



IBA ICC MOOT COURT

Organised by the Grotius Centre

Case before the International Criminal Court (ICC): Prosecutor v. Agon Megor of The Republic of Ibbin

Appeal from the Pre-Trial Chamber's Denial of 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 roles: (1) Counsel for the Prosecution which brings the appeal, (2) Counsel for the Defendant, and (3) Victims' Counsel.

In accordance with the rules of the competition, each team shall write a Memorial for each of these roles, setting forth its legal arguments in the context of the interlocutory appeal by The Counsel for the Prosecution, challenging the Pre-Trial Chamber's denial of Confirmation of Charges. In addition, each team shall represent each role (twice) in the Oral Round of the Competition.

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

Pursuant to Pre-Trial Chamber VI's decision to grant the Prosecution's request for leave to appeal the denial of Confirmation of Charges of 15 September 2021 (reproduced below), the Appeals Chamber seeks submissions of all parties and participants on the following two issues:

- a. Whether the Pre-Trial Chamber erred in denying the Prosecution's request for confirmation of charges pertaining to the Defendant, Agon Megor?

- b. Whether the Pre-Trial Chamber erred in deciding that a single Victims' Representative was sufficient to represent families of killed adult pirates as well as the families of child pirates, hostages, and innocent bystanders who were also killed in the counter-piracy operations?

Pre-Trial Chamber VI

Prosecutor v. Agon Megor of Ibbin

Pre-Trial Chamber VI of the International Criminal Court (ICC) renders this decision on the application of the Prosecution to confirm the charges against Defendant Agon Megor of Ibbin, who is accused of aiding and abetting war crimes and crimes against humanity in Quarth.

The States involved

1. The case involves two States: (1) the State of Quarth (population 2 million), a developing island-State located in a remote corner of the Stormy Sea; and (2) the Republic of Ibbin (population 100 million), an industrialized State located on the continental mainland some 300 miles west of Quarth across the Stormy Sea. (See appended map.) Quarth is not a party to the Rome Statute for the International Criminal Court (the ICC Statute). Ibbin became a party to the ICC Statute when it deposited its instrument of accession on 15 August 2020. Both States are parties to the 1982 UN Convention on the Law of the Sea, the 1949 Geneva Conventions and their Additional Protocols, as well as the International Covenant on Civil and Political Rights.

The Defendant

2. The Defendant is Colonel Agon Megor (age 47), a national of Ibbin, who serves as the National Security Advisor and head of the National Security Council of Ibbin. He is accused of secretly providing sophisticated hunter-killer drones to Quarth in July 2020, intending that they should be used in a series of deadly attacks against pirates (including juveniles) who are threatening Quarth society. Quarth's deployment of the drones in October 2020 resulted in nearly 1,000 casualties, including both adult and juvenile pirates, innocent civilians, and hostages held by the pirates.

Factual Background

3. On 21 December 2020, by a 2-1 decision, the Pre-Trial Chamber granted the Prosecution's request under Article 15(4) of the ICC Statute to initiate an investigation into the involvement of Agon Megor of Ibbin in alleged international crimes that occurred in Quarth in October 2020 based on submission of two documents: (1) A 14 November 2020 report by the U.N. High Commissioner for Human Rights on Quarth's deployment of sophisticated hunter-killer drones in counter-piracy operations which resulted in the deaths of 1,000 victims; and (2) A 13 October 2020 article in the *Quarth News and Observer*, which indicated that Agon Megor had secretly provided hunter-killer drones to Quarth with the intent that they be used to exterminate all of the Quarth pirates, notwithstanding any likely collateral damage. The relevant text of those documents is reproduced in paragraphs 4 and 5 below.

