

2016 ICC Moot Court Competition Problem

Case before the International Criminal Court (ICC): Situation in Porvos

Appeal from the Pre-Trial Chamber's Decision on Challenge to Jurisdiction and Motion for Disqualification of a Pre-Trial Chamber Judge

Introduction

This is a fictional case intended to enable students to familiarize themselves with the law and practice of the ICC. Participating teams will be divided into three groups: (1) Counsel for the Government of Yunkel, (2) Counsel for the Prosecution, and (3) Legal Representative for Victims (hereinafter “Victims’ Representative”). In accordance with the rules of the competition, each team shall write a Memorial for each of these groups, setting forth its legal arguments in the context of the interlocutory appeal by the State of Yunkel challenging the jurisdiction of the ICC and the impartiality of one of the Pre-Trial Chamber judges.

The facts and procedural history are set forth in the Decision of the Pre-Trial Chamber reproduced below. Each team’s Memorial will be evaluated on its: (i) organization, structure and analysis of issues; (ii) use of facts and legal principles; (iii) use of authorities and citation; (iv) persuasiveness, ingenuity, logic and reasoning; and (v) grammar, style and clarity. At oral argument, the order of presentation will be first, Counsel for the Government of Yunkel; second, Counsel for the Prosecution, and third, Victims’ Representative.

Established Agenda for the Appeal of the Pre-Trial Chamber’s Decision

The Appeals Chamber seeks submissions of all parties and participants on the following issues:

- a. Whether recruitment and use of juvenile pirates by a nonstate organization under the facts stipulated in this case can be tried as a crime against humanity within the jurisdiction of the International Criminal Court under Article 7 of the ICC Statute;
- b. Whether a nonstate organization’s cross-border contamination of a State’s water supply, resulting in over 3,000 cases of illness, can constitute the war crime under Article 8(2)(b)(iv) of “widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” under the facts stipulated in this case;
- c. And whether a judge who wrote a passage in a book when she was a law professor prior to appointment to the ICC that opines on the issue of whether recruitment and use of juvenile pirates can be tried by the ICC as a crime against humanity must be disqualified from the Pre-Trial Chamber in this case under Article 41 of the Court’s Statute.

[This is a fictional document for use in the ICC Moot Court Competition]

Pre-Trial Chamber VI
ICC Moot Court Competition
Situation Relating to Attacks Against Porvos

**Decision on Jurisdiction and Motion to Disqualify one of the Pre-Trial
Chamber Judges**

Pre-Trial Chamber VI of the International Criminal Court (ICC) renders this decision on the application filed by the State of Yunkel challenging the jurisdiction of the ICC and requesting the disqualification of a Pre-Trial Chamber Judge in this case.

Factual Background

This case arises out of allegations of war crimes and crimes against humanity committed on the territory and against the vessels of the State of Porvos by members of a non-state group calling itself the “Olmic State of Tyvosh and Yunkel” (OSTY). A map of the region is appended at the end of this Decision. Except where indicated otherwise (i.e., para. 2), the following facts have been stipulated by the Parties:

1. The States of **Porvos** (pop. 2.8 million), **Tyvosh** (pop. 1 million), and **Yunkel** (pop. 1.5 million) are located adjacent to each other on the west shore of the **Sea of Mirth**. Since the 1970s, all three States have been members of the United Nations, parties to the Vienna Convention on the Law of Treaties, and parties to the Geneva Conventions of 1949 and their Additional Protocols of 1977. Porvos ratified the ICC Statute in 2002; Tyvosh and Yunkel are not parties to the ICC. None of the States have ratified any other treaties relevant to this situation.
2. Each of the three States has a democratic form of government. Because there has not been an armed conflict in the region for hundreds of years, none of the three States has an army or navy; rather, they each have only lightly-armed police forces. Porvos and Tyvosh have a long history of trade and friendly relations between them. According to a 2014 report of the UN High Commissioner for Human Rights, “Yunkel has a weak, corrupt government that for the past five years has been unable and unwilling to control a growing paramilitary organization based in the southern portion of its territory and the western portion of Tyvosh, calling itself the Olmic State of Tyvosh and Yunkel (OSTY).” Yunkel takes issue with that characterization, but has stipulated here that it has had extreme difficulties meeting the challenges posed by the rise of OSTY.
3. Formed in 2010, OSTY is a religious-based organization committed to the goal of creating an autonomous region ruled by Olmic Religious leaders, comprising the southern portion of Yunkel and all of Tyvosh. OSTY has been variously characterized as a “terrorist organization” (2014 US State Department Report), a “paramilitary group” (2014 UN High Commissioner for Human Rights Report), and “a band of pirates and criminals hiding behind a religious veneer” (2014 Amnesty International Report). OSTY is led by a charismatic Olmic Cleric named **Lance Raider**, who is a national of Yunkel. In 2010, Raider inherited tens of millions of dollars from

