

ICC Case Simulation Exercise: Prosecutor v Five Pilots from Blueland and Whiteland

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A. Introduction

During the process of the establishment of the International Criminal Court (ICC), a voluminous set of rules was elaborated to ensure that the Court will become an effective instrument for the enforcement of international law.¹ These rules and provisions were drafted and approved in the abstract, but how would they actually work in practice? – We hear that the USA has undertaken an enormous diplomatic effort to limit the jurisdiction of the ICC. To what extent would the outcome of these efforts create an obstacle for the Court to exercise its jurisdiction? – The new ICC Prosecutor has just been sworn in, and several hundred incidents have been reported to the Court where crimes falling under the Rome Statute of the International Criminal Court² might have been committed. Still, it might take some months, if not years until the Court sees its first indictment or trial and until the statute and rules of the Court are applied for the first time.

At a recent seminar on international criminal law at Würzburg University (Germany),³ participants had the chance to take a trial-run at the functioning of the Court's legal foundations and at the practical impact of US attempts to undermine its jurisdiction. For this purpose, a "simulation exercise" of a hypothetical case before the ICC was staged. The organizers of the seminar had the good fortune of securing the support of Roy S. Lee⁴ for this exercise. Roy Lee not only provided the

¹ Cf. the Rome Statute of the International Criminal Court (ILM 37 (1998) p. 1002), the Rules of Procedure and Evidence (UN Doc. PCNICC/2000/1 of 12 July 2001), the Elements of Crimes (UN Doc. PCNICC/2000/1/Add.2 of 2 November 2000).

² Cf. Article 5 para. 1 of the Rome Statute (n. 1).

³ "A New World Order? – International Criminal Law", Seminar by ELSA-Würzburg e.V. (The European Law Students' Association), University of Würzburg, 22-25 May 2003.

⁴ Roy S. Lee: LL.M., Ph.D.; Special Senior Fellow, UNITAR; Adjunct Professor, Columbia University, New York; formerly director of the Codification Office of the Office of Legal Affairs, United Nations; Executive Secretary of the Rome Diplomatic Conference for the Establishment of an International Criminal Court (1998).

“Blueland and Whiteland Scenario” upon which the exercise was based and which he had originally developed for his class at the Columbia University Law School (New York), but he also agreed to oversee the simulation in person.

The seminar, which was organized by the European Law Students’ Association (ELSA), assembled about 100 law students and young professionals from twelve European countries. ELSA, a Europe-wide organization with over 20,000 members, has been involved in the process leading to the establishment of the ICC since the Rome Diplomatic Conference in 1998. As a non-governmental organisation with UN special consultative status, ELSA delegates attended the sessions of the Preparatory Commission for the ICC. A number of working groups carry out research on topics related to international criminal law, and a handbook on the ICC was published.⁵ For these reasons, there is a high awareness of the development of international criminal law within ELSA and among its members. Most of the participants were familiar with the legal foundations of the ICC, which made it possible for them to act out the roles of prosecutor, defence counsel, counsel of the victims and judges during the simulation exercise.

However, the “simulation exercise” was not intended to be just another moot court where law students can experiment with their oral presentation skills. In the words of Roy Lee, the simulation exercise aims at achieving a “legal discussion” among the participants, allowing them to become familiar with certain aspects of the Statute and rules of the ICC, and maybe to find out the legal questions which the first judgements of the Court will have to deal with.⁶

B. The Scenario

The case was based on a scenario which sounded all too familiar: a failing state (*Sweetland*) is weakened by tribal disagreement and descends into anarchy; eventually a truce is agreed to between the warring factions, and the UN sends in a peacekeeping mission to oversee its implementation. However, the ASNA, an insurgent group, breaks away from the coalition government established by the truce agreement. A terrorist attack by an unidentified rebel group kills several UN peacekeepers of Whiteland and Blueland nationality whereupon Whiteland and Blueland decide to stage their own attacks on the territory under the control of ASNA in retaliation. These unilateral attacks result in a large amount of “collateral damage”

⁵ For further information on ELSA and its projects related to international criminal law, please visit www.elsa-pinil.org (ELSA Project on ICC National Implementation Legislation).

⁶ The materials for the simulation exercise can be obtained from the authors of the present article. Authorisation by Roy Lee should be sought before use.

in the form of 300 civilian deaths and destruction of farmland and civilian property. ASNA captures five of the pilots flying these attacks and decides to surrender them to the ICC for trial. Neither Sweetland, a State Party to the Rome Statute, nor any neutral third country shows an interest in bringing the pilots before a court. Whiteland and Blueland threatened ASNA with military attacks if the pilots were not released immediately. Through the good offices of the UN Secretary-General they were eventually surrendered to the International Criminal Court in The Hague.

