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# 2007 ICC Moot Court Competition Winning Briefs: "Best Brief" Defense

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# 2007 PACE LAW SCHOOL I.C.C. MOOT COMPETITION “BEST BRIEF” DEFENSE

**Chad D. Ehrenkranz\***

## STATEMENT OF FACTS

Tierna is a sovereign State with a lengthy history. Despite occupation by its northern neighbor, Albilion’s leaders, since the end of World War I, continuously sought to regain freedom. On or about September 3, 2006, Tierna reestablished its independence. Tierna was not a party to the Rome Statute in 2005 when the events that are the subject of this prosecution took place.

While Tierna never took steps to ratify the Rome Statute by 2005, Albilion was opposed to the ICC when the criminal acts in question occurred. Despite Albilion’s initial ratification of the the Rome Statute in 1999, Albilionese Prime Minister Eiling announced unequivocally that he had resolved to “unsign” the Statute in January 2003.

The unsigned of the Statute by Albilionese leadership was consistent with the Prime Minister’s mandate after a victory in national elections, during which he had been an outspoken opponent of the International Criminal Court (“ICC” or “Court”). Although the record is silent as to whether explicit written notification of Albilion’s withdrawal was sent to the UN Secretary General, Albilion led an extensive campaign to register its objection to ICC jurisdiction over its territory and citizens, barring Albilionese consent.

The Albilionese government took numerous steps to register its opposition to the ICC. First, in March 2003, the Albilionese Parliament passed the Albilionese Citizenry Protection Act

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\* J.D. University of Miami School of Law 2008. B.A. New York University 2002. This brief is dedicated to my mentor Professor Edgardo Rotman. Without Professor Rotman’s support, this brief would not have been possible. In addition, I owe great thanks to Professor Elizabeth M. Iglesias for her encouragement and advice.

("ACPA"), authorizing the use of military force to prompt the release of Albilionese citizens or citizens of an Albilionese-allied country being held by the ICC. In addition, the ACPA provided for the withdrawal of Albilionese military assistance from countries that had merely ratified the ICC treaty and constrained Albilionese involvement in UN peacekeeping as an ultimatum to the international community seeking immunity from prosecution by the ICC.

Even after demonstrating its willingness to use deadly force to avoid submission to ICC jurisdiction, Albilionese leadership went even further in order to avoid the possibility that its citizens could be brought before the ICC despite the fact that Albilion was no longer a party. Albilion persistently sought agreements with other countries in an attempt to bar the transfer or surrender of Albilionese nationals to the ICC by utilizing the controversial theory, most notably promoted by the United States, that bilateral agreements create an exception to ICC territorial jurisdiction under Rome Statute Article 98(2). In furtherance of its clear objection to the ICC, Albilion also threatened the withdrawal of aid for countries that would not guarantee Albilionese immunity from ICC prosecution.

Albilion also notified the United Nations of its objections to ICC jurisdiction. Despite broad international opposition, Albilionese representatives successfully applied multi-faceted persistent pressure to the UN Security Council in support of Resolution 2214. This Resolution was loosely modeled after a similar resolution, 1422, that limited jurisdiction over U.S. citizens. Resolution 2214 exempted peacekeepers from ICC jurisdiction, an even greater blow to ICC jurisdiction than 1422, which merely delayed prosecution.

The text of Resolution 2214, championed by Albilion in 2003, only applies to cases "involving current or former officials or personnel from a contributing State *not a Party to the Rome Statute.*" (emphasis added).

Over two years after Albilion's repeated assertions of freedom from ICC jurisdiction, a criminal act of tragic proportions took place in Albilion, claiming the lives of 6,666 people. Rogue actors unassociated with the legitimate Tiernan Republican Army ("TRA") members and policies perpetrated these acts of murder, which were perhaps politically motivated.

Accordingly, Tiernan Prime Minister Coogan, then the leader of the TRA, immediately condemned the acts. Prime Minister Coogan explicitly affirmed that the TRA considered its conflict to be governed by the Geneva Convention rules of war, thus expressly ruling out attacks like the one committed by the rogue murderers. Subsequently, Coogan made a solemn promise to bring "these murderers to justice for their heinous and cowardly attacks on the Albilionese people."

The Albilion military then launched a campaign against the Tiernan people to discover the identities of the perpetrators. This included random interrogation and wrongful detention without trial of Tiernan citizens as well as increased military checkpoints throughout the Tiernan countryside. Moreover, Amnesty World Wide reported numerous instances of abuse and torture of detainees by Albilionese military personnel.