4. Report of the U.N. High Commissioner for Human Rights on the Situation in Quarth, dated 14 November 2020.

Para. 1. The Office of the U.N. High Commissioner had previously investigated the government of Quarth's deadly campaign against suspected drug traffickers. In 2017, the Office reported that roughly 2,000 people suspected of being involved in the illegal drug trade had been slain since the Quarth government launched its bloody "war on drugs" the previous year. We concluded that such summary executions violated human rights norms and international law and urged the government of Quarth to bring the practice to an immediate halt. Now, the Quarth government has turned its attention to another criminal element - piracy.

Para. 2. For the past three years, the State of Quarth has been subject to sporadic attacks by the Tyvosh pirates, who operate in the high seas and waters off its coast. These loosely organized pirates, numbering about 700-strong, were once Quarth fishermen of the minority Tyvosh clan who turned to the more lucrative vocation of piracy when the warming of the seas around Quarth resulted in a significant diminution of fish stocks. About 50% of the pirates are juveniles under the age of 15, many of whom were abducted and forcibly enlisted into the pirate ranks. During that three-year period, the Tyvosh pirates hijacked 17 Quarth-bound civilian cargo vessels and oil tankers, killed dozens of passengers and crew members and kidnapped others for ransom. While the pirates have grown wealthy and powerful, their activities have disrupted Quarth's trade, destroyed its tourism industry, and thrown Quarth's economy into a steep downturn.

Para 3. As a small island nation, Quarth possesses neither an army nor navy, but has a lightly-armed coast guard and police contingent collectively known as the Quarth Homeland Security Force. In January 2019, the President of Quarth, Lamor Daron, publicly declared a "war on piracy," focusing on the Tyvosh pirates, who operate from ships anchored in Lightning Bay and Pike Harbor and land bases in the coastal villages of Harbortown and Watertown in the north of Quarth. Until October 2020, the Quarth Homeland Security Force was no match for the Tyvosh pirates, who were heavily armed with machine guns, mortars, RPGs, and even shipboard missiles. During this 20-month period of sporadic conflict (January 2019-October 2020), dozens of Quarth Homeland Security personnel were killed in skirmishes with the pirates on land and sea.

Para 4. Starting on 8 October 2020, Quarth began to deploy sophisticated hunter-killer drones, reportedly supplied by the Republic of Ibbin, in its counter-piracy operations. Deploying this powerful weapon in a week of raids against the pirates' vessels and bases, Quarth was able to completely decimate the Tyvosh pirates.

Para 5. Based on eyewitnesses' accounts and morgue records, the Office of the High Commissioner has determined that Quarth's week of nighttime raids against the pirates resulted in the deaths of nearly 1,000 people, including around 700 pirates and 300 innocent civilians. About 50% of the pirates who were killed were juveniles. Four incidents were particularly noteworthy for the high number of casualties:

[1] On 8 October 2020, Quarth used the drones to attack a warehouse which the pirates were using as a supply center in Harbortown. The missiles ignited fuel drums and the resulting fire burned down much of the Harbortown wharf area, killing 250 people, including non-pirate civilians who were lodging in nearby boarding houses.

[2] On 9 October 2020, Quarth used the drones to attack the pirate "mother ship" anchored in Lightning Bay. The ship exploded and sank, killing at least 90 persons on board. More than half the victims of this attack were reportedly under the age of 15.

[3] On 10 October 2020, Quarth used the drones in a night-time raid at the Watertown elementary school which the pirates had recently appropriated for temporary use as a detention center for their kidnapped hostages pending receipt of ransom payments. There, 50 hostages as well as dozens of pirates were killed when the missile strike caused the roof of the building to collapse, utterly destroying the school.

[4] On 11 October 2020, Quarth used the drones in a night-time attack on the Harbortown Hospital after the remaining pirates took shelter there in an attempt to use the hospital staff and patients as human shields. The building was incinerated by the missiles, killing an estimated 100 pirates as well as 50 medical staff and patients.

5. Article titled "Tyvosh Pirates Extinguished," by Rogor Costane, *Quarth News and Observer*, published on 13 October 2020, p. A-1.