The question which the parties now had to argue (and the judges to decide) was whether the ICC was entitled to exercise jurisdiction, given that the principle of complementarity⁷ normally entitles a state to try its own nationals if willing and able to do so. The scenario also pointed out that additional questions of admissibility were raised by the existence of a Security Council Resolution dated 12 July 2002 granting a one year immunity to all UN peacekeepers as well as a Bilateral Immunity Agreement between Whiteland and Sweetland prohibiting Sweetland from ever surrendering to the ICC any Whiteland nationals. Even without these additional pointers, most participants had no difficulty in identifying Whiteland and Blueland as the US and the UK.

Alongside these procedural questions, the parties also had to focus their attention on arguments in relation to substantive international criminal law: had the pilots committed crimes against humanity; did the attacks constitute a widespread or systematic attack on a civilian population and had the pilots had knowledge of the extent and nature of the attacks; and, had they committed war crimes and if so, which particular ones? These questions required careful consideration and a detailed analysis of the facts.

C. The Preparations

The participants had been divided into groups and had been given the opportunity to prepare arguments for their particular roles before their arrival in Würzburg. At the seminar, separate workshops were held to allow participants to meet their teams and settle between themselves their motions for the next day. Professor Otto Triffterer from the University of Salzburg supervised the group of judges, Ekkehard Withopf, Senior Trial Attorney at the Office of the Prosecutor of the ICTY, oversaw the group of prosecutors, Dr. Heiko Ahlbrecht, an ICTY defence counsel himself, aided those individuals who had taken it upon themselves to fight for a fair trial for the five pilots, and Türkmen Teczan, a Pupil Barrister from Nuremberg,

⁷ Para. 10 of the Preamble of the Rome Statute (n. 1).

assisted the victims counsel in formulating their additional arguments to remind the Court of the plight of those who had suffered the most by recent events.

D. The Proceeding

During the exercise, the parties were positioned so that the Bench had the Defence on its left and the Prosecution and Victims' Counsel on its right. This allowed a proper advocacy match to ensue between the Prosecution/Victims' Counsel and the Defence who were effectively facing each other. Roy Lee conducted the exercise from the centre of the "court room" and provided the participants with useful information where necessary. He emphasised that the parties were not rigidly bound by the facts of the case but were allowed a certain discretion in their interpretation and could fill in the lacunae with their submissions. This allowed new aspects to appear and to challenge the spontaneity of the participants.

I. First Phase: Jurisdiction and Admissibility

The first phase of the exercise consisted of a hearing before the Pre-Trial Chamber under Article 19 of the Rome Statute. The Chamber had to decide whether the ICC had jurisdiction in the present case and whether the case was admissible.

1. Jurisdiction and Admissibility, Articles 11-19 of the Rome Statute

In its initial statement, the Prosecution alleged that the ICC had jurisdiction to try the pilots under Articles 11-15 of the Rome Statute, whereas the Defence rejected this submission on the grounds that Whiteland was not a State Party to the Rome Statute and that, in any case, both Whiteland and Blueland would carry out their own investigations into the matter and prosecute the pilots if necessary, and that the Prosecution bears the burden of the proof to establish that Whiteland or Blueland were "unwilling or unable genuinely to carry out the investigation" (Article 17 (1) (a) of the Rome Statute). After an argument between the Victims' Counsel and the Defence over the right of the former to participate in the proceedings according to Rules 89 to 91 of the Rules of Procedure and Evidence of the ICC, the Victims' Counsel supported the point made by the Prosecution.

In response to the earlier challenge by the Defence, the Victims' Counsel retaliated by questioning if Whiteland was in fact submitting to the jurisdiction of the Court by sending legal representatives. However, the Defence convincingly stated that they were first and foremost representing the accused pilots as nationals of Whiteland and Blueland. Whiteland and Blueland, however, were also participating in the arguments since they had a legitimate interest in contesting the ICC's jurisdic-

tion (and were entitled to do so under Article 19(4) of the Rome Statute); this was in no way to be read as a submission to its jurisdiction.

When the Prosecution alleged that it had commenced the investigation *propriu motu* in accordance with Article 15 (1) of the Rome Statute, it stepped into a trap set by the Defence: the Defence asserted that neither Blueland nor Whiteland had been notified of the investigation and that their rights under Article 18 (1) of the Statute had therefore been violated. Further, the Prosecution had not sought the authorization of the Pre-Trial Chamber to proceed with the investigations. This raised the question whether these procedural mistakes would have an impact on the admissibility of the case. With regard to Article 18 (1), the Prosecution argued that Whiteland and Blueland had not been substantially prevented from initiating their own investigations. It was also put forward that a ruling of the Pre-Trial Chamber on the admissibility of the case under Article 19 would make up for the lack of authorization.

