

Asia-Pacific Moot Court Rounds 2014

Prosecutor vs Mr Tony Gusman

before the International Criminal Court at the Hague

INSTRUCTIONS

1. *The hearing takes place pursuant to Article 61 of the ICC Statute (confirmation of charges). At this stage, the Prosecutor has to “support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.”*
2. *The case is entirely fictional. Teams should confine themselves to the facts supplied. Neither the Prosecution nor the Defence may introduce new facts. The Moot Problem includes all the facts supported by the evidence that has been presented before the Court. Teams may nonetheless draw reasonable inferences from the evidence produced. They may also question the credibility or weight of the evidence.*
3. *Teams should not hand anything to judges unless asked to by a judge.*
4. *The problem is not intended to raise questions of procedure before the ICC. Procedural questions should be ignored.*
5. *The problem is not intended to raise questions relating to the jurisdiction of the ICC. The jurisdiction of the ICC should be assumed. Counsel may in this instance address issues regarding the admissibility of the case under article 17 of the Statute of the ICC (“Statute”) if relevant.*
6. *Applicable law: In accordance with Article 21 of the ICC Statute, the Court shall apply*
 - a) *In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;*
 - b) *In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;*
 - c) *Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.*

The Court may apply principles and the rules of law as interpreted in its previous decisions.

THE CASE

Background

1. The Republic of Astro, the Kingdom of Casa and the Republic of Bereto are bordering the Middle Sea. Casa is located to the northwest of Astro and faces the east coastline of the Republic of Bereto. Bereto is a highly industrialised country. President Blake of Bereto was elected in 2009.
2. Between 2003 and 2010, Astro was ruled by a military government led by General George Ayana and Admiral Tony Gusman, with General Ayana acting as the country's President. During this period, Admiral Gusman chaired the powerful Crisis Military Commission, which acted as the de facto government of the country. Admiral Gusman also acted as Commander-in-chief of the Armed Forces.
3. The Yukule Archipelago (the Archipelago) lies at about 750 kilometres east of Bereto, 300 kilometres south of Casa and 100 kilometres from Astro's west coast. Yukule Island is the largest island of the Archipelago, and the only one which is inhabited. Until 2008, the Archipelago was under Bereton control, although it enjoyed complete autonomy in managing its internal affairs. The Bereton central government was in charge of its defence and foreign affairs.
4. According to a 2008 survey, Yukule has a population of 1.5 million. The Archipelago is home to large bird populations. Massive groups of coral reef close to the Yukulean shore attract thousands of tourists every year. The Archipelago is also known for its large oil reserves on the land and in the surrounding waters. Oil and tourism are the main sources of revenue for Yukule. Fish and other sea products form a significant part of Yukule's diet. Foodstuff is otherwise mainly imported from nearby countries, but there is a small agricultural production – mainly fruits and vegetable – on the island.
5. Since the 1980s, Astro has been contesting Bereton sovereignty over the Archipelago. The arguments advanced by successive Astron governments were based on the proximity of the Archipelago to Astro's coast and the unlawful annexation of the Archipelago after the Second World War.
6. In January 2008, Astro was struck by a political crisis which led to large-scale civil unrests against the Ayana government. In order to divert the population's resentment towards the government, Admiral Gusman suggested to the Crisis Military Commission to take control of the Yukule Archipelago. On 4th February 2008, the Astron Armed Forces invaded Yukule and quickly gained control of Port Solferino, the capital city of Yukule.
7. On 10th February 2008, the Astron forces obtained surrender from the then Governor of the Archipelago. A Military Administration was established to govern the Archipelago directly under the supervision of the Crisis Military Commission. However, there was continued local resistance to Astro's rule. Inhabitants and the remaining members of the Bereton armed and police forces on the island formed a "resistance militia", led by Colonel Spartan from the Bereton army. The militia mostly used

guerilla tactics, including laying improvised explosive devices along the main roads of the island. Meanwhile, Bereto promoted Spartan to Major General, and instructed him to “drive the invaders out of Yukule”. Bereto was the main source of military supply to the resistance.

