples would cause a certain degree of destruction towards the Cave Temples. Thus, the implementation of the order signed by Tammy amounted to a common plan to destroy the Cave Temples.

**iv. Tammy provides an essential contribution to the implementation of the common plan.<sup>55</sup>**

32. At the emergency meeting,<sup>56</sup> Tammy made an effective decision to attack the Cave Temples by signing the order drafted by General Rambeck. The order set out the coordinated and deliberate manner in which the attack was to be carried out, and is within the framework of the agreement with the rest of her advisors.<sup>57</sup>

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<sup>51</sup> Lubanga's case, *op. cit.* ¶921.

<sup>52</sup> *Id.*, ¶982.

<sup>53</sup> *Id.*, ¶994.

<sup>54</sup> *Id.*, ¶1013.

<sup>55</sup> *Ibid.*

<sup>56</sup> Facts, ¶14.

<sup>57</sup> *Al Mahdi's Case, Op. Cit.*, ¶54.

**III. COUNT TWO: TAMMY SHOULD BE TRIED FOR THE WAR CRIME OF ATTACKING CIVILIAN POPULATION UNDER ARTICLE 8(2)(e)(i) OF THE ROME STATUTE.**

**A. The Elements of Crime under Article 8(2)(e)(i) in the Rome Statute are fulfilled.**

33. In order to establish liability under this crime, **five elements** must be fulfilled.

**a. There was an attack directed by the perpetrator**

34. An attack is defined as “acts of violence against the adversary, whether in offence or in defence”.<sup>58</sup> Shelling is a form of attack<sup>59</sup>, and even the mere launching of an attack without any harmful impact on the civilian population or individual civilians is sufficient to fall within the meaning of attack of Article 8(2)(e)(i).<sup>60</sup>
35. The act of the Fodavan Air Force bombing the five suburban buildings<sup>61</sup> and carrying out the airstrike<sup>62</sup> by dropping more bombs is equivalent to shelling which falls under the category of an attack. The shelling killed 150 people and left more than 300 others injured.<sup>63</sup> This proves that there was in fact an attack directed by Colonel Peter Tomass.<sup>64</sup>

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<sup>58</sup> *Bahar*, Ch. I, Public Redacted Version, (Decision on the Confirmation of Charges) ICC-02/05-02/09-243-red (8 February 2010), ¶65; *Prosecutor v Katanga*, (Trial Chamber II) ICC-01/04-01/07-3436 (7 March 2014), (“*Katanga’s Case II*”) ¶ 798; *Prosecutor v Ntaganda*, (Pre-Trial Chamber II) ICC-01/04-02/06-309 (9 June 2014), (“*Ntaganda’s Case*”), ¶45.

<sup>59</sup> *Ntaganda’s Case*, ¶46.

<sup>60</sup> *Prosecutor v Katanga*, (Pre-Trial Chamber I) ICC-01/04-01/07-55 (6 July 2007), (“*Katanga’s Case I*”), ¶37

<sup>61</sup> Facts, ¶16.

<sup>62</sup> Facts, ¶18.

<sup>63</sup> Facts, ¶20.

<sup>64</sup> Facts, ¶18.

**b. The object of the attack were civilians**

36. A civilian is anyone who is not a member of the State or non-State armed forces<sup>65</sup> and making the civilians as object of attack or doing acts or threats of violence to spread terror among the civilians are prohibited.<sup>66</sup> The presence amongst the civilian population of individuals who do not fit within the definition of a civilian does not deprive the entire population of its civilian character.<sup>67</sup> Where the attack is directed towards a legitimate military objective and simultaneously the civilian population or civilians not taking direct part in the hostilities, the perpetrator can still be prosecuted under Article 8(2)(e)(i).<sup>68</sup>
37. In the present case, the bombings struck buildings situated in Osso's suburban area where many SP followers resided.<sup>69</sup> The fact that there are some WOL fighters hiding among these civilians does not deprive the population of its civilian character and subsequently the protection afforded to civilians. The Rose Garden building is located at the heart of Starlight residential community, a highly populated area,<sup>70</sup> evincing that civilians were to be the object of the attack. Alternatively, even if the object of the attack was only the Rose Garden building, Colonel Tomass can still be prosecuted under Article 8(2)(e)(i) because the attack is directed simultaneously to the civilians as well.

