

2018 International Criminal Court Moot Court Competition Problem

Case before the International Criminal Court (ICC): Prosecutor v. McGregor Klegane of Northeros

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

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 Defendant, (2) Counsel for the Prosecution, and (3) Counsel for the 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, McGregor Klegane, challenging the jurisdiction and admissibility of the ICC in the context of the Pre-Trial Chamber’s Decision on Confirmation of Charges.

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

Pursuant to Pre-Trial Chamber VI’s decision to grant the “Defense Request for Leave to Appeal Issues in the Confirmation of Charges Decision” (dated 1 October 2017), the Appeals Chamber seeks submissions of all parties and participants on the following issues:

- a. Whether the ICC should recognize human trafficking, as set forth in the facts described in the Pre-Trial Chamber’s decision, as qualifying as “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” under Article 7(1)(k) of the ICC Statute.
- b. Whether a corporate subsidiary that purchases shrimp at an extremely low price from the Westeros shrimp-sheds with knowledge of their labor abuses can be treated as an unindicted co-perpetrator for purposes of prosecuting the Defendant under art. 25(3)(a) of the Statute notwithstanding Article 25(1) of the ICC’s statute.
- c. Whether a domestic court acquittal of the defendant based on an erroneous interpretation of the ICC Statute’s definition of crimes against humanity under the

circumstances of this case shall preclude the ICC from prosecuting the crime under the *ne bis in idem* principle enshrined in Article 20 of the ICC Statute.

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

Pre-Trial Chamber VI
2018 ICC Moot Court Competition
Situation Relating to Crimes Against Humanity in Westeros

**Confirmation of Charges against
Defendant McGregor Klegane of Northeros**

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

Introduction

1. This case constitutes several “firsts” for this Court. It is the first case to address whether the crime of human trafficking can be tried as a distinct crime against humanity. It is the first case to address whether a corporate officer can be tried for failing to exercise proper control over a subsidiary which was implicated in acts of human trafficking committed by its suppliers. And it is the first case to address the defense of *ne bis in idem*.

Factual Background

2. This case involves the territory and nationals of three States: Northeros (to the north), Southeros (to the south), and Westeros (to the West, bordering the Foamy Sea). See map at Appendix 1. All three countries are about the same size (100,000 square miles). Northeros has a population of 2 million, and a developed economy, with a \$10 Billion GDP. Southeros has a population of 1 million, and a developing economy based largely on extraction and export of cobalt, with a \$1 Billion GDP. Westeros has a population of 1 million, and a developing economy based largely on shrimp exports, with a \$1 Billion GDP. All three countries are democracies and have court systems that generally comply with international standards of due process. Of the three, only Northeros is a Party to the Rome Treaty (ratification deposited in 2003). This case arises under the ICC’s nationality jurisdiction since the Defendant is a national of Northeros. Although all three States are members of the United Nations and the International Labor Organization, none of them are party to any of the international or regional treaties related to human trafficking or work conditions.

3. The facts underlying this case came to the Prosecutor’s attention when a class action law suit was filed in Westeros District Court on behalf of victims of abusive labor practices in the Westeros shrimp industry. The Defendant was a Westeros corporation registered as “Little Fingers, Inc.” The litigants vigorously contested the allegations, and the Court noted in its

judgment that over 1,000 pages of documents and witness testimony were entered into the record during a two-week trial. On 25 February 2017, the Westeros Trial Court issued its judgment. It found against Little Fingers, Inc., and ordered the company to pay \$20 million in compensatory and punitive damages to the class action plaintiffs. The next day, Little Fingers, Inc. declared insolvency and shut down operations. According to news reports, its officers fled the country and their whereabouts are unknown. The victims have been paid nothing.

4. The basic facts of this case are summarized in the 25 February 2017 Judgment of the Westeros Trial Court, the relevant excerpts of which are reproduced below:

Para. 4: Facing international pressure after reports surfaced of widespread human trafficking in its shrimp industry, the government of Westeros publicly proclaimed on 6 April 2015 that it would investigate complaints, shut down offending work places, and compensate victims of human trafficking. At the same time, major exporters of Westeros shrimp vowed to bring all shrimp processing in-house where conditions could be closely monitored. Neither of these things have happened. Instead, the Westeros government has provided no compensation and permitted local shrimp-peeling sheds to continue to operate with impunity, while several seafood export companies have continued to do business with the operators of the local shrimp-peeling sheds despite continuing reports of widespread labor abuses.

Para. 5: With the depression of cobalt prices on the world market, the State of Southeros has experienced high levels of unemployment, and since 2013 many Southeros workers have sought employment in the shrimp-peeling industry of Westeros. Currently, more than 10,000 migrants from Southeros work in the 220 Westeros shrimp-peeling sheds, which are independently owned and operated and located in isolated rural areas surrounded by rustic camps for the migrant workers.