2. Security Council Resolution 1422

Security Council Resolution “1234” of 12 July 2002 seemed to create the major obstacle to the admissibility of the case. Again, the real background of the case was quite obvious and the resolution could easily be identified as the rather infamous Security Council Resolution 1422⁸ which was adopted in July 2002 after strong US pressure on the Security Council to exempt its military personnel participating in UN peacekeeping missions from prosecutions before the ICC. The Prosecution, supported by the Victims’ Counsel, stated that the Security Council Resolution “1234” of 12 July 2002 was void, since the Security Council had not made a determination that one of the situations referred to in Article 39 of the UN Charter existed.⁹ The resolution was also said to be inconsistent with Article 16 of the Rome Statute;¹⁰ it followed clearly from the drafting history of this provision that it could only be used for temporary deferrals on a case-by-case basis in situations where an investigation by the ICC prosecutor would e.g. endanger the conclusion of a peace agreement.

⁸ Security Council Resolution 1422 of 12 July 2002. Please note that the Resolution has just been renewed for another year on 12 June 2003 (Resolution 1487) with 12 votes in favour and France, Germany and Syria abstaining.

⁹ Article 9 UN-Charter: “The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression...”

¹⁰ Article 16 of the Rome Statute reads as follows: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the council under the same conditions.”

Reference was also made to a separate opinion of Ad Hoc Judge Lauterpacht in the *Bosnia and Herzegovina* case. In this case, Bosnia and Herzegovina claimed that Security Council Resolution 713 (1991), which imposed an arms embargo on that country, necessarily assisted genocide by preventing the victims from defending themselves and, therefore, violated *ius cogens* provisions. Judge Lauterpacht concluded that the Security Council did not have discretion in such a case and that the resolution was therefore without effect and *ultra vires*.¹¹ In the case at hand, the Prosecution argued that Resolution “1234”, seeking to prohibit states, in effect in perpetuity, from taking steps to repress crimes under international law that violate *ius cogens* prohibitions severely endangered the enforcement of these prohibitions and was therefore equally invalid and should be disregarded by the Court.

Even if the Security Council had not acted *ultra vires*, it was argued that the resolution would in any case not be applicable to the case at hand, since it only applied to “UN authorised missions”. The retaliatory attacks by Whiteland and Blueland, however, were not covered by the mandate of the peacekeeping mission.

While the Prosecution could rely on a wide range of excellent publications challenging the legality of Resolution 1422,¹² the Defence was in a much less favourable position. Still, they vigorously opposed the arguments of the Prosecution. They contented that the wording of Article 16 of the Rome Statute in no way precluded the interpretation that was given to it by the Security Council. The Defence also emphasized that the resolution had been adopted unanimously. Since several States Parties to the ICC had voted in favour of it, it was a clear indication of a certain state practice prevailing over arguments drawn from the drafting history.¹³ Further, the ICC had to respect the discretion exercised by the Security Council in the adoption of its resolutions. If Security Council resolutions were to be reviewed by the ICC, the current international legal order would be put at risk.

¹¹ *Case concerning application of the Convention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further requests for the indication of provisional measures, Order of 13 September 1993, 1993 I.C.J. Rep., Separate opinion of Ad Hoc Judge Elihu Lauterpacht, para. 100 (citing both the judgment in this case and the *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 ICJ Rep. 22).

¹² Cf. especially “The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice”, Amnesty International, May 2003, AI Index: IOR 40/006/2003.

¹³ Compare Article 31 para. 3 lit. b) with Article 32 of the Vienna Convention on the Law of Treaties (1155 UNTS p. 331).

3. "Article 98 Agreement"

The Bench then asked the Defence to comment on the "Article 98" Bilateral Immunity Agreement between Whiteland and Sweetland. Again, the agreement had a real background since it reflected the agreements that the United States has sought to conclude with almost all states in order to prevent them from surrendering its nationals to the ICC.¹⁴ The Defence contended that the agreement was of relevance in the proceedings and should prevent the Court from exercising jurisdiction as the surrender of the accused had been illegal in the first place. The Prosecution vigorously argued that the Agreement should never have been concluded in the first place as it went against the spirit of the Rome Statute and was therefore in breach of Sweetland's international obligations. The Prosecution further argued that, in any case, the Immunity Agreement was not binding on the Court and that even if it was binding, it could not have imposed a specific obligation on Sweetland in this regard, as the accused had been in the custody of a rebel group outside of Sweetland's official control.

