

3rd Red Cross International Humanitarian Law (IHL) Moot (2009)

MOOT PROBLEM

PROSECUTOR v. ALBERT WISEMAN

Before the International Criminal Court at The Hague

in accordance with Security Council Resolution 5066 of 25 January 2008

1. The major part of the continent of Pacifia was a Blueland colony for more than three hundred years. The decolonisation of Pacifia started immediately after the Second World War and continued till 1984 when the last colony, Tyria, obtained independence from Blueland. The historical Kosambian Empire included the southern half of the continent of Pacifia. For administrative purposes, the Kosambian Empire was divided into Nimbusland and Durako before the colonisation by Blueland. This administrative division also continued during colonial rule. When all was set for independence from Blueland in 1952, political leaders in Nimbusland and Durako demanded separate territorial entities as independent States rather than one single sovereign entity of Kosambia. After intense deliberations, it was decided that Nimbusland and Durako would each become States at international law upon independence, in 1952.

2. Scholars attribute several reasons for the partition of Kosambia and the formation of Nimbusland and Durako. Though the peoples of Nimbusland and Durako belong to the same broad ethnic identity, Zylo, there are differences between the peoples living in these two States. These differences are based on levels of economic development, languages spoken and cultural practices. The river Tile enters and meanders through Durako before passing through Nimbusland and merging with the sea. During the colonial period in 1935, two large-scale irrigation projects were built on the river Tile in Durako, which helped to irrigate large tracts of agricultural land, resulting in more rapid economic progress of most of Durako. No such major development initiatives were undertaken in Nimbusland. Better irrigation facilities resulted in the faster economic progress of the people of Durako. This also helped them to have access to better education. Because of these factors, the people of Durako were placed in a relatively privileged position, and they constituted the dominant component of the anti-colonial movement. This created suspicion among the people of Nimbusland that the leadership coming from Durako would not be concerned with their

development and it acted as catalyst for the demand for the creation of separate country upon independence.

3. A majority of the people of Nimbusland speak the Desperanto language and similarly a majority of the people of Durako speak the Migami language. During the colonial period, Desperanto was not given its due importance in official communications of the colonial government. Economic inequality added to the differences in language and cultural practices, and this led the people of Nimbusland to believe that separation from Durako at the time of independence (rather than forming a joint country of Kosambia) would give them the opportunity to decide their own economic development and respect for their language and cultural practices, thereby leading to the formation of Nimbusland and Durako in 1952.

4. Since independence, both States have shared a common border. Tensions between the two countries led to 11 instances of border guards shooting across the border between 1952 and the present, with both sides alleging unprovoked firing from the other. Though there were tensions on the border several times, this never led to a declared war between the two States. Durako and Nimbusland have good trading relations and people from both countries visit tourist and pilgrimage sites in each other's State.

5. Durako is divided into four provinces for administrative purposes and one of these, the province of Chengo, lies on the border of Nimbusland. Seventy percent of the people of Chengo speak Desperanto, while twenty five percent of the population speak Migami, and the remaining five percent speak other languages. Desperanto-speaking people feel that those who speak Migami are not the "true original" inhabitants of Chengo, and believe that Migami-speaking persons came from other parts of Durako, mainly during the colonial rule. They also feel that economically their province has been neglected and the agricultural land and industries in Chengo are owned by people from other provinces who came to Chengo. National statistics indicate that Chengo province is being ranked at the bottom in the per capita income of Durako provinces for the last 50 years. The Desperanto-speaking people of Chengo linguistically and culturally feel closer to Nimbusland than to Durako. They also feel that at the time of independence from Blueland, an injustice was done to them when Chengo province became part of Durako for various historical and geographical reasons. This led the educated and unemployed youth to develop animosity towards the administration.

