



2015 ICC Moot Court Competition Problem

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

Appeal from the Pre-Trial Chamber's Decision on Jurisdiction and Assignment of Victims' Counsel

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 Braanos, (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 Braanos challenging the jurisdiction of the ICC and the designation of a single Victims' Representative.

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 Braanos; 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 Astafur is competent to make an Article 12(3) Declaration, triggering the jurisdiction of the Court over war crimes committed in Pantos, despite its lack of effective control over the territory of Pantos at the time of submission of the Declaration;
- b. Whether the Court has jurisdiction under the objective territorial principle over crimes committed by a Non-Party State (Braanos) via cyberspace that have an effect in a State (Astafur) that has lodged an Article 12(3) Declaration;
- c. Whether the widespread disruption of communications and electricity during a revolt against the government of Astafur via a Distributed Denial of Service attack constitutes a war crime; and
- d. Whether there must be two different victims' legal teams under separate Victims' Legal Representatives in this case because one portion of the victims supported secession and the other favored remaining part of Astafur.

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

Pre-Trial Chamber VI

ICC Moot Court Competition

Situation in Astafur

Decision on Jurisdiction and Designation of Victims' Legal Representative

Pre-Trial Chamber VI of the International Criminal Court (ICC) renders this decision on the application filed by the State of Braanos challenging the jurisdiction of the ICC and the designation of a single Victims' Legal Representative. The general facts contained in the background section below have been stipulated to by the parties and participants, but Braanos does not concede the veracity of the conclusions of the International Rights Watch Report quoted in paragraph 7. A map of the region is attached as an Appendix to this decision.

Factual Background

1. This case arises out of allegations of war crimes committed in the territory of the State of Astafur by the Cyberwar Unit of the Braanos armed forces.
2. The States of Astafur (pop. 1.8 million) and Braanos (pop. 2 million) formed the Federal State of Braanafur until that State underwent a negotiated dissolution known as the "Velvet Divorce" in June 2005. Both resulting States were admitted into the United Nations in November of that year. Although it is contiguous with Braanos and separated from Astafur by a body of water, the region known as Pantos had been deemed a part of Astafur by the prior federal government of Braanafur, whose capital was Volantos, the current capital of Astafur. The 2005 dissolution agreement confirms that the new independent States would respect the prior federal borders and that the persons living within them would have the citizenship of the State in whose territory they habitually reside. As such, Astafur continued to control the governing institutions in Pantos, including a 10,000-strong military base known as Camp Astaf.
3. Braanos and Astafur are parties to 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, as well as the Hague Convention of 1907.
4. Astafur's economy is based primarily on farming and fishing, and its main export is cobalt (5,000 metric tonnes per annum) from mines in the Pantos region. Braanos's major exports are timber (10 million cubic meters per annum) and coal (15 million tonnes per annum).

5. Most of the roughly 400,000 inhabitants of Pantos originally migrated there from Braanos, and a majority of the Pantosian population speak Braan, the predominant language of Braanos, rather than Astaf, the predominant language of Astafur. With the encouragement of the government of Braanos, on March 15, 2014, the population of Pantos conducted a plebiscite in which sixty percent of the voting age men and women supported severing sovereign ties with Astafur and merging with Braanos. Consistent with the provisions of the Astafur Constitution, the government of Astafur immediately announced that the secession plebiscite was not valid and that Pantos would remain part of Astafur unless and until a dissolution agreement was reached with the Astafur government and approved by the Astafur Parliament. Negotiations for such an agreement were commenced but stalled over the issue of legal rights to the lucrative cobalt reserves within Pantos.
6. Immediately after the plebiscite, Braanos announced that it would honor the wishes of the Pantosian people and annex Pantos. Astafur, in turn, issued an official statement, warning that such annexation would be unlawful and promising to prevent it by force of arms. To that end, during the next thirty days Astafur sent an additional 10,000 troops to strengthen Camp Astaf and guard government buildings throughout the Pantos region.
7. Only 20 States, all close trading partners and allies of Braanos, recognized the legitimacy of the March 15, 2014 secession plebiscite. About the same number publicly declared their non-recognition. Most states have taken no formal position on the matter.
8. The week after the plebiscite Braanos Pantosian protesters started occupying Hugo Park in the center of Pantos. The protests were non-violent, and the protesters were mostly ordinary Pantosian people. They protested against Astafur's decision not to accept the results of the plebiscite, even though it showed that a majority of the Pantosian people were in favor of a merge with Braanos. Although the protests were peaceful, the Astafurian Government decided that the protests had to be ended, and so the protesters were warned to leave. When they refused, Astafurian police cleared the area with water cannons, rubber bullets and tear gas, resulting in many injuries.
9. At 6:00 AM on April 20, 2014, all power went off and communications went down throughout Pantos. Within hours, local paramilitary forces calling themselves the Pantosian Liberation Army (PLA), who were armed and funded by the government of Braanos, launched a coordinated attack on the government institutions and the Astaf military base. There was little resistance by the Astafur forces, who were without communication, rendering them confused and disorganized. When power and communications were restored in Pantos on April 24, the world learned that the PLA had taken control of the government of Pantos with few combat casualties on either side. Later that day, Braanos announced that an annexation agreement had been concluded with the new government of Pantos, that the Braanos Parliament had approved the annexation, and that Pantos was now part of the sovereign territory of Braanos.
10. On April 30, International Rights Watch, a highly respected NGO similar to Human Rights Watch, published a report based on its investigation into the power and communications disruption in Pantos. Relevant parts of the 32-page report, available in full on the organization's website, are reproduced.

