
3rd RED CROSS

INTERNATIONAL HUMANITARIAN LAW MOOT

PROSECUTOR

v.

ALBERT WISEMAN

MEMORIAL FOR THE DEFENDANT

XIAMEN UNIVERSITY

Chen Jin & Zhang Yingtian

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PLEADINGS AND AUTHORITY

I. MR WISEMAN IS NOT LIABLE FOR THE ALLEGED WAR CRIME OF UNLAWFUL CONFINEMENT

1. The Detention of Migami-speaking Residents by CLA Does Not Constitute War Crime of Unlawful Confinement

To convict war crime of unlawful confinement, five elements must be fulfilled,¹ but two key elements are missing herein.

1.1 There Exists No International Armed Conflict (IAC)

IACs only contain the following three situations: (a) the parties to the conflict are sovereign States;² (b) a third State intervenes through its troops in an internal armed conflict, or alternatively if some of the participants in the internal armed conflict act on behalf of that other State;³ and (c) armed conflicts in which peoples are exercising their right of self-determination.⁴ However, the conflict in the present case falls into none of them.

(a) The Conflict Did Not Occur Between Two or More States

The armed conflict in this case was a domestic armed conflict occurring between Durako government on one side and CLA armed groups on the other side.

(b) Neither Nimbusland Intervened in This Internal Armed Conflict Nor CLA Acted on Behalf of Nimbusland

Considering the second situation, it is obvious that Nimbusland had never

¹ Elements of Crimes, p.129.

² Geneva Conventions, Common Article 2.

³ *Tadic* (AC), IT-94-1-A, para.84; *Blaskic* (TC), IT-95-14-T, para.76; *Kordic* (TC), IT-95-14/2-T, para.39.

⁴ Additional Protocol I to Geneva Conventions, Article 1.

deployed troops into Durako to intervene in the conflict between CLA and Durako. CLA was aimed at liberating Chengo from Durako and fighting for its own sake, not on behalf of Nimbusland. Even though Nimbusland might have provided CLA with some weapons and training assistance, there is no evidence indicating that Nimbusland participated in the organization, coordination or planning of CLA's military activities. Therefore, the "overall control" criterion of proxy war⁵ is not satisfied in the present case.

(c) It Was Not a Fight for the Right to Self-determination

Although the category of international armed conflict may compass armed conflicts in which peoples are fighting against colonial domination, alien occupation and racist regimes in the exercise of their right to self-determination,⁶ the instant case did not fit these situations.

Chengo is one of Durako's provinces, rather than a colony or occupied territory, so the conflict between CLA and the Durako government cannot be deemed as hostilities against colonial domination or alien occupation.

Racist regime means a regime denying racial groups' equal access to government.⁷ However, there is no evidence that Durako government denied Desperanto-speaking people such an access.

1.2 The Detainees Were Not Protected Persons

Since the conflict hereby was not an international armed conflict (*supra* I 1 1.1), Geneva Conventions (GCs) should not be applied.⁸

Even though GCs can be applied, Article 4 of GC IV defines protected persons as civilians who do not have the nationality of the belligerent in whose hands they find themselves. However, the detained Migami-speaking residents and the belligerent CLA shared the same nationality of Durako. Therefore the detainees

⁵ *Tadic* (AC), para.137.

⁶ *Supra* note 3.

⁷ ANTONIO CASSESE, *SELF – DETERMINATION OF PEOPLE* (Cambridge, 1995), p.181.

⁸ GC, Common Article 2.

were excluded from the protection under GC IV.

Alternatively, even if adopting a broader constriction of Article 4 of GC IV and utilizing ethnicity to define protected persons,⁹ the Migami-speaking residents still cannot acquire the status of protected persons, for they had the same Zylo ethnicity as CLA did.

2. Wiseman Should Bear No Individual Responsibility for the Alleged War Crime of Unlawful Confinement

A person should bear individual criminal responsibility under Article 25(3) (b) of Rome Statute, where two elements are satisfied: (1) *actus reus*, i.e. the accused clearly prompts a person to commit the crime; (2) *mens rea*, i.e. the accused has the intent or is aware of the criminal acts' substantial likelihood as a result of the accused's conduct.¹⁰

In this case, even if Wiseman participated in deciding the programme, the programme only called on CLA to seize the prison, but not to detain the Migami-speaking residents. Therefore, Wiseman had no intention to prompt the cadres to commit the confinement.

