

United Nations Special Court

The Prosecutor v Colonel Potter

Prosecution Memorandum of Argument

Submission 1 – Jurisdiction of the Special Court

- 1 The United Nations Special Court (“the Special Court”) has jurisdiction to hear and decide the present matter.
- 1.1 The Special Court has jurisdiction over violations of the law and customs of war in situations of international armed conflict, where those crimes are closely related to that armed conflict: *Prosecutor v Mladen Naletilic and Vinko Marinovic* (Trial Chamber) IT-98-34-T, [176] (“*Naletilic Trial*”); *Prosecutor v Radoslav Brdanin* (Trial Chamber) IT-99-36-T, [121] (“*Brdanin Trial*”).
 - 1.1.1 There was an international armed conflict on the border of Manis and Tuton: *Prosecutor v Dusko Tadic* (Appeals Chamber, Jurisdiction) IT-94-1-AR72, [70] (“*Tadic Jurisdiction Decision*”), *Brdanin Trial*, [124].
 - 1.1.2 The violations alleged took place in circumstances closely related to the armed conflict: *Tadic Jurisdiction Decision*, [70].
 - 1.1.3 The Hild villagers were ‘protected persons’ pursuant to *Geneva Convention IV: Brdanin Trial*, [125].
- 1.2 The crimes charged are specifically listed in the statute of the Special Court. Additional jurisdictional decisions are therefore not relevant.

Submission 2 – Count 1: Violations of the Law or Customs of War – Underlying Crime

- 2 The civilian population was transferred from the Occupied Territory of Hild to Elvos in contravention of Article 2(g) of the Statute and Article 49 of the Fourth Geneva Convention.
- 2.1 The Accused’s soldiers created and took advantage of a coercive environment where the villagers leaving Hild cannot be considered as having made a genuine choice to be transferred: *Prosecutor v Momcilo Krajisnik* (Trial Chamber I) IT-00-39-T, [724] (“*Krajisnik Trial*”); *Prosecutor v Vidoje Blagojevic and Dragan Jokic* (Trial Chamber) IT-02-60-T, [596] (“*Blagojevic Trial*”); *Naletilic Trial*, [519].
 - 2.1.1 The humanitarian crisis that caused the displacement was itself the result of the Accused and his soldiers’ own unlawful activities: *Prosecutor v Milomir Stakic* (Appeals Chamber) IT-97-24-A, [287], [310].
 - 2.1.2 The soldiers were deliberately depriving the villagers of food, water and electricity under the pretext of enforcing security measures.
 - 2.1.3 The soldiers were routinely stopping and searching villagers leaving or returning Hild, significantly delaying their commute to work and health services.
 - 2.1.4 Genuine choice cannot be inferred from the fact that consent was expressed by the villagers as the coercive circumstances gave them no real option but to leave: *Prosecutor v Milorad Krnojelac* (Appeals Chamber) IT-97-25-A, [229].
- 2.2 In the alternative, the transfers were not warranted for the physical security of the population or for imperative military reasons.
 - 2.2.1 Hild was not in danger as a result of ‘military operations’ or ‘intense bombing’: *Blagojevic Trial*, [598].
 - 2.2.2 On the facts, the civilian population of Hild was not at risk as any attacks were directed at the Tuton military forces.

- 2.3 The requisite *mens rea* can be established as there was intent to forcibly displace the Hild villagers: *Krajisnik Trial*, [726]
 - 2.3.1 The notices put up by soldiers in the Accused's unit clearly offered to relocate the villagers to Elvos.
 - 2.3.2 It is not necessary to show that there was an intent to displace the population on a permanent basis: *Stakic Appeal*, [304]-[307]; *Prosecutor v Momcilo Krajisnik (Appeals Chamber) IT-00-39-A*, [304].
 - 2.3.3 In any event, the billeting arrangements were only for Tuton families, indicating intent to discriminatorily and permanently displace the Manisian Hild villagers.

