2004 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

THE KINGDOM OF ARKAM V. THE STATE OF RANDOLFIA

THE CASE CONCERNING THE INTERNATIONAL CRIMINAL COURT

BENCH MEMORANDUM

CONFIDENTIAL

FOR JUDGES EYES ONLY

Version 4.0 – Shearman & Sterling International Rounds

2004 Philip C. Jessup International Law Moot Court Competition

BENCH MEMORANDUM

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PART I: GENERAL INFORMATION

I. Introduction

The purpose of this bench memorandum is to provide judges in the Philip C. Jessup International Law Moot Court Competition with a basic outline of the factual and legal issues relevant to the 2004 Jessup Problem (the "Compromis"). This Bench Memorandum should be read in conjunction with the Compromis and the Corrections and Clarifications to the Compromis. The Compromis is intended to present the competitors with a balanced problem, such that each side has strengths and weaknesses in its case. The Compromis contains a number of legal issues that are relevant to more than one claim for relief, and competitors will be placed in the difficult situation of arguing in favor of a rule of law in support of one claim, which rule they will then be forced to distinguish with respect to another claim. In light of this, judges should note and question any internal inconsistencies that may arise in a competitor's or team's argument.

This memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis, but rather an outline of the most relevant arguments and authorities the competitors may present. As such, judges should not be surprised when, in evaluating either a memorial or an oral argument, they encounter arguments and authorities that are not discussed in this memorandum. The omission of such arguments or authorities from this memorandum does not suggest that they are not relevant or credible.

The problem includes tangential issues, some of which are discussed in this memorandum. The teams should not be penalized for missing such issues or credited unduly for noticing them.

The Jessup Competition is an international competition. As such, competitors come from many different countries with a wide variety of available legal resources. Regrettably, some teams are inevitably at a disadvantage in this respect. The issues in this Compromis are addressable with generally available materials and careful reading of the facts. That being said, teams should be candid about the existence of apparently adverse, significant authority.

II. Judging the Jessup

There are differing opinions as to the role of a judge in a moot court competition. On the one hand, there are those who believe that a judge should do whatever necessary to ensure that the competitors complete their entire presentation. At the other end of the spectrum are those who believe that competitors are tested only when they spend their entire allocation of time responding to questions from the judges. It is left to each judge to find a balance between these two extremes.

Most observers agree that judges should at least ask questions of a sufficient difficulty and in a sufficient quantity to prevent the competitors from merely reading a rehearsed speech. In any event, a rehearsed presentation is not particularly interesting from the judges' standpoint, and, when asked, competitors have indicated that they do not enjoy extremely passive benches. On the other hand, judges should absolutely avoid purposely reducing competitors to tears or demeaning them by being either deliberately overbearing or rude.

Judges in the Jessup Competition play a different role than those in the real world. Jessup Judges do not decide a case on the merits; they must assess the quality of the participants' arguments, the persuasiveness of their presentation and the thoroughness of their preparation. Judges are expected to judge the performance of the participants as outlined by the criteria noted on the judging forms for the written and oral aspects of the competition.

Once submitted, participants may not revise their written Memorials. As they advance through the competition, however, participants are sure to revise the substance, style and structure of their arguments. It is important that judges in the oral rounds keep this fact in mind, as their questions and responses to the participants should be formulated so as to encourage that learning process. **MOST IMPORTANTLY, JUDGES MUST NOT ANNOUNCE THE WINNER OF A ROUND UNLESS THE ROUND IS AN ADVANCED ROUND.**

There are certain tactics oral-round judges can employ to test a competitor's flexibility without unduly interfering with the competitor's performance. These include asking a competitor to resolve apparent internal contradictions between her position and that of her partner; or asking about the particular remedy sought for a particular international delict. A judge should refrain from insisting upon an answer to a question when it appears as if a competitor has already made a good-faith effort to respond. In the final analysis, a moot court competition should, as much as possible, emulate a real courtroom to maximize the learning experience for the competitors.

It is important to keep in mind that the competitors choose neither the problem nor the side of the issue that they argue. As such, a competitor may be forced into making a weak legal argument. This by itself should not be held against the competitor. On the other hand, if the competitor incorrectly states the law, incorrectly cites a holding, or is unaware of an obvious source of relevant international law, a judge should bring it to the attention of the competitor through questioning and scoring.

Judges should feel free to ask "basic" questions of competitors, for example about the nature and sources of international law. Such questions ensure that the competitors have an understanding of international law, and are not merely regurgitating memorized details.

The following are some specific suggestions for questioning:

- Frequently utilize questions that call for a "yes" or "no" answer. Such questions test a competitor's ability to answer directly, and the questions themselves tend to be shorter and more concise.

- Customary law is a key source of law in this Compromis. Students should not be permitted simply to assert that a particular rule or practice is a matter of customary international law, but should know and be prepared to present examples of the two elements of customary law: state practice and *opinio juris*. That is, if a student asserts that a given rule is a tenet of customary international law, ask the student to provide examples of state practice and *opinio juris*. (For a description of customary international law, state practice, and *opinio juris*, *see generally* Section IV.C of this Bench Memorandum.)

- Avoid asking rhetorical questions or making statements.

- Avoid lengthy debates with the competitors. As much as possible, the interaction between the competitors and the bench should be in question and answer format.

- Do not focus all of your questioning on one competitor or team. Try as much as possible to interject evenly throughout the round.

- Avoid detailed questioning about a co-counsel's argument. Each competitor should, at the beginning of their presentation, outline the points he or she will cover. Although it is sometimes difficult to avoid questioning on a co-counsel's argument, such questioning should be general in nature when necessary.

- Be mindful of how much time remains for the student's argument, and avoid extensive questioning after the competitor's allotted time has expired.

- Word your questions carefully and clearly, especially when facing a competitor who is not a native English speaker. It is especially helpful in such instances to avoid asking questions with overly complex sentence structures.

III. Synopsis of the Facts

This section summarizes the facts as set out in the Compromis. *Any footnotes are to the "Clarifications and Corrections," a supplemental document which is published two months after the original* Compromis, *in response to requests from Jessup teams worldwide.*

This dispute arises between two countries, Arkam (Applicant) and Randolfia (Respondent), and concerns Randolfia's desire to surrender two Arkamian nationals to the International Criminal Court ("the ICC") for prosecution.

Arkam, Randolfia, and their neighbor, Leng, were created in 1918 out of a now-defunct State. (Leng is not participating in this case.) Arkam's population consists of 90% ethnic Arkamians and 10% ethnic Lengians. Leng is composed of 90% ethnic Lengians and 10% ethnic Arkamians. Randolfia is ethnically heterogeneous, with large and roughly equal numbers of Lengians and Arkamians. Ethnic Arkamians and ethnic Lengians share a common language, but generally adhere to different religions.[1]

In January 2003, a trans-border armed conflict erupted between ethnic Lengians and ethnic Arkamians in Leng and Arkam. The U.N. convened a peace conference in the capital of Randolfia (Cimmeria). Both Arkam and Leng sent high-level delegations. Leaders of the two ethnic groups signed the Cimmeria Peace Agreement on February 14, 2003, ending the conflict in Arkam. Unfortunately, the delegates were unable to end the conflict in Leng. Ethnic Arkamians in Arkam continued to provide material and financial support to Arkamians in Leng, who continued to fight against ethnic Lengians.

Under the terms of the Peace Agreement, the government of Arkam established on March 1, 2003, a "Truth and Reconciliation Commission" ("the TRC"), modeled after that of South Africa. Unlike the South African TRC, the mandate of the Arkamian TRC was not limited to acts associated with a political objective. The TRC was empowered to "grant a full amnesty for all criminal charges that have been or might be brought based upon any acts, including acts of violence, committed during and in furtherance of the armed conflict between the ethnic Arkamians and Lengians, to any person who makes a full disclosure of all the relevant facts relating to such acts." The Clarifications to the *Compromis* indicate that the TRC may grant amnesty for "any acts of which an individual is accused."[2] Furthermore, the Clarifications indicate that the TRC has broad plenary powers: it may exercise jurisdiction over an individual of any nationality found within the territory of Arkam, with respect to any act prior to or after the Commission's establishment which the TRC considers to be within its competence.[3]

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[1] Clarifications and Corrections to the *Compromis* [hereinafter "Clarifications and Corrections"], Clarification 1.
[2] Clarifications and Corrections, Clarification 6.
[3] *Ibid.*

The TRC began its operations on April 15, 2003. In its first four months, the TRC granted amnesty to 11 individuals, and has been cited by numerous international human-rights organizations as (in a frequently-used phrase) "a shining example of how truth and reconciliation can bring peace to a troubled region."

In Leng, sporadic fighting continued in the primarily Arkamian northern province of Yuggott. The fighting was led by the Greater Arkamian Liberation Army (GALA), a militia with members in both Leng and Arkam dedicated to the secession of the Yuggott province from Leng and its unification with Arkam. GALA does not receive support from any government.[4]

On May 1, 2003, the Rome Statute establishing the ICC entered into force for Leng and Randolfia. Although Arkam participated in the diplomatic conference establishing the ICC, it abstained from voting on the Rome Statute and is not a party to the Statute, which its government has repeatedly called "an illegal and dangerous incursion into the concept of State sovereignty."

