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2007 ICC Moot Court Competition Winning Briefs: "Best Brief" Victim's Advocate

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**2007 PACE LAW SCHOOL I.C.C. MOOT
COMPETITION “BEST BRIEF”
VICTIM’S ADVOCATE**

Bharathi Pillai

PRELIMINARY STATEMENT

On March 17, 2005, the State of Albilion suffered a violent terrorist attack that killed 6,666 of its citizens and uprooted the security and future safety of all citizens of Albilion. After years of struggling to bring the perpetrators of these crimes to justice, Albilion was finally able to arrest three confessed masterminds to the crimes of “Bloody Thursday.” Unfortunately, due to Albilion’s own instability, it was no longer able to prosecute the crimes, and referred the case to the ICC pursuant to Article 14.

Tierna currently seeks the opportunity to take control of this case involving these three Tiernan nationals and confirmed members of the Tiernan Republican Army (TRA). It is clear that Tierna is neither capable nor genuinely willing to provide a fair and impartial trial. Also, changing jurisdiction now, after investigation has already commenced, places the victims at great risk. Accordingly, the Court should reject Tierna’s petition challenging the ICC’s jurisdiction over this case. The victims and families of the victims respectfully request that the Court maintain jurisdiction over the investigation and prosecution of the case referred to it by Albilion in order to ensure a fair and impartial trial of the crimes, as well as to guarantee the safety and full protection of the rights of the victims of “Bloody Thursday.”

STATEMENT OF FACTS

Our clients, the victims and families of the victims, are moving to reject Tierna’s petition challenging the ICC’s jurisdiction over the crimes committed on the tragic “Bloody Thursday.” Tierna’s petition, seeking to have the Court reverse its original decision to investigate and prosecute these crimes, not only vio-

lates the rights of victims to seek reparation and justice, but also directly contradicts the purpose of the International Criminal Court.

Beginning in August 1999, Albilion made official its commitment and support of the establishment of an independent court for effective and uniform enforcement of the “most serious crimes of concern to the international community” by signing and ratifying the Rome Statute and becoming a State Party to the International Criminal Court under Prime Minister Nathaniel Essex.

In 2002, a new administration headed by Prime Minister Eiling came into power and, fearing the bounds of the ICC’s jurisdiction, resolved to diminish the power of the ICC over Albilion. Subsequently, Eiling placed pressure on Albilionese Parliament to pass the Albilionese Citizenry Protection Act (ACPA) in March 2003. The Act authorized the use of military force to liberate any Albilionese citizen or citizen of an Albilionese-allied country being held by the ICC, provided for the withdrawal of Albilionese military assistance from countries ratifying the ICC treaty, and threatened to restrict Albilionese participation in United Nations peacekeeping unless Albilion was given immunity from prosecution by the ICC. Notably, the Act included a waiver clause, allowing the Prime Minister to waive any of these provisions in the interests of national security. In April 2003, increased pressure from Albilion led to the widely controversial agreement by the United Nations Security Council, Resolution 2214, a resolution exempting peacekeepers from prosecution.

Although Prime Minister Eiling announced a desire to “unsign” the Rome Statute, at no time did Albilion formally withdraw from the Rome Statute by completing “written notification addressed to the Secretary-General of the United Nations” as required under Article 127 of the Rome Statute.

On March 17, 2005, a day mournfully remembered as “Bloody Thursday,” 18 underground railway stations were bombed in Albilion’s capital city of St. Rache. This massive terrorist attack, resulting in the tragic deaths of 6,666 Albilionese citizens, is in violation of Articles 7(1)(a), 8(2)(a)(i), 8(2)(b)(i) or 8(2)(e)(i), (8)(2)(b)(iv), and 8(2)(c)(i)-1.

Tiernan Republican Army (TRA) leader, Eamon Pat Coogan, denied any responsibility for the attack. Although Tierna, a small nation on the southern border of Albilion, declared that they would continue their fight for independence from the Albilionese government, Coogan expressed his intention to honor the Geneva Convention, as well as his commitment to bring "these murderers to justice for their heinous and cowardly attacks on the Albilionese people."

In the months following the attack, continuing concerns about security in Albilion caused panic in the international business community and quickly led to the crash of Albilion's once flourishing economy. Massive rioting and violence amongst the population soon followed, forcing the Albilionese government to declare a state of martial law on January 18, 2006.

