

IN THE INTERNATIONAL CRIMINAL COURT

PRE-TRIAL CHAMBER I

March 2015

(corrected)

Prosecutor v. General Smith

A. INSTRUCTIONS

- 1 *Proceedings*: The hearing takes place pursuant to Article 61 of the ICC Statute (confirmation of charges). At this stage, the Prosecutor has to “support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.” The Accused may “object to the charges” and/or “challenge the evidence presented by the Prosecutor”.
- 2 For the purpose of the moot, the hearing comprises a main speech and a rebuttal for the Prosecution and a main speech and a surrebuttal for the Defence (see Moot Rule 12).
- 3 *Facts and evidence*: The case is entirely fictional. The Moot problem includes all the facts supported by evidence that have been transmitted to the Defence, as well as facts and evidence presented by the Defence for the purpose of the hearing. Teams should confine themselves to the facts supplied. Neither the Prosecutor nor the Defence may introduce new evidence or facts at the hearing (Article 61 (6) (c) of the ICC Statute is not applicable). Teams may nonetheless draw reasonable inferences from the facts. They may also question the credibility or weight of the evidence. Teams should not hand anything to judges unless specifically asked to by a judge.
- 4 *Procedure*: The problem is not intended to raise questions of procedure other than the rights of the accused pursuant to Articles 66-69 of the ICC Statute. Any other procedural questions should be ignored.
- 5 *Jurisdiction and admissibility*: Counsels may; if relevant, address any issue regarding the admissibility of the case.
- 6 *Applicable law*: In accordance with Article 21 of the ICC Statute:
The Court shall apply
 - a) *In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;*

- b) *In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;*
- c) *Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.*

The Court may apply principles and the rules of law as interpreted in its previous decisions.

8 Teams are encouraged to look at the case law of international and national courts. If teams rely on decisions of national courts, these should be leading decisions and teams should expect to be asked for copies of the headnote and the portion of the transcript or judgment referred to in their argument.

9 *Participation to treaties:* At all material times, the following treaties were in force for the States indicated (✓):

	Midlands	Panema	Minos
1949 Geneva Conventions	✓	✓	✓
1977 Additional Protocols I and II	✓		✓
1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict	✓	✓	✓
1954 Protocol to the Convention for the Protection of Cultural Property in the Event of Armed conflict	✓	✓	✓
1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict		✓	
1998 Statute of the International Criminal Court		✓	✓
1984 Convention against Torture	✓		✓
2006 International Convention for the Protection of All Persons from Enforced Disappearance		✓	✓
1972 Convention Concerning the Protection of the World Cultural and Natural Heritage	✓	✓	✓
1969 Vienna Convention on the Law of Treaties	✓	✓	✓

B. FACTS

1. The Republic of Midlands occupies the north-western corner of a continental landmass. It shares a border with two other States: Panema on the east side and Minos on the south side. These smaller states, with others, form the Federated Union, an organisation not unlike the European Union.
2. Midlands has harboured long term historical (and not unreasonable) claims to a swath of territory abutting its international border with Panema. This contested territory is called Lowlands. The peoples of both States have a common heritage but have developed different religious and cultural practices. The populace of Midlands firmly believes they are, by reason of religion and culture, superior to the people of Panema. The people of the Federated Union tend to be secular and multicultural.
3. Since the rise to power of President Bono in Midlands there have been regular border incidents between Midlands and Panema. President Bono rose to power on the strength of his nationalist agenda the centre pieces being the superiority of the Midlands people and the return of territory to the east currently under the control of Panema. On numerous occasions President Bono spoke publicly about the Lowlands providing necessary resources and breathing space for the expansion of Midlands into a middle-ranking player on the international scene. He also implied that non-Midlanders were not legitimate occupants of the Lowlands and should be returning to Panema. Panema has consistently challenged President Bono's claims over the Lowlands.
4. The disputed territory of Lowlands extends the length of the border and eastwards to the River Merx that flows almost directly north to south eventually joining the River Styx. The disputed territory is rich in oil and gas. The population of the Lowlands was concentrated in the city of New Troy with a population of about 100,000 people. The remaining population of the Lowlands was about 50,000 who lived on isolated farms and small mining and farming settlements. At various times the Federated Union has tried, unsuccessfully, to have the dispute resolved by negotiation or referred to the International Court of Justice. The United Nations has also actively supported these attempts but Panema refuses to engage in any attempt to resolve the dispute, stating the territory rightly belongs to Panema.
5. Midlands is separated from its southern neighbour by the River Styx, which is for most of the border some 200 to 300 metres wide. The border between Midlands and Panema is marked by a two metre high chain link border fence topped with