**c. The perpetrator intended for the civilians to be the object of the attack**

38. The threshold for mental element is that the perpetrator knew or should have known about the civilian character of the objects damaged.<sup>71</sup> Such a standard is met when the attack has

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<sup>65</sup> *Katanga's Case II*, *op. cit.*, ¶788.

<sup>66</sup> Article 13 of Additional Protocol II.

<sup>67</sup> *The Prosecutor v Callixte Mbarushimana*, (Pre-Trial chamber I) ICC-01/04-01/10 (16 December 2011), (“*The Mbarushimana*”), ¶148.

<sup>68</sup> *Katanga's Case II*, *op. cit.*, ¶802; *Mbarushimana*, *id.*, ¶142.

<sup>69</sup> Facts, ¶16.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Prosecutor v Radovan Karadzic*, (Prosecutor's Pre-Trial Brief) ICTY, IT-95-05/18-PT (29 June (2009), (“*Karadzic's Case*”), ¶4.

been conducted intentionally with the knowledge, or when it was impossible to not know that civilian property was being targeted.<sup>72</sup>

39. The five suburban buildings and the Rose Garden building were situated in the Starlight residential community.<sup>73</sup> The statement made by the Starlight survivor who tried to save his family from the attack<sup>74</sup> further proves the civilians status of the residents. Accordingly, it would be impossible for Colonel Tomass to not be aware of the civilian status of the population.

**d. The conduct took place in the context of and was associated with a NIAC**

40. The bombings occurred in the course of an on-going NIAC, as submitted above.<sup>75</sup>

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<sup>72</sup> *Blaskic's Case, op. cit.*, ¶180.

<sup>73</sup> Facts, ¶16.

<sup>74</sup> Facts, ¶14.

<sup>75</sup> §§ C&D of the Preliminary Matters in Prosecution's Submission.



**B. Tammy bears individual criminal responsibility for ordering, soliciting or inducing the attack under Article 25(3)(b) of the Rome Statute.**

41. An individual behind a perpetrator may be individually criminally responsible, regardless of whether the direct perpetrator is also responsible<sup>76</sup> “Ordering”, “Soliciting” and “Inducing” refer to a conduct by which an individual is influenced by others to commit a crime.<sup>77</sup> The following elements need to be proven:<sup>78</sup>

**i. The person is in a ‘position of authority’.**

42. Tammy is the President of Fodava which also makes her the Commander-in-Chief of the armed forces.<sup>79</sup> This establishes her ‘position of authority’ on the Fodavan military.

**ii. The person instructs another person in any form to commit a crime which in fact occurs or is attempted.**

43. Soliciting includes authorizing another person to commit a crime.<sup>80</sup> Hence, Tammy authorizing the Fodavan military to attack Osso’s suburban area qualifies as soliciting the Fodavan military to commit a crime.<sup>81</sup>

**iii. The order has a direct effect on the commission of the crime.**

44. Direct effect is established if the orders are acted upon.<sup>82</sup> There were already bombings before Tammy made the statement on national television<sup>83</sup> on authorizing the Fodavan

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<sup>76</sup> *Katanga’s Case I*, *op. cit.*, ¶493.

<sup>77</sup> *The Prosecutor v Laurent Gbagbo and Charles Ble Goude*, (Trial Chamber) ICC-02/11-01/15 (12 June 2014), (“*Gbagbo’s Case*”), ¶243.