The first human subject of this case, Dr. Herbert West, is a citizen, resident, and national of Arkam, an ethnic Arkamian, and a globally-respected historian. He is also one of the leaders of the GALA. In April 2003, West made a two-minute audiotape recording at his home in Arkam, in which he urged Arkamians in Leng "to rid Yuggott . . . of its Lengian occupiers." During the audiotape, he repeatedly intoned, "Eliminate them all."

West gave the only copy of the recording to his neighbor, who was also a member of the GALA, but there is no evidence that he issued specific instructions as to what use, if any, should be made of the tape. Members of GALA duplicated the recording, which was then widely circulated to GALA members in both Arkam and Leng. Between May 15 and May 25, 2003, it was repeatedly played on "Radio Yuggott," a private radio station based in and bradcasting from Yuggott, which is controlled by members of the GALA and which has supported the GALA's goals in its broadcasts. In the past, West has frequently recorded audiotapes with messages denouncing ethnic Lengians and supporting GALA.[5]

Beginning on May 16, bands of ethnic Arkamians conducted a series of nighttime raids, massacring ethnic Lengians in several Yuggott towns. Local newspapers reported that many of the Arkamians were chanting "Eliminate them all," an apparent reference to Mr. West's recording. By the end of May, they had killed nearly 10 percent of the Lengian population of the province. It is not known whether any GALA members were involved in the attacks.[6]

On June 17, 2003, the Lengian U.N. ambassador requested that the U.N. Security Council authorize the deployment of troops to Yuggott, to quell the raids. On June 20, 2003, the Security Council, invoking its powers under Chapter VII of the U.N. Charter, adopted

[4] Clarifications and Corrections, Clarification 2.
[5] Clarifications and Corrections, Clarification 4.
[6] Clarifications and Corrections, Clarification 3.

Resolution 2241, which authorized a multilateral force, designated "IFLEN." The Resolution designated a Randolfian national, Lieutenant General John Legrasse as the commanding officer of the multilateral force. IFLEN's mandate was: to enter Yuggott, to shut down Radio Yuggott, and to put a stop to the bloodshed. IFLEN included troops from 13 countries in the region, including a small contingent from Arkam.

Paragraph 7 of Resolution 2241 contains a provision intended to prevent nationals of States who were not parties to the Rome Statute from being prosecuted before the ICC. The paragraph was highly controversial: 10 members voted in favor, while five abstained, and several delegates wondered aloud whether the paragraph was consistent with the Rome Statute or international law. In particular, the Lengian Ambassador to the U.N. General Assembly objected strongly to the paragraph.[7] The paragraph reads:

> "Decides . . . that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to . . . IFLEN, unless such exclusive jurisdiction has been expressly waived by that contributing State."[8]

On June 28, the day after the arrival of the first IFLEN troops in Yuggott, GALA snipers attacked an IFLEN platoon. The platoon was under the command of Lt. Joseph Curwen, a citizen, resident, and national of Arkam, an ethnic Arkamian, and a veteran of several other peacekeeping missions.

Lieutenant Curwen immediately ordered the platoon to attack and destroy Exhamtown, a nearby village which IFLEN intelligence reports stated was a GALA stronghold. On June 29, 2003, the platoon attacked the undefended town and killed 200 unarmed ethnic Lengian and Arkamian men, women, and children. The next day, GALA and the Lengian government jointly announced they were horrified at the so-called "Massacre at Exhamtown," and agreed to a U.N.-monitored cease-fire, which continues to this day.

IFLEN's Gen. Legrasse immediately dismissed Curwen, and the government of Arkam promptly ordered him home. On July 3, Curwen returned to Arkam, and was ordered by the commander-in-chief of the Royal Arkamian Army to resign his commission without benefits. He was also subpoenaed before the Arkam TRC within thirty days.

Shortly thereafter (and before appearing before the TRC), Curwen left Arkam to visit family members in Randolfia. On July 20, he was arrested by Randolfian civilian police, after his car struck and injured a pedestrian. Field tests indicated Curwen was inebriated.

West also traveled to Randolfia, as part of a GALA fundraising effort. On July 22, he arrived at his hotel and reached into his pocket to present identification to the hotel's

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[7] Clarifications and Corrections, Clarification 9.

[8] The "Decides" verb was added in the Clarifications and Corrections. *Ibid.*

security guard, and accidentally spilled an amount of marijuana from his pocket to the floor. A civilian policeman on the scene arrested West and took him into custody.

West and Curwen were each charged with minor offenses in Randolfia, indicted, and jailed. On July 23, a highly-respected Randolfian daily newspaper called for the government to send these two "war criminals" to the ICC.

On July 25, Eliza Tillinghast, the Randolfian Minister of Justice, dispatched a communiqué to the ICC Registrar, proposing to extradite both men to the ICC, and requesting that the Registrar indicate "the Court's willingness to exercise its jurisdiction under Article 13(a) of its Statute" to try them. Minister Tillinghast stated that Curwen might be culpable for war crimes for his conduct at Exhamtown, while West might be guilty of incitement of genocide. She stated that Randolfia lacked jurisdiction to prosecute either individual for his crimes. She also stated that she was unwilling to extradite the men to Arkam, since the TRC amnesty process there made it unlikely that either would be subject to genuine prosecution. Finally, she stated that extradition to Leng was inappropriate, since Randolfia did not have an extradition treaty with Leng, and she did not believe the men would receive a fair trial there.

On July 26, the King of Arkam protested Tillinghast's request in a diplomatic note to the President of Randolfia. The note indicated that Arkam would not appear before the ICC Chamber to challenge admissibility, since Arkam believed the ICC was an illegal court.

On July 29, the ICC Prosecutor notified Arkam and all Parties to the Rome Statute that he was commencing an investigation into Tillinghast's allegations and any other allegations regarding the conflict in Leng" Pursuant to Randolfia's reference of the matter to the Court under Article 13(a) of the Rome Statute. The Prosecutor expressly identified Arkam, Leng, and Randolfia as "States which would normally exercise jurisdiction over the crimes concerned." None of the three States has replied to the notification.

In August 2003, consistent with the procedures set out in the Rome Statute, the Prosecutor conducted two investigations, and the ICC constituted two Pre-Trial Chambers to conduct proceedings. On September 1, the Prosecutor charged Curwen with the commission of a serious war crime in Leng under Articles 8(2)(a)(i) and (iv), under Articles 8(2)(b)(i), (iv), and (v), and, in the alternative, under Articles 8(2)(c)(i) and 8(2)(e)(i).[9] Articles 8(2)(a) and (b) concern war crimes which occur during an international armed conflict, while Articles 8(2)(c) and (e) concern war crimes which occur during a conflict which is not international.[10] West was charged with incitement to

[9] Clarifications and Corrections, Clarification 12.

[10] Specifically, the sections of Article 8(2) concern the following crimes: willful killing ((a)(i)), unlawful and extensive destruction and appropriation of property ((a)(iv)), intentional attacks against civilians ((b)(i)), knowingly launching attacks, knowing that they will cause incidental loss of life to civilians ((b)(iv)), attacking undefended villages ((b)(v)), violence to life and person of non-combatants ((c)(i)), and intentionally directing attacks against a civilian population ((e)(i)). Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiatics on the Establishment of an

genocide and attempted genocide in Leng under Rome Statute Articles 6(a) and 25(e). On September 9, the ICC Pre-Trial Chambers issued arrest warrants for West and Curwen, and served them upon Tillinghast, as the Minister of Justice of Randolfia.

The King of Arkam threatened to impose an economic embargo on Randolfia if it delivered West or Curwen to the ICC. Faced with the dire economic results of such an embargo, the Randolfian Prime Minister ordered that the two prisoners remain in custody in Randolfia. The parties have agreed to submit their dispute to the International Court of Justice, in light of Arkam's hostility to the ICC.

The treaty and membership status of the three countries is as follows:

	Arkam	**Randolfia**	**Leng**
United Nations	Orig. Member	Orig. Member	Orig. Member
Vienna Conv. on Law of Treaties	Ratified	Ratified	Ratified
Int'l Covenant on Civil/Political Rts.	Ratified	Ratified	Ratified
Genocide Convention	Ratified	Ratified	Ratified
1949 Geneva Conventions and the two Additional Protocols of 1977	Ratified	Ratified	Ratified
Randolfia-Arkam Extradition Treaty	Ratified	Ratified	*No*
Rome Statute establishing the ICC	*No*	Ratified	Ratified

Randolfia seeks to turn Messrs. Curwen and West over to the ICC for prosecution. Arkam objects, on three independent grounds with respect to each man. With respect to Curwen:

(1) that Security Council 2241 grants Arkam exclusive jurisdiction over him, to the exclusion of the ICC;

(2) because Arkam is not a party to the Rome Statute, it is improper to exercise jurisdiction over Lt. Curwen, a national of Arkam; and

(3) the principle of "complementarity" (discussed below) prohibits the ICC from exercising jurisdiction where the Truth & Reconciliation Commission is investigating his actions.

