Pace International Law Review

Volume 21
Issue 1 *Winter 2009*

Article 12

January 2009

2007 ICC Moot Court Competition Winning Briefs: "Best Brief" Prosecution

Lauren DiLeo

Leila Parvizian

Delon Lewis

Follow this and additional works at: http://digitalcommons.pace.edu/pilr

Recommended Citation
Lauren DiLeo, Leila Parvizian, and Delon Lewis, *2007 ICC Moot Court Competition Winning Briefs: "Best Brief" Prosecution*, 21 Pace Int'l L. Rev. 387 (2009)
Available at: http://digitalcommons.pace.edu/pilr/vol21/iss1/12

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

2007 ICC MOOT COURT COMPETITION WINNING BRIEFS

2007 PACE LAW SCHOOL I.C.C. MOOT COMPETITION "BEST BRIEF" PROSECUTION

Lauren DiLeo, Leila Parvizian & Delon Lewis

Statement of Facts

Albilion, a European nation, signed and ratified the Rome Statute in August of 1999. Several years later in 2003, a newly-elected Prime Minister announced his resolve to see Albilion "unsign" the Rome Statute and initiated the Albilionese Citizenery Protection Act (ACPA) to pressure Albilion and neighboring countries to avoid utilizing the ICC. No formal withdrawal was ever effectuated.

On March 17, 2005, Albilion was victim to a terrorist attack, later named Bloody Thursday. Eighteen underground railway stations in the capital city of St. Rache were bombed by members of the Tiernan Republican Army (TRA). TRA members are citizens of Tierna, a small nation on the southern border of Albilion.

The terrorist attacks resulted in the deaths of 6,666 Albilionese citizens. Fearing additional terrorist attacks, several corporations moved their European corporate headquarters from Albilion to other nations throughout Europe, destabilizing the Albilionese government. The national unemployment rate rose to 41% and rioting left thousands of Albilionese citizens dead. An indefinite state of martial law was declared on January 18, 2006.

In April 2006, the ACPA was rescinded and a new Prime Minister was elected in Albilion.

On August 28, 2006, three Tiernan nationals, Henry Lynch, Thomas Dane, and Jackson Cray were arrested in St. Rache for suspicion of involvement in the Bloody Thursday bombings. After six days of interrogation, Lynch, Dane, and Cray confessed to being the masterminds of Bloody Thursday.

In early September 2006, the Albilionese economy collapsed and anti-government rioting and violence spread across the country. Realizing that the Albilionese army and constabulary would be unable to contain the violence, Prime Minister Essex formally requested UN intervention and referred the prosecution of Lynch, Dane, and Cray to the Office of the Prosecutor of the ICC.

By December 2006, the erupting violence had resulted in the destruction of Capitol Hall, the home of the Albilionese Parliament, and the assassination of Prime Minister Essex. The violence and rioting had annihilated the existing forms of infrastructure and support for the Albilionese people. The UN Security Council sanctioned the deployment of additional troops and non-military personnel to establish a provisional government.

In February 2007, after an initial investigation, the ICC prosecutor charged Lynch, Dane, and Cray with: (i) crimes against humanity of murder; (ii) war crimes of willful killing; (iii) war crimes of attacking civilians; (iv) war crimes of excessive incidental death, injury, or damage; (v) war crimes of murder.

Representatives of the newly formed Tiernan government have come forward and are contesting the ICC's jurisdiction over the prosecution of Lynch, Dane, and Cray. Advocates for the surviving family members have also come forward to challenge Tierna's petition and request that the case remain under the jurisdiction of the ICC.

Pleadings and Authorities

A. *The Case is Admissible Before the ICC Because No Other State Can Properly Conduct the Prosecution.*

Albilion and Tierna are the only States with potential jurisdiction over the current proceedings. Albilion, being the territory on which the attacks occurred, has territorial jurisdiction.

Tierna's jurisdiction is based on the nationality of the offenders, being that all three suspects are Tiernan nationals. Albilion and Tierna are the primary jurisdictions to hear the Bloody Thursday proceedings. However, neither is capable of providing an adequate and impartial judicial process. Therefore, based on the principle of complementarity, the ICC may exercise its jurisdiction.