<sup>78</sup> *Prosecutor v Sylvestre Mudacumura* (Decision on the Prosecutor’s Application under Article 58) ICC-01/04-01/12 (13 July 2012), ¶63.

<sup>79</sup> Facts, ¶1.

<sup>80</sup> Commentary of Rome Statute, 796.

<sup>81</sup> Facts, ¶18.

<sup>82</sup> *Ntaganda’s Case*, *op. cit.*, ¶149.

<sup>83</sup> Facts, ¶16.

military to attack, and more bombings occurred after the statement was made. This proves that the order made by Tammy was acted upon by the Fodavan military.

**iv. The person is at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution of or implementation of the order.**

45. Upon authorizing the Fodavan military to attack, Tammy should have known and expect that her order will be followed and that the crimes will be committed, especially since she is the Chief-in-Commander of the Fodavan military.<sup>84</sup>

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<sup>84</sup> Facts, ¶1.

**IV. COUNT THREE: TAMMY SHOULD BE TRIED FOR THE WAR CRIME OF VIOLENCE TO LIFE AND PERSON UNDER ARTICLE 8(2)(c)(i) OF ROME STATUTE**

**C. The evacuation of the medical personnel caused the death and cruel treatment of civilians and wounded WOL fighters in violation of Article 8(2)(c)(i).**

**a. Murder**

**i. The perpetrator killed one or more persons.**

46. The actus reus of killing includes omissions as well as concrete actions.<sup>85</sup> If the perpetrator was aware that death would occur in the ordinary course of events, the mental elements will be fulfilled and the crime of murder can be established.<sup>86</sup>
47. By evacuating the medical personnel, Colonel Tomass has deprived the civilians and wounded WOL fighters from getting adequate medical treatment. This constitutes an omission to supply medical treatment for the sick and wounded. Colonel Tomass also had reason to know that death would occur to the patients who were left behind with limited medical assistance as the evacuation happened on the morning of 24 September;<sup>87</sup> a day after the airstrike on the Rose Garden building which caused more than 300 injuries<sup>88</sup> and destruction of the power plant that cuts off the supply of electricity to the hospital.

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<sup>85</sup> *Prosecutor v Zejnil Delalic*, (Trial Chamber) IT-96-21-T (16 November 1998), (“*The Delalic*”), ¶424.

<sup>86</sup> *Prosecutor v Dusko Tadic*, (Appeals Chamber) IT-94-1-A (15 July 1999), (“*Tadic Appeal’s Case*”), ¶232.

<sup>87</sup> Facts, ¶22.

<sup>88</sup> Facts, ¶20.

**ii. Such person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.**

48. Persons taking no part in hostilities<sup>89</sup> are protected person against any war crimes.<sup>90</sup> Civilians constitute persons who are not, or no longer, members of the armed forces<sup>91</sup> and hors de combat means persons who have become defenceless because of wounds or sickness.<sup>92</sup> The people left behind without the medical treatment were civilians and WOL fighters that were wounded from the war<sup>93</sup> rendering them as hors de combat.

**iii. The perpetrator was aware of the factual circumstances that established this status.**

49. The fact that the evacuation occurred at a hospital<sup>94</sup> evinces that Colonel Tomass must have been aware that the hospital patients would include wounded WOL fighters no longer taking part in the hostilities. The Starlight Hospital is also located in Osso's suburban area; a place highly populated with civilians.<sup>95</sup>

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<sup>89</sup> Civilians, persons who have laid down their arms and persons hors de combat for having surrendered or being unable to engage in hostile acts.

<sup>90</sup> Common Article 3 to Geneva Convention.

<sup>91</sup> Customary International Law ("CIL") Rule 5.

<sup>92</sup> CIL Rule 47.

<sup>93</sup> Facts, ¶23.

<sup>94</sup> Facts, ¶22.

<sup>95</sup> Facts, ¶16.

