

ICC Moot Court Competition Problem 2017

Case before the International Criminal Court (ICC): Prosecutor v. Tarion Bannister of Valaria

Appeal from the Pre-Trial Chamber's Decision on Confirmation of Charges

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 Defense, (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 Defendant challenging the jurisdiction of the ICC and other matters in the context of the Pre-Trial Chamber's Decision on Confirmation of Charges reproduced below.

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 Defense; second, Counsel for the Prosecution, and third, Victims' Representative.

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

The Pre-Trial Chamber has granted the Defense leave to appeal the following issues to the Appeals Chamber, which seeks submissions of all parties and participants on:

- a. Whether a military regime that seized power in a coup and claims to be the interim government was competent to accept the jurisdiction of the ICC on behalf of the State of Valaria;
- b. Whether the alleged actions taken by the accused against the third-gender people in Valaria could qualify as genocide; and
- c. Whether an 18 year-old could be excluded from criminal responsibility due to his former status as an involuntary child soldier.

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

Pre-Trial Chamber VI
ICC Moot Court Competition
Situation Relating to Valaria

**Confirmation of Charges against
Defendant Tarion Bannister of Valaria**

Pre-Trial Chamber VI of the International Criminal Court (ICC) renders this decision on the application filed by the Defense, challenging the jurisdiction of the ICC and other matters in the context of Confirmation of Charges.

Factual Background

1. The case arises out of allegations of genocide and crimes against humanity committed in the territory of Valaria by members of a militant group known as the “Dothrocky Riders,” including Tarion Bannister. Relevant geographic locations are set forth in the attached map of the area.
2. The State of Valaria and its neighbor to the south, the State of Quirth, are parties to several international instruments relevant to this case including the Vienna Convention on the Law of Treaties, the International Covenant on Civil and Political Rights, the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. They have not, however, ratified the Genocide Convention nor enacted domestic law making Genocide a crime within their borders.
3. At this stage in the proceedings, the Pre-Trial Chamber bases its findings largely on a public report issued by the London-based NGO, International Rights Watch, titled “Massacres in Valaria,” dated 10 June 2016. The NGO is highly respected and its reports are often cited in the work of U.N. human rights bodies. Relevant excerpts are reproduced below:

Para 1. With the cooperation of the interim government, International Rights Watch has investigated the crisis in Valaria, which was marked by the massacre of 5,000 Verdache people from December 2015-January 2016. This report is based on interviews with survivors and eye-witnesses, inspection of hospital and morgue records, and forensic examination of mass grave sites.

Para. 2. The State of Valaria has a population of approximately 1 million people. The country is demographically divided into two ethnic groups, which emerged from separate tribes that had immigrated to the region centuries ago -- the Lorash (currently about 510,000 members) and the Steelborn (about 490,000 members). Most of the Lorash ethnic group live in urban cities in the industrial northern part of Valaria, while most of the Steelborn group live in the southern part in rural farms, cattle ranches, and small villages. Through democratic elections, the Lorash-dominated political party controlled the parliament and executive branch of Valaria from 1964-2015. The Capital of Valaria, “New Town,” which is the headquarters of the 50,000-strong national army



and all national government institutions, is located in the center of Valaria. Until recently, Valaria had a sizeable, distinct “third-gender” population of about 7,000 members (known as “Verdache”), which come from both the Lorash and Steelborn ethnic groups.

Para. 3. While biology determines whether a human’s anatomy is male or female, the concept of “third gender people” recognizes individuals who, notwithstanding their anatomy, are self-identified or identified by society as belonging to neither the male nor female genders. They may represent an intermediate state between man and woman, a state of being both, a state of being neither, or the ability to cross or swap genders. The term has been used to describe Hijras of India, Bangladesh and Pakistan who have gained legal identity, the Fa’afafine of Polynesia, the Sworn Virgins of the Balkans, the Berdache among native American tribes, and the Verdache in Valaria.

