

2004 PHILIP C. JESSUP
INTERNATIONAL MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PLALACE
THE HAGUE, NETHERLANDS

CASE CONCERNING THE INTERNATIONAL
CRIMINAL COURT

THE KINGDOM OF ARKAM

Applicant

v.

THE STATE OF RANDOLFIA

Respondent

SPRING TERM 2004

MEMORIAL FOR THE RESPONDENT

University of Queensland, Australia

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I. STATEMENT OF JURISDICTION

The Kingdom of Arkam and the State of Randolfia have agreed to submit their dispute to the International Court of Justice. The Court has jurisdiction to decide the case pursuant to Article 36(1) of the Statute of the International Court of Justice.

II. QUESTIONS PRESENTED

1. Whether Randolfia's decision to surrender Lieutenant Joseph Curwen to the custody of the International Criminal Court would be consistent with international law?
2. Whether Randolfia's decision to surrender Dr Herbert West to the custody of the International Criminal Court would be consistent with international law?

III. STATEMENT OF FACTS

In January 2003, a trans-border conflict erupted in the Kingdom of Arkam and the Kingdom of Leng. There have been centuries of tension and periodic conflict between ethnic Arkamians and ethnic Lengians. Following the outbreak of conflict in 2003, high-level delegations from both States attended an international peace conference, convened by the United Nations, in the Randolfian capital of Cimmeria. Randolfia shares a common border with both States. The Cimmeria Peace Agreement was brokered on 14 February and concluded the conflict in Arkam. The conflict in Leng continued.

In accordance with the terms of the Peace Agreement, the government of Arkam established a Truth and Reconciliation Commission (TRC) which commenced operation on April 15, 2003. The TRC was modelled on the South African Truth and Reconciliation Commission. There are however, differences between the Arkamian and South African Commissions.

During the early months of 2003, sporadic fighting continued in the ethnically-mixed Lengian province of Yuggott. The conflict was spurred by the Greater Arkamian Liberation Army (GALA), a militia dedicated to the secession of Yuggott from Leng and its unification with Arkam.

On May 1, 2003, the *Rome Statute of the International Criminal Court* (Rome Statute) entered into force for Leng and Randolfia. Arkam is not a party to the Statute.

Dr Herbert West, an Arkamian national, is a leader of GALA. In April 2003, West recorded an audiotape in Arkam, in which he urged his "Arkamian brothers and sisters to rid Yuggott ... of its Lengian occupiers. Eliminate them all: men, women and children. Eliminate them all!" West passed the audiotape to another member of GALA. The recording was subsequently duplicated and

circulated. Between May 15 and May 25, 2003, the recording was broadcast repeatedly on Radio Yuggott, a private radio station controlled by members of GALA which has supported GALA's goals in its broadcasts.

On May 16, 2003, bands of ethnic Arkamians began to conduct a series of raids in Yuggott. By the end of May, nearly ten percent of the Lengian population of Yuggott had been massacred. Local newspapers surmised that the raids were inspired by West. West then subsequently traveled to Randolfia.

On June 17, 2003, the Lengian ambassador to the United Nations formally requested that the UN Security Council authorise the deployment of troops to Yuggott. On June 20, the Security Council adopted Resolution 2241 which provided for the IFLEN multilateral peacekeeping force. Operative Paragraph 7 of Resolution 2241 included provisions concerning the jurisdiction of the ICC. The paragraph granted exclusive jurisdiction to contributing States over their nationals, if those contributing States were not party to the Rome Statute. Several states expressed concerns about this paragraph. Five members of the Security Council abstained from the vote on Resolution 2241.

Lieutenant Joseph Curwen, an Arkamian national, was a member of the IFLEN peacekeeping mission. On June 28, 2003, GALA forces attacked the IFLEN platoon under Curwen's command. Curwen ordered the remaining members of his platoon to attack and destroy Exhamtown, which was purported to be a GALA stronghold. During the attack, which later became known as the "Massacre at Exhamtown", 200 unarmed civilians were killed. On June 30, GALA and the Lengian government agreed to a UN monitored cease-fire.

As a result of his involvement in the massacre, Curwen was dismissed from IFLEN, and subsequently ordered to return home to Arkam. On July 3, Curwen was subpoenaed to appear before the Arkamian TRC and promptly left Arkam to visit family in Randolfia. His departure from Arkam was not forbidden by the subpoena or by Arkamian law generally.

Both West and Curwen were arrested in Randolfia for minor offences and were indicted in accordance with Randolfian law. Randolfia has not enacted municipal laws criminalising genocide, crimes against humanity, or war crimes committed by non-Randolfian nationals outside of its borders. Thus on July 25, 2003, the Randolfian Minister of Justice dispatched a communiqué to the Registrar of the ICC, requesting that the Court exercise jurisdiction over Curwen and West to the custody of the ICC.

Arrest warrants for West and Curwen were issued by the ICC on September 9, 2003. Curwen has been charged under Articles 8(2)(a), 8(2)(b), 8(2)(c) and 8(2)(e) of the Rome Statute. West has been charged under Articles 6(a), 25(3)(b), 25(3)(e), 25(3)(f), and 28 of the Rome Statute. On the same day, the King of Arkam warned the President of Randolfia that the surrender of West and Curwen to the custody of the ICC would result in an immediate disruption of economic and diplomatic relations between the two States.

The potentially crippling economic consequences of this disruption precipitated diplomatic negotiations between the foreign ministers of Arkam and Randolfia. These negotiations concluded with an agreement to submit the dispute to the International Court of Justice. Leng has declined to intervene in the matter.

IV. SUMMARY OF PLEADINGS

- A. The International Court of Justice has jurisdiction to review the operation of United Nations Security Council Resolutions. The exercise of power by the Security Council is limited by the principles and purposes of the United Nations Charter and general international law. Randolfia has no obligation to comply with Resolutions 1487 or 2241. The assertion of exclusive jurisdiction by Arkam through its TRC would undermine the *jus cogens* prohibition of war crimes. Therefore, Resolution 2241 is not binding upon Randolfia. Resolution 1487, which invokes the Rome Statute, is not binding upon Randolfia due to its inconsistency with that Statute.
- B. The surrender of Curwen to the ICC is consistent with the *Vienna Convention on the Law of Treaties* and customary international law. The Rome Statute does not create obligations for Arkam. The surrender of Curwen to the ICC does not abrogate Arkam's rights. Accordingly, the surrender of Curwen does not violate of the principle of *pacta tertiis nec nocent nec prosunt*.
- C. The surrender of Curwen to the ICC would not violate the principle of complementarity. An investigation of Curwen by the Arkamian TRC is incompatible with a genuine willingness to investigate or prosecute. Furthermore, a Randolfian surrender of Curwen to the ICC would not give rise to State responsibility.
- D. The issue of jurisdiction of the ICC is distinct from the merits of any claim of criminal responsibility before the ICC. Consequently, it is only necessary for the International Court of Justice to be satisfied that there is a sufficiently plausible case of ICC jurisdiction in order to justify the surrender of West to the ICC. There is a sufficiently plausible case that the crimes for which West is responsible occurred within the territory of Leng. This satisfies the nexus requirement.
- E. There is a sufficiently plausible case that West's acts fall within the temporal jurisdiction of the ICC. He is charged with responsibility for the genocide, which occurred in Yuggott after the entry into force of the Rome Statute for Leng. Furthermore, West's conduct

constitutes continuing crimes, which fall within the temporal jurisdiction of the ICC.

- F. In order to justify the surrender of West to the ICC, it is only necessary to establish a sufficiently plausible case that a crime within the jurisdiction of the ICC has occurred. Genocide has occurred in Yuggott. While it is not necessary for this Court to establish West's individual criminal responsibility, there is sufficient evidence to support each of the charges against West under Articles 25 and 28 of the Rome Statute.

