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## PLEADINGS AND AUTHORITIES

### **I General Butcher is criminally responsible for the incidents in 2006 up to 8 January 2007.**

#### **1 Butcher is criminally responsible for direct and public incitement to commit genocide.**

By his message on 31 December 2006 and response to media inquiry concerning the leaflets and posters by the Suvidesh Nationalist Youth (hereinafter “SNY”) on 3 January 2007, Butcher committed direct and public incitement of genocide under article 6(a) and 25(e) of Rome Statute.

##### **1.1 Mens rea**

Genocide requires the intent to destroy in whole or in part, a national, ethnical, racial, or religious group.<sup>1</sup> Several facts are important when deciding the *mens rea*:<sup>2</sup>

(1) The environment where the statement was made

The speaker’s awareness of his statement’s possible genocide is a sign of his intent.<sup>3</sup> It can be established from an environment where ethnic attacks have already taken place.<sup>4</sup>

Before Butcher’s statements, there has been “repetition of destructive and discriminatory acts against”<sup>5</sup> the Rumons, including attacks “in many places” before the message and leaflets and posters containing genocidal content before the media inquiry. Thus Butcher knew how his would be interpreted.<sup>6</sup> He condoned the SNY’s obvious call for genocide.

(2) The policy to destroy the group harbored by the accused<sup>7</sup>

To make the “political agenda clear”, Butcher equates the Rumons with

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<sup>1</sup> Rome Statute, art.6.

<sup>2</sup> *Prosecutor v. Akayesu*, ICTR-96-4-T, (Trail Decision, 1998), para.728.

<sup>3</sup> Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 Va. J. Int'l L. 485.

<sup>4</sup> *Prosecutor v. Nahimana*, ICTR-99-52- T, (Trail Judgment, 2003), para.1022; *Mugesera v. Canada*, 2 S.C.R. 100, 2005 SCC 40, para.97.

<sup>5</sup> *Akayesu*, para.523.

<sup>6</sup> *Mugesera*, para.9.

<sup>7</sup> *Prosecutor v. Jelusic*, IT-95-10-T,(Trail Judgment, 1999) para.66.

“enemies”, making it a task of the Delphons to suppress the Rumons.

(3) “The factual occurrence of genocide”<sup>8</sup>

Genocide happened only one day after Butcher’s response to media.

## **1.2 Actus reus**

### **1.2.1 Targeting protected group**

Ethnic group is enumerated as targets of genocide. Rumons, who shares a common language and culture,<sup>9</sup> is an ethnical group.

### **1.2.2 Public and direct incitement**

Butcher’s response to media inquiry was directed to audiences not “selective or limited”, and thus public.<sup>10</sup>

“Direct” implies that the incitement “specifically provokes another to engage in a criminal act”.<sup>11</sup> Implicit speech can also be regarded as direct.<sup>12</sup> The key elements of deciding “direct” are: (1) the audience’s understanding of the genocide incitement, which can be indicated by occurrence of genocide;<sup>13</sup> (2) the weight of the speech on the perpetrators *per se*.<sup>14</sup> The SNY understood Butcher’s statements as calling for genocide and did conduct genocide one day after his response to media. Butcher is the leader of SNA, who explicitly hailed his leadership and took action in accordance with his message.

## **2 General Butcher is liable for crimes against humanity.**

Butcher is liable for soliciting and inducing crimes against humanity of extermination and persecution under article 7(1)(b), 7(1)(h) and 25(3)(b) of Rome Statute.

### **2.1 Chapeau elements of crimes against humanity**

#### **2.1.1 Widespread or systematic attack**

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<sup>8</sup> *Nahimana*, para.1029.

<sup>9</sup> *Prosecutor v. Kayishema*, ICTR-95-1-T, (Trail Judgment 1999), para.98.

<sup>10</sup> *Akayesu*, para.557.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Nahimana*, ICTR-99-52-A, (Appeal Decision, 2006) para.698.

<sup>13</sup> *Ibid.*, para.609; *Akayesu*, para.558.

<sup>14</sup> *Nahimana*, Appeal, para.713.

“Widespread” refers to the “scale of the attack or the multitude of victims”.<sup>15</sup> It exists here for Rumons were attacked “in many places” in 2006 and then more than 1000 Rumons were killed and many were physically attacked.

A “systematic” attack is one that is “thoroughly organized and follows a regular pattern on the basis of a common policy” involving high-level military authorities.<sup>16</sup> A “common policy” of attacking the Rumons was formally adopted in a “thoroughly organized” conference of the SNA. The conference involved the “highest-level authorities” of the SNA.

It may be argued that there was no widespread or systematic attack when Butcher’s statements took place. However, Butcher is charged with solicitation and inducement. They can be accomplished before the widespread and systematic attack.<sup>17</sup>

### **2.1.2 Targeting civilian population**

The Rumon residents targeted were “civilian population”, because they never “took part in any hostilities”.<sup>18</sup>

### **2.1.3 Knowledge of the attack**

The knowledge requirement is satisfied when the perpetrator intended the conduct to be part of a widespread or systematic attack.<sup>19</sup> Butcher’s intention can be seen from his leading role in forming the common policy of attacking Rumons, as well as his encouragement to the SNY’s explicit genocidal propaganda.

