



ICRC

18th Henry Dunant Memorial Moot Court Competition 2018

International Criminal Court

At

The Hague

Prosecutor

v.

Brigadier G. Kumanova

Prosecutor v. Brigadier G. Kumanova

Facts of the Case

Zamharta and Khawransik are two countries situated in continent X. Continent X is of great political significance in the world politics due to the presence of abundant important mineral and natural resources. Zamharta covers almost sixty percentage (60%) of the total landmass of continent X. Khawransik is situated in the northern portion of continent X. The southern borders of Khawransik touch the northern frontiers of Zamharta. The eastern and western borders of both these countries touch the margins of this continent respectively

Navigation from the northern portion of continent X to any other part of the world is not easy during most of the year due to thick ice cover that surrounds the northern portion of continent X. Thus navigation from continent X to other parts of the world is conducive mostly through the port city of Zambavi. Zambavi is also the capital of Zamharta. Zambavi is situated in the south west portion of continent X. The creation of both these countries of the continent had close nexus with the colonial rule of Colour Land over the whole continent X. Khawransik got independence from Colour Land in the year 1970. However, Zamharta got independence from Colour Land in 1950.

The whole continent 'X' had a common and shared history of more than two thousand (2000) years. The kingdoms once based in the present port city of Zambavi had administered almost the entire continent from time to time. It was true that various clans and groups had administered this continent during different phases of its history but all of them had based their courts or primary seats of office in the city of Zambavi. Thus, the control over Zambavi had been historically a key feature almost for all the kingdoms that had administered continent X.

The colonial masters of Colour Land had also come to continent X through Zambavi at the beginning of eighteenth century and slowly established their control over the continent by the middle of the nineteenth century. The political conditions in continent X during the late

seventeenth century had been full of deceit and treachery. Though there was a rudimentary and moribund central authority based in Zambavi for the entire continent X but in reality, the south and central parts of the continent (known as Zamabarta during those days and mostly populated by followers of Zambua religion) were administered by more than hundreds of local feudal lords expressing their mere formal allegiance to the then political seat in Zambavi. The northern portion of the continent (known as Khawduma during those days and mostly populated by the people of Khaw tribe) did not express or share such formal allegiance and were under the control of different groups of Khaw tribes. This was the political situation of continent 'X' when the first group of businessmen of Colour Land entered the port of Zambavi in October 1701 AD. Colour Land had completely controlled the administration over the entire continent X and strengthened her rule over it by 1850 AD.

The authorities of Colour Land discovered abundant and diverse natural and mineral resources in continent X. They adopted an Industrial and Development Policy for Continent X in the 1870s. This policy observed that Khawduma region was full of many natural resources and could be developed for excavation purposes while Zamabarta region for its potential to provide abundance of work force and easy availability of fertile land and water resources could be developed for plantation and industrial purposes. The policy also observed that establishment of industries could not be possible due to the uneven terrain of Khawduma region and difficulty in generating skilled workforce in the region.

Pursuant to this, works for extensive rail and road networks commenced for connecting the important locations of Khawduma and Zamabarta regions to the port city of Zambavi. Many places in Khawduma were developed for excavation works and correspondingly many industries were established in Zamabarta region. Extensive excavation activities were undertaken in Khawduma and the raw materials were taken to the various industrial locations in Zamabarta region to be used for many purposes. This industrial development had also caused some economic migration of the population from one region to another.

As per the first census report of continent X conducted under the aegis of Colour Land in 1910 AD, the total population of continent X comprised mostly with the population of two religions namely Zambua and Niwansik. The followers of Zambua religion comprised of fifty percent (50%) of the total population of the continent X, whereas the followers of Niwansik religion comprised of thirty percent (30%) of the total population of the continent X. The rest twenty

percent (20%) of the population of continent X comprised of local tribes known as Khaw. The followers of Niwansik religions were further divided into two theological groups. These theological groups were known as Zam-Niwansik and Haw-Niwansik. The cultural practices of the former group were almost similar to Zambua religion and the latter to the Khaw tribes. This report however, did not specify the geographical distribution of the religious population in continent X.