**b. Cruel Treatment**

**i. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.**

50. Cruel treatment constitutes an intentional act or omission ‘which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity’.<sup>96</sup> The failure to provide adequate medicine or medical treatment would constitute the offence of "cruel treatment" if it is carried out with the requisite mens rea.<sup>97</sup> The mental element of this offense requires that the perpetrator acted with the direct or indirect intent to commit cruel treatments.<sup>98</sup> Being aware that severe physical or mental pain or suffering upon one or more persons will occur in the ordinary course of events will fulfil the mental element of this offence.<sup>99</sup>
51. When the evacuation of the medical staffs was done, it was a day after the airstrikes happened.<sup>100</sup> There were 300 injured civilians<sup>101</sup> deprived of access to any medical treatment due to the lack of power and shortage of medical staff. The sick and wounded could not travel out to the city hospital as they risked being arrested as WOL fighters.<sup>102</sup> Colonel Tomass, who directed the airstrike, must be aware that there is a great need for medical treatment for the wounded people. However, he still proceeded with the evacuation, evincing an intention to cause serious suffering towards the Starlight people. Such person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.

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<sup>96</sup> *Blaskic's Case*, *op. cit.*, ¶186.

<sup>97</sup> *Prosecutor v Mile Mrkšić et al.*, (Trial Judgment) IT-95-13/1-T (27 September 2007), ¶517.

<sup>98</sup> *Prosecutor v. Prlić*, (Judgment), IT-04-74-T (vol. 1) (19 May 2013), ¶147 [Unofficial translation].

<sup>99</sup> Article 30(2)(b) Rome Statute.

<sup>100</sup> Facts, ¶22.

<sup>101</sup> Facts, ¶20.

<sup>102</sup> Facts, ¶23.

**ii. Such person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.**

52. The people left behind without the medical treatment were civilians and WOL fighters who were hors de combat, as submitted above.<sup>103</sup>

**iii. The perpetrator was aware of the factual circumstances that established this status.**

53. Colonel Tomass was aware that the people left behind without sufficient medical treatment were civilians and hors de combats, as submitted above.<sup>104</sup>

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<sup>103</sup> Prosecution's Submission, ¶47.

<sup>104</sup> *Id.*, ¶48.

**D. Tammy bears criminal responsibility as a military commander under Article 28(a) of the Rome Statute.**

54. A superior may be held responsible for the prohibited conduct of his subordinates for failing to fulfil his duty to prevent or repress their unlawful conduct or submit the matter to the competent authorities.<sup>105</sup> To establish this criminal responsibility, three elements must be fulfilled.<sup>106</sup>

**i. Tammy had effective control over the perpetrator involved in the crime.**

55. The imposition of command responsibility is premised upon a superior-subordinate relationship,<sup>107</sup> in which the commander exercised effective control over the subordinates.<sup>108</sup> Effective control has been defined as “the material ability in preventing or punishing the crime”.<sup>109</sup> The *de jure* position of the accused creates a presumption of effective control.<sup>110</sup>

56. Tammy had *de jure* authority over Colonel Tomass as well as the Fodavan military since Tammy is the President of Fodava, making her the Commander-in-Chief of the Fodavan military as well.<sup>111</sup> Hence, Tammy was presumed to have effective control over the perpetrator<sup>112</sup> until the contrary is proven.<sup>113</sup>

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<sup>105</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, (Pre-Trial Chamber II) ICC-01/05-01/08-424 (15 June 2009), (“*Bemba’s Case*”), ¶405.

<sup>106</sup> *Ntaganda’s Case*, *op. cit.*, ¶164.

<sup>107</sup> *Prosecutor v. Sefer Halilović*, (Appeals Chamber Judgment) IT-01-48-A (16 October 2007), (“*Halilović’s Appeal Judgment*”), ¶210.

<sup>108</sup> *Prosecutor v. Delalic et al.*, (Appeals chamber Judgment) IT-96-21-A (20 February 2001), (“*Delalic’s Appeal Judgment*”), ¶197.