By contrast, Tierna consistently demonstrated its respect for the Geneva Convention and international customary law throughout the remainder of its conflict with Albilion, as the record reflects no instances of any violations of the Geneva Convention or international law by Tiernan leadership.

Tierna also has demonstrated a commitment to freedom and a fair system. Significantly, in May 2006, free elections were held and a democratically elected leadership led by Prime Minister Coogan was peacefully installed. Tierna's respect for the Geneva Convention and demonstrated commitment to aid Albilion citizens continued when Tierna established itself as an independent state. As an act of goodwill towards Albilion, Prime Minister Coogan released all Albilionese soldiers in Tiernan custody to Albilion in order to aid the country in a time of economic and political crises.

In July 2006, new elections were held resulting in Nathaniel Essex being reelected as Prime Minister of Albilion. In an effort to mend relationships with various members of the international community, Prime Minister Essex pressured parliament to rescind the ACPA as well as any agreements with other countries not to surrender or transfer Albilionese nationals to the ICC. Nothing in the record, however, indicates that such a rescission took place. Even so, such a rescission solely suggests that Albilion would no longer challenge the ability of the ICC to assert jurisdiction over non-parties in limited circumstances,

but there is no indication that Essex began proceedings to “re-sign” the Rome Statute.

Several months after the Tiernan elections, on August 28, 2006, three Tiernan nationals and confirmed TRA members, Henry Lynch, Thomas Dane, and Jackson Cray, were arrested in Albilion by the Albilionese Constabulary 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. Nothing in the record indicates the factual basis for their arrest or whether these confessions were coerced by abuse or torture.

On September 10, 2006, during a crisis that resulted in the collapse of the Albilionese economy and much of its infrastructure, Prime Minister Essex referred the case against the accused to the ICC.

In February 2007, after an initial investigation, the ICC Prosecutor charged the defendants with five crimes under Articles 7 and 8. The record gives no indication that the Prosecutor received authorization from the Pre-Trial Chamber prior to the investigation in accordance with Article 15(3). Furthermore, nothing in the record states that notice was given to Tierna prior to the issuance of the charging document.

Subsequently, Tierna challenged the ICC’s jurisdiction over the defendants based on the jurisdictional limits and complementarity principle imposed by Articles 17, 18, and 19.

#### PLEADINGS

A. *Under Article 19, the ICC Lacks Jurisdiction Over the Accused Because Albilion Effectively Withdrew from the Rome Statute Prior to March 2005.*

1. *The ICC is a court of limited jurisdiction.*

The text of the Rome Statute explicitly states that certain preconditions must be met to grant the ICC jurisdiction, regardless of the circumstances. When a State Party refers a case to the ICC, the Court cannot exercise jurisdiction unless one of the following states is a party to the Rome Statute: The state in whose territory the alleged crime was committed *or* the state of the alleged offender’s nationality.

Such a limit is vital to the legitimacy of the ICC because it is one of the few significant checks and balances on the power of the Court. The limit is also in accordance with long-standing principles of international law that a State will not be subject to restrictions of a treaty that it does not agree to. Article 12 emphasizes in both Section One and Section Two that a State must be a "party to this Statute" with respect to the crimes against humanity listed in Article 5 for the ICC to assert jurisdiction.

Thus, the Statute repeatedly emphasizes the need for a State party to be connected to the events in question either through a nexus to the territory where the event took place or the nationality of the accused.

2. *The ICC lacks jurisdiction over conduct that falls outside the temporal jurisdiction of the court.*

Regardless of the current status of a State where the conduct in question occurs, the ICC may not assert jurisdiction retroactively. Under Article 24's rule of non-retroactivity *ratione personae*, "[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute." By logical implication, temporal jurisdiction does not extend to parties who withdraw from the treaty once its one-year notice provision has been met.

This interpretation is consistent with the Rome Statute's grant of withdrawal of status as a State party "one year after the date of receipt of . . . notification, unless the notification specifies a later date."

Such a temporal limitation is also consistent with similar international law jurisprudence. In *Nahimana*, for example, the International Criminal Tribunal of Rwanda ("ICTR") made it clear that events prior to the establishment of the tribunal in 1994 could not be considered other than in the limited context of "continuing crimes" or merely as evidence of a crime within its temporal jurisdiction.

