

LAW SCHOOL, TSINGHUA UNIVERSITY
BEIJING, CHINA

PARTICIPANTS: ZHANG XUE, GU XIN, CUI NING

MEMORIAL FOR THE RESPONDENT

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* OSCOLA (4th edn) as the citation standard.

I. DABAR IS NOT GUILTY FOR THE CRIME AGAINST HUMANITY OF DEPORTATION AND FORCIBLE TRANSFER.

1. Pursuant to *Elements of Crimes* ('EOC') Article 7(1)(d), the crime against humanity of deportation and forcible transfer requires five elements amongst which Dabar and the alleged conducts on 3 and 12 February 2009 fail to meet the following three elements.

2. **As to Element 1, no evidence indicates that Dabar has ever personally and directly deported or forcible transferred any person.** Even if the armed groups that shall take responsibility for the acts of 3 February 2009 had declared to take guidance from Dabar, he shall not bear individual criminal responsibility.¹

3. In addition, the conduct on 12 February in Pleasant Garden area amounts to an evacuation of civilians for their security, which is permitted under international law. Pursuant to 1949 Geneva Convention ('GC') IV Article 49(2), evacuation outside the bounds of the occupied territory is allowed when there is material reason for such displacement and the evacuated persons are transferred back as soon as the hostilities cease. In the present case, the residential area became increasingly dangerous because of the random attacks against the Lemis. Hence, the NDRA and NSA have material reasons to displace the Lemis outside the bounds of Losovo for the sake of their security. In addition, the transferred Lemis were promptly allowed to go on 6 July 2009 as soon as the hostilities in the area ceased.

4. **As to Element 4, the conducts were not part of a widespread or systematic attack against civilian population.**

5. First, there was no aforesaid attack as background at all. Pursuant to *Rome Statute* ('ICCSt') Article 7(2)(a), the attacks shall be committed 'pursuant to or in furtherance of... organizational policy'. However, the random attacks in Vanilia were separately launched by isolated individuals without a unified military strategy, a command structure, or any disciplinary within a group. Without any 'organizational policy', the attacks in question are not qualified as an attack under ICCSt, not to mention the lack

¹ *Infra*, paras 24-27.

of widespread and systematic character as required in Element 4.

6. Second, even if the attacks were widespread or systematic, the conducts in question are not relevant to them in any manner. Pursuant to ICCSt Article 7(2)(a), a conduct shall be ‘sufficiently connected with’ the attack in order to be part of it.² However, the conducts which amounts to an evacuation with a *bona fide* purpose of protecting civilians is different by its nature from the attacks. Further, no evidence indicates that the attacks which occurred in various places in Vanilia were launched by Dabar or the armed groups in question. Thus the last possible link between the attacks and the conducts is rejected.

7. **As to Element 5, even if there were any deportation or transfer as part of an aforesaid attack, there is no evidence that Dabar knew.** As implied in all of his statements, Dabar has always been promoting Lemi-friendly policies,³ which can be further affirmed through the fact that no civilian was injured or killed during their stay in camps. The alleged conducts, which are clearly inconsistent with Dabar’s policies could by no means launched within his knowledge or permission, assuming he has control over the pro-independence groups. Otherwise, the ignorance of Dabar’s holdings by the groups would negate Dabar’s *de facto* leading position, and consequently negate Dabar individual criminal responsibility.

8. **In conclusion, Dabar is not guilty for the alleged crime against humanity as Element 1, 4 and 5 are not fulfilled.**

II. DABAR IS NOT GUILTY FOR THE WAR CRIME OF TAKING HOSTAGES.

9. Pursuant to EOC Article 8(2)(c)(iii), the war crime of taking hostages requires seven elements amongst which Dabar fails to meet the following five.

10. **As to Element 1, the possible conducts of the NDRA and NSA on 12 February 2009 that may criminalize Dabar with taking hostages can be justified as an evacuation of civilians with security reasons permitted under international law.**⁴

² *Prosecutor v Kunarac and others*, Case No: IT-96-23&IT-96-23/1-A, ICTY Appeals Chamber, Judgment, 12 June 2002, para 100.

³ *Asia-Pacific Moot Court National Rounds 2011, Moot Problem (‘Facts’)*, paras 9-11.

⁴ *Supra*, para 3.

Hence, none of the alleged conducts amount to seizure, detention, or holding hostages within the meaning of this element.

11. As to Element 2, no evidence indicates that Dabar has ever directly or indirectly threatened the Lemi civilians with death, injury or further detention.

The welcoming policy to humanitarian organizations can be strong evidence which negates such threat. As the most renowned impartial and neutral organization acting as the guardian and promoter of international humanitarian law ('IHL'), should any threat in forms of ill-treatment existed, ICRC would have repeated visits as often as they deem necessary.⁵ Hence, the well implementation of IHL in camps shall be left unchallenged, and no threat within the meaning of Element 2 is established in the present case.

12. As to Element 3, no evidence indicates Dabar has compelled any subjects into certain act as a condition for the safety or release of the Lemis. The camp was evacuated at the end of June 2009 as soon as the said attacks ceased, without any specific intention within the meaning of Element 3 indicated or achieved. The well implementation of IHL in camps⁶ further implies the absence of such intention, and hence negates Dabar's criminal responsibility.

13. As to Element 6, no non-international armed conflict ('NIAC') existed when the alleged conduct occurred.

14. An armed conflict is non-international in character if it is protracted armed conflict between government authorities and organized armed groups or between such groups within a State.⁷ The violence in question fails to meet the said thresholds considering the absence of any exchange of fire between Vanilian forces and any armed groups, or within the said groups.