<sup>109</sup> *Id.*, ¶256.

<sup>110</sup> Eleis van Sliederecht, *Individual Criminal Responsibility in International Law*, (OUP 2012), 198.

<sup>111</sup> Facts, ¶1.

<sup>112</sup> *Delalic’s Appeal Judgment*, *op. cit.*, ¶197.

<sup>113</sup> *Ibid.*

**ii. Tammy knew or should have known that her subordinates were committing or about to commit such crimes.**

57. “Knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.<sup>114</sup> Actual knowledge may be proven if “a military commander is part of an organized structure with established reporting systems”.<sup>115</sup> There exist a reporting system between Tammy and her subordinates based on General Rambeck’s report to Tammy.<sup>116</sup> If actual knowledge cannot be proved with direct evidence, it may be established by way of circumstantial evidence.<sup>117</sup> Tammy knew that her subordinates were about to commit crimes following her order of authorizing the Fodavan military to attack.<sup>118</sup>
58. Alternatively, even if Tammy did not know, as the Commander-in-Chief, Tammy possessed constructive knowledge and should have known that her subordinates were committing or about to commit such crimes. The “should have known” standard merely requires that the superior has been negligent in failing to acquire knowledge of his subordinates illegal conduct.<sup>119</sup> The fact that Colonel Tomass told the press about his gratitude towards the medical staffs that have been helping the Fodavan military<sup>120</sup> shows the availability of such knowledge to Tammy. Whether or not she had acquainted herself with such information was immaterial.<sup>121</sup>

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<sup>114</sup> Article 30 Rome Statute.

<sup>115</sup> *Prosecutor v. Hadžihasanović*, (Trial Chamber) IT-01-47-T (15 March 2006), ¶94.

<sup>116</sup> Facts, ¶13.

<sup>117</sup> *Prosecutor v. Celebici*, (Trial Chamber) IT-96-21-T (16 November 1998), ¶386.

<sup>118</sup> Facts, ¶17.

<sup>119</sup> *Bemba’s Case, Op. Cit.*, ¶432.

<sup>120</sup> Facts, ¶24.

<sup>121</sup> *Delalic’s Appeals Judgment*, ¶239.



**iii. Tammy, as the military commander, failed to take all necessary and reasonable measures within her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.**

59. Upon knowing that the crime was about to be committed, Tammy was required to warn the subordinate against the unlawful practice.<sup>122</sup> Consecutively, after the commission of the crime, Tammy had the duty to take reasonable and necessary punitive measures falling within his material control<sup>123</sup> which encompass investigation.<sup>124</sup> Failure to do so amounted to her approval of the crimes committed by Colonel Tomass.<sup>125</sup> In any event, failure to prevent crimes cannot be cured by fulfilling the duty to repress or submit the matter to the competent authorities.<sup>126</sup>
60. Tammy took no action to prevent, repress or submit the crimes to the competent authorities. This demonstrates Tammy's culpability over the crimes done by the Fodavan military.

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<sup>122</sup> *Orić TJ*, ¶331.

<sup>123</sup> *Halilović's Appeal Judgment, Op. Cit.*, ¶63.

<sup>124</sup> *Prosecutor v. Sefer Halilović*, (Trial Judgment) IT-01-48-T (16 November 2005), ("*Halilovic's Trial*"), ¶100.

<sup>125</sup> *Blaskić's Case, Op. Cit.*, ¶789.

<sup>126</sup> *Bemba's Case, Op. Cit.*, ¶436.

**V. PRAYERS FOR RELIEF**

The Prosecution respectfully requests for this honourable court to confirm the charges under Article 8(2)(e)(iv), Article 8(2)(e)(i) and Article 8(2)(c)(i) of the Rome Statute as against Tammy.

RESPECTFULLY SUBMITTED,  
AGENTS FOR THE PROSECUTION.