V. PLEADINGS

A. Randolfia's Decision to Surrender Joseph Curwen to the Custody of the International Criminal Court is Consistent with International Law.

1. Arkam Does Not Have Exclusive Jurisdiction Over Curwen.

Randolfia has no obligation under United Nations Security Council Resolutions 1487 or 2241 to recognise Arkam's claim to exclusive jurisdiction over Curwen. The International Court of Justice has jurisdiction to review Security Council resolutions in order to determine the nature of obligations created therein. Curwen has been charged by the International Criminal Court (ICC) with war crimes. The prohibition of war crimes is a rule of *jus cogens*. States are obliged under international law to extradite or prosecute (*aut dedere aut judicare*) persons accused of war crimes. The granting of an amnesty to Curwen by the Arkamian Truth and Reconciliation Commission (TRC) would violate these obligations. Recognition by this Court of Arkam's claim to exclusive jurisdiction would therefore undermine the obligations to prohibit war crimes and to extradite or prosecute persons accused of such crimes. Resolutions 1487 and 2241 are not binding upon Randolfia to the extent that they conflict with these obligations.

a. The International Court of Justice has Jurisdiction to Review the Operation of Security Council Resolutions.

Security Council resolutions are subject to international law.¹ Obligations created by the Security Council are limited by the purposes and principles of the United Nations Charter and rules of general international law.² The obligations under Article 25³ to carry out decisions of the Security Council are limited to those decisions made in accordance with the Charter.⁴ The International Court of Justice, as the principal judicial organ of the United Nations, has jurisdiction to review obligations created under the Charter.⁵

1. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U. S.), 1998 I.C.J. No. 89 ¶ 4 (Feb. 27), http://icj-cij.org/icjwww/idocket/ilus/ilusjudgement/ilus_ijudgement_980227.htm (Rezek, J. separate opinion); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U. K.), 1992 I.C.J. No. 88 ¶¶ 24-26 (April 14), http://www.icj-cij.org/icjwww/idocket/iluk_iorder_920414.html (Bedjaoui, J., dissenting); Libyan Arab Jamahiriya v. U. K., 1992 I.C.J. at 171, 174-75 (Weeramantry, J., dissenting); Legal Consequences for State of the Continued Presence of South Africa in Namibia (South West Afr.) Notwithstanding Security Council Resolution, 1971 I.C.J. 16, 294, 340 (June 21) (Fitzmaurice, J., dissenting; Gros, J., dissenting); See Conditions of Admissions of a State to Membership of the United Nations, 1948 I.C.J. 57, 64 (May 28) (advisory opinion); Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Prosecutor v. Dusko Tadic), 1995 I.C.T.Y. No. IT-94-1-AR72 ¶¶ 32-34 (Oct. 2), <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>; Lauterpacht, E., *The Legal Effect of Illegal Acts of International Organisations*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW, ESSAYS IN HONOUR OF LORD MCNAIR 89 (Stevens & Sons ed., 1965); See Thomas M. Franck, *The Security Council and "Threats to The Peace." Some Remarks on Remarkable Developments*, in THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL: PEACE-KEEPING AND PEACE-BUILDING: WORKSHOP, 84 (Rene-Jean Dupuy ed. 1993); See John Dugard, *Judicial Review of Sanctions*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 83, 85-6 (Vera Gowlland-Debbas ed. 2001); Michael Bothe, *Les Limites des Pouvoirs du Conseil de Sécurité*, in LE DEVELOPEMENT DU ROLE DU CONSEIL DE SECURITE, PEACE-KEEPING AND PEACE-BUILDING 67, 69 (Rene-Jean Dupuy ed. 1993); Secretary-General's Statement to the Security Council, in Security Council Official Record Second Year, No.3, Ninety-First Meeting, 44-45.

2. U.N. CHARTER arts. 2 ¶ 7, 24 ¶ 2; See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. No. 91 ¶¶ 100-01 (Sept. 13), http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyorders/IBHY_iorder_19930913.htm (Lauterpacht, J. separate opinion).

3. U.N. CHARTER art. 25; Repertory of Practice of United Nations Organs; Extracts Relating to Article 25 of the Charter of the United Nations Practice, Supp. 5, Vol. 2, 34, 38 ¶15 (1970- 78); *South West Afr.*, 1971 I.C.J. at 53; Libyan Arab Jamahiriya v. U. K., 1992 I.C.J. ¶ 28; See LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 209 (George W. Keeton, et al. eds., 2nd ed. 1949).

4. East Timor (Port. v. Austl.), 1995 I.C.J. 90 ¶ 155 (Jun. 30) (Weeramantry, J., dissenting); Libyan Arab Jamahiriya v. U. S., 1998 I.C.J. at 175 (Weeramantry, J., dissenting).

5. U.N. CHARTER art. 92; Libyan Arab Jamahiriya v. U. S., 1998 I.C.J. at 152, 154, ¶ 3 (Rezek, J., separate opinion); See Bos. & Herz. v. Yugo., 1993 I.C.J. at 439 ¶ 99 (Lauterpacht, J., separate opinion); *South West Afr.*, 1971 I.C.J. at 303-304, 143-145 (Fitzmaurice, J., dissenting; Onyeama, J., separate opinion); East Timor (Port. v. Austl.), 1995 I.C.J. 90 ¶ 251 (Jun. 30) (Skubiszewski, J., dissenting).

b. Grounds of Review —Purposes and Principles of the United Nations Charter and Rules of General International law

The third preambular paragraph of the United Nations Charter refers to the determination “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”⁶ Articles 1 and 2 of the Charter address the purposes of the UN, and require that organs and members of the UN act “in conformity with the principles of justice and international law ... in the settlement of international disputes.”⁷

Principles of justice and international law require that States prohibit the commission of war crimes, and extradite or prosecute those accused of war crimes.⁸ Romania and Armenia, as parties to the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Compromis ¶ 30), are obliged to extradite or prosecute those accused of war crimes.⁹ In particular, such an obligation exists in relation to the crime of intentionally directing attacks against a civilian population.¹⁰ Furthermore, under general international law there is a duty to extradite or prosecute individuals accused of war crimes committed in both international¹¹ and non-international¹² armed conflicts.

6. U.N. CHARTER pmbi.

7. U.N. CHARTER art. 1 ¶ 1.

8. *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. GAOR, 28th Sess., pmbi. (1973); *Question of the Punishment of War Criminals and Persons who have committed Crimes Against Humanity*, U.N. GAOR, 26th Sess., 2025th mtg. at 88, U.N. Doc. A/2840 (1971); U.N. GAOR, Hum. Rts. Comm., 57th Sess., 56th mtg. ¶ 11, U.N. Doc. E/CN.4/2002/200 (2002), <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/cd893dbd5bbded7c1256bab0051565d?OpenDocument>.htm; See Thomas Buergenthal, *To Respect and Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 77 (Louis Henkin ed. 1981); *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 ¶ 113 (June 27); M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 52 (1995); See generally Thomas Buergenthal, *Inter-American Court of Human Rights: Judgement in Velasquez Rodriguez Case (Forced Disappearance and Death of Individual in Honduras)* 28 I.L.M. 291 (1989); *The Princeton Principles on Universal Jurisdiction*, Princ. 7, PROGRAM IN LAW AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY, 2001, <http://www.law.uc.edu/morgan/newsdir/univjuris.htm>; *South West Afr.*, 1971 I.C.J. at 143-45 (Onyeama J., separate opinion).

9. Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 146, 75 U.N.T.S. 287.

10. ROME STATUTE, art. 8(2)(b)(i); See generally *supra* note 9 and accompanying text; *Illegality of the Threat or Use of Nuclear Weapons* Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).