The poor intelligence reporting and brutal tactics Albilion used in its efforts to track down the architects of Bloody Thursday resulted in the TRA gaining support from Tiernans. With this new support, the TRA was able to lead Tiernans in guerilla warfare to gain independence from Albilion. Tierna was then able to hold its first free election in over 85 years, in which Tierna elected TRA leader Coogan as Prime Minister. The Albilionese people, angry with Eiling for failing to control Tierna, re-elected Essex as Prime Minister. Eager to repair Albilion's relationship with the international community, Essex immediately placed pressure on Parliament to rescind the ACPA, as well as other agreements previously made with other countries that stated that these countries would not surrender or transfer Albilionese nationals to the ICC.

On August 28, 2006, three Tiernan nationals and confirmed members of the Tiernan Republican Army (TRA), Henry Lynch, Thomas Dane, and Jackson Cray, were arrested in St. Rache by the Albilionese Constabulary for their involvement in the Bloody Thursday bombings. All three confessed to being the masterminds of Bloody Thursday within six days of interrogation.

After the complete and total collapse of the Albilionese economy on September 2, 2006, rioting and violence fully overwhelmed Albilion. On September 8, 2006, Prime Minister Essex requested intervention by the UN to control the violence and formally referred the prosecution of Lynch, Dane, and Cray

to the Office of the Prosecutor of the ICC as prescribed in Article 14.

On October 2, 2006, UN Peacekeepers were sent to aid military forces in containing the extreme violence that had culminated in the firebombing and destruction of Capitol Hill, the home of the Albilionese Parliament, and the assassination of Prime Minister Essex. Devoid of all infrastructure and support, Albilion is now relying on the UN's support to maintain peace and rebuild Albilion by establishing a provisional government.

ARGUMENT

A. *The ICC Has Jurisdiction Over Crimes Committed on March 17, 2005.*

1. *Albilion meets preconditions to the exercise of jurisdiction as required under Article 12.*

The ICC has jurisdiction over the crimes committed on March 17, 2003 because it was a State Party at the time the aforementioned crimes occurred in Albilion. Albilion, a long time supporter of the International Criminal Court (ICC), officially became a State Party to the ICC on August 1999 upon signing and ratifying the Rome Statute. As provided under Articles 12(1)(c) and 14(1)(c)-(d) of the Vienna Convention on the Law of Treaties ("Vienna Convention"), Albilion signaled its consent to be bound by this treaty by signing the Rome Statute. Albilion, recognizing that it was in desperate need of assistance, formally referred this case to the Office of the Prosecutor of the ICC, as provided in Article 14(1). As a State Party prosecuting crimes under Article 5, Albilion easily meets the preconditions for the exercise of jurisdiction under Article 12(1) and accepts the jurisdiction of the ICC to prosecute the crimes of Bloody Thursday.

2. *Albilion was a State Party to the ICC on Bloody Thursday.*

a. *Albilion did not unsign the Rome Statute.*

On the date the crimes of Bloody Thursday were committed, March 17, 2005, Albilion was still a State Party to the ICC. Albilion had shown no intention to formally withdraw from the

Statute by "providing written notification addressed to the Secretary-General of the United Nations" as required under Article 127. Additionally, in order to have met the qualifications for withdrawal as a State Party to the ICC on the date of the incident of Bloody Thursday, Albilion would have needed to take these formal steps at least one year prior to March 17, 2005.

b. *Albilion did not formally withdraw as a State Party to the ICC.*

Albilion has remained a State Party to the ICC since its ratification of the Rome Statute in 1999 through the horrific events of Bloody Thursday to its most recent downfall. Although Prime Minister Eiling publicly declared his desire to "unsign" the Rome Statute, he did not complete the formal requirements as provided under Article 127, even though withdrawal from the ICC through this process was an available option. Rather, Albilions's actions do not even indicate a true intention to withdraw as a State Party to the Rome Statute. Eiling feared over-policing of Albilion nationals, civilians, and military authorities by the ICC, but rather than withdraw formally from the ICC, Eiling merely sought to *limit* the ICC's jurisdiction through the Albilion Citizenry Protection Act (ACPA). Although the ACPA provided for strict limitations against the jurisdiction of the ICC, the act also included a waiver clause that allowed the Prime Minister to waive any of the provisions of the ACPA in the interests of national security. Additionally, Albilion entered into formal agreements with other countries not to surrender or transfer Albilionese nationals to the ICC. Although the actions of Albilion may be considered coercive and self-interested, it is clear that Albilion did not withdraw from the ICC. Rather, Albilion used political pressure to ensure immunity from the ICC, while securing its own national safety. Albilion's actions indicate that it never sought to give up the potential protection it could gain from the ICC. While the ACPA lessened the ICC's control over Albilion and allowed the Albilionese national government greater protection of its citizens, it did not change the status of Albilion as a State Party to the ICC.