barb wire, a ten metre wide and two metre deep trench on the Panema side together with a sealed road each side of the fence and regular border check points supported by military bases.

6. On 1 July 2013 Midlands invaded Panema. General Smith is the officer in charge of the Midlands Armed Forces (MAF) and a surprise attack drives the Panema Armed Forces (PAF) back beyond the River Merx at which point the hostilities reach a stalemate. The city of New Troy held out for a brief period but by 12 July 2013 the Midlands army had gained control of most of the city.
7. A Midlands militia was formed after the enactment of the *Midlands Militia Act 1985*. This Act provides, amongst other things that:
 - All able-bodied men between the age of 17 and 45 who were not members of the armed forces have to enlist as members of the militia.
 - Militia members are grouped into local units corresponding to the military administrative zones. Members of the Militia wear a uniform when on duty.
 - The commanding officer of the Militia holds the rank of Colonel within the MAF.
 - The commanding officer reports to the President when deployed within the territory of Midlands and to the most senior army officer above the rank of Colonel when deployed beyond the territory of Midlands.
8. As the Midlands Armed Forces were advancing into the Lowlands, militia units began assuming control of the territory behind them. General Smith tasked Colonel White, his immediate subordinate, to move people from isolated farms and small settlements to reduce the opportunities for guerrilla warfare impacting upon MAF supply lines. Colonel White directed his forces to drive people from all small settlements and farms into larger settlements where they could be more easily controlled, with the support of the militia under the authority of Colonel Brown. Initially, Colonel Brown was able to arrange for the safe passage of civilians fleeing the territory through MAF lines into Panema. This became more difficult when the front line became firmly established. The militia destroyed many farm buildings and small settlements. Buildings and residences that were not destroyed were often requisitioned and occupied by the militia as bases or living quarters. In some cases, members of the militia organised workers from Midlands to take over farms, small businesses and mining settlements left empty in the Lowlands to maintain production. The result was an emptying of large areas of the Lowlands of all but Midlands militia, members of the MAF and workers from Midlands.
9. After the MAF had taken control, General Smith left a militia unit in New Troy to “weed out any remaining resistance” freeing his troops for the front line. By 15 July 2013 the militia had replaced the MAF. By then, over half the town’s population had managed to flee eastwards with what possessions they could

transport. This flood of people increased as people from the smaller settlements and farms passed through New Troy with stories of being driven from their homes and businesses by militia.