Paragraph 10 of the Preamble of the Rome Statute dictates that the ICC is to be complementary to national criminal jurisdictions. Therefore, a case is inadmissible "when it is being appropriately dealt with by a national justice system." If there is an appropriate and willing national jurisdiction, the ICC is unable to hear the case according to the terms of the Rome Statute. Furthermore, the complementarity principle dictates that the ICC must demonstrate the failure or inadequacy of the national justice system, subsequent to a challenge of admissibility from a State. According to Article 17(1), the Court may only proceed where the State "is unwilling or unable genuinely to carry out the investigation or prosecution."

Albilion is unable to hold the proceedings due to the current dilapidated state of the nation and its lack of infrastructure. Tierna would not be able to provide a fair and impartial proceeding and has not met the requisite procedural requirements to prevent the ICC from moving forward in the matter. Presently, the lack of any competent and impartial national jurisdiction purports this case to be admissible before the ICC.

1. *Albilion is clearly unable to carry out the investigation or prosecution.*

Albilion has suffered greatly as a result of Bloody Thursday. The nation was so debilitated as a result of the violence and ensuing economic hardship that the local government requested that the United Nations intervene. While Albilion does have the jurisdiction to hold the proceedings related to Bloody Thursday, it is unable to do so.

Inability in a particular case is to be determined by considering whether, due to a total or substantial collapse or unavailability of its national justice system, the State is unable to obtain the accused or the necessary evidence and testimony or to carry out proceedings. The attacks of Bloody Thursday have

left Albilion's judicial system in ruins. Government buildings have been destroyed, there has been anti-government rioting and political leaders have been killed. As was stated in its referral of the Bloody Thursday prosecution to the ICC, Albilion lacks a functioning judiciary infrastructure and, therefore, is unable to prosecute. Albilion has eliminated itself as a possible jurisdiction to resolve this matter and, therefore, its jurisdiction will not supersede that of the ICC.

2. *Tierna is not a willing jurisdiction.*

Tierna, through its actions since Bloody Thursday, has proven itself to be an unwilling jurisdiction. By virtue of its failure to initiate prosecution, its election of TRA members as political leaders and Teirna's political gain that has resulted from this tragedy, the State's intent to avoid a proper prosecution has been revealed.

Article 17(2)(c) states that a State is to be deemed unwilling when the proceedings are not being conducted independently and impartially, and they are being conducted in a manner inconsistent with an intent to bringing the person concerned to justice. Therefore, a State must be independent and impartial in order to be deemed a willing jurisdiction.

Tierna is clearly not an impartial jurisdiction. Since the end of World War I, Tiernans have been fighting for their independence from the Albilionese government. The aftermath of Bloody Thursday has allowed Tierna to substantially advance in its pursuit towards independence. Tiernan mutiny would not have been successful without the actions of Bloody Thursday and the havoc that it caused. Because Tierna has achieved a long sought-after goal as a result of this tragedy, it is not an impartial jurisdiction.

Tierna's political lineup also illuminates its bias. In May 2006, Pat Coogan, a former TRA leader, was elected as Prime Minister of Tierna. It was a faction of the TRA that was determined to be responsible for the Bloody Thursday attacks. To entrust Tierna, led by a TRA member, to prosecute other TRA members, would inevitably lead to injustice. Mr. Coogan was elected after the attacks in question. Therefore, the citizens of Tierna clearly do not condemn the TRA, despite the death and destruction their actions have caused. Tierna, with a leader

who is politically associated with the accused, would not provide impartial proceedings in this matter.

Furthermore, Tierna's actions are inconsistent with the requisite intent to seek justice. Article 17(2)(b) states that unwillingness will be found when there has been an unjustified delay in the proceedings which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. The timeliness of Tierna's actions shows that the state does not intend to prosecute its nationals for this crime.

Bloody Thursday occurred on March 17, 2005. In August 2006, the accused were arrested and were subsequently surrendered to The Hague in September 2006. Two years passed, hundreds of Albilion and Tiernan died, a neighboring government collapsed and the ICC had conducted a full investigation before Tierna expressed any interest in prosecuting this case. It was not until March 2007 that representatives of the Tiernan government challenged the ICC's jurisdiction. Despite knowledge that Tiernan nationals were under the custody of the ICC for six months prior, Tierna did not come forward until formal charges had been made. To prosecute timely would involve initiating an investigation immediately after the incident or contributing to the incarceration of the suspects. Tierna conducted no investigation of its own, nor did it express any intent to do so. By "dragging their feet" and remaining uninvolved in the investigation process, Tierna has revealed that it does not wish to prosecute this case; rather, it wishes to prevent the ICC from doing so.

