D05

I. THE CASE AGAINST GENERAL STUN IS INADMISSIBLE BEFORE THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court ("the Court") is explicitly a court of last resort and is bound by the principle of complementarity.[1] As such, the Court may only take action with respect to a case where States with jurisdiction have remained inactive, or a decision not to prosecute has resulted from unwillingness or inability to genuinely prosecute within the meaning of the *Rome Statue* art 17.[2]

A. Minos has taken action with respect to General Stun

Genuine domestic proceedings have taken place in Minos leading to the prosecution of high-ranking commanders, including Colonel Brown.[3] The prosecution of Colonel Brown shows that the investigations encompass the conduct underlying the offences with which General Stun is charged[4] because Colonel Brown was the local commander involved in the attack in Sarona that gave rise to the second charge against General Stun.[5] Further, it can be inferred that since other local commanders are also being charged, all incidents in the war are being investigated. There is no evidence that General Stun is exempt from these investigations.

B. Minos made a genuine decision not to prosecute General Stun

Under the *Rome Statue* art 17(b)(1), a State with jurisdiction can investigate and prosecute, or investigate and then decide not to prosecute. Either decision, as long as it is "genuinely" made, makes the case in question inadmissible. Establishing that a State is unwilling to

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1 *Rome Statute of the International Criminal Court*, 2187 UNTS 90, entered into force 1 July 2002, art 1 ("*Rome Statue*").

2 *Prosecutor v Lubanga*, ICC-01/04-01/06-8-US-Corr, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, [29] ("*Lubanga Warrant Decision*").

3 Facts, [36].

4 *Lubanga Warrant Decision*, [31].

5 Facts, [21].

genuinely prosecute requires evidence that persons are being shielded, that there are unjustified delays, or that proceedings are not independent and impartial.[6] There is no evidence of any of these situations. The Minos investigation was launched under the auspices of a unity government and it can be inferred that former opposition forces would not allow the investigation to be conducted in bad faith.[7]

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[6] *Rome Statute*, art 17(2)(a)-(c).

[7] Facts, [33].

II. COUNT 1: GENERAL STUN DID NOT CONTRIBUTE TO THE GROUP CRIME OF DIRECTING AN ATTACK AGAINST A MEDICAL UNIT USING THE DISTINCTIVE RED CROSS EMBLEM IN CONFORMITY WITH INTERNATIONAL LAW

A. The ferry was not marked in conformity with international law

The ferry was converted into a hospital ship.[8] The use of the Red Cross Emblem was not in conformity with the rules that apply to hospital ships under *GC II* art 22.[9] While it is acknowledged that *AP I* extends the circumstances in which medical ships may be used,[10] *AP I* does not remove the need for hospital ships to comply with *GC II* art 22. Further, the use of the Red Cross Emblem was not in conformity with the rules that apply under *AP I* to medical ships generally.

1. The requisite notifications were not made

Under *GC II* art 22, all Parties to the conflict must be notified of the name and description of hospital ships ten days before such ships are employed.[11] Additionally, where a neutral State makes a medical ship available to a belligerent Party, both the neutral State and the belligerent Party must notify the adverse Party prior to the medical ship being used.[12] On the facts none of these notifications were made.[13]

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[8] Facts, [22].

[9] *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85, entered into force 21 October 1950 ("*GC II*").

[10] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts,* 1125 UNTS 3, entered into force 7 December 1979 ("*AP I*").

[11] *GC II* art 22.

[12] See also *AP I* art 12.

[13] Facts, [23].