During the past week, the north coast of Quarth was the site of dozens of late-night attacks by the Quarth Homeland Security Force against the Tyvosh pirates. Night after night, the people of the north shore have awoken to the sound of explosions and the sight of fires. I encountered Colonel Reena Valyeron, the commander of the Quarth Homeland Security Force, in Drago's Pub in Eastham last evening. There, she was celebrating the success of the counter-piracy operation with her senior staff. I asked Col. Valyeron to tell me the story behind the operation, and it turned out to be a tale for the ages.

According to Col. Valyeron, the secret to the successful operation was the deployment of a pair of high-tech hunter-killer drones that were a gift from "our friends in Ibbin." She told me that during the negotiations last April for the future establishment of an Ibbin military base in Quarth, she had a side conversation with Colonel Agon Megor, the Ibbin National Security Advisor. Col.

Valyeron said she requested Megor's help in extinguishing the Tyvosh pirates before the next round of negotiations in November 2020.

As Col. Valyeron recounted the conversation, she told Megor, "The Tyvosh are unscrupulous, hiding out in school houses and hospitals." She confided to him, "We don't just want to defeat the Tyvosh, we want to eradicate them completely – including the juvenile pirates who are the most vicious of all."

According to Col. Valyeron, "Megor said that he had control over Ibbin's black ops funds and weapons systems, and that Ibbin had developed an experimental weapon that could be just what Quarth needs to wipe out every last Tyvosh pirate, wherever they are found." Megor went on to describe a new type of hunter-killer aerial drones that he said were "the most powerful and sophisticated in the world." He told her, "They have remarkable stealth technology, they have infrared targeting so they can attack at night, and they employ air-to-ground armor piercing missiles that are so powerful they can destroy an entire city block."

"But, deploying such weapons is not for the faint of heart," Megor warned Col. Valyeron. "Expect a lot of casualties in the area of deployment because it's not a precision weapon." Col. Valyeron told Megor that wasn't a problem, "we want to utterly destroy the pirates, whatever it takes." Megor replied, "In that case, we would be happy to provide a couple of our drone prototypes but it's important that you keep Ibbin's involvement secret and return the drones and any unused missiles to us when the operation is complete."

As the conversation wound up, Megor promised to supply Valyeron "the drones and armor-piercing missiles, as well as a mobile launch and control base, and remote training," all of which Col. Valyeron said "we received in July 2020, when we began planning for our October anti-piracy operation."

"The drones were as good as Megor had promised," Col. Vayron said. "With this amazing weapon, we were able to annihilate nearly 1,000 pirates in a single week, ending the scourge of the Tyvosh pirates once and for all," Col. Valyeron boasted.

But not everyone in Quarth is celebrating tonight. The operations that Col. Valyeron directed with Megor's miracle drones resulted in the deaths of nearly a thousand people including many civilians, who Valyeron dismissed as "acceptable collateral damage." When the smoke cleared, the dead were found to include dozens of hostages, innocent people who happened to be living near the attacks, human shields, and several hundred juvenile pirates -- kids under 15 years of age who were forcibly recruited into the pirate ranks. The Tyvosh pirates have been extinguished, but at a horrible price.

6. The Office of the Prosecutor informed the Pre-Trial Chamber that on 15 January 2021 an article appeared at page A-2 of the *Quarth News and Observer*, written by the paper's Associate Editor, Juran Martel, titled "Rogor Costane Retracts Drone Attack Story." The relevant text is reproduced below.

Back in October, *News and Observer* reporter Rogor Costane recounted an extraordinary conversation he had with Reena Valyeron, Commander of the Quarth Homeland Security Force. Now, Costane says it was all a misunderstanding and exaggeration. Yesterday morning, he told the paper's editorial staff that "Valyeron and I were both drinking that night, and I let my imagination get away from me. I do not stand by the accuracy of the 13 October story, and retract it."

