

THE 13TH INTERNATIONAL HUMANITARIAN LAW MOOT

NATIONAL ROUNDS

MALAYSIA

2016

THE PROSECUTOR

v.

MONA TAMMY

MEMORIAL FOR THE DEFENDANT

Pleadings: 3997 words

TEAM INDIVIDUAL MOOT NUMBER: 1304 (D)

MEMORIAL FOR THE DEFENDANT

TABLE OF CONTENTS

PRELIMINARY ISSUES.....	1
STANDARD OF PROOF IN THE CONFIRMATION OF CHARGES HEARING. 1	1
NATURE OF THE ARMED CONFLICT	1
(a) The armed struggle between Mona Tammy’s government forces and Warrior of Light (“WOL”) is not an armed conflict	1
(b) Mona Tammy does not consider the fight against WOL as an internal armed conflict governed by Article 8(2)(c) and 8(2)(e) of the Rome Statute	6
SUBMISSIONS	7
COUNT ONE:	7
MONA TAMMY IS NOT INDIVIDUALLY RESPONSIBLE UNDER ARTICLE 25(3)(a) FOR THE WAR CRIME OF ATTACKING PROTECTED OBJECTS UNDER ARTICLE 8(2)(e)(iv) OF THE ROME STATUTE	7
A. THE WAR CRIME OF ATTACKING PROTECTED OBJECTS IS NOT ESTABLISHED	7
B. MONA TAMMY IS NOT INDIVIDUALLY RESPONSIBLE FOR THE WAR CRIME	9
COUNT TWO:	11
MONA TAMMY IS NOT INDIVIDUALLY RESPONSIBLE UNDER ARTICLE 25(3)(b) IN RESPECT TO THE SERIES OF BOMBINGS IN OSSO UNDER ARTICLE 8(2)(e)(i) OF THE ROME STATUTE	11
A. THE WAR CRIME OF ATTACKING CIVILIANS IS NOT ESTABLISHED.....	11
B. MONA TAMMY IS NOT INDIVIDUALLY RESPONSIBLE FOR THE WAR CRIME.....	13
COUNT THREE:.....	16
MONA TAMMY DOES NOT HAVE COMMAND RESPONSIBLE UNDER ARTICLE 28(a) OF THE ROME STATUTE RESPECT TO TRANSFER OF MEDICAL PERSONNEL FROM STARLIGHT HOSPITAL UNDER ARTICLE 8(2)(c)(i)	16
A. THE ALLEGED WAR CRIME OF VIOLENCE TO LIFE AND PERSON IS NOT ESTABLISHED	16
B. MONA TAMMY IS NOT CRIMINALLY LIABLE AS A MILITARY SUPERIOR.....	17
PRAYER FOR RELIEF.....	21

PRELIMINARY ISSUES

STANDARD OF PROOF IN THE CONFIRMATION OF CHARGES HEARING

1. Pursuant to Article 61(7) of the Rome Statute of the International Criminal Court 1998 (“**Rome Statute**”), the prosecution must support each charge with sufficient evidence to establish substantial grounds¹ to believe that Mrs. Mona Tammy (“Mona Tammy”) has committed the crimes charged.
2. Sufficient evidence is a concrete and tangible evidence which demonstrate a clear line of reasoning underpinning its specific allegations.²

NATURE OF THE ARMED CONFLICT

(a) The armed struggle between Mona Tammy’s government forces and Warrior of Light (“WOL”) is not an armed conflict

3. An armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State.³
4. For the purpose of the Rome Statute, an existence of a protracted violence⁴ depends on the:
 - i) Sufficient degree of the organisations involved in the conflicts; and

¹ Article 61(5), Rome Statute.

² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (2008), ICC 01/04-01/07, Pre-trial Chamber I, (Decision on the confirmation of charges), [65].

³ *The Prosecutor v. Thomas Lubanga Dyilo* (2012), ICC-01/04-01/06, Trial Chamber I, (Judgement pursuant to Article 74 of the Statute), [533]; *Prosecutor v. Tadić* (1997), ICC IT-94-1-T, Trial Chamber, [561].

