
7th RED CROSS

INTERNATIONAL HUMANITARIAN LAW MOOT

PROSECUTOR

V.

MR. REED

MEMORIAL FOR THE PROSECUTOR

XIAMEN UNIVERSITY

Chen Siya & Peng Yicheng

(3931 words)

TEAM NUMBER: BJIHL1311

I. PRELIMINARY MATTERS

1. Common Elements to All Crimes

Elements of war crime provided for Article 8(2)(a) and (b), require the existence of an armed conflict and a nexus between the alleged crime and an armed conflict.¹

1.1. Existence of the International armed conflict

An armed conflict is considered to be in international character if it takes place between two or more states.² An internal armed conflict in the territory of a country will turn into international in character if another country intervenes through sending troops to the armed conflict.³ In this case, since PAB sent 2000 troops to support DKF, the armed conflict in Kebia was of international in character.

1.2. Nexus between war crime and the IAC

First, war crimes charged with General Reed were conducted in the context of an armed conflict. Concerning nexus between a conduct and the armed conflict, ICTY finds that in determining whether the acts are sufficiently related to the armed conflict, the following factors need to be taken into account: the perpetrator is a combatant; the victim is a member of the opposing party; the act is to serve the ultimate goal of a military campaign; the crime is committed as part of or in the context of the perpetrator's official duties.⁴

Accordingly, factors in present case are: General Reed was a combatant; victims were non-combatants; acts committed were serving control over Kebia; the crimes were committed in the context of General Reed's duty as a military leader. It proves that there exists nexus between the conduct of General Reed and the IAC.

Second, General Reed was fully aware of the existence of an armed conflict. In determining whether the perpetrator was aware of the factual circumstances, it is

¹ Elements of Crimes, Art. 8(2)(a) and (b).

² ICJ, Armed Activities on the Territory of the Congo (*Democratic republic of Congo v. Uganda*), Judgment, I.C.J. Reports 2005, 19 December 2005).

³ Ibid.

⁴ ICTY, *Prosecutor v. Kunarac* (AJ), Case No. IT-96-23&23/1, para.59.

stated that the leader of the military group as a party of the armed conflict were fully aware of the existence of the armed conflict, and the attacks charged in the crimes were part of the strategic common plan to secure control over the area.⁵ Accordingly, General Reed as a military commander was participating in the armed conflict in Kebia so that he was fully aware of the factual circumstances. Also, acts charged in three crimes would obviously contribute to the control over Kebia.

II. WAR CRIME OF EXCESSIVE INCIDENTAL DEATH, INJURY OR DAMAGE

1. General Reed Committed War Crime of Excessive Incidental Death, Injury, or Damage

Apart from the common elements stated above, war crime of excessive incidental death, injury or damage still requires the following elements:

1.1. The attacks caused excessive death, injury and damages

General Reed violated the principle of proportionality. The principle of proportionality required that any incidental damage to civilians must within the proportion to the direct military advantage gained by the military attack.⁶

Military objectives are those which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction offers a definite military advantage.⁷ The BAS factory was used to produce the explosive devices and made an effective contribution to military action, and the destruction of it would offer a definite military advantage.⁸ Bing, as a commander of DKF (a paramilitary group in Kebia), made an effective contribution to the military action and his death offers a definite military advantage. Therefore, the factory and Bing can be

⁵ ICC, *Prosecutor v. Katanga*(TJ), Case No. ICC-01/04-01/07, para.385-388.

⁶ ICTY, *Prosecutor v Kupreški*•(TJ), Case No. IT-95-16-T, para.524.

⁷ API GC, Article 52(2).

⁸ Moot Problem, para.18-25.

justified as military objectives. The concrete and direct military advantage anticipated here was the destruction of the factory and the killing of Bing.

Civilians are persons who are not, or no longer, members of the armed forces.⁹ The workers in the factory, Bing's family and other residents in this building were civilians, the death and injury of who shall be justified as incidental loss.