2. *The ferry was not placed under the control of a Party to the conflict*

All medical ships provided by neutral Parties must be placed under the power of a Party to the conflict.[14] Control over neutral medical ships by the State of origin is inconsistent with the administrative, disciplinary and security demands of relief operations during armed conflict.[15] The ferry was not placed under the control of Minos, Paros or opposition forces, but remained under the control of Andros,[16] which was not a belligerent Party until after the Sarona incident occurred.[17]

3. *The ferry was not exclusively assigned to medical functions*

Ships may only display the distinctive Red Cross Emblems when they are exclusively assigned to medical functions.[18] As such functions are determined "[i]rrespective of the reason for which the unit was established, it is the use at the relevant moment which counts."[19] Medical functions include the transport of medical supplies and the evacuation of the sick and wounded. However, medical functions do not include the transport of supplies that may contribute to the war effort[20] or the evacuation of healthy individuals.[21] Since the

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[14] *GC II* art 25 (hospital ships). *AP I* art 9(2) (extending *GC I* art 27 to medical units of neutral States). *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31, entered into force October 1950, art 27 (recognized societies of neutral States) ("*GC I*").

[15] Jean Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary - Volume II* (ICRC, 1960) 168 ("*Commentary – Volume II*").

[16] Facts, [22].

[17] *Prosecutor v Lubanga*, ICC-01/04-01/06-803, Decision on the Confirmation of Charges, 29 January 2007, [209] ("*Lubanga Confirmation Decision*").

[18] *GC II* art 22 (Hospital Ships), art 33 (Converted Merchant Ships), art 38 (Ships used for the conveyance of medical equipment). *AP I* art 8(e) (Medical Units), art 9(2)(i) (Extending *GC I* art 27 to medical units of neutral States).

[19] Yves Sandoz et al (eds), *Commentary on the Additional Protocols* (ICRC, 1987) [372] and [549] ("*AP I Commentary*").

[20] Pictet (ed), *Commentary – Volume II*, 214.

ferry was assigned to deliver food rations and engaged in the evacuation of local families,[22] the ferry was not exclusively assigned to medical functions.[23]

B. General Stun did not contribute to the commission of a crime by a group acting with a common purpose

1. A common criminal purpose cannot be attributed to any identifiable group

Absent an explicit agreement, a common purpose can only be inferred from multiple instances of concerted action by a group.[24] While a medical establishment was previously destroyed in Uri on 15 March, this has not been attributed to any particular group[25] and has not been shown to be unlawful. To the contrary, attacks were directed at opposition fighters occupying the town and no civilian casualties were reported.[26]

2. General Stun did not intentionally contribute to the commission of any crime by a group of persons

Liability under the *Rome Statute* art 25(3)(d) requires that a "significant contribution"[27] is made to the criminal purpose. At its highest, General Stun's involvement was to order an artillery regiment to deploy at Sarona and to justify the attack after the event.[28] These acts did not contribute to the crime; the originating cause of the attack was the targeting decision of

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[21] Sandoz et al (eds), *AP I Commentary*, [383].

[22] Facts, [22].

[23] Sandoz et al (eds), *AP I Commentary*, [549].

[24] *Prosecutor v Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, 16 December 2011, [271] ("*Mbarushimana Confirmation Decision*"). *Lubanga Confirmation Decision*, [345], [379].

[25] Facts, [12].

[26] Facts, [12].

[27] *Mbarushimana Confirmation Decision*, [283]. *Prosecutor v Katanga*, ICC-01/04-01/07-3371-tENG, Additional Information Decision, [16] 15 May 2013.

[28] Facts, [21].

Colonel Brown,[29] which was made without General Stun's knowledge, ordering or encouragement. Merely issuing public explanations of attacks does not constitute encouragement or any other form of contribution.[30]

3. General Stun did not have knowledge of criminal activity or aim to further any criminal activity

The *Rome Statute* art 25(3)(d) requires that the accused either had knowledge of criminal activity or had the aim to further such activity. General Stun did not know that a ship using the Red Cross Emblem would be present or that Colonel Brown would attack the ship. Nor did General Stun have an intention to further any concerted group crime; the decision to deploy troops at Sarona was based on intelligence indicating the presence of legitimate military targets.[31] No contrary intention can be inferred from merely descriptive statements explaining the nature of an attack.[32]

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[29] Facts, [21], [23].

