

11th Red Cross International Humanitarian Law Moot (2013)

(An Inter-University Competition for Asia-Pacific Region)

Co-organized by the Hong Kong Red Cross and the International Committee of the Red Cross

in collaboration with The University of Hong Kong, City University of Hong Kong

and The Chinese University of Hong Kong

The Moot Problem

IN THE INTERNATIONAL CRIMINAL COURT

PRE-TRIAL CHAMBER I

Prosecutor v. Andrew Stage

1. INSTRUCTIONS

- 1.1 *Proceedings*: 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.” The Accused may “object to the charges” and/or “challenge the evidence presented by the Prosecutor”.
- 1.2 For the purpose of the moot, the hearing comprises a main speech and a rebuttal for the Prosecution and a main speech and a surrebuttal for the Defence (see Moot Rules 57-61).
- 1.3 *Facts and evidence*: The case is entirely fictional. The Moot problem includes all the facts supported by evidence that have been transmitted to the Defence, as well as facts and evidence presented by the Defence for the purpose of the hearing. Teams should confine themselves to the facts supplied. Neither the Prosecutor nor the Defence may introduce new evidence or facts at the hearing (Article 61 (6) (c) of the ICC Statute is not applicable). Teams may nonetheless draw reasonable inferences from the facts. They may also question the credibility or weight of the evidence. Teams should not hand anything to judges unless specifically asked to by a judge.

1.4 *Procedure*: The problem is not intended to raise questions of procedure other than the rights of the accused and witnesses pursuant to Articles 67 and 68 of the ICC Statute. Any other procedural questions should be ignored.

1.5 *Jurisdiction*: The Parties involved in the conflict (see Moot problem) were parties to the ICC Statute at all material times. Questions relating to jurisdiction of the ICC need not be raised, unless they are linked to the substance or the merits of the case.

1.6 *Admissibility*: Counsel may, if relevant, address any issue regarding the admissibility of the case under Article 17 of the ICC Statute.

1.7 *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.

1.8 Teams are encouraged to look at the case law of international and national courts. If teams rely on decisions of national courts, these should be leading decisions and teams should expect to be asked for copies of the headnote and the portion of the transcript or judgment referred to in their argument.

2. THE CONTEXT

2.1 The Republic of Banksia and the Republic of Lantana emerged from the ashes of the First World War as independent States. After the end of World War II, they both signed the UN Charter and were among the original members of the United Nations.

2.2 Both States have espoused democratic institutions to some extent, but governments and domestic politics have been dominated by a few ruling families who established their power in the 1970's at the height of the Cold War. Up to 2008, Banksia was ruled by President B. Stage and, Lantana by President C. Quill.

2.3 Since their independence, the two States have not succeeded in resolving territorial disputes. In particular, both States claim sovereignty over a land corridor that separates them known as "The Hills", which extends seawards some 40 kilometres to a parcel of largely uninhabited islands known as "The Rocks". While the *de facto* border runs down the middle of The Hills and extends seawards dissecting The Rocks, each State claims the whole of The Hills and The Rocks. The width of the corridor is some 50 kilometres inhabited by wildlife and used by farmers from both States as grazing land. Both States have maintained marine research installations on The Rocks.

2.4 Banksia and Lantana have had many border skirmishes over the disputed territory, but the dispute has never been solved and no agreement has ever been reached on the border delimitation. Both States have recently re-asserted their claims, especially with the anticipated potential for oil, gas and rare earth reserves.

2.5 No permanent settlements have been established in the Hills due to occasional outbreaks of a rare, as yet incurable haemorrhagic or septicemic disease within the corridor. Persons affected by the disease develop a red rash and high fever. Overall mortality rate is between 20-25%. The disease is locally referred to as the "Rash". The limited research that has been conducted seems to indicate that the Rash is probably caused by a virus transmitted by small rodents that live amongst the rocks and gullies in the corridor. Notwithstanding the risk associated with the disease, many farmers graze their cattle and sheep on the rich pastures of the Hills.