General Reed failed to keep balance between the military advantage and incidental loss. In determining whether an attack was proportionate, it is necessary to examine whether a reasonable well-informed commander make a balanced decision between the military advantage and incidental loss.¹⁰

In reference to the Israel attack on the Gaza police force, the Mission¹¹ claimed that the attack was disproportionate for the Israel party failed to strike an acceptable balance between the direct military advantage anticipated (i.e. the killing of those policemen who may have been members of Palestinian armed groups) and the loss of civilian life (i.e. the other policemen killed and members of the public who would inevitably have been present or in the vicinity). Accordingly, the workers were inevitably present or in the vicinity of the factory at the time of attack, and it was the same with Bing' family and other residents in Bing's apartment. The loss of these civilian lives was not balanced with the military advantage anticipated (i.e. the destruction of the factory and the killing of Bing). Thus, the attacks were disproportionate.

1.2. General Reed should have known the attacks would cause excessive damages.

⁹ICTY, *Prosecutor v Blaškić* (TJ), Case No.IT-95-14-T, para.751.

¹⁰ICTY, *Prosecutor v Garlić* (TJ), Case No.IT-98-29-T, para.58.

¹¹ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, para.432-437

The negligence standard of "should have known" is met when the perpetrator lacked such knowledge because he did not act with due diligence in the relevant circumstances.¹² General Reed should have known that the attack would cause excessive damages if he had taken due diligence, i.e. his duty to take precautions in the attacks. The precautions General Reed should take include: (i) the choice of method of attack; (ii) effective advanced warning before attack.¹³

(i) General Reed failed to choose proper methods of attack to be used to prevent or minimize loss or damage to the civilians.¹⁴ According to the Blaškić case, the method used in an attack is important in determining whether the attack is proportionate.¹⁵ Hence, if there is a choice of methods of attack available, a commander should select those which are most likely to avoid, or at least minimize, incidental damage.¹⁶

First, in order to avoid hitting the people working in the factory, the attacks shall take place on days or at times when the factory were empty; the desired effect is to destroy the factory without killing the workers.¹⁷ However, General Reed chose to attack the factory when the workers were still in the factory which General Reed should have known from the observation of the reconnaissance. Such attack caused excessive damages to the civilians.

Second, the method of attack against Bing was deemed to be disproportionate. In order to kill Bing, General Reed could have chosen another method which would not imperil the civilians and civilian objects. Additionally, the time of attack¹⁸ General

¹² *Prosecutor v. Katanga* (TJ), ICC-01/04-01/07-717 01-10-2008 1/226 VW PT, para.252.

¹³ API GC, Article 57.

¹³ ICTY, *Prosecutor v Blaškić* (TJ), Case No.IT-95-14-T, para.50.

¹⁴ API GC, Article 57(2)(a)(iii).

¹⁵ ICTY, *Prosecutor v Blaškić* (TJ), Case No.IT-95-14-T, para.507.

¹⁶ ICTY, "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia", para.21.

¹⁷ ICRC, Commentary on Protocol I, para.2200.

¹⁸ Moot Problem, para.26-27.

Reed chose to attack Bing's building at the time when the residents were asleep, which gave rise to the risk of excessive civilian casualties.

(ii) General Reed failed to give effective advance warning to the workers. In the attack of the factory, the surprise was not a condition of its success.¹⁹ Hence, General Reed should give prior warning to the workers before the attack, which would definitely minimize the incidental damage to the civilians.

2. General Reed should bear individual responsibility as a co-perpetrator

Liability as a co-perpetrator indicates a person shall be criminally responsible for a crime if that person jointly with another or through another person to commit a crime.²⁰

2.1. Existence of a common plan and essential contribution of the co-perpetrator

Objective elements required a co-ordinate liability are: (i) Existence of a common plan between two or more persons²¹; (ii) Co-ordinated essential contribution by each co-perpetrator resulting in the realization of the material elements of the crime.²²

(i) As for the first element of the criminality, the common plan does not need to be specifically directed at the commission of the crime.²³ If the plan include the possibility that the crime would be committed, it is defined as directed at the commission of the crime.²⁴ In judgment of *Katanga* case, even the plan did not set out to recruit children under 15, the recruitment of “ young people” in their plan contain a risk the accused willingly took.²⁵ Accordingly, the Thunderstorm Operation included attacking many targets all over the city where might have high density of

¹⁹ ICRC, Commentary on Protocol I, para.2223.