[30] *Mbarushimana Confirmation Decision*, [292], [312]-[315], [321]-[340].

[31] Facts, [21].

[32] *Prosecutor v Gotovina*, IT-06-90-A, ICTY, Appeals Judgment, 16 November 2012, [81] ("*Gotovina Appeals Judgement*"). *Mbarushimana Confirmation Decision*, [312],[315].

III. COUNT 2: GENERAL STUN IS NOT LIABLE AS A COMMANDER OR SUPERIOR FOR DIRECTING ATTACKS AGAINST CIVILIAN OBJECTS

A. The attack on the air-missile defence system was not directed against civilian objects

1. The attack was directed at a military objective, not civilian objects, and complied with the principle of proportionality

At customary international law, where aerial attacks involve multiple military aircraft it is "improper to consider the impact of each single sortie in isolation. It is rather necessary to assess the overall mission".[33] The air-missile defence system was a legitimate military target as it made an effective contribution by its nature and use to Rios military capability and, in the context of the overall mission, destruction of the system gave Minos the advantage of denying current and future use of the airfields.[34] The anticipated military advantage outweighed any expected civilian casualties,[35] as the Unmanned Aerial Vehicles ("UAVs") were programmed to comply with the principles of distinction and proportionality,[36] the targeting software was the result of a "successful project"[37] and the list of permissible targets was unambiguously military in nature.[38]

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[33] *Commentary to the HPRC Manual on International Law Applicable to Air and Missile Warfare* (HPRC, 2010) rule 14, [12] ("*HPRC Manual Commentary*"). United Kingdom, *Manual on the Law of Armed Conflict* (Ministry of Defence, 2004) [5.33.5].

[34] *AP I*, art 52(2).

[35] *AP I*, art 57(2).

[36] Facts, [28].

[37] Facts, [6].

[38] Facts, [28].

2. *Collateral damage to civilian objects does not qualify the attack as having been directed at civilian objects*

The mere fact of collateral damage to a civilian area does not qualify the attack as having been directed at civilian objects.[39] Direct attacks can only be inferred where civilian objects are struck outside of a reasonably derived margin of error for the weapon used.[40] Aerial attacks on airport infrastructure during the Yugloslav War and the Eritrean-Ethiopian War were not found to have been directed at civilian objects even though cluster bombs hit civilian areas up to 7.7 kilometres away from identified targets on multiple occasions.[41] In the present case no evidence of any reasonably derived margin of error has been provided, the civilian neighbourhood was located close enough to military targets as to make incidental damage a conceivable explanation, and civilian objects were only hit once despite multiple attacks on airfield infrastructure.[42]

3. *A direct attack cannot be inferred from the nature of the weapons used*

Neither autonomous UAVs nor cluster weapons are illegal *per se* at customary international law.[43] While in the case of *Martić* the *International Criminal Tribunal for the former Yugoslavia* inferred a direct attack on civilians from the indiscriminate nature of the weapons system, this decision rested on findings that (a) cluster bombs landed in an area with no military objectives nearby, (b) the bombs were unsuited for use against the buildings allegedly being targeted and (c) the rocket system that delivered the cluster bombs was

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[39] *HPRC Manual Commentary,* rule 14, [3].

[40] *Prosecutor v Martić*, No IT-95-11-T, ICTY, Trial Judgement, 12 June 2007, [462] ("*Martić Trial Judgement*"). *Gotovina Appeals Judgement,* [66].

[41] *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 2000 ILM 1257, 1280-1281, [27]. Landmine Action, *Cluster Munitions: A survey of legal responses* (2008), 9-17. *Partial Award, Central Front, Ethiopia's Claim 2*, Eritrea-Ethiopia Claims Commission, 2004 ILM 1275, [101], [108] ("*Ethiopia's Claim 2*").

[42] Facts, [28].