⁴ *The Prosecutor v Germain Katanga* (2014), ICC-01/04-01/07, Trial Chamber II, [1185] (French).

centre of residential area, hiding among civilians¹⁰ and deriving their opponent of medical services.¹¹

9. Apart from sufficient degree of organisation, there must also be a high intensity conflict between parties. Generally, the intensity of the armed conflict is decided on a case to case basis.¹² The fact that the conflict between WOL and government forces has exceeded that of “internal disturbances, tensions”¹³, which is shown when the armed force has taken up districts such as Tyra¹⁴, suggests a high intensity of conflict.
10. However, it should be noted that the criteria of intensity and sufficient degree of organisation is used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to International Humanitarian Law (IHL).¹⁵ The struggle that was facing Fodavan military however, amounts to a war on terrorism. Ergo, the jurisdiction of Article 8(2)(e) and Article 8(2)(c) of the Rome Statute cannot efficiently cover the conflict between WOL and Fodavan military.
11. There is no internationally agreed definition for terrorism. However in some international regulations, terrorism suggests an involvement of an act which is done to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.¹⁶ Whilst in some latest law proposals¹⁷, terrorism is defined as an act which aims to:

- a) Seriously intimidate a population or seriously destabilising; or

¹⁰ Statement of Facts, [16].

¹¹ Statement of Facts, [21].

¹² *Prosecutor v George Rutaganda* (1999), ICTR, Case No ICTR-96-3-T, Trial Chamber 1, [93].

¹³ *Prosecutor v Mbarushimana* (2011), ICC-01/04-01/10, Trial Chamber II (Decision on the confirmation of charges), [103].

¹⁴ Statement of Facts, [11].

¹⁵ *Prosecutor v. Tadić* (1997), ICC IT-94-1-T, Trial Chamber, [562].

¹⁶ Article 2(b), International Convention for the Suppression of the Financing of Terrorism.

¹⁷ Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, Article 3 (2).

- b) Destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

12. The act includes¹⁸:

- a) Attacks upon a persons' life which may cause death;
- b) Attacks upon the physical integrity of a person;
- c) Causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss.

13. WOL was said to be formed by a few opposition groups, consisting mainly of Starlight path religion followers.¹⁹ The group had no clear and precise founding purpose, violence was their first and foremost modus operandi. This can be seen as they attacked local police stations and military bases without resort to any other non-violent method.²⁰

14. Mounting an attack on police stations per se is considered a criminal act causing extensive destruction to a Government or public facility as police were considered not to be combatants²¹ so long as the Fodavan government did not formally integrate the police into military forces.

15. WOL has also attempted to directly deprive the wounded soldiers which are included in the protected group category of medical services.²² This act is contrary to IHL as it could constitute to an act of cruel treatment or indirect murder.²³

¹⁸ Ibid.

¹⁹ Statement of Facts, [10].

²⁰ Statement of Facts, [10].

²¹ Rule 4, Customary International Humanitarian Law.

²² Statement of Facts, [21].

²³ **Article 8 (2)(c)(i)**, Rome Statute.

16. WOL employed other tactics which are commonly adopted by other terrorist groups, which include attacking police²⁴, whom are considered as civilians²⁵, hiding among the population and intending to use civilians to mask their presence.²⁶ These actions do not necessarily conclude WOL as a terrorist group but should be taken into account in establishing a link with terrorism.
17. Although before the founding of WOL, it was reported that the oppositions had been active and had launched a campaign which only lasted for a month²⁷. However, it is not clear as to what was the theme of their campaign nor what were their ideologies, the tagline “Tammy is the death of us”²⁸ suggests a radical and violent theme, with an intention to incite and provoke.
18. There have been instances where a terrorist group was recognised by other countries as a legitimate group with legal standing such as the Palestine Liberation Organisation (PLO) which while it was designated by Israel as a terrorist group, nevertheless it enjoyed an observer status at the United Nations at the same time.
19. However, those are instances of national liberation movements, where the armed conflicts involve people fighting against colonial domination, alien occupation and racist regimes in the exercise of their right of self-determination.²⁹ WOL on the other hand was facing no such situation. Thus, there is no justification for WOL to take up arms against a democratic government voluntarily.
20. On top of that, Fodava is a parliamentary democracy nation³⁰, Mona Tammy’s government was elected through democratic passage, a completely legitimate government. The opposition should have gone through legal and democratic passages

²⁴ Instruction, [10].