11. See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Oct. 21, 1950, art. 49, 75 U.N.T.S. 970; Geneva Convention for the

Resolution 2241 purports to confer exclusive jurisdiction on States not party to the *Rome Statute of the International Criminal Court* (Rome Statute) in relation to crimes committed by their nationals whilst serving in the IFLEN peacekeeping mission. The prohibition of war crimes is a peremptory norm (*jus cogens*) of international law.¹³ Article 103,¹⁴ which addresses conflicts between the Charter and other treaty obligations, does not apply to conflicts involving rules of general international law.¹⁵ *A fortiori*, Article 103 has no application in relation to peremptory norms.¹⁶

The Arkamian TRC was established on March 1, 2003 (Compromis ¶7). Curwen ordered the destruction of Exhamtown on June 29, 2003 (Compromis ¶ 17). This assertion of jurisdiction in a prospective manner by the Arkamian TRC in relation to Curwen is contrary to Arkam's obligation to prohibit war crimes. Thus, Resolution 2241 effectively obliges member States having custody of an accused to become "supporters"¹⁷ of Arkam's non-fulfilment of its *jus cogens* obligation to prohibit war crimes. Notwithstanding Articles 25 and 103 of the United Nations Charter, "in strict logic"¹⁸ Resolution 2241 is not binding on Randolfia.

Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, 50, 75 U.N.T.S. 971, http://www.unhchr.ch/html/menu3/b/q_genev2.htm; See Geneva Convention Relative to the Treatment of Prisoners of War; Aug. 12, 1949, art. 129, 75 U.N.T.S. 972, <http://www.unhchr.ch/html/menu3/b/91.htm>; See Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belg.), 2002 I.C.J. No. 121 ¶¶ 59, 61-62 (Feb. 14) (Van Den Wyngaert, J. dissenting); Draft Code of Crimes Against Peace and Security of Mankind 1996, I.L.C. art. 9, 20 (1996), <http://www.un.org/law/ilc/texts/dcode.htm>; See BASSIOUNI, *supra* note 8, at 20.

12. John Dugard, *Dealing With Crimes of a Past Regime*, 12 LEIDEN J. INT'L L., 1001, 1003 (1999); See G.A. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/Res/955 (1994); *Dusko Tadic*, 1995 I.C.T.Y. ¶¶ 32-34; Draft Code of Crimes Against Peace and Security of Mankind 1996, I.L.C. art. 20 ¶14.

13. See *Illegality of the Threat or Use of Nuclear Weapons Advisory Opinion*, 1996 I.C.J. at 273, 496, 574 (Weeramantry, J., dissenting; Koroma, J., dissenting); *Prosecutor v. Kupreskic et al.*, 2000 I.C.T.Y. No. IT-95-16-T ¶ 520 (Jan. 14) (Judgment); M. Cherif Bassiouni, *Normative Framework of International Humanitarian Law*, 8 TRANSNAT'L L. & CONTEMPOR. PROBS., 199, 201 (1998); M. Cherif Bassiouni, *International Crime: Jus Cogens and Obligatio Erga Omnes*, 59 AUT LAW & CONTEMP. PROBS. 63, at 68 (1996) (citing U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/Res/955 (1994) & U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993)); LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW, HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 621-22 (1988).

14. U.N. Charter art. 103.

15. *Libyan Arab Jamahiriya v. U. S.*, 1998 I.C.J. at 152 ¶ 2 (Rezek, J. separate opinion).

16. See *Bosn. & Herz. v. Yugo.*, 1993 I.C.J. at 440 ¶100 (Lauterpacht, J. separate opinion).

17. See *Bosn. & Herz. v. Yugo.*, 1993 I.C.J. at 441 ¶102 (Lauterpacht, J. separate opinion).

18. See *id.* ¶ 103.

c. Resolution 1487 is Not Applicable

The Security Council, in paragraph one of Resolution 1487, adopted in purported reliance on Article 16 of the Rome Statute, “requests” that the ICC not commence investigations or prosecutions of members of UN peacekeeping missions for a renewable period of twelve months, commencing July 1, 2003.¹⁹ The Security Council in paragraph three of the same Resolution decided that member States take no action inconsistent with such a Security Council request, or with their international obligations. As paragraph one explicitly envisages consistency with Article 16 of the Rome Statute, the scope of any obligation imposed by paragraph three of the resolution is dependent on such consistency. It is inconsistent with the intention of the drafters of Article 16 of the Rome Statute to allow a broad, prospective deferral of ICC jurisdiction in respect of a general class of conflicts.²⁰ Article 16 only envisages a Security Council request for deferral of investigation or prosecution on a case-by-case basis.²¹ The request contained in Resolution 1487 is inconsistent with Article 16. Therefore, Randolfia’s surrender of Curwen to the ICC would not be inconsistent with paragraph three of the Resolution. Furthermore, Randolfia has an obligation under international law to surrender Curwen to the ICC [Rome Statute, Article 89(1)].

2. The surrender of Curwen to the ICC is Consistent with the Vienna Convention on the Law of Treaties and Customary International Law.

It is a general rule of customary international law that a treaty cannot impose obligations or confer rights on States not party to the treaty without their consent (*pacta tertiis nec nocent nec prosunt*).²² Article 34 of the *Vienna Convention on the Law of Treaties* (VCLT) embodies this principle. For the purposes of the *pacta tertiis* rule, however, non-party States have no grounds of

19. U.N. SCOR, 58th Sess., 4772d mtg. ¶ 1, U.N. Doc. S/Res/1487 (2003).

20. *The Unlawful Attempt By The Security Council to Give U.S. Citizens Permanent Impunity from International Justice* 47, AMNESTY INTERNATIONAL: INTERNATIONAL CRIMINAL COURT, A.I. Index: I.O.R. 40/006/2003 (May 2003).

21. See U.N. SCOR, 57th Sess., 4568th mtg. at 6, 7, 9, U.N. Doc S/PV.4568 (2002); See U.N. SCOR, 58th Sess., 4772nd mtg. at 2, 5-7, 9, 15, 18, 20, U.N. Doc. S/PV4772 (2003) (concerning the renewal by the Security Council. of Sess. 1422 (2002), art. 16 of the Rome Statute).

22. German Interests in Polish Upper Silesia (Judgment No. 7) 1926 P.C.I.J. (ser.A) No. 7, at 29 (May 25); See Free Zones of Upper Savoy and the District of Gex (Judgments, Orders and Advisory Opinions) 1932 P.C.I.J. (ser.A/B) No.46, at 141 (Jun. 7); See Territorial Jurisdiction of the International Commission of the River Oder (Judgment No. 16) 1929 P.C.I.J. (ser.A) No.23, at 20-22 (Sept. 10); Island of Palmas Case, II R.I.A.A. 831, 842, 850, 870 (1925).

complaint²³ regarding “incidentally unfavourable effects of lawful and valid treaties.”²⁴

The Rome Statute does not create obligations for Arkam. The obligations created by the Rome Statute are expressly limited to State parties.²⁵ The principle of complementarity recognizes Arkam’s entitlement to exercise criminal jurisdiction over Curwen, but does not impose any obligations on Arkam.²⁶ To the extent that Arkam is obliged to extradite or prosecute persons accused of war crimes, this is a pre-existing obligation under general international law.

The surrender of a national of a non-party State to the ICC does not violate the *pacta tertiis* rule. States are entitled under customary international law to exercise jurisdiction over foreign nationals without the consent of the State of nationality.²⁷ States are entitled to delegate this jurisdiction to an international tribunal.²⁸ States are also entitled to extradite foreign nationals to third States without the consent of the State of nationality of an accused.²⁹ The incidental and potentially unfavorable effect of a Randolfian surrender of Curwen to the ICC is consistent with international law.