10. The 'weeding out of resistance' in New Troy proved difficult because of the town layout, its terrain and the resistance of residents, many of whom refused to leave. Colonel Brown, personally supervising the control of the city, ordered his militia units to "empty the outlying suburbs of all remaining inhabitants to prevent any outside support to the town's armed resistance and reduce the risk to non-combatants". Buildings around intersections were flattened to lessen ambush opportunities and provide open spaces and fields of fire while those buildings on high ground were occupied by the militia. The militia set up camps in a nearby forest some ten kilometres west of New Troy to receive the displaced. The process of evacuating the suburbs began on the morning of the 17 July 2013. People were only allowed to take what possessions they could carry. Many reported being told that "they were moved to ensure their security and were to be accommodated in a safer area for the time being", others heard "you should have fled east, that is where you belong". During the daylight hours the movement of people was carried out forcibly but without excessive violence. All mobile phones and other electronic communication devices were seized as a 'security measure'. Women and children under twelve years of age were housed in Camp W1, while boys and men who were deemed non-combatants in Camp W2, two kilometres away from W1. Individuals suspected of being part of the resistance or supporting it were transported to a third camp, Camp Z, in a isolated setting some thirty kilometres north west of the town. The evacuation of the outer suburbs proceeded over a week. It had the effect of pushing opposing fighters into those parts of the central business district that were not under the full control of militia.
11. Accounts started to appear on social media about the rape of women and children, even young boys, by members of the militia in their homes. Some of these reported incidents were depicted as gang rapes, particularly violent and the victims being held one or two days. Girls as young as 6 years of age were reported victims, while mothers were assaulted in front of their children. On one occasion a hidden mobile phone was used to record and upload militia talking as they watched their colleagues rape a 14-year-old girl and her mother in front of the three teenage boys and their grandparents. Part of the recorded conversation referred to an earlier conversation between Colonel Brown and one member of the militia that the displaced people should not wish to come back.
12. General Smith heard about the stories, and on 21 July 2013 summoned Colonel Brown. The latter explained that the stories were Panama propaganda. Colonel Brown assured him that he had personally been present at some of the collection points where people were put on board buses bound to the camps, and there was

no indication that people had been ill-treated. Nonetheless, Colonel Brown agreed with General Smith that the matter should be further investigated.

13. New accounts continued to be published in the following days, alleging that women interned in Camp W1 were subjected to diverse forms of coercion, including food in exchange for sexual favours. Several sources mentioned younger, unmarried women, kept separated within the camp W1, were “offered as brides” to Midlands men and that some twenty of them were taken to a Midlands town across the border. A group of women interviewed later by the town local news channel said that indeed they were originally from New Troy and had been evacuated to Camp W1 for a few days, but had moved to Midlands and settled there on their own accord.
14. On 13 August 2013 General Smith called Colonel Brown to a brief meeting in a lull in the fighting around Old Troy. Old Troy was a key site northeast of New Troy due in part to its geographical position and surrounds as well as being a major road and rail junction. The remains of a MAF High Command meeting minutes book (parts of the document had been destroyed in the fighting) found after the war recorded that General Smith had reiterated to Colonel Brown that he had to take responsibility for the behaviour of the militia, and that alleged rapes had to be investigated and offenders punished. According to a witness present at the same meeting, General Smith had added that such allegations damage the justness of the Midlands’ cause and they should cease at once. The same witness said that Colonel Brown had replied: “I will see what I can do, it is a bit embarrassing but good policy if we want Lowland for our nation”. General Smith took no further action on the matter.
15. At Old Troy on 15 August 2013 after heavy fighting General Smith accepted the surrender of Panema army forces and ordered everybody to assemble – captured soldiers in the town’s football stadium, and civilians in the area on the level ground outside the town walls. General Smith directed that all captured soldiers, as well as men and women of military age within the assembled civilians, be taken as prisoners. Members of the PAF and civilian men were taken to Camp Z, while women were separated and loaded onto trucks and placed under the guard of Colonel Brown’s militia.
16. Located on the outskirts of Old Troy was an archaeological site and museum holding prized artefacts dating back thousands of years. In 2005, at the request of Panema, the site was included on the “World Heritage List” by the World Heritage Committee. In the same year, Panema also sought to register the site and museum as “cultural property under special protection” under Article 8 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. However, Midlands objected to the registration, and the request is still pending with the UNESCO Director General. After becoming party to the 1999 Second Protocol to the 1954 Convention in 2011, Panema also submitted to the

Committee for the Protection of Cultural Property in the Event of Armed Conflict a request to grant enhanced protection to the site and the museum. After considering the request, the Committee decided to postpone its decision on the request until Panama adopts “adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection”, as required under Article 10 of the Protocol. The request is due to be re-considered at the next session of the Committee.

17. The museum is located on high ground providing sweeping views across the surrounding fields while also overlooking the archaeological site below. Panama artillery was dug into the raised ground around the museum which commanded the northern access to Old Troy. The museum was largely destroyed and the site shelled as the battle for Old Troy raged. Both sides blamed the other for the destruction. General Smith toured the destroyed museum and the archaeological site after the fall of Old Troy. He ordered one of his subordinate, Major Adams, to protect the historical artefacts. On 18 August 2013, Major Adams informed the international media that the Midlands army had seized the site but investigations revealed that most of the historical artefacts had been destroyed.