Para. 6: The general employment contract widely used in the Westeros shrimp-peeling industry provides that the shrimp shed operators will hire Southeros laborers who are over the age of 13 to prepare shrimp for export by ripping the guts, heads, tails and shells off the shrimp. Under the contract, the operators agree to pay for the transportation of the laborers from Southeros to their place of employment in Westeros, the processing fees for their travel and work permits, and to provide them three meals a day and lodging in camps located near the shrimp sheds. Each worker is paid a daily wage of \$8.50 (US), which is about the same as the average wage for unskilled laborers in other sectors of the Westeros economy. Under the contracts, eighty percent of the wages are retained by the shrimp shed operators and the employees are required to work 80 hours a week for three years until they pay off their debts (for the travel, permits, meals, and lodging) to the operators plus ten percent interest. The operators require that the migrant laborers turn over their passports and identification documents, which are kept in possession of the operators until their debts are paid off at the end of the third year of employment.

Para. 7: The Southeros workers are not under the minimum age set forth in international labor standards. Nor are they illegal immigrants. And they willingly entered into their

three-year contracts with the Westeros shrimp operators. Nevertheless, this Court finds the arrangement to constitute a form of human trafficking due to the unequal bargaining position of the parties, the high number of required weekly hours of work, and the fact that the laborers are not free to leave during the three-year period of the contract.

Para. 8: About sixty percent of the Westeros shrimp are purchased by the Defendant, a seafood export company called “Little Fingers Inc.,” which then sends the shrimp to restaurant- and supermarket-chains across the globe pursuant to lucrative purchasing agreements. Little Fingers’ only source of business is Westeros shrimp exports. Because of the low cost of Westeros labor which is factored into the price of shrimp, Little Fingers’ profit margin is much higher than companies that purchase and export shrimp in other countries, giving Little Fingers a comparative advantage in the international shrimp market.

Para 9: This Court finds that Little Fingers’ continued extensive purchase of shrimp from the Westeros shrimp-peeling shed operators, with knowledge of their abusive labor practices, and the fact that Little Fingers derives a substantial comparative advantage by doing business with them, implicates Little Fingers in their widespread acts of human trafficking. The Court, therefore, finds in favor of the plaintiffs and orders Little Fingers to pay \$20 million (US) in compensation and punitive damages to the class action plaintiffs.

5. Also relevant is a 7 May 2017 Decision of the Northeros District Court (Trial Division II), in the case of State of Northeros v. McGregor Klegane, excerpts of which appear below:

The State has charged McGregor Klegane with aiding and abetting crimes against humanity under the Northeros ICC Implementation Act of 2003 and the domestic crime of human trafficking under the Northeros Human Trafficking Act of 2013.

The following was proved at trial: Defendant McGregor Klegane is a national of Northeros with residence in the Northeros capital of Summerfell. For the past eight years, Klegane has been the corporate Chief Executive Officer of Giant Finger, Inc, a multinational seafood distributor incorporated in Northeros with its headquarters in Summerfell. Giant Finger is the sole-owner of Little Fingers, Inc., a subsidiary incorporated in the neighboring country of Westeros. Under Giant Finger’s corporate structure, Klegane had the ultimate authority to disapprove and block the corporate actions of Little Fingers and supervisory control over Little Fingers’ executive officers.

Despite public reports of labor abuses in the Westeros Shrimp sector (beginning in April 2015), as described in the 25 February 2017 Judgment of the Westeros Trial Court, Klegane never instructed Little Fingers to suspend purchases from the Westeros shrimp sheds pending implementation of promised reforms by the government of Westeros.

This Court nonetheless finds for the Defendant on two grounds: First, the Court concludes that the acts described in the 25 February 2017 Judgment of the Westeros Court constitute human trafficking but do not constitute crimes against humanity as

defined in the Northeros ICC Implementation Act, which applies by reference the language of Article 7 of the ICC Statute. Second, since the overt acts all took place abroad (in Westeros), they cannot be prosecuted under the Northeros Human Trafficking Statute, which this court concludes does not have extraterritorial application.

Under Northeros law, acquittals are not appealable, so that concludes the case against the Defendant.

[signed] Judge I.M. Nefarious, Northeros District Court, 7 May 2017

6. The ICC Prosecutor determined that the case of the Westeros shrimp laborers fell within the criteria laid out in its 15 September 2016 Policy Paper on Case Selection and Prioritization. At the request of the Prosecutor, on 25 May 2017, pursuant to Article 57 of the ICC Statute, the ICC Pre-Trial Chamber authorized an investigation, and on 2 July 2017, pursuant to Article 38, the ICC issued a warrant for the arrest of the Defendant, McGregor Klegane of Northeros for involvement in the crime against humanity of human trafficking under Article 7(1)(k), Article 25(3), and Article 28(b) of the ICC Statute. On 3 July 2017, the Pre-Trial Chamber appointed a Common Legal Representative to serve as counsel to the Southeros victims under Article 68 of the Statute. And on 10 July 2017, Northeros took Klegane into custody and transferred him to the ICC, which immediately appointed him Defense Counsel pursuant to Article 55 of the ICC Statute.