²⁰ ICC statute, Article 25(3)(a).

²¹ *Prosecutor v. Lubanga*(TC), ICC-01/04-01/06-803-tEN, para.361-366 .

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

civilians. Such plan had attributed to the risk of excessive damage to civilians and civilian objects.

(ii) As for the second element of crime, “essential” was established if the perpetrator have the power to frustrate the plan. The determination of whether the particular contribution of the accused results in liability as a co-perpetrator is based on the division of tasks. Accordingly, the tasks assigned to General Reed were to plan and execute of the Thunderstorm Operation, which was essential to the common plan.

2.2. General Reed and other co-perpetrators were aware of committing the crime

General Reed fulfilled the required subjective elements²⁶, which could be demonstrated as follows:

(i) The accused and the other co-perpetrators were mutually aware of and accepted the excessive damage that will occur in the ordinary course in implementing their common plan. “Ordinary course” is the the consequence participants anticipated may occur in the future based on their own knowledge. At the time the co-perpetrators agreed on a common plan throughout its implementation, General Reed and his co-perpetrator mutually accepted the existence of the risk that excessive damage would occur, with the knowledge large number of civilians existed in the factory and Bing’s apartment.²⁷

(ii) General Reed was aware that he provided an essential contribution to the implementation of the common plan. General Reed, as the commander of AAF, took direct participation in the attacks against the factory and Bing.²⁸ Hence, General Reed was aware of his essential contribution to the implementation of the common plan.

²⁶ *Prosecutor v. Lubanga*(TC), ICC-01/04-01/06-803-tEN, para.1008.

²⁷ Moot problem, para.25,27.

²⁸ *Prosecutor v. Katanga*(PC), ICC-01/04-07, para,402.

For the foregoing reasons, General Reed should bear individual responsibility in the war crime of excessive damage to civilians.

III. WAR CRIME OF ATTACKING HOSPITAL WHICH IS A PROTECTED OBJECTIVE

1. General Reed Committed War Crime of Attacking A Hospital Which is Not A Military Object

Besides common elements mentioned above, objective and subjective elements are to be satisfied to prove that General Reed was guilty for the war crime under the statute.

1.1. The objective of the attack was a hospital, which was not a military object

Element of the crime requires the objective of the attack not to be a military object and was targeted in the attack. The objective of attack shall be limited strictly to military objectives.²⁹ Moreover, in case of doubt whether an object was a protected object is being used to make contribution to military action, it shall be presumed not to be used.³⁰

General Reed targeted at the hospital which was not a military objective. The existence of combatants does not permanently turn the nature of a hospital into a military objective. In *Gali* case, although there existed fire from the hospital toward its enemies on its ground, the hospital is still recognized as commit “military”, rather than “hostile” or “harmful” acts. Since only “harm” and “harmful” acts turn a hospital to a military object, the hospital is not a legitimate military object. Additionally, the existence of small amount of combatants does not change the nature of a civilian

²⁹ API-GC, Article 52(2).

³⁰ ICRC, Commentary on GC IV, Article 18.

object.³¹ Accordingly, the Bethuisian soldiers in the hospital could not be seen as committing hostile or harmful act since they did not commit aggressive military activity. Also, they don't change the nature of the hospital since there was a compound of combatants and civilians.

1.2. General Reed directed an attack against the municipal hospital

“Attack” is defined as of violence against the adversary, whether in offence or in defence, and Article 8(2)(a)(ix) does not require material result.³² The expression “direct the attack” requires that the protected objectives be the primary object of the attack.

In determining whether the attack was targeting towards a hospital, the destructive consequence on hospital can be taken into consideration.³³ In *Garli* case, although some of the fire was aimed at enemy army around hospital with military necessity. It was later proved that attacks also caused the death and injury of civilians present at hospital, significantly damaged its infrastructure, and substantially reduced the medical facility's ability to treat patients.³⁴ Depending on above evidences, it is sufficient to believe that hospital was also targeted, resulting in civilian casualties.³⁵ Accordingly, although Bethuisian soldiers were witnessed taking refuge in the hospital, it was found that innocent people in hospital were killed or injured and most hospital's equipment was destroyed due to the attack. For foregoing evidence, Municipal hospital was the objective of the attack in General Reed's case.