²⁵ Rule 5, Customary International Humanitarian Law.

²⁶ Statement of Facts, [16].

²⁷ Statement of Facts, [9].

²⁸ Statement of Facts, [9].

²⁹ Article 1(4), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 10 June 1977.

³⁰ Statement of Facts, [1].

to oust Mona Tammy's government. The oppositions however made no attempt to make a democratic change, instead they swiftly and willingly propagated their course by means of terror and violence.

21. Thus, the armed struggle against WOL was a war on terror which does not fall under the scope of armed conflict not of an international character.

(b) Mona Tammy does not consider the fight against WOL as an internal armed conflict governed by Article 8(2)(c) and 8(2)(e) of the Rome Statute

22. The prosecution is tasked to prove that Mona Tammy recognized the struggle against WOL as an armed conflict.³¹

23. Mona Tammy has explicitly mentioned that the government was doing nothing but eradicating the terrorist. This happened when she was addressing the public via national television broadcast, twice.³² It was clearly shown that Mona Tammy's government recognised WOL as a terrorist group.

24. In conclusion, the armed struggle against WOL was not an armed conflict but a series of actions against terrorism i.e. a war against terror. Thus, Article 8(2)(c) and 8(2)(e) of the Rome Statute should not apply. Even if the armed struggle against WOL is indeed an armed conflict, Mona Tammy would not have been aware of the conflict³³ as she was under the impression that WOL was a terrorist group.

³¹ **8(2)(c)(i), 8(2)(e)(iv), 8(2)(e)(i)**, Elements of Crime.

³² Statement of Facts, [17] and [19].

³³ **Article 8(2)(e)(iv)-4**, Elements of Crimes.

SUBMISSIONS

COUNT ONE:

MONA TAMMY IS NOT INDIVIDUALLY RESPONSIBLE UNDER ARTICLE 25(3)(a) FOR THE WAR CRIME OF ATTACKING PROTECTED OBJECTS UNDER ARTICLE 8(2)(e)(iv) OF THE ROME STATUTE

A. THE WAR CRIME OF ATTACKING PROTECTED OBJECTS IS NOT ESTABLISHED

A. The protected object was a military objective

25. Attack on protected objects is strictly prohibited save for military objectives.³⁴

26. Protected objects are buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected.³⁵

27. A military objective is an object which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.³⁶

28. In circumstance where the protected buildings are designated as military objectives, the buildings would then lose its protected status.³⁷

³⁴ Article 8 (2)(e)(iv)(2), Elements of Crimes.

³⁵ Article 8 (2)(e)(iv)(2), Elements of Crimes.

³⁶ Article 52, [2]Additional Protocol 1; Article 1(f) Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999.

³⁷ *Prosecutor v. Pavle Strugar*, (2005), ICTY, Case No. IT-01-42-T, Judgement, Trial Chamber II, [310].

29. The Cave Temples of Tyra (The Temples) were buildings dedicated to religion³⁸. However, The Temples should be presumed as a military objective unless the Prosecution proves otherwise.³⁹
30. There is clear indication that The Temples were a definite military objective as WOL were seen in an air reconnaissance entering and leaving The Temples with arsenals of grenades as well as high-grade military rifles on a daily basis,⁴⁰ which shows The Temples as a rendezvous spot for the fighters. It entailed that a successful assault against The Temples would significantly scale down the military presence of the armed fighters and shorten the path to peace, which it in fact did. The attack on The Temples decimated WOL's military strength in Tyra and the government forces were able to recapture Tyra in the subsequent 5 days.⁴¹
31. Additionally, the report of the killing of scouts sent by the Fodavan military in the vicinity of The Temples further endorses the evidence of WOL's armed fighters in The Temples.
32. Therefore, The Temples served as a military objective at the time of attack and the protection accorded to it was lost.