Indonesia is a clear example of the setbacks that can occur when a government, though reluctant, prosecutes what many nationals still think of as "homeland heroes." It was only after outbursts of violence by Indonesian-supported militia groups in which at least 1,500 East Timor civilians were killed and hundreds of thousands forced from their homes that the Indonesian government set up an ad hoc tribunal in Jakarta. The trials were considered a travesty by many outside observers. The prosecutors made no attempt to reveal the role of higher-up Indonesian officials in arming and orchestrating the militia groups that committed the massacres. The Indonesian judges had little experience or training, there were virtually no witness protection measures, and of the eighteen persons tried, twelve

were acquitted. Six of those convictions were reversed on appeal. The United States Department of State called Indonesia's ad hoc tribunal "profoundly disappointing, due to its serious flaws and lack of credibility," and international human rights groups deemed the trials "theatre, a farce" and "a tragedy."

Like Indonesia, Tierna is not a "willing" jurisdiction. The State has gained substantially from the Bloody Thursday attacks, having received independence as a result. Tierna has continued to support members of the TRA despite the fact that the attacks on Albilion were credited to TRA members. Finally, the lack of timely prosecution further reveals Tierna's lack of resolve to bring those responsible for Bloody Thursday to justice.

3. *Tierna's challenge to the ICC's admissibility is improper*

In order to properly challenge the admissibility of a case before the ICC, the State's challenge must be both timely and procedurally correct. Without both of these elements a challenge to admissibility is improper.

According to Article 19(5), a State which has jurisdiction over the case must make a challenge at the earliest opportunity. Additionally, according to Article 18(2), a State has one month from receipt of notice of investigation in which to inform the Prosecutor that they are investigating or have investigated the crimes in question.

Notice of the ICC's investigation was received by virtue of the formal referral of the prosecution to the ICC on September 8, 2006 and the surrender of the three Tiernan suspects to The Hague on September 10, 2006. It was not until six months had passed, and formal charges had been brought against the Tiernan nationals, that Tierna gave the court notice of its intent to prosecute. Tierna clearly did not object within the requisite timeline of one month. Therefore, their objection in March 2007 is improper.

Furthermore, in order to inform the Court of its objection to the Court's exercise of jurisdiction, the State would have to put the challenge in writing. Rule 58(1) states, "a request or application made under Article 19 [challenges to the jurisdiction of the Court or the admissibility of a case] shall be in writing and

contain the basis for it." Representatives of the Tiernan government appeared before the Court in March 2007 in order to contest the Court's admissibility. A written statement was not provided as required by the Rome Statute. By failing to respect the procedure of the Court and submit a written statement, Tierna's objection to admissibility is improper.

Tierna's challenge to the Court's admissibility is unacceptable both for its lack of timeliness and form. Tierna failed to exercise its own jurisdiction within one month from notice of the ICC's intent to do so, as required by the Rome Statute and also failed to timely notify the Court of its intent to contest admissibility.

B. *Tierna's Attack on the ICC's Jurisdiction is Unfounded.*

In March 2007, Tiernan officials appeared before the court and argued that because Albilion had "unsigned" the Rome Statute and was "no longer party" to the ICC, the ICC lacked jurisdiction to prosecute the crimes occurring on Bloody Thursday. While Albilion never formally withdrew from the Rome Statute, Albilion's status as a signatory is inconsequential under the current circumstances. As a signatory or as a non-signatory, Albilion's actions after Bloody Thursday ensure that the ICC has jurisdiction over this matter.

1. *The Court's jurisdiction exists by virtue of the nature and location of the attack.*

Jurisdiction refers to the legal parameters of the Court's operations in terms of subject matter, time, space, and individuals. In order to have jurisdiction over the matter, the Court must be empowered by virtue of the incident's subject matter, time, space, and persons involved. In regards to Bloody Thursday, the Court's jurisdiction exists due to the subject matter, time, and territory involved.

a. The nature of the crime provides the Court with subject matter jurisdiction.

The Court has subject matter jurisdiction over this case due to the nature of the crimes. Article 5 of the Rome Statute states, "the Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) the crime of geno-

cide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression. The crimes committed on Bloody Thursday by TRA members constitute both crimes against humanity and war crimes. Therefore, the incident in question falls under the Court's jurisdiction.

i. The actions of the accused constitute a crime against humanity.