A foreign visiting military force does not enjoy immunity from the jurisdiction of the receiving state.³⁰ This means that Arkam is unable to claim that the Rome Statute abrogates its rights under the rules of sovereign immunity.

23. FITZMAURICE, G, 1960 YBILC II, 84; See SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 98-100 (Manchester University Press, 2d ed, 1984) (1973).

24. FITZMAURICE, *id.* at 100-101.

25. See generally ROME STATUTE, pt 9.

26. See *id.* at art. 17, 18.

27. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882-23 (2d Cir. 1980); *United States v. Yunis*, 724 F.2d 1086, 1092 (D.C. Cir. 1991); Convention for the Suppression of Unlawful Seizure of Aircraft, Oct. 14, 1971, art. 4, 860 U.N.T.S. 105, <http://www1.umn.edu/humanrts/instree/hague1970.html>; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, art. 5-7, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, arts. 6-7, 1035 U.N.T.S. 167; G.A. Res. 34/146, U.N. GAOR, 34th Sess., arts. 2, 4-5, U.N. Doc. A/34/146 (1979); G.A. Res. 39/46, U.N. GAOR, 39th Sess., arts. 2, 4-5, U.N. Doc. A/39/46 (1984), <http://www.un.org/documents/ga/res/39/a39r046.htm>; Convention on Psychotropic Substances, Feb. 21, 1971, arts. 2(7)(b)(vi), 2(7)(c)(v), 2(7)(d)(iii), 21-22, 1019 U.N.T.S. 174; G.A. Res. 52/164, U.N. GAOR, 52d Sess., arts. 3, 4, 6, U.N. Doc. A/52/164 (1997), <http://www.un.org/ga/documents/gares52/res521164.htm>.

28. See JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, NUREMBERG, 30 SEPTEMBER AND 1 OCTOBER, 1946, 38 (London His Majesty’s Stationery Office 1946); See Michael P. Scharf, *The United States and the International Criminal Court Articles: The ICC’s Jurisdiction over the Nationals of Non-Party States* 64 WTRL. & CONTEMP. PROB. 67, 103-104 (2001).

29. I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 130 (1971).

30. ROBERT JENNINGS, & ARTHUR WATTS, OPPENHEIM’S INTERNATIONAL LAW 1157 (9th ed. 1992).

Arkam is also unable to claim that the surrender of Curwen undermines a right to exercise exclusive jurisdiction under Security Council Resolution 2241. To the extent that any right was created by Resolution 2241, Arkam, by its initiation of an inappropriate TRC process, has relinquished any such right.

3. The Exercise of Jurisdiction over Curwen Does Not Violate the Principle of Complementarity.

Arkam contends, in the alternative, that “given the ongoing investigation by the Arkamian TRC into the acts of Mr. Curwen, ... the exercise of jurisdiction over him by the ICC would violate the principle of complementarity” (Compromis ¶ 31), and that therefore any prosecution by the ICC is inadmissible. In order to succeed on the issue of admissibility, Arkam must establish that the case against Curwen is inadmissible under the Rome Statute, and that the surrender of an accused in relation to an inadmissible case would give rise to State responsibility. The obligation to surrender and the issue of admissibility are distinct legal questions.

The issue of admissibility raised by Arkam is addressed in the Rome Statute in Article 17.³¹ Article 17(1)(a) provides that a case is inadmissible before the ICC where the case is being “investigated or prosecuted” by a State having jurisdiction over the matter.³² A case is admissible, where a State is “unwilling or unable genuinely”³³ to carry out an investigation or prosecution.

In order to determine whether there is an unwillingness to investigate or prosecute for the purposes of the Rome Statute, the ICC is required to consider several factors. These include: whether national proceedings have been taken for the purpose of shielding the accused from criminal responsibility and whether the proceedings are being conducted independently or impartially, and consistently with an intent to bring the accused to justice.³⁴

a. Investigations by Truth and Reconciliation Commissions Do Not Preclude Admissibility of Cases Before the ICC.

For the purposes of Article 17, an investigation by a TRC is not sufficient to render a case inadmissible before the ICC.³⁵ An “investigation” within the terms of Article 17(1)(a) must be undertaken with a view to subjecting an

31. ROME STATUTE, art. 17(1)(a).

32. *Id.*

33. *Id.*

34. ROME STATUTE, at art. 17(2).

35. See John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions*, in VOLUME I THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY 701-2 (Antonio Cassese, et al. eds. 2002).

accused to criminal prosecution.³⁶ The preamble to the Rome Statute affirms the need for effective prosecution of international crimes, and recalls the duty of every State to exercise its criminal jurisdiction.³⁷ If Curwen makes full disclosure to the TRC³⁸ then he will be granted amnesty in respect of his alleged war crimes (Compromis ¶ 7). The preclusion of the possibility of prosecution is incompatible with a genuine willingness to investigate.

b. Investigation of Curwen by the Arkamian TRC Does Not Preclude Admissibility of his Case Before the ICC.

Furthermore, in relation to the Arkamian TRC, the following factors evince an unwillingness to investigate or prosecute. First, unlike the South African³⁹ and other TRCs,⁴⁰ which have only been able to investigate crimes that have occurred prior to their establishment, the jurisdiction of the Arkamian TRC is prospective (Clarification 6). The TRC was established on March 1, 2003 (Compromis ¶ 7). Curwen ordered the destruction of Exhamtown on June 29, 2003 (Compromis ¶ 17). The prospective jurisdiction of the Arkamian TRC creates *carte blanche* to commit war crimes.

Secondly, the purported exercise of extraterritorial jurisdiction by the Arkamian TRC in respect of crimes committed against Lengian nationals, and the evidentiary difficulties created thereby,⁴¹ demonstrate the inappropriateness of an exercise of TRC jurisdiction in these circumstances. Granting amnesty to Curwen is not conducive to the national healing and reconciliation for which the Arkamian TRC was established. The determination of the Arkamian authorities to proceed with the TRC process notwithstanding these considerations demonstrates an unwillingness genuinely to investigate or prosecute.

36. See Rome Statute of the International Criminal Court, pmbl., art. 20; See John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 41, 77 (Roy S. Lee, ed. 1999); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 499-500 (2003).

37. See DUGARD, *supra* note 34 at 701; Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 522, (1999); Rome Statute of the International Criminal Court, pmbl.

38. See Promotion of National Unity and Reconciliation Act, No 34 § 20(1)(c) (South Africa) (1995), <http://www.doj.gov.za/trc/legal/act9534.htm>.

39. *Id.* § 20(2).

40. Law on General Amnesty for Consolidation of Peace Decree, No. 486 1993, art. 1 (El Sal.); Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999, art. 26, http://www.usip.org/library/pa/sl/sierra_leone_07071999_toc.html; The Commissions of Inquiry Act Legal Notice No.5 (May 16 1986) (Uganda); U.N. SCOR, 48th Sess., 13-14, U.N. Doc. A/48/954-S/1994/751 (1994); L'arrêt présidentiel du 28 Mars 1995 (Haiti) art.2.

41. ROBINSON, *supra* note 35, at 501-02; See HOLMES, *supra* note 35, at 49.

c. *The Surrender of Curwen to the ICC Does Not Give Rise to State Responsibility*

The applicant claims that surrender of Curwen to the ICC would be illegal under international law. As noted above, admissibility and surrender are discrete legal issues. Even if Curwen's case is inadmissible before the ICC, a Randolfian surrender of Curwen would not be wrongful under international law. Therefore, it does not give rise to State responsibility.