B. The attack was intended to be directed against a military objective

33. The Prosecution has to satisfy the mental element on the part of Mona Tammy of having the intention to attack the protected object with the knowledge of the building not being a military objective.⁴²
34. The Temple should not fall under the category of military objective if it was not reasonable to believe, in the circumstances of the person contemplating the attack,

³⁸ Statement of Facts, [4], [13] line 4.

³⁹ *Prosecutor v. Dario Kordić and Mario Čerkez* (2004) Case No. IT-95-14/2-A, Judgement, Appeal Chamber, [53].

⁴⁰ Statement of Facts, [13].

⁴¹ Statement of Facts, [15].

⁴² **Article 8 (2)(e)(iv)(3)** Elements of Crimes; *Prosecutor v. Blaškić*, (2000), Case No. IT-95-14T, Trial Chamber, [185].

including the information available, that the object is being used to make an effective contribution to military action.⁴³

35. The attack was allowed because both Mona Tammy and Rambeck reasonably believed that by launching an attack against the objective, they could neutralize as many armed fighters as possible, which would gain them an advantage position.⁴⁴ This has given a credible evidence that Mona Tammy believed that The Temples were being used to make an effective contribution to WOL's actions.

36. Moreover, Mona Tammy was convinced by Rambeck's firm use of words "...must be hiding something..."⁴⁵ that attacking the temple would secure a definite military advantage. Thus, Mona Tammy, who was not familiar with military tactics and strategies, was very well under the belief that The Temples were definitely misused by the WOL. Rambeck also suggested to uproot the Starlight fighters,⁴⁶ which might further give an impression that The Temples were used by WOL as a significant strategic object.

37. Therefore, the mental element is not satisfied as Mona Tammy did not have the knowledge of The Temples being a non-military objective.

B. MONA TAMMY IS NOT INDIVIDUALLY RESPONSIBLE FOR THE WAR CRIME

38. Three subjective elements must be satisfied for Mona Tammy to be individually responsible for the war crime⁴⁷:

- a) The accused was aware that by implementing the common plan, the criminal consequences would 'occur in the ordinary course of events';

⁴³ *Prosecutor v. Stanislav Galić* (2003) Case No. IT-98-29-T Trial Chamber 1, [51].

⁴⁴ Statement of Facts, [14] line 12.

⁴⁵ Statement of Facts, [14] line 10.

⁴⁶ Statement of Facts, [14].

⁴⁷ *The Prosecutor v. Thomas Lubanga Dyilo* (2012), ICC, ICC-01/04-01/06, *Trial Chamber I, (Judgement pursuant to Article 74 of the Statute)*, [1008].

- b) The accused was aware that she provided an essential contribution to the implementation of the common plan; and
- c) The accused was aware of the factual circumstances that established the existence of an armed conflict, and of the link between these facts and her conduct.

39. However, Mona Tammy was not aware of an existence of an armed conflict as her understanding was that the WOL was a terrorist group. This was shown in multiple occasions where Mona Tammy explicitly addressed the WOL as terrorist on TV broadcast.⁴⁸

40. Thus, Mona Tammy is not individually responsible for the war crime as the subjective elements are not reached.

⁴⁸ Statement of Facts, [17] and [19].