With respect to Mr. West,

(1) since Mr. West is a national of Arkam and all his actions occurred in Arkam, the ICC may not exercise jurisdiction;

(2) since Mr. West's actions occurred before the Rome Statute entered into force with respect to Leng and Randolfia, the ICC may not exercise jurisdiction; and

(3) Mr. West's conduct does not constitute a crime within the jurisdiction of the ICC.

International Criminal Court on 17 July 1998, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999 [hereinafter Rome Statute], art. 8(2).

IV. Sources of International Law

This section is intended as an introduction to public international law for the judge who might not have professional experience or training in the field. There are important distinctions between international law and domestic legal systems. The most significant, in the context of the international law moot court environment, is the rigid definition of what sources of law are acceptable before the Court.

A. General

The conduct and rules of the International Court of Justice (the "ICJ") are governed by the Statute of the International Court of Justice (the "ICJ Statute"). Under Article 38(a) of its Statute, the International Court of Justice may consider the following sources of international law in order to decide disputes before it:

> (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (2) international custom, as evidence of a general practice accepted as law;
> (3) the general principles of law recognized by civilized nations;
> (4) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There is some dispute among commentators as to whether these four sources of international law are listed in order of importance.

Judges hailing from common-law systems should take note of the status of precedent before the International Court of Justice. With respect to decisions of the ICJ itself, Article 59 of the ICJ Statute specifically and formally deprives decisions of the Court any status as precedent, stating, "The decision of the Court has no binding force except between the parties and in respect of that particular case." However, in practice, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(a)(4). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those holdings in later decisions.

Decisions by other tribunals are dealt with in the discussion in Section E ("Decisions and Publicists") below.

Practitioners familiar only with domestic law should note that resolutions of the United Nations General Assembly are not, of themselves, binding before the Court. Although such resolutions may be evidence of customary international law, the General Assembly's position in international law is not analogous to that of a domestic legislature, and resolutions of the General Assembly do not create international law.

B. Treaties

Treaties are affirmative agreements between and among sovereign States, by which they voluntarily bind themselves to act or refrain from acting according to the terms of the treaty. The rules regarding treaty procedure and interpretation are spelled out in the 1959 Vienna Convention on the Law of Treaties[11] (the "VCLT") (itself, a treaty).

The fundamental principle relating to treaties, reiterated in Article 26 of the VCLT, is that of *pacta sunt servanda:* "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." In other words, once a State becomes a party to a treaty, it is bound by that treaty.

A corollary to this rule is contained in Article 34 of the VCLT: a treaty is generally not binding on States which are not parties to the treaty, and does not create rights or obligations for such third-party States. Article 18 tempers this general rule with respect to States that have signed – but not yet ratified – a treaty: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty...." pending ratification, unless it has "made its intention clear not to become a party to the treaty." For example, a State which has signed but not ratified a treaty forbidding testing of nuclear weapons would not be held to the minute procedural details of the treaty; however, actual nuclear-weapons testing by the State would probably be seen as a violation of international law, constituting a breach of the "object and purpose" of the treaty.

Even if a State is not party to a treaty, a treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this "back-door" means by which a treaty may become binding on non-parties. Judges should be aware, however, that situations arise where some provisions of a treaty – for example, many provisions of the International Covenant on Civil and Political Rights -- may reflect or codify customary international law, while other parts do not.

C. Customary International Law

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has the binding force of law simply because the community of States treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a State whether or not it has affirmatively assented to that rule.

In order to prove that a given rule has become a rule of customary international law, one must prove two elements: widespread state practice and *opinio juris* – the "mutual conviction that the recurrence (of state practice) . . . is the result of a compulsory rule."

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[11] 1155 U.N.T.S. 331 (1969), *available online at* http://fletcher.tufts.edu/multi/texts/BH538.txt. (hereinafter, the "VCLT").

"State practice" is the material element of customary international law, and simply means that a sufficient number of states behave in a regular and repeated manner that establishes a customary norm. As alluded to in the section on treaties, State practice also may be evidenced when a sufficient number of States sign, ratify, and accede to a convention. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create "regional customary international law" or whether the practice of particularly affected states, e.g. in the area of space law, Internet law, or antitrust law, can create custom that binds states which later become affected by these issues, although the ICJ, in its decision in the *North Sea Continental Shelf Cases, (F.R.G. v. Den.), 1969 I.C.J. 1 (1969)*, appears to have acknowledged the possibility.

O*pinio juris* is the psychological or subjective element of customary international law. It requires that the State action in question be taken out of a sense of legal obligation, as opposed to domestic expediency. Put another way, *opinio juris*, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it."[12]

Customary international law is evidenced by treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations. Depending upon the context and content of such statements and documents, each of these items may serve as evidence of State practice, *opinio juris*, or both.

With respect to the burden of proof, in *The North Sea Continental Shelf Cases*, the ICJ stated that the party asserting the existence of a rule of customary international law bears the burden of proving the existence of such a rule.

D. General Principles of Law

The third source of international law recognized by the Court consists of "general principles of law." Such principles are gap-filler provisions: on occasion, the ICJ must have recourse to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature, for example, the laws regarding burden of proof and admissibility of circumstantial evidence. Many others, for example estoppel, waiver, unclean hands, necessity, and *force majeure,* may sound to an American practitioner like appeals to equity. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited "general principles" of international law. The ICJ has upheld the application of equitable principles generally in, among other cases, the *North Sea Continental Shelf Cases* (1969); its predecessor, the Permanent Court of International Justice, recognized equitable

[12] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

principles as part and parcel of international law in *The Diversion of Water from the Meuse* (Neth. v. Belg.).[13]

It is important to note, however, that "equity" in this sense is a source of international law, brought before the court under Article 38(1)(c) of the Statute of the ICJ. It is an *inter legem* application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono*, a separate matter treated under Article 38(2) of the Statute.

E. Decisions and Publicists

The final source of international law recognized by the ICJ is judicial decisions and teachings of scholars. This category is explicitly mentioned only as "a subsidiary means of finding the law." That is, judicial decisions and scholarly writings are, in essence, research aids for the Court, used for example to support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they address international law directly or demonstrate a general principle.

"Teachings" refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published law-review article constitutes an Article 38(1)(d) "teaching." However, the provision is expressly limited to teachings of "the most highly qualified publicists." For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. However, within the context of a specific field of international law – for example, environmental law, children's rights, or law of the sea – there are additional experts who would be regarded, within the field of their expertise, as "highly qualified publicists."

V. Burdens of Proof

In the *Corfu Channel Case*,[14] the ICJ set out the burdens of proof applicable to cases before it. First, the Applicant normally carries the burden of proof with respect to factual allegations by a preponderance of the evidence. Clear and convincing evidence is needed to establish state responsibility for violations of international law. Second, the burden falls on the Respondent with respect to factual allegations contained in a cross-claim. Third, where one party has exclusive control of the evidence and refuses to produce it or stipulate to it, it is appropriate for the Court to take liberal inferences of fact against that party, whether it is the Applicant or Respondent.

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[13] P.C.I.J. Ser. A/B, No. 70, 76-78 (1937)

[14] Corfu Channel Case (Merits) (U.K. v. Alb.), 1949 I.C.J. Rep. 4.

The posture of this case, however, is somewhat unique, in that the ICC has confirmed indictments containing factual allegations about Curwen and West. Applicant's claim is therefore functionally equivalent to a motion to dismiss for failure to state a claim and for lack of jurisdiction. As such, the ICJ would take the factual allegations as true, and interpret ambiguous facts in the light most favorable to the ICC Prosecutor and Respondent. One other unique aspect of the ICC is that under the complimentary regime of the Rome Statute, there is a strong presumption that a state's exercise of domestic jurisdiction over an offender is adequate and legitimate. To overcome this presumption, and justify the ICC's exercise of jurisdiction, Respondent will have the burden of proving that Arkam's exercise of jurisdiction over Curwen through the operation of its Truth and Reconciliation Commission is inadequate, illegitimate, or in bad faith (i.e. to shield him from accountability).

PART II: LEGAL ANALYSIS

This legal analysis is divided into two main sections. The first concerns the claims of the parties concerning Lt. Curwen, while the second concerns the claims concerning Mr. West. Each section is further divided to correspond to the three legal claims the parties make with respect to each prisoner.

Preliminary Matters: Obligations Under International Law and Standing

As a preliminary matter, an important issue outside of Arkam's objections – and relevant to both West and Curwen – stems from the form of the pleadings. Applicant asserts that it is illegal to surrender West or Curwen to the ICC. Applicant must demonstrate some source of law that stipulates a duty on Respondent not to hand West or Curwen over to the Court. Without such an affirmative source, Respondent would not breach international law. Moreover, Respondent faces an obligation under Article 90(4) of the Rome Statute to give priority to a request for surrender from the Court when a competing request has been received by a non party state (Arkam) and the Court has already determined that the case is admissible. The issue is moot if Arkam succeeds on any of its objections to the ICC's exercise of jurisdiction over West, but if Applicant cannot succeed on any of its specific objections, then Respondent has a powerful argument at its disposal.