Besides, referring to circumstance concerning one's intent, it is unnecessary to prove if there was intent to commit the crime.³⁶ It can also be proved if the perpetrator

³¹ ICTY , *Prosecutor v Blaškić* (TJ), Case No. IT-98-29-A, para .

³² *Elements of crime under the Rome statute of the International criminal court: sources and commentary*, Cambridge university Press, Cambridge 2003, p.452 in relation with p.456

³³ ICTY , *Prosecutor v Blaškić* (TJ), Case No. IT-98-29-A, para.349 .

³⁴ ICTY , *Prosecutor v Tadić* (TJ), Case No. IT-98-29-T, para.50.

³⁵ ICTY , *Prosecutor v Tadić* (TJ), Case No. IT-98-29-T, para.509.

³⁶ ICTY , *Prosecutor v Bridjanin* (TJ), Case No. IT-99-36-T, p.29.

intentionally targeted an object which involves a protected one. In *Blaškić* case, he was found guilty for he intended the group of people with only small amount of combatants in a large number of civilians the object of an attack. In this specific case, targeting at the Muslim combatants involve targeting civilians as they were involved in the combination. Respect to our case, Bethusian soldiers was a compound with civilians and was inside the hospital so they cannot be separated from the hospital. To target Bethusian soldiers would involve the hospital because they were inside the hospital, so even without criminal motive, intention is established.³⁷

In conclusion, General Reed directed an attack against the hospital which was not a military object prove that elements of crimes were fulfilled

2. General Reed Should Bear Individual Responsibility of Ordering The Commission of The Crime

Individual responsibility as ordering to commit the crime presupposes someone in a position of *de jure* authority uses that authority to instruct another person to commit an offence.³⁸

2.1. Objective elements required for ordering to commit a crime

This form of liability requires: (i) a formal superior-subordinate relationship between the accused and the perpetrator³⁹; (ii) a causal link between the act of ordering and the physical perpetration of a crime only to show that the offence would not have been perpetrated in the absence of the order.⁴⁰

³⁷ ICTY, *The prosecutor v Blagojevic* (TJ), Case No. IT-02-06-T.

³⁸ ICTY, *The prosecutor v Kordić et al.* (AJ), para.28; *Garlić*, (TJ), para.168; *Rutaganda*, (TJ) para.39.

³⁹ *Prosecutor v. Kordić et al.* (AJ), para.28; *Garlić*, (TJ), para.168; *Rutaganda*, (TJ)39.

⁴⁰ ICTY, *Prosecutor v. Nahimana et al.* AJ • Ž para.481.

In determining superior position of the accused, control over the organization can be inferred from General Reed's leadership in military operation.⁴¹ In this case, military units in Rose District were controlled by General Reed, and the squad was subordinate to Reed.

Second, it is obvious that without the order from General Reed, the attack could not have been launched since he instructed the squad to eliminate danger.

2.2. General Reed knew or should have known the crime would be committed

"Should have known" means the accused must have been aware of the "substantial likelihood" that the crime committed would be the consequence of the execution or implementation the order.⁴²

The "substantial likelihood" is established on the circumstances known to the accused at the time of his order that the crime would happen in the course of implementing the order. Factors such as time, location, were taken into consideration in the decision of whether the accused is aware of the substantial likelihood the crime would be committed.⁴³

Accordingly, the municipal hospital was known as the biggest medical facility in Rose District and Bethuisian soldiers were inside the hospital at the time. Based on above facts, targeted towards those soldiers inside the hospital will inevitably include the hospital.

IV. WAR CRIME OF INHUMAN TREATMENT

1. War Crime of Inhuman Treatment Was Committed

⁴¹ ICTY , *Prosecutor v. Delali*• (AJ), Case No,IT-96-32-T para.354.

⁴² ICTY , *Prosecutor v Blaški*• (TJ), Case No. IT-98-29-A, p.42.