COUNT TWO:

MONA TAMMY IS NOT INDIVIDUALLY RESPONSIBLE UNDER ARTICLE 25(3)(b) IN RESPECT TO THE SERIES OF BOMBINGS IN OSSO UNDER ARTICLE 8(2)(e)(i) OF THE ROME STATUTE

A. THE WAR CRIME OF ATTACKING CIVILIANS IS NOT ESTABLISHED

41. **Article 8(2)(e) of the Rome Statute** does not prohibit attacks⁴⁹ against civilian objects.⁵⁰

42. The attack was against civilian objects, namely buildings in Osso that were suspected for being used as WOL bases.⁵¹

I. The perpetrator directed an attack.

43. To establish a link between the attack and the conduct of the hostilities, the Court has stipulated that these civilians must be those “who have not fallen yet into the hands of the attacking party”.⁵²

II. The object of the attack was not a civilian population as such nor individual civilians not taking direct part in hostilities

44. The intended result was to attack the buildings that were found to support the terrorists and the death and/or injuries to the combatants in the buildings.⁵³

⁴⁹ *Prosecutor v. Abu Garda*, ICC PT. Ch. APCh. II, ICC-01/04-01/07-3436, 7 March 2014, [798]; *Ntaganda*, ICC PT. Ch. II, ICC-01/04-02/06-309, 9 June 2014, [45]. The Court has used **Article 49** of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Conflicts and applied it by analogy to **Article 13(2)** AP II to define an attack as “acts of violence against adversary, whether in offence or defence.

⁵⁰ Elements of Crime.

⁵¹ Statement of Facts, [16].

⁵² *Prosecutor v. Katanga*, (Case No. ICC-01/04-01/07), ICC PT. Ch. I, *Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga*, ICC-01/04-02/06-309, 9 June 2014, [45] and [47].

⁵³ Statement of Facts, [16].

45. This is the foreseeable outcome of the attack.
46. Terrorists were known to hide among the population and were active especially in suburban areas.⁵⁴ They were using a building in a Starlight residential community for hostile activities.⁵⁵
47. Surveillance reports showed that materials for homemade bombs were moved into a building.⁵⁶ An informer informed Tomass that WOL was planning to launch an attack from the suspected building in Rose Garden shortly.⁵⁷
48. This evidently put the lives of the military personnel and 4.2 million people in Osso, the capital city of Fodava in an imminent danger.⁵⁸
49. An airstrike was ordered by Tomass against the suspected WOL building.⁵⁹

III. The perpetrator did not intend the civilian population as such nor individual civilians not taking direct part in hostilities to be the object of the attack.

50. Factors such as the number and the behavior of the fighters present amongst the population should be taken into account.⁶⁰
51. The terrorists hiding in suburban areas of Osso were carrying out guerrilla attacks and causing increasing casualties to the government soldiers.⁶¹ They were hiding in a densely populated area, squeezed between the residential communities.
52. There is a distinction between the principal target of the attack which was the civilian population against military objectives with the awareness that they will or may result

⁵⁴ Statement of Facts, [16].

⁵⁵ Statement of Facts, [16].

⁵⁶ Statement of Facts, [18].

⁵⁷ Statement of Facts, [18].

⁵⁸ Statements of Facts, [2].

⁵⁹ Statement of Facts, [18].

⁶⁰ *Katanga*, Annex, [801].

⁶¹ Statement of Facts, [16].

in incidental loss of life or injury to civilians. The Court distinguishes between a violation of discrimination and a violation of principal proportionality.⁶²

53. The object of the attacks were the buildings the terrorists were found to be hiding in, whom were taking direct part in hostilities.⁶³

54. Homemade bombs were found to have been moved into the building.⁶⁴ The attack on the Rose Garden building offers a concrete and direct military advantage.⁶⁵

55. The attack was proportionate to the foreseeable result anticipated that is to obliterate active terrorists in Osso. Therefore, there is no violation of the principle of proportionality.

B. MONA TAMMY IS NOT INDIVIDUALLY RESPONSIBLE FOR THE WAR CRIME

I. Mona Tammy did not order, solicit nor induce the commission of such a crime

56. A person orders, solicits or induces another person(s) to commit a war crime pursuant to **Article 8(2)(e)(i)**⁶⁶ when their conduct substantially contributed⁶⁷ to its commission.⁶⁸

57. “Ordering” under Article 25⁶⁹ requires the superior to have actively contributed to the crime in question.⁷⁰

⁶² *Prosecutor v. Mbarushimana*, ICC PT. Ch. I. *Decision on the confirmation of charges* ICC-01/04-01/10-465-Red, [142] and [218].