At the end of the first phase the Bench delivered its decision. It announced that, in general, the Court did have jurisdiction over the case. However, the case was held not to be admissible, as there was not sufficient evidence that Whiteland and Blue-land would not properly investigate their nationals before their own respective national institutions. As a moot point, the Court held that the Security Council Resolution was of advisory value, but not binding on the Court. Furthermore, in relation to the Article 98 Agreement, the Court held that it had no effect on the Court. In any case, the Agreement was not in accordance with the Rome Statute and had therefore been concluded in breach of international law.

Since the exercise was supposed to be rather a discussion than a moot court, a vote was taken at the end of the first phase on all the issues in dispute. It was interesting to observe how the participants' analysis of these issues in their private capacity differed from the position they had taken during the proceedings.¹⁵

¹⁴ The wording of these agreements seems to be more or less identical in each case. For the purpose of the simulation exercise, the text of the USA-East Timor agreement was used (signed 23 August 2002).

¹⁵ 53 participants (with no dissents) were of the opinion that the Court had jurisdiction over the case. 42 participants (with three dissents) opined, however, that the case would not have been admissible. 41 participants thought that the Security Council Resolution could not bind the Court, whereas 18 thought it could. Only three participants thought that the Article 98 Agreement should have had any binding effect on the Court.

II. Second Phase: Substantive Criminal Law

Even though the Court had held the case to be inadmissible, for the sake of argument, the proceedings continued on the assumption that the case had gone on to full trial.

1. *Character of the Conflict*

The Prosecution and Victims' Counsel submitted that the accused had committed crimes against humanity and war crimes. Arguments were put forward in relation to whether or not the conflict had been of an international or national character. This distinction was necessary to determine which of the war crimes under the Rome Statute were applicable.¹⁶ While the Prosecution argued that ASNA was to be considered as a local *de facto* regime enjoying the protection of Article 2 (4) of the UN Charter, the Defence contended that Whiteland and Blueland had been invited by Sweetland and that the ASNA had broken with the coalition government just shortly before the attacks and could therefore not be considered a stabilised *de facto* regime.

2. *Crimes Against Humanity, Article 7 of the Rome Statute*

The Prosecution and Victims' Counsel submitted that the different bombings were a continuous, rather than a separate event, to support the view that there had been a "widespread and systematic attack" (Article 7 of the Rome Statute) and to prevent any possibility that parts of the attacks (which had commenced on 10 July 2002 and ended on 20 July 2002) could possibly fall under the immunity granted by the Security Council Resolution as of 12 July 2002. In relation to the actual culpability of the accused, the Defence acknowledged that the acts which the pilots were blamed of had taken place, but rejected that they were crimes under the Rome Statute. They denied that an "attack on a civilian population" had taken place, and in any case, that it had been "widespread or systematic". This raised the question of how many people would have to suffer death to consider the attack a "widespread" one.

3. *War Crimes, Article 8 of the Rome Statute*

In relation to war crimes, the Prosecution submitted that crimes were committed under Article 8 (2)(a)(i) and 8 (2)(b)(i), (ii) and (iv)¹⁷ (for international conflicts) or 8

¹⁶ While Article 8 (2) lit. (c) and (e) of the Rome Statute apply to non-international conflicts, the much more extensive lit. (a) and (b) apply to international armed conflicts.

¹⁷ Article 8 (2) (a) (i): Wilful killing; (b) (i): Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (b) (ii): Intentionally directing

(2)(c)(i), and 8(2)(e) (i) and (ii)¹⁸ (for internal conflicts). The accused had intended to kill or had at least been grossly reckless as to whether or not civilians would get killed. The Defence countered by contending that no wilful killing or intentional attack against civilians had taken place, and that all attacks had been legitimate. The Prosecution replied that committing such acts in full knowledge of the consequences indicated that the accused also had the necessary intent (i.e. the voluntary element in the terms of Article 30 of the Rome Statute).

4. Acquittal in Exchange for Compensation to the Victims

Attention then moved to the Victims' Counsel who, in accordance with a Rule 94 request sent previously to the ICC Registrar, requested \$30 million in reparation for a group of identified victims. This sum, they argued, was little in comparison to the \$3 billion paid by Whiteland and Blueland for the war. The reparation was to be forthcoming from the accused or, failing the availability of sufficient funds, from the ICC's Victims' Trust Fund. At this stage, the legal representatives of Whiteland and Blueland intervened and offered that their governments make a contribution to the Trust Fund of \$10 million if the charges against the accused were withdrawn. The Victims' Counsel, however, scoffed at this suggestion and insisted on a payment of \$30 million, a mine clearance programme, an official apology and a statement of intent to investigate the superior commanders involved in the attack. They also requested security by way of payment into the Court under Art 75(4), 57 (3) (e) in connection with Rules 87 and 99 of the Rules of Procedure and Evidence.