8. Facing an increasingly volatile situation in Yukule, on 1st July 2008, the Military Administration established check-points in key areas of the island. Restraints were also imposed on the flow of goods in and out of Yukule. Anti-Astron attacks were, however, still on rise. In one incident, an ambulance carrying wounded Astron soldiers was hit by roadside bombs. All 5 wounded soldiers, one nurse and one doctor were killed in the explosion. On several occasions, fishing boats were caught transporting weapons and explosive devices to Yukule. Astron vessels also suffered from surprise attacks launched from Yukulean fishing boats.

Control measures

9. With the view to impeding the supply of weapons to the local militia and pressuring the population to disengage from the unrest, Admiral Gusman’s Administration announced on 1st September 2008 that all foreign ships entering a “Maritime Control Zone” defined as the area within 24 nautical miles from the Yukule Island coastline had to request prior authorization from the Military Administration. Astron naval and air forces started to patrol the area to enforce the measure.
10. The Military Administration also limited the activities of local fishermen to 6 nautical miles offshore. Astron vessels routinely patrolled the Yukulean coastline to deter fishermen from going beyond the prescribed limit. In one incident, a boat was fired at 5 nautical miles from shore, resulting in the death of a fisherman. The Yukulean newspaper Peppermint Express reported the incident and accused the Astron patrol of “reckless use of force” against innocent civilians.
11. Control over the importation of goods was also tightened. Admiral Gusman announced that only goods exclusively used for civilian purposes would be allowed into Yukule. At Port Solferino, ships bringing goods to Yukule had their shipload approved or rejected on a case-by-case basis, with no reasons given. Items allowed in were always changing and the Military Administration refused to publish any list of controlled goods. Importation of raw materials and manufactured goods was reduced, and prices soared.
12. Among other things, the importation of construction materials such as cement and steel was curtailed and strictly scrutinized for the Administration’s alleged fear of possible use by the armed militia. Metal objects, such as tin cans were banned because melted metal might be used to make weapons, according to the Administration officials. As a result, local farmers ran short of containers to preserve their food. A range of chemicals including certain fertilizers and pesticide, which may be used in the production of explosives, were also banned.
13. After being unloaded from ships, the goods were brought by road to different areas of the island. Because of exchanges of fires between armed forces and the frequent use of road bombs, the main roads were severely damaged. Repair work was slow due to

scarcity of materials. In some instances, wheelbarrows and carts had to be used to deliver goods and materials. Transport of food and basic necessities was long-delayed in some areas. Inspection at check-points slowed down further the distribution of food and medicine. Captain Ardent, a local commander in Yukule, claimed that “we monitor supplies closely to prevent them from being diverted to terrorists, who must be pressed to surrender.”

14. Casa Radio International, a radio station based in Casa, published a report leaked from the Astron Ministry of Health. The report contained data presenting the minimum intake of calories necessary to keep Yukule local population alive. According to Casa Radio International, the Military Administration used the data to estimate the quantity of food products allowed in and distributed to the different areas of Yukule. The Administration’s officials later stated that such calculation was intended to better implement import controls. Yukule Watch, an Astro-based human-rights group, said that in fact the food distributed to the local population was short of meeting the estimated needs.
15. The Yukulean fishermen needed to sail at least 12 to 15 nautical miles from shore to catch larger shoals. By September 2009, the total catch had been halved since the implementation of the control measures on fishing in 2008, and was still decreasing. Local food production had been reduced by a third of its past level because of the restriction on the import of fertilizers and pesticides. The local newspaper Peppermint Express warned that with the stark reality in local agriculture and fishing sectors, the population would almost entirely depend on food import to survive the autumn and winter of 2009.
16. On 15th November 2009, the Astron Military Administration in Solferino was attacked by militia members. Dozens of Astron soldiers and the deputy of the Administration were killed. A number of wounded militia members were seen seeking shelter in the offices of several humanitarian organizations. The next day, Admiral Gusman announced suspension of all imports for “security reasons,” including import of humanitarian aids. The import of food and other essential supplies started to resume slowly on 15th January 2010.
17. In February 2010, the International Committee of the Red Cross (ICRC) noted that hospitals lacked medical stores and were not able to maintain their equipment or make necessary repairs. Islanders posted numerous complaints about their poor living conditions, the lack of medical services and medicines on various social media sites. In some cases, especially in remote areas, a small ailment could develop into serious illness for lack of treatment.
18. A United Nations Development Programme (UNDP) report dated to 5th March 2010 stated that damage to sewerage networks and pumping stations was left unrepaired. Thousands of Yukulers were affected according to the UNDP report. The report indicated that the water supply was largely “unfit for consumption” in Yukule.
19. On 6th March, the Peppermint Express, citing reports of the ICRC and UNDP, accused Astro of deliberately starving Yukule’s population and appealed for an immediate international intervention. The appeal was soon reprinted by the international media. The next day, the website of Peppermint Express was shut down,