3. Wiseman Should Bear No Superior Responsibility for the Alleged Crime

Superior responsibility under Article 28(b) of Rome Statute is incurred where: (1) there existed a superior-subordinate relationship; (2) the superior knew or consciously disregarded pertinent information of crimes perpetrated or about to be perpetrated by subordinates. However, neither is satisfied in the instant case.

3.1 There Is No Superior-subordinate Relationship between Wiseman and CLA Cadres

Effective control is a determinative factor of the superior-subordinate relationship.¹¹ It means that the superior has material ability to prevent or punish

⁹ *Tadic* (AC), para.166.

¹⁰ *Kunarac et al.* (TC), IT-96-23 & 23/1, para.251; *Tadic* (AC), para.688; *Celebici* (TC), IT-96-21-T, para.326; *Galic* (TC), IT-98-29, paras.171-172.

¹¹ *Celebici* (TC), para.195.

subordinates' criminal offences.¹² In this case, Wiseman's authority was limited to initiate discussions with other countries and groups, while General Tharikana was the military commander. Therefore Wiseman was not capable of preventing or punishing the misconduct of CLA cadres.

Furthermore, influence and powers, however substantial, are insufficient to establish superior responsibility without indications of effective control.¹³ The fact that Wiseman started CLA and was elected as president indicates he possessed a degree of influence, but such influence falls short of the standard required for effective control.¹⁴ Even if Wiseman participated in deciding the programme to seize the prison, it merely indicates his influence but fails to establish effective control.¹⁵

3.2 Wiseman Did Not Have Knowledge or Constructive Knowledge of the Confinement

When determining the mental element of the accused, one shall consider when and where the illegal acts occurred and the location of commander at the time.¹⁶ In terms of non-military superior, either knowledge or a conscious disregard of pertinent information must be demonstrated beyond reasonable doubt.¹⁷

In the present case, Wiseman had already taken shelter in a foreign country before the alleged crime happened in Durako. Moreover, Wiseman only decided the seizure of prison without mention of confinement. Therefore, the current evidence did not beyond reasonable doubt demonstrate that he had the requisite mental element.

¹² *Ibid*, para.378.

¹³ *Kordic* (TC), paras.838-841; *Halilovic* (TC), IT-01-48-T, para.59.

¹⁴ *Halilovic* (TC), para.752.

¹⁵ *Kordic* (TC), paras.839-840; *Halilovic* (TC), paras.748-752.

¹⁶ *Celebici* (TC), para.386; *Kordic* (TC), para.427.

¹⁷ Rome Statute, Article 28(b).

• . **WISEMAN IS LIABLE FOR THE ALLEGED CRIME AGAINST HUMANITY OF
EXTERMINATION**

**1. The Attacks Occurred in Chengo Does Not Constitute the Alleged Crime Against
Humanity of Extermination**

Article 7(1) of the Rome Statute refers extermination as a form of crime against humanity where: (1) the perpetrator's conduct constitutes a mass killing of civilians;¹⁸ (2) it is committed as part of a widespread or systematic attack directed against a civilian population. However, in this case at issue, neither of the two conditions is met.

**1.1 The Attacks Against Migami-speaking People Were Not a Massive Killing of
Civilians**

**(a) The Victims of the Attacks Cannot Be Characterized as Civilian
Population**

Crimes against humanity are restricted to inhumane acts committed against civilians.¹⁹ “Civilians” refers to persons not taking part in the hostilities in any pattern.²⁰ Meanwhile the combatant status can be determined by facts, not formalities.²¹ Moreover, to be characterized as “civilian population”, the population must be predominantly civilians in nature.²²

In this case, supporting UDF and prepared to sacrifice for Durako, the Migami-speaking people of Chengo were *de facto* participants in hostilities against CLA. Further, the existence of intermittent firing from the targeted locality indicates that the attacked locality was not undefended. Additionally, people killed in the attack on the night of 30 November 2007 were mainly adult men who cannot be held as “civilian population” beyond reasonable doubt. Since the civilian status was negated, they can be legitimately attacked

¹⁸ Elements of Crimes, Article 7(1) (b).

¹⁹ *Kupreskic* (TC), IT-95-16-T, para.640.