The objections of the Defense

7. In a written submission dated 30 July 2017, Counsel for McGregor Klegane raised several objections to the jurisdiction of the ICC and admissibility of the case, 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:

- a. First, the alleged acts do not come within the subject matter of the ICC. Specifically, lawful employment contracts between the migrants and the shrimp-shed operators do not constitute human trafficking under customary international law. Further, the ICC should not recognize human trafficking as qualifying as “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” under Article 7(1)(k) of the ICC Statute because it does not rise to the same level of severity as the other acts set out in Article 7, and if it did, it would be covered under Article 7(1)(c)(enslavement).
- b. Second, the defendant cannot be held liable for the alleged acts. Specifically, the ICC does not have jurisdiction to consider whether Little Fingers' purchases of shrimp from the shrimp-sheds with knowledge of the migrant's employment arrangement renders Little Fingers, Inc. an indirect co-perpetrator in crimes against humanity because Article 25(1) of the ICC's statute provides that the ICC's jurisdiction is limited to natural persons. Moreover, the Chief Executive Officer of Little Fingers' foreign parent cannot be prosecuted as an indirect co-perpetrator of crimes against

humanity merely for failing to exercise proper control over the subsidiary, under either Article 25(3) or Article 28(b) of the ICC Statute.

- c. Third, since the Defendant has already been tried for the same alleged offense and acquitted by the Northeros District Court, his retrial by the ICC would violate the ne bis in idem principle enshrined in Article 17(1)(c) and Article 20(3) of the ICC Statute.

Findings and Conclusions

1. On August 30, 2017, representatives of the ICC Office of the Prosecutor, Counsel for McGregor Klegane, 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. McGregor Klegane was present during the proceedings. After duly considering their submissions and arguments, the Pre-Trial Chamber hereby makes the following findings and conclusions:
 - a. First, the Pre-Trial Chamber determines that the agreements between the shrimp peeling shed operators and the Southeros migrants constitute an exploitative practice falling within the crime of human trafficking as understood in customary international law. Further, the Pre-Trial Chamber recognizes human trafficking as qualifying as “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” under Article 7(1)(k) of the ICC Statute. Recognition of human trafficking as a unique form of crime against humanity by the ICC will help eradicate this odious practice throughout the world.
 - b. Second, the Pre-Trial Chamber determines that a corporate subsidiary (Little Fingers, Inc.) that makes substantial shrimp purchases from shrimp-shed operators with knowledge of their labor abuses can be treated as an unindicted co-perpetrator notwithstanding Article 25(1) of the ICC’s statute, where the subsidiary derives a significant benefit from doing so. Tackling human trafficking requires companies to take active steps to identify and prevent human rights abuses in their supply chains. The Pre-Trial Chamber concludes that as a national of a State Party to the ICC Statute, the Chief Executive Officer (McGregor Klegane) of the subsidiary’s foreign parent (Giant Finger, Inc) can be prosecuted for involvement in crimes against humanity under both Article 25(3) and Article 28(b) of the ICC Statute. There is sufficient proof at this stage to conclude that the money paid by Little Fingers to the shrimp-peeling shed operators facilitated the human trafficking, and that Defendant was in a superior-subordinate relationship with the officers of Little Fingers.

c. Third, the Pre-Trial Chamber determines that the *ne bis in idem* principle, codified in Article 20 of the ICC Statute, does not apply where the domestic court's acquittal is based on a clear error of law and there are reasons to doubt the impartiality of the domestic judge. We find particularly significant a newspaper article the Prosecution submitted from the *Northeros Inquirer*, indicating that the Defendant was an extremely wealthy and powerful businessman who contributed millions of dollars (US) to the campaign of the former President of Northeros, who after winning the election appointed Judge Nefarious to the bench for an eight-year term in 2011.

For these reasons, the Pre-Trial Chamber hereby:

- Determines that the ICC has necessary jurisdiction to proceed with the charges of crimes against humanity against Defendant in this case.
- Determines that the case is admissible.
- Confirms the that the Prosecutor has supported the charge with sufficient evidence to establish substantial grounds to believe that McGregor Klegane is criminally liable for crimes against humanity committed in Westeros between 6 April 2015 and 25 February 2017.
- Orders the Registrar to notify the parties and participants of this decision.

Dissent by Judge Vexatious:

I found the arguments of the Defense persuasive and I therefore dissent from the Decision of the Pre-Trial Chamber, and urge the Chamber to certify the case for interlocutory appeal.

[Signed] Judge Friendly, Judge Learned, and Judge Vexatious (Dissenting)

**Dated 15 September 2017
At The Hague, The Netherlands**

Appendix 1