his father, who owned one of the world's largest maritime shipping companies based out of the Yunkel port city of Fodor. Raider makes all major political and military decisions for OSTY.

4. About one-third of the population of Tyvosh and Yunkel are adherents of the Olmic faith, a fundamentalist religion that deals harshly with those who commit transgressions of the tenets of the faith. Since its formation, OSTY's membership has increased to over 50,000 members. Armed with millions of dollars of weapons purchased on the black market using Lance Raider's inheritance, in January 2014 OSTY forces indigenous to Tyvosh launched a coordinated series of attacks, resulting in gaining control over all of the territory of Tyvosh with the exception of the walled port city of Quirth, the capital of Tyvosh (pop. 200,000).
5. Since March 2014, the OSTY forces in Tyvosh have been engaged in a siege of Quirth. At the request of the Government of Tyvosh, beginning in April 2014, the State of Porvos commenced shipments of humanitarian aid to the people of Quirth -- including food, water, medicines, and fuel -- to help them withstand the siege. The aid was shipped to Quirth from the Porvos port city of Sylaria, using dozens of Porvos-flagged commercial cargo vessels.
6. In June 2014, OSTY transformed two dozen vessels from Lance Raider's shipping fleet into pirate ships, equipped with special boarding ladders, grappling hooks, and grenade and rocket launchers. Using these vessels, OSTY launched a series of attacks against the Porvos aid vessels traveling on the high seas between Sylaria and Quirth. From June 2014 through February 2015, OSTY captured thirty Porvos-flagged vessels, took 550 Porvosian crew members hostage (who OSTY subsequently ransomed for \$2,000 each), and confiscated \$10 million worth of humanitarian cargo.
7. Estimates by the NGO "Oceans without Boundaries" put the total number of OSTY pirates at about 2,000, with about half under fourteen years of age. The juvenile pirates are systematically recruited from the OSTY-controlled parts of Tyvosh and Yunkel for a year of piratical service by Lance Raider and his OSTY lieutenants, who contract with the parents of the juveniles to share a percentage of the piratical booty with them.
8. In February 2015, the Porvos-flagged commercial cargo vessels bound for Quirth began to employ armed private security forces. These security forces successfully repelled many of the pirate attacks. An estimated 1,000 pirates, including 500 juveniles, have been killed in these skirmishes.
9. The population of Porvos obtains half of its fresh water from Mirror Lake, and its Capital city, Dothran (population, 500,000), is situated on the southern shore of the lake. In March 2015, OSTY publicly announced that it would poison the rivers that feed into Mirror Lake from the Yunkel side of the border unless Porvos immediately halted its aid shipments to Quirth. When Porvos refused, OSTY contaminated the rivers with Salmonella, resulting in an outbreak of Salmonella-caused illness in Dorhran. The outbreak lasted three weeks, and resulted in 3,000 hospital visits and 50 deaths, with most victims among the frail elderly and young children. Immediately after this attack, Porvos halted its aid shipments to Quirth, but other nations began shipping aid to Quirth which has continued to withstand the OSTY siege.

Procedural Posture

10. At the request of the Government of Porvos, on April 10, 2015 the Office of the Prosecutor asked the Pre-Trial Chamber for authorization to formally open an investigation into whether OSTY committed international crimes within the jurisdiction of the ICC by (a) recruiting and using child pirates in attacks against Porvos vessels as a crime against humanity; and (b) contaminating Porvos' water supply as a war crime under Article 8(2)(b)(iv) of the Court's Statute.
11. Since April 10, 2015 the Pre-Trial Chamber has received written requests from 450 Porvosian victims wishing to participate in the proceedings, and has appointed a common legal representative for these victims. About half the victims were Porvosian crew members who had been injured or held captive by the OSTY pirates; and the other half were Porvosian nationals who contracted Salmonella-caused illness from the contaminated water of Mirror Lake.
12. In its submission, dated May 25, 2015, Counsel for the Government of Yunkel raised several objections to the jurisdiction of the ICC with respect to this matter. Government Counsel argued that:

