

International Criminal Court Moot Court Competition May 2014

Case before the International Criminal Court (ICC): Appeal from the Pre-Trial Chamber's Decision on Jurisdiction and Validity of a Cooperation Request in the Case of Theon Redbark of the Republic of Southeros

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 Prosecution, (2) Defense Counsel, and (3) Counsel for the Government of Southeros. 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 Prosecution, Defense Counsel, and Government's Counsel from the Pre-Trial Chamber's Decision on Jurisdiction and Cooperation in the Case of Theon Redbark. The facts and procedural history are set forth in the Decision of the Pre-Trial Chamber and its Appendix, reproduced below. Each team will be evaluated on its knowledge of the relevant rules and precedents of international criminal law; the quality of its arguments; and its overall presentation.

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

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

- a. Whether the Pre-Trial Chamber can rely exclusively on a report by the U.N. High Commissioner for Human Rights in finding a sufficient evidentiary basis for the issuance of an arrest warrant.
- b. Whether the Pre-Trial Chamber was correct in its legal conclusion that an official who orders a series of Drone strikes to kill leaders of a terrorist group, where widespread injury to civilians was a predictable result of such action, can be criminally liable for crimes against humanity.
- c. Whether the Pre-Trial Chamber was correct in interpreting Article 98 of the ICC Statute to preclude the issuance of a cooperation request for arrest and surrender by a State Party of the former head of the military regime of a State that is not a party to the ICC and has not waived his immunity.

During oral arguments, the Defense will go first, followed by the Prosecution, and finally the Government of Southeros. The Government of Southeros is arguing on behalf of itself and Westeros in opposition to the Prosecution's appeal of the Pre-Trial Chamber's conclusion in paragraph 10 of its 15 September 2013 Decision, and in favor of the Defense's appeal of the Pre-Trial Chamber's conclusions in paragraphs 8 and 9.

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

Pre-Trial Chamber VI

ICC Moot Court Competition

Situation in Northeros

The Prosecutor v. Theon Redbark

Decision on Jurisdiction and Validity of Cooperation Request

Pre-Trial Chamber VI of the International Criminal Court renders this decision on the application filed by the Defense challenging the jurisdiction of the ICC and evidentiary basis for issuance of an arrest warrant, and by the Republic of Southeros challenging the validity of the cooperation request issued to Westeros with respect to the arrest and surrender of Theon Redbark.

1. This case arises out of allegations of crimes against humanity committed in the territory of the Republic of Northeros, which is a State Party to the ICC, having ratified the ICC Statute in 2007. These crimes were allegedly committed by the aerial forces of the Republic of Southeros, a state that has not ratified the ICC Statute, under the authorization of the defendant, Theon Redbark, who was at the time in question the head of the Southeros military regime. Both Southeros and Northeros are parties to the U.N. Charter, the 1949 Geneva Conventions, and the Additional Protocols thereto of 1977.
2. Northeros referred “the situation of drone strikes in Northeros from 1 August to 17 December 2011” to the ICC on 26 January 2012. After a preliminary examination, the ICC Prosecutor decided on 1 February 2012 to initiate an investigation into the Northeros situation. At the request of the ICC Prosecutor, and based on the facts set forth in the 25 January 2012 Report of the UN High Commissioner for Human Rights, entitled “The Situation of Drone Strikes in Northeros” (**attached as an Appendix to this Opinion**), on 15 March 2012 this Pre-Trial Chamber issued an arrest warrant for Theon Redbark, a national of Southeros, finding that there were reasonable grounds to believe that he is criminally responsible under Article 25(3)(b) and Article 28 of the ICC Statute for acts constituting crimes against humanity (mass killing of non-combatants) committed in the territory of Northeros under Article 7 of the Statute.