18. On 24 August 2013 UN News Centre article titled "UN adviser says rape in the Lowlands with impunity" reported:

Armed militias in the Lowland region are continuing to rape women and girls with impunity, an expert from the United Nations said today on her return from a mission to the region. Paula Thisman, the UN adviser on violence and sexual exploitation, said she heard dozens of harrowing accounts of sexual assaults – including numerous reports of gang-rapes – when she visited Panama last week. "Rape is used as a weapon to terrorize individual women and girls, and also to terrorize their families and to terrorize entire communities," she said in an interview with the UN News Service. "No woman or girl is safe." In the same article she also reported that “every woman or girl she spoke to had either endured sexual assault herself, or knew of someone who had been attacked.”

19. On the advice of General Smith, Midlands’ authorities invited Paula Thisman to visit Camp W1 in Lowlands. She was not allowed to have private interviews with the displaced for security reasons, but was able to talk with some of the women in the presence of the camp commander – a subordinate of Colonel Brown. The camp commander recognized that there had been a few incidents but that the matter had been duly handled with the replacement of those involved. That was confirmed by the women to whom P. Thisman could talk with. One of the women interviewed by P. Thisman later told ICC investigators that the camp commander had promised the women that they would be under his personal protection if they confirmed that they were not aware of recent cases of sexual violence.