B. *Randolfia's Decision to Surrender Dr. Herbert West to the Custody of the International Criminal Court Would Be Consistent With International Law.*

The ICC is entitled to exercise jurisdiction over West, as the following jurisdictional requirements are satisfied. First, the conduct in question occurred on the territory of Leng, demonstrating a territorial nexus to a party to the Rome Statute (*ratione loci*). Secondly, the crimes for which West is accused occurred after the entry into force of the Rome Statute for Leng (*ratione temporis*). Finally, West has been charged with responsibility for crimes within the jurisdiction of the ICC (*ratione materiae*). However, before addressing these jurisdictional issues in more detail, it is necessary to consider, as a preliminary matter, the role of this Court in examining the jurisdiction of the ICC.

The issue of the ICC's jurisdiction is distinct from the merits of any claim of criminal responsibility before the ICC. This means Randolfia is not required to establish before this Court that it has an "unassailable legal basis"⁴² for its arguments regarding ICC jurisdiction. Furthermore, the International Court of Justice has drawn a distinction between the determination of its own jurisdiction, and the determination of the jurisdiction of another body.⁴³ This Court considered the jurisdiction of an arbitral body in the *Ambatielos*⁴⁴ case and effectively concluded that a claim of a "sufficiently plausible character"⁴⁵ would establish that body's jurisdiction. Therefore, Randolfia need only establish a sufficiently plausible basis for ICC jurisdiction over West in order to justify his surrender.

42. *Ambatielos Case, Merits: Obligation to Arbitrate (Greece v. U.K. 1953 I.C.J. 10, 18 (May 19)).*

43. *See Id.* at 14.

44. *Id.* at 10-35.

45. *Id.* at 18; *Oil Platforms (Islamic Republic of Iran v. U.S.) 1996 I.C.J. 803 ¶¶ 824, 833, 869 (Dec. 12) (Preliminary Objection) (Shahabuddeen, J., separate opinion; Rigaux, J., separate opinion); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.) (Jurisdiction of the Court and Admissibility of the Application) 1984 I.C.J. 392 ¶ 637 (Nov. 26) (Judge Schwebel, dissenting).*

1. West's Conduct Demonstrates the Necessary Nexus With a State Party to the Rome Statute.

The ICC is entitled to exercise jurisdiction where there is a sufficiently plausible claim that the requirements of Article 12(2) of the Rome Statute have been satisfied. Pursuant to Article 12(2)(a), jurisdiction arises when conduct proscribed under the Rome Statute has occurred on the "territory"⁴⁶ of a State party to the Statute. This requirement of a territorial nexus is based⁴⁷ on the principle of territorial jurisdiction under general international law.⁴⁸ In accordance with the territorial principle, States have jurisdiction to prescribe laws, adjudicate and enforce in relation to crimes committed "in whole or in part" within their territory.⁴⁹ A crime is committed in part within the territory of a State if a constituent element of the crime occurs, or if the crime is consummated, within the State's territory.⁵⁰

The massacres which occurred in the Lengian province of Yuggott (Compromis ¶ 12) constitute genocide within the terms of Article 6(a) of the Rome Statute. This issue is discussed in further detail below. Leng is a party to the Rome Statute (Compromis ¶ 30).

West has been charged (*Corrections* ¶ 2) with ordering, inducing or soliciting genocide⁵¹ as well as command responsibility for genocide.⁵² These offences were all consummated within the territory of Leng when the killing of ethnic Lengians occurred. West has also been charged with direct and public

46. ROME STATUTE, art. 12(2)(a).

47. Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction, in THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 583, 607-08 (Antonio Cassese *et al.*, eds. 2002).

48. See North Atlantic Fisheries Case, Sept. 7, 1910, 11 R.I.A.A. 167, 180; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1)(b) (1987); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987); JENNINGS, *supra* note 29, 458; *Draft Convention on Jurisdiction with Respect to Crime, Introductory Comment & Territorial Jurisdiction* art. 3, 29 AM. J. INT'L L., 435, 443-45, 480 (Supp. 1935), <http://0-heiononline.org.novacat.nova.edu/HOL/Page?handle=hein.journals/ajils29&id=1231&collection=journals&id.htm>.

49. See *Draft Convention on Jurisdiction with Respect to Crime, Introductory Comment & Territorial Jurisdiction, supra* note 48, art. 3, 480, 495; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987).

50. S.S. "Lotus" (Fra. v. Turk.), 1927 P.C.I.J. (ser. A) No.10, at 23 (Sept. 7); See *Draft Convention on Jurisdiction with Respect to Crime, Introductory Comment & Territorial Jurisdiction, supra* note 48, art. 3, 495; JENNINGS, *supra* note 29, at 459-60; F.A. Mann, *Recueil Des Cours, in VOLUME 111 THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW* 83-85 (A.W. Sijthoff, Leyde ed. 1964).

51. See ROME STATUTE, art. 25(3)(b).

52. *Id.* at art. 28.

incitement to genocide⁵³ and attempted genocide.⁵⁴ The consummation of these offences occurred in Leng when the audiotope was broadcast on Radio Yuggott (Compromis ¶ 11). There is a sufficiently plausible case that West has directed the broadcast in Leng, and that he is responsible for conduct that occurred in Leng.

2. West's Actions Fall Within the Temporal Jurisdiction of the International Criminal Court.

In order for the ICC to exercise jurisdiction, there must be a sufficiently plausible claim that the crimes alleged fall within the Court's temporal jurisdiction. Article 11(2) of the Rome Statute provides that "[i]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State."⁵⁵ This Article should be read in conjunction with the general principle of law embodied in Article 24, which prohibits the Rome Statute from having retrospective effect. Article 24 is inapplicable in this case because it only restricts the Statute from having retrospective effect prior to July 1, 2002, the day on which the Statute came into force generally. All the relevant acts of West occurred in 2003.

In April 2003, West recorded the relevant audiotope (Compromis ¶ 10). The Rome Statute entered into force for Leng on May 1, 2003 (Compromis ¶ 9). Radio Yuggott began broadcasting West's audiotope on May 15, 2003 (Compromis ¶ 11). The massacres in Yuggott commenced on May 16, 2003 (Compromis ¶ 12). Notwithstanding the date of the recording, West is charged with responsibility for genocide, which occurred after the entry into force of the Rome Statute with respect to Leng. The ICC's temporal jurisdiction is therefore established.

a. The Charges of Command or Superior Responsibility Are Within the Temporal Jurisdiction of the ICC.

Article 28 of the Rome Statute addresses criminal responsibility of superiors for crimes committed by their subordinates.⁵⁶ West is charged with command or superior responsibility for the massacre of ethnic Lengians, which occurred after the entry into force of the Rome Statute with respect to Leng. Therefore, the ICC has temporal jurisdiction over this charge.

53. *Id.* at art. 25(3)(e).

54. *Id.* at art. 25(3)(f).

55. *Id.* at art. 11(2).

56. ROME STATUTE, art. 28.

b. The Continuing Crimes of Inciting, Ordering, Soliciting, Inducing and Attempted Genocide Are Within the Temporal Jurisdiction of the ICC.

Certain crimes are, by their very nature, continuing.⁵⁷ The International Criminal Tribunal for Rwanda (ICTR), in considering its temporal jurisdiction, has accepted that the crime of conspiracy to commit genocide constitutes a continuing crime.⁵⁸ The Trial Chamber of the ICTR has endorsed⁵⁹ the following passage from a decision of the English House of Lords:

When the conspiratorial agreement has been made, the offence of conspiracy is complete, ... But [that] ... does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged....⁶⁰

The ICTR has applied this reasoning to the crime of incitement to genocide.⁶¹ By parity of reasoning, a similar approach should apply in relation to the crimes of ordering, soliciting or inducing genocide. These crimes continue “to the time of the commission”⁶² of the genocide. The ICC is therefore not precluded from exercising jurisdiction over West as his acts constitute continuing crimes, which resulted in the commission of genocide after the entry into force of the Rome Statute.