B. *This Case Is Admissible to the ICC Under Articles 17, 18, and 19.*

1. *Admissibility is met under Article 17.*

a. *Albilion is unable and unwilling to genuinely carry out proceedings.*

While the ICC was established with the purpose of creating an independent forum for prosecuting the most serious crimes of concern to the international community (Paragraph 9 of the Preamble to the Rome Statute), the Court emphasized the importance of this system being complementary to national criminal jurisdiction. However, realizing that there would be many instances in which a nation would need the assistance of the ICC, the Rome Statute provides specific guidelines for determining when a case is admissible. Under Article 17(1)(a), a case is admissible if the State with jurisdiction over the proceedings is unwilling or unable to genuinely carry out the investigation or prosecution. Overwhelmed with violence and devoid of any government or infrastructure, including a substantial collapse of its national judicial system, it is clear that Albilion, the State with jurisdiction over these proceedings, is unable to genuinely carry out the investigation or prosecution. Article 17(3).

b. *Tierna is unable and unwilling to genuinely carry out proceedings.*

Tierna's challenge to the ICC's jurisdiction is absurd and dangerous. While they seek jurisdiction over this case, it is abundantly clear that Tierna is both unwilling and unable to carry out the investigation and prosecution of Lynch, Dane, and Cray genuinely. Not only will Tierna, a country recovering from over 80 years of occupation, be unable to carry out proceedings because of the unavailability of a national judicial system, it is clear that Tierna is unwilling genuinely to conduct this case impartially or with the intent to bring any of the parties to justice. Further, any judicial system that would be established after Tierna's elections in May 2006 would be highly prejudicial towards the victims of Bloody Thursday who are seeking relief against Tiernan nationals, since the system would have been created after the events of Bloody Thursday occurred. Such a

system created *ex post facto* is incapable of providing a fair trial. It is clear that granting the ICC jurisdiction of this case is not merely admissible, but it is precisely the type of situation for which the ICC was created.

2. *Admissibility is Met under Article 18.*

a. *Prosecution meets the "reasonable basis for commencing an investigation" standard.*

The Prosecution easily meets the "reasonable basis to commence an investigation" standard per Article 53. Under Article 53(1)(a), the Prosecution must have a reasonable basis to believe that the crimes being prosecuted are among the most serious crimes in the international community, as enumerated in Article 5. The Prosecution is charging the confessed masterminds of the Bloody Thursday attack Lynch, Dane, and Cray with crimes against humanity and war crimes under Articles 7 and 8. As Lynch, Dane, and Cray are Tiernan nationals and confirmed members of the TRA, their alleged acts were likely part of a plan or large-scale commission by the Tierna Republican Army against Albilion. The acts of Bloody Thursday, involving the bombing of 18 railway stations and resulting in the deaths of 6,666 grandmothers, fathers, sisters, children, and friends, and injuring many more, were clearly crimes of the highest gravity.

The Prosecutor has determined that there exists a "reasonable basis to commence an investigation" pursuant to Article 15(3). While this case meets the detailed standards provided in Article 53(1)(a)-(c) for assessing whether a reasonable basis to proceed exists, Article 15(1) powers of *proprio motu* suggest that the standard is not very stringent, as seen under Rule 48 of the Rules of Procedure and Evidence and Article 53 of the Rome Statute. Negotiations of the Rome Statute suggested that it was essential that the Prosecutor had independence and the power to open investigations on his own initiative. Further, the text of Article 53(1) indicates that the threshold just requires *some* basis, rather than "no reasonable basis to proceed" under the Rome Statute.

Further, taking into account the gravity of the crime and interests of the victims, it is absolutely clear that justice can only be served if the ICC is granted jurisdiction of this case.

Although it is clear that the Prosecution has surpassed the “reasonable basis to proceed” standard required by the Rome Statute, it is important to note that the lenient standard for the Prosecution is allowed and necessary due to likely impairment of the Prosecution to collect evidence in these highly unpredictable situations. The volatility of both Albilion and Tierna, as well as the enormous vulnerability of the victims, makes it dangerous to proceed with written or oral testimony without a guarantee of protection by the ICC.