Submission 3 – Count 1: Violation of the Laws or Customs of War – Attribution of Responsibility

3. Col. Potter is criminally responsible within the meaning of Article 7(1) or 7(3) of the Statute for the crimes referenced in Count 1 of the Indictment.
 - 3.1 The Accused ordered the commission of the unlawful transfers and is therefore criminally responsible under Article 7(1) of the Statute.
 - 3.1.1 The Accused, being the commander of the Hild unit, possessed the authority to order the commission of the offence: *Prosecutor v Mile Mrksic (Trial Chamber) IT-95-13/1-T*, [550] (“*Mrksic Trial*”); *Brdanin Trial*, [270].
 - 3.1.2 The existence of the order may be proven through circumstantial evidence: *Mrksic Trial*, [550]; *Prosecutor v Thomir Blaskic (Trial Chamber) IT-95-14-T*, [281] (“*Blaskic Trial*”).
 - 3.1.3 There is a causal link between the act of ordering and the physical perpetration of the crime: *Prosecutor v Pavle Strugar (Trial Chamber) IT-01-42-T*, [332] (“*Strugar Trial*”).
 - 3.1.4 The requisite *mens rea* may be inferred from the circumstances that the Accused intended to bring about the commission of the crime or was aware of the substantial likelihood that a crime would be committed as a consequence of the execution of the order: *Strugar Trial*, [333]; *Mrksic Trial*, [550]. *Prosecutor v Thomir Blaskic (Appeals Chamber) IT-95-14-A*, [42] (“*Blaskic Appeal*”); *Brdanin Trial*, [270].
 - 3.2 By virtue of his command responsibility, the Accused is also criminally responsible under Article 7(3) of the Statute.
 - 3.2.1 Given that the Accused was the Commander in charge of Tuton soldiers in Hild, a formal superior-subordinate relationship existed between him and the soldiers conducting the unlawful transfers: *Mrksic Trial*, [560].
 - 3.2.2 His command position, the regularity of the unlawful transfers and the logistics involved meant that the Accused knew or had reason to know that the crime had been committed: *Naletilic Trial*, [558]; *Mrksic Trial*, [563]; *Prosecutor v Zlatko Aleksovski (Trial Chamber) IT-95-14/1-T*, [80]; *Blaskic Trial*, [307].
 - 3.2.3 The Accused did not take necessary and reasonable measures to prevent or punish the crimes: *Mrksic Trial*, [567]-[568]; *Blaskic Trial*, [335].

Submission 4 – Count 2: Violation of the Laws or Customs of War – Underlying Crime

4. Tuton medical personnel made improper use of a distinctive emblem of the Geneva Convention, the Red Cross, resulting in death and serious personal injury, in contravention of Article 3 of the Statute and Article 37 of *Additional Protocol I*.
 - 4.1 The *actus reus* of the offence is made out on the facts based on actions of the medical personnel.
 - 4.1.1 The definition of perfidy is ‘inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord protection, under the rules of IHL, with intent to betray that confidence’: *Additional Protocol I (“AP I”) art 37*; International Criminal Court, *Elements of Crime*, UN Doc PCNICC/2000/1/Add2 (2000) (“*ICC Elements of Crime*”) art 8(2)(b)(vii).

- 4.1.2 The medical personnel improperly used the distinctive emblem of the Red Cross by wearing it for a non-humanitarian purpose: *AP I* art 37; International Committee of the Red Cross Customary IHL Rule 65 (Section F); *Trial of Heinz Hagendorf* (United States Intermediate Government Court) Case no. 80, Law Reports of Trials of War Criminals, Vol. 13, 146.
 - 4.1.3 On 22nd July, Col. Potter ordered most medical personnel to assist with the general protection of the Base, including patrols to identify Manisian units attempting to infiltrate the border to reach the Base.
 - 4.1.4 On 30th July, a unit of Tuton medical personnel, wearing brassards bearing the Red Cross emblem, conducted a patrol around the Base in an armoured vehicle also bearing the emblem, armed with personal weapons.
 - 4.1.5 Recognising the Red Cross emblem, the Manisian soldiers identified the approaching unit as non-military and continued their course, not expecting to be engaged.
 - 4.1.6 Tuton military medical personnel fired at the approaching Manisian vehicle from an armoured vehicle displaying a Red Cross emblem with the ensuing battle resulting in the deaths of six Manisian soldiers.
 - 4.1.7 The uniforms and vehicle used by the Tuton medical personnel invited the confidence of the Manisian soldiers, leading them to believe that the Tutons were entitled to protection under international law.
 - 4.1.8 Any improper use of a distinctive emblem of the Geneva Convention has the effect of diminishing the protective value of the emblem, which is why only strictly humanitarian use is allowed.
- 4.2 It is also made out from the facts that the Accused acted with the necessary *mens rea* to establish the underlying crime.
- 4.2.1 The Accused intended to betray the confidence of the Manisian soldiers through the use of the Red Cross emblem to gain a military advantage.
 - 4.2.2 The medical personnel were ordered by the Accused to participate in a non-humanitarian assignment and the Accused failed to take reasonable steps to cover or remove the Red Cross emblems.
 - 4.2.3 There was a severe shortage of personnel and nightly raids on the Base. This may have forced the Accused to resort to perfidy as a tactical means of gaining a military advantage.
 - 4.2.5 As a military commander, the Accused must have known of the protection afforded to the medical personnel under international law, and the illegality of improper use of the Red Cross emblem: *ICC Elements of Crime* art 8(2)(b)(vii).

