

**3<sup>rd</sup> RED CROSS  
INTERNATIONAL HUMANITARIAN LAW (IHL)  
MOOT (2009)**

**THE PROSECUTOR  
v.  
ALBERT WISEMAN**

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**MEMORIAL FOR THE PROSECUTOR**  
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**NANKAI UNIVERSITY LAW SCHOOL**

**Hua Yue & Li Qin**

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## PLEADINGS AND AUTHORITIES

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- **Wiseman should be charged with war crime of "unlawful confinement" under Article 147 of the Fourth Geneva Convention and Article 8(2)(a)(vii) of the ICC Statute, for acts committed in the province of Chengo from 5 May 2007 to 10 November 2007.**

### **1 The CLA committed the war crime of "unlawful confinement".**

#### **1.1 Actus Reus**

##### **1.1.1 The CLA “confined and continued to confine persons to a certain location”.<sup>1</sup>**

On 11 May 2007, CLA cadres took many of the residents into custody and confined them in the prison until the rescue of the Durako forces on 10 November 2007. The whole process of imprisonment was continuous for 6 months without interruption.

##### **1.1.2 Residents confined were “protected under the Fourth Geneva Convention”.<sup>2</sup>**

The Convention is relative to the protection of “civilian persons”, and “all non-participants in the hostilities, including persons hors de combat, should be regarded as civilians.”<sup>3</sup> The allegation that those officials, business people and industrialist had ever participated in hostilities against the CLA was mainly based on naked conjecture and the intention to “send a threat to the UDF and the government of Durako.”<sup>4</sup> The persons were not “definitely suspected of or engaged in activities hostile to the security”<sup>5</sup> of the CLA.

##### **1.1.3 The confinement “took place in the context of and was associated with an international armed conflict”.<sup>6</sup>**

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<sup>1</sup> Elements of Crimes, Article 8 (2) (a) (vii)-2(1)

<sup>2</sup> Elements of Crimes, Article 8 (2) (a) (vii)-2(2)

<sup>3</sup> Prosecutor v. Mile Mrksi• and Veselin Sljivancanin, Case No.IT-95-13/1-A, para.20 (5 May 2009).

<sup>4</sup> Moot problem, para.16.

<sup>5</sup> Prosecutor v. Dario Kordic and Mario Cerkez, Case No.IT-95-14/2-T, para.275 (26 February 2001).

<sup>6</sup> Elements of Crimes, Article 8 (2) (a) (vii)-2(4)

An “international armed conflict” can be a “protracted armed violence between governmental authorities and organized armed groups.”<sup>7</sup> The CLA was acting under the overall control of<sup>8</sup>, and on behalf of<sup>9</sup> Nimbusland, sharing the same objectives and strategy to disintegrate Chengo from Durako, thereby rendering the armed conflict international<sup>10</sup>. Evidences were listed below:

(1) Kinivadeh spoke to the media early on 4 August 2006 that his government would “extend solidarity” to the CLA and support it “in various means”, which showed Nimbusland’s resolve and intent to support the CLA.

(2) The weapons used by CLA cadres in the conflictions in the first week of December 2006 were Nimbusland-made, which showed that Nimbusland was providing the CLA with material assistance.

(3) The military expenditure of Nimbusland had significantly and abnormally increased, which was superabundant if the money were only used for strengthen armed forces of their own.

(4) Wiseman himself admitted on 30 October 2007 that the CLA “do have solidarity and support from other countries”. Considering the historical, geographical and cultural intimacy between Chengo and Nimbusland, it was obvious that Nimbusland was the “other country”.

Nimbusland “remained the controlling force behind” CLA armed forces<sup>11</sup> and the act was for the ultimate goal to weaken Durako, thus the nexus between the confinement and the conflict is proved.<sup>12</sup>

## 1.2 Mens Rea

The offenders were “aware of the factual circumstances that established that protected status”<sup>13</sup> and “the existence of an armed conflict,”<sup>14</sup> because the people who participated in the action of confinement were those who belonged to the CLA

<sup>7</sup> Prosecutor v. Dusko Tadic, Case No.IT-94-I-AR72, paras.67 and 70(2 October 1995).

<sup>8</sup> Prosecutor v. Dusko Tadic, Case No.IT-94-I-A, para.145 (15 July 1999)

<sup>9</sup> Ibid,para.84

<sup>10</sup> Prosecutor v.Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Case No.IT-96-21-A, para.19(20 February 2001).

<sup>11</sup> Ibid, para.50.

<sup>12</sup> Supra, note 5,para.277.