3. *This case is admissible to the ICC under Article 19.*

Article 19 addresses challenges to the jurisdiction of the Court. As previously determined, the Court has jurisdiction over this case under Article 17 because of Tierna’s inability and unwillingness genuinely to investigate and prosecute this case. Moreover, Tierna’s standing to challenge the jurisdiction of the Court is highly questionable. Under Article 19(2), challenges to the jurisdiction of the Court are limited to: a) an accused or a person for whom the arrest or a summons to appear has been issued under Article 58; b) a State which has jurisdiction to investigate or prosecute the case or has so investigated or prosecuted; or c) a State from which acceptance of jurisdiction is required under Article 12.

Accordingly, Tierna was not recognized as a State on Bloody Thursday and continues to be unrecognized as a State under customary international law. To be recognized as a State under the Convention on the Rights and Duties of States, Tierna should 1) have a permanent population 2) in a defined territory with an 3) established government and 4) the capacity to enter into relations with other states. Tierna, while still developing its economy and working to maintain stability of its newly elected government, is unable to enter relations with other states and remains highly vulnerable to conflict in Albilion. Like Tierna, similar international conflicts involving secessions of *de facto* regimes from a collapsed country allowed for legal status as a state in limited circumstances. Generally, legal status as a state was only granted in situations where the regime had clearly established effective control and functioning. However, even in these cases, non-recognition of the *de facto* regime suggests reluctance from the international community

to recognize secessionist entities as states. Consequently, Tierna does not have standing to challenge the jurisdiction of the Court.

Since the challenge to jurisdiction is being made by Tierna, rather than the three defendants, Lynch, Dane, Cray, it is irrelevant whether an arrest or a summons to appear was issued under Article 58.

C. *Failure of the ICC to Retain Jurisdiction Threatens Victim's Rights.*

1. *Victims' position on a case's rightful forum should be given considerable weight.*
 - a. *Victims have considerable rights under the Rome Statute and Rules of Evidence and Procedure that are threatened by removal of jurisdiction from the ICC.*

On Bloody Thursday, 6,666 people lost their lives, and many more lost their parents, siblings, children, and spouses in a terrorist attack that deeply shocked the world. Recognizing the great value of incorporating the victims' perspective in these types of "unimaginable atrocities" the ICC provides that the victim shall be allowed to participate in the trial and all proceedings in a manner that is not prejudicial to or inconsistent with the rights of the accused, and a fair and impartial trial. As set out by both the Rome Statute and the Rules of Procedure and Evidence, it is clear that the victims and the families of victims of these crimes are guaranteed certain rights under the ICC. Specifically, the ICC provides protection "where the personal interests of the victims are affected" by requiring that the Court permit the views and concerns of the victims to be presented. The victims of Bloody Thursday strongly urge the court to maintain jurisdiction over this case. There is no way the losses suffered by the victims can be compensated for by any court other than the ICC. Failure of the Court to maintain jurisdiction of this case not only greatly threatens the rights of victims and families of victims to a full and fair trial, it also injudiciously strips them of their right to participate in the proceedings of the case.

b. Protecting victims' right to participate in proceedings is in the core values of the ICC.

Victims of the world's most appalling and atrocious international crimes are left extremely vulnerable in the criminal justice system. One of the greatest contributions of the ICC is its protection and representation of these defenseless victims. The Victims' Rights Working Group, a group acknowledging the importance of the rights of victims, urges that taking into account the perspectives of victims will help to ensure that victims have a positive relationship with the Court, and that the processes will neither re-traumatize them nor undermine their dignity. It ensures respect and encouragement of the core values of the Court: to promote respect for the rights and dignity of the individual, and to promote greater peace and security through accountability for crimes.

The victims and families of the victims of Bloody Thursday have already lost lives, limbs, and loved ones by the hateful and savage acts of the perpetrators' egregious crimes. Failure to provide the victims protection in front of the ICC will undoubtedly result in further trauma to the victims and their families and greatly contradict the values of the ICC.

2. The ICC is the only forum that can properly ensure full protection of victims' rights.

The ICC must retain jurisdiction of this case in order to ensure the full protection of victims' rights. Openly acknowledging its own inability to properly investigate and prosecute this case, Albilion referred this case to the ICC in order to protect the right of Albilion citizens, the unwitting victims of the Bloody Thursday attack, and to be allowed a fair opportunity to seek justice. Paragraph 10 of the Rome Statute. While Tierna challenges the jurisdiction of the ICC and seeks control of this case, it is clear that Tierna is not able to provide a fair and impartial trial to the victims of Bloody Thursday. Tierna is neither willing nor able to investigate and prosecute this case without posing undue risk of prejudice and harm to the safety of the victims and the families of the victims of Bloody Thursday. Even if Tierna was able to use principles of international jurisdiction, it would be unable to provide a fair trial, free of prejudice, to the victims of Bloody Thursday.