3. Based on the 25 January 2012 Report of the UN High Commissioner for Human Rights, this Pre-Trial Chamber concluded in its 15 March 2012 decision that there were reasonable grounds to believe that: (a) 658 civilians of Highlander ethnicity, including 39 Highlander children under the age of 15, were killed in the Craggy Mountain region of Northeros from 1 August to 17 December 2011 as a result of the firing of missiles from aerial drones launched and operated by Southeros; (b) the authorization for such use of drones by Theon Redbark, who was at the time the head of the Southeros military regime, was pursuant to or in furtherance of a State or organizational policy within the meaning of Article 7 of the ICC Statute; and (c) the air strikes in question were both widespread and systematic as to their character, within the meaning of Article 7 of the Statute. The Pre-Trial Chamber does not believe that these mass casualties were acceptable collateral damage from lawful actions in self-defense against a terrorist threat. The Pre-Trial Chamber, therefore, found that there was sufficient evidence to establish reasonable grounds to believe that Theon Redbark is criminally responsible for crimes against humanity within the meaning of Article 7 of the Statute and issued an order for his arrest.
4. Since Since Theon Redbark is no longer the leader of the Southeros Military Regime and currently resides in Westeros under a grant of asylum, on 15 March 2012 the Pre-Trial Chamber directed the ICC Registrar to transmit a copy of the arrest warrant to Westeros (a State Party to the ICC since 10 June 2005), along with the Pre-Trial Chamber's specific request that Westeros take all necessary measures to immediately arrest Theon Redbark and surrender him to the ICC. Invoking Article 98 of the ICC Statute, Westeros responded in a communication to the ICC dated 1 April 2012 that it would take no action to enforce the ICC's cooperation request because the government of Southeros had informed Westeros that it will not waive Redbark's immunity and consequently under customary international law Redbark is protected by Head of State immunity in relation to official acts done while he was Head of State of Southeros.
5. That same day, 1 April 2012, the governments of Southeros and Westeros filed a joint submission contesting the ICC's competence to issue a cooperation request to Westeros for the arrest and surrender of the former Head of State of Southeros, Theon Redbark, on the grounds that while in Westeros Redbark is protected by Head of State immunity.
6. Two weeks later, on 14 April 2012, Counsel for Theon Redbark filed a submission contesting the ICC's jurisdiction to prosecute Redbark on the basis that (a) the Report of the UN High Commissioner for Human Rights does not constitute a sufficient evidentiary basis for the ICC to issue an arrest warrant, and (b) the allegations do not constitute a crime within the ICC's jurisdiction, specifically because there is no claim that Theon Redbark intended to kill civilians when he ordered drone strikes for the purpose of killing the leaders of a deadly terrorist group.

7. On 15 June 2012, representatives of the ICC Office of the Prosecutor, Counsel for Theon Redbark, and Counsel for the government of Southeros submitted briefs and made oral presentations before this Pre-Trial Chamber on these issues. After duly considering the submissions, the Chamber hereby makes the following findings and conclusions:
8. First, the Pre-Trial Chamber rejects the Defense argument that the 25 January 2012 Report of the UN High Commissioner for Human Rights does not, standing alone, provide a sufficient evidentiary basis for the issuance of an arrest warrant for Theon Redbark.
9. Second, the Pre-Trial Chamber rejects the Defense challenge to jurisdiction because Article 30 of the Statute provides, in pertinent part, that “a person has intent where . . . In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events” and that “[f]or the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events” (emphasis added). As the injury to civilians was a regular, predictable, and ongoing consequence of the firing of missiles from drone aircraft, and as the defendant was *aware* that such consequences were occurring and would inevitably continue to occur, the accused can be found, within the meaning of Article 30, to have *intended* such consequences. Under the facts alleged, the Defendant, therefore, can be found as a matter of law, to have intended the death and injury of the civilians in question.
10. Third, the Pre-Trial Chamber accepts the argument of the governments of Southeros and Westeros that the issuance of the cooperation request to Westeros for the arrest and surrender of Theon Redbark was in contravention of Article 98(1) of the ICC Statute, which provides that “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”

For these reasons, the Chamber hereby:

1. Confirms that the report by the U.N. High Commissioner for Human Rights provided a sufficient evidentiary basis for the issuance of an arrest warrant for Theon Redbark.
2. Determines that the case falls within the jurisdiction of the Court.
3. Rescinds the cooperation request for Westeros to take all necessary means to arrest and surrender Theon Redbark.
4. Orders the Registrar to notify the parties and participants of this decision.