²⁰ *Blagojević & Jokić* (TC), IT-02-60, para.544; *Akayesu* (TC), ICTR-96-4-T, para.582.

²¹ *Kupreskic* (TC), para.512.

²² *Limaj et al.* (TC), IT-03-66, para.186.

by the enemy belligerents.²³

(b) Clashes between Hostile Groups Cannot Be Defined as a Mass Killing

There were tensions on the border for a while. Clashes were caused by accumulative animosity between the Desperanto-speaking and Migami-speaking people. The attacks were reciprocal with deaths of both sides. Hence, the potential death of civilians was more likely to be a regrettable consequence of the turbulent situation in Chengo rather than a mass killing.

1.2 The Attacks by CLA Were Not Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population

To be part of a widespread or systematic attack directed against a civilian population, it requires that: (a) the course of conduct is pursuant to or in furtherance of a policy;²⁴ and (b) the policy consciously has a civilian population as its object.²⁵ However, in this case, there is no fact exhibiting the existence of such a policy.

(a) The Attacks Were Not Pursuant to or in Furtherance of a Policy

As a crime against humanity, it must not be just a random violence.²⁶ A policy element must be included and considered collectively.²⁷ Moreover, the requirement that the attacks be committed against a “civilian population” inevitably demands some kind of policy.²⁸

In this case, there existed no repeated or continuous commission of crimes to demonstrate the implementation of such a policy.²⁹ With one secret message carried by an anonymous person and the unplanned skirmishes occurring at times, it is insufficient to prove a deliberate policy actively promoted or

²³ *Kupreskic* (TC), para.523.

²⁴ Rome Statute, Article 7(2) (a).

²⁵ Elements of Crimes, p.117.

²⁶ *Akayesu* (TC), para.579.

²⁷ *Kayishema* (TC), ICTR-95-1-T, para.124.

²⁸ Elements of Crimes, Article 7(2); *Kayishema* (TC), para.124.

²⁹ *Tadic* (TC), IT-94-1-T, para.648.

encouraged by CLA.³⁰

(b) The Civilians Were Not the Objects of CLA's Attacks

Article 7 of Rome Statute prohibits attacks consciously aimed at a civilian population.³¹ However, Chengo was a disputed territory and the military base of CLA and UDF forces. CLA's attacks strictly focused on the support base of UDF. Combined with the existence of the confrontations of the adversary forces in Chengo, the acts were military in character. The death of civilians was unavoidably a collateral damage.

Consequently, the attacks by CLA in Chengo during the prosecuted period do not constitute the alleged crime against humanity of extermination.

2. Wiseman Should Bear No Individual Responsibility for the Alleged Crime Against Humanity of Extermination

As mentioned above in I 2, a person should bear individual responsibility when the requisite *actus reus* and *mens rea* are both satisfied. Wiseman repeated that CLA's aim was to liberate Chengo from Durako. The message found by Durako did not mean exterminating Migami-speaking people.³² Instead, it stated that Migami-speaking people would have the option to leave or remain in Chengo. Hence, it cannot be inferred that Wiseman had the intent of extermination and that he prompted such an act.

Therefore, for the absence of the *actus reus* and *mens rea*, Wiseman should not bear individual responsibility for extermination.

3. Wiseman Should Bear No Superior Responsibility for the Alleged Crime

As previously proved in I 3 (a), the superior-subordinate relationship did not exist between Wiseman and CLA cadres. Meanwhile, the requisite mental element cannot be satisfied either. In the message, Wiseman just called upon CLA to weaken the support base of UDF in Chengo. Moreover, when the alleged crime took place, Wiseman was still

³⁰ Elements of Crimes, Article 7(3).

³¹ *Supra* note 25.

³² *Nahimana* (TC), ICTR-99-52-T, para.975.

outside Durako. It can not be concluded Wiseman knew or constructively knew that CLA cadres would kill and injure the people.

PRAYER

The Respondent thus respectfully requests this Honorable Court to adjudge and declare that:

1. Wiseman shall not bear individual or superior responsibility for the alleged crime under Article 8 (2) (a) (vii) of the International Criminal Court Statute.
2. Wiseman shall not bear individual or superior responsibility for the alleged crime under Article 7 (1) (b) of the International Criminal Court Statute.

RESPECTFULLY SUBMITTED,

THE RESPONDENT