First, the recruitment and use of juvenile pirates by OSTY used in attacks against Porvosian-flagged commercial vessels cannot be tried as a crime against humanity under Article 7 of the Court's Statute because (a) attacks on Porvosian-flagged vessels in the high seas does not qualify as attacks against the civilian population in the territory of Porvos under Article 7 of the ICC Statute, (b) the parents of the juveniles consented to their participation in the piratical excursions; (c) the number of child pirates does not rise to Article 7's implicit "numerosity requirement"; and (d) OSTY is not a government or parastatal entity and is therefore incapable of committing crimes against humanity.

And second, the contamination of Mirror Lake cannot be deemed a war crime in the territory of Porvos in violation of Article 8(2)(b)(iv) of the Court's Statute because (a) no action by OSTY took place in the territory of Porvos, (b) the contamination of the river did not take place in the course of and in furtherance of an international armed conflict; (c) the injury caused by the contamination was not widespread, long-term and severe; and (d) in the alternative, the injury was not excessive in relation to the concrete military advantage anticipated.

In addition, Counsel for the Government of Yunkel requested that one of the three members of the Pre-Trial Chamber assigned to this matter, Judge Rosemelle Hasty, be disqualified from this Case under Articles 40 and 41 of the Court's Statute because she authored a book while serving as a professor at the Major Planc Institute, titled "Emerging Issues in International Criminal Justice" (Westeros University Press, 2011), in which she wrote: "The scourge of Somalia Piracy may someday trigger the ICC's jurisdiction in a variety of contexts. For example, recruitment and use of juvenile pirates could be tried as a crime against humanity by the International Criminal Court if the Court had personal jurisdiction over parties responsible for this heinous practice." Although this was written before her election to the ICC bench, Yunkel argues that this published passage indicates that Judge Hasty's impartiality on the novel question of whether recruitment of juvenile pirates is a crime against humanity is in doubt.

Findings and Conclusions

13. On June 30, 2015, representatives of the ICC Office of the Prosecutor (representing the interests of Porvos), Counsel for the State of Yunkel, and the Legal Representative for the Victims submitted briefs and made oral presentations before this Pre-Trial Chamber on these issues. After duly considering their submissions and arguments, the Pre-Trial Chamber hereby makes the following findings and conclusions:
14. First, the Pre-Trial Chamber does not believe that Judge Hasty's disqualification is required in this case. This is not a case where the judge has opined on the guilt of a particular individual. The Judges of the ICC take an oath to act impartially. We must be presumed capable of deciding cases based on the evidence presented even if we opined generally on a legal matter relevant to an assigned case prior to becoming an ICC judge.
15. Second, the Pre-Trial Chamber concludes that, if proven, the recruitment and use of juvenile pirates by OSTY, which were employed in attacks against Porvosian-flagged commercial vessels, can be tried as a crime against humanity under Article 7 the Court's Statute. Judge Samuel Prudence dissented from this part of the Pre-Trial Chamber's Decision.
16. Third, the Pre-Trial Chamber concludes that, if proven, the intentional contamination of the Porvos water supply was a war crime in violation of Article 8(2)(b)(iv) of the Court's Statute.

For these reasons, the Pre-Trial Chamber hereby:

1. Declines to disqualify Judge Hasty from this Case.
2. Authorizes the Office of the Prosecutor to launch an investigation into crimes against humanity based on the recruitment and use of child pirates who were employed in attacks against Porvosian-flagged vessels from June 2014 through February 2015.
3. Authorizes the Office of the Prosecutor to launch an investigation into war crimes against the environment based on the March 2015 contamination of Lake Mirror in Porvos.
4. Orders the Registrar to notify the parties and participants of this decision.

Dated: September 15, 2015

Judge Jon Crow (concurring on all findings/conclusions).

Judge Rosemelle Hasty (concurring on findings/conclusions in paragraphs 15 and 16, but taking no part in the issue referred to in paragraph 14).

Judge Samuel Prudence (concurring on findings/conclusions in paragraphs 14 and 16, but dissenting from the findings/conclusions in paragraph 15).

Appendix: Map of the Region