A well acclaimed book on the colonial administration of Colour Land published in 1930 observed the following in respect of the spread of Niwansik religion and its effect in this continent -

The Niwansik religion spread in the continent X mostly during eighteenth and nineteenth centuries through continuous religious preaching through theological dialogue and debates conducted by the religious persons from Colour Land and other countries of the world following Niwansik religion. Though there were some followers of Niwansik religion in this continent but it was during the colonial control of Colour Land that it witnessed the exponential growth in the numbers of followers of Niwansik religion. Extensive humanitarian and philanthropic works carried by religious leaders of Niwansik religion were one of the important factors for this growth in the number of its followers. The extensive academic encounters of the teachings of the Niwansik religion were primarily responsible for various religious reforms and inculcation of global value of humanism in the existing cultural and religious practices and understandings of followers of Zambua religion and Khaw tribe.

However, anti-colonial protests started in the continent from 1890 AD onwards. The focus of this protest was to establish a meaningful and responsible self-government under the overall control of Colour Land. These protests intensified and garnered support with the passage of time. Though the nature of these protests was primarily political but sometimes they also reflected the intertwined feudal, religious and cultural dogmas and conflicts existing in the social and political milieu of continent X. Though the leaders of the independence movement belonged to diversified social, economic, religious and political backgrounds but most of them were the followers of Zambua religion.

The prominent group of this independence movement was The Great Zamabarta. The Great Zamabarta was a political outfit consisting mostly of the family members of the erstwhile feudal lords of the Zamabarta region. The leadership of this group was under the hands of the group of descendants of the royal families of continent X. This group had significant clout in

Zamabarta region and had been successful in suppressing and sidelining democratic voices of the independence movement.

The independence movement was mostly concentrated in the Zamabarta region while the Khawduma region remained mostly untouched and unaffected from these movements and sometimes proved very loyal to the authorities of Colour Land. The demand for independence and separation of Khawduma from Zamabarta was also raised and was gaining momentum and growing in strength with each passing year. The stories of the brutal treatment and massacres against Khaw tribes by the kingdoms once situated in Zambavi were on the minds of the residents of Khawduma region.

Some of these groups active in Khawduma considered Colour Land as their savior and liberator. These pro Colour Land allegiance of some of the residents of Khawduma region sometimes also invited wider condemnation from the leaders of the independence movement and the majority of residents of Zamabarta region. In 1930, the authorities of Colour Land with the help of some local historians published a series of books about the political, cultural and economic history of continent X. These books represented the histories of both the regions of the continent in complete contrast and endorsed the stories of exploitation and bad treatment of Khaw tribes at the hands of the followers of Zambua religion.

The second census of continent X was conducted in 1940 . As per the report of this census the percentage of the religious groups in the total population of continent X had remained more or less the same as it was in the first census except it showed a five percentage (5%) decrease in the total population of Khaw tribe and the corresponding increase in the population of Haw-Niwansik. This report also narrated the geographical distribution of various religious groups of continent X. As per this report, seventy percent (70%) population of Zamabarta region were followers of Zambua religion. The rest thirty percent (30%) population of the region comprised of Zam-Niwansik (twenty percent (20%)), Khaw tribe (seven percent (7%)) and Haw-Niwansik (three percent (3%)). On the other hand, in Khawduma region, the Haw-Niwansik accounted for the sixty percent (60%) of the total population of the region. The rest forty percent (40%) population of Khawduma region comprised of Khaw tribe (Fifteen percent (15%)), Zambua (Ten percent, 10%) and Zam-Niwansik (Fifteen percent (15%)). The census report of geographical distribution of these religious groups and their percentage share of the population stands true even in 2018.

Considering this report and other existing political and economic conditions the authorities of Colour Land divided the whole continent X into two autonomous provinces of Zamharta and Khawrtunia in year 1947. The region of Zamabarta now became the autonomous province Zamharta and the region of Khawduma now became the autonomous province Khawransik. As per the statements made by the authorities of Colour Land, the name had been minutely changed just to remind the residents of each autonomous provinces the importance of peaceful co-existence and mutual respect and tolerance for larger causes.

Except the subjects of defense, communication, foreign affairs and the issues common to the interests of both the provinces, all other subjects of governance were transferred to these autonomous provinces. This plan had divided the various sections of independence movement. However, the leaders of The Great Zamabarta accepted this plan and they formed the first government of autonomous province of Zamharta after a symbolic and restricted election conducted in the region. Similarly the government was also formed in autonomous province of Khawransik. As per the basic plan of division, both these autonomous governments had signed in 1948 many agreements of mutual understanding mostly about industries, supply of raw materials, work force and rail and road connectivity of Khawransik region to the important location in Zamharta and to the port city of Zambavi etc. These agreements are generally known as 1948 Agreements of Mutual Coexistence.