Similarly, in the *Lovelace* case, the UN Human Rights Committee held that alleged human rights violations that occurred prior to the entry into force of the International Covenant on Civil and Political Rights ("ICCPR") were outside its jurisdiction. Furthermore, the European Court of Human Rights ("ECHR") in the *Veeber* case, stated that the ECHR is

generally binding on each of the contracting parties only for events that take place after the entry into force.

Here, the events in question consisted of a single event, one that cannot reasonably be characterized as a continuing crime. Certainly, there is nothing in the record that alleges that the criminal activity began significantly earlier than the actual attack.

Since Tierna never became a party to the Rome Statute, the accused are not subject to ICC jurisdiction based on their nationality. If they are considered to be Albilionese citizens because of such status at the time of the crimes, the same argument about Albilion's lack of party status, made in Section IV (3), *supra*, applies. Consequently, the only way for the ICC to assert jurisdiction is to establish that Albilion, the State where the events occurred, was a State party in 2005. This assertion fails, however, because Albilion denounced the Statute well over one year before the acts in question.

3. *Albilion effectively denounced the Rome Statute as of April 2003, nearly two years prior to the 2005 criminal activity.*

The drafters of the Rome Statute clearly contemplated the ability of a State Party to withdraw from the treaty without significant obstacles. Article 127(1) of the Statute provides: “[a] State Party *may*, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date” (emphasis added).

The use of the word “may” rather than “shall” or “must” strongly implies that the drafters did not intend for this to be the exclusive method of withdrawal. Such a provision also sharply contrasts with the withdrawal provision of many treaties, which require “significant change in circumstances” or offer no withdrawal provision at all.

Key concepts of customary international law are utilized by States to guide their judgment in interpretation of international agreements: *pacta sunt servanda* and *rebus sic stantibus*. The most significant interpretive guideline, however, is codified by the Vienna Convention, which states, “[a] treaty shall be inter-

preted 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." While it is true that the Vienna Convention notes that "denunciation of an international agreement . . . may take place only . . . in conformity with the agreement," the meaning of "conformity" must be viewed through the lens of the treaty's object and purpose.

Here, in light of the object and purpose of the Rome Statute, a good faith interpretation of Article 127 is that parties who express their present intent to withdraw are no longer considered a State Party after a year, unless otherwise indicated. Albilion expressed a present intent to withdraw on or about April 2003, after its declaration to "unsign the treaty" and extensive, well-documented legislative steps to denounce any ICC jurisdiction over its citizens without an explicit waiver by Albilion.

While the record is silent as to whether explicit written notice was sent, such notice to the Secretary General is strongly implied by the circumstances and consistent with the Vienna Convention principles of treaty interpretation.

Specifically, Albilion's actions seem to be patterned closely after those of the United States in its efforts to oppose the Rome Statute. Just as U.S. President Bush announced his decision in May 2002 to "unsign" the Rome Statute, Albilion Prime Minister Eiling announced his decision to unsign the Statute in January 2003. Just as the U.S. passed a law that conditioned military and financial support on an agreement not to turn over its citizens to the jurisdiction of the ICC, Albilion passed a nearly identical Statute in March 2003. All of these acts are consistent with those of a State that no longer wishes to be considered a Party to the Rome Statute.

Most significantly, in April 2003, Albilion sought the passage of UN Security Council Resolution 2214, a resolution somewhat similar to an earlier resolution initiated by the United States. Although it is true that the U.S. never formally ratified the Rome Statute as Albilion had, it seems clear that Albilion was modeling its own opposition after that of the U.S.

After affirming its intent to unsign the Rome Statute, the U.S., through its ambassador John Bolton, sent formal notice of its intent to disavow its status as a party to the Statute with a three-line letter to then- Secretary General Kofi Annan. It



seems highly unlikely that Albilion, which adopted the U.S. procedural forms of opposition nearly without alteration, would fail to similarly communicate a formal letter of withdrawal to the Secretary General.

Even if, whether through design or inadvertence, such a communication was not sent, Albilion's intent to withdraw was clearly expressed to the Secretary General. Nearly two years before the 2005 criminal activity, Albilion "pressure[d]" the UN Security Council to pass a resolution that limits jurisdiction over *non-parties*.