For the past 80 years, Tiernans have been fighting for independence from Albilion. The long history of war and violence between the peoples of these two countries cannot be ignored in assessing the ability of Tierna to provide the defendants and victims with a fair and impartial trial. It is precisely when two nations' history of prejudice and hatred towards each other leave them unable to genuinely provide for an impartial trial that a court of international jurisdiction is necessary. Days after the attack, Eamon Pat Coogan, former TRA leader and current Prime Minister of Tierna, denied any responsibility for the horrific bombings across Albilion, stating that the perpetrators were members of a "rogue extremist faction" of the TRA. Coogan also publicly stated that the TRA was committed to bringing "these murderers to justice for their heinous and cowardly attacks on the Albilionese people." Despite these public statements, Tierna has not shown any progress towards investigating and prosecuting the culprits of Bloody Thursday in over two years. Today, the main suspects and confessed-masterminds behind Bloody Thursday, Lynch, Dane, and Cray, are Tiernan nationals and confirmed members of the TRA. Although these suspects were first arrested in late August of 2006 and confessed to being responsible for Bloody Thursday shortly after, Tierna waited six months from this time before even making any indication that they were interested in being involved in the prosecution of these Tiernan nationals. Tierna's prolonged failure to act indicates an unwillingness to take responsibility and properly prosecute the crimes of Bloody Thursday.

3. *Removing jurisdiction from the ICC poses a great threat to victims.*

The victims of Bloody Thursday are granted status as a "victim" in the ICC. Accordingly, they have been granted standing as participants to this legal proceeding. While victims are guaranteed certain rights by the ICC, personal information such as identity and crimes suffered may be revealed to the accused, the Prosecutor, and potentially the public. Although there are mechanisms and steps that can be taken to ensure privacy and protection, the system acknowledges that it has some flaws and asks the victims to protect themselves while in

this vulnerable state. Accordingly, participation in investigations and proceedings must be taken seriously.

Tierna's delay in challenging the jurisdiction poses a threat to the physical and psychological well being of the victims. Tierna waited almost 5 months after the case was formally referred to the ICC before challenging jurisdiction; more importantly, it waited until after initial investigation of the crimes, putting the victims in a highly vulnerable position. Recognizing the highly sensitive nature and threats to security that confront victims during the criminal investigation, the Rome Statute provides that the Prosecutor shall inform the victims about the commencement of investigations "unless the Prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims or witnesses."

D. *Maintaining Jurisdiction Is In the Best Interests of the International Community.*

The ICC was created in order to establish an independent permanent court to investigate and prosecute the most serious crimes of concern to the international world. Recognizing that these grave crimes threatened the peace, security, and well being of the world, the Rome Statute and the Rules of Procedure and Evidence provide guidelines for the fair and impartial investigation and prosecution of these crimes. Due to the high sensitivity and gravity of the crimes, the ICC recognized that victims must be guaranteed certain rights and protections. The protection and involvement that is guaranteed to victims allows the court to take into account the victims' needs and claims for justice, and offers procedural fairness and increased equity.

By referring this case to the ICC, Albilion used the Court exactly as is desired by the international community. After realizing that its own national criminal system would not be able to prosecute these highly serious crimes, it referred the investigation and prosecution to the ICC. If Tierna is now able to take control of this case, it not only puts the victims, Albilion citizens, in great danger, but it also signals to the international community that cases referred to the ICC may easily be placed into outside courts that do not have the ability or willingness to prosecute crimes fairly.

Further, failure to maintain jurisdiction puts the Court in a position to lose respect in the eyes of the international community by establishing a dangerous precedent of granting jurisdiction to a highly volatile, prejudicial region. Granting Tierna jurisdiction of this case places already vulnerable victims in even greater danger. Rather than pushing away those it seeks to protect, the Court should reach out to the international community and victims of serious crimes and develop a culture that is responsive to the perspectives, needs, and concerns of victims.

CONCLUSION

For the foregoing reasons, the victims and families of the victims respectfully request that the Court reject Tierna's petition challenging the ICC's jurisdiction over the case brought against Henry Lynch, Thomas Dane, and Jackson Cray.