2.6 Banksia has established research stations near the corridor to monitor grazing and outbreaks of the disease, as well as to conduct research to assess the commercial viability of mining the area for rare earth metals. By 2006, commercially viable deposits had been identified by Banksia experts. Unbeknown to Banksia, the existence of these deposits is also known to authorities in Lantana.

2.7 In late 2008, President Stage died unexpectedly. His son Dr Andrew Stage, the Minister for Science and Technology at the time, replaced him as President.

2.8 The succession of President B. Stage was not without difficulties. Some saw the death of the President as an opportunity to weaken the stranglehold of the Stage family and friends on the Banksia government. Mass manifestations of support for the Stage presidency by a nationalist political youth movement (the “Futurists”) were staged by the government. Dr Andrew Stage was finally anointed as President, promising open elections in the near future. To pave his way to the Presidency, he outlined ultra-nationalist policies, notably setting as a priority the reinforcement of Banksia’s claim over the Hills and the Rocks. He vowed to establish permanent settlements in the corridor and exploit as soon as possible the natural resources of the Hills and the Rocks, for the benefit of the country.

2.9 Dr Andrew Stage is also a renowned scientist. He graduated in medicine from the University of Banksia in 1982 and completed post-graduate studies in virology at a leading university abroad. Upon returning to Banksia in 1995, he was appointed director of a modern research facility centre known as the Banks Institute that specialized in disease control and prevention. One of the early projects Dr Stage instigated was research into the Rash. Early research led him to believe the Rash virus had properties similar to the smallpox virus.

2.10 While director of the Banks Institute, Dr Stage had established close cooperation with the military and intelligence establishments, in the context of countering terrorist threats. Later investigations have revealed that in 1994, the Banks Institute had acquired vials of smallpox and smallpox vaccine, as well as research materials related to the manufacturing of a “weaponised” smallpox virus (SPV-1), from unknown sources. Following an outbreak of the Rash in 2007, the Institute’s research team was directed to study the smallpox virus and vaccine as a possible means to develop a vaccine for the Rash. While there had been some production of the SPV-1 and its vaccine in the early 2000’s, Banksia military research had focused on the development of a delivery system.

2.11 Lantana had committed large resources towards the development of a vaccine and a treatment for the Rash. Little information had, however, been released on the advancement of its research program. Lantana’s research was carried out in a military research center, under strict rules of national security secrecy.

2.12 In 2007, Dr Stage was appointed Minister of Science and Technology, and was replaced as director of the Banks Institute by a long-time colleague Dr. Clever. Dr Stage and Dr Clever conducted research together and co-authored articles in reputable scientific journals. As Minister, Dr Stage continued to follow closely the work undertaken at the Banks Institute and the research conducted by Dr Clever. In mid-2008, while still Minister of Science and Technology, Dr Stage was eager to announce himself that the Institute had made a major breakthrough and was on the

verge of developing a vaccine. With Dr Clever by his side, Dr Stage announced that clinical trials were to begin in about two months.

2.13 In late 2008, Dr Stage issued a Presidential decree that transformed the Futurist movement into the Presidential Volunteers for the Future (PVF). The PVF was closely associated with the organization of political events and activities in support of the Presidency. Membership in the PVF was open to all Banksia citizens over 16 years of age. Enrolment became rapidly popular with young people – as they were paid a small stipend for their participation. A “militia” was created within the PVF which often acted in support of police in maintaining order and security at public events or manifestations. The PVF, with the support of the President’s Office, also organized many social activities, including summer “boot camps” for children from 12 years to 18 years of age. Activities at the camps included classes and exercises on political education and leadership, survival techniques and training on the use of firearms. The organization of those “boot camps” especially for children less than 14 years of age was at times severely criticized in the medias.