The text of Resolution 2214, as well as the record as a whole, makes it clear that the only plausible interpretation of Albilion's actions in 2003 was an expressed intent to become a non-party. Resolution 2214 supports this by emphasizing that "not all States are parties to the Rome Statute. . . , States not Party to the Rome Statute will continue to fulfill their responsibilities in their national jurisdictions in relation to international crimes," and reaffirming the principle of complementarity. The text of the Resolution only applies to cases "involving current or former officials or personnel from a contributing State *not a Party to the Rome Statute*" (emphasis added). There would be no reason for Albilion to champion such a resolution if it remained a State Party, to which the Resolution would be irrelevant. This interpretation is bolstered by Amnesty International's description of Albilion in April 2003 as a State "which opposes the ICC."

Thus, notice of its withdrawal was certainly expressed to both the UN Secretary General and other signatories between January and April of 2003. Such a campaign surely involved some form of written communication to the UN, which also would satisfy the "written notification" portion of Article 127. In the alternative, the text of resolution 2214 itself qualifies as written notification.

Consequently, Albilion was no longer a State Party by April 2004, one year after it communicated its withdrawal. While the Vienna Convention does not specifically address how to conform to withdrawal provisions of a treaty, it does mention that a party who signs a treaty is subject to ratification *until it shall have made its intention clear not to become a party to the treaty*. By analogy, even though Albilion had ratified the treaty four

years earlier, Albilion withdrew its party status under the Rome Statute by making its intention clear in April 2003, when it actively sought to avoid jurisdiction over its citizens.

4. *Albilionese leadership's words and actions sufficiently indicate a desire to withdraw, consistent with the parallel concept of persistent objection.*

Honoring Albilion's expressed intent to withdraw is also consistent with parallel concepts of international law. Since the Rome Statute's use of the word "may" in its withdrawal provision implies that there are other acceptable means to do so, the boundaries of acceptable methods are defined by good faith interpretation and customary law. The most highly analogous concept in customary law is that of persistent objection. Persistent objection to a customary law can take a variety of forms; its statement of objection can be couched in a variety of ways or a combination of words and actions, even if gently stated, can preserve a State's status as an objector.

By analogy, Albilion's combination of words and actions indicated its status as a party that had withdrawn from the Rome Statute. Certainly, allowing States a multiplicity of means to withdraw from treaties creates a risk of ambiguity, but the numerous and repeated indications by Albilion were more than sufficient to meet such a standard.

5. *Honoring the right of a State to denounce a treaty obligation, in accordance with international law, helps promote international cooperation.*

While conventional wisdom might characterize treaty withdrawal as a rare and momentous event, the facts suggest otherwise. An empirical study of all treaty obligations between 1945 and 2004 reveals that there were 1547 denunciations (approximately 4.8% of ratifications) total and 191 (3.5%) denunciations of multilateral agreements. Withdrawals are therefore a regularized component of modern treaty practice.

Thus, honoring Albilion's clear indication of intent to withdraw will not result in a slippery slope of parties constantly leaving treaties. The relatively low rate of statistical withdrawal shows that most countries prefer to allow treaties to remain in force as a means of securing their best interests. But when the duly

elected representatives of a State express the desire to withdraw, failure to empower this action actually discourages treaty commitments for fear that such commitments can never be adjusted to meet the needs of a signatory State.

It is true that many of Albilion's actions centered on objection to jurisdiction over peacekeepers. But Albilion's immediate declaration to "unsign" the treaty, and the text of Resolution 2214 make it clear that, in context, Albilion was persistently communicating its objection not only to jurisdiction over non-parties, but to its status as a party to the Rome Statute.

Challenges to the jurisdiction of the Court may be made by a State that has jurisdiction over a case on the ground that it is investigating or prosecuting the case. Since Tierna is a State with jurisdiction that is in the process of investigating the accused, discussed in detail *supra*, Tierna has standing to challenge ICC jurisdiction.

Since neither Tierna nor Albilion was a Party to the Rome Statute at the time of the criminal activity, Tierna respectfully requests that this Court refer the case to Tierna based on the jurisdictional limits of Articles 12 and 19.

B. *In Addition to a Lack of Jurisdiction Due to Albilion's Withdrawal, the Case Is Inadmissible Because Tierna Is Willing and Able to Investigate and Prosecute the Accused.*

1. *The ICC's jurisdiction is governed by the principle of complementarity and the burden of proof rests with the Prosecution.*

One of the major goals of the Rome Statute is to retain the primacy of sovereign States as the preferred forum for criminal prosecution. Thus, the Preamble and Article 1 of the Rome Statute each emphasize that the ICC is complementary to national criminal jurisdictions. In contrast to earlier *ad hoc* tribunals, such as the one for Rwanda, the ICC does not have primacy over national systems.