57. See *Regina v. Bow Street Stipendiary Magistrate and Others Ex Parte Pinochet Ugarte No.3*, 1 A.C. 147, 153 (2000); See *Stephane Bourgon, Jurisdiction Ratione Temporis*, in *THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 543, 550 (Antonio Cassese, et al. eds. 2002); See *Raul C. Pangalangan, Non-Retroactivity Ratione Personae Art. 24*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE* 467, 471-72 (Otto Triffler ed. 1999).

58. *Hassan Ngeze and Ferdinand Nahimana v. Prosecutor*, I.C.T.R. No. 97-27-AR72, No. I.C.T.R. 96-11-AR72, ICTR App. Ch. (2000), ¶¶ 13-15 (Shahabudeen, J., separate opinion) (Decision on the Interlocutory Appeals); Decision on the Defense Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void AB Initio (*Prosecutor v. Kabiligi and Ntabakuze*), 2000 I.C.T.R. No. 96-34-I ¶ 39 (April 13), file://C:\DOCUME~1\LOCALS~1\Temp\PDD2413T.htm; Decision on the Defense Motions Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment (*Prosecutor v. Nsengiyumva*), 2000 I.C.T.R. No. 96-12-I ¶ 28 (April 13), <http://www.ictor.org/ENGLISH/cases/Nsengiyumva/decisions/dcs20000413.htm>.

59. *Ntabakuze*, 2000 I.C.T.R. ¶ 41; *Nsengiyumva*, 2000 I.C.T.R. ¶ 30.

60. *Director of Public Prosecutions v. Doot*, 1973 A.C. 807, 827.

61. *Prosecutor v. Nahimana*, 2003 I.C.T.R No. 99-52-T ¶ 104 (Dec. 3) (Judgment and Sentence).

62. *Id.*

Furthermore, the charge of attempted genocide also falls within the temporal jurisdiction of the ICC. The broadcast of the audiotape occurred after the Rome Statute came into force for Leng. This broadcast forms a basis for the charge that West is responsible for attempted genocide. The determination of West's role in the broadcast is a matter to be determined on the merits before the ICC. As the charge of attempted genocide is sufficiently plausible, the ICC therefore has temporal jurisdiction.

3. The ICC Has Jurisdiction Over West.

a. The Role of the International Court of Justice in Determining the Jurisdiction of the ICC

This Court was established to adjudicate upon disputes between States, and to provide advisory opinions to certain international organisations.⁶³ It is not empowered to determine individual guilt or innocence. Accordingly, the Respondent need not make submissions on the merits of West's individual criminal responsibility. It is only required to establish a sufficiently plausible case that a crime within the jurisdiction of the ICC has occurred. On this basis, the case against West may then be submitted to the ICC for a determination on its merits. Arguments set out below that appear to relate to the merits "are clearly designed as measures of defence"⁶⁴ which it would be necessary to examine only in the alternative that the Court adopts a standard of proof other than that submitted by the Respondent.

b. ICC Jurisdiction Over the Crime That Occurred in Yuggott.

In order for the ICC to have subject-matter jurisdiction over West, there must be a sufficiently plausible case that a covered crime under Article 5 of the Rome Statute has occurred. Under Article 5, the ICC has jurisdiction with respect to the most serious international crimes, including the crime of genocide. There is ample evidence to establish a sufficiently plausible case that the crime of genocide has occurred in Yuggott.

Pursuant to Article 9 of the Rome Statute, the *Elements of Crimes*⁶⁵ assists the ICC in the interpretation and application of the crime of genocide. The

63. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 34, at 64.

64. Anglo-Iranian Oil Co. Case (U.K. v. Iran) 1952 I.C.J. 93 ¶ 114 (July 22) (Preliminary Objection).

65. *Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes*, UN Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter *Elements of Crime*].

Elements of Crimes elaborates upon Article 6(a) of the Rome Statute, and sets out the following requirements for the crime of genocide:⁶⁶

- I) The perpetrator killed one or more persons.
- II) Such person or persons belonged to a particular national, ethnical, racial or religious group.
- III) The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
- IV) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

(i) The Perpetrator Killed One or More Persons

On May 16, 2003, ethnic Arkamians began to conduct a series of nighttime raids, massacring ethnic Lengians in Yuggott. By the end of May, nearly ten percent of the Lengian population of the province had been killed by the end of May (Compromis ¶ 12). Such killings are sufficient to satisfy this element.

(ii) Such Person or Persons Belonged to a Particular National, Ethnical, Racial or Religious Group.

The massacred Lengians were part of a particular ethnical, racial, and religious group.⁶⁷ Lengians share a common culture, distinctive physical characteristics, and religious beliefs (Compromis ¶ 2, 3; Clarification ¶ 1).

(iii) The Perpetrator Intended to Destroy, in Whole or in Part, That National, Ethnical, Racial or Religious Group.

The ethnic Arkamians who carried out the massacres intended to destroy, in part, the group of ethnic Lengians. There is evidence that they possessed the special intent (*dolus specialis*) required for genocide, “which demands that the

66. *Elements of Crimes*, art. 6(a).

67. See Prosecutor v. Akayesu, 1998 I.C.T.R. No. 96-4-T ¶ 170, 512-15 (Sept. 2) (Judgment), <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>.

perpetrator clearly seeks to produce the act charged”.⁶⁸ Intent may be inferred⁶⁹ from their “words or deeds.”⁷⁰

Intent can be inferred from the fact that the Arkamians conducted a series of night-time raids in several towns in which ethnic Lengians were targeted and massacred.⁷¹ Within three weeks, nearly ten percent of the Lengian population of the province had been killed (Compromis ¶ 12). Intent can also be inferred from evidence that the perpetrators were chanting “Eliminate them all!” while carrying out the massacres.

(iv) The Conduct Took Place in the Context of a Manifest Pattern of Similar Conduct Directed Against That Group or Was Conduct That Could Itself Effect Such Destruction.

This element contains two alternative limbs. The second appear to be satisfied in the present case. Approximately ten percent of the Lengian population of Yuggott was killed within a three week period by ethnic Arkamians. (Compromis ¶ 12). These killings, in themselves, effected the destruction required to constitute genocide.⁷²

4. West’s Criminal Responsibility For Genocide

As noted above, this Court is not empowered to determine individual guilt or innocence. Therefore, for the purposes of determining whether the ICC has subject-matter jurisdiction, it is not for this Court to determine that West is criminally responsible for genocide. It is only necessary to consider whether genocide has occurred. However, should this Court find that West’s individual criminal responsibility under Articles 25 and 28 of the Rome Statute is relevant to the determination of ICC jurisdiction, there is a sufficiently plausible case in support of each of the charges against West.

68. *Id.* ¶ 498.

69. *Elements of Crimes*: General Introduction, *supra* note 65, ¶ 3; Prosecutor v. Goran Jelusic, 2001 I.C.T.Y. No. IT-95-10-A, ¶ 47 (July 5) (Judgment); The Prosecutor v. Milomir Stakic, 2003 I.C.T.Y. No. IT-97-24-T, ¶526 (July 31) (Judgment); Prosecutor v. Dusko Sikirica, 2001 I.C.T.Y. No. IT-95-8 ¶ 61 (Sept. 3) (Judgment on the Defense Motions to Acquit); *See Nahimana*, 2003 I.C.T.R. No. 99-52-T ¶ 957; Prosecutor v. Semanza, 2003 I.C.T.R. No. 97-20-T ¶ 313 (May 15) (Judgment and Sentence); Prosecutor v. Musema, 2000 I.C.T.R. No. 96-13-A ¶ 167 (Jan. 27), <http://www.ictr.org/ENGLISH/cases/Musema/judgement/index.htm> (Judgment and Sentence); Prosecutor v. Rutaganda, 1999 I.C.T.R. No. 96-3 ¶ 63 (Judgment and Sentence), <http://www.ictr.org/ENGLISH/cases/Rutaganda/index.htm>; Prosecutor v. Kayishema and Ruzindana, 1999 I.C.T.R. No. 95-1-T ¶ 93 (May 21), <http://www.ictr.org/ENGLISH/cases/KayRuz/judgement/index.htm> (Judgement); *Akayesu*, 1998 I.C.T.R. No. 96-4-T ¶ 523.