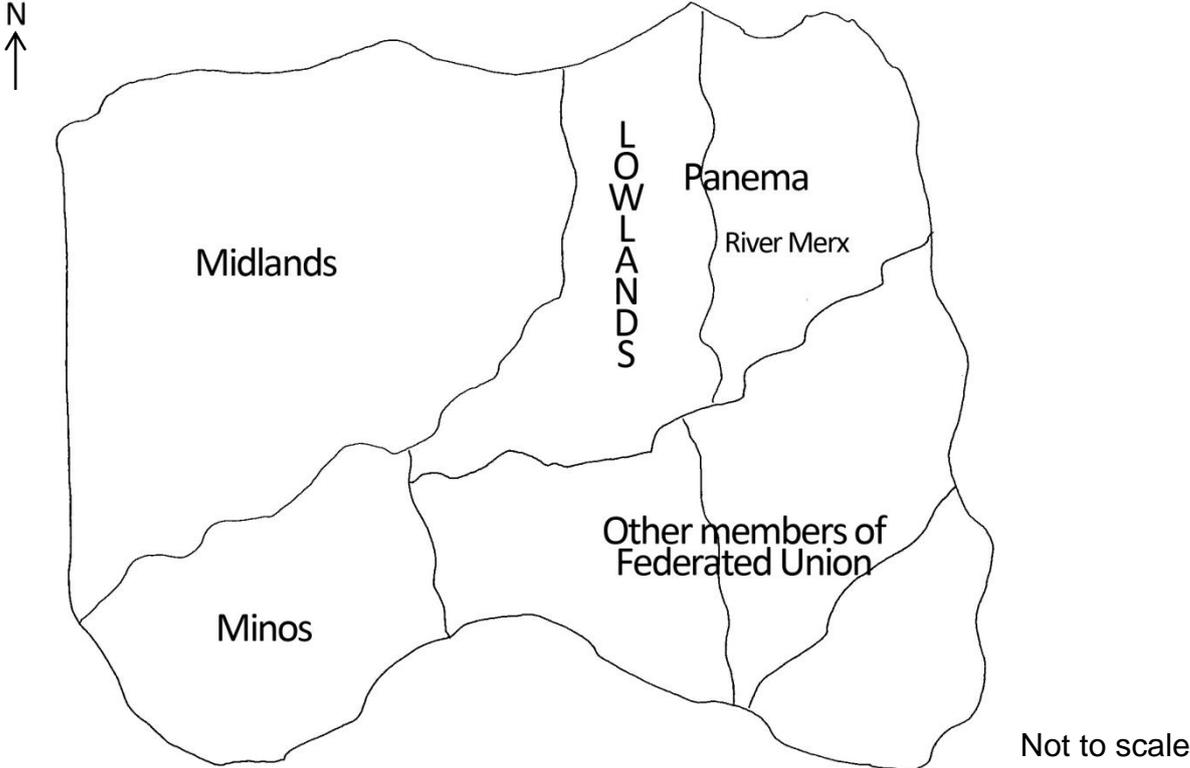
20. The sentence condemning sexual violence in a draft UN General Assembly resolution calling for an end to the hostilities was deleted after successful representations by the Midlands' government to the States sponsoring the resolution following P. Thisman draft report circulated among Members of the Security Council.
21. On 29 August 2013, Panama, having recovered from the suddenness of Midlands' attack and having fully mobilised its military resources, launched a fierce counter-attack driving the MAF back west of New Troy and Old Troy. In the partial rout of the Midlands army and militia Colonel Brown was killed.
22. As the Panama armed forces drove Midlands forces back, security officials from Panama obtain information from captured Midlands soldiers and militiamen that included statements "...we took the historical artefacts back to Midlands....they are prizes of war....they were not destroyed...". The statements were obtained with the promise that those who provided information would not be prosecuted and could benefit from early release and repatriation. Major Adam, also captured, said "...General Smith let us take them ... in fact, some of the most valuable ones were taken to his property in Midlands before I made any announcement about them being destroyed..." when subsequently interviewed by representatives from the office of the prosecutor of the ICC. He required complete anonymity if he was to give evidence before the Court because he feared for the security of his family if anyone found out he had provided information incriminating his superiors. He is thereafter referred to as Witness P. The ICC representatives from the office of the prosecutor also found that Witness P had been disciplined and demoted in the early stages of the war for wilful disobedience.
23. On 15 September 2013, Midlands and Panama signed a ceasefire agreement. The terms for a final settlement of the dispute are currently being negotiated.
24. After an investigation authorized by the pre-trial Chamber under Article 15 and the issuance of a summons by the Pre-trial Chamber under Article 58, General Smith decided to voluntarily appear before the Court for the confirmation of the charges.
25. The Prosecutor intends to seek the trial of General Smith on the following charges:
 - (1) In respect of the acts of sexual violence committed between the 1 July 2013 and 15 September 2013, the crime against humanity of "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" within the meaning of article 7(1)(g) and 28 (a) of the ICC Statute.
 - (2) In respect of the transfer and displacement of the civilian population between the 1 July 2013 and 15 September 2013, the war crime of "unlawful deportation or transfer or unlawful confinement" within the meaning of Article 8(2)(a)(vii) and 25(3)(b) of the ICC Statute.

- (3) In respect of the destruction, seizing and looting of cultural property between 15 and 18 August 2013, the war crime of “destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war” within the meaning of Article 8(2)(b)(xiii) and 25(3)(a) of the ICC Statute.
26. Midlands notified the ICC that it does not recognize the jurisdiction of the Court over the situation, and that, in addition, the Court has no jurisdiction over its national, General Smith, since Midlands is not a party to the Statute, even if he appears voluntarily before the Court. Midlands also challenges the admissibility of the case on the ground that “the case is not of sufficient gravity to justify further action by the Court” pursuant to Article 17(1)(d) and Article 19 of the Statute.
27. General Smith, on the basis of Article 69, has requested that any evidence or information obtained from Witness P should be excluded since the admission of such evidence or information would be prejudicial to or inconsistent with his right to a fair and impartial trial.
28. The Pre-trial Chamber issued an order pursuant to Rule 58 (2) of the Rules of Procedure and Evidence to join the challenge to admissibility and the request to exclude evidence to the confirmation proceeding.
29. The Pre-trial now holds a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing is held in the presence of the Prosecutor and General Smith, as well as his counsel.

Annex: map

Annex: map

Map 1: The continental landmass



Map2: The Lowlands Midlands/Panema border