Note that *even if* Applicant succeds on any of its stated objections to the ICC's jurisdiction, this only demonstrates that the ICC may not try one or both prisoners. It does not demonstrate that *Randolfia* violates an international legal obligation by surrendering them to the ICC. The Bench may wish to put this question to Applicant, in the form "Even if we agree with you on all three of your objections, and we agree that the ICC does not have jurisdiction over these two men or their actions, is there anything which affirmatively forbids Randolfia from surrendering them?"

(Note: Respondent should be able to demonstrate such an obligation with respect to Curwen. Operative Paragraph 1 of Security Council Resolution 1487, discussed below, *does* create such an affirmative prohibition with respect to members of U.N.-sanctioned peacekeeping missions. Resolution 1487 is discussed at greater length below.)

On the other hand, Respondent may argue that Arkam does not have standing to object to Randolfia's surrender of either prisoner to the ICC, because Arkam has failed to exhaust available remedies outside of the Court. A bilateral extradition treaty exists between Randolfia and Arkam,[15] which is identical to the U.N. Model Treaty on Extradition.[16] The Model Treaty states that Randolfia's obligation to extradite is predicated upon a

[15] *Compromis*, para. 30.

[16] Clarifications and Corrections, Clarification 8. The Model Treaty on Extradition is contained in General Assembly Resolution 45/116, A/RES/45/116, adopted by the General Assembly at its 68th plenary meeting, 14 December 1990.

"request" from Arkam.[17] Likewise, Arkam has not objected directly to the ICC concerning its exercise of jurisdiction over West and Curwen.[18]

I. JURISDICTION OVER LIEUTENANT CURWEN

The first issues the parties must address concern whether Randolfia may turn over Lt. Joseph Curwen for prosecution by the ICC.[19] Lt. Curwen (a citizen of Arkam) was an officer in IFLEN, the multinational force which was sent into the Yuggott province, in the territory of Leng, to end the bloodshed in that area. In response to a sniper attack against his troops, Curwen ordered his platoon to attack and destroy Exhamtown. 200 residents were killed in the attack. Randolfia now seeks to turn Curwen over to the ICC, and Arkam opposes this.

Arkam raises three objections to Randolfia's desire to turn Curwen over to the ICC, which will be addressed in the following sections. These objections are each separate and sufficient: namely, if Arkam succeeds on any of these three issues, then the Court must order Randolfia not to turn over Lt. Curwen.

A. Personal Jurisdiction: The Security Council Resolution and the ICC

With respect to this issue, the parties might refer to one or more of four relevant Security Council Resolutions. They are described in the following table.

S.C. Res. 1422	12 July 2002	**Op. par. 1**: S.C. requested under Article 18 of the Rome Statute that the ICC "not commence or proceed with investigation or prosecution" in any case involving "current or former officials or personnel" in a U.N. or multilateral force from a non-party State to the Rome Statute. **Op. par. 3**: S.C. decided that U.N. Member States take no action inconsistent with op. par. 1.
S.C. Res. 1487	12 June 2003	Renewed Resolution 1422 until 1 July 2004.
S.C. Res. 1497	1 Aug 2003	The resolution upon which Res. 2241 is based. **Op. par. 7** decides that "current or former officials" in the Liberian multinational force from a non-party State to the Rome Statute shall be subject to the exclusive jurisdiction of that State, until waived by that State.
S.C. Res. 2241	20 Jun 2003	*This resolution is fictional, created in the Compromis.*

[17] *Ibid* at Annex, art. 1.

[18] *See* discussion accompanying n.52.

[19] Arkam's pleadings concerning Lt. Curwen are contained at *Compromis*, para. 31(a), sections (1) through (3). Randolfia's pleading, contained at *Compromis*, para. 32(a), simply asks the Court to deny Arkam's claim for relief with respect to Lt. Curwen.

		Created IFLEN. **Op par.** 7 decides that "current or former officials" in the Liberian multinational force from a non-party State to the Rome Statute shall be subject to the exclusive jurisdiction of that State, until waived by that State.

IFLEN was created and authorized by the United Nations Security Council on June 20, 2003, in Resolution 2241. Chapter VII of the United Nations Charter directs the Security Council to authorize multilateral forces "necessary to maintain or restore international peace and security."[20] The Security Council has done so many times in the past, the most recent example being the International Security Assistance Force (ISAF) in Afghanistan.[21]

Such forces are different than U.N. peacekeeping forces. Most notably, in authorizing a multilateral force, the Security Council typically designates a "lead country" and a commanding officer, and calls upon all other United Nations members to contribute personnel and supplies to the effort. In this case, the Security Council designated Randolfia as the lead country, and a Randolfian Lieutenant General as the commanding officer.

The legal issue arises in Operative Paragraph 7 of Resolution 2241. This paragraph states, in relevant part:

> "that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to . . . IFLEN, unless such exclusive jurisdiction has been expressly waived by that contributing State."[22]

This language is drawn directly from Operative Paragraph 7 of Security Council Resolution 1497 (2003), by which the Council authorized the multilateral force in Liberia.[23]

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[20] U.N. Charter, Art. 42.

[21] ISAF was authorized by U.N. Security Council Resolution 1386, S/RES/1386 (2001), adopted by the Security Council at its 4443rd meeting, on 20 December 2001.

[22] *Compromis* at para. 14.

[23] S/RES/1497 (2003), adopted by the Security Council at its 4803rd meeting, on 1 August 2003. Available on the Web at http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/449/48/PDF/N0344948.pdf?OpenElement. Operative Paragraph 7 states:

> "that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State"

The Baseline Position Set Out in the Rome Statute

The Rome Statute sets out the jurisdiction of the ICC. If the Security Council refers a case to the Court, the Court may exercise its jurisdiction regardless of the nationality of the accused or the adherence (or not) of the territorial State to the Rome Statute.[24] Where a State Party refers an apparent crime to the Prosecutor, the ICC may exercise jurisdiction if either the accused is a national of a State Party or the crime was committed on the territory of a State Party, as follows:

> "[I]f one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national."[25]

However, and of special import to the arguments in this case, Article 16 of the Rome Statute also allows the Security Council to defer investigation or prosecution in a given case or cases by submitting a "request" to the ICC.[26] The effects of such a request are discussed at greater length in the next Section.

History of the Issue – Arkam's position

Counsel for Arkam will rely heavily upon the position set out by the United States concerning the International Criminal Court. The Court should be aware that the United States and Arkam are virtually alone among States in propounding this position. Using its veto power in the Security Council, the United States has effectively negotiated an exception to the baseline position set out above.

The Rome Statute establishing the International Criminal Court was adopted on July 17, 1998. Almost from its outset, the United States objected to the notion of "their" soldiers facing criminal charges in an international forum.[27] This objection was among the stated

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[24] This has led some commentators to refer to the Rome Statute as an example of universal *international* jurisdiction. *See, e.g.*, LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW 103-14 (2002).

[25] Rome Statute, *supra* n.10 , art. 12(2).

[26] Rome Statute, art. 16. This Article states:

> "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

[27] Mike Allen, "Bush Renews Criticism of Tribunal for War Crimes; Troops are Told U.S. Will Protect Them From Panel," Washington Post, July 20, 2002, at A4. *See, e.g.*, "Statement by Ambassador Charles Cunningham, Deputy United States Representative to the United Nations, on the Renewal of Resolution 1422, Security Council, June 12,2003," USUN Press Release # 85 (03), June 12, 2003, *available online at* http://www.iccnow.org/documents/statements/governments/US1422Stmt12June03.doc

reasons that the United States refused to ratify – and in fact purported to "un-sign" –the Rome Statute.[28] The Rome Statute entered into force on July 1, 2002.

From the United States' perspective, its non-membership in the Rome Statute did not adequately address its concerns that its soldiers might be subjected to the jurisdiction of the ICC. During debates in the summer of 2002, the United States therefore threatened to use its veto power at the Security Council (granted to all five Permanent Members) to block any future Resolutions authorizing U.N. peacekeeping missions, unless the United Nations granted immunity to U.S. soldiers serving in multinational peacekeeping missions.[29]

As mentioned above, Article 16 of the Rome Statute provides that the ICC must comply with a request by the Security Council to defer an investigation or prosecution for twelve months. To trigger such a deferral, the Security Council must adopt a Resolution to such effect under Chapter VII of the U.N. Charter.[30] The Security Council resolved the *impasse* between the United States and other members by relying upon Article 16, and adopting Resolution 1422, on July 12, 2002.[31] The Resolution provides, in pertinent part,

> "if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise."[32]

The Resolution is framed as a "Request" to the ICC from the Security Council, and asks the ICC to refrain from any investigation or prosecution of military and civilian officials from the U.S. (and other non-party states) working on any U.N. operations for one year.