Some protests emerged against this scheme in Zamharta province. There were also some incidents of violence against Khaw and Haw-Niwansik peoples in Zamharta. Though Khawransik had well received this scheme but there were also reports of reciprocal violence against followers of Zambua religion from this province also. Fearful about the spread of this violence, Colour Land declared independence for Zamharta in October 1950 and transferred power to the then existing provincial government of Zamharta. Thus, The Great Zamabarta formed the first government of independent Zamharta.

The continuance of 1948 Agreements of Mutual Coexistence was promised by the new independent government of Zamharta through a unilateral declaration in 1950. The Instrument of Independence of Zamharta also requested the new government of Zamharta to make specific provisions for uncompromised and unrestricted compliance and continuance of the 1948 Agreements of Mutual Coexistence. However, Colour Land maintained its control over Khawransik province till 1970 when independence was also granted to it. The new independent

government of Khawransik also declared its intention to always comply with the terms of 1948 Agreements of Mutual Coexistence in 1970. Khawransik was receiving extensive aid and other assistance from Colour Land even after its independence.

A new political organization named United X was created in the city of Zambavi in 1975. The demand of this organization was to unite the whole continent X into one nation. It did not accept Khawransik as an independent State and accused the leaders of The Great Zamabarta for compromising the interests of the country just to quench their political aspirations. The United X was receiving slow but steady popularity in Zamharta. However, this group had never participated in the elections till 1990 which it alleged was always rigged in favour of The Great Zamabarta at the behest of Colour Land. However, United X under the leadership of Mr. H. Zambawa formed the government in Zamharta in the year of 1995 through an election processes.

The scientists and technical experts from Colour Land undertook extensive survey of Khawransik to construct industries so that the raw materials could be used to their maximum extent and benefit. With the help of the modern advancement in technology, the work for five such industries commenced in 1998. These industries started working from the year 2008. In February 1999, Mr. H. Zambawa reminded Khawransik of its obligations under 1948 Agreements of Mutual Coexistence. Khawransik asserted that it was undertaking its own development activities and it would comply with its obligations under the said Agreement.

However, the United X government of Zamharta had also ordered several investigations against hundreds of leaders and prominent workers of The Great Zamabarta in respect of almost more than thousand cases of corruption and conspiracy in year 1997. Extensive search and seizure were conducted against these persons and properties of the leaders of The Great Zamabarta. By the year 2005, more than five hundred leaders and workers of the Great Zambarta were under the jail facing severe punishments.

There was also an unsuccessful attempt to capture power over Zamharta on 5 August 2006 through a coup. However, the coup resulted in many jail breaks to assist the jailed leaders and workers of The Great Zamabarta to flee. There were also attempts on the life of key functionaries of Mr. H. Zambawa. This has resulted into the death of fifty (50) civilians and hundred (100) police personnel and security guards. On 10 August 2006, Mr. H. Zambawa

declared The Great Zamabarta a terrorist organization and issued an order of ban against it. Pursuant to his order, the properties of The Great Zamabarta had also been seized. Most of the leaders and workers of The Great Zamabarta migrated to Khawransik and took refuge there. Mr. H Zambawa demanded that all those accused of corruption, sedition and terrorism must be extradited to Zamharta so that prosecution could be initiated.

The supply of raw materials to the industries of Zamharta from the mines of Khawransik started dwindling from the beginning of year 2009. Supplies reached almost half from their previous records. Khawransik with the help of modern technology and the assistance from Colour Land also started work for building its own port at its north-west coast in the year 2010. Khawransik also indicated the intention to renegotiate the terms of 1948 Agreements of Mutual Coexistence under the changed need and reality of the time. It expressed its incapacity to comply with the terms of these Agreements to maintain the unhindered supply of raw materials to the industries of Zamharta. Due to the lack of raw materials ten (10) heavy industries of Zamharta were closed down in 2010. This caused severe economic strain to Zamharta and also worsened the already tenuous condition of unemployment.

On 5 March 2011, Mr. H. Zambawa terminated the 1948 Agreements of Mutual Coexistence and denied access to any kind of road and railway connectivity of Khawransik to and fro from port Zambavi. Subsequently on 6 March 2011, Khawaransik formally stopped the supply of raw materials to the industries situated in Zamharta. This resulted in the closure of five more industries in Zamharta during the next two months. This caused further strain and animosity in the mutual relationships of these two countries. Though both countries were facing hardships, Khawransik had been successful in managing its essential supplies through air route with the active support from Colour Land.