Dated 15 September 2013

Appendix

[This is a fictional document developed for the
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Report of the United Nations High Commissioner for Human Rights on the situation of drone strikes in Northeros

25 January 2012

Based on news accounts, eye-witness interviews, and hospital and morgue records, the UN High Commissioner for Human Rights makes the following findings and conclusions related to the situation of drone strikes in Northeros:

- a. The Republic of Southeros (population 10 million, 100,000 square miles) and the Republic of Northeros (population 9 million, 90,000 square miles), are located adjacent to each other (Southeros to the south and Northeros to the north) on the west coast of the Solantis Sea. Both States border the Kingdom of Westeros on their west. **See map attached at the end of this report.** The two States were formerly a single colony of the Kingdom of Westeros, which granted them independence in 1989, and they were both admitted into the U.N. later that year. Since their separation and independence, the two countries have engaged in periodic skirmishes, and they currently do not have diplomatic relations. The border between the two countries is well marked and subject to frequent patrols.
- b. The populations of both Southeros and Northeros consist of two ethnic groups: the Highlanders, who dwell in the region known as the Craggy Mountains, which straddles the two countries' common border; and the Lowlanders, who live in the low-lying plains and coastal areas of the two States. Although they share a common ancestry, the two groups have developed distinctive dialects, cultural mores, and religious practices. The Highlanders make up 30 percent of the population of Southeros and 60 percent of the population of Northeros.
- c. The Lowlanders of Southeros are generally well educated, have a high standard of living, and reside in or near the modern capital city, Queen's Port, located in the verdant southern region of the State. The Highlanders of Southeros live in dwellings in the caves that pockmark the Craggy Mountains. Nearly all of the Highlander men, women and

children over the age of twelve work in the Craggy Mountain coal mines, which are owned and operated by the government of Southeros. Under contract with the government, the Highlander miners work an average of twelve hours a day, in unhealthy and dangerous conditions, for low wages. Due to this harsh lifestyle, the average Highlander lifespan (52 years) is twenty years less than the average Lowlander lifespan (72 years) in Southeros.

- d. Since the breakup of the colony in 1989, the Highlanders of Southeros have been seeking to secede from Southeros in order to merge their Craggy Mountain territory with Northeros, which they believe will provide the Highlanders better pay, working conditions, social services, and an improved standard of living. The government of Southeros has historically opposed the Highlander secessionist aspirations because the Craggy Mountain coal mines are seen as absolutely essential to the country's economic well-being.
- e. In 2005, the Highlander Liberation Organization (HLO) was formed, dedicated to improving conditions for the Highlander people and achieving the secession of the Craggy Mountain region of Southeros, by force if necessary. The HLO does not employ a distinctive uniform or insignia. The organization currently has an estimated 1,000 members, and is very popular with Highlanders on both side of the border. The HLO receives approximately \$10 million in non-lethal aid annually from the government of Northeros, which publicly supports both the humanitarian and secessionist aims of the HLO.
- f. On 1 November 2010, elections ushered in a government in Southeros that publicly supported entering into negotiations with the HLO to provide the Craggy Mountain region greater autonomy and the Highlanders improved living conditions. The day the status negotiations were to commence, 1 December 2010, the commander of the Southeros armed forces, General Theon Redbark, seized power and declared himself Head of State in a coup d'état backed by the Southeros army. In a public statement the next day, General Redbark announced that his regime would never negotiate with the HLO.
- g. On 1 January 2011, the HLO issued a public warning to the citizens of Southeros, urging them not to ride on the trains between Queen's Port and the Craggy Mountains. The warning said that the HLO would periodically subject the trains to attack until the government of Southeros agreed to the secession of the Craggy Mountain Region. Thereafter, from February through July 2011, the HLO claimed responsibility for a series of three deadly attacks against the Southeros government-owned and operated trains which were transporting coal from the Craggy Mountain mines to Queen's Port. In one, the train's breaks were disabled; in the second, the tracks were cut with a saw; and in the third, a bridge was weakened with corrosive acid. Altogether, over 150 Lowlanders

were killed and 200 others were injured in these attacks. Ninety-five percent of the casualties were government employees.