[43] *HPRC Manual Commentary*, rules 6 and 7, 67-77.

unguided and incapable of hitting specific targets. By contrast, the Minos attack hit the specified military objectives, the cluster weapons were suited to targeting infrastructure (as can be inferred from the successful destruction of the two airfields) and the autonomous drones had been designed and programmed to discriminate between military targets and civilian objects.[44]

4. There is insufficient evidence to infer an intention to target civilian objects

Intention includes direct intent (*dolus directus in the first degree*) and oblique intent (*dolus directus in the second degree*), but excludes recklessness (*dolus eventualis*).[45]

To establish direct intent to attack civilians Tribunals have required sufficiently explicit statements[46] or evidence that an attacker anticipated an advantage from targeting civilian objects.[47] No such explicit statement was made and no such advantage was anticipated.

Oblique intent requires awareness that the result "will be the almost inevitable outcome of [the perpetrator's] acts or omissions."[48] Given the precautions taken to programme compliance with targeting laws,[49] use fully developed software[50] and select only unambiguous military targets,[51] those involved in deploying the UAV's would not have been aware that the targeting of civilians was possible in the ordinary course of events.

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[44] Facts, [28].

[45] *Prosecutor v Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b), 15 June 2009, [358]-[359] ("*Bemba Confirmation Decision*").

[46] *Gotovina Appeals Judgement,* [77], [81]-[83]. *Martić Trial Judgement*, [314]-[320].

[47] *Ethiopia's Claim 2*, [108].

[48] *Bemba Confirmation Decision*, [359].

[49] Facts, [28].

[50] Facts, [6].

[51] Facts, [28].

As intent does not encompass recklessness or mistake of fact,[52] any potential errors in the design or programming of the drone are not a basis for liability.[53] Where, during the Eritrea-Ethiopia War, mistakes in the programming of targeting computers contributed to the aerial bombing of civilian objects, the *Eritrea-Ethiopia Claims Tribunal* found against there having been a direct attack.[54]

B. General Stun is not liable as a commander or superior

1. General Stun did not knowingly fail to prevent a crime

Liability for command responsibility only arises where the commander knew or should have known of the commission of a crime.[55] General Stun was not involved in the detailed planning of the attack, as indicated from the fact that his suggestion to use guided missiles was not adopted.[56] General Stun did not know that autonomous UAVs would be deployed and there was no information available to "put him on notice".[57] As such he did not knowingly fail to prevent any crime.

2. General Stun did not knowingly fail to punish a crime

The more remote a commander is from the commission of the crime, the more indicia of knowledge required to establish knowledge.[58] While the agreed facts state the nature of the attack and the number of casualties,[59] it is reasonable to infer that this information was not available to Minos immediately after the event. Unlike other attacks described in the facts, no report of the attack was made by the media, State authorities or non-governmental

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[52] *Rome Statute*, art 32(1).

[53] *HPRC Manual Commentary*, rule 11, [5].

[54] *Ethiopia's Claim 2*, [109].

[55] *Rome Statute* art 28(a).

[56] Facts, [27].

[57] *Bemba Confirmation Decision*, [434].

[58] *Prosecutor v Naletilić*, IT-98-34-T, ICTY, Trial Judgement, 31 March 2003, [72].

[59] Facts, [28].

organisations. Since the attack took place outside Minos territory, it would have taken time to ascertain the attack's impact. However, General Stun was relieved from his position as General Chief of Staff and as a member of the National Security Council ("NSC") within 22 days of the attack occurring. Absent any other indicia of knowledge it cannot be inferred that General Stun was in a position to obtain full knowledge of the consequences of the attack.