⁴³ ICTY , *Prosecutor v Pavle strugar*(TJ), Case No. IT-01-42-T, para.336.

The term “inhuman treatment” is defined as the infliction of “severe physical or mental pain or suffering”⁴⁴, which was inflicted in Westwood Prison and constituted elements of war crime as follows:

1.1. Severe physical or mental pain or sufferings to the detainees were inflicted

It is prohibited to take any measures of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies to any measures of brutality applied by civilian or military agents.⁴⁵

In *Jalloh* case, the applicant was administered emetics against his will with a tube fed through his nose into stomach, which caused him pain and anxiety.⁴⁶ With respect to our case, Professor Mange went through physical sufferings in the procedure of force-feeding, during which he usually kinked to resist and almost lost his breath. The tube was inserted through his nose regardless of his resistance, which shall be justified as an action against his will. This caused great pain for him, both mentally and physically.

The applicant of *Jalloh* case was then subjected to a further bodily intrusion through the injection of another emetic.⁴⁷ Two drugs that can cause irreversible neurological disorder were administered to Mange, which caused bodily intrusion. Other hunger strikers were also subject to forced feeding. In light of above, this brutal action shall be taken as inhuman treatment.

The applicant suffered mental pain while he waited for the emetics to take effect and during that period he was restrained and kept under observation forcibly.⁴⁸ Mange

⁴⁴ Elements of Crimes for the ICC, Definition of inhuman treatment as a war crime (ICC Statute, Article 8(2)(a)(ii)).

⁴⁵ Geneva Convention • , Article 32.

⁴⁶ ECtHR, *Jalloh v. Germany*, Grand Chamber Judgment, p4-5.

⁴⁷ Ibid.

⁴⁸ Ibid.

was also placed under watch up to 60 minutes which lasted for 27 days during the hunger strikes after the two-hour force-feeding each time. Severe mental suffering can be constituted.

To conclude, although this had not been the intention, the measure was implemented in a way against the applicant's will which had caused him both physical pain and mental suffering. He had therefore been subjected to inhuman treatment under Article 3⁴⁹. Hence, Mange was also subjected to inhuman treatment on the same ground.

Prolonged solitary confinement can also do great mental harm to inmates. The restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning, producing a stuporous condition associated with affective disturbances. Countless individuals have been examined in solitary confinement who have become obsessively preoccupied with some minor, almost imperceptible bodily sensation, a sensation which grows over time into a worry, and finally into an all-consuming, life-threatening illness. The duration of isolation is commonly considered.⁵⁰ In our case, Professor Mange was detained in Westwood Prison for more than one year, and there was a four-month solitary confinement that separated him from others⁵¹, which can be regarded as a relatively long time. Hence, severe mental suffering can be constituted.

In light of the above, inhuman treatment to the detainees was inflicted.

1.2. The detainees were protected under Geneva Conventions •

Protected persons “are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the

⁴⁹ European Convention on Human Rights, Article 3(prohibition of inhuman or degrading treatment).

⁵⁰ Stuart Grassian, Psychiatric Effects of Solitary Confinement. *Journal of Law & Policy* [Vol.22:325], p. 354, 332, 346.

⁵¹ Moot Problem, para.38.

conflict or Occupying Power of which they are not nationals”⁵². However, under certain circumstance, even if the perpetrators and the victims can be regarded as possessing the same nationality, they can still be regarded as protected persons. In an inter-ethnic armed conflict, a person’s ethnic background may be regarded as a decisive factor in determining to which nation he owes his allegiance and may thus serve to establish the status of the victims as protected persons.⁵³

It is submitted that Professor Mange and other detainees who were arrested by AAF possessed Alphonian nationality and ethnic Bethuisians background in an inter-ethnic armed conflict between AAF and DKF. Nevertheless, Mange and his students were supporters of the incorporation of Kebia to Bethuis, and other detainees who joined the hunger strike were members of the PAB and of the DKF⁵⁴, which indicated they owed their allegiance to Bethuis. Hence, the detainees shall be protected under Geneva Convention • .