⁶³ Statement of Facts, [16].

⁶⁴ Statement of Facts, [18].

⁶⁵ Rule 14, Customary International Humanitarian Law.

⁶⁶ Rome Statute.

⁶⁷ *Nahimana et al. v. Prosecutor* (2007), ICTR, IT-99-52-A, *Trial Judgement*, [502].

⁶⁸ *Prosecutor v. Kvočka et al.* (2001), ICTY-98/30-1, *Trial Judgement*, (“*Kvočka*”), [252].

⁶⁹ Rome Statute.

⁷⁰ *Prosecutor v. Bemba*, ICC PT Ch. II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 15 June 2009, §405.

58. Mona Tammy did not order, solicit nor induce Tomass to commit the alleged war crime.⁷¹
59. There is an established reporting system similar to normal functioning state militaries.⁷² Prior to an attack, an order is required to be drafted, agreed upon and signed by the President.⁷³ Mona Tammy did not sign any such order authorizing the attacks.
60. It was Tomass who carried out the attack based on surveillance reports and an informer's intelligence.⁷⁴
61. There is insufficient evidence available that her statement on national television was a substantial factor to the alleged war crime.⁷⁵ It was meant to deter and discourage terrorism and its activities in Fodava.
62. Tomass ordered the airstrike against the suspected WOL building. The airstrike in Osso was carried out based on his orders. Tomass was not manipulated or exploited by Mona Tammy to commit the crime. Therefore, there is no indirect perpetration on Mona Tammy's part.
63. When he ordered the airstrike, he was not under the control of Mona Tammy neither was he used as an instrument by Mona Tammy. Therefore, the purported crime that is alleged cannot be attributed to Mona Tammy.⁷⁶

⁷¹ Article 25(3)(b), Rome Statute.

⁷² Clarifications, [20].

⁷³ Statement of Facts, [18].

⁷⁴ Statement of Facts, [18].

⁷⁵ Statement of Facts, [17].

⁷⁶ Katanga, Annex, [717].

II. mens rea

64. Intent may be proven when the accused meant to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the crime occurred as a consequence.⁷⁷
65. As stated, Mona Tammy's statement on the national television was issued to discourage civilian support towards the terrorists and deter further terrorists' attacks in Osso.
66. Thus, it is impossible that Mona Tammy could have foreseen that any war crimes were substantially likely to happen pursuant to her statement.⁷⁸

⁷⁷ *Prosecutor v. Naletilić and Martinović*, (2003), IT-98-34-T, Trial Judgement, (“*Naletilić*”), [60].

⁷⁸ **Article 30**, Elements of Crimes.

COUNT THREE:

MONA TAMMY DOES NOT HAVE COMMAND RESPONSIBLE UNDER ARTICLE 28(a) OF THE ROME STATUTE RESPECT TO TRANSFER OF MEDICAL PERSONNEL FROM STARLIGHT HOSPITAL UNDER ARTICLE 8(2)(c)(i)

A. THE ALLEGED WAR CRIME OF VIOLENCE TO LIFE AND PERSON IS NOT ESTABLISHED

67. Material elements of the crimes alleged under **Article 8(2)(c)(i) of the Rome Statute** is not established.

68. Evacuation of medical personnel from Starlight Hospital is not an attack on the civilians and *hors de combat*.

1. The perpetrator killed one or more persons⁷⁹.

69. Fodavan military forces did not kill one or more persons.

70. Fodavan military forces conducted an evacuation from the Starlight Hospital.⁸⁰ They were brought to Fodavan military bases situated throughout Fodava where battles were occurring.⁸¹ Moreover, Starlight Hospital is the only hospital where the evacuation of medical personnel occurred.⁸²

71. An occupying force is allowed to evacuate an area and its occupants if “imperative military reasons so demand”.⁸³

72. Tomass had the authority to evacuate medical personnel.⁸⁴

⁷⁹ Article 8(2)(e)(i), Elements of Crimes.