This surprising retraction comes while the International Criminal Court in The Hague has launched an investigation into the October drone attacks, based in part on the contents of Costane's article. Meanwhile, the *News and Observer* learned that Costane, who has no means other than a modest journalist salary, was seen yesterday afternoon purchasing a 2021 Porsche 911 at an auto-dealership in Hightown. He paid in full in cash. That car has a (US) \$92,000 price tag. Today, Constantine was suspended from the paper pending an internal inquiry as to whether he may have accepted a bribe to retract the drone story. Meanwhile, multiple sources have confirmed that his source, Reena Valyeron, resigned from the Quarth government last month, and has not been seen since.

Procedural History

7. On 16 January 2021, the Republic of Ibbin informed the ICC Registrar that it had determined that Agon Megor had done nothing wrong and declined to cooperate in the ICC investigation into the alleged involvement of Megor in purported international crimes that occurred in Quarth.

8. Since Ibbin was unwilling to pursue criminal charges against Agon Megor, on 1 February 2021, the ICC Prosecutor requested confirmation of the charges against Megor for aiding, abetting or otherwise assisting the commission of war crimes in a non-international armed conflict and crimes against humanity in Quarth, under Article 7(1)(a) [murder], (b) [extermination], and (k) [other inhumane acts], Article 8(2)(e)(i) [intentionally directing attacks against civilians] and (iv) [intentionally directing attacks against buildings dedicated to education, hospitals, etc], Article 12(2)(b), and Article 25(3)(c) of the ICC Statute.

9. On 15 February 2021, Agon Megor appeared before the ICC remotely via Webex from his office in Ibbin and informed the Pre-Trial Chamber that he would be represented by government counsel. The Pre-Trial Chamber immediately approved Megor's Defense Counsel.

10. During the month of February 2021, several NGOs representing the interests of those killed in the October 2020 Quarth "anti-piracy" operations filed requests to serve as Victims' Counsel in these proceedings. They included a group representing the families of the killed adult pirates, a separate group representing the families of the killed juvenile pirates, a group representing the

pirate hostages who had been killed in the raid at the Watertown Elementary School, a group representing the families of the medical staff and patients who had been killed in the raid on the Harbortown Hospital, and a group representing the victims of the Harbortown wharf fire. Pursuant to Rule 90 of the ICC Rules of Evidence and Procedure, on 21 February 2021, the Court's Registry announced that it had appointed a common Victims' Counsel to represent the interests of all the families of those killed in the drone attacks in these proceedings.

11. On 28 February 2021, Defense Counsel filed a motion in opposition to confirmation of charges on the following grounds:

- The ICC lacks temporal and personal jurisdiction over Agon Megor under Article 24(1) of the Statute because his alleged acts took place prior to the entry into force of the ICC Statute for Ibbin, his state of nationality.
- The alleged facts indicate only that Agon Megor provided the drones to the Quarth Homeland Security Force for the purpose of combating a deadly national security threat, which does not amount to the *mens rea* or *actus reus* necessary to prove aiding and abetting an international crime under Article 25(3)(c) of the ICC Statute.
- Since the pirates constituted a legitimate military target during a non-international armed conflict, their deaths and any collateral damage and incidental damage was justified and lawful under the laws of war. In this regard, child pirates can be considered combatants and may be lawfully targeted for attack.
- 1,000 deaths during a week of military operations does not meet the gravity threshold required by Article 17(1)(d) of the ICC Statute. Furthermore, the lawful deaths of the 700 pirates cannot be counted toward the gravity threshold.
- It has been more than a month since the Pre-Trial Chamber approved an investigation into this case and yet the Prosecution has produced no additional evidence implicating Col. Megor. Since the reporter recanted, and the original statements were just hearsay on hearsay, the 13 October 2020 newspaper article cannot establish substantial grounds to believe that Col. Megor is responsible for the charged crimes.

12. That same date, 28 February 2021, appointed Counsel for the victims filed a motion for the appointment of a separate Victims' Counsel to represent the families of juvenile pirates and of the non-pirate victims of the drone attacks, while Counsel would continue to represent the families of the adult pirate victims, arguing that the different victims' groups would have conflicting interests and legal arguments.

