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**Memorial of the Prosecutor**

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Submission to the International Criminal Court

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## STATEMENT OF RELEVANT FACTS

### 2001:

**September:** Peace agreement was signed between central Government of Vineland and three ethnic groups, which were fighting for independence, after four years of continuous fighting.

### 2002:

**January:** In January 2002, the Security Council authorized UNVINE to deploy 500 military personnel and 600 civilian personnel to Vineland to verify cessation of hostilities, to set up a security zone for civilians and refugees, and to make preparations for the forthcoming elections in the various regions. States Katonia and Ridgeland both deployed soldiers and paratroopers to the UNVINE mission in Vineland.

**June:** Katonia vetoed a draft renewing the UN peacekeeping mission in Bosnialand, but agreed to extend the deadline for 15 days pending further negotiation on the question of request for exemption of its soldiers from ICC jurisdiction

**July 10:** Unidentified armed groups in Vineland attacked UNVINE peacekeeping forces. Ten Katonia soldiers and 15 Ridgeland paratroopers were killed. Katonia and Ridgeland decided to send an additional 200 paratroopers to assist their soldiers and launched, in retaliation, a ten-day aerial bombing of the general area of the attacks.

As a result, numerous unexploded bombs left on the roads and fields, and farmlands, crops and livestock were destroyed. 10 days later they have bombed ANVA headquarters. But this time, during their action more than 300 civilians were killed, including women and children, and over 550 civilians were seriously injured.

**July 20:** On 20 July 2002, five pilots from Katonia and Ridgeland were captured by ANVA. Pilots, whose planes had encountered engine trouble and landed in a nearby marsh.

On the same day, 100 individuals went to a local police station where it was known that four Ridgeland military police, who had taken part in the earlier house-to-house searches, were stationed as trainers and consultants to the local police force. The four Ridgeland military police officers were recognized by several women in the group. They were overwhelmed and taken as a prisoners.

**August 1:** On the first day of August 2002, after Vineland became a State Party to the Rome Statute, Katonia and Vineland have signed so called article 98 agreement, which prevents any party to the agreement to surrender or transfer by any means to the International Criminal Court for any purpose, or to any other entity or third country, person of other party present in the territory of the other.

### **2003:**

**October:** Since there were serious political and legal problems in finding a third country that was at the same time acceptable to ANVA and willing to try the captured soldiers, after negotiations with SRSG, they have accepted to surrender the accused to the ICC at The Hague in October 2003. ANVA surrendered the accused to the ICC through the offices of Secretary General. Vineland issued an official statement that it had no intention to exercise jurisdiction over the accused. Neither Katonia nor Ridgeland made any statement on the surrender.

## **SUBMISSIONS**

According to the statement of all relevant facts mentioned above, considering the provisions of Rome Statute of ICC and Rules of Procedure and Evidence, prosecutor makes the following submissions:

1. The Court should find that it has jurisdiction to try the defendants for committing the war crimes.
2. The Court should find that war crimes, provided by provisions of article 8 of the Rome Statute, were committed at the soil of Vineland.
3. The Court should find that the case is admissible.

## I. THE COURT HAS JURISDICTION TO TRY THE DEFENDANTS FOR COMMITTING THE WAR CRIMES.

### I. a) The International Criminal Court – major objectives and jurisdiction

1. The Rome Statute of the International Criminal Court entered into force on 1 July 2002. The ICC is a permanent international tribunal that will try individuals responsible for the most serious international crimes - genocide, war crimes, and crimes against humanity, all defined in the court's treaty.

2. The ICC has jurisdiction over crimes committed by the nationals of governments that ratify the treaty, or in the territories of governments that ratify treaty. It can try any person responsible for such crimes, regardless of his or her civilian or military status or official position. Considering the non-States parties, general rule is, that ICC jurisdiction does not extend to non-States Parties. But there are two exceptions. The first is where a non-State Party refers a situation to International Criminal Court. The second exception is when citizen of non-State Party commits a crime within the Court's jurisdiction on the territory of State party.

3. Emphasising the primary responsibility of States to investigate and prosecute international crimes, the Statute provides that "a case is inadmissible before the Court where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution"\*1 ( **see list of citations and authorities, numb. 1**). Vineland issued an official statement that it had no intention to exercise jurisdiction over the accused.

4. Concluding the previous, ICC has jurisdictions over the crimes referred to in article 5 of the Statute, where the crime has been committed by a citizen of a State party in territory of a non-State Party, or the crime has been committed by a citizen of a non-State Party in the territory of a State Party.

