

**5th RED CROSS
INTERNATIONAL HUMANITARIAN LAW MOOT**

International Criminal Court

THE PROSECUTOR OF THE COURT

AGAINST

DAVID DABAR

MEMORIAL FOR THE APPLICANT

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MEMORIAL FOR THE APPLICANT

PRELIMINARY FINDINGS

I. TYPE OF CONFLICT

1. The non-international armed conflict (NIAC) between pro-independence forces and VPF commenced on 3 February 2009.

In *Tadic*, the ICTY Appeals Chamber held that an armed conflict exists whenever there is “protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”¹ For a NIAC, this definition focuses on, “the intensity of the conflict and the organisation of the parties to the conflict.”²

(1) The intensity of the conflict between pro-independence forces and NSA reached the “protracted” requirement in *Tadic*. In ICTY cases, “the length of the conflict”, “the existence of casualties”, “the displacement of local population” and “the concerted nature of the hostile acts undertaken by the attackers” demonstrates intensity.³ In this case, beginning with the protests on 15 October 2008, the intensity of the violence gradually increased. On 8 December 2008, NSA threatened to use military force to carry out a boycott of classes. On 3 February 2008, NSA’s attacks caused large casualties and injuries.⁴ Accordingly, the intensity of this conflict reached the requirement of “protracted”.

(2) Both pro-independence forces and VPF possessed the requisite organisation.

In deciding the organisation of parties to an NIAC, ICTY Trial Chambers have considered the “joint command structure”, “general staff as the main governing body”, “ability to recruit new members”, “possession of weapons” and “issuance of political

¹ *Tadic* Jurisdiction Decision, para.70.

² *Tadic* Trial Judgement, para.562.

³ *Milosevic* Rule 98bis Decision, para.28, *Limaj* Trial Judgement, para.134-167.

⁴ Moot Problem, para.8.

statements”.⁵ In the current case, NDRA had both a leader—Dabar—and cadres.⁶ Moreover, NDRA, NSA and VPF were all able to recruit, arm themselves, and issue political statements.⁷ Both pro-independence forces and VPF thus had the required extent of organisation.

2. On 22 May 2009, the conflict turned into an international armed conflict (IAC).

(1) The armed conflict became international because Nomags were exercising their right of self-determination against a racist Vanilian government. Under Article 1(4) of Additional Protocol I to Geneva Conventions (AP I), an IAC exists when “peoples are fighting against racist regimes in the exercise of their right to self-determination”.⁸ Antonio Cassese defines racist regime as a regime denying racial groups’ equal access to government.⁹ In this case, the Nomags were under-represented in Vanilia’s political decision-making process and their political demand to make their language official was refused. These facts demonstrated the Vanilian government was a racist regime.¹⁰

(2) Losovo’s declaration of independence further demonstrated the international character of this armed conflict. By 5 June 2009, Losovo had satisfied all four elements of Statehood under the *Montevideo Convention on Rights and Duties of States*, since it had “a permanent population”, “a defined territory”, “a government”, and “diplomatic relations” with Berryland and Mingolia.¹¹ Moreover, two neighbouring States’ recognition further demonstrated Losovo’s Statehood under international law.¹² For these reasons, the resort to force between Losovo and Vanilia

⁵ *Milosevic Trial Chamber Decision*, para.23, *Limaj Trial Judgement*, para.94-134.

⁶ Moot Problem, para.5, 10.

⁷ *Ibid.*, para.5-6.

⁸ Article 1(4), AP I.

⁹ Antonio Cassese, *Self-Determination of People* (Cambridge, 1995), p.181.

¹⁰ Moot Problem, para.3.

¹¹ Article 1, the Montevideo Convention on Rights and Duties of States.

¹² James Crawford, *The Creation of States in International Law* (Oxford, 2006), p.27.

on 5 June 2009 constituted an IAC.