Para. 4. The Verdache have been socially (though not legally) recognized as a unique gender in Valaria for hundreds of years. By tradition, when a child is determined to be third-gendered (usually at the time of puberty), the child is often sent to live with the local Verdache community. The Verdache largely live outside of cities and villages in temporary camps, similar to the Roma or Travelers in Europe. Over the years, the Verdache have developed a heavily accented dialect of the Valarian language, as well as many unique customs and distinctive clothing. While the Lorash have always been tolerant of the Verdache in the north, the Steelborn in the south have historically expressed animosity towards them, viewing them as untrustworthy and unclean and subjecting them to periodic pogroms.

Para. 5. In the 1990s, when extensive iron ore deposits were discovered in the southern region of Valaria, the national government of Valaria began forcibly taking land from rural Steelborn farmers for strip mining mineral extraction. Iron ore became Valaria’s chief export and the national government’s primary source of revenue. Around 1997, the Dothrocky Riders, a paramilitary group composed of several thousand Steelborn farmers and herdsman, was formed by a charismatic Steelborn leader named John Sleet (born 1963), under the promise to retake and return the confiscated land of Steelborn farmers. In order to grow its ranks, the Dothrocky Riders began to kidnap hundreds of children from local villages in the southern part of the country to use as child soldiers. None of the children taken were Verdache. While the national army was able to protect most of the major iron ore mining sites from Dothrocky attack, the Dothrocky campaign had success with respect to liberating some of the smaller mining operations in the deep south of Valaria.

Para. 6. During the past five years, the world price of iron ore has plummeted, forcing the Valarian national government to cut back dramatically on provision of public services and maintenance of infrastructure throughout the country. In the November 2015 national election, the Steelborn-dominated political party ran on a slogan blaming the Verdache for the country’s economic ills. By a thin margin, the Steelborn-dominated political party captured a majority of seats in Parliament and won the Presidency, which appoints all executive branch department heads. The newly elected President, Leon Redjoy, immediately began implementing a series of executive measures against third-gender people, including disenfranchising them, confiscating their property, and banning them from access to public services. On December 4, 2015, the Verdache began organizing unarmed protests in New Town. In response, President Redjoy, ordered the 1,500 members of the national police to forcibly quash the protests. Dozens of Verdache protesters were killed. In the ensuing days, third-gender people across Valaria began arming themselves for self-defense.



Para. 7. The Dothrocky Riders seized the opportunity to align with the new Steelborn government leaders and began launching attacks against the Verdache throughout Valaria. Based on inspection of hospital and morgue records, and forensic examination of mass grave sites, International Rights Watch has determined that between 4 December 2015 and 25 January 2016, nearly five thousand Verdache were killed across the State of Valaria in a series of attacks planned and coordinated by John Sleet. Based on interviews with eye witnesses, International Rights Watch has determined that an 18-year-old former child soldier named Tarion Bannister led one of the most brutal Dothrocky raiding parties which committed dozens of massacres, resulting in hundreds of deaths, during that six-week period.

Para. 8. Despite public reports of the widespread massacres, the Steelborn-dominated central government took no action against the Dothrocky Riders, consistent with the Steelborn's longstanding hostility towards third-gender people. In late December 2015, the national army, composed largely of Lorash troops and dominated by Lorash officers, began taking unauthorized action against the Dothrocky Riders to stop the killing of the Verdache. When President Redjoy ordered the national army to halt its actions against the Dothrocky, the leaders of the national army demanded that President Redjoy and his cabinet resign. With no military support to protect them, the President and the members of his cabinet fled the country for neighboring Quirth, which has a large population of Steelborn. The national police immediately declared their allegiance to the military regime and on 25 December 2015 the national army suspended the parliament and declared itself the interim government of Valaria until new national elections could be held.