### I. b) Jurisdiction *Ratione Materiae*: The crimes in Vineland are within the jurisdiction of the ICC

5. The International Criminal Court's *ratione materiae* jurisdiction under Article 5 of Rome Statute comprehends three international crimes: genocide, war crimes, and crimes against humanity. During the armed conflict in Vineland, between UN peacekeepers and ANVA, war

crimes were committed. Those crimes fall within the jurisdiction of ICC, in accordance with articles 5 and 8 of the Rome Statute.( Explanation of this crimes will be presented in the part II )

### **I. c) Jurisdiction *Ratione Temporis*: Time moment of crimes in Vineland**

6. This armed conflict between UNVINE and ANVA started on July10. The war crimes were committed after the Rome Statute of International Criminal Court has entered into the force. Crimes were committed in Vineland. Vineland became State Party to the Rome Statute before the crimes were committed.

7. The Rome Statute entered into the force on 1 July 2002. Since then, more than 85 states (including Vineland) have become Parties to the Statute. “A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5”. \*<sup>2</sup> Since the crimes were committed after this period, it is clear that Vineland was under ICC jurisdiction.

### **I. d) Jurisdiction *Ratione Personae*: Individual criminal responsibility**

8. Articles of Rome Statute confirms that the *Ratione Personae* jurisdiction covers natural persons: Article 25 is devoted to individual criminal responsibility, Article 26 is talking about exclusion of jurisdiction over persons under eighteen, and Article 27 provides that the Rome Statute shall apply equally to all persons without any distinction based on official capacity. So, personal jurisdiction refers what persons shall the Court have in jurisdiction. Since the crimes were committed by UN peacekeepers at the territory of Vineland and although they had some kind of official capacity, previous articles are showing that they are not out of Court’s jurisdiction.

### **I. e) Jurisdiction *Ratione Loci*: The territory where crimes were committed**

9. The territorial jurisdiction determines the territory over which crimes must be committed for the Court to exercise its jurisdiction. Crimes were committed at the soil of Vineland. “The ICC may exercise its jurisdiction at the territory of the State Party in which the conduct in question occurred”. \*<sup>3</sup> Since the Vineland became a State Party to the Rome Statute, it is clear that Vineland was under ICC jurisdiction.

## **I. f) Security Council Resolution 1234**

10. Regarding this problem, the UN Security Council On 12 July 2002 adopted unanimously resolution 1234 that effectively gave a twelve-month exemption from prosecution by the ICC to the peacekeepers taking part in UN peacekeeping operations coming from the country not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operations.

11. It is important to say, that the UN Security Council On 12 July 2002 adopted resolution 1422. Provisions of this resolution are exact with problem resolution 1234. So, everything what is going to be said below, equally applies to both resolutions.

12. The question here is the legality of the resolution 1234?. The resolution was made under Chapter VII of the UN Charter, which requires a "threat to international peace or security" for the Security Council to act. Katonia threat to veto peacekeeping operations does not constitute a threat to international peace or security.

13. Article 16 of Rome Statute "was seen as prudent mechanism only to be invoked on a case-by-case basis to a specific case or particular situations, rather than in general way as a means of creating a general exception for certain groups of individuals. It is also confirmed by the words of the Article 16 which specifically refer to "investigations" or "prosecutions" before the Court as opposed to a general term such as proceedings". \*<sup>4</sup>

14. Phrase, "no investigation or prosecution may be commenced or proceeded with," as it is said in Article 16, means the existence of investigation or prosecution that relates to a specific incident. According to Article 15, prosecutor must submit to the Pre-Trial Chamber a request for authorization of an investigation. Then, the Pre-Trial Chamber, after examination of the request, can authorize the commencement of the investigation.

15. It is clear, then, that Article 16 "does not sanction blanket immunity in relation to unknown, future events. By ignoring the "case-by-case" requirements of Article 16, the current text of 1234(1422) resolution does exactly the opposite to Article 16. It is subjugating the ICC to the politics of the Security Council."\*<sup>5</sup>

16. Security Council Resolution 1234 as such do not fit into the purposes that underline Article 16. "Therefore the ICC is able to disqualify SC resolutions 1234(1422) for being too vague and lacking in specificity in that it is not confined to any specific situation in view of the

fact that Article 16 of the ICC statute does not allow investigations and prosecutions in abstracto”.\*<sup>6</sup>

17. Rome Statute and especially provisions of Article 27 prohibits making distinctions on the basis of official capacity. Impunity must be stopped. It can be achieved only with strict adherence to the principle that no person is above the law. This includes peacekeepers as well.