3. The conflict

3.1 On 29 August **2010**, a Lantana marine research ship drifted into Banksia territorial waters and, caught in heavy mist, struck a smaller Banksia fishing boat which sunk. Two fishermen were killed. The incident provoked uproar in Banksia and, before the full facts about the incident emerged, fighting had broken out between farmers from both sides of the Hills over grazing land. Both governments sent security forces to the area to calm the situation but it finally resulted in shots from both sides; and five died. The violence rapidly escalated in a matter of days, and artillery fire resumed along the border. In contrast to earlier skirmishes, the Lantana government saw it as an opportunity to preclude the establishment of permanent Banksia settlements in the corridor (that would be made possible by the development of the Rash vaccine). Lantana’s military establishment also saw the opportunity not only of settling scores with Banksia, but also of allowing Lantana to permanently seize the Hills and the Rocks.

3.2 In the early morning of 10 September **2010**, Lantana launched a strong offensive on land and sea to seize control of the Hills and the Rocks. Meeting little resistance, it overran Banksia’s border defences in a few days. The fiercest battles took place over the Hills. On 12 September **2010**, a counter-attack stopped the Lantana armed forces at the outskirts of Banksia’s capital city, Rosebud. Both sides took prisoners. Prisoners held by Banksia were interned in a disused prison facility in Rosebud.

3.3 Late in the evening of 14 September **2010**, Dr Stage convened a meeting with his “war council”, composed of senior political and military advisers, to assess the situation. Chief commander General Talent depicted the situation as critical. The

Lantana Armed Forces (LAF) had been stopped for the moment, but they controlled all access routes to the city. With reinforcements, the LAF would be in a position to capture Rosebud within one or two weeks. The initial defence and the counter offensive had depleted Banksia's military resources to the extent that – if the taking of Rosebud could be resisted for a while – it would be unrealistic to think that they could push back the Lantana forces across the border. What was needed was something to force the Lantana forces to withdraw. For Air Vice-Marshal Brown, this was the time to use air power to attack Lantana's cities and transport infrastructure. Both emphasized that all able-bodied soldiers and citizens would be needed to defend the city.

3.4 Dr Stage asked his military advisers to prepare a plan of defence/attack, while his political advisers were instructed to seek international support. The President's internal security adviser told General Talent that the PVF could be used to provide support to the army, especially by helping with the transport and handling of food and medical supplies. He also told the President that the PVF should be used to help maintain order within the city. The President agreed recalling that he had personally visited PVF summer camps observing that they were a "bunch of very capable youngsters" and could help or contribute to the protection of the city and its population.

3.5 During the above meeting the following conversation took place:

- *Dr Stage*: "Do we have enough troops and equipment to prevent the takeover of the city"?
- *General Talent*: "As we speak now, we can prevent the takeover, but if they bring in reinforcements combined with the use of air power, we will not be able to stop them."
- *Dr Stage*: "Can we expect some support from outside?"
- *General Talent*: "I'm afraid that the LAF will try to move in before there is any move from our allies or the international community."
- *Dr Stage*: "We have to find a way to force the LAF to withdraw ..."
- *General Talent*: "There is still possible use of the SPV-1..."
- *Dr Stage*: "Do we have enough stockpiles?"
- *General Talent*: "Thanks to the research program on the Rash vaccine, our teams have a small stockpile of the SPV-1. We have not yet, however, worked out the mechanical means of delivery. For the time being, human carriers would have to be used."
- *Dr Stage*: "I see. What about immunization?"
- *General Talent*: "From the information received from Dr Clever's team, the SPV-1 vaccine is effective. Some testing remains to be done for the Rash vaccine. The SPV-1 is more virulent than previous smallpox strain or the Rash ... it is as lethal, but more easily transmitted from one person to another – it transmits more or less like the flu".

- *Dr Stage*: “If we can provoke some chaos in Lantana’s population, it might bring their government to reconsider their operations in Banksia, or at least slow them down. Obviously, we should only think of that as a means of last resort, but we should be prepared. I will also need to speak to the Attorney-General about our legal position.”
- *General Talent*: “I will instruct Dr Clever to accelerate the testing of the vaccine. With the fighting that took place in the Hills, we have some prisoners who have been infected by the Rash. They have been isolated from the others so far.”