The *travaux préparatoires* suggest that the ICC should only be resorted to in exceptional cases. In turn, Article 17 definitively states that the Court shall determine that under investigation by a State with jurisdiction is inadmissible "unless the

State is unwilling or unable genuinely to carry out the investigation or prosecution."

According to one leading scholar, the burden of proof to show an inability or unwillingness is on the Prosecutor, and meeting this heavy burden in light of the complementarity principle may "demand greater resources of the Prosecutor in preparing the admissibility argument than proving the guilt of the alleged perpetrator." This interpretation is consistent with Article 17(2)'s mandate to interpret the definition of willingness in light of "the principles of due process recognized by international law." Principles of due process in nearly all criminal justice systems place the burden of proof on the Prosecution.

2. *Tierna is a State that has jurisdiction over a matter that is being investigated or prosecuted by the State.*

Tierna satisfies Article 17's requirement that the case is "being investigated or prosecuted by a State with jurisdiction over it." Tierna's current status as a State is amply supported by its history as a sovereign State, military victory over its occupiers, and its democratically elected leadership. Since the accused are Tiernans, Tierna has jurisdiction based on the nationality principle, long recognized by international law as a valid basis.

While the record is somewhat lacking in detail, a good faith interpretation of Article 17 also must hold that the accused are "being investigated" by Tierna. Tiernan Prime Minister Coogan, immediately after the events in question, demonstrated his commitment to such an investigation when he vowed to bring these "murderers to justice." Tierna's appearance before the Court to assert jurisdiction is also strong circumstantial evidence that the process of investigation has been ongoing.

Furthermore, in light of the content and purpose of the Rome Statute, the Court should simply require indicators of a commitment to investigate when the accused has been held in a foreign jurisdiction or at the ICC. When a country knows that another jurisdiction holds the suspects in question, it inefficiently allocates resources to require another willing jurisdiction to investigate prior to receipt of the accused in order to preserve its rights under Article 17.

3. *Tierna is willing to genuinely investigate and prosecute the matter.*

Article 17(2) lists several factors to determine the meaning of willingness. The factors relating to unjustifiable delay and impartial proceedings do not apply here because Tierna has yet to have custody over the accused. Therefore, the prosecution has the burden to show that “[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person[s] concerned from criminal responsibility for crimes.” In effect, Article 17(2) calls for an evaluation of the good faith of national authorities.

To meet its burden, the Prosecution must do more than make an unsubstantiated challenge to the good faith of a sovereign State, when Tierna actively seeks to prosecute individuals for a crime, which its leadership has publicly condemned in unequivocal terms. The Victim’s Advocates’ theory that the historical relationship between the Albilionese and Tiernans make a fair trial impossible is mere speculation and unpersuasive.

Former status as an occupied State does not, by itself, eliminate a sovereign State’s ability to investigate and prosecute citizens accused of heinous crimes during the period of occupation. For example, in 2006, the Police Service of Northern Ireland established a Historical Enquiries Team (“HET”) charged with investigating a total of 3,268 deaths that took place during the period prior to a truce between the IRA and British authorities. According to Peter Hain, Britain’s Secretary of State for Northern Ireland, it is “quite possible” that perpetrators will face prison sentences as a result of the HET’s work.

If Tiernan leadership had considered the accused to be POWs, it could easily have sought to free them in exchange for the return of Albilionese soldiers prior to referral to the ICC. The fact that Tierna followed the Geneva Convention protocol without any preconditions suggests that Tierna seeks the opportunity to demonstrate its commitment to justice.

There are a number of good faith motives that are at least as plausible as the illicit motives attributed to Tierna by the opposing parties. First, trial and conviction by a jury of Tiernan peers will send a strong message that mass murder is intolerable even to those whose name is used to justify such an act. In addition, judgment by a Tiernan court delegitimizes any at-

tempt by the accused for martyrdom, a goal that could be reached if the ICC convicts them. Finally, trial in a Tiernan court may serve as a tool for reconciliation and truth seeking, just as domestic trials paved the way for a peaceful transition in post-apartheid South Africa.

4. *Tierna is genuinely able to investigate and prosecute the matter.*

Freedom from occupation and democratic free elections over the past eighteen months bolster Tierna's ability to investigate and prosecute the accused. Despite the suggestion from the victims' advocate that Tierna's "recovery" from the occupation meets the standard for inability; such an inference is both unsupported by facts in the record and a misstatement of Rome Statute standards. Under Article 17(3), "the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." The "heart of inability" is a lack of control over the accused.