Mr. H. Zambawa declared war against Khawransik on 20 December 2011 and gave a call to the citizens of Zamharta to assist the army in its war efforts. He stated that each and every citizen from children to the elderly must sacrifice their lives for the cause of the country. By 31 December 2011 almost half of Khawransik came under the control of Zamharta. Thirty out of Sixty districts of Khawransik came under the control of Zamharta and intense fighting broke out in the rest of the thirty districts mostly situated in the close vicinity of district Khawartun – the capital city of Khawransik. The government of Khawransik gave a call to her citizens for non-cooperation with occupied authorities and to fight for their motherland.

Mr. H Zambawa on 1 January 2012 established Zamaharta's Occupying Authority over Khawransik (ZOAK) for carrying out its administration over the districts that came under the control of his army. He appointed his close associate Brigadier G Kumanova as Principal Administrator of ZOAK. All the orders, rules and regulations in respect of occupied Khawransik territories were being promulgated by ZOAK with the signature of Brigadier G. Kumanova. However, Brigadier G. Kumanova was acting under the control of Mr. H Zambawa and receiving his salary under the defense head of the budget of Zamharta.

Through Order No. 5 of 3 January 2012, ZOAK ordered the restoration of excavation of mineral resources in mines that had fallen under its control. It had ordered all the employees of these sites to resume work as early as possible. However, only five percentage (5%) of employees had turned up to take up their job. Similar orders were also made in respect of many other services and all these orders met with a similar response. ZOAK through its Order No. 16, of 15 January 2012 provided for bringing workmen from Zamharta or to provide training to the local and willing residents of occupied territory to fulfill the gap of required workforce to conduct smooth administration over occupied territories. In next two months, over twenty thousand followers of Zambua religion from Zamharta were placed almost in all occupied districts of Khawransik to carry out important administrative works. These persons were also placed to work in mines for excavation of mineral resources.

ZOAK, through its Order No. 34 of 20 February 2012 further terminated the services of all the employees of occupied Khawransik who did not report to their duties till the date of this order. They were also ordered to leave their government provided residences immediately and subsequently these residences were allocated to the incoming population from Zamharta who were working for the occupying regime. Further very harsh and stringent limits had been imposed on the citizens of Khawransik with regard to withdrawal of money from their bank accounts.

Extensive arrangements had been made to settle the Zamhartan work force in different parts of occupied Khawransik. Most of the government buildings were converted into the temporary residences for these workmen. Empty private houses were also allocated to them in the villages where the followers of Zambua or Zam-Niwansik religions were in significant numbers. This attempt significantly changed the demography of many districts of Khawransik. There were also reports of arson and riots against the citizens of Khawransik, particularly against the

population of Khaw tribes and Haw-Niwansik groups. The religious schools of Khaw tribes and Haw-Niwansiks were closed and armed contingents of Zamharta were stationed in them.

Mr. H Zambawa issued an advisory on 15 April 2012 to all the staffs of ZOAK to maintain the law and order and to protect and respect the private interests of the citizens of Khawransik. Mr. H Zambawa also declared that Zamharta has no further intention to capture the remaining territories of Khawransik provided Khawransik renders active support in search of the accused leaders of The Great Zamabarta and should also promised the continuous and unhindered supply of raw materials to the industries situated in Zamharta.

Most of the industries in Zamharta started receiving raw materials from occupied regions by April 2012 and became functioning thereafter. On 15 May 2012, the Prime Minister of Khawransik accepted the defeat and expressed his willingness to cooperate with the government of Zamharta in finding out the whereabouts of the leaders of The Great Zamabarta. He also indicated the willingness of Khawransik to respect the 1948 Agreements of Mutual Coexistence provided Zamharta also fulfilled its part under the agreement and further withdrew its forces and population from Khawransik. He also stated that the citizens of Khawransik might assist in the lawful activities of occupying forces as per their own conscience.

However on the very next day Mr. H Zambawa died in a plane crash and on the same day, ZOAK's chief Brigadier G. Kumanova was appointed as the supreme political and military authority of Zamharta. Brigadier G. Kumanova organized a Press Conference on 18 May 2012 and released a statement that his forces would not withdraw from occupied Khawransik till it realized the complete reparation for the losses suffered by her due to non fulfillment of obligations on the part of Khawransik under 1948 Agreements of Mutual Coexistence. He also stated that no Zamharta's citizen working in the mines of occupied Khawransik and other localities would withdraw before the cessation of occupation.

Khawransik appealed to the world community at large to help her to end this unlawful situation existing in its own territory. Pursuant to this appeal and active diplomacy by Colour Land, the union of seven great military powers (three of which are the permanent members of the United Nations Security Council) of the world referred as "Super Seven", gave one month's time to Zamharta on 22 May 2012 to withdraw its forces from Khawransik.