its chief editor taken away by Astron military for suspicion of colluding with Bereto. Admiral Gusman eventually ordered to release the chief editor and restored the website two days later.

Operation Blue

20. On 15th April 2010, ten NGOs (eight from Bereto and two from Astro) decided to form a coalition under the name of Free Yukule Movement (the Movement). The Movement was led by the Bereton NGO “Sacred Fighters”, whose chairman was Mr Jonas Borman. “Sacred Fighters” was listed by several countries as a terrorist group. Other members of the Movement included the Astron NGO Yukule Watch.
21. On 30th May 2010, the Free Yukule Movement announced on its website and various social media that it had chartered a Casa-registered merchant vessel, Nirvana, to deliver “humanitarian packages” to Yukule. The stated aim was to send “a message of alarm to the international community” by breaking the “blocking line” and “confronting the occupying invaders”.
22. The Bereton government expressed support for the “just cause” of the Movement. Thirty employees of a Bereton private security company, Sphinx, were hired to provide escort to the convoy. All were former Bereton soldiers. Jonas Borman explained it was out of security considerations that Sphinx was hired.
23. On 1st July 2010, Nirvana left a Bereton port for Yukule. In addition to the 30 armed Sphinx guards, on board were also 200 passengers, among them members of the Movement and a number of human rights activists and anti-Astro protestors recruited through the internet. Most passengers were Bereton citizens, but some were from Astro, Casa and ten other countries. Nirvana had 2,000 tons of cargo on board, mostly food, medicine and basic necessities. During the voyage, Jonas Borman, together with the Sphinx guards, regularly briefed the passengers on measures to be taken “in case of emergency”. Jonas Borman told all the passengers that the mission would proceed to Yukule regardless of any obstacles.
24. Meanwhile, Admiral Gusman received intelligence that the Nirvana was also carrying a stock of weapons, notably rifles, ammunition and grenades. He soon established a commando of 60 marines to deal with the potential threat. The operation was named “Blue”. Gusman appointed Commander Hanson to lead operation. During a pre-deployment briefing, Hanson instructed the marines that the inviolability of the Maritime Control Zone should “under no circumstances be compromised”.
25. In the late evening of 20th July 2010, when Nirvana was 40 nautical miles from Port Solferino, its master was informed by radio that he was approaching a controlled maritime zone and that the ship would not be authorized to proceed to Port Solferino unless its cargo was inspected and its passengers controlled before entering the zone.
26. Despite of repeated warnings, Nirvana proceeded towards Port Solferino. Mr Borman announced that he would not stop the ship and protested the Astron occupation of Yukule. When Nirvana was 24 nautical miles away from Port Solferino, Commander Hanson sent a final warning via radio that all available measures would be taken to

prevent unlawful entry into the Maritime Control Zone. He then ordered to board and seize the Nirvana.