⁸⁰ Statement of Facts, [22].

⁸¹ Clarifications, [61].

⁸² Clarifications, [60].

⁸³ Article 5 and 49, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977 (“**APII**”).

⁸⁴ Clarifications, [33].

73. There were inadequate medical personnel to attend to the wounded and sick soldiers in the Fodavan military forces.⁸⁵ Tomass conducted an evacuation of the medical personnel and re-stationed them to military bases all throughout Fodava.⁸⁶
74. The State has the authority to the requisition of civilian hospitals and in cases of urgent necessity of care for the wounded and sick military.⁸⁷ The State also has the authority to determine what activities are deemed prejudicial to its security.⁸⁸
75. WOL leaders had requested Starlight Hospital not to receive wounded or sick Fodavan soldiers.⁸⁹ Many medical personnel in Starlight Hospital were reluctant and refused to treat anyone of Ipso Faith.⁹⁰
76. Besides that, WOL hiding among the population launched surprise attacks against Fodavan soldiers.⁹¹
77. The military forces who were sick and wounded would not receive a safe and secure treatment at the Starlight Hospital, therefore the medical personnel were temporarily brought to Fodavan military bases to provide treatment.
78. The medical personnel were not under any risk or harm as all personnel returned home unharmed.⁹²

B. MONA TAMMY IS NOT CRIMINALLY LIABLE AS A MILITARY SUPERIOR

I. Mona Tammy does not have an effective command and control over the perpetrators involved in the crimes.⁹³

⁸⁵ Statement of Facts, [22].

⁸⁶ Clarifications, [22].

⁸⁷ Article 57, Protocol Additional to the Geneva Conventions of 12 August 1949.

⁸⁸ *Prosecutor v Zejnil Delali Zdravko Muci, Hazim Delic* (1998) ICTY IT-96-21-T Trial Chamber, [574].

⁸⁹ Statement of Facts, [21].

⁹⁰ Statement of Facts, [21].

⁹¹ Statement of Facts, [16].

⁹² Statement of Facts, [24].

⁹³ Article 28(a), Elements of Crimes.

79. Formal designation as a commander should not be considered as a prerequisite for command responsibility to attach.⁹⁴
80. Mona Tammy was the Commander-in-Chief of Fodava.⁹⁵ However, she was not the *de facto* military commander who had the “effective command and control”.
81. Mona Tammy did not have an “effective command and control” over the Fodavan military forces in Osso at the material time of the crime that required her being able to issue orders which needed to be followed.⁹⁶
82. Mona Tammy did not execute any order that calls for an evacuation of medical personnel.
83. The qualitative aspect of the superior-subordinate relationship, namely the effectiveness is that Mona Tammy must possess “the material ability to prevent or punish the material conduct of her subordinates”.⁹⁷
84. Mona Tammy was the Commander-in-Chief who had “substantial influence” over Fodavan military forces, however she did not have the “material ability” to prevent/punish Tomass’ actions.⁹⁸
85. The indicators of effective control are a matter of evidence.⁹⁹ In order to evaluate the effectiveness of the commander’s control, it is hence necessary to look at the evidence provided on a case by case basis.¹⁰⁰

⁹⁴ *Prosecutor v. Mucic et al.*, ICTY T. Ch., 16 November 1998, [370].

⁹⁵ Statement of Facts, [1].

⁹⁶ *Prosecutor v. Blaskic* (2004), ICTY, IT-95-14-A, *Appeals Judgment (“Blaskic”)*, [69] and [399].

⁹⁷ *Prosecutor v. Mucic et al.*, ICTY A. Ch., *Judgement*, 20 February 2001, [256].

⁹⁸ Statement of Facts, [1].

⁹⁹ *Prosecutor v. Blaskic* (2004), ICTY, IT-95-14-A, *Appeals Judgment (“Blaskic”)*, [69].