However, without giving any heed to this ultimatum, the Zamhartan forces launched fresh attacks against the unoccupied territories of Khawransik on 15 June 2012. Pursuant to this surprise onslaught, the Super Seven launched extensive air attacks on the military and strategic locations in different parts of Zamharta and occupied Khawaransik. They also used their joint naval forces to launch attacks on the port city of Zambavi. The city of Zambavi came under the control of joint armed forces of Super Seven by 05 July 2012.

Most of the leaders and authorities of Zamharta had already fled the city. There was also no trace of Mr. G. Kumanova and as per unconfirmed reports he had migrated to inner lands of Zamharta. Within next two weeks, the control over the road networks of Zamharta linking Zambavi to Khawransik was established by the joint forces of Super Seven without much effort. Meanwhile the Super Seven also sent its armed air forces planes and personnel to the city Khawartun. The final battle to liberate the occupied Khawransik started on 25 July 2012 from both North and South. However there were also some media reports of abuse and violence against ZOAK authorities in the occupied territory of Khawransik.

The forces of Super Seven advanced from both north and south and soon it became clear that Zamharta's control over Khawransik would not continue for too long. On 27 July 2012, some ZOAK authorities had visited a village and ordered the burning of all the houses belonging to Haw-Niwansik population because they had attacked the Zamharta's army contingent passing through the locality. On 29 July 2012, ZOAK authorities also ordered the burning down of two schools dedicated to the teachings of Khaw tribe and also murdered two guards on the ground that their teachings were seditious and was inciting violence and uprising against the legitimate interests of the occupying power. On 5 August 2012, the occupying forces surrendered and whole Khawransik came under the control of the joint forces of Super Seven. However, this end of occupation also brought to fore many more gruesome stories about the last phases of the occupation.

Zamharta was placed under the control of United Nations through UN Security Council Resolution 2015 of 2012 adopted on 6 August 2012. Extensive search operations were launched for tracing the whereabouts of Brigadier G. Kumanova. He was captured from a village in Central Zamharta on 10 March 2013. The Office of the Prosecutor of the International Criminal Court (ICC) obtained the approval of the Pre-trial chamber for investigating into the situations in occupied Khawransik. In response to the arrest warrants issued by the ICC, the

United Nations peace keeping troops handed over Mr. G Kumanova to the ICC. The ICC Pre Trial Chamber confirmed the following charges on Mr. G Kumanova and committed the case to trial. The Trial Chamber will now commence hearings based on the following charges -

The Charges

1. Brigadier G. Kumanova was charged with the war crime under article 8(2)(b)(viii) for transferring directly or indirectly Zamavarta's civilian population into the occupied territories of Khawransik.
2. Brigadier G. Kumanova was further charged with the crimes against humanity under article 7(1)(h) for persecution against Khaw tribe and Haw-Niwansik religious group for the arson and murder committed on 27 July and 29 July 2012.

Zamharta and Khwarsik both are parties to the Four Geneva Conventions of 1949 and two Protocols Additional to the Geneva Conventions of 1977. Both these countries have also ratified the Statute of the International Criminal Court in 2008. Both these countries are also parties to the other important conventions of International Humanitarian Law, Human Rights Law and Public International Law.

Written and oral arguments on behalf of the Prosecution and Defence are to be confined to these two charges. Counsel for both sides are to make arguments with respect to the applicability of the charges and whether the “Elements of Crimes” (United Nations Doc. PCNICC/2000/1/Add.2 (2000), with relevant parts reproduced below) have been met for each of the two charges. Counsels are expected to bring to the Court’s attention relevant jurisprudence of the international and national courts and tribunals and other documentation. Questions relating to jurisdiction and admissibility may not be raised unless they are substantially linked to the merits of the case.

Elements of Crime

Article 8 (2) (b) (viii):

The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

Elements

1. The perpetrator:

(a) Transferred,¹ directly or indirectly, parts of its own population into the territory it occupies; or

(b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.

2. The conduct took place in the context of and was associated with an international armed conflict.

3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 7 (1) (h):

Crime against humanity of persecution

Elements

¹ The term “transfer” needs to be interpreted in accordance with the relevant provisions of international humanitarian law.

1. The perpetrator severely deprived, contrary to international law,² one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.³
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

² This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes.

³ It is understood that no additional mental element is necessary for this element other than that inherent in element