This conversation between the President and General Talent was recorded in a memo written by General Talent’s assistant. Later that day, Dr Stage spoke to the Attorney-General about the use of SPV-1. The Attorney-General informed Dr Stage that the question required some research.

3.6 Later in the day, General Talent informed Dr Clever of his conversation with Dr Stage and indicated that Dr Clever’s team could access the infected prisoners if needed for clinical tests. He underlined that the President was keen to have the Rash vaccine tested immediately.

3.7 Under the supervision of Dr Clever, Rash vaccine trials were started immediately. Three vaccines were in various stages of development. “Rash VA” had undergone animal trials and was ready for clinical trials, animal trials were just starting for “Rash VB”, and “Rash VC” had not yet been trialled. Twenty prisoners affected by the Rash were offered to participate in the trial on condition that they signed a waiver stating that they consented to receive a trial vaccine, and that there could be serious complications, including lethal consequences. Each prisoner’s signature was witnessed by a doctor and a civilian witness. On 17 September 2010, twenty prisoners received vaccines, each vaccine being administered to five prisoners and five receiving a placebo.

3.8 Within three days, two of those who received the placebos and three of those who received “Rash VC” had died. Those who received “Rash VB” showed temporary improvement, before one died and the four others continued to show symptoms of the Rash. Those who received “Rash VA” had nearly recovered within five days.

3.9 On the night of the 20 September 2010, an artillery shell exploded near the medical facility used for the trials causing a partial collapse of the wall. A prisoner, one from the group who received the “Rash VC”, managed to escape. However, weakened by the disease, he was not able to leave the city. He was found nearly unconscious in a public park and brought to a local medical clinic by passers-by. The same attack on Rosebud also killed the Attorney-General and key members of his staff who were on their way to meet with Dr Stage about the use of SPV-1.

3.10 After informing General Talent of the result of the trials, Dr Clever was requested through the President's Office to organize the immediate production of the "Rash VA". With the existing production facilities, 200 individual doses could be produced within three days. At least a month would be needed to produce sufficient quantity to meet the immediate needs of the Banksia Armed Forces (BAF) – either to treat those infected or as prophylaxis. After a phone conversation with the President Dr Stage, Dr Clever informed his staff that the first 50 doses were to be shipped to the President's Office as soon as possible.

3.11 On 30 September 2010, General Talent informed the President they had intelligence indicating that the LAF was preparing to launch an assault on Rosebud. He underlined that more information on LAF's preparations was needed to be able to prepare the defence of the city. Access to the areas behind the frontlines was severely constrained given the terrain. General Talent added that some intelligence had already been collected by some PVF members who had been able to sneak back into the city, but more information was needed on the enemy's positions. Disused water pipes that ran under the frontline could be used to access areas behind the frontline. The pipes were narrow, so only youngsters would be able to get through. Moreover, should youngsters get through they were less likely to be spotted once behind enemy lines. Dr Stage suggested to General Talent to call on the PVF to find volunteers among their former "boot camp" trainees.

3.12 Six youngsters aged between 12 and 15 presented themselves to a BAF officer in charge of preparing their mission at a command post accompanied by a PVF member. The officer – reluctant to use of children that look so young for such a difficult mission – sought confirmation from General Talent. The latter confirmed that they were acting under instructions from the Presidency. He instructed the officer in charge to seek from the PVF militant who presented them release forms signed by the parents that indicated that they were 16 years of age. The six volunteers were briefed and supplied with maps and light communication equipment. As night fell on the following day, they penetrated the enemy lines via the pipes and soon after started reporting back on Lantana troop positions. On the same day, the PVF militant forwarded released forms seemingly signed by the parents to the officer in charge. No other official proof of age was provided.