To the surprise of the Victims' Counsel, the Prosecution was in any case not willing to drop their charges. Stressing once again the gravity of the crimes committed and the lack of co-operation from the accused, they requested terms of imprisonment of 12 years for each accused. They did not, however, request the imposition of a fine in addition to imprisonment in accordance with Article 77 (2) (a) of the Statute and Rule 146 of the Rules of Procedure and Evidence. This sanction seems rather designed for the key officials of rock states who, apart from ordering the commission

attacks against civilian objects, that is, objects which are not military objects; (b) (iv): Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

¹⁸ Article 8 (2) (c) (i): Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (e) (i): Intentionally directing attack against the civilian population as such or against individual civilians not taking direct part in hostilities; (e) (ii): Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.

of crimes falling under the Statute, had accumulated considerable riches while being on power.¹⁹ The Defence insisted on the innocence of the accused, whilst stressing that Whiteland and Blueland were upholding their offer of an out of court settlement of \$10 million and an official press conference to admit their mistakes.

The judges held that the conflict in question had been of an international character, and that the attacks on ASNA had been a continuous event. However, they held that no crimes against humanity had been committed, as the acts complained of lacked the seriousness and scale required. The judges admitted having been divided on the issue of whether or not war crimes had been committed, but in the end had narrowly agreed that the accused had committed war crimes under articles 8(2)(b)(i), (ii) and (iv) in that they had been at least grossly reckless as to whether their acts would result in death of civilians or destruction of civilian property. The Court reserved judgement on the length of the sentence imposed on the accused. The Court felt that the victims had the right to compensation and reparation in the sum of \$30 million. The Court would not, however, seize any property of the accused in order to guarantee at least part of this sum. Instead, it strongly urged the national governments of the accused that they ought to make a payment into the Victims' Trust Fund equal to that sum.²⁰

E. Conclusion

¹⁹ Note that section 43a of the German Criminal Code, which provided for the imposition of fines in addition to imprisonment similar to Article 77 (2) (a) of the Rome Statute, was declared null and void by the German Federal Constitutional Court (Bundesverfassungsgericht) in its decision 2 BvR 794/95 of 20 March 2002 (105 BVerfGE (2003) p. 135 *et seq.*), since it was seen to be in violation of the principle of *nulla poena sine lege certa* (Article 103 para. 2 of the German Basic Law). In contrast to German law, however, Rule 146 of the ICC Rules of Procedure and Evidence contains a detailed catalogue of criteria which the Court has to take into account in determining whether to order a fine and in fixing the amount of the fine. This catalogue would probably meet the concerns of the German Federal Constitutional Court.

²⁰ Again, it was interesting to observe the participants' analysis of the issues in dispute in their private capacity. The final results mirrored the decisions taken by the judges. 26 participants thought the conflict was of an international character, 16 thought it was internal. 37 participants were of the opinion that the attack had been continuous, only eight thought the bombings starting on 10 July and those on 20 July were separate events. In relation to the individual crimes, only four participants thought that crimes against humanity had been committed, whereas 23 thought that war crimes in an international conflict had been committed, one thought war crimes in an internal conflict had been committed and three thought that war crimes in both an international and internal conflict had been committed. Lastly, 40 participants believed that the victims had the right to claim reparation regardless of culpability, and two thought that the Court should take interim measures to seize property of the defendants in order to guarantee compensation. 38 participants felt that an amount in excess of \$10m should be paid to the victims for death and injury and loss to farmland, whereas 17 felt that the pilots should be fined.

The Participants agreed that the simulation exercise had been a success, that any onlookers had observed impressive instances of advocacy and academic arguments and that many valuable lessons about the ICC had been learned. They warmly thanked Roy Lee for developing this exercise and for his skilful co-ordination. Roy Lee concluded that it was his intention to make young lawyers understand the Rome Statute better by giving them the opportunity to work with this outstanding instrument for the enforcement of international law.

Due to time constraints, the question of the *concursum delictorum* had to remain unanswered. The crimes under Article 8 (2) (b) (i) and (iv) as well as between No. (ii) and (iv), of which the accused were held accountable, seem to be at least partly overlapping. To date the question appears to be rather unsettled and certainly deserves further academic analysis.