### **I. g) Article 98 of the Statute and the Agreement between Government of Katonia and Government of Vineland**

18. In the international law there are various bilateral agreements. One of those is US bilateral agreement called " article 98 agreement". Mentioned agreement expresses US efforts to obtain, for their citizens, impunity from ICC jurisdiction. That agreement is exact with Katonia - Vineland agreement. Everything below equally applies to both agreements.

19. Considering the agreement between the Government of Katonia and the Government of Vineland and the agreements with the other countries, regarding the surrender of persons to the International Criminal Court, these agreements are contrary to the purpose of article 98(2) and do not legitimately fall within its scope. This is clear from the language of article 98(2).

20. The purpose of that agreement is in the exact opposite of SOFAs, the agreements that Article 98 (2) addresses.” Instead of allocating responsibility for investigating and prosecuting crimes committed by members of a sending state’s armed forces stationed in a receiving state and requiring each party to provide the other with assistance in such investigations and prosecutions, as in a SOFA, the sole purpose of this agreement is to prevent the International Criminal Court from exercising its jurisdiction.”.\*<sup>7</sup>

21. Such agreement do not fall within the provisions of article 98(2). The effect of that agreement is to prevent States Parties to fulfill their obligations under the Rome Statute. As such, that agreement constitute a breach of articles 27, 86, 87, 89 and 90 of the Rome Statute. It is clear from the text of those Articles. It also constitute a breach of article 18 of the Vienna Convention on the Law of Treaties. That Convention applies to Rome Statute States Parties.

22. Clearly, agreements concluded in line with the Katonia interpretation of article 98(2) would lead to “such an absurd or unreasonable result, by allowing non-State parties to subvert the fundamental principle of the Rome Statute that anyone--regardless of nationality--committing

genocide, crimes against humanity, or war crimes on the territory of a State Party is subject to the jurisdiction of the International Criminal Court”.\*<sup>8</sup>

23. Article 27 (1) provides that the Rome Statute "shall apply equally to all persons without any distinction based on official capacity". Article 27 (2) states that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". It can be said that the object and purpose of the Rome Statute is within the content of Article 27. Nobody can be immune for committed crime, especially not for crimes like genocide, crimes against humanity or war crimes. Under Articles 12 and 26, jurisdiction of the Court extends to the following - to any of the mentioned crimes, committed by any person over 18 age, in the territory of a State party, regardless of nationality of the perpetrator.

24. But "Article 98" agreement does exactly the opposite. It stops the ICC from exercising its primary function, when a State is unable or unwilling to investigate a case, and that function is to prosecute offenders for committed crimes.

25. The Katonia “article 98” agreement, also do not fit within the purview of article 90 of RS. That agreement do not seek return of the individuals for purpose of investigation or prosecution for potential international crimes, but only to ensure impunity.

26. “Article 98 (2) applies to existing SOFAs, not to SOFAs entered into after a state has become a party to the Rome Statute. Nevertheless, even if the International Criminal Court were to hold that this provision also applies to renewed or new SOFAs, those SOFAs would, of course, have to be consistent with the Rome Statute and other international law. In addition, a state entering into a Katonia(US) impunity agreement that had previously signed the Rome Statute, would be acting in a manner that would defeat the object and purpose of the Statute and, therefore, would be in violation of its obligations under customary international law governing treaties”.\*<sup>9</sup>

## **I. h) Conclusion**

27. Since the Katonia and Ridgeland soldiers, as accused, were surrender to the ICC at The Hague, and Katonia and Ridgeland did not made any statement about that, the ICC prosecutor is fully empowered to prosecute those perpetrators.

## II. THE COURT SHOULD FIND THAT CRIMES WITHIN ITS JURISDICTION WERE COMMITTED AT THE SOIL OF VINELAND

### II. a) The nature of armed conflict

28. At the times relevant to this memorial, a state of armed conflict existed in the territory of Vineland. All acts or omissions set forth as war crimes recognized by Article 8 of the Rome Statute occurred during that armed conflict, and after the conflict, when Katonia and Ridgeland did not suffer armed attack.

29. A central element of the armed conflict is the existence of "parties" to the conflict. According to the International Committee of the Red Cross, an internal armed conflict involves "fighting on the territory of a State between the regular armed forces and rebel forces- or just armed groups, or between armed groups fighting one another. To be considered an armed conflict, fighting must reach a certain level of intensity and extend over a certain period of time."\*<sup>10</sup>

30. This opinion was also represented by ICTY, saying that "armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".\*<sup>11</sup>

31. Regarding mentioned definitions, it is clear that conflict in Vineland was at the level of an internal armed conflict. The armed conflict in Vineland had its intensity (number of casualties), had lasted for a certain period (four years) and it had involved, among others, ANVA, group from the north of Vineland, which was fighting for its independents and Vineland government.

