

29 January 2007

SIMULATION ¹

A CASE BEFORE THE INTERNATIONAL CRIMINAL COURT

This Simulation is intended to enable the participants to familiarize with the basic principles and rules of the ICC through a multi-sided examination of a hypothetical case before the International Criminal Court (ICC). Participants will be divided into four groups: Judges, Prosecutors, Defence Counsel and Victims Counsel. The quartet will exchange legal arguments on the core issues from their assigned role as judges, prosecutors, defence counsel, or counsel for the victims. Each group is expected to put forward their arguments and the Judges are expected to question submissions and raise additional issues. The performance of the groups will be evaluated by a Jury Group composed of practitioners in the field.

FACTS

1. For over a century, Appleland had been under the control of the dominant ethnic group living in the central plains of the country. The northern part of the country is rich in oil deposits and ranks the world's second largest oil reserves. Investment banks and oil industry from the Pearland have poured billions of dollars in the past ten years for the exploration and exploitation of oil in Appleland.

2. In September 2001, after fifteen years' continuous fighting in Appleland between the central region and three other ethnic groups from the southern and northern region, a peace agreement was finally signed by all the parties to the conflict. They agreed to form a democratic, coalition government to share power and oil revenue by all the ethnic groups in the country.

3. In January 2002, the Security Council authorized a peacekeeping operation, UN for Peace (UNFP), to deploy 500 military personnel and 600 civilian personnel to Appleland to verify the cessation of hostilities, to set up a security zone for civilians and refugees, and to make preparation for the forthcoming elections in the various regions. The UN Secretary-General was requested to invite member States to contribute forces, civilian personnel, and equipment to UNFP in order to carry out the mandate.

4. In June 2002, a Peace conference was convened by the Secretary-General and a provisional government was established. ASNA, one of the largest insurgent groups from the northern region, refused to join as it was dissatisfied with the share of oil revenue allocated to the northern region and with the posts and seats assigned to ASNA in the provisional government. Soon, the southern insurgent groups left the coalition and joined the ASNA. They formed the

¹ This exercise was prepared by Professor Roy S. Lee initially for his class at the Columbia University Law School, New York and has been conducted in various academic institutions in Berlin, Den Haag, New York and Beijing. The author welcomes comments royslee@optonline.net encourages the use of this exercise.

United Front for Independence (UFI) and succeeded in gaining military control of most parts of the country, except the capital and its immediate surrounding areas.

5. To protect its investments in Appleland, Pearland provided funds, arms and ammunition, and training to the provisional government to fight against UFI. But the assistance was not sufficient to curb the UFI's advance to the capital. Millions of refugees fled to nearby neighbouring countries. Etonesia, neighbour to the east, drove the refugees back to Appleland and further launched attacks inside Appleland against the UFI forces. Initially, it succeeded in driving the UFI forces back 200 miles from its border. But after a few months, its soldiers packed up and went home.

6. Concerned with the possible military outcome in Appleland, Pearland sent in AC130 gunship² and dropped cluster bombs and munitions³ upon UFI forces and its controlled areas. According to reports of a reputable non-governmental organization, many UFI military camps and depots were seriously damaged and thousands of UFI soldiers were killed.

7. On 1 July 2002 the Statute of the ICC entered into force between the States Parties to the Statute and empowered the Court to prosecute and punish persons who committed genocide, war crimes, or crimes against humanity in the territory of the States Parties where the competent national courts are either "unwilling" or "not able" to exercise their jurisdiction. Since then, 104 States have become Parties to the Statute, accepting the jurisdiction of the Court in accordance with the Statute and, in particular, the principle of complementarity.

8. Appleland did not sign the Rome Statute because it was preoccupied with internal conflicts. Nor did it not have a government at the time. Pearland rejected and campaigned against the Rome Statute. It threatened to terminate economic or military aids to those States that refused to accept the condition not to surrender Pearland servicemen to the ICC. Under this campaign, many developing countries concluded bilateral agreements with the Pearland accepting the non-surrender condition. The "provisional government" was approached by the Pearland officials but no agreement was signed. The government of Pearland formed a study group to examine the application and implications of the principle of complementarity and whether its criminal law covers all the ICC crimes. Reportedly, the study was delayed for political reasons.

