

**2nd RED CROSS
INTERNATIONAL HUMANITARIAN LAW (IHL)
MOOT(2008)**

**THE PROSECUTOR
v.
GENERAL BUTCHER,
MAJOR GENERAL MARSHALL**

MEMORIAL FOR THE RESPONDENT

FUDAN UNIVERSITY LAW SCHOOL

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PLEADINGS AND AUTHORITIES

I. GENERAL BUTCHER IS NOT LIABLE FOR CRIME OF GENOCIDE

A. The incidents on 7 and 8 January 2007 do not constitute the crime of genocide since the *mens rea* and the *actus reus* are missing.

The crime of genocide requires *the mens rea* of the offence, which is described as the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such; and *the actus reus* of the offence, which consists of one or several of the acts enumerated under the Statute.¹

The special intent or *dolus specialis* demands that the perpetrator clearly seeks to produce the act charged.² However, the crucial element of genocidal intent is not satisfied here. If the assumed genocidal intent had existed, Delphon youth shouldn't have spared the whole night of 7 January and the entire daytime of 8 January for Rumons to flee away, which apparently contradicts the genocidal intent. The successful flight of many Rumon men during the period demonstrates that the "wider-ranging intention³" or the "ulterior motive⁴" lacks here. The afterwards incidents were merely a response to those who refused to flee away from Suvidesh as warned rather than intended genocide. The Rumon men were killed for their disobedience to Delphon youth instead of their membership of the particular group⁵. Moreover, the prosecutor has no proof that the attacked women and children were caused serious bodily or mental harm which satisfies the element *actus reus*.

B. General Butcher is not liable for the crime of genocide since he didn't directly or publicly incite others to commit any crimes.

Incitement is defined as encouraging or persuading another to commit an offence.⁶ The element of **direct** incitement requires specifically urging another

¹ See *Prosecutor v. Krstic* (Judgment), No. IT-98-33-T ('*Krstic*') Para. 542

² See *Prosecutor v. Akayesu* (Judgment), ICTR-96-4-T Para. 498

³ See *Prosecutor v. Jelisi* (Judgment), ICTY- IT-95-10-T Para. 79

⁴ See *Akayesu*, Para. 522

⁵ See *Krstic* (Judgment) Para. 582

⁶ See Andrew Ashworth, *Principles of Criminal Law*. Clarendon Press, Oxford: 1995, Para. 62, Para. 462 *Akayesu*, Para. 555

individual to take immediate criminal action rather than merely making a vague or indirect suggestion⁷. The two-page message only called on Delphons to assert them politically and economically.⁸ Many methods could be adopted to achieve the goal so that no definite causation can be reached between the message and the specific offence.⁹ No explicit implication thereof could be immediately grasped¹⁰ by the audiences. Therefore, it shouldn't be viewed that the incidents were directly provoked by the message.

The **public** element is defined with reference to the circumstances of the incitement—for instance, where the incitement occurred and whether or not the audience was selected or limited.¹¹ The two-page message of General Butcher was only distributed to the cadres of SNA, not all the SNA members or Delphons, on the conference on 1 January 2007 which proved that the audience was selected and limited. Furthermore, the conference wasn't public occasion and the content or documents of the conference weren't available to the public.

II. GENERAL BUTCHER IS NOT LIABLE FOR CRIMES AGAINST HUMANITY

Crimes against humanity refer to acts committed as part of a widespread or systematic attack¹², namely, in a systematic manner or on a large scale¹³, which exclude isolated or random acts from the notion¹⁴.

The concept of **widespread** may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a

⁷ See article 2(3)(t) of Draft Code of Crimes Against the Peace and Security of Mankind; Report of the International Law Commission to the General Assembly. 51 U.N.ORG.A Supp. (No. 10). at 26. U.N. Doc. N51/10(1996).

⁸ See Moot problem, Para.3

⁹ See *Akayesu*, Para.557

¹⁰ See *Akayesu* Para.558

¹¹ See *Prosecutor v. Kajelijeli* (Judgment), ICTR-98-44A-T, Para.851

¹² See article 7 (1) of the Rome Statute

¹³ See article 18 of International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind,

¹⁴ See *Prosecutor v. Tadic* (judgement), ICTY-IT-94-1-T, Para.648

multiplicity of victims.¹⁵ The victims were mainly Rumons and the incidents happened only once.

The concept of **systematic** may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.¹⁶ The incidents on 7 and 8 January 2007 were random act without organized or regular pattern or as part of a broader plan, thus the incidents can't be held as crimes against humanity. General Butcher wasn't involved directly or indirectly in the incidents at all, so he is not liable for crimes against humanity.

III. GENERAL BUTCHER SHOULD NOT BEAR SUPERIOR RESPONSIBILITY FOR GENOCIDE OR CRIMES AGAINST HUMANITY

According to Rome statute, the superior responsibility requires the crime committed by the subordinate. In light of the foregoing, the incidents were not genocide or crimes against humanity so that General Butcher should bear no superior responsibility.