IV. COUNT 3: GENERAL STUN DOES NOT HAVE INDIVIDUAL OR JOINT CRIMINAL RESPONSIBILITY FOR THE CRIMES OF UNLAWFUL DEPORTATION OR TRANSFER OR UNLAWFUL CONFINEMENT

A. Rios nationals were not unlawfully transferred or confined

1. The alleged crimes did not take place in the context of international armed conflict

Internal armed conflict can co-exist alongside international armed conflict[60] and "will be internationalized only if there is a clear relationship between the non-governmental party to that conflict and one of the States party to the international conflict."[61] Intervention in internal armed conflict in Minos was not undertaken on behalf of, or in coordination with, anti-government opposition forces. Rather, as the UASO Council resolution[62] and the statements of the Paros Government indicate,[63] intervention was undertaken on humanitarian grounds to protect civilians. This gave rise to an international armed conflict between Minos and Paros, but did not internationalise the conflict between the Minos Government and opposition forces. Therefore, the involvement of Rios nationals in violent protests and the subsequent transfer and detention of Rios nationals took place in the context of non-international conflict.[64]

2. Rios nationals living in Minos were not protected persons under GC IV

The protection afforded by *GC IV* does not apply to "[n]ationals of a neutral State who find themselves in the territory of a belligerent State" where normal diplomatic relations are

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[60] *Lubanga Confirmation Decision*, [209].

[61] Christopher Greenwood, "The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign" in Andru Wall (ed) *Legal and Ethical Lessons of NATO's Kosovo Campaign* (Naval War College, 2002).

[62] Facts, [13].

[63] Facts, [17].

[64] Facts, [30].

maintained between the States.[65] Prior to 9 April, when Minos attacked Rios airfields,[66] Rios was not a Party to the conflict as they had not intervened with their troops and their nationals were not acting on their behalf in Minos.[67] In the absence of hostilities between the two States it is reasonable to infer the continuation of diplomatic relations. The deportation of Rios nationals began on 2 April and finished 4 April. Additionally, given the "short duration"[68] that Rios protestors were detained for, it can be inferred they were released before 9 April.

3. Rios nationals in Brig were lawfully evacuated and detained

Evacuation is permitted where it is justified by "imperative military reasons",[69] while detention is permitted where "the security of the detaining State makes it absolutely necessary."[70] Determination of what constitutes activity prejudicial to security "is left largely to the authority of [the affected] State itself"[71] as long as there is "good reason"[72] for the determination. In February, Brig was the site of violent anti-government demonstrations.[73] Reports from local government authorities and the media suggested Rios nationals were supporting the anti-government opposition.[74] On 2 April Rios nationals in Brig participated in a protest involving attacks on police.[75] Minos therefore had good reason for believing that

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[65] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287, entered into force 21 October 1950, art 4 ("*GC IV*").

[66] Facts, [28].

[67] *Lubanga Confirmation Decision*, [209].

[68] Facts, [32].

[69] *GC IV* art 49.

[70] *GC IV* art 42.

[71] *Prosecutor v Delalić*, IT-96-21-T, ICTY, Trial Judgement, 16 November 1998, [574] ("*Delalić Trial Judgement*").

[72] *Delalić Trial Judgement,* [577].

[73] Facts, [9].

[74] Facts, [24].

[75] Facts, [30].

evacuation was justified by imperative military reasons and the detention of certain individuals was absolutely necessary for security in Brig.

4. Rios detainees were not denied procedural rights

Although detainees were held incommunicado, under *GC IV* art 5 the obligation to afford detainees the rights to give news of themselves to their families and to send and receive correspondence[76] may be derogated from where individuals are definitely suspected of, or have engaged in, activities hostile to the security of the State and the exercise of those rights would be prejudicial to State security. The individuals detained had engaged in hostile activities by participating in the violent protest in Brig and they were suspected of supporting opposition forces.[77] Affording detainees rights to communication while in detention would have prejudiced the security of Minos by making available to opposition forces information about the targets, methods and effectiveness of Minos' security investigations.