Findings and Conclusions of the Pre-Trial Chamber

13. On 15 April 2021, representatives of the ICC Office of the Prosecutor, Counsel for Agon Megor, and Victims' Counsel submitted briefs and made oral presentations before this Pre-Trial Chamber on the issues raised by the Defense and Victims' Counsel. In addition, Agon Megor participated in the proceedings remotely via Webex. After duly considering their submissions and arguments, the Pre-Trial Chamber hereby makes the following findings and conclusions:

[1] First, the ICC lacks jurisdiction. The Court lacks temporal and personal jurisdiction over the alleged acts of Agon Megor under Article 24(1) of the Statute. Moreover, the allegations do not meet the *mens rea* or *actus reus* requirements for aiding and abetting under Article 25(3)(c) of the Statute. Finally, the alleged acts do not constitute war crimes or crimes against humanity under Article 7 and Article 8 of the Statute.

[2] Second, the case is inadmissible. The alleged number of innocent victims is too small to meet the ICC's gravity requirement of Article 17(1)(d) of the Statute, and the child pirates do not count as innocent victims.

[3] Third, there is insufficient evidence. Given that the journalist disavowed the contents of the 13 October 2020 newspaper article, there is insufficient evidence to establish substantial grounds to believe that Agon Megor committed the crimes charged, as required by Article 61(7)(b) of the Statute.

[4] Fourth, if the case were to proceed, there is no justification for the appointment of a separate Victims' Representative for juvenile pirates or for non-pirate victims under Article 68(3) of the Statute and Rules 89 and 90.

For these reasons, the Pre-Trial Chamber hereby:

- Denies the prosecution's motion to confirm the charges against Agon Megor of Ibbin.
- Denies appointment of a separate Legal Representative of Victims for future proceedings related to this case.
- Orders the Registrar to notify the parties and participants of this decision.

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

**Dated 15 September 2021
At The Hague, The Netherlands**

Dissent by Judge Variance

I would have granted the Prosecution's motion to confirm charges, and I therefore dissent from the Decision of the Pre-Trial Chamber and urge the Chamber to certify the case for interlocutory appeal. Specifically, I would have held:

- First, that the ICC has temporal and personal jurisdiction over Agon Megor under Article 24 of its Statute because the aiding and abetting culminated when the drones he provided were used in October 2020, two months after the entry into force of the Rome Treaty for Ibbin.
- Second, that the alleged facts, particularly those indicating that Megor knew Quarth planned to use the drones against civilians, juveniles and protected sites, do meet the *mens rea* and *actus reus* requirements of Article 25(3)(c) of the ICC Statute.
- Third, that the piratical and governmental actions leading up to the October raids did not meet the armed conflict threshold for application of the laws of war as noted in Articles 8(2)(d) and 8(2)(f) of the Statute; consequently, the use of force in the October raids could only be lawful if justified under peacetime human rights law. As such, the targeting of all pirates, including juveniles, for extermination was a crime against humanity, and the collateral damage cannot be justified.
- Fourth, even if the case met the armed conflict threshold, the operation as contemplated and carried out violated the principles of necessity, precaution, distinction, and proportionality. Moreover, the weapons constituted use of means and methods which are of a nature to cause superfluous injury or unnecessary suffering.
- Fifth, 1,000 unlawful deaths is sufficiently widespread and systematic to constitute a crime against humanity under Article 7 and to meet the gravity threshold required by Article 17(1)(d) of the ICC Statute.
- Sixth, under the circumstances, including the apparent disappearance of a primary witness and information indicating that another witness has been bribed to change his story, I believe the 14 November 2020 Report of the UN High Commissioner for Human Rights and the 13 October 2020 *Quarth News and Observer* article were sufficient evidence to confirm the charges. Further, I would authorize the opening of an investigation into whether Megor committed the additional crime of witness tampering.