II. DABAR'S COMMANDER STATUS

Dabar was “effectively acting as the military commander” of NDRA and NSA, and had “effective authority and control” over these groups. Under Article 28(a) of the Rome Statute, a person “effectively acting as a military commander” bears criminal responsibility if he knew or should have known the commission of crimes but failed to prevent or rectify it.¹³ Customary international humanitarian law further requires the “material ability to prevent and punish the commission of crimes” to conclude “effective authority and control”.¹⁴ Here, throughout the conflict, Dabar remained in charge of Losovo’s law and order affairs,¹⁵ which enabled him to prevent and punish NSA and NDRA’s commission of crimes. In addition, Dabar was the leader of NDRA and after a meeting on 2 February 2009, gave guidance to NSA.¹⁶

SPECIFIC CHARGES

I. CRIME AGAINST HUMANITY OF DEPORTATION OR FORCIBLE TRANSFER OF POPULATION

1. NSA members committed the crime against humanity of deportation or forcible transfer of population.

(1) NSA members forcibly transferred Lemis on 3 February 2009 and deported Lemis on 10 February 2009, without grounds permitted under international law. In *Blagoje Simic*, the Trial Chamber held a civilian is forcibly transferred if he is “not

¹³ Article 28(a), Rome Statute.

¹⁴ *Delalic* Trial Judgement, para.370-378, *Aleksovski* Trial Judgement, para.67-81 and *Kvočka* Trial Judgement, para.313-318.

¹⁵ Moot Problem, para.5.

¹⁶ *Ibid*, para.7.

faced with a genuine choice as to whether to leave or to remain in the area”.¹⁷ Moreover, a lack of choice may be inferred from acts like “the shelling of civilian objects and the burning of civilian property”,¹⁸ to which NSA’s attacks on Lemis are comparable.¹⁹ On 10 February 2009, the NSA forcibly seized and transferred more than 400 Lemis from Pleasant Gardens to remote camps in Berryland, constituting a deportation as defined in *Naletilic*.²⁰

(2) The forcible transfer and deportation were part of a widespread or systematic attack against Lemi civilians. In *Blaskic*, the Trial Chamber defined widespread according to “the scale of the acts perpetrated and the number of victims.”²¹ In this case, the attacks lasted more than 10 days, damaging property and resulting in deaths and injuries to hundreds of victims.²² Accordingly, the attacks against Lemis were widespread.

(3) NSA members knew that their conduct was part of a widespread or systematic attack directed against Lemi civilians. In *Blaskic*, a conduct is considered as part of a widespread or systematic attack if the perpetrator knowingly takes “the risk of participating in the implementation” of this attack.²³ As perpetrators of a series of violence, NSA members knew that there existed a widespread or systematic attack against Lemis. Despite a TV report predicting further violence on Lemi residents,²⁴ NSA members knowingly risked participating in this attack by deporting Lemis on 10 February 2009.

(4) The 2nd and 3rd elements of this crime are also present here. Prior to the conflict, both the Lemis expelled to neighbouring provinces and the Lemis deported

¹⁷ *Krstic* Trial Judgement, para.147.

¹⁸ *Blagoje Simic*, Trial Judgement, para.126.

¹⁹ Moot Problem, para.8.

²⁰ *Naletilic* Trial Judgement, para.670.

²¹ *Blaskic* Trial Judgement, para.206.

²² Moot Problem, para.8, 12.

²³ *Blaskic* Trial Judgement, para.247, 251.

²⁴ Moot Problem, para.10.

to Berryland were lawful residents of Losovo. Furthermore, the NSA said Losovo would welcome back Lemis,²⁵ acknowledging their lawful presence in Losovo.

2. Dabar bears command responsibility for this crime.

According to an internal NDRA document,²⁶ which stated that it was committed to eliminating the influence of Lemis, Dabar expected or should have expected the forcible transfer. On 10 February 2009, at the spot of deportation, Dabar also knew or should have known about the deportation committed by NSA members. Nevertheless, he did nothing to prevent or rectify the crime, fulfilling the requirements under command responsibility.²⁷

II. WAR CRIME OF TAKING HOSTAGES

1. NSA members committed the war crime of taking hostages on 10 February 2009.

(1) There was a threat to continue to detain 400 Lemis. On their seizure, these Lemis were said to be taken to the border until their safety would be ensured in Rizoba.²⁸ Combined with NSA's former allusion to welcome Lemis back only after Losovo's independence and their allegiance to the new state,²⁹ a threat to continue to detain the Lemis indefinitely existed.

(2) NSA members intended to compel Lemi people in Losovo to approve Losovo's independence as an implicit condition for the release of the detained Lemis. Dabar's declaration implied that the Lemi people's approval of Losovo's

²⁵ *Ibid*, para.9.

²⁶ *Ibid*, para.9.

²⁷ See above, PRELIMINARY FINDINGS, Section II.

²⁸ Moot Problem, para.10.