According to Article 7, a crime against humanity means "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder, extermination, enslavement. . ." The "widespread or systematic" qualification requires that the incident have a quantitative dimension. A crime against humanity requires destruction on a large scale. The perpetrators of Bloody Thursday murdered 6,666 people when their plan went into action. Moreover, the plot was systematic in its design. To bomb eighteen underground railway stations in the same city in a single day would undoubtedly require extensive planning and organization and result in large scale destruction. The crime clearly falls within the definition of a crime against humanity as defined in Article 7.

ii. The actions of the accused constitute war crimes.

Due to the conflict between Albilion and Tierna and the fact that the attacks that were intentionally directed against the civilian population of Albilion, the actions here constitute war crimes. Article 8 states that a war crime is a "serious violation of the laws and customs applicable in an international armed conflict, within the established framework of international law, namely,. . .(1) intentionally directing attacks against the civilian population as such or against individual citizens not taking direct part in hostilities. . ." Bloody Thursday occurred as a result of an international conflict and was intended to kill civilians. Therefore, the actions of the TRA members can be defined as a war crime.

Tierna's status as an independent state or faction of Albilion is irrelevant in determining the existence of an international armed conflict. If Tierna is deemed to be an independent

state, the conflict between Tierna and Albilion would be defined as an international armed conflict. If Tierna is considered part of Alibilion instead, the war crimes categorization still applies. The UN Security Council recognized the punishability of war crimes for internal armed conflicts when it adopted the Statute of the International Criminal Tribunal for Rwanda in 1993. This sentiment was confirmed in 1998 at the Rome Conference when States confirmed that they supported the prosecution of war crimes for non-international armed conflicts. Therefore, Tierna's status as an independent state does not prevent the crime in question from being defined as a war crime.

b. The Court has temporal jurisdiction.

The Court can only prosecute crimes that have occurred after entry into force of the Statute. If the State is a signatory to the Rome Statute, the Court has jurisdiction over crimes committed after its entry into force with respect to that State. Article 126(2) states that "for each state ratifying, accepting, approving or acceding to this Statute . . .the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession." Bloody Thursday occurred nearly three years after the ratification of the Rome Statute and nearly six years after Albilion's ratification of the Statute. Due to the date of Bloody Thursday, the crime grants the Court temporal jurisdiction.

If Albilion is determined to have "unsigned" the Rome Statute, temporal jurisdiction exists. Through its ad hoc declaration recognizing the Court's jurisdiction, Albilion need not be a party to the Statute. In these instances, temporal jurisdiction still exists, so long as the incident occurred after the entry into force of the Rome Statute. Bloody Thursday occurred in March 2007, with the Rome Statute being ratified in July 2002. Therefore, temporal jurisdiction survives, regardless of Albilion's status as a signatory.

c. The Court has territorial jurisdiction.

International law has repeatedly held that jurisdiction exists where the crime took place on the land of a state that has submitted itself to the proceedings of an international tribunal.

Article 12(2) reveals that the Court has jurisdiction over crimes committed on the territory of the State party, regardless of the nationality of the offender. The Court may exercise its jurisdiction if one or more of the following States are parties or have accepted the jurisdiction of the Court. . . (a) the State on the territory on which the conduct in question occurred; (b) that State of which the person accused of the crime is a national. In addition to State parties, territorial jurisdiction also applies to crimes committed on the territory of States that accept its jurisdiction on an ad hoc basis and on territory approved by the Security Council. There is no dispute that the crime in question occurred on the territory of Albilion, being that the attacks occurred in the State's capital city.

2. *As a State party, Albilion enables the ICC's exercise of jurisdiction.*

Albilion is a State party to the Rome Statute as it did not effectively withdraw from it. Article 127 states that withdrawal occurs upon "written notification addressed to the Secretary-General of the United Nations." In January 2003, the current Prime Minister announced that "he had resolved to 'unsign' the Rome Statute." The mere announcement of an intent to withdraw by a single State national is not sufficient to effectuate withdrawal. No written withdrawal was received by the UN Secretary General affirming the State's desire to withdraw. Therefore, Albilion remains a signatory of the ICC.