2. Reed Bears Superior Responsibility for the Alleged Crime

A superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his effective authority and control, as a result of his or her failure to exercise control properly over such subordinates.⁵⁵ In this case, the following three elements of superior responsibility are fulfilled:

2.1. A superior-subordinate relationship existed

“The superior-subordinate relationship lies in the very heart of the doctrine of a commander’s liability for the crimes committed by his subordinates.”⁵⁶ A person is in “formal status” or in “effective authority and control” as a military commander is

⁵² Geneva Convention • , Article4 (1).

⁵³ ICTY, *The prosecutor v Blaškić* (TJ), Case No. IT-95-14-T, para.127.

⁵⁴ Moot Problem, para.34 and 37.

⁵⁵ ICC Statute, Article 28(b).

⁵⁶ ICTY , *Prosecutor v Limaj et al* (TJ), Case No. IT-03-66-T, para.521.

required in a superior-subordinate relationship.⁵⁷ “Effective control” has been accepted as a standard for the purposes of determining superior responsibility. Only those superiors, either *de jure* or *de facto*, military or civilian, who are clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of subordinates may incur criminal responsibility.⁵⁸

Pursuant to *Aleksovski* case, soldiers arrested and transferred the detainees under the accused’s orders, indicating that he had *de facto* effective authority over them.⁵⁹ Since the declaration of a state of emergency, Westwood Prison had been under military control, and General Reed appointed Jackson Wall as warden to supervise all the operations in the Prison. After attacks to the Municipal Hospital, 25 people were detained in Westwood Prison under Reed’s order.⁶⁰ In light of the above, it can be indicated that the prison was under Reed’s *de facto* effective control, thus the existence of superior-subordinate relationship is fulfilled.

2.2. The superior knew or had reason to know that subordinate was about to commit or had committed such acts

A commander will be considered to have “had reason to know” only if information was available to him which would have put him on notice of offences committed or about to be committed by his subordinates.⁶¹ This information refers to “general information”, which need not provide specific information about unlawful acts committed or about to be committed.⁶²

In our case, the news of Mange’s hunger strike soon got through to the major media in Alphon and Bethuis, and in Wall’s letter to Reed, Wall stated that “something needs to

⁵⁷ ICTY , *Prosecutor v Delali•* (TJ), Case No. IT-96-21-T, para.370.

⁵⁸ ICTY , *Prosecutor v Kordi• and •erkez* (TJ), Case No. IT-95-14/2-T, para.416.

⁵⁹ ICTY , *Prosecutor v Aleksovski* (TJ), Case No. IT-95-14/1-T, para.90.

⁶⁰ Moot Problem, para.15 and 34.

⁶¹ ICTY , *Prosecutor v Haliovi•* (TJ), Case No. IT-01-48-T, para.67.

⁶² ICTY, *Prosecutor v Delali•* (AJ), Case No. IT-96-21-A, para.238.

be done”. Furthermore, not until consultation with General Reed’s staff did Wall decide to embark on the force-feeding. There was great possibility for Reed to acquire such information that could put him on notice and infer the possible consequence that could constitute a “crime act”, hence Reed had reason to know that force feeding on the detainees who were on hunger strike was about to be committed. During the procedure of forced feeding, a military spokesman even made public announcement, which indicated that Reed, as the military commander, had reason to know that force-feeding was committed.

2.3. The superior failed to take the necessary and reasonable measures to prevent such acts or to punish the principal perpetrators

Notwithstanding it is required that any commander who is aware that his subordinates are about to commit a crime to “initiate such steps as are necessary to prevent such violations”⁶³ , nothing was done since Reed had the knowledge of such inhuman treatment was about to committed.

In the Appeals Chamber of Blaškić case, the responsibility of a commander for his failure to punish was recognized in customary law prior to the commission of crimes relevant to the indictment.⁶⁴ In our case, no sufficient evidence proves that Reed punished Wall after his commitment of inhuman treatment to the detainees.

Thus he failed to fulfill his commitment to ensure that detainees would receive a fair treatment or to prevent the commission of crimes and to punish the principal perpetrators.

⁶³ Additional Protocol• to Geneva Conventions, Article 87.

⁶⁴ ICTY, *Prosecutor v Blaškić* (TJ), Case No. IT-98-29-A,para.85.