A case is inadmissible to the ICC unless there is a gap in jurisdiction, typically caused by a collapse of judicial institutions, widespread anarchy, or inability. This situation is distinguishable from the present case. Significantly, the burden is on the Prosecution to demonstrate Tierna's inability to prosecute, and there is little or no evidence in the record that Tierna lacks this fundamental ability. While it is true that Prime Minister Coogan released Albilionesse soldiers to their native country, such an act of political reconciliation is a sign of respect for international law, rather than a lack of prosecutorial resources. In point of fact, such an act demonstrates Tiernan leadership's continuing commitment to the Geneva Convention which mandates, "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities."

The mere fact that Tierna has been free from occupation for over a year is insufficient evidence of an inability to prosecute. Unlike the situation in Albilion, nothing in the record suggests that Tierna lacks a judicial infrastructure. Many countries have demonstrated an ability to conduct trials in the aftermath of occupation or civil war. In Uganda, for example, an indepen-

dent judicial system remained after a bloody armed conflict in the North. Even during the violent period of conflict between Britain and the IRA, Northern Ireland's courts, and the British judicial system in general, produced convictions of criminal offenders - especially those involved in paramilitary violence. Therefore, the Victim's Advocate's theory that the "recovery" from many years of occupation makes it impossible to "adequately" try the accused lacks merit.

Tierna's peaceful transition to a democratically elected government demonstrates its commitment to the rule of law. The Prosecution cannot meet either its burden to show that there has been a substantial collapse of the judicial system in Tierna or that it is currently unavailable. The current situation is distinguishable from the court's assertion of admissibility over the Uganda referral. There, the Ugandan government had agreed to grant amnesty over the accused and had little chance of gaining custody over members of the accused who were being sheltered in Sudan. By contrast, Tierna has no restrictions on its ability to prosecute and can easily gain custody upon a grant of its motion.

Furthermore, Tiernan officials are more likely than the ICC to have the ability to obtain relevant evidence as a result of both geographical proximity and access to TRA members who may have had contact with the accused.

ICC Chief Prosecutor Luis Moreno-Ocampo has emphasized publicly that "[a]s a consequence of complementarity . . . the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."

Tierna fought for its sovereignty after nearly a century of deprivation; it is simply bad policy for the ICC to seek to divest Tierna of one of the essential rights as a sovereign State: to determine the guilt or innocence of its accused and to be empowered to demonstrate to the civilized world their commitment to a fair and enlightened system of justice.

C. *In Furtherance of Complementarity, the ICC Must Defer to Tierna's Investigation Under Article 18(2).*

The Rome Statute clearly contemplates domestic investigation by a willing sovereign State with jurisdiction as the pre-



ferred course of action over ICC investigation. Article 18(1) specifies that after a referral by a State Party (here, assuming *arguendo*, Albilion had such a status in 2007), "the Prosecutor shall notify . . . those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned." The use of the plural "States" indicates that this requirement extends to not only the State where the crime occurred, but also to any State that typically would exercise jurisdiction.

Tierna is a State that would normally exercise jurisdiction under the nationality principle, as discussed *infra*. Nothing in the record indicates that the Office of the Prosecutor gave notice to Tierna prior to the charging document. Therefore, the charging document, in effect, served as notice.

Consequently, Tierna triggered Article 18(2) by indicating their desire to investigate within one month of the public release of the charging document. In such a situation, at the request of a State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

The Statute is ambiguous as to what grounds would be appropriate for the Pre-Trial Chamber to authorize an investigation even where a State is willing to do so. Applying the Vienna Convention principles of context and purpose, the Pre-Trial Chamber would not honor the principle of complementarity if it failed to defer to Tierna, a State that would normally exercise jurisdiction.

The ability of the Pre-Trial Chamber to reevaluate after six months provides the safeguard against concerns about Tierna's motives. In the unlikely event that doubts about Tierna's willingness and ability are supported by actual proof during the six month period, a dismissal based solely on Articles 17 and 18 could be reversed. The drafters set up such a system to ensure that issues of complementarity would be based on facts derived from a State's actions during the six-month period of deference, rather than mere speculation.



## PRAYER FOR RELIEF

Four years ago, Prime Minister Coogan made a solemn promise to bring the “murderers to justice for their heinous and cowardly attacks on the Albilionese people.” Tierna respectfully seeks the Court’s deference to Tiernan jurisdiction to honor that promise in the context of an open and fair trial by a willing and able State.