

**1st RED CROSS INTERNATIONAL HUMANITARIAN
LAW • IHL • MOOT (2007)**

CASE CONCERNING
LIBERTARIA

THE PROSECUTOR

v.

JOSEPH RABUKO, ET AL.

MEMORIAL FOR THE RESPONDENT

CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW

CHEN YI CHAO & YANG DAN

(words1982)

MOOT NUMBER: 20070101

PLEADINGS AND AUTHORITIES

I. INTERNATIONAL CRIMINAL COURT HAS NO ADMISSIBILITY OF THIS CASE

A. The case which is the subject of the Application is inadmissible

International Criminal Court (ICC) is a court of last resort, and may initiate cases only where: (i) there has not been any national investigation or prosecution of the case; or (ii) there is, or has been, such an investigation or prosecution, but the state is unwilling or unable genuinely to carry out the investigation or prosecution.¹

In this case, before a joint trial, the accused persons have moved the Supreme Court of Libertaria for a writ of mandamus requiring the Government of Libertaria to have them tried in the criminal courts of Libertaria and the Supreme Court has appointed an eminent lawyer as *amicus curia* participated in the writ proceedings. Thus, this case is inadmissible as it is being investigated or prosecuted by a State with jurisdiction according to Rome Statute².

Moreover, the state is willing and able to carry out the investigation or prosecution because (i) no evidence show that the government have the purpose of shielding the accused persons; (ii) from this case, there aren't any evidence that the proceedings are not or are not being conducted independently or impartially. (iii) the national judicial system of Libertaria doesn't collapse and is available.³

B. All accused persons are entitled to challenge the admissibility of the Court

Although the Pre-Trial Chamber of ICC authorized the Prosecutor of the ICC James Jackson, to cause investigation of the case so referred to by the Security Council, according to Rome Statute⁴, it dose not influence the subsequent determinations by the Court with regard to the jurisdiction and admissibility of this

¹ Office of the Prosecutor of ICC, *Fact-Sheet-The Situation in Darfur,theSudan*, NO.ICC-OTP-20070227-206, P.4

² Rome Statute art.17(1)(a)

³ Rome Statute art.17(2)(b)(c) &17(3)

⁴ Rome Statute art.15 (4)

case.

II. THE ACCUSED PERSONS ARE NOT LIABLE FOR CRIME OF GENOCIDE, CRIMES AGAINST HUMANITY AND CRIMES IN THE MASSACRE OCCURRED ON 30 JUNE

A. Lt. General Jacob Smith is not liable for the crime of genocide

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. The special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".⁵ However, the crucial element of genocidal intent appears to be missing here." Generally speaking, the policy of attacking on the nine Arantic villages of the Zimbaloon region dose not evinces such intent. Rather, it would seem that those who planned and organized attacks on villages pursued the aim to find out the pro-Tshombe militancy, which was discovered in the caves there later, primarily for purposes of counter-insurgency warfare.

What happened in Zimbaloon, despite its gravity, dose not constitute the crime of genocide because of the unavailability of the genocide determination conditions. The prosecutor has no proof that any of the protected ethnic, religious, racial or national groups is subjected. In fact, the causation of the civil war came from the different opinions on the nationalization of the mining activities between Prime Minister Roger Tshombe and President Rabuko. Then the situation began deteriorating into a civil war between pro-Rabuko Naasthists and pro-Tshombe Arantics. Later, the attack on Zimbaloon triggered full scale anti-Aromatic "witch-hunting" throughout the country. It is impossible to deduce the genocidal intent inherent in the general context of the perpetration against the political group. Therefore, it is totally a politic issue rather than a religious one. Groups other than those named explicitly in the definition of the crime are not protected by either international treaty or customary law. Thus, Lt. General Jacob Smith shouldn't take any criminal responsibility for genocide.