- h. Since its founding, the HLO has been led by Sandor Cliften, a 40 year-old charismatic Highlander priest, born and raised in the Craggy Mountain region of Southeros. As head of the HLO, Sandor Cliften exercised tight control over all of the planning and operations of the organization. Little is known about the identities of the other leaders of the HLO.
- i. In July 2011, the 20,000 strong Southeros army conducted a massive manhunt for Sandor Cliften, searching every cave dwelling on the Southeros side of the Craggy Mountains. The army's efforts, however, were without success as Sandor Cliften and his followers avoided capture by moving their operations to the Northeros side of the border. Despite knowledge that the HLO had established headquarters, arms caches, and training centers in its territory, and despite the public protests of the government of Southeros, the government of Northeros took no action to shut down the HLO bases on its side of the Craggy Mountains and continued to provide non-lethal aid to the HLO.
- j. Southeros had not been the subject of an armed attack by the forces of Northeros, nor had Northeros ever threatened the use of force against the people or the territory of Southeros. Further, Northeros did not consent to military action in its territory. Nevertheless, on 1 August 2011, General Redbark issued a written order authorizing the Southeros military to conduct air strikes using drone aircraft equipped with missiles in an effort to hunt down Sandor Cliften and other leaders of the HLO in the Northeros side of the Craggy Mountains. From 1 August to 17 December 2011, Southeros conducted more than 50 drone strikes in the Northeros' Craggy Mountains.
- k. The government of Southeros reported this action in a Diplomatic Note to the U.N. Security Council on 2 August 2011, invoking its right of self-defense "against an ongoing terrorist threat emanating from the territory of a State unwilling or unable to do anything about it." Due to threatened vetoes by Permanent Members, the Security Council has taken no action to either authorize or condemn the Republic of Southeros' air strikes.
- l. General Theon Redbark, at the time of the actions in question, was the effective Head of State of the Republic of Southeros. He had complete control of the country's government and military apparatus. His representatives had participated in U.N. bodies without challenge to their credentials. The sorties in question were undertaken pursuant to and in fulfillment of orders approved within normal military channels, and were subject to standard operating procedures and established government policies.
- m. According to a variety of sources consulted in the preparation of this report, the drone attacks in Northeros resulted in the deaths of 29 members of the HLO and 658 civilians

of Highlander ethnicity, including 39 Highlander children under the age of 15. The majority of the casualties were nationals of Northeros.

- n. Theon Redbark received reports of the civilian casualties, beginning with the initial sortie, yet the use of drones continued unabated for at least four months thereafter. Southeros disputes these civilian casualty figures and argues that the non-HLO casualties were all supporters of the HLO and acceptable collateral damage of a lawful military operation taken in self-defense against a continuing terrorist threat.
- o. On 17 December 2011, the government of Southeros announced that it was ending the drone strikes after it was revealed that Sandor Cliften was killed in a drone attack that day, along with 24 others who were attending the wedding of Cliften's niece in a mountain cave on the Northeros side of the border.
- p. To protest the killing of the popular leader of the HLO, beginning on 18 December 2011, the Southeros Highlanders staged a region-wide work stoppage of the Craggy Mountain mines. This threw the Southeros economy into a steep decline, and on 20 January 2012 prompted a second coup d'état by the military in which General Redbark was replaced by his second in command, Colonel Arya Lark. General Redbark was forced into exile and fled to Westeros, which had publicly supported his efforts to combat the HLO. Upon General Redbark's entry into Westeros on 21 January 2012, the Government of Westeros announced that it had granted him asylum. Like Southeros, Westeros does not presently have diplomatic relations nor an operational extradition treaty with Northeros.

Map of the Region