“With the acquiescence of local Pantosian authorities, International Rights Watch was able to dispatch a twelve-person team of investigators, including several computer experts, to Pantos on April 25, 2014.

... After examining hospital and morgue records, analyzing digital information from broadly distributed network devices, and conducting dozens of witness interviews, the team was able to ascertain that on April 20, 2014, Pantos had been the target of a well-orchestrated series of Distributed Denial of Service attacks. The attacks bore the cyber-signature of the Braanos Armed Forces Cyberwar Unit. When notified of this, Braanos announced that it will not investigate the matter or pursue criminal prosecution against those who might be responsible for the cyber attacks.

... As a result of these attacks, the mobile phone network and internet connections throughout Pantos were completely disrupted for four days, and the electrical power grid, airports, trains, and the water supply were all shut down.

...The temperatures in arid Pantos averaged 31 Celsius during the day and 26 Celsius at night during this period.

... In addition to rendering government institutions and military facilities vulnerable, the team documented that the cyber attack resulted in a total of more than 7,000 civilian deaths throughout Pantos from April 20-24 due to food shortages and spoilage (1,503), water scarcity and contamination (3,456), several train and airplane crashes (536), people trapped in elevators (17), accidental deaths in the dark (911), and casualties at hospitals whose dialysis, neo-natal care, and life support equipment depended on electricity from the power grid (523).

... The total number of persons killed and injured in the conflict were:

- 90 PLA members killed, 100 injured.
- 190 Astafurian military personnel killed, 200 injured.
- 30 Astafurian police killed, 50 injured.
- 7,000 plus civilians killed, 3,000 injured. About one-third of the casualties were under the age of 18.”

Procedural Posture

11. Neither Astafur nor Braanos is a State Party to the Statute of the ICC. On April 25, 2014, Astafur filed a declaration, pursuant to Article 12, paragraph 3 of the ICC Statute, recognizing the jurisdiction of the Court for purposes of identifying, prosecuting, and judging the authors and accomplices of war crimes committed on the territory of the Astafuran province of Pantos from April 20-24, 2014. The Registrar of the Court transmitted the declaration to the Office of the Prosecutor, which accepted the referral,

determining that the preconditions to the exercise of jurisdiction under Article 12 were met. The Prosecutor has asked the Pre-Trial Chamber for authorization to formally open an investigation.

12. Since April 25, the Pre-Trial Chamber has received written requests from 234 victims (all of whom are immediate family members of people whose deaths are allegedly attributable to the April 20 cyber attack) wishing to participate in the proceedings, and has appointed a common legal representative for these victims. Approximately 60% of the victims had supported secession/annexation while 40% favored remaining part of Astafur. Polls indicate that some victims blame the attack partly on Astafur, since it had ignored the results of the plebiscite and in light of the events in Hugo Park.

13. In a submission, dated May 25, 2014, Counsel for the Government of Braanos raised several objections to the jurisdiction of the ICC with respect to this matter. Government Counsel argues that:

-- an Article 12(3) Declaration can only be made by the government in control of the State on whose territory the crime occurred, and that Astafur does not have effective control of Pantos.

-- even if Pantos had been part of Astafur at the time of the acts in question, there is no reasonable basis to believe that a crime within the jurisdiction of the Court has been committed because all the alleged actions took place in the territory of Braanos and in cyberspace; none took place in Pantos.

-- the facts alleged in the International Rights Watch Report (excerpted in paragraph 7 above) do not constitute violations of the laws of war.

In addition, Government Counsel argues that the Pre-Trial Chamber erred in designating a single Legal Representative for Victims since there are two distinct victims' groups with distinct interests.

Findings and Conclusions

14. On June 30, 2014, representatives of the ICC Office of the Prosecutor, Counsel for The State of Braanos, 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:

15. First, the Pre-Trial Chamber concludes that Astafur was competent to make an Article 12(3) Declaration for crimes committed in the territory of Pantos from April 20-24, 2014 because Astafur was in effective control of Pantos when the attack commenced.

16. Second, the Pre-Trial Chamber concludes that Article 12 of the Court's Statute contemplates the objective territorial basis of jurisdiction, including cases in which war crimes are committed by a non-Party State over the internet.
17. Third, the Pre-Trial Chamber concludes that the facts alleged in the International Rights Watch Report, if proven in court, would constitute violations of the law of war principle of distinction, forming the basis of war crimes under Article 8 of the Rome Statute.
18. Finally, the Pre-Trial Chamber concludes that a single Legal Representative for Victims can appropriately represent the victims in this case, despite the fact that some of those in the victims' group supported secession while others favored continuing to remain part of Astafur.

For these reasons, the Pre-Trial Chamber hereby:

1. Authorizes the Office of the Prosecutor to launch an investigation into war crimes committed in the territory of Pantos from April 20-24, 2014.
2. Determines that the appointment of a single Representative for the Victims is appropriate in this case.
3. Orders the Registrar to notify the parties and participants of this decision.

Dated: September 15, 2014

Appendix: Map of the Region