15. Alternatively, even if any exchange of fire between the said parties had occurred, no evidence indicates the 'organized' character of the armed groups. The 'organized'

⁵ Marina Staiff, 'Visits to Detained Torture Victims by the ICRC (I) Management, Documentation, and Follow-up' (2000) 10 Torture 4.

⁶ *Supra*, para 11.

⁷ *Prosecutor v Tadic*, Case No: IT-94-1-A, ICTY Appeals Chamber, Judgement, 15 July 1999, paras 138-40.

character focuses on the need for the armed groups to have the ability to plan and carry out military operations for a prolonged period of time.⁸ The isolated groups that launched the random attacks without an organizational policy⁹ obviously negates the existence of such ability.

16. As to Element 7, there is no evidence to prove Dabar's knowledge of the said attacks that might constitute the factual circumstances establishing an NIAC. The aforesaid disorganizations of the said armed groups¹⁰ further proved the absence of such awareness.

17. In conclusion, Dabar is not guilty for the alleged war crime of taking hostages as Element 1, 2, 3, 6 and 7 are not fulfilled.

III. DABAR IS NOT GUILTY FOR THE WAR CRIME OF WILFUL KILLING.

18. Pursuant to EOC Article 8(2)(a)(i), the war crime of willful killing requires five elements amongst which Dabar fails to meet the following four elements.

19. As to Element 1, there is no evidence indicating that Dabar personally and directly caused the deaths. As the NDRA declared, the persons taken away on 10 June 2009 were no longer in their custody. Since the Applicant fails to provide any solid evidence for the tangible causal link between the 15 human remains found on 22 June 2009 and the NDRA, the imputation against the NDRA shall be rejected. So does the imputation against Dabar. Even given that the NDRA's conducts could be attributed to him, the argument of which shall also be rejected with the absence of evidence. Hence, Element 1 is not fulfilled.

20. As to Element 2, even if there was any evidence indicating Dabar has caused the deaths, the objects of the action were not under the protection of the GCs. According to GC IV, a protected person shall be in the hand of a Party of which they are not nationals.¹¹ However the said persons have the nationals of Losovo, for the fact that 'the first official act of the new government was to grant by decree Losovo

⁸ *Prosecutor v Lubanga*, Case No: ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007 ('*Lubanga*'), para 234.

⁹ *Supra*, para 5.

¹⁰ *Ibid.*

¹¹ GC IV, Article 4.

citizenship to all Lemis residing in the province'.¹² Hence, any crime against the said victims shall be within the jurisdiction of municipal law of Losovo, not international law instead.

21. **Element 3 is not fulfilled for the mistake of fact.** Even if the victims were non-combatants and in protection of GC IV, a mistake of fact regarding their protective status shall be a ground for excluding criminal responsibility since it negates the mental element required by the crime.¹³ Considering the fact that the NDRA was aware that Vanilian forces were employing civilians to counter their control and that the victims and Vanilia-manufactured were found in the same building, it is reasonable to assume that the occupants were Vanilian forces who camouflaged to be civilians. If it was proved otherwise, such assumption would constitute a mistake of fact regarding the victims' protective statutes, which negates the mental element of Dabar and therefore becomes a ground for excluding his criminal responsibility, if there was any.

22. **As to Element 4, the conduct took place in an NIAC.** A State is defined as 'a community which consists of a territory and a population subject to an organized political authority; that such a State is characterized by sovereignty'.¹⁴ Losovo, although declared the independence on 28 May 2009, neither consists of a territory nor a population subject. Given that an armed conflict is international in character when it occurs between states¹⁵, the conduct in the present case is of a non-international character.

23. **In conclusion, Dabar is not guilty for the alleged war crime of willful killing as Element 1, 2, 3 and 4 are not fulfilled.**

IV. INDIVIDUAL CRIMINAL RESPONSIBILITY

24. Even if all the aforesaid elements of alleged crimes were fulfilled, **Dabar shall not be individually criminally responsible for such conducts committed by the**

¹² *Facts*, para 16.

¹³ ICCSt, Article 32(1).

¹⁴ *Opinion 1, Badinter Arbitration Committee*, in Alain Pellet, 'The Opinions of the Badinter Arbitration Committee' (1992) 3 EJIL 178, 182.

¹⁵ *Lubanga*, para 209.

NSA or the NDRA.

25. The individual criminal responsibility shall be determined strictly in accordance with the requisite material and mental elements under **ICCSt Article 25(3) or 28**. It is the agreed fact that Dabar never first-hand perpetrated any alleged conducts. Thus the conduct that is most likely to criminalize him the said articles would be his orders to the said armed groups. However, the sole order by Dabar that has been tangibly proved in this case was the one to erect roadblocks in the residential area and any charge based on this order shall be rejected for the following two reasons.

26. **First**, no provision in ICCSt or EOC forbids a roadblock. Thus the content of the order is completely lawful and would by no means criminalize Dabar with any crimes under ICCSt Article 25(3).

27. **Second**, as the only order Dabar ever made, his ‘authority or control’ implied in it is far from ‘effective’ to establish a superior-subordinate relationship. Dabar has barely any ability of issuing orders or taking actions¹⁶, not to mention the material ability to prevent or punish subordinates’ criminal conduct¹⁷. Hence, the position of merely a guidance provider would by no means result in Dabar’s individual criminal responsibility under ICCSt Article 28.

¹⁶ *Prosecutor v Blaskic*, Case No: IT-95-14-T, ICTY Trial Chamber I, Judgement, 3 March 2000, paras 300-02.

¹⁷ *Prosecutor v Delalic and others*, Case No: IT-96-21-A, ICTY Appeals Chamber, Judgement, 20 February 2001, para 256.