<sup>13</sup> Elements of Crimes, Article 8 (2) (a) (vii)-2(3)

<sup>14</sup> Elements of Crimes, Article 8 (2) (a) (vii)-2(5)

and those who were executing an pre-arranged plan, it was impossible for them to be insensible of the status of civilians of their targets and the “palpable armed conflict” between the CLA and Durako government. They designedly implemented the confinement based on such awareness, which indicates that they had the utter knowledge and intention to commit the crime.

## **2 Wiseman has the superior responsibility for the confinement.**

Three required elements<sup>15</sup> were ex facto fulfilled by Wiseman:

(1) There existed a superior-subordinate relationship.

As the elected president and core leader of the CLA, Wiseman was the de jure and de facto superior of all CLA cadres. Proof of a superior-subordinate relationship ultimately depends on the existence of the superior’s effective control.<sup>16</sup> It can be inferred that Wiseman had “effective authority and control”<sup>17</sup> over his subordinates during the period from 5 May 2007 to 10 November 2007, as he planned the action and was still releasing message as the definite authority of the CLA on 30 October 2007.

(2) Wiseman knew or at least had reason to know that the unlawful confinement was about to be or had been committed.

The CLA claimed publicly on 12 May 2007 that Wiseman had participated in the decision of the programme of the actions, which indicated that Wiseman had the “actual knowledge” of the preparation of the crime. Moreover, he must have information which would put him on notice of the risk of such offence<sup>18</sup>, because “information was available to him”<sup>19</sup> as he can still receive notes and release messages. It is not required that the information was detailed<sup>20</sup> or Wiseman was acquainted with the information.<sup>21</sup>

(3) Wiseman failed to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

Wiseman took no action of prevention, including issuing orders, taking

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<sup>15</sup> Prosecutor v. Rasim Delic, Case No.IT-04-83-T, para.56(15 September 2008).

<sup>16</sup> Prosecutor v. Naser Orić, Case No.IT-03-68-T, para.311(30 June 2006).

<sup>17</sup> ICC Statute, art28.(b)

<sup>18</sup> Supra, note 10, paras.223 and 241.

<sup>19</sup> Prosecutor v. Enver Hadžihasanovic and Armir Kubura, Case No.IT-01-47-A, para.27(22 April 2008).

<sup>20</sup> Supra, note 15, para.66.

<sup>21</sup> Supra, note 10, para.239.

disciplinary measures or protesting<sup>22</sup>, at any stage before the commission of the unlawful confinement.

Wiseman punished nobody afterwards. The duty to punish includes at least an obligation to investigate (or have investigated) possible crimes, to establish facts, and, if the superior has no power to initiate sanctions himself, to report the crimes to the competent authorities.<sup>23</sup> Wiseman did nothing instead of “consciously disregarding the situation which clearly indicated that his subordinates were committing a crime”.<sup>24</sup>

- **Wiseman is liable for the crime against humanity of "extermination" under Article 7(1)(b) of ICC Statute for acts committed in the province of Chengo from 30 November 2007 to 31 December 2007.**

**1 Wiseman should bear individual criminal responsibility under Article 25(1)(b) of the ICC Statute.**

**1.1 Actus Reus was explicit.**

Soliciting, also known as instigation is commonly defined as “prompting another to commit the offence”.<sup>25</sup> The message signed by Wiseman contained statements like “weaken its support base in the Migami-speaking residents”, “in the coming few days act concertedly to weaken our enemies” and give “a decisive blow”. It surely exerted influence on his subordinates by way of inciting them to commit the extermination.<sup>26</sup>

**1.2 Mens Rea was beyond doubt.**

The instigator’s mens rea is component of intention and knowledge<sup>27</sup>.

Intention means the instigator must at least accept that the crime be committed<sup>28</sup>. Wiseman has long been hating Migami-speaking people and Durako government, if he was unwilling to accept the crime, he would not have issued the inciting message before the attack, nor would he took no means to control the acts of extermination and punished nobody afterwards.

Wiseman utterly had the knowledge that his acts assisted in the commission of

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<sup>22</sup> Supra, note 15, para.73.

<sup>23</sup> Supra, note 5, para.446.

<sup>24</sup> ICC Statute, art28.(b)(i).

<sup>25</sup> Prosecutor v. Dario Kordi• and Mario • erkez, Case No.IT-95-14/2-A, para.27 (17 December 2004).

<sup>26</sup> Supra, note 16, para.271.

<sup>27</sup> ICC Statute, art30

<sup>28</sup> Supra, note 16, para. 279.

the crime,<sup>29</sup> because the message was an instruction and he signed it in complete willingness.

## **2 Wiseman should bear superior responsibility for the extermination.**

### **2.1 Extermination**

Extermination, which refers to mass destruction<sup>30</sup> committed as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds<sup>31</sup>, with knowledge of the attack<sup>32</sup>, had de facto occurred.