32. On the other hand, considering international armed conflicts, the Appeals Chamber of the ICTY stipulated that: "It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if another State intervenes in that conflict through its troops, or alternatively if some of the participants in the internal armed conflict act on behalf of that other State". \*<sup>12</sup>

33. At the moment when UN peacekeepers attacked ANVA, that attack transformed this conflict to internationalized non-international armed conflict (considering the international dimension of UN peacekeeping mission). It is obvious that UNVINE forces were attacked, and they have suffered casualties. Considering the component of proportion they had a right to use force to protect themselves (right to self-defense) and UN staff during the armed conflict. But UNVINE overstepped their right to self-defense. Nobody authorized UNVINE, especially Katonia and Ridgeland, or gave them an order to use measures like they did. Certainly not in retaliation.

34. The internationalized non-international armed conflict existed in Vineland. That fact can be proved by following:

- An armed conflict took place in the territory of Vineland, between UN peacekeepers and earlier mentioned, organized armed group ANVA
- ANVA, as organized armed group, was under responsible command. A party to an armed conflict has a military-like formation with a certain level of organization and command structure. Both parties had it. According to reports from reputable NGO's, several ANVA training camps were destroyed during the Katonia and Ridgeland action. That proves that ANVA was organized armed formation.
- ANVA was able to carry out and exercise a full control over a part of their territory

35. Considering this and the mentioned facts, it is clear that, there was an internationalized non-international armed conflict in Vineland, and that some serious war crimes were committed during that conflict.

## **II. b) The casualties and destroyed objects in this conflict**

36. All the victims in this war crimes were persons protected under one or more of the Geneva Conventions – the civilians. Besides, each party in the armed conflict can attack military objects of the opponent, but it is prohibited to direct attacks against civilians. The perpetrators, although aware of this, have committed their crimes.

37. The Fourth Geneva Convention states that "Collective penalties and likewise all measures of intimidation or of terrorism are prohibited"\*<sup>13</sup>, while Additional Protocol II prohibits "acts of terrorism against persons not or no longer taking part in hostilities"\*<sup>14</sup>. The main aim is to emphasize that neither individuals, nor the civilian population may be subject to collective punishments. Both Additional Protocols to the Geneva Conventions also prohibit acts aimed at

spreading terror and fear among the civilian population. "The civilian population as such, as well as individual civilians, shall not be the object of attack".\*<sup>15</sup>

38. These provisions are a key element of the way military operations are carried out. They prohibit acts of violence during armed conflict that do not provide a definite military advantage. By conducting house-to-house raids, by detaining approximately 50 men and 20 boys and torturing them (one of the tortured men died) , the Katonia and Ridgeland soldiers exceeded their duties and their rights..

39. Under the definition provided for by Article 52(2) of Protocol I, "an object must cumulatively fulfill two criteria to be a military objective. First, the object has to contribute effectively to military action of one side, and second, its destruction, capture or neutralization has to offer a definite military advantage for the other side".\*<sup>16</sup> That was not the case in Vineland

## **II.c) Charges**

Considering all the above mentioned facts, prosecutor is accusing 4 military police officers that they have committed war crimes defined in article 8: 8/2/a/vii, 8/2/a/ii, 8/2/a/iv, 8/2/b/xvi.

### **Count 1**

(torture)

40. On 10 July 2002 4 military police officers were part of a squad that cordoned off the surrounding areas of attack and conducted house-to-house raids detaining approximately 50 men and 20 boys. These detainees were taken to a detention compound. Four of the men were tortured in an isolated area of the camp. One of the tortured men died.

41. The crime of torture was perpetrated, executed and carried out by following:

- the cruel and inhumane treatment of civilians in detention compounds including torture

By these actions 4 military police officers committed:

**Count 1** – War crime, - Torture or inhuman treatment; recognized and punishable under Article 8/2/a/ii of Rome Statute of ICC.

## **Count 2**

(unlawful deportation and confinement)

42. By conducting house-to-house raids, and putting civilians into detention Katonia and Ridgeland soldiers have arrested approximately 50 men and 20 boys which were civilians protected under Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

43. The crime of unlawful deportation and confinement was perpetrated, executed and carried out by following:

- the deportation and expulsion of civilians from their homes and villages by force, intimidation and coercion

By taking part in this actions 4 military police officers committed:

**Count 2** – War crime, - Unlawful deportation or transfer or unlawful confinement; recognized and punishable under Article 8/2/a/vii of Rome Statute of ICC.