6. This disgruntlement was sought to be made into an organised protest by some individuals led by Mr Albert Wiseman who started the Chengo Liberation Alliance (CLA) on 1 January 2006. Mr Wiseman was professor of Economics at the University of Chengo. He

claimed to have left his job for the cause of Chengo people. The CLA started as a political alliance of various sections of people who were of the view that they were not equally sharing the benefits of the Durako economy and their language and cultural practices were looked down upon by the Durako government. A large number of the educated and unemployed Chengonese youth were attracted to the CLA agenda. On 25 March 2006 the CLA gave a call for a week-long province-wide strike, which was widely respected. Enthused by the mass support they received for the strike call, the CLA convened a conference with a view to drafting its programme and the goals to be achieved. During the conference, on 15 April 2006, the CLA elected Mr Wiseman as its president and declared that the aim of the alliance was to "liberate" Chengo from Durako. Towards achieving this end, it was also decided to obtain all possible support internally and externally, and to resort to all possible means to realise their goal as soon as possible. The conference also gave complete authority to Mr Wiseman to initiate discussions with other countries and groups within Durako to garner support to their cause of complete liberation of the province of Chengo.

7. On 26 July 2006, Mr Wiseman addressed a press conference in a hotel in Malga, the capital of Nimbusland, and explained the discrimination they were experiencing and the goals they would like to achieve through the struggle. When asked by the media about the reasons for his visit to Nimbusland, Mr Wiseman said that he was there to seek support from the government and the people of Nimbusland for their just cause and that he had held extensive talks with the Prime Minister of Nimbusland, Mr Kinivadeh, and had obtained a positive response from him in terms of extending support by "all possible means." He also informed the press that he had been having discussions with other civil society groups within Nimbusland seeking support from them.

8. On 4 August 2006, on his way to attend the Pacifica Economic Forum in Kili, capital of Bahara, a State in the northern half of the continent of Pacifica, Mr Kinivadeh spoke aboard an airplane to the media on several issues that would be discussed at the Forum. When asked about the visit of Mr Wiseman to Nimbusland and the meeting he had held, Mr Kinivadeh said that it was a "courtesy visit" and that Mr Wiseman had sought solidarity for their cause. He, however, said that the Chengonese cause was a democratic demand from the people of Chengo who had been neglected for decades in the political, economic and social life of Durako. He said that his government was of the opinion that the liberation of Chengo was a democratic demand and it would correct the historical wrong of Chengo being made part of Durako and the perpetuation of discrimination by the successive governments in Durako. He said that those governments which believe in upholding democratic principles and values should support it. As a government, which has the consistent stance of

supporting democratic aspirations of peoples anywhere, his government would extend solidarity to the struggle being waged by the CLA with various means of support.

9. After returning from Nimbusland, Mr Wiseman held intense discussions with CLA leaders and cadres. On 17 September 2006, it was decided to send envoys to neighbouring countries seeking support for their cause. On 18 September, Durako police raided the houses of a few important leaders of the CLA and some youth wing cadres, and several of them were arrested and booked under the Preventive Detention for Anti-National Activities Act (PDANAA) of 1977, as a measure to prevent commission of acts defined as anti-national. In the following days, rumours spread about the arrest of Mr Wiseman. However, the Chengo police had in fact not arrested him. On 28 September 2006, Durako police went to the house of Wiseman but could not find him, and search was intensified, with a view to arresting him under the PDANAA.

10. On 5 November 2006, Mr Wiseman sent a press note to the media, which, inter alia, contained the following text:

"Our movement for the liberation of Chengo province from the clutches of Durako has taken a decisive turn. Until now we have been protesting in a peaceful manner to convince the authoritarian Durako government to concede to our demands. However, by invoking the Preventive Detention for Anti-National Activities Act, the government arrested many of the CLA's leaders and cadres who are now languishing in jails. I and some other leaders of CLA were able to escape arrest. The government of Durako by threatening our existence in Chengo is now forcing us to resort to armed violence. We are now seriously working on counter-offensive operations. It is just a matter of time before we give a befitting reply to the Government of Durako."