Resolution 1422 also provides for its own annual renewal "for as long as may be necessary."[33] On June 12, 2003, the Council adopted Resolution 1487, which renewed the exemption for another twelve-month period (through July 1, 2004).[34]

At its first opportunity, the Security Council further bolstered this position. In the above-mentioned Resolution authorizing the new multilateral force in Liberia, the Council "decide[d]" that U.N. officials hailing from non-party States were subject to the *exclusive* jurisdiction of that non-party State, unless the State explicitly waived such exclusive

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[28] *Ibid.*

[29] Colum Lynch, "Action on Bosnia Forces Delayed; U.S. Fails to Get Support on Immunity for Its Peacekeepers," Washington Post, July 4, 2002, at A18.

[30] *See* text accompanying n. 16.

[31] Resolution 1422, S/RES/1422 (2002), adopted by the Security Council at its 4572nd meeting, on 12 July 2002.

[32] *Ibid* at Operative Paragraph 1.

[33] *Ibid* at Operative Paragraph 2.

[34] Resoltuion 1487, S/RES/1487 (2003), adopted by the Security Council at its 4772nd meeting, on 12 June 2003.

jurisdiction." In short, U.S. personnel working as part of the Liberia multilateral force could not be tried by the ICC (or by any other court outside the U.S.) without the express consent of the United States.

Analysis

Good arguments should include both facets based on Resolutions 1422 (and 1487) and 2241 in their responses, even though the *Compromis* itself only refers to Resolution 2241

Resolution 1487

With regard to Resolution 1487, Applicant will argue that this resolution prevents the ICC from exercising jurisdiction over Lt. Curwen under Article 16 of the Rome Statute. The issue, then, is the interpretation of Article 16. (It may be interesting during oral argument to tweak students by asking them whether the ICJ's interpretation of Article 16 is binding upon the ICC, and where the authority of the ICJ comes from with regard to the interpretation of the Rome Statute. The correct answer is that the decision of the ICJ does not "bind" the ICC, but will bind the parties to this dispute and would prevent Randolfia from surrendering Lt. Curwen to the ICC. The authority to interpret the Rome Statute is given to the ICJ in its own Statute, which gives it the authority, as the judicial organ of the United Nations, to interpret the meaning of international treaties).

Respondent will first reply that Resolution 1487 does not comply with the Rome Statute, and therefore does not bind the ICC, and should be given no effect under Article 16 by the ICJ. By its language and according to many scholars, Article 16 appears to cover only situations in which the Security Council makes a request with a specific, ongoing case. The intent was to permit the Council to intervene to try to settle ongoing conflicts without the threat of prosecution unduly complicating matters. Thus, Article 16 was not intended to permit the Security Council to prospectively defer prosecution for an entire class of individuals from the consequences of actions they have not even committed.

Applicant may respond that the preamble of Resolution 1487 does properly invoke the existence of a threat to the peace, breach of the peace of act of aggression. Therefore, Resolution 1487 is a legitimate interpretation of Article 16. Both sides should make extensive use of the negotiating history of the Statute, and, both will be able to find some support for their respective positions.

Resolution 2241

This Resolution, which is identical to Resolution 1497 in all material respects, is much more difficult for Respondent to surmount, for it presents a much sharper conflict between the demand of a Security Council Resolution, and the rights (and obligations) of Randolfia under the ICC Statute. In Resolution 2241, the Security Council created IFLEN, the multilateral force charged with shutting down Radio Yuggott, and putting a stop to the bloodshed in Leng. Paragraph 7 of the Resolution expressly places exclusive

jurisdiction for Lt. Curwen with Arkam, his State of nationality. Under the plain language of the text, unless Arkam waives its exclusive jurisdiction, the Resolution preculdes Randolfia from surrending Lt. Curwen for any "acts or omissions arising out of or related to . . . IFLEN, unless [Arkam expressly waives its jurisdiction]."

While the Security Council has great latitude in exercising its Chapter VII powers, its powers are not without limit. Article 24(2) of the U.N. Charter states, "In discharging [its] duties, the Security Council shall act in accordance with the Purposes and Principles of the United Nations."[35] Article 1 of the Charter enumerates the Purposes of the United Nations, and requires the U.N. organs to act "in conformity with the principles of justice and international law."[36] The ICJ has reasoned that the political character of an organ the United Nations does not release it from its obligations under the Charter.[37] In restricting the territorial State's right to prosecute crimes which occur on its territory, Respondent will argue that the Security Council has acted in derogation of its obligations under international law. It is important to note, however, that a majority judgment of the ICJ has never asserted the right to judicially review the legality of Security Council Resolutions, though recent cases do suggest that a growing number of ICJ judges would recognize the Court's competence to do so in an appropriate case.[38]

B. Rights and obligations of third-party States: the Vienna Convention

Analysis

Under Article 12 of the Rome Statute, the ICC may exercise jurisdiction in any case where war crimes, crimes against humanity or genocide has been committed in the territory of one of the states that have ratified the Rome Statute, whether or not the perpetrator is a national of a State which has ratified the Rome Statute. However, the United States, which is not a party to the Rome Statute, has taken the position that the ICC cannot lawfully indict U.S. nationals for crimes that take place or have an effect in the territory of states that have ratified the Rome Statute without the consent of the United States. In the Jessup Problem, the issue arises because Lt. Curwen and Dr. West (who are nationals of Arkam, which has not ratified the Rome Statute) have allegedly committed war crimes and acts of genocide in the territory of Leng (which has ratified the Rome Statute).

The Vienna Convention on the Law of Treaties

Echoing the arguments made by the United States (most notably by then Ambassador-at-Large for War Crimes Issues, David Scheffer, in a series of public statements), Applicant

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[35] U.N. Charter, Art. 24(2).
[36] U.N. Charter, Art. 1(1).
[37] *See Conditions of Admission to the United Nations*, Advisory Opinion, 1948 *ICJ Reports*, at 64.
[38] *See, e.g.*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom*), Provisional Measures, ICJ Reports (1992) 3.

may argue that the ICC's exercise of jurisdiction over Lt. Curwen (and Dr. West as well) would be contrary to the Vienna Convention on the Law of Treaties. Article 34 of the Vienna Convention states that "a treaty does not create either obligations or rights for a third state without its consent."[39] In explaining this article, the International Law Commission's official commentaries to the Vienna Convention state that "international tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose obligations on states which are not parties nor modify in any way their legal rights without their consent."[40]

In this case, Applicant will contend that the ICC is prejudicing its right to exercise jurisdiction over Lt. Curwen and Mr. West through a TRC process, and its right to induce the territorial state, Leng, to refrain from prosecuting Arkam's nationals (Curwen and West).

Respondent may respond that the ICC does not impose any obligations on Arkam nor modify its legal rights in any way. The ICC requires state parties to contribute funds to the tribunal, participate in selecting its judges and officers, and provide evidence or surrender accused persons to the tribunal upon request. None of these obligations apply to Arkam. The ICC may affect the rights of Arkam's nationals (Curwen and West), but Arkam's own rights as a State cannot be affected unless Arkam has a right under international law to exercise exclusive jurisdiction over its nationals. With the exception of certain status of forces agreements, states do not possess such exclusive jurisdiction, and their nationals can be lawfully prosecuted abroad when they commit crimes in foreign states (whether or not they were acting in an official capacity at the time).

Note that the Vienna Convention only governs the rights *of States*. Therefore, Applicant must demonstrate that Randolfia has violated some obligation owed to Randolfia. It is not sufficient to demonstrate that Randolfia has violated an international human right owed to Curwen and/or West, unless Applicant can also show that Arkam has a right to espouse a claim on Curwen and/or West's behalf.

Customary International Law

Arkam may argue that there is no precedent under customary international law for an international tribunal created by a treaty between several states to exercise jurisdiction over the nationals of states that are not party to the treaty without the consent of such non-party states. It may attempt to rely upon decisions holding extraterritorial jurisdiction to be exorbitant, such as in the case of the United States' attempt to impose sanctions on European companies assisting the Soviet Union in building an oil pipeline in the 1980s.[41] The Inter-American Juridical Committee found that the U.S. Helms-Burton law enacted in the 1990s was an exorbitant exercise of extraterritorial jurisdiction on similar grounds

[39] VCLT, art. 34.
[40] Report of the International Law Commission, 1966, at 226.
[41] See The Netherlands District Court, Judgment in Compagnie Eupeaenne des Petroles S.A. v. Sensor Nederland B.V., 22 Int'l. Legal Materials 66 (1983).

since there was no precedent under international law for the imposition of sanctions on foreign companies that "traffic" in property that had been owned by U.S. nationals before being nationalized by Cuba.[42] However, these cases do not involve the application of international legal norms by an international tribunal, and are clearly distinguished from the present case.

In response, Randolfia will rely on *dicta* from the PCIJ's *Lotus* case that "Restrictions upon the independence of states cannot . . . be presumed . . . international law leaves to states a wide measure of discretion which is only limited in certain cases by prohibitive rules."[43] This language, which has been cited with approval by the ICJ on a number of occasions, suggests that sovereign states are free to collectively establish an international jurisdiction applicable to the nationals of non-party states unless it can be shown that this violates a prohibitive rule of international law. So long as states have a legitimate interest in establishing such an arrangement, the question is not whether international law or precedent exists permitting an ICC with this type of jurisdictional reach (as Arkam asserts), but rather whether any international legal rule exists that would prohibit it.