27. The commando encountered strong resistance from the Sphinx guards and passengers when boarding. Three marines were thrown over the deck head down, some were seized and stabbed. Activists also used improvised weapons such as axes, iron bars, fire extinguishers, etc. The Sphinx guards fired a few shots to stop the commando from advancing. Stun grenades taken from the seized marines were thrown at the commando and some gunshots were also fired by activists. Commander Hanson ordered to open fire.
28. After one hour of intense exchange of fire, the Sphinx guards surrendered after running out of ammunition. In the early morning of 21st July 2010, the marines took control over the ship. The wounded were given medical care. In the melee, 30 activists and 15 Sphinx guards were killed, 60 injured, including guards and passengers. Among the Astron marines, 10 were killed and 15 injured, 5 of them in serious condition. The Nirvana was escorted to Port Solferino, and all Nirvana crew, guards and passengers were put into Solferino's central prison.
29. Some of Nirvana's passengers were soon released, others held for further investigation. The Peppermint Express subsequently published a series of interviews with some of those who had been released. One of them, Nobel Peace Prize laureate Denise Baris, said that the Astron soldiers were "shooting indiscriminately at innocent civilians" on Nirvana. She claimed she was holding a banner and "peacefully" protesting with some other passengers, when bullets came at their direction and one of the protestors was shot dead right in front of her. A priest from Casa said bullets were flying around and at some point he could no longer tell whether they were from the Astrons or the protestors. Sphinx later claimed that all their guards on board were only carrying light defensive arms.
30. Operation Blue drew international condemnation. Demonstrations were held in major cities in Bereto to pressure the government to take "real" actions against Astro. In a press conference, the Bereton President denounced Operation Blue as serious violation of international humanitarian law.
31. Faced with increasing international pressure, in August 2010, Astro conducted an inquiry on Operation Blue. Commander Hanson attended the inquiry and pleaded self-defence in ordering to open fire. He claimed that most of the people on board were armed and violent. Some of the marines testified that some passengers were wearing "military-like fatigues" and clearly carrying heavy firearms. They claimed to believe the armed men were Bereton soldiers because they "were well-trained in combat activities". According to the members of the commando, many activists and Sphinx guards tossed weapons into the water before surrender.
32. One month after Operation Blue, Astro issued a statement noting a decline of militia attacks in Yukule and promised to loosen the import controls. In September 2010, a report released by the Astron Ministry of Defence concluded that Operation Blue was conducted lawfully on grounds of national security and self-defence. Commander Hanson was cleared of any responsibility.

33. The conclusions of the Astron report were met with skepticism. Bereto, Casa and various other countries called the inquiry a sham and urged the United Nations to conduct an independent investigation. In October 2010, the UN Secretary-General appointed a panel of legal experts to investigate the conduct of Operation Blue.
34. In March 2011, the Expert Panel produced a preliminary report which concluded that the Astron commando had used excessive force. The Panel found that all casualties suffered by the activists were caused by gunshots, some of them at point-blank range or from behind. According to the report, renowned journalist Phil Dumphy was video recording the event when shot in the head. An engineer was shot at when trying to cut off the light system of the vessel. Several others were injured by gunfire when waving knives at the soldiers. Some of the Sphinx guards were killed or wounded when reaching out to the lifeboats of Nirvana. The report found no conclusive evidence of a cache of weapons on board Nirvana.