70. *Kayishema*, 1999 I.C.T.R. ¶ 3.

71. *See id.* ¶ 93.

72. *See* Prosecutor v. Radislav Krstic, 2001 I.C.T.Y. No. IT-98-33, ¶ 80-84 (Aug. 2) (Judgment).

West has been charged with responsibility for the crime of genocide that has occurred in Yuggott. A critical requirement of any criminal responsibility for genocide under Article 25 of the Rome Statute is that West possessed the necessary genocidal intent (*dolus specialis*).⁷³ However special intent is not necessary, for the charge of command/superior responsibility under Article 28 of the Rome Statute.

a. Genocidal Intent

There is evidence that West intended to destroy, in part, the distinct group of ethnic Lengians. He possessed the *dolus specialis* required for genocide, “which demands that the perpetrator clearly seeks to produce the act charged.”⁷⁴ In the absence of a confession, the intent of an accused may be inferred from his “words or deeds.” There are two key inferences that may be drawn from West’s actions and words. First, the language in the audiotape evinces an intent to destroy the ethnic Lengians. Secondly, West’s intention to destroy can also be evidenced by the fact that he intended that the audiotape be disseminated.

The language on the audiotape clearly evinces an intention to destroy ethnic Lengians. Ethnic Lengians were deliberately targeted by West’s language by virtue of their membership of a specific group. West urged Arkamians to rid Yuggott of its “Lengian occupiers,” and directed them to “[e]liminate them all: men, women, and children. Eliminate them all!” (Compromis ¶ 10).

Furthermore, West’s intention to destroy may be evidenced by the fact that he has “frequently recorded audiotapes with messages denouncing ethnic Lengians and supporting GALA.” (Clarification ¶ 4). The repetition of destructive or discriminatory acts is a fact from which intention to destroy may be inferred.⁷⁵

West’s intention to disseminate his audiotape can be inferred from his language and from his actions. West specifically addressed his audio recording to “my Arkamian brothers and sisters” (Compromis ¶ 10). By necessary implication, his intention was that the recorded message be communicated to a wider audience than the GALA member to whom he handed the audiotape. The medium through which West communicated his message further demonstrates an intention that the message be widely disseminated. An audio recording can be readily re-produced and re-played.

73. *Id.* ¶¶ 544, 569-580; *Akayesu*, 1998 I.C.T.R. ¶¶ 498-99, 517, 540; *Prosecutor v. Ignace Bagilishema*, 2001 I.C.T.R. No. 95-1A-T ¶¶ 60-62 (Jun. 7), <http://www.ict.org/ENGLISH/cases/Bagilishema/judgement/index.htm> (Judgement); *Musema*, 2000 I.C.T.R. ¶¶ 164-166; *Rutaganda*, 1999 I.C.T.R. ¶¶ 59-61; *Kayishema*, 1999 I.C.T.R. ¶ 91.

74. *Akayesu*, 1998 I.C.T.R. ¶ 498.

75. *Id.* ¶ 524.

West, a GALA leader, passed his audiotape to a fellow member of GALA (Compromis ¶ 10). The tape was played on Radio Yuggott, a station controlled by members of GALA, repeatedly for a ten day period (Compromis ¶ 11). GALA is “organized in a formal hierarchy with corresponding command structures.” (Clarification ¶ 2). These facts are relevant in establishing an intention to disseminate, from which an intention to destroy may be inferred.

b. Charges Pursuant to Article 25 and Article 28 of the Rome Statute

West has been charged with 4 crimes:

- 1) Ordering, soliciting or inducing genocide;
- 2) Directly and publicly inciting genocide;
- 3) Attempted genocide;
- 4) Command responsibility for genocide.

In relation to each of these individual charges, the *Elements of Crimes* will be modified “*mutatis mutandis*” as necessary.⁷⁶ That is, the elements that define the crime of genocide in relation to Article 6(a) of the Rome Statute vary according to the type of criminal responsibility charged.

c. Ordering, Soliciting or Inducing Genocide.

Pursuant to Article 25(3)(b) of the Rome Statute, West has been charged with ordering, soliciting or inducing genocide. In the context of Article 6(a), this charge does not require that West actually killed any Lengians. The *Elements of Crimes*, as modified *mutatis mutandis*, to address criminal responsibility under Article 25(3)(b) requires that West ordered, solicited or induced the killing of ethnic Lengians. It also requires that West possessed the requisite intent to destroy Lengians, as a distinct group, which has been dealt with above.

Ordering implies a superior-subordinate relationship,⁷⁷ in which “the person in a position of authority uses it to convince another to commit the offence”.⁷⁸ West is a leader of GALA, which has a “formal hierarchy with corresponding command structures” (Compromis ¶ 10, Clarification ¶ 2). West’s employment of imperative language reflects his position of authority, and constitutes an order.

76. *Elements of Crimes, General Introduction, supra* note 65, ¶ 8.

77. *Akayesu*, 1998 I.C.T.R. ¶ 483; *Musema*, 2000 I.C.T.R. ¶ 121; *Rutaganda*, 1999 I.C.T.R. ¶ 39; *Prosecutor v. Tihomir Blaskic*, 2000 I.C.T.Y. No. IT-95-14 ¶¶ 281-82 (Mar. 3) (Judgement) (citing *Akayesu*, 1998 I.C.T.R. ¶ 483); Albin Eser, *Individual Criminal Responsibility, in THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 767, 796-97 (Antonio Cassese, et al. eds. 2002); Kai Ambos, *Article 25: Individual Criminal Responsibility, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OBSERVERS’ NOTES, ARTICLE BY ARTICLE* 475, 480 (Otto Triffterer ed. 1999).

78. *Akayesu*, 1998 I.C.T.R. ¶ 483.

Soliciting means to “command, authorise, urge, incite, request or advise”⁷⁹ another to commit a crime.⁸⁰ Inducing is broader and encompasses solicitation as well as any other behaviour that would influence another person to commit a crime.⁸¹ There is evidence that West solicited and induced genocide, by urging Arkamians to rid Yuggott of its “Lengian occupiers.” His precise words were “[e]liminate them all: men, women, and children. Eliminate them all!” (Compromis ¶ 10). West provided a justification for a potential genocide. In doing so, influenced the ethnic Arkamians to carry out the killings in Yuggott. Contemporaneous media reports surmised that the killings in Yuggott were influenced by West (Compromis ¶ 12).

To be responsible for ordering, soliciting or inducing the commission of genocide, Article 25(3)(b) also requires that genocide either be committed or attempted. As previously established, the massacres which occurred in Yuggott constitute genocide.

d. Directly and Publicly Inciting Genocide

Pursuant to Article 25(3)(e) of the Rome Statute, West has been charged with directly and publicly inciting genocide. In the context of Article 6(a), the *Elements of Crimes*, as modified *mutatis mutandis* for this charge, does not require that West actually killed any Lengians, nor that genocide occurred or was attempted.⁸² The *Elements of Crimes* requires that West possessed the requisite intent to destroy Lengians, as a distinct group, which has been dealt with above.

The element of direct incitement requires “specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.”⁸³ West’s language constitutes a direct incitement. He calls for the elimination of Lengians living in Yuggott. His words were “Eliminate them all—men, women and children” (Compromis ¶ 10). He urged the commission of genocide against a specific group in a specific area. This is not a vague or indirect suggestion. It was acted upon immediately.