11. On 30 November 2006, Mr Wiseman communicated to the media, announcing the names of the persons in charge of various CLA activities. General Tharikana, who worked previously with the Durako army, was appointed as the chief of operations of the CLA. While in the Durako army, there were public allegations made by other officers against General Tharikana during his tenure as deputy chief of military intelligence that some confidential Durako military information was leaked and found to have reached Nimbusland armed forces. Though disciplinary action was not initiated, he was forced to take premature retirement from the Durako army following this incident.

12. In the first week of December 2006, groups of people attacked places of public property in several towns in Chengo. Though it started as sporadic violence, it soon turned out to be a more regular occurrence, with attacks in numerous places in Chengo province. It was also reported that CLA cadres armed with guns directly confronted Durako police at several places. The Durako government deployed armed forces throughout Chengo to bring the situation under control. In several places, Durako police and armed forces took a total of more than 200 CLA cadres into custody along with their weapons. The armed forces' spokesperson displayed the weapons for the media and informed them that they were Nimbusland-made. On 20 December 2006, Durako armed forces arrested three people crossing the Nimbusland border into Chengo. After interrogation, it was revealed that the three, along with others, were coming from military training at a location in Nimbusland. They also revealed that a big cache of weapons would also be delivered in Chengo for the CLA through different sources. However, they expressed ignorance about the involvement of Nimbusland army in the training.

13. In the last week of March 2007, opposition parties in Nimbusland noted a significant increase (seventy-five percent over the previous year's budget) in the budget for defence related activities, during discussion in the Nimbusland parliament on the 2007-08 budget. The opposition parties argued that the Nimbusland government was involving itself in the affairs of Durako, supporting the CLA forces militarily and by other means, which would be burdening the citizens of Nimbusland. The Nimbusland government, without directly refuting this criticism by opposition parties, said that the increase in the budget in fact was the result of conflict in Chengo province in Durako which they felt would have a spill over-effect on Nimbusland, and it was essential to strengthen its armed forces to face any eventuality.

14. Meanwhile, on 15 April 2007, a person by the name of Duran Razera convened a press meeting with a select electronic media at an undisclosed location away from Merul, the capital of Chengo. He addressed the media, along with two others with masks on their faces to conceal their identity. He said "two days ago, we established a group called the United Durako Front (UDF) with a view to saving Durako from disintegration. We are extremely concerned with the safety of Migami-speaking Chengo people who are being targeted by the CLA. We believe in a united Durako which only would provide economic prosperity to the people of Chengo. We are opposed to the CLA and they are just playing with the sentiments of a few sections and do not represent the entire Desperanto-speaking population of Chengo. We oppose with all possible means, and if necessary by force, the activities of the CLA and the liberation of Chengo. All the Migami-speaking people of Chengo: men and

women, elderly and children, rich and poor, are behind the UDF, and we all are prepared to sacrifice our lives for the sake of a united Durako".

15. On 20 April 2007, based on confidential sources, the media reported that Mr Wiseman was taking shelter in a foreign country, and probably in Nimbusland. On 5 May 2007, there were incidents of attacks on Migami-speaking civilians by youths claiming to belong to the CLA, in the city of Merul. On 10 May 2007, some armed youths claiming to belong to the CLA seized the prison in Merul and took the chief and some of the guards of the prison into custody and released all the leaders and the cadres of the CLA who were arrested under the Preventive Detention for Anti-National Activities Act. The seizure of the prison continued even after the release of the CLA supporters. On the same day, the Chengo administration informed the Durako government that similar attacks had taken place on three other prisons in other parts of Chengo and that they were under the custody of armed CLA cadres. On 11 May 2007, CLA cadres went on to attack a residential locality in Merul where predominantly the rich of the city live. This locality housed the residences of Migami-speaking officials, business people and industrialists, who, the CLA claimed, had their origins in neighbouring provinces and who were a formidable force behind the Durako government. The CLA took many of the residents - men, young and middle-aged, into their custody. They were then taken to the prison which was under the control of the CLA and confined them in the prison.