Oil spills and oil fires

35. Following the post-Nirvana demonstrations and the weakening of Astro's government, the Bereton government decided that time had come to recapture Yukule. On 25th August 2010, a Bereton naval task force set sail for Yukule. On 17th September, Bereto launched an intensive air campaign against the Astron land and naval forces in Yukule, while the Bereton navy engaged Astron navy on the high seas.
36. On 20th September 2010, the commander of the Astron fleet, Rear Admiral Freedman, reported to Admiral Gusman that he was unable to stop the advancement of the Bereton Navy. Admiral Gusman told Freedman to "resort to all resources available to stall the enemy". In the ensuing days, several pro-government magazines stated that the Bereton government should "re-consider" any attempt to disrupt Astro's sovereignty over Yukule, which would only lead to "unforeseen consequences".
37. On 24th September 2010, Captain Ardent, after consulting Rear Admiral Freedman, ordered to open the valves of three oil terminals on the western side of the island, while Astro's ships moved eastward towards the Astron coast. Three oil tankers also started to discharge oil into the same sea area.
38. The Bereton naval forces were slowed down by the oil slicks offshore western Yukule, but on 15th October, the Bereton forces managed to land on the south beaches of Yukule. The positions in the southern part of Yukule were poorly defended, so the Bereton forces rapidly started to make their way inland towards Port Solferino.
39. On 16th October 2010, Admiral Gusman told the Astron paper Hashtag Daily that the Bereton attacks would only "lead to the destruction of Yukule". Admiral Gusman told Captain Ardent to take "all measures possible to stop the advancement of the Bereton forces". On the same day, large oil storage tanks on a site by the sea near Port Solferino burst into huge fires (approx. 60 million litres of oil were stored on the site). Astron soldiers in Yukule retreated to the mainland.
40. Port Solferino and the surrounding areas were awash in smoke, soot and ash. A large amount of the oil found its way to Port Solferino waterways and into the sea. As the

site was surrounded by landmine fields, access was difficult and dangerous for firefighters and civil defence personnel. It took 10 days to get the fires under control, by then, several million litres of oil had already been released into the sea.

41. In January 2011, United Nations Environment Programme (UNEP) pointed out that the oil spills could have a major effect on the massive reef habitation offshore Yukule. According to UNEP, certain habitations of coral reefs were extremely susceptible to hydro carbon pollution. Thousands of birds in the region were found dead. Marine turtles, which use the Yukule Archipelago as nesting sites, were also endangered.
42. Meanwhile, Dr Sullivan from the Casan Meteorology and Environmental Protection Administration assured the public that the damage to the marine environment in the region was “not devastating”, but added that it might take a few years for the environment to return to its former state. In June 2011, prominent public health experts attending an international conference projected that the air and maritime pollution in the aftermath of the war would kill approximately 800 Yukulers in the years to come.
43. In November 2013, a study on coral reefs offshore Yukule was concluded by a joint team consisted of members from national science institutes of Astro, Bereto and Casa. Two-way analysis of variance between those oiled and non-oiled reefs off Yukulean coastline showed no significant differences for either species or families.

Referral to the ICC

44. At the end of 2010, the Ayana government was discredited by the failure in Yukule and eventually had to step down. Following the election of a new government, Admiral Gusman was placed under house arrest for suspected crimes committed against the Astron people. In May 2011, Astro and Bereto agreed to jointly refer the situation in Yukule between 1 January 2008 and 31 December 2010 to the International Criminal Court. However, the status of the Archipelago has not yet been definitively agreed upon.
45. The Pre-trial Chamber now holds a hearing to confirm the following charges on which the Prosecutor intends to seek trial. The hearing is held in the presence of the Prosecutor and Tony Gusman, as well as his counsel.

Count One

Article 8(2)(b)(xxv) and Article 25 (3)(a) of the Rome Statute

Regarding the import and fishing control imposed on Yukule, Tony Gusman is criminally responsible for committing, as an individual or jointly with another or through another person, the war crime of intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

Count Two

Article 8(2)(b)(i) and Article 28 (a) of the Rome Statute

Regarding Operation Blue on Nirvana from 20th to 21st July 2010, Tony Gusman, as a military commander, is criminally responsible for the war crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

Count Three

Article 8(2)(b)(iv) and Article 25 (3)(b) of the Rome Statute

Regarding oil spills and oil fires from September 2010 onwards, Tony Gusman is criminally responsible for ordering the war crime of intentionally launching an attack in the knowledge that such attack will cause 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.

NOTE

Participation to treaties

At all material times, the following treaties were in force for Astro, Bereto and Casa:

- United Nations Charter
- 1949 Geneva Conventions and their 1977 Additional Protocols I & II
- 1969 Vienna Convention on the Law of Treaties
- 1976 UN Convention on the Prohibition of Military or Any Other Use of Environmental Modification Techniques
- 1982 UN Convention on the Law of the Sea
- 1998 Statute of the International Criminal Court