Further, Randolfia can point to several historic precedents for international tribunals created by treaty and by action of the U.N. Security Council that have exercised jurisdiction over the nationals of non-party states, including the Nuremberg Tribunal (created in 1945 by a treaty between the UK, US, France, and Russia and having jurisdiction over German nationals); the International Criminal Tribunal for the Former Yugoslavia (created in 1993 by the Security Council, under the U.N. Charter, and having jurisdiction over Serb nationals despite the Security Council's position from 1993-1999 that Serbia was not a member of the U.N.); the Special Court for Sierra Leone (created in 2001 by a treaty between Sierra Leone and the U.N. and asserting jurisdiction over Charles Taylor, a national of Liberia).

Arkam may correctly argue that these precedents are all distinguishable in some way from the ICC. However, these distinctions may or may not support Arkam's underlying position. The four countries that created the Nuremberg Tribunal had occupied Germany at the time so they therefore consented as the effective power in control of Germany to the trial of German citizens. Respondent should respond that ultimately 23 countries ratified the treaty establishing the International Military Tribunal, making it much less like an "occupation court," and more like an international court. The ICTY was created by and as a subsidiary body of the Security Council and endowed with the Security Council's extraordinary powers to override state sovereignty when taking measures to respond to threats to international peace and security. At the time this Bench Memo was being written, the question of whether the Special Court for Sierra Leone could legitimately prosecute Charles Taylor had not yet been decided by the Special Court.

Finally, Respondent will reply that nearly all the member States of the United Nations participated in the Rome Conference, 139 States have signed the Rome Statute, 92 have

[42] *See* OAS Inter-American Juridical Committee Resolution, 35 I.L.M. 1322 (1996).
[43] SS. Lotus (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 18.

ratified it, and no States except for the United States (and, perhaps, Israel) have objected to the Court's jurisdiction over non-Party nationals. This suggests that most States believe they are entitled under customary international law to establish the ICC (or, in the alternative, that a new custom has emerged permitting the establishment of the ICC) and indeed, generally recognize the propriety of creating additional courts to resolve international disputes.

However, Arkam may argue that it is not bound to any such new customary rule, since it is a "persistent objector" to its formation. The "persistent objector" doctrine states that a new customary law is not binding upon "a State which, while the custom is in process of formation, unambiguously and persistently registers its objection to the recognition of the practice as law."[44] Whether Arkam is in fact a persistent objector is a factual argument which Applicant must establish, and Respondent must refute.

C. Complementarity: the Arkamian TRC and the ICC

Under the principle of "complementarity" codified in Article 17 of the Rome Statute, a case will be inadmissible before the ICC if a state with jurisdiction is or has investigated or prosecuted the matter. Article 17 provides as follows:

> 1. ... the Court shall determine that a case is inadmissible where:
> (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; ...
> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
> (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Art. 5;
> (b) there has been unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
> (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with the intent to bring the person concerned to justice.

According to Philippe Kirsch, the Chairman of the Rome Diplomatic Conference, the issue of whether a South African type Truth Commission process would qualify as a genuine investigation under Article 17 "was not definitively resolved during the diplomatic Conference"; rather, the provisions that were adopted reflect "creative

[44] WALDOCK, GENERAL COURSE ON PUBLIC INTERNATIONAL LAW, 2 Recueil de Cours 1, 49-53 (1962).

ambiguity."[45] As one of the delegates at the Rome Diplomatic conference explains: "During the negotiations, some delegations (most importantly, the delegation of South Africa) sought explicit recognition of truth and reconciliation commissions in Article 17. Other delegations, as well as NGOs, resisted any such provision. Due to the politically controversial and philosophically difficult nature of any such provision, the issue was deliberately sidestepped in Article 17, although a narrow doorway was left for the Court to consider whether such a procedure was indeed a 'genuine' effort to do justice."[46] Given this ambiguity, the Jessup Problem is designed to have the two sides develop the arguments -- based on the language of the statute, its negotiating record, and policy interests -- for and against the recognition that a South African type Truth Commission would qualify under the complementarity principle.

On the one hand, Respondent may point out that the Rome Statute's Preamble suggests that deferring an ICC prosecution to a Truth Commission proceeding would be incompatible with the purpose of the Court, namely to ensure criminal prosecution either before "national criminal jurisdictions" or the ICC of persons who commit serious international crimes. In particular, the Preamble:

> Affirms that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured....
> Recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. [And]
> Emphasizes that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.

On the other hand, Applicant may argue that its Truth Commission process encompasses all of the fundamental aspects of justice: imposition of punishment, creation of an historic record, and reparations for victims. First, in terms of punishment, following the Exhamtown massacre, Lt. Curwen was forced to resign from the army and stripped of all accrued military benefits. He was served with a subpoena to appear before the TRC where he will be forced to confess his crimes fully or face prosecution, a process not unlike a plea bargain. The confession of his crimes will serve as further punishment, with a severe stigmatizing effect on his future. Second, in terms of an historic record, the TRC is responsible for compiling a comprehensive public account of the atrocities that Curwen committed. Third, in terms of reparations, the TRC allows the victims and their families to share their own accounts at public hearings. In addition, the TRC is charged with providing redress to the victims and their families. Finally, Arkam will argue that, under the framework of the Rome Statute, which reflects concerns for State sovereignty,

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[45] *See* Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Cornell Int'l L.J. 507, 521-522 (1999) (quoting from interview with Philippe Kirsch)

[46] Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,* 14 Eur. J. Int'l L. 481, 499 (2003) (author was a delegate from Canada).

Randolfia bears a heavy burden of proving that the TRC does not represent a legitimate accountability mechanism under the ICC's complementarity regime.

Randolfia may also argue that, under the facts set forth in the *Compromis*, Curwen's war crimes were committed in an international armed conflict, rather than an internal armed conflict. The characterization is critical because the Grave Breaches provision of the Geneva Conventions, which carry with them a duty to extradite or prosecute, apply only in an international armed conflict. If the Grave Breaches provision applies, the submission of Curwen to a Truth Commission with the prospect of amnesty would violate this international obligation, which does not apply to war crimes in internal armed conflict. Arkam will reply that the situation was not an international armed conflict because: (1) There is a high threshold of violence necessary to rise to the level of an armed conflict generally, whereas after the Cimmeria peace conference, there was only "sporadic small-scale fighting" in Leng which would not be sufficient to qualify; (2) The fighting was primarily between members of two ethnic groups that were all nationals of Leng. That Arkamians provided financial support to one of the groups does not imbue the conflict with the required international character as recognized by the ICTY in the 1999 *Tadic* case;[47] and (3) As indicated by the 1994 conflict in Rwanda, the presence or involvement of international peacekeepers from foreign countries does not transform an internal armed conflict into an international armed conflict. Thus, despite the fact that a dozen Belgian Peacekeepers were killed by the Hutus on the first day of the fighting, the Security Council determined that the International Criminal Tribunal for Rwanda would have jurisdiction only over war crimes committed in internal armed conflict, and did not extend the court's jurisdiction to Grave Breaches of the Geneva Convention. Randolfia may respond that IFLEN was not a peacekeeping force, but rather a peace enforcement force, consisting of foreign troops, sent into Leng with a robust mandate under Chapter VII of the U.N. Charter. As such, the armed conflict was internationalized, and Lt Curwen's war crimes could qualify as Grave Breaches of the Geneva Conventions.

In particular, Respondent may rely upon the Appeals Chamber's decision in the *Tadic* case, [48] which established a lower standard for the internationalization of a conflict than was set in the ICJ's 1986 *Nicaragua* decision. Under the *Tadic* standard, a conflict is international for purposes of the application of the Grave Breaches provision of the Geneva Conventions, if an outside state had a role in organizing, coordinating or planning the military actions of a military group operating in the forum state, whether or not the outside state issued any specific instructions to the military group.

In particular, the Appeals Chamber noted, "This requirement . . . does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation."[49]

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[47] Prosecutor v. Tadic, No.: IT-94-1-T, Appeals Chamber, Judgement 15 July 1999.
[48] *Id.* at para. 137.
[49] *Ibid.*

One should note that Mr. West has been charged with incitement and attempted Genocide. The Genocide Convention, like the Grave Breaches provision of the Geneva Conventions, requires prosecution or extradition of accused offenders. It is presumably for this reason that Arkam has not asserted that Mr. West should be permitted to appear before the Truth Commission in lieu of prosecution before the ICC.

II. JURISDICTION OVER MR. WEST

The second set of issues concerns whether Randolfia may turn over Mr. Herbert West for prosecution by the ICC.[50] West is a citizen of Arkam and a leader of the "GALA" movement, an ethnic Arkamian movement based in Leng. He recorded an inflammatory tirade, calling upon ethnic Arkamians to rid Yuggott province of ethnic Lengians. This recording was broadcast in Yuggott, and apparently prompted a series of nighttime raids against ethnic Lengian villages in the province.