Para. 9. By 25 January 2016, the Dothrocky Riders were finally vanquished by the national army, with many of the militant group's ranks, including John Sleet, killed in intense fighting. A small group of surviving Dothrocky Riders, including Tarion Bannister, fled across the border and sought refuge in Quirth, which is not a Party to the Rome Statute.

Para. 10. The military regime that has taken over the government of Valaria has to date shown no signs of preparation for a national election. While Valaria continues to have diplomatic and economic relations with over 40 States, thirty of its former trading partners, including Quirth, have denounced the coup d'état and cut off trade with Valaria until the former democratically elected government is reinstated. In some UN bodies there have been challenges to the credentials of the Valarian interim government representatives but since there have been no competing delegations from the former government, the UN Secretariat has decided to provisionally seat the Valarian representatives and "take no action" on their credentials at this time.

4. On 29 January 2016, the Commander of the national army of Valaria, purportedly acting as head of the interim government for the country, filed a declaration "accepting the jurisdiction of the ICC over international crimes committed in Valaria against the Verdache people between 4 December 2015 and 25 January 2016." The Registrar of the ICC responded in a letter dated 1 February 2016 to the head of the Valarian interim government, which stated:

I confirm receipt of your 29 January 2016 Declaration Accepting the Jurisdiction of the International Criminal Court over crimes committed in Valaria against the Verdache people. I hereby accept the declaration and I have transmitted it to the Prosecutor and Judges of the Court. This acceptance is without prejudice to any prosecutorial or judicial determinations on this matter.



5. On 15 March 2016, pursuant to Article 57 of the ICC Statute, the ICC Pre-Trial Chamber authorized an investigation into the crimes committed in Valaria against the Verdache people; on 2 July 2016, pursuant to Article 58, the ICC issued a warrant for the arrest on charges of genocide and crimes against humanity of Tarion Bannister who was specifically named as a major perpetrator in the 10 June 2016 International Rights Watch Report and known to be living in Quirth; and on 3 July 2016, the Pre-Trial Chamber appointed a Common Legal Representative to serve as counsel to the Verdache victims under Article 68 of the Statute.
6. On 5 July 2016, shortly after Quirth notified Valaria and the ICC that it had no intention of arresting any of the Dothrocky Riders or former Valarian officials who had taken refuge in its territory, the military government of Valaria sent a special forces unit into Quirth, which captured Tarion Bannister, who had been living openly in a Quirth town near the Valarian border. Since Valaria does not have a domestic law enabling it to prosecute the crime of genocide, on 9 July 2016, the interim government of Valaria turned Tarion Bannister over to the ICC, which appointed him Defense Counsel pursuant to Article 55.
7. The Prosecution and Defense have stipulated that Tarion Bannister was 18-years-old at the time of the acts alleged in paragraph 7 of the 10 June 2016 International Rights Watch Report. They further stipulate that Tarion Bannister was kidnapped from a small village in southern Valaria by the Dothrocky Riders in 2006 when he was 8 years-old and forced to serve as a child soldier. From age 8 to age 15, he was subject to forcible indoctrination, including through beatings and involuntary use of narcotic drugs. Other child soldiers who disobeyed commands or attempted to escape were tortured and killed in front of him by John Sleet and his lieutenants. The Prosecution and Defense do not agree on the legal significance of these facts.

The objections of the Defense

8. In a written submission dated 24 July 2016, Counsel for Tarion Bannister raised several objections to the jurisdiction of the ICC and other related matters, which the Pre-Trial Chamber agreed to consider at a hearing on Confirmation of Charges under Article 61 of the Court's Statute. Specifically, the Defense argued:
 - First, the military regime, which seized power in a coup and then claimed to have accepted the jurisdiction of the ICC as the so-called "interim government," is not the lawful government of Valaria, and therefore it was not competent to accept ICC Jurisdiction with respect to this case under Article 12(3) of the ICC Statute.
 - Second, the facts alleged in the International Rights Watch Report do not constitute genocide because the third-gender people do not fall within any of the groups listed in Article 6 of the ICC Statute, and as a consequence the ICC lacks jurisdiction to prosecute him for that crime. *The Defense has not, however, challenged the Court's subject matter jurisdiction with respect to crimes against humanity.
 - Third, although Tarion Bannister was 18 years old at the time of the alleged acts, he is excluded from criminal responsibility under Article 31(1) of the ICC Statute due to his

former status as an involuntary child soldier, and therefore the charges against him must be dismissed.