¹⁰⁰ *Prosecutor v. Mucic et al.*, ICTY A. Ch., *Judgement*, 20 February 2001, §197.

86. Tomass acting without any orders by the President is an evidence of disobedience.¹⁰¹ Therefore, Mona Tammy lacks the effective control over the Fodavan military forces in Osso.

II. Mona Tammy did not knowingly fail to prevent a crime

87. Liability for command responsibility only arises where the commander knew or should have known of the commission of a crime.¹⁰²

88. A superior cannot be asked for more than what is in her power, the kind and the extent of measures to be taken ultimately depend on the degree of effective control over the conduct of subordinates at the time the superior is expected to act.¹⁰³

89. Mona Tammy was the Commander-in-Chief of the armed forces, however she was not involved in the detailed planning of the attack.¹⁰⁴

90. She did not sign any evacuation order to evacuate Starlight Hospital medical personnel.

91. There is no such information and intelligence report available for Mona Tammy that would “*put her on notice*” with regards to the evacuation.¹⁰⁵

III. Mona Tammy did not knowingly fail to punish a crime

92. The more remote a commander is from the commission of the crime, the more indicia of knowledge is required to establish knowledge.¹⁰⁶

93. Mona Tammy cannot keep completely informed of the details of military operations of subordinates... so the prosecution has to prove knowledge.¹⁰⁷

¹⁰¹ ¹⁰¹ *Prosecutor v. Blaskic* (2004), ICTY, IT-95-14-A, *Appeals Judgment* (“***Blaskic***”), [69] and [399].

¹⁰² Article 28(a), Rome Statute.

¹⁰³ *Prosecutor v. Orić*, ICTY T Ch, *Judgement*, 30 June 2006, [328].

¹⁰⁴ Statement of Facts, [1].

¹⁰⁵ *Bemba Confirmation Decision*, [434].

¹⁰⁶ *Prosecutor v. Naletilić*, ICTY, IT-98-34-T, *Trial Judgement*, [72].

¹⁰⁷ Landrum, “The Yamashita War Crimes Trial,” [299], “The High Command Case”, [543].

94. 'Knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.¹⁰⁸

95. The knowledge of the alleged crime was not made known to her until or after the alleged war crime charges were brought against her. Therefore, she did not knowingly fail to punish a crime.

IV. Mona Tammy did not fail to submit the matter to the competent authorities

96. The duty to submit the matter to the competent authorities arises after the commission of crimes. Such a duty requires the commander to take active steps in order to have the ability to ensure that the perpetrators are brought to justice.¹⁰⁹

97. Mona Tammy was not aware of the circumstances that exists at the material time in regards to the alleged crime. She did not know that a war crime was alleged until or after the war crime charges were brought against her.

98. There is no sufficient concrete and tangible evidence available to justify further action by the Court.¹¹⁰

¹⁰⁸ Article 30(3), Rome Statute.

¹⁰⁹ *Prosecutor v. Bemba*, ICC PT Ch. II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo*, 9 June 2009, [442].

¹¹⁰ Article 17(1)(d), Article 19, Rome Statute.

PRAYER FOR RELIEF

The Defence respectfully requests for the *dismissal* of the charges under the **Rome Statute** against Mona Tammy for the following reasons:

1. This Court is unable to exercise jurisdiction because the armed struggle against WOL was not an armed conflict but a series of actions against terrorism i.e. a war against terror.
2. There are insufficient grounds to confirm charges against Smith, thus indicating:
 - 2.1. Mona Tammy is not individually responsible with respect to the attack on the Cave Temples of Tyra under **Article 25(3)(a)**.
 - 2.2. Mona Tammy is not individually responsible with respect to the series of bombings in Osso's suburbs under **Article 25(3)(b)**.
 - 2.3. Mona Tammy is not criminally responsible with respect to transfer of medical personnel from Starlight Hospital under **Article 28(a)**.

**RESPECTFULLY SUBMITTED,
COUNSELS FOR THE DEFENDANT.**