16. On 12 May 2007, a man who claimed to be leading the team of CLA members explained their activities. He informed the electronic and print media that they had seized the prison in accordance with the programme decided by the CLA and their leader Mr Wiseman. He claimed that the reason for detaining the officials, business people and industrialists was that they all belonged to the UDF, which is opposing the liberation of Chengo, and that they would be punished in accordance with the law for their participation in the activities of the UDF in the soon-to-be-declared independent Chengo. When asked about the crime the officials, business people and industrialists had committed, he said that they had detained only young and middle-aged men whom they considered to be members of the UDF armed groups and who were conniving with State officials in discriminating against Desperanto-speaking Chengo citizens and were complicit with what state officials, including the military and police, were doing. He said that by detaining them they wanted to send a threat to the UDF and to the government of Durako, and also to prevent the further arrest of CLA supporters.

17. By mid-June 2007, armed wings of the CLA had spread across Chengo and there were attacks on public property mainly on the communication system, as well as on television and radio stations. By 15 October 2007, confrontations between the CLA and Durako military and police forces intensified with regular casualties on both sides.

18. On 28 October 2007, the Chief of the Durako army released a note to the media which contained the following text:

"The CLA has been making unconstitutional demands and indulging in unreasonable activities. As has been repeatedly announced by the government there are *fora* to redress the grievances, if any, of any group of people. However, the CLA is now taking law into their own hands by indulging in the seizure of prisons and are attacking public authorities and innocent civilians. We are extremely concerned with the safety of innocent civilians who are illegally detained in the prison by CLA cadres. Incidents during the previous months compel us to believe that CLA cadres are well equipped with arms. Incidents have clearly shown that they are preparing an onslaught on the military strength of Durako. We have clear intelligence reports that Nimbusland is supporting the CLA materially, technically and militarily to make them formidable and indulging in a proxy war. It is not for the first time that Nimbusland has made this kind of attempt. However, this time they have a misguided ally within Durako. If the CLA forces fail to realise the machinations of Nimbusland and act as pawns in their hands, then we will respond in a language they understand."

19. In response to this message, Mr Wiseman released another message on 30 October 2007, which read as follows.

"The Chief of the Durako army is trying to underplay the demands of the Chengo people. His attempts to link up the CLA strength with a foreign country stems from the attitude of denial of the Durako government. However, we would like to reiterate that the political and moral strength of the CLA comes from the will of the people of Chengo to liberate themselves from Durako. We do have solidarity and support in various forms from other countries who feel that the demands of the Desperanto-speaking Chengo people are genuine and legitimate."

20. On 10 November 2007, Durako armed forces attacked the prison in Merul and there was armed resistance from the CLA armed cadres. After firing lasting more than an hour, Durako armed forces took control of the prison and released all the 431 persons who were

detained by the CLA cadres. All of them were taken to the hospital for immediate medical attention as many of them were found to be physically weak with wounds on their bodies. On the next day, many of them narrated their experiences. The common experience of all was that they were kept confined in unhygienic conditions by stuffing them into small rooms without even proper light and ventilation. For many days food was served only once a day. Whenever there was any request from them it was met with verbal abuses and occasional beatings from the prison guards, who, while not CLA members but rather the regular prison staff, confessed with the detainees that they were acting under orders given to them by the CLA cadres.

21. Soon after, the Durako army started targeting CLA bases, and arrested hundreds of people across Chengo. In many of these cases, relatives were clueless about the whereabouts of the arrested people. On 14 November 2007, in protest against the disappearances, large numbers of people came onto the streets in Merul. The CLA did not officially proclaim any role in this protest march. The Durako army and police obstructed the march midway and announced through the public address system an order to the protesters to disperse immediately as they knew that CLA armed groups had joined the protest march and that they would apprehend them. As the crowds did not heed to the order to disperse, the soldiers fired into the air, which led to chaos. Soon firing was directed at crowds. After 45 minutes when crowds dispersed army medical units recovered 173 dead bodies out of which four were of soldiers. 26 soldiers received bullet injuries. Chief of Durako army stated that the CLA was using human shields.