Findings and Conclusions

9. On August 30, 2016, representatives of the ICC Office of the Prosecutor, Counsel for Tarion Bannister, and the Legal Representative for the Victims submitted briefs and made oral presentations before this Pre-Trial Chamber on the issues raised by the Defense. Tarion Bannister was present during the proceedings. After duly considering their submissions and arguments, the Pre-Trial Chamber hereby makes the following findings and conclusions:
- First, the Pre-Trial Chamber finds and concludes that the military regime is the effective government of Valaria and as such was able to accept the jurisdiction of the ICC over this case.
 - Second, the Pre-Trial Chamber finds and concludes that the Verdache are a distinct, stable and permanent group and thus, the facts alleged in the International Rights Watch Report, if proven in court, could constitute the crime of genocide under Article 6 of the ICC Statute.
 - Third, the Pre-Trial Chamber concludes that, pursuant to Article 26 of the ICC Statute, Tarion Bannister's former status as an involuntary child-soldier can have no effect on his culpability for international criminal acts undertaken as an 18 year-old adult.

For these reasons, the Pre-Trial Chamber hereby:

1. Determines that the ICC has necessary jurisdiction to proceed with this case.
2. Confirms the applicability of the crime of genocide in this case and that there are substantial grounds to believe that Tarion Bannister committed this crime, as well as crimes against humanity, via the models of liability set forth in Article 25 (3) (a-d) of the ICC Statute, against the Verdache people in Valaria between 27 December 2015 and 25 January 2016.
3. Commits Tarion Bannister for trial on the charges as confirmed.
4. Orders the Registrar to notify the parties and participants of this decision.

[Signed] Judge Friendly, Judge Learned, and Judge Vexatious

**Dated 15 September 2016
At The Hague, The Netherlands**

Pre-Trial Chamber VI
ICC Moot Court Competition
Situation Relating to Valaria

Decision on the Defense Request for leave to appeal the Decision on the Confirmation of Charges against Tarion Bannister of Valaria

Pre-Trial Chamber VI of the International Criminal Court (ICC) hereby issues this decision on the “Defense Request for Leave to Appeal Issues in the Confirmation of Charges Decision” filed on 20 September 2016.

1. On 15 September 2016, the Pre-Trial Chamber issued the “Decision on the Confirmation of Charges Against Tarion Bannister of Valaria,” whereby it confirmed the charges brought against Tarion Bannister and committed him for trial on the charges as confirmed.
2. On 20 September 2016, the Defense filed the Request, seeking leave to appeal the Confirmation Decision on three different issues, namely:
 - a. Whether the Chamber erred when it refused to recognize that a military regime that seized power in a coup and claims to be the interim government was not competent to accept the jurisdiction of the ICC on behalf of the State of Valaria.
 - b. Whether the Chamber erred when it ruled that the alleged actions taken by the accused against the third-gender people in Valaria could qualify as genocide; and
 - c. Whether the Chamber erred when it refused to recognize that an 18 year-old could be excluded from criminal responsibility due to his former status as an involuntary child soldier.
3. Noting that the Defense has an automatic right to appeal jurisdictional issues, pursuant to Article 82(1) of the Statute of the Court, leave to appeal the Confirmation Decision in relation to these three issues is hereby granted.

[Signed] Judge Friendly, Judge Learned, and Judge Vexatious

Dated 25 September 2016
At The Hague, The Netherlands