9. On 20 July, acting on the "provisional government" intelligence reports, Pearland dispatched again AC130 gunship and troops, which bombed and attacked what was believed to be the UFI headquarters. Two days later the Human Rights Monitors (HRM), a non-governmental organization, reported that this bombing had in fact destroyed three villages, killing 470 civilians, including women and children, and seriously injuring over 250 men and women. Hundreds of acres of farmland were ruined; large quantities of crops and livestock were also destroyed. Numerous unexploded cluster bombs and munitions lined the roadsides and the fields.

² AC130 gunship is an extremely blunt instrument. "The tactic is well proven in Afghanistan and Iraq: kill every thing that moves within given coordinates ... It's the military equivalent of drift-net fishing." (The Guardian, 10 January 2007, page 28.

³ When used, cluster bombs and munitions explode into hundreds of smaller explosives which scatter an area of up to hundreds of thousands of feet.

10. On the same day, the UFI forces captured three Pearland pilots whose AC130 gunship had engine trouble and landed in the nearby marsh. It was believed that these pilots had engaged in bombing missions that resulted in civilian fatalities on 20 July mentioned above.

11. Some UFI members wanted to execute the captured pilots immediately. HRM persuaded the UFI leaders to try the captives by a UFI military tribunal. Pearland issued strong warnings to UFI that they would face further military attacks if the captives were not released immediately. To de-escalate an explosive situation, the Special Representative of Secretary-General of the United Nations proposed two alternatives to UFI: to try the pilots in a neutral third country or in the International Criminal Court at The Hague.

12. There were serious political and legal difficulties in finding a third country that was acceptable to UFI and willing to try the captured soldiers. Meanwhile, Pearland threatened UFI with further bombing. To prevent imminent attacks, UFI reluctantly agreed to surrender in October 2002 the accused to the International Criminal Court at The Hague. Pearland made no statement or announcement on the surrender.

13. The Prosecutors are of the opinion that the Court has jurisdiction over the case submitted to it: (i) The surrender of the accused pilots by the UFI to the ICC constituted a de facto declaration under article 12 paragraph 3 of the Statute and can be supplemented, if necessary, in written form to that effect. (ii) The Pearland cannot claim priority over the ICC and it cannot benefit from the principle of complementarity because there has been no evidence of genuinely investigation or prosecution. (iii) The applicable law in Pearland does not cover the alleged crimes of the pilots. Nor have such crimes been criminalized in its law. (iv) The use of AC130 gunship and cluster bombs and munitions resulted indiscriminate attacks on the civilian population and constitutes crimes against humanity.

14. Pearland intervened on behalf of its accused nationals to challenge the admissibility of the case and the jurisdiction of the Court. They argue that their national courts are ready to exercise jurisdiction over their nationals and that their courts enjoy priority over the ICC according to the principle of complementarity. Further, there is no legal obligation for Pearland to incorporate the ICC crimes into their system.

15. The defendants and families of victims have invoked their right to participate in the proceedings and to be represented by counsel. The accused pleaded not guilty. Victims and families of the victims have submitted claims for reparation.

16. The Central issues are:

- (i) Legal status of UFI: an insurgent, a government with effective control;
- (ii) Nature of UFI surrender of the pilots: a de facto acceptance of the court's jurisdiction and thus gave valid jurisdiction to the Court;
- (iii) Is UFI entitled to make a declaration under article 12, paragraph 3?
- (iv) Applicability of article 15, paragraph 1: proprio motu power of the Prosecutor;
- (v) Legal basis for the standing of the Pearland (not a party to the ICC) and of the Counsel for the Victims and their families before the Court;

- (vi) Applicability of the principle of complementarity to Pearland which is not a party to the Rome Statute;
- (vii) Applicability of the principles of nullum crimen sine lege (article 22) and nulla poena sine lege (article 23): must the Pearland law satisfy these requirements? Does the absence of these deprive of Pearland jurisdiction?
- (viii) The use of cluster munitions (for technical information consult: info@stopclustermunitions.org)
- (ix) Elements of the following crimes:
 - a. Crimes against humanity of murder (article 7 (1)(a));
 - b. War crimes of wilful killing (article 8(2)(a)(i));
 - c. War crimes of violence to life and person (article 8(2)(c)(i))
 - d. War crimes of extensive, unlawful and wanton destruction of property (article 8(2)(a)(iv))

Relevant Materials

1. The Rome Statute, Rules of Procedure and Evidence (to be downloaded at http://www.icc-cpi.int/about/Official_Journal.html)
2. Simulation-Exercise Background