²⁹ *Ibid*, para.9.

independence was a condition of their safety.³⁰ Meanwhile the seized Lemis were explicitly told that they would not return “until their safety would be ensured”.³¹ As a result, the Lemi people’s approval of Losovo’s independence was a condition for releasing the Lemis.

(3) The conduct took place in the context of and was associated with the NIAC.

As asserted by the *Kunarac* Appeals Chamber, acts are associated with an armed conflict if the perpetrator acted, “in furtherance of or under the guise of the armed conflict”.³² Taking 400 Lemis as hostages had the effect of compelling the other Lemi people to appreciate Nomags’ demands, which would normally help NSA by suppressing Lemi-dominating VPF. In addition, the NSA justified its conduct as a protection of Lemis under the guise of this conflict.

(4) The 1st, 4th, 5th and 7th element of this crime are also fulfilled.

The NSA members seized more than 400 Lemi residents and detained them until the last week of June 2009.³³ These residents were civilians, without any evidence or allegations of their participation in hostilities. Meanwhile, the NSA’s alleged protection of Lemis in Pleasant Gardens proves its awareness of their civilian status, as well as its knowledge of the sporadic violence, which constituted a NIAC.

2. Dabar bears command responsibility for this crime.

Since David Dabar was on the spot of deportation,³⁴ he knew or should have known about the crime committed by NSA members. However, he did nothing to prevent or rectify the crime, which makes him liable under command responsibility.³⁵

³⁰ *Ibid*, para.11.

³¹ *Ibid*, para.10.

³² *Kunarac* Appeals Judgement, para.59.

³³ Moot Problem, para.10, 21.

³⁴ *Ibid*, para.10.

³⁵ See above, PRELIMINARY FINDINGS, Section II.

III. WAR CRIME OF WILFUL KILLING

1. NDRA members committed the war crime of wilful killing on 10 June 2009.

(1) At least 15 out of 108 people taken away by NDRA were killed by NDRA fighters. In *Delalic*, wilful killing was concluded from victims' deaths after severe beatings and torture.³⁶ In this case, according to those who escaped from NDRA fighters, the detainees were similarly subject to beatings severe enough to cause death when they were in detention of the NDRA.³⁷ The NDRA fighters are therefore responsible for the deaths of the 15 Lemis.

(2) The people killed by NDRA fighters were protected under Geneva Conventions (GCs). Civilians cannot be held participating in hostilities without a threshold of harm, direct causation and belligerent nexus.³⁸ Although weapons were found in the building, the 108 people in the VPF secretariat office were not personally armed and women and children were also present. In addition, the Lemis did not consent to take up Losovo citizenship and were not citizens of Losovo.³⁹ Thus, they were civilians protected under GC IV.⁴⁰

Even if as stated by NDRA, part of the people at the VPF secretariat were members of Vanilian forces, they would have become prisoners of war (POWs) and once captured by NDRA would have been protected under GC III.⁴¹

(3) The 3rd, 4th and 5th elements are also satisfied here. The NDRA fighters knew the 108 people were protected as either civilians or POWs.⁴² Taking into account

³⁶ *Delalic* Trial Judgement, para.813-866.

³⁷ *Ibid*, para.20.

³⁸ *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Section V.

³⁹ Malcom Shaw, *International Law* (Cambridge, 2008), p.1005.

⁴⁰ GC IV, Article 4.

⁴¹ GC III, Article 4.

⁴² Moot Problem, para.20.

factors stressed by the *Kunarac* Appeals Chamber,⁴³ the killing of 15 persons was in the context of and associated with the IAC, the circumstances of which NDRA fighters were conscious.⁴⁴

2. Dabar bears command responsibility for this crime.

Based on the report of Losovo Messenger Daily, Dabar knew or should have known the detainees were in danger of death due to severe beatings by NDRA members. However, he did nothing to prevent or rectify the crime, making him liable under command responsibility.⁴⁵

⁴³ *Kunarac* Appeals Judgement, para.59.

⁴⁴ *Supra* note 42.

⁴⁵ See above, PRELIMINARY FINDINGS, Section II.

PRAYER

The Prosecution submits that it has been proved beyond a reasonable doubt that David Dabar, due to his failure to exercise control properly over his subordinate forces, bears criminal responsibility for three crimes under the Rome Statute. The Prosecution respectfully requests this Honourable Court to adjudge and declare that David Dabar is guilty on all charges.

RESPECTFULLY SUBMITTED,

Counsel for the Prosecution