5. Minos authorities were not obligated to register detainees or to transmit information to Rios

The obligations to register detainees and forward information to the State of origin only arise where detention is longer than two weeks.[78] That Minos authorities did not perform these acts is consistent with their assertion that detainees were only held for a period of short duration.[79] In any event, unlike in the case of denial of detainees' procedural rights, there is no jurisprudence that has found the failure to register and notify to constitute the war crime of unlawful detention.[80]

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[76] *GC IV*, arts 25, 106, 107.

[77] Facts, [24], [30].

[78] *GC IV*, art 137. *AP I* art 32(2)(a).

[79] Facts, [32].

[80] See, eg, *Prosecutor v Delalić*, IT-96-21-A, ICTY, Appeals Judgement, 20 February 2001, [574], [322].

C. General Stun does not have individual or joint criminal responsibility

The material elements of the alleged crime were perpetrated by the Ministry of Interior,[81] over which General Stun did not exercise control. The Minos Armed Forces ("MAF"), over which General Stun did exercise control, were only involved in providing a protective escort. Only to the extent that General Stun can be found to have been an indirect co-perpetrator with the Minister for the Interior can General Stun be held liable.[82] However, there are no substantial grounds to believe General Stun was a party to a common plan, made an effective contribution to the alleged crime or intended the crime to take place.

1. There was a no common plan to unlawfully transfer or detain Rios nationals

There is no evidence of the existence of any express agreement between General Stun and any other person to unlawfully transfer or detain Rios nationals. While a plan may be inferred from the circumstances,[83] the available evidence would not support such an inference. The NSC directive to expel foreign nationals did not instruct security forces to perform unlawful acts or detain Rios nationals. The transfer and detention of protesters occurred as an unplanned response to the violent protest in Brig, which took-place after the order was issued.[84]

2. General Stun did not make an effective contribution to a crime

While an essential contribution may consist of "activating the mechanisms which lead to the automatic compliance with … orders and, thus, the commission of … crimes",[85] there is no evidence of any order issued by General Stun for the MAF to cooperate with unlawful transfer or confinement. Further, recent Pre-Trial decisions have required evidence that the suspect and co-perpetrator have performed their essential contributions in a coordinated

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[81] Facts, [30].

[82] *Prosecutor v Muthaura*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges, 23 January 2012, [296] ("*Muthaura Confirmation Decision*").

[83] *Muthaura Confirmation Decision*, [296].

[84] Facts, [30].

[85] *Muthaura Confirmation Decision,* [402].

manner.[86] Rios nationals were not detained or investigated by any organisations other than the Ministry of Interior.[87]

3. General Stun did not intend the crimes to take place

The requisite degrees of fault under the *Rome Statute* art 30 are intent or oblique intent.[88] When General Stun, as a member of the NSC,[89] directed the expulsion of Rios nationals held in Brig,[90] he had no knowledge and could not have intended that protestors would be arrested, transferred and detained. The mere fact that General Stun, through the NSC, subsequently became aware that the Ministry of Interior was detaining Rios nationals is not a basis for liability. Intent would require evidence that General Stun allowed ongoing detention with the knowledge that the detention was unlawful. General Stun may reasonably have believed that the detention was lawful since the evidence shows that other detention centres in Minos complied with laws governing detention, such as allowing visits by organisations assisting protected persons under *GC IV* art 142.[91]

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[86] *Muthaura Confirmation Decision,* [296]. *Prosecutor v Ntaganda*, ICC-01/04-02/06-36-Red, Decision on the Prosecutor's Application under Article 58, 13 July 2012, [67].

[87] Facts, [30].

[88] *Bemba Confirmation Decision*, [358]-[359].

[89] Facts, [5]-[6].

[90] Facts, [30].

[91] Facts, [25].

V. PRAYER FOR RELIEF

The defence respectfully requests this Honourable court to find that there are not substantial grounds to believe that General Stun is liable for the war crimes of:

1. attacks against medical units using the distinctive Red Cross Emblem;
2. attacks against civilian objects; and
3. unlawful deportation or transfer or confinement.

RESPECTFULLY SUBMITTED,

Counsel for the Defence.