79. See ESER, *supra* note 76, at 796.

80. See *Bagilishema*, 2001 I.C.T.R. ¶ 30.

81. See ESER, *supra* note 76, at 796; AMBOS, *supra* note 76, at 480-81.

82. See *Akayesu*, 1998 I.C.T.R. ¶ 562; *Nahimana*, 2003 I.C.T.R. ¶ 1029; *Prosecutor v. Ruggiu*, 2000 I.C.T.R. No. 97-32-1 ¶ 16 (Jun. 1) (Judgment and Sentence); *Musema*, 2000 I.C.T.R. ¶ 120; *Rutaganda*, 1999 I.C.T.R. ¶ 38; ESER, *supra* note 76, at 803-5.

83. Draft Code of Crimes Against Peace and Security of Mankind 1996, I.L.C. at art. 2 ¶ 16.

Euphemistic language can satisfy the directness requirement.⁸⁴ However, in inciting the “elimination” of Lengians, West did not appear to have relied upon euphemism.

Public incitement “requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large.”⁸⁵ The employment of technological means of mass communication such as radio constitutes a public incitement.⁸⁶ Indeed, “this public appeal for criminal action ... encourages the kind of mob violence in which a number of individuals engage in criminal conduct.”⁸⁷

West handed his audiotape to a GALA member who then distributed this to Radio Yuggott, a private radio station controlled by members of GALA, which has supported GALA’s goals in its broadcasts (Compromis ¶ 11). The recording was repeatedly played on Radio Yuggott between May 15 and 25. The massacres commenced on May 16 and approximately ten percent of the Lengian population of Yuggott was killed by the end of the month. Contemporaneous media reports acknowledged the likely impact of West’s broadcasted message on the massacres (Compromis ¶ 12).

e. Attempted genocide

Pursuant to Article 25(3)(f) of the Rome Statute, West has been charged with attempted genocide. This charge only becomes applicable if the ICC finds, on the facts that no genocide occurred in Leng. Thus, in the context of Article 6(a), the *Elements of Crimes*, as modified *mutatis mutandis* for this particular charge, requires only that West, with *dolus specialis*, attempted the genocide of ethnic Lengians and failed to effect the commission of that genocide.

Article 25(3)(f) provides for criminal responsibility where a person “forms the intent to commit a crime, commits an act to carry out this intention and fails to successfully complete the crime only because of some independent factor.”⁸⁸ As previously established, West had the intention to destroy, in part, the relevant group. West committed acts to carry out this intention through his involvement in the recording and dissemination of his message. West’s actions

84. U.N. GAOR, Hum. Rts. Comm., 51st Sess. ¶ 24, U.N. Doc. E/CN.4/1995/71 (1995); See Prosecutor v. Jean Kambanda, 1998 I.C.T.R. No. 97-23-S ¶ 39(x) (Sept. 4), <http://www.ictor.org/ENGLISH/cases/Kambanda/judgement/kambanda.html> (Judgment and Sentence); See *Akayesu*, 1998 I.C.T.R. ¶ 557; *Mugesera v. Can.*, (The Minister of Citizenship and Immigration) 2003 F.C.A. 325, ¶ 17 (Sept. 8); ESER, *supra* note 76, at 805; See *AMBOS*, *supra* note 76 at 487.

85. Draft Code of Crimes Against the Peace and Security of Mankind 1996, I.L.C. art. 2, ¶ 16.

86. *Id.*; *Nahimana*, 2003 I.C.T.R. ¶ 1031; *Akayesu*, 1998 I.C.T.R. ¶ 556; See *Ruggiu*, 2000 I.C.T.R. ¶ 17; ESER, *supra* note 76, at 805.

87. Draft Code of Crimes Against the Peace and Security of Mankind, art. 2, ¶ 16.

88. *Id.* ¶ 17.

thus constitute “a substantial step”⁸⁹ in relation to the crime of genocide and the non-occurrence of that genocide could only conceivably be “for reasons that are independent of [West’s] intentions.”⁹⁰

f. Command/Superior Responsibility

Pursuant to Article 28 of the Rome Statute, West has been charged with command/superior responsibility. The *Elements of Crimes*, as modified *mutatis mutandis* for this particular charge, does not require that the commander/superior possessed an intention to destroy. Both Article 28(a) and Article 28(b) are potentially applicable.

Pursuant to Article 28(a), there is evidence that West effectively acted as a military commander. While GALA has no clear distinction between its military and political organs (Clarification ¶ 2), this lack of distinction implies an indivisibility of the two functions. Regardless of what official title West holds, his order to attack Yuggott, eliminate the Lengians within the territory of Yuggott and subsume the territory into Arkam, is a statement of a military nature. Furthermore, the perpetrators of the genocide appear to have acted in response to GALA commands and in a manner consistent with GALA objectives. This is sufficient to satisfy the requirement that the forces were under the effective command and control of West.⁹¹

There is evidence that West knew, or should have known,⁹² of the massacres in Leng. Radio Yuggott is a radio station controlled by members of GALA. It is a reasonable inference that West, as a leader of GALA, knew of the broadcasts which were played repeatedly for a ten day period (Compromis ¶ 11). There is no evidence that West took any action to prevent or repress the commission of the massacres.

If the ICC finds that West is not a military commander, he may still be liable as a non-military superior under Article 28(b) of the Rome Statute. Non-military superiors can include political leaders, business leaders, and senior civil servants.⁹³ West clearly falls within the category of a non-military superior.

89. ROME STATUTE, art. 25(3)(f).

90. *Id.*

91. Beth Van Schaack, *Command Responsibility: The Anatomy of Proof In Romagoza v Garcia*, 36 U.C. DAVIS L. REV. 1214, 1236, 1257-58 (2003).

92. See Prosecutor v. Zlatko Aleksovski, 1999 I.C.T.Y. No. IT-95-14/1-T ¶¶ 79-80 (June 25) (Judgement); See Prosecutor v. Zejnil Delalic, 1998 I.C.T.Y. No. IT-96-21 ¶¶ 386-93 (Nov. 16) (Judgement); See William J. Fenrick, *Responsibility of Commanders and Other Superiors Article 28 in COMMENTARY ON THE ROME STATUTE OF THE CRIMINAL COURT, OBSERVER’S NOTES, ARTICLE BY ARTICLE* 515, 519 n.57 (Otto Triffterter ed. 1999); *Yamashita*, 13 I.L.R. at 256; Kirsten M.F. Keith, *The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence* 14 LEIDEN J. INT’L L. 617 (2001).

93. *Delalic*, 1998 I.C.T.Y. ¶ 377; *Ruzindana*, 1999 I.C.T.R. ¶ 214.

The Arkamians who committed the massacres in Yuggott were subordinates acting under West's "effective authority and control."⁹⁴ This is evidenced by the fact that his instructions to "eliminate" Lengians were acted upon immediately. West's recording was first broadcast on May 15. The massacres began the next day.

West's recording was repeatedly broadcast over a period of ten days on Radio Yuggott. Furthermore, there was media coverage of the massacres being committed in Yuggott (Compromis ¶ 12). Therefore, it may reasonably be inferred that West "consciously disregarded information which clearly indicated"⁹⁵ that the massacres were occurring and failed to take "all necessary and reasonable measures" to "prevent or repress"⁹⁶ the commission of the massacres.

VI. PRAYER FOR RELIEF

The Respondent respectfully requests that the International Court of Justice:

- (a) Determine that Randolfia's decision to surrender Mr. Joseph Curwen to the custody of the International Criminal Court would be consistent with international law, and on that basis reject Applicant's request for relief concerning Mr. Curwen; and
- (b) Determine that Randolfia's decision to surrender Mr. Herbert West to the custody of the International Criminal Court would be consistent with international law, and on that basis reject Applicant's request for relief concerning Mr. West.

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