3.13 Dr Rachel Moore, a doctor working at a local medical clinic in Rosebud was asked to treat a man found unconscious in a public park who was very ill. The nurse who had originally received the man at the clinic – Nurse Cloe Smith – mentioned to Dr Moore that the man had said something about "foolishly volunteering for a vaccine trial." At first sight, Dr Moore immediately suspected that the man was infected by the Rash and put him in isolation. Dr Moore conducted a detailed examination of the patient, who was the next day identified as John Lim, the escapee prisoner from

“Group VC”. Lim died the day after his admittance and his body was taken away by PVF militia and returned to the Banks Institute.

3.14 In the following days, over twenty (20) persons presented themselves at the clinic with symptoms of the Rash. Dr Moore contacted the Banks Institute to enquire on the probable source of the epidemic and the availability of vaccine and treatment. She mentioned to Dr Clever that it was unlikely that her patients had been infected through contact with the escaped prisoner in such a short period of time. Many of them had started to have symptoms before the escape. Dr Moore informed Dr Clever that she had notified the Ministry of Health. The Ministry notified the President’s Office of the outbreak. Among the members of the President’s “war council”, suspicion grew that the Rash virus has been voluntarily spread by infiltrated agents from Lantana. Those suspicions were communicated to the President.

3.15 By 10 October 2010, it appeared from the intelligence transmitted by the “PVF volunteers” that the LAF was close to over-running Banksia’s last defences, but were also running low on ammunition but were prepared to commit all their reserve forces. Dr Stage ordered an “all out” counter-attack using all their resources.

3.16 General Talent confirmed with Dr Stage that “all means of last resort” should be put into action, and informed his staff that the President meant that all possible means to defend the city be deployed. General Talent then ordered that six-members of a BAF special operations unit infected by the SPV-1 to be parachuted into the Hills and into Lantana’s capital city, with the objective to spread the virus among those who came into contact. The BAF soldiers were infected late on 24 October 2010 and were parachuted into enemy-held areas two days later. They were assured that they would be provided with the SPV-1 vaccine on their return.

3.17 By 30 October 2010, the Lantana authorities realised that the disease spreading across their capital city and amongst their troops was smallpox. They immediately ordered every infected person into quarantine. Following international media reports on the use of smallpox virus and the condemnations that followed – including threats of military intervention by members of the UN Security Council – both sides concluded a truce. Lantana agreed to withdraw its forces and Banksia agreed to provide supplies of the SPV-1 vaccine.

3.18 The Security Council, acting under Chapter VII of the UN Charter, “decided to refer the situation prevailing in Banksia since 1 August 2010 to the Prosecutor of the International Criminal Court”. It also “decided that the Government of Lantana and the Government of Banksia would cooperate fully with the Court and Prosecutor, providing them with any necessary assistance.”

3.19 In December 2010, following a request by the ICC Prosecutor, Banksia’ authorities forwarded a police investigation report containing a statement of Nurse

Cloe Smith collected by a police officer stating that she “witnessed a Lantana prisoner telling Dr Moore that he had been threatened if he did not participate in the vaccine trials.” The report also mentioned that Ms Cloe Smith had passed away a few days after the statement was taken. Finally, the report indicated that Dr Moore’s records in relation to the treatment of infected patients in October 2010 could not be disclosed under Banksia’s Law on the protection of personal medical data. Several weeks later Dr Moore’s medical records, including those covering treatment of John Lim and other persons infected by the Rash were delivered to the Prosecutor’s Office by an undisclosed source.

3.20 On 25 August 2011, on the application of the Prosecutor, the ICC Pre-Trial Chamber – being satisfied that there were reasonable grounds to believe that the suspect had committed war crimes – issued a summons requiring President A Stage (see the charges below) to appear before the court. Dr Stage declared, through the national media, that he did not accept the jurisdiction of the ICC. He claimed that the whole process of research and development on the treatment and vaccine of the smallpox/Rash viruses, including the trials, was internally investigated as it involved questions of national security. Therefore, the court had no jurisdiction.