## **Count 3**

(property destruction)

44. On 10 July 2002, in retaliation for suffered casualties, Katonia and Ridgeland soldiers have conducted a ten-day aerial bombing of northern territory of Vineland and house-to-house raids. According to reports from reputable NGO's, as a result of this actions, thousands of acres of farmland were ruined and large quantities of crops and livestock were also destroyed. It is important to say that, this destructions were not justified by military necessity

45. The crime of property destruction was perpetrated, executed and carried out by following:

- destructing the property of civilians including crops and livestock.

By taking part in this actions 4 military police officers committed:

**Count 3** – War crime, - Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; recognized and punishable under Article 8/2/a/iv of Rome Statute of ICC

## **Count 4**

(stealing the property )

46. During house-to-house raids military police officers have stolen personal property from the civilians that lived in those houses. This was proved by various NGO's. Many families complained to representatives of various NGO's that personal property had been stolen after the Katonia and Ridgeland soldiers removed the cordon.

47. This crime was, executed and carried out by following:

- stealing, plundering and looting of the property of civilians including dwellings and personal property

By taking part in this actions 4 military police officers committed:

**Count 4** - War crime, - Pillaging a town or place, even when taken by assault; recognized and punishable under Article 8/2/b/xvi of Rome Statute of ICC

48. Considering the arrested pilots, prosecutor is accusing arrested pilots that, they have committed war crime defined in article 8: 8/2/b/iv .

## **Count 5**

(attack on civilian objects, destruction of civilian population and environment)

49. On 10 July 2002 Katonia and Ridgeland soldiers, in retaliation for suffered casualties, have conducted a ten-day aerial bombing of northern territory of Vineland. On 20 July 2002, Katonia and Ridgeland soldiers have bombed ANVA headquarters. When bombing stopped, numerous unexploded bombs left lined the roadsides and in the fields. Instead of destroying ANVA headquarters HRM reported that this bombing had in fact destroyed three villages, killing three hundred civilians, including women and children, and seriously injuring 550 more. They had no proof that those object are used, or they were used by military forces. Although they knew that, this attack would cause damage to civilians and civilian objects, they have launched the attack

50. The crime of attack on civilian objects, destruction of civilian population and environment was executed and carried out by following:

- destruction, killing and willful damaging of the civilians, civilian objects and environment

By these actions arrested pilots committed:

**Count 5** – War crime, - Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; recognized and punishable under Article 8/2/b/iv of Rome Statute of ICC

### III. THE COURT SHOULD ACCEPT THE CASE AS ADMISSIBLE.

51. For all the reasons stated above, the Court has to accept the case as admissible. The prosecutor has shown that ICC has jurisdiction, that war crimes within its jurisdiction have happened and that ICC is empowered to prosecute the perpetrators.

## IV. LIST OF CITATIONS AND AUTHORITIES

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2. - Article 12 (1) of Rome Statute
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7. - Amnesty International: ICC, US efforts to obtain impunity for genocide, crimes against humanity and war crimes, July 2002. -  
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10. – Refugees International; <http://www.refugeesinternational.org/content/article/detail/4962>
11. – United Nations International tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-94-1-AR72, October 2, 1995
12. - *Prosecutor v. Tadić*, T-94-1-A, Judgement, 15 July 1999, para. 84 (hereafter *Tadić Appeal Judgement*).
13. - Article 33 of The Fourth Geneva Convention
14. - Article 4 of Additional Protocol II
15. - Additional Protocol I, Article 51(2) and Additional Protocol II, Article 13(2).
16. - Article 52(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

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20. – "Introduction to international criminal law" – M. Cherif Bassiouni
21. - Rome Statute of the International Criminal Court
22. - Rules of Procedure and Evidence
23. – Fond za humanitarno pravo – Haski Tribunal, Publikum, Beograd 2001
24. - Vienna Convention on the Law of Treaties
25. - HUMAN RIGHTS WATCH - Bilateral Immunity Agreements, June 20, 2003
26. – THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, Volume I and II, Published in the United States by Oxford University Press Inc., New York, 2002
27. - Q&A: U.S. Bilateral Immunity Agreements (or so-called "Article 98" Agreements)
28. - EXCERPTS FROM THE 5209TH MEETING OF THE UN SECURITY COUNCIL - PROTECTION OF CIVILIANS IN ARMED CONFLICT – 21 JUNE 2005

## V. LIST OF ABBREVIATIONS

ICC	-	INTERNATIONAL CRIMINAL COURT
UN	-	United Nations
NGO	-	Non-governmental organization
RS	-	Rome Statute
SOFA	-	Status of Forces Agreements
HRM	-	Human Rights Monitors