⁵ *Prosecutor v. Akayesu* (Trial Judgment), ICTR-96-4-T, ("Akayesu") ¶557

B Lt. General Jacob Smith is not criminally responsible for crimes against humanity

The crime against humanity being prosecuted must be committed as part of a widespread or systematic attack against civilian population.⁶ In accordance with customary international law⁷, Article 7 (1) of the ICC statute explicitly provides the perpetrator must act “with knowledge” of the attack on the civilian population. This is a declaratory reference to Article 30’s⁸ general requirement for the mental element.⁹ The attack on the nine Arantic villages of the Zimbaboon region mounted by RAF was just for military purpose of finding out the army of the opposite party, rather than attacking against civilian population, let alone the element of being widespread or systematic one. Thus, subjective criteria for crimes against humanity can not be found here.

Note worthily, the case didn’t indicate any killing of Arantics during the attack, the material elements of crimes against humanity can not be satisfied here. Furthermore, the Longos’ massacre was supported by the surrounding Arantic tribes. Apparently, the Arantics were participating in hostilities. In this case, the most important in demonstrating membership in a civilian population is the person’s actual role at the time of commission of the crime.¹⁰ How can the court decide that Jacob Smith is responsible for crimes against humanity when the Arantics are participating in hostilities?

C. Lt. General Jacob Smith is not criminally responsible for war crimes

In this case, a non-international armed conflict existed between governmental authorities and pro-Tshombe rebels. (i) Attacking or bombarding villages, dwellings or buildings and (ii) launching an attack which will cause damage to the natural environment are not forbidden in the civil war according to Rome statute.¹¹

Apparently, it is a general principle of law that the establishment of criminal

⁶ Prosecutor v. *Tadic* (Trial Judgment), ICTY-IT-94-1-T, ¶ 647-7

⁷ Prosecutor v. *Kupreskic et al.* (Trial judgment), ICTY-IT-95-16-T, ¶556

⁸ Rome Statute art.30(1)(3)

⁹ Gerhard Werle, *Principles of International Criminal Law*, (2003) P.231

¹⁰ Prosecutor v. *Blaskic* (Trial Judgment) , ICTY IT-95-14-T ¶ 210

¹¹ Rome Statute art.8(2)(e)

culpability requires an analysis of two aspects: *actus reus* and *mens rea*.¹² The subjective requirement for war crimes is the existence of intentionally directing attacks,¹³ As General Kanube clarified that his forces never meant to destroy them, and that it happened because of a technical flaw in the bomb release mechanism in the bomber, the accused are not liable for war crimes.

D. Col. Ramsey McGibbon is not liable for war crime.

By the same token, as employing poison is not forbidden in an inter-state conflict according to Rome statute.¹⁴ Col. Ramsey McGibbon is not liable for war crime by using poison gas after the zimbaloons' massacre.

E. President Joseph Rabuko and General Patton Kanube can not be held superior responsibility for the massacre happened in Zimbaloons

In accordance with Rome statute¹⁵, the superior responsibility requires that the crime committed by the subordinate. In light of the foregoing, Lt. General Jacob Smith, as the directly liable person, is not liable for crime of genocide, crimes against humanity or war crimes, President Joseph Rabuko and General Patton Kanube do not take any criminal responsibility of the indictments.

III. LT. GENERAL JACOB SMITH IS NOT LIABLE FOR DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

Incitement to commit genocide involves a *direct* and *public provocation* for perpetrators to commit genocidal violence.¹⁶ The "public" element is appreciated by looking at the circumstances of the incitement—such as where the incitement occurred and whether or not the audience was select or limited.¹⁷

In Lt. General Jacob Smith's case, he is not liable for his words "I do not want any Arantic prisoners of war. I will be happier if no Arantic stays alive." These words were only said to Jacob Smith's direct subordinates, the whole non-Arantic rank and

¹² Gerhard Werle, *Principles of International Criminal Law*, (2003) P.101

¹³ Rome Statute art.8 2(e)(iv)

¹⁴ Rome Statute art.8(2)(e)

¹⁵ Rome Statute art.28

¹⁶ *Akayesu* ¶557

¹⁷ *Prosecutor v. Kajelijeli* (Trial Judgment), ICTR-98-44A-T, ¶851

file of army knew these words by indirect hearings. However, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media¹⁸.