3.21 Six months later, Dr Stage, while not formally acknowledging the jurisdiction of the Court, retained legal counsel. On 25 May 2012, his Defence Counsel wrote to the ICC Prosecutor seeking confirmation that the Defence had been served all documents held by the Prosecutor in the case against Dr Stage. He also requested information on the steps taken, if any, by the Office of the Prosecutor to confirm the veracity of the statement that Nurse Cloe Smith died as alleged.

3.22 The Prosecutor informed the Defence counsel that, pursuant to Article 61 of the ICC Statute, President A Stage

- has been duly informed that a hearing to confirm the charges was to be held will be held from 14 to 16 March 2013;
- has been duly provided with a copy of the document containing the charges on which the Prosecutor intends to bring to trial; and
- has been duly informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Prosecutor added that:

- Dr Moore’s records, which was provided to the Defence Counsel, had been partially redacted in order to protect sensitive personal information covered by the physician–patient privilege;
- For the purpose of the confirmation of the charges, some of the witnesses’ statements would remain anonymous at the request of the witnesses themselves who expressed fears for their well-being (*this is the case for the memo mentioned in § 3.5*). It will remain for the Court to decide at the

trial whether the identity of those witnesses should be revealed to the Court and the Defence at that later stage;

- All the available document and information in relation to Ms Cloe Smith's statement and death have been provided to the Defence Counsel.

4. Treaties

4.1 At all material times, Banksia and Lantana were parties to the following treaties (and those treaties were in force for these States):

- 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare
- 1949 Geneva Conventions (I-IV)
- 1969 Vienna Convention on the Law of Treaties
- 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
- 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
- 1977 Additional Protocols (I and II) to the 1949 Geneva Conventions.

Upon accession to the 1925 Protocol, Lantana made the following reservations. No State made objections to the reservations.

"(1) The said Protocol is only binding on the Government of the Republic of Lantana as regards States which have signed and ratified it or which may accede to it;

(2) The said Protocol shall ipso facto cease to be binding on the Government of the Republic of Lantana in regard to any enemy State whose armed forces or whose allies fail to respect the prohibitions laid down in the Protocol."

The Republic of Banksia acceded to the 1925 Protocol without reservation.

4.2 **For the purpose of the case**, the "use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices of bacteriological methods of warfare as prohibited under the *1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*" has been annexed to the ICC Statute (Article 8(2)(b)(xx)) in accordance with the procedure provided in Article 121 and 123 of the ICC Statute.

5. Charges

The Prosecutor intends to seek the trial of Dr Andrew Stage on the following charges:

- First count:

In respect of the use of prisoners for biological experimentation, in particular for the development of the Rash vaccines,

- on the basis of superior responsibility, the war crime of torture or inhumane treatment, including biological experiments within the meaning of Articles 8(2)(a)(ii) and 28 (a) of the ICC Statute.

- Second count:

In respect of the recruitment and use of persons under 15 years to collect military intelligence in areas controlled by the adverse party,

- on the basis of individual responsibility, the war crime of enlisting children under the age of fifteen years and using them to participate actively in hostilities within the meaning of Articles 8(2)(b)(xxvi) and 25 (3) (a) of the ICC Statute.

- Third count:

In respect of the use of biological agents as a method of warfare:

- on the basis of individual criminal responsibility, the war crime of employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict within the meaning of article 8(2)(b)(xx) and 25 (3) (c) of the ICC Statute.

6. Position of the Prosecution and Defence

6.1 The position of the Prosecutor is that:

- (a) at all material times, there was an international armed conflict taking place between the Republic of Lantana and the Republic of Banksia;
- (b) there are substantial grounds to believe that Dr Andrew Stage has committed the alleged charges;
- (c) that Dr Andrew Stage has no defence to any of the charges;

6.2 The position of the Defence is that:

- (a) the case is not admissible since the facts outlined are being investigated by the relevant national authorities;

- (b) while the conflict was an international armed conflict the jurisdiction of the ICC is not warranted;
- (c) the prosecutor has not complied with the provisions of article 67;

In the alternative, Dr Andrew Stage has a defence to all charges.