#### **2.1.1 The perpetrator killed many persons<sup>33</sup> and the conduct constituted a mass killing of members of a civilian population.<sup>34</sup>**

Wiseman's subordinates, CLA armed cadres, organized and directly took part in the massacre against certain persons whom they deemed to be "non-Chengo" and UDF-supporting-people. In Stakic Case, the killing of 1500 persons was regarded as "mass killing"<sup>35</sup>. Here, more than 3000 people were killed in sequential attacks within one month mainly by CLA armed forces.

"Civilian population" can be defined as those who didn't "take direct part in hostilities"<sup>36</sup>. Considering their identities, residents targeted by the CLA in Chengo were not likely to participate in the acts or plots of any hostilities. Moreover, the act was "pursuant to the organizational policy"<sup>37</sup> of the CLA, as mentioned above, which indicated that the attacks were directed against Migami-speaking civilians.

#### **2.1.2 Widespread or systematic attacks<sup>38</sup> had taken place.**

A widespread attack should affect a large scale of individuals<sup>39</sup>. The assault of the CLA apparently exerted formidable influences in thousands residents who were believed "non-Chengo" and UDF-supporting-people, which satisfied the "large-scale

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<sup>29</sup> Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-95-54A-T, para.599 (22 January 2004).

<sup>30</sup> Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, para.590 (2 September 1998).

<sup>31</sup> Prosecutor v. Ntakirutimana, Case No. ICTR-96-17-T, para.812 (21 February 2003).

<sup>32</sup> ICC Statute, art.7(1)

<sup>33</sup> Elements of Crimes, Article 7 (1) (b) 1

<sup>34</sup> Elements of Crimes, Article 7 (1) (b) 2

<sup>35</sup> Prosecutor v. Milomir Stakic, Case No. IT-97-24-A, para.242 (22 March 2006).

<sup>36</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest, p7.

<sup>37</sup> ICC Statute, art.7.(2)(a)

<sup>38</sup> Elements of Crimes, Article 7 (1) (b) 3

<sup>39</sup> Supra, note 36, p5.

nature”.<sup>40</sup>

A systematic attack means an attack carried out pursuant to a preconceived policy or plan<sup>41</sup>. The message dated 19 November 2007, which was signed by Wiseman, indicated that the attack was previously prepared, for it agitated the CLA cadres to “act concertedly to weaken our enemies” and “give a decisive blow”, if not for the message, it was hardly imaginable that attacks could occur almost simultaneously in different parts of Chengo in organized way, which fulfilled the “organized nature”.<sup>42</sup>

### **2.1.3 The attacks were based on discriminatory grounds, mainly political and ethnical grounds herein.**

Wiseman based his objective of “liberating Chengo from Durako” and his encouragement of violence mainly on **ethnical and political discrimination**, and the CLA firmly believe that “injustice was done to them” for “they were not equally sharing the benefits of the Durako economy and their language and cultural practices were looked down upon”<sup>43</sup> due to their natural discrepancy from Migami-speaking residents.

### **2.1.4 Mens rea**

The CLA armed cadres shared the same motivation and purpose to weaken the support base of the UDF, while they knew that the conduct was part of widespread and systematic attacks directed against a civilian population- the Migami-speaking residents<sup>44</sup>, and that their acts were part of the premeditated attacks.<sup>45</sup> Hence, the CLA had the intention and knowledge of extermination.

## **2.2 Wiseman also has superior responsibility for the extermination.**

Wiseman failed to exercise control properly over CLA armed cadres<sup>46</sup> and turned a blind eye on the extermination. Although he was in control of the offenders, he took no means to prevent or repress their commissions, nor did he punished

<sup>40</sup> Prosecutor v. Kunarac et al, Case No. IT-96-23/1-A, para.94 (12 June 2002).

<sup>41</sup> Supra, note 39.

<sup>42</sup> Supra, note 40.

<sup>43</sup> Moot Problem, para.6.

<sup>44</sup> Elements of Crimes, Article 7 (1) (b) 4

<sup>45</sup> Prosecutor v. Tihomir Blaškić, Case No.IT-95-14-A, para.124(29 July 2004).

<sup>46</sup> ICC Statute, art 28(b)



anybody or submitted the matter to any authorities. Furthermore, the superior-subordinate relationship never vanished during the period of extermination.

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**PRAYER**

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The Prosecutor (Applicant) respectfully requests this Honorable Court to adjudge and declare that:

1. Mr. Wiseman should be charged with war crime of "unlawful confinement" for acts committed in the province of Chengo from 5 May 2007 to 10 November 2007.
2. Mr. Wiseman should further be charged with the crime against humanity of "extermination" for acts committed in the province of Chengo from 30 November 2007 to 31 December 2007.

**RESPECTFULLY SUBMITTED,  
AGENTS FOR THE PROSECUTION**