Therefore, Lt. Genera Jacob Smith's action can not match this criterion.

The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. However, in light of the foregoing, it can be noted the target group is a political one, which goes beyond the definition of the incitement to commit genocide.

IV. THE ACCUSED PERSONS ARE NOT LIABLE FOR CRIME OF GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES ACCORDING TO THE ASTORIA TIME'S REPORT ON 20 NOVEMBER 2006

A. The Astoria Times' report is the inadmissible evidence

In accordance with Rome Statute, the prosecutor has duty and power to collect and examine evidence.¹⁹ Any other organizations do not take this responsibility, and that, the report released by The Astoria Times was only the hearsay evidence. Care must be taken to avoid hearsay from consisting of rumor, gossip, or scuttlebutt. "General exclusion of hearsay evidence is based upon its presumed lack of reliability".²⁰ In this case, Amnesty International kept silence when the Longos massacre took place, what AI released was inequitable and inexact. Moreover, the Arantics' words were unilateral, having danger of impaired perception, ambiguity and insincerity.

B. The accused persons are not liable for genocide crimes against humanity and war crimes according to the report released by The Astoria Times.

To say the least, even though The Astoria Times' report has a little of probative value, the accused persons are not liable for genocide. Many acts of violence were not clearly described in The Astoria Times, at least, it didn't indicate who ever commit such crimes except the followings:

¹⁸ Akayesu ¶556

¹⁹ Rome Statute article 54 3(1)

²⁰ In Prosecutor v. Tadic, *Decision on Defense Motion on Hearsay*, August 5, 1996 NO.IT-94-1-T

1. Col.Sano NBonga is not liable for genocide.

The LLF kidnapped Arantic and non-Arantic children between 9 and 14 years of age and forced them to join its ranks. Obviously, the children have been transferred are not belong to any protected group, they involve non-Arantic children indeed. Furthermore, LLF is a terrorist group, it is not belonged to any part of the inter-state conflict. According to Rome Statute²¹, as its leader, Col.Sano NBonga is not liable for crime of genocide.

2. General Patton Kanube can not be hold superiority responsible for the activities done by RAF commanders.

General Patton Kanube didn't know, and owing to the circumstances at that time²², he shouldn't have known that the RAF commanders had Arantic "wives" and they would bear Naasthist children, as mentioned above, there was no genocidal policy, it was impossible for General Patton Kanube to know such few commander's private affairs, let alone to prevent or repress their activities.

3. President Joseph Rabuko dose not take any superior responsibility in the full scale anti-Arantic witch-hunting throughout the country.

President Joseph Rabuko did issued an official decree authorized his subordinate "to take whatever action necessary to quell the fighting and as far as possible to eliminate the pro-Tshombe militancy," he never harbor the intent to destroy any targeted groups or attack any civilians. Furthermore, Joseph Rabuko was not the military governor, he didn't know or shouldn't have known the activities happened in the army, not to mention the inhibition or punishment. Then again, as his subordinates haven't committed any crimes mentioned above, President Joseph Rabuko bears no superior responsibility at all.

²¹ Rome Statute art.6(e)

²² Rome Statute art.28 (a)(i)&(ii)

PRAYER

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

President Joseph Rabuko, General Patton Kanube, Col.Sano NBonga, Col. Ramsey McGibbon, Lt. General Jacob Smith do not incur any criminal responsibility for genocide, crimes against humanity as well as war crimes, and all of the charges in the indictments against the accused persons should be dismissed.

**RESPECTFULLY SUBMITTED,
AGENTS FOR THE RESPONDENT**