Randolfia believes Mr. West has committed the crime of "incitement to genocide," which is a crime within the jurisdiction of the ICC. Randolfia wishes to turn him over to the ICC for prosecution, a wish that Arkam opposes.

Arkam raises three objections to Randolfia's desire to turn West over to the ICC, which will be addressed in the following sections. These objections are each separate and sufficient: namely, if Arkam succeeds on any of these three issues, then the Court must order Randolfia not to turn over Mr. West.

One "broad" argument,[51] which applies to all elements of the prayer, is a more radical Respondent response. Respondent may claim that surrendering West to the ICC does not violate international law *even if* the ICJ ultimately decides that West's acts are not within the jurisdiction of the ICC, because the ICC has, through pretrial decisions, already decided that the case is admissible. Although this decision could be appealed,[52] pursuant to Article 90(4) of the Rome Statute, Randolfia "shall give priority to the request for surrender from the Court." By surrendering West to the Court, Randolfia would simply be fulfilling its obligations under the Rome Statute and would not violate any affirmative obligation to Arkam.

A. The Nexus between the Activity and the ICC

Arkam's first argument with respect to Mr. West is that "neither Mr. West nor his allegedly criminal conduct demonstrates the necessary nexus with a State Party to the Rome Statute."[53] For purposes of this argument, the question of whether the ICC has jurisdiction turns on the question of whether either the State on whose territory the conduct in question occurred or the State of which the accused is a national was a party to the Rome Statute.[54]

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[50] Arkam's pleadings concerning Mr. West are contained at *Compromis*, para. 31(b), sections (1) through (3). Randolfia's counter-pleading, contained at *Compromis*, para. 32(b), simply requests the Court to deny Arkam's claim for relief.

[51] A second broad argument, concerning the lack of an affirmative prohibition on surrendering West, is discussed at the beginning of the Legal Analysis section of this memorandum.

[52] In particular, note that Arkam itself could appeal the jurisdiction of the ICC before the ICC itself, even though it is not a State Party to the Rome Statute. *See* Rome Statute, art. 19(2)(b).

[53] *Compromis,* para. 31(b)(1).

[54] Rome Statute, Art. 12(2).

Since Mr. West is a national of Arkam and Arkam is not a party to the Rome Statute, the second avenue to jurisdiction is clearly not available. Mr. West recorded his offending audiotape at his home in Arkam, and gave it to a neighbor in Arkam.[55] Arkam will argue that the "conduct in question" here is either Mr. West's recording of the audiotape or his delivery of the tape to his neighbor. Therefore, because all of West's actions occurred in Arkam, the first avenue of jurisdiction also does not apply.

Randolfia's task is to impart to West individual responsibility for an act *which occurred in Leng*. The three most obvious choices are: the distribution of the audiotape within Leng; the broadcast of the audiotape on Radio Yuggott; and the nighttime raids conducted against ethnic Lengians.

Command Responsibility

The first theory Randolfia may attempt to utilize is one of "command responsibility." Under the doctrine of command responsibility, "a commander can be convicted on the basis of negligent failure to prevent his subordinates from committing war crimes."[56] This doctrine is embodied in Article 28(a) (for military superiors) and Article 28(b) (for non-military superiors) of the Rome Statute. Article 28(b) reads, in relevant part:

> "[A] superior shall be criminally responsible for crimes . . . committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> > (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> > (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> > (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."[57]

The necessary and preliminary hurdle Randolfia must overcome is that of characterizing West as a "superior" for the purpose of this rule. In the *Celebici* case, the ICTY Trial Chamber stated that "individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors."[58]

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[55] *Compromis,* para. 10.
[56] Michael P. Scharf, "The ICTY At Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal over the Past Decade: Forward," 37 New Eng. L.R. 865, 868 (2003).
[57] Rome Statute, Art. 28(b).
[58] Prosecutor v. Delalic, Judgment, Case No. IT-96-21-T, P 343 (Int'l Crim. Trib. for the Former Yugoslavia Trial Chamber II, Nov. 16, 1998), at para. 354.

The Trial Chamber enunciated that, in order to establish the existence of such a command relationship "it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences."[59] While acknowledging that civilian as well as military commanders can incur command responsibility, the Trial Chamber observed that "the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders"[60] and "The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates."[61]

Respondent's challenge is to prove, upon a paucity of facts, that West exercises effective command and control over GALA or over Radio Yuggott. The *Compromis* states explicitly that West is "one of the leaders of GALA,"[62] and the Clarifications stipulate that GALA has a hierarchical command structure without a formal division between political and military functions.[63] No further facts are available describing the nature of West's position, authority, or role within the organization. Respondent may argue that the fact that GALA members distributed the audiotape and Radio Yuggott broadcast it indicates some degree of authority, but even this falls well short of power to control. Furthermore, the inference can equally be drawn that it was distributed out of respect for West or out of recognition of the propaganda quality of this recording. Either inference defeats outright a claim to a superior relationship.

Respondent's argument – and Applicant's reply – will turn upon factual speculation and characterization of the command structure of GALA, and Mr. West's role in that structure. On this issue, the facts weigh heavily in Arkam's favor. Randolfia must demonstrate that a "control" relationship exists on the facts, or upon the reasonable inferences which may be drawn from the facts. Also, it is unclear whether command responsibility should be a grounds for liability for genocide, because genocide is a specific intent crime.

Territorial Jurisdiction – Traditional and "Effects"

Respondent's second and more substantial approach is to focus on the territorial basis of the ICC's jurisdiction. Article 12(2)(a) permits the ICC to exercise jurisdiction if the "State on the territory of which the conduct in question occurred" is a Party to the Rome Statute.[64] Applicant will argue that the reference to "conduct" places West firmly outside

[59] *Id.* at para. 378.
[60] *Ibid.*
[61] *Id.* at para. 377.
[62] *Compromis* at para. 10.
[63] Clarifications and Corrections, Clarification 2.
[64] Rome Statute, art. 12(2)(a).

the ICC's jurisdiction. After all, his "conduct" was to create the audiotape and, perhaps, to give it to his neighbor, both of which acts occurred in Arkam.[65]

Respondent may argue that the territorial principle described in Article 12(2)(a) includes the "objective territorial principle," in addition to the pure "subjective territoriality" upon which Applicant relies in the previous paragraph. "While subjective territoriality requires an element of the offense to occur within the asserting state, objective territoriality obtains when the effect or result of criminal conduct impacts on the asserting state, but the other elements of the offense take place wholly beyond its territorial boundaries."[66]

The objective territoriality principle helps Respondent because it extends the territorial principle to cover a situation where the effects of the act occurred in another country. In this case, although West's acts (the making and delivery of the audiotape) occurred in Arkam, a non-party State to the Rome Statute, the effect or result of the conduct (the broadcast of that tape or the resultant genocide) occurred within Leng, which is a party State.

Applicant will reply with one or more of three counterarguments. First of all, Article 12(2) does not refer to "elements of the offense" or vague notions of "territoriality." It affirmatively requires that some "conduct" occur within the territory of a Party State. This would seem to preclude Respondent's reading of objective territoriality into the Statute. Second (and related), while a limited notion of objective territoriality has been accepted as a justification for a State to exercise jurisdiction over an offender, the Rome Statute explicitly enumerates the bases of jurisdiction of the ICC. That is, objective territoriality might avail Respondent if it were seeking to assert Leng's exercise of jurisdiction over West, but it does not at all follow that, in the absence of an affirmative mandate in its Statute, the ICC can rely upon the same argument. Third, incitement is an inchoate offense. Because it is complete when the utterance is complete, Arkam may argue that any "crime" committed was perfected on the territory of Arkam, regardless of any "effect" in Leng.

B. When did the crimes occur?

The jurisdiction of the ICC is restricted in a second important way – temporally (*rationae temporis*). Jurisdiction *rationae temporis* relates to the date on which the crimes occurred. The *rationae temporis* jurisdiction of the ICC is strictly limited by Article 11 of the Rome Statute, according to which:

> 1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

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[65] *Compromis*, para. 10.

[66] Christopher L. Blakesley, "Extraterritorial Jurisdiction," in International Criminal Law: Cases and Materials (Jordan J. Paust et al., eds. 1996), at 33.

> 2. If 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, unless that State has made a declaration under article 12, paragraph 3.[67]

The salient dates are as follows. West made his audiotape in April 2003.[68] The tape was widely circulated in both Arkam and Leng and, between May 15 and May 25, 2003, it repeatedly aired on Radio Yuggott, a GALA controlled radio station. During the period of broadcast, massacres of ethnic Lengians occurred in Yuggott.[69]

In order for the ICC to properly exercise *rationae temporis* jurisdiction over Dr. West's actions, two conditions must be satisfied. First, Dr. West must have committed a crime after the entry into force of the Statute and, second, his crime must have been committed after either the territorial state (the state on whose territory the crimes occurred) or the national state (in this case Arkam) became a party to the statute. The Rome Statute entered into force on July 1, 2002. As Dr. West's crimes occurred in spring 2003 – well after the entry into force of the Rome Statute – the first condition is satisfied.