## **2.2 Specific elements of each crime charged**

### **2.2.1 Extermination**

Extermination means unlawful killing of civilians on a large scale.<sup>20</sup> In *Akayesu*, killing of 16 civilians constitutes “large scale”.<sup>21</sup> Here, more than 1000 people were killed.

### **2.2.2 Persecution**

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<sup>15</sup> *Kayishema*, para.123.

<sup>16</sup> *Prosecutor v. Kordic*, IT-95-14/2-T, (Trail Judgment, 2001) para.179.

<sup>17</sup> *Nahimana*, Appeal, para.934.

<sup>18</sup> *Prosecutor v. Tadic*, IT-94-1-T, (Trail Judgment, 1997) paras.637,638.

<sup>19</sup> Elements of crimes, art.7.

<sup>20</sup> Rome Statute, art.7(1), art.7(2)(b).

<sup>21</sup> *Akayesu*, para.744.

Persecution means “intentional and severe deprivation of fundamental rights contrary to international law” “by reason of the identity of group”.<sup>22</sup> Fundamental rights include right to life, right to security, right to liberty of movement and freedom to choose his residence, right to dignity.<sup>23</sup> The Rumons were killed, attacked, enforced to leave Survidesh and subjected to severe hatred speeches describing them as inferior people only because of their ethnical identity.

### **2.3 Soliciting or inducing**

Rome Statute imposes criminal responsibility on the act of soliciting and inducing.<sup>24</sup>

The *actus reus* of “solicits or induces” implies prompting another person to commit an offence.<sup>25</sup> Demonstration of the solicitation’s substantial contributes to the committing of the crime is sufficient.<sup>26</sup> It satisfied if “the accused’s conduct strengthened the resolve of the direct perpetrator who already had the intention of crime”.<sup>27</sup> This can be inferred from the affiliation between the perpetrator *per se* and the solicitor<sup>28</sup> as well as the time between the solicitation and the commission.<sup>29</sup> Butcher’s response encouraged the SNY, who hailed his leadership and conducted mass killing just one day after his speech.

The *mens rea* for soliciting or inducing is the intent to provoke another to commit a crime or awareness of the substantial likelihood that a crime will be committed.<sup>30</sup> Butcher provoked hostility against the Rumons. After the SNY issued leaflets and posters explicitly depicting genocidal content, Butcher noticed the substantial likelihood for his endorsement or at least condonation.

## **II Major General Marshall is liable for incidents of 10 February 2007 and 13 to**

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<sup>22</sup> Elements of crimes, art.7(h).

<sup>23</sup> International Convernant on Civil and Political Rights, art.6(1), art.9(1), art.12(1), art.20(2); *Nahimana*, para.988.

<sup>24</sup> Rome statute, art.25(3) (b).

<sup>25</sup> *Nahimana*, Appeal, para.480.

<sup>26</sup> *Gacumbitsi v prosecutor*, ICTR-2001-64-A,(Appeal Judgment, 2006) para.129.

<sup>27</sup> *Kordic*, para.380.

<sup>28</sup> *Prosecutor v.Furundzija*, IT-95-17/1-T, paras,217-221.

<sup>29</sup> *Nahimana*, Appeal, para.513.

<sup>30</sup> *Ibid.*, para.480.

## **15 March.**

An international armed conflict “exists whenever there is a resort to armed force between states”.<sup>31</sup> There is an international armed conflict between Suburbia and Megriland beginning 1 February 2007.

### **1 Attack on 10 February 2007**

By attacking the shrine Gopada, Marshall committed war crime of attacking protected objects, or alternatively, war crime of excessive incidental damage.

#### **1.1 War crime of attacking protected objects**

Cultural property enjoys special protection and is immune from attack. The immunity is lost only if it is used for military purposes.<sup>32</sup> It will not lose special protection simply because there are military installations in its immediate vicinity.<sup>33</sup>

The *mens rea* requires the perpetrator knew or should have known the character of the protected object, and he attacked it with guilty intent or recklessness.<sup>34</sup> Recklessness can be inferred from the perpetrator’s failure to take precautionary measures to verify the object of attack.<sup>35</sup>

The Shrine is a well-known cultural property listed under the “enhanced protection” category of the Second Protocol to the 1954 Hague Convention. Marshall knew or should have known its protected status. He was obliged to distinguish the forces from the shrine to avoid unnecessary damage to it.<sup>36</sup> However, while the enemy forces were behind the Shrine, Marshall fired at the front side of the Shrine without trying to make a distinction.

#### **1.2 War crimes of excessive incidental damage**

This crime requires excessive damage to civilian objects in relation to the concrete and direct overall military advantage anticipated.<sup>37</sup>

The shrine is a cultural heritage of the greatest importance for humanity and

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<sup>31</sup> *Prosecutor v. Tadic*, IT-94-1-AR72, (Trail Decision, 1995), Para.70.