With Albilion a signatory to the Rome Statute, the ICC has jurisdiction over the prosecution of the Bloody Thursday suspects. As Article 12 (1) reads, "a state which becomes a party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5." As a State party, Albilion has accepted the jurisdiction of the Court.

Due to the location of the crimes, the ICC may exercise its jurisdiction. The court may exercise its jurisdiction if the State on the territory of which the conduct in question occurred is a party to this statute. The attacks on Thursday, March 17, 2005 occurred in Albilion's capital city of St. Rache. The Court may exercise its jurisdiction because Albilion is a State party and because of the territory on which the conduct in question occurred, as required by Article 12(2)(a).

3. *If Albilion is deemed to be a non-state party, the ICC has jurisdiction by virtue of Albilion's ad hoc declaration.*

The determination that a State is not a signatory to the Rome Statute does not bar the Court's exercise of jurisdiction. In the event that Albilion is deemed to be a non-signatory at the time of the attack in question, the State's declaration accepting jurisdiction grants the Court the ability to proceed. "The Court may exercise jurisdiction if one or more of the following States . . .have accepted the jurisdiction of the court: . . . a state on the territory of which the conduct in question occurred." The attacks of March 17, 2005 occurred in Albilion's capital city of St. Rache. Therefore, Albilion is the State on the territory of which the crimes occurred.

In order to accept the jurisdiction of the Court, the State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. On September 8, 2006, the Prime Minister *formally* referred the prosecution of the Bloody Thursday suspects to the Office of the Prosecutor of the ICC. Formal, by definition, means, "following or according with established form, custom, or rule, done in due or lawful form." To formally refer the prosecution, Albilion lodged the acceptance of jurisdiction with the Registrar as required by the Statute. Therefore, even if deemed a "non-signatory," Albilion has accepted the jurisdiction of the Court and the Court is capable of exercising jurisdiction in this matter.

This court has recognized and accepted the self-referral of prosecutions in the recent past. The first three prosecutions addressed by this Court, Uganda, the Democratic Republic of the Congo, and the Central African Republic, were all submitted to the court by self-referral. On April 18, 2003, Côte d'Ivoire, which is not a party to the Rome Statute, lodged an *ad hoc* declaration with the ICC accepting the court's jurisdiction over crimes committed on its territory since September 19, 2002. Non-state parties, through an ad hoc declaration, enable the Court to exercise jurisdiction over a matter on their territory. Therefore, Albilion's formal referral of the prosecution to the ICC provides the Court with jurisdiction over the matter, regardless of its status as a signatory.

By virtue of its subject matter, temporal and territorial jurisdiction, this case can be heard by the ICC. The nature of the crime falls within the definition of war crimes and crimes against humanity, granting the Court subject matter jurisdiction. The date of the crime provides the temporal jurisdiction, as Bloody Thursday occurred years after the Statute's ratification and Albilion's ratification of the Statute. Territorial jurisdiction exists due to the fact that the crime occurred on the territory of Albilion. Tierna is incorrect in stating that Albilion's status as a non-signatory prevents the Court from exercising jurisdiction in this matter.

C. *To Allow Tierna to Obstruct the Current Prosecution of the Bloody Thursday Attackers Undermines the Foremost Principles of the ICC.*

The ICC arose from the need for an impartial and fair forum, in which the most egregious criminals would be brought to justice. To allow these crimes to go unpunished threatens the peace, security, and well-being of the world, as recognized in the Rome Statute Preamble. The ICC was formed for precisely this type of situation. International law dictates that treaties are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A clear and simple interpretation of the Rome Statute determines that the ICC must proceed with the prosecution of the Bloody Thursday attackers.

Albilion, the State in which these crimes occurred, is unable to prosecute. The State from which the suspects hail is not an impartial forum and has expressed no resolve to prosecute their nationals for this crime. To allow Tierna to stop this ongoing prosecution and bring the matter to its courts would undoubtedly end in impunity for the suspects involved. The court is properly exercising its jurisdiction in this matter according to all sections of the Rome Statute. To forgo the jurisdiction of the Court is contrary to the Rome Statute and undermines the goals of the ICC.

Prayer for Relief

The Office of the Prosecutor respectfully requests that the International Criminal Court:

Exercise jurisdiction over the Bloody Thursday attackers;
Find the case admissible before the Court; and,
Deny the defense's challenge to the Court's jurisdiction.