Even if the crime of genocide and crimes against humanity existed, General Butcher can't be held superior responsibility

1. The superior-subordinate relationship didn't exist¹⁷

The factor that determines liability for the particular crime is the actual possession or non-possession of powers of control over the actions of subordinates.¹⁸ The level of control required was defined as the actual authority over the offenders to issue orders to them not to commit illegal acts.¹⁹ General Butcher stated that SNA organizational structure didn't contain any official youth wing. It can be accordingly believed that SNY was established by the Delphon youth spontaneously and General Butcher didn't have material authority to prevent SNY from committing crimes.

2. General Butcher had no actual or potential knowledge of crimes perpetrated or

¹⁵ See *Akayesu*, Para.580

¹⁶ See *Akayesu*, Para.580

¹⁷ See *Prosecutor v. Aleksovski* (Judgment), ICTY-IT-95-14/1-T('Aleksovski'), Para.78

¹⁸ See case *^elebi^i*, Para. 370, pp. 136-137.

¹⁹ See *Aleksovski*, Para.77

about to perpetrate²⁰.

The maligning leaflets and posters were seen as Delphons' expressions of anger by General Butcher. No linkage can be inevitably reached between the messages and the crimes, so General Butcher had no potential knowledge of crimes about to perpetrate. Since General Butcher had no *de facto* relationship with the Delphon youth, he could get the message of the incidents only from the media, which wasn't available until 9 January 2007, so General Butcher had no actual knowledge of the incidents.

IV. MAJOR GENERAL MARSHALL IS NOT LIABLE FOR THE WAR CRIMES OF ATTACKING THE PROTECTED OBJECTS FOR THE INCIDENTS OF 10 FEBRUARY 2007

The war crimes against the protection of cultural property is defined in Rome Statute as "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives."²¹ The missing of two crucial elements made Major Marshall not responsible for the crime.

A. The shrine should not have been military object when attacked.

A centre containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material carried on within the centre.²² The fact that Marshall was sent to Suburbia to help the rebel forces by the government of Megriland made it apparent that the incidents on 10 February 2007 were international armed conflicts²³. The Suburbian forces stayed in the shrine for a certain period of time from early that evening to nine o'clock, which

²⁰ See *Prosecutor v. Delalic* (Judgment), ICTY-IT-96-21-T, Para.346

²¹ See article 8(2)(b)(ix) of Rome Statute

²² See article 8.3 of Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954

²³ See footnote 743 of Case (*Prosecutor v. Strugar*) No IT-01-42-T.

proved that the shrine was used for military purposes when attacked.

B. The special intent or *dolus specialis* that war crimes should embody is missing.

The special intent lies in intentionally directing attacks. It is significant to prove that the accused did have the hostility to damage the religious building for the purpose of using them in support of the military effort so as to prove the existence of the special intent.²⁴ As to the geographic situation, the only approach to the open space is through the two narrow passages from both sides of war since the southern freeway towards the southern end is an impasse. That Marshall aimed to attack the Suburban forces in the shrine made it inevitable to fire through the western or the eastern passage. No matter which passage was taken, the damage to the shrine was equivalent. Therefore, the damage of the shrine was made with no special intent or hostility directed against the shrine.

To conclude, the firing of Marshall's force was of no special intent and the shrine was regarded as a military object. Thus Major General Marshall was not liable for war crimes against protection of the cultural objects for the incidents of 10 February 2007.

V. GENERAL MARSHALL IS NOT LIABLE FOR WAR CRIMES OF EXCESSIVE INCIDENTAL DEATH, INJURY OR DAMAGE FOR THE INCIDENTS FROM 13 MARCH TO 15 MARCH 2007

According to the Rome Statute, the serious crime of environmental destruction means 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.²⁵

A. The behavior of shelling the oil field was a normal military counterattack, not an intentional attack.

During war time, it's natural to beat back when the nation's interest is injured by

²⁴ See article 16 of Additional Protocol II to the Geneva Conventions

²⁵ See article 8(2)(b)(iv) of Rome Statute

the opposite. When General Marshall attacked the oil field, his intent was for military strategy and military need instead of destroying the environment. Thus, what he had done to the oil fields could not fall within the element of “intentionally”.

B. The element of excessive is not satisfied.

Although General Marshall commanded to shell the oil field, we could not assess whether the military interest was excessive or not compared with the damages. What’s more, the behavior of shelling is normal for military.

C. The element of widespread and long-term is not satisfied.

The term widespread, long-term is vague because widespread encompasses an area on the scale of several hundred square kilometers while long-term means lasting for a period of months, or approximately a season.²⁶ Concerning the facts, the fire continued for only several days near the borders of the two countries, no evidence shows that the behavior has caused widespread, long-term damage. Experts’ preliminary judgment is not inevitably consistent with the factual situation.

PRAYER

For the foregoing reasons, the respondent respectfully requests this Honorable Court to adjudge and declare that:

General Butcher and Major General Marshall do not incur any criminal responsibility for genocide, crimes against humanity, war crimes against protection of cultural property and environment in the indictments against the accused persons should be dismissed.

**RESPECTFULLY SUBMITTED,
AGENTS FOR THE RESPONDENT**

²⁶ See Commentary on the Additional Protocols I to the Geneva Conventions Para. 417