22. On 21 November 2007, Durako intelligence agencies released a message to the media which they claimed to have received from a person who was arrested in Merul. This message was dated 19 November 2007 and was signed by the president of the CLA, Mr Wiseman. It was meant to be an internal call for the CLA cadres. The message contained the following text:

"The time has come for all of us to act decisively. We are confronted with two enemies acting in tandem. Therefore, along with countering the Durako army, it is equally important for us to confront the UDF whose support base lies in the Migami speaking people. Hence, to weaken the UDF, it is necessary to weaken its support base in the Migami-speaking residents of Chengo. In the coming few days act concertedly to weaken our enemies. Migami-speaking residents of Chengo do not want Chengo to be independent as they want us to be subordinate to the Durako government through which they have been enjoying all the benefits from the

resources in Chengo. We want Chengo to be with Chengo people and Migami-speaking residents of Chengo will have the option to go to other provinces of Durako or remain with Chengo. Surely, in a future independent Chengo, we do not want any remnants of subjugation that we are undergoing now. Hence give a decisive blow to remove permanently the stains of non-Chengo domination on the true Chengo people."

23. On the night of 30 November 2007, CLA armed cadres attacked residential localities in Merul and started attacking those residences where they believed that the "non-Chengo" and UDF-supporting-people lived. This attack continued for the whole night. There was intermittent firing from the locality. More than 500 people, including 47 women, 36 children and 19 elderly were killed, and several hundred were injured. Similar attacks took place in other parts of Chengo, which resulted in the killing of more than 2500 Migami-speaking people (a mix of ages and gender) and more than 450 Desperanto-speaking people, mainly some adult men and some women. It was found that some of these killings were the result of clashes between the groups consisting of Desperanto-speaking and Migami-speaking people. These attacks continued until the end of December 2007.

24. As the situation worsened, on 5 January 2008, the United Nations Security Council adopted Resolution 5060 taking note of the situation and appealed to all sides to abide by their obligations under international law and settle their disputes accordingly. The Security Council in its later resolution 5066 adopted on 25 January 2008 reiterated its appeal to all the parties to end hostilities immediately and find a political solution to the problem. In the same resolution, the Security Council also referred the matter to the International Criminal Court (ICC) on the allegations of violations as mentioned under the Rome Statute of the ICC. On 29 January 2008, Mr Wiseman was arrested by the Durako forces when he was trying to cross the border from Nimbusland to enter into Chengo province.

25. Pursuant to the Security Council resolution, the prosecutor initiated the proceedings and based on the investigation report initiated charges against several persons. Durako government, after some discussion, surrendered Mr Wiseman to the ICC for trial on 30 August 2008.

For the purpose of the present case, the charges against Mr Wiseman in the ICC are as follows:

1. Mr Wiseman is charged with war crime (a grave breach of the Fourth Geneva Convention of 1949, under Article 147) of "unlawful confinement" under Article 8(2)(a)(vii) of the International Criminal Court Statute, for acts committed in the province of Chengo from 5 May 2007 to 10 November 2007.

2. Mr Wiseman is further charged with the crime against humanity of "extermination" under Article 7(1)(b) of the International Criminal Court Statute, for acts committed in the province of Chengo from 30 November 2007 to 31 December 2007.

NOTE:

The memorials and oral arguments by counsel for both the Prosecution and Defence are to be confined to the **two** charges only.

The following points are to be noted:

- Counsel for both Prosecution and Defence are expected to make arguments with respect to the applicability of the charges, including the type of armed conflict (if any), and whether the Elements of Crimes (United Nations Doc. PCNICC/2000/1/Add.2 (2000)) have been met for each of the two charges.
- Counsel for both Prosecution and Defence will also be expected to bring to the Court's attention all the relevant jurisprudence and other relevant documentation.
- The issues relating to the Security Council referral to the Court and the jurisdiction of the Court **need not** be raised.