Submission 5 – Count 2: Violation of the Laws or Customs of War – Attribution of Responsibility

5. Col. Potter is criminally responsible within the meaning of Article 7(1) or 7(3) of the Statute for the crimes referenced in Count 2 of the Indictment.
- 5.1 The Accused ordered the commission of the crime and is therefore criminally responsible under Article 7(1) of the Statute.
- 5.1.1 Ordering requires that an order be given, and a crime be committed in execution of that order: *Prosecutor v Milutinovic et al* (Trial Chamber), IT-05-87-T, [85] (“*Milutinovic Trial*”); *Prosecutor v Stanislav Galic* (Trial Chamber) IT-98-29-T, [168] (“*Galic Trial*”).
 - 5.1.2 On 22nd July, the Accused ordered the medical personnel to assist with the general protection of the base, and they acted in accordance with that instruction when they went out on patrol and engaged the Manisian soldiers.
 - 5.1.3 The Accused acted with the requisite *mens rea* as he ordered the attack in the knowledge of the substantial likelihood a crime would be committed: *Blaskic Appeal*, [42]; *Galic Trial*, [172]; *Strugar Trial*, [333].

- 5.2 Col. Potter failed to discharge his obligations as a commander, and is therefore criminally responsible under Article 7(3) of the Statute.
- 5.2.1 The Accused had effective control over the medical personnel at the Base which amounted to a superior-subordinate relationship: *Mrksic* Trial, [559], [561]; *Blagojevic* Trial, [791].
- 5.2.2 The Accused knew or ought to have known a crime would be or had been committed: *Mrksic Trial* [562]-[564]; *Milutinovic* Trial, [119]; *Blaskic* Appeal, [62]; *Blagojevic* Trial, [792].
- 5.2.3 The Accused failed to take measures to prevent or punish the crimes: *Mrksic* Trial, [568], *Blaskic* Appeal, [72]; *Galic* Trial, [176]; *Blagojevic* Trial, [793].

So submits the Counsel for the Prosecution on this the 3rd day of September 2013.

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Prosecution's Case List

1. *Prosecutor v Dusko Tadic* (Appeals Chamber, Jurisdiction) 2 October 1995, IT-94-1-AR72.
2. *Prosecutor v Mile Mrksic* (Trial Chamber) 27 September 2007, IT-95-13/1-T.
3. *Prosecutor v Milomir Stakic* (Appeals Chamber) 22 March 2006, IT-97-24-A.
4. *Prosecutor v Milorad Krnojelac* (Appeals Chamber) 17 September 2003, IT-97-25-A.
5. *Prosecutor v Milutinovic et al* (Trial Chamber) 28 February 2009, IT-05-87-T.
6. *Prosecutor v Mladen Naletilic and Vinko Marinovic* (Trial Chamber) 31 March 2003, IT-98-34-T.
7. *Prosecutor v Momcilo Krajisnik* (Trial Chamber I) 17 September 2006, IT-00-39-T.
8. *Prosecutor v Pavle Strugar* (Trial Chamber) 31 January 2005, IT-01-42-T.
9. *Prosecutor v Radoslav Brdanin* (Trial Chamber) 1 September 2004, IT-99-36-T.
10. *Prosecutor v Stanislav Galic* (Trial Chamber) 5 December 2003, IT-98-29-T.
11. *Prosecutor v Thomir Blaskic* (Appeals Chamber) 29 July 2004, IT-95-14-A.
12. *Prosecutor v Vidoje Blagojevic and Dragan Jokic* (Trial Chamber) 17 January 2005, IT-02-60-T.
13. *Prosecutor v Zlatko Aleksovski* (Trial Chamber) 25 June 1999, IT-95-14/1-T.
14. *Trial of Heinz Hagendorf*, Case no. 80, Law Reports of Trials of War Criminals, Vol. 13 at 146 (United States Intermediate Government Court, August 9, 1946).

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