<sup>32</sup> *Prosecutor v. Kupreskic*, IT-95-16-T, para.523.

<sup>33</sup> *Prosecutor v. Strugar*, IT-01-42-T, (2004), para.310.

<sup>34</sup> Elements of Crimes, art.8(2)(b)(ix).

<sup>35</sup> Rome Statute, art.30.

<sup>36</sup> AP I, art.57.

<sup>37</sup> Rome Statute, art.8(2)(b)(iv)

should enjoy the highest level of protection.<sup>38</sup> In the first Gulf War, Iraq placed lots of valuable military equipment in or near its cultural properties. However, the coalition decided not to attack them for fear of excessive damage.<sup>39</sup> Marshall should know the incidental damage would be clearly excessive.

## **2 Attack on 13 March 2007**

By attacking the oil wells, Marshall committed war crime of attacking civilian objects, or alternatively, war crimes of excessive incidental death or damage.

### **2.1 War crime of attacking civilian objects**

#### **2.1.1 The oil fields are civilian objects.**

An object becomes a military object, when: it makes an effective contribution to military action by its nature, location, purpose or use; its total or partial destruction, in the circumstances ruling at the time, offers a definite military advantage.<sup>40</sup>

By its nature, oil can be used as war material. However, oil wells are not necessarily military objects.<sup>41</sup> Nothing shows the oil wells are for military use. Anyway, in case of doubt an object, which is normally dedicated to civilian purposes, shall be presumed to be civilian object.<sup>42</sup>

#### **2.1.2 The attack was targeted against the oil wells.**

The *mens rea* requires guilty intent or recklessness (see para.1.1.1).<sup>43</sup> Commanders have duties to do everything practicable to verify the objectives of attack.<sup>44</sup> Failure to fulfill this obligation and apparent damage to civilian objects indicate the perpetrator's recklessness.<sup>45</sup> In *Galic* case, ICTY decided that the launching "two shells into a residential neighborhood at random, without taking feasible precautions to verify the target of the attack" is an unlawful attack against a

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<sup>38</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art.10.

<sup>39</sup> Department of Defense Final Report to Congress: Conduct of the Persian Gulf War, p.702.

<sup>40</sup> AP I, art.52(2).

<sup>41</sup> Georgetown International Environmental Law Review, *IRAQ's environmental warfare in the Persian gulf*, Shilpi Gupta.

<sup>42</sup> AP I, art.53(3).

<sup>43</sup> *Prosecutor v. Kordic* (Pre-trial Brief), IT-95-14/2-PT, p.49.

<sup>44</sup> The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Para.28.

<sup>45</sup> UN Commission of Experts, Final Report, UN Doc.S/1994/674.

civilian object.<sup>46</sup>

It was claimed that Marshall knew the exact location of the oil wells and he did not deny that. In any event, Marshall knew there were oil wells on the border. However, Marshall did not take any precaution measures.

## **2.2 War crimes of excessive incidental death or damage**

The elements of this crime include: an attack; it cause excessive incidental loss of life or widespread, long-term and severe damage to the environment in relation to the concrete and direct overall military advantage anticipated; the perpetrator knew the damage would be excessive.

### **2.2.1 Widespread, long-term and severe damage to the environment**

The AP I *travaux préparatoires* indicate that "long-term" refers to damage that lasts for decades. While "widespread" means "several hundred square kilometers" and "severe" means "any act that prejudices the health or survival of the population."<sup>47</sup> The experts from UNEP and other NGOs reported that there would be long-term environmental damage influencing a huge area.

### **2.2.2 Excessive loss and damage**

Admittedly, there is no measurable means to determine “excessive” and it could “pose difficult problems” in complicated decision. However, “the golden rule to be followed... is the duty to spare civilians and civilian objects in the conduct of military operations”.<sup>48</sup>

Drawn from Marshall’s statement, the anticipated military advantage was the repression of the firing from the enemy. However, Marshall did not do anything to try to spare the oil wells or civilian population. His indiscriminate shelling caused significant damage to environment and loss of life, which had no necessity with regard to the military advantage anticipated.

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<sup>46</sup> *Prosecutor v. Galic*, IT-98-29-T ( Trial Judgment 2003), para.387.

<sup>47</sup> NTL & OPERATIONAL LAW DEPT, U.S. ARMY, OPERATIONAL LAW HANDBOOK 238 (2006).

<sup>48</sup> Commentary to API, 2215.

## **PRAYER**

The Prosecutor (Applicant), thus, respectfully requests this Honorable Court to adjudge and declare that:

1. General Butcher is criminally responsible for direct and public incitement to commit genocide and soliciting and inducing crimes against humanity of extermination and persecution for the incidents in 2006 up to 8 January 2007.
2. Major General Marshall is criminally liable for war crime of attacking protected objects, or alternatively, war crime of excessive incidental damage for incidents of 10 February 2007 and 13 to 15 March.

**RESPECTFULLY SUBMITTED,  
AGENTS FOR THE PROSECUTION**