The second prerequisite for *rationae temporis* jurisdiction is more difficult. Turning to the territorial state, again West made his recording in Arkam and handed the tape over to his neighbor in Arkam. However, the tape was broadcast on Radio Yuggott – located in the Yuggott province of Leng. There will thus be some dispute as to which is the territorial State. If the territorial State is determined to be Arkam, Arkam is not a party to the Rome Statute and the ICC would have no jurisdiction over the case. On the other hand, if it is deemed that West committed a crime in Leng (either directly or through a theory of command responsibility), we must look to the date on which the Statute entered into force for Leng to determine the Court's *rationae temporis* jurisdiction. The *Compromis* states, "On May 1, 2003, the Rome Statute establishing the International Criminal Court entered into force for Leng and Randolfia."[70] Thus, the *rationae temporis* jurisdiction of the court with respect to crimes committed in Leng or by Lengian nationals began on May 1, 2003. The Court will only have jurisdiction over Dr. West's actions if he is deemed to have committed a crime in Leng on or after May 1, 2003.

The question of when West's crimes were committed will thus be another significant area of contention. If West's crimes were committed only on the date when he made the tape and gave it to his neighbor in April 2003, the ICC will not have jurisdiction. If, instead, West's crimes continued from the moment he made the tape through to its broadcast in mid-May 2003 and the potential acts of genocide (see below) that accompanied the broadcast, the ICC will have jurisdiction. The broadcasts occurred between May 15 and May 25. As the date of these crimes is after the May 1 entry into force of the Statute for

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[67] Rome Statute, Art. 11.
[68] *Compromis,* para. 10.
[69] *Compromis,* para. 11.
[70] *Compromis,* para. 9.

Leng, the I.C.C. would have *rationae temporis* jurisdiction per Article 11 of the Rome Statute.

The leading case addressing this issue is *Hassan Ngeze and Ferdinand Nahimana v. The Prosecutor*, Decision on the Interlocutory Appeal, 5 September 2000, before the International Criminal Tribunal for Rwanda. In that case, the accused perpetrated acts of genocide within the *rationae temporis* jurisdiction of the Rwanda tribunal. The question raised in the interlocutory appeal was whether evidence of genocidal intent by the accused prior to the *rationae temporis* jurisdiction of the ICTR could be used to prove the case. The Appeals Chamber found that no facts predating the Court's jurisdiction could be used to prove any count of the indictment. Nonetheless, the ICTR found that evidence of the accused's mental state prior to the court's jurisdiction could be relied upon to establish the *mens rea* of genocide. Judge Shahabuddeen wrote in a separate opinion, "evidence of earlier genocidal developments is admissible to prove the genocidal character of an act committed" within the Court's jurisdiction. The case is of only marginal help when applied to West's activities. The case suggests the tape could be used to establish West's mental state if he subsequently committed genocidal acts after May 1, 2003. But, West's only act was the recording of the tape and passing of it to his neighbor in April. Thus, he does not appear to have himself committed a subsequent act within the Court's jurisdiction.

Another relevant incident relates to a Rwandan official, Leon Mugesera, who made various statements in November 1992 prompting massacres of ethnic Tutsi. The ICTR's jurisdiction *rationae temporis* began only in 1993, thus excluding the case from Court's jurisdiction. Nonetheless, prosecutors for the Rwanda tribunal examined whether they could initiate a case against Mugesera based on the fact that his incitement caused crimes in 1993 that were themselves within the jurisdiction of the Tribunal. The prosecutors, however, decided that such an argument "would be difficult to sustain."[71] Instead, a case was brought in Canada, where he was resident, and which did not have the same temporal jurisdictional limits. This incident suggests that the fact that West's acts before the Court's jurisdiction despite effects within the court's jurisdiction are not sufficient. But, the Mugesera incident can be distinguished on three grounds. First, this was merely a matter of prosecutorial discretion, not a firm legal holding. Second, Mugesera's speech was chronologically far more remote than was West's recording. Third, an alternative forum for prosecution – Canada – existed for Mugesera but does not exist for West.

A few other significant issues of law may be raised with respect to the date of West's activity. First, there is a provision in the Rome Statute that allows for a state which becomes a Party to the Statute after the Statute entered into force on July 1, 2002 to accept the jurisdiction of the court for the period between July 1, 2002 and the entry into force of the Statute for the state in question. These are known as Article 12(3) declarations. None of the States involved have made such declarations. The effective date of *rationae temporis* jurisdiction is then May 1, 2003 and not July 1, 2002. Similarly, in cases which are referred to the Court by the Security Council pursuant to Article 13(b) the

[71] Schabas, at 273.

effective date of *rationae temporis* jurisdiction is July 1, 2002. In this case, however, the case was referred to the Court by Eliza Tillinghast, the Randolfian Minister of Justice (see compromise paragraph 22) under Article 13(a) of the Statute, not by the Security Council. Again, therefore, the relevant date of *rationae temporis* jurisdiction is May 1, 2003 (when the Statute entered into force in Leng) and not July 1, 2002. Finally, the issue of "continuing crimes" may be used by Randolfia. However, this issue was expressly addressed in the Elements of Crimes Against Humanity to avoid the possibility that crimes such as disappearances, taking place prior to the Rome Statute's entry into force, would ultimately be brought within the ICC's ambit.[72]

It is also important to draw a distinction here between the ICC's jurisdiction *rationae temporis*, crucial to whether the Court has jurisdiction over West's acts, and the principle of *nullum crimen sine lege*. The *nullum crimen* principle is found at Article 22(1) (and in customary law). The Article states: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." In short, no one can be held responsible for an act that was not a crime at the time it occurred. This does not speak to whether the Court has jurisdiction, but rather is a general principle of individual criminal responsibility. West's possible crime is incitement to genocide.[73] Incitement to genocide has been a crime in international treaty law since the 1948 Genocide Convention and was subsequently determined by the ICJ to constitute a crime in customary law as well.[74] It is thus beyond doubt that the *nullum crimen* principle is satisfied and does not limit the Court here. The discussion of the *nullum crimen* principle is largely superfluous and may represent confusion by competitors of the Court's *rationae temporis* jurisdiction and the general *nummum crimen* principle.

Likely Applicant Arguments

Within the context of the legal landscape discussed above, Applicant must argue according to paragraph 31(b)(2) of the Compromis that it would be illegal for Randolfia to surrender West to the ICC because West's acts preceded the date on which the Rome Statute entered into force for Randolfia and Leng. This is by far the easier legal position to maintain on this issue. Applicant will claim that the crimes were committed in Arkam in April 2003 when West made the recording and gave it to his neighbor. Applicant will further argue that there is no evidence that West had intent, instruction or knowledge that the tape would subsequently be played in Leng. The *Compromis* largely supports this position, though it is silent on the question of knowledge.

Respondent must argue that Randolfia's decision to surrender West to the ICC is consistent with international law. This is a far harder position to maintain. Respondent

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[72] *See* Element 7(1)(i), n.24, *discussed in* SADAT, *supra n.20*, at 158.
[73] *Compromis*, para. 22.
[74] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. Yugo.)*, 1996 I.C.J. 595 (1996), Separate Opinion of Juge Weeramantry at 648.
[74] *Compromis*, at para. 26.

will need to first argue that the court has jurisdiction *rationae personae* and *rationae temporis.* To do so, Respondent will need to argue that West's crimes occurred not only when the tape was recorded in April, but continued through the broadcast in Leng in May 2003. Respondent must admit that the *Compromis* offers no evidence that West had intent or instruction for the tape to be broadcast in Leng. Respondent could nonetheless try to infer from the circumstances that West had such intent or that he must have known the tape would be used for this purpose. Or Respondent could again rely on command responsibility, as discussed above. Both sides will speculate and try to stretch the *Compromis* on these issues. Judges should pay close attention to any suggestions or inferences of West's knowledge of intent that are not explicit in the *Compromis.*

The resolution of these issues before an actual court would, to a large degree, turn on factual evidence as to the knowledge, intent and instructions of Dr. West. Unfortunately, we have little information at our disposal as to his mental state. Rather than allow vast speculation outside the scope of the *Compromis*, judges should focus on the complex issues of law relating to the Court's *rationae temporis* jurisdiction.

C. The Formal Definition of West's Crime and the Rome Statute

West was charged by the ICC prosecutor with incitement to genocide and attempted genocide in Leng, pursuant to Articles 6(a) and 25(3)(b), (e), and (f) of the Statute.[75]

West is charged with two different forms of the perpetration of genocide – incitement and attempt. As both are inchoate offences of genocide, this section will begin with a general discussion of the legal requirements of genocide and then proceed to consider incitement and attempt in more detail.

Genocide is a crime within the jurisdiction of the ICC and defined at Article 6 as:
any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

The basic legal requirements for the crime of genocide are, first, an *actus reus*, for our purposes killing a member of a national, ethnical, racial or religious group. Second, the perpetrator must have a very specific *mens rea* or mental state, namely the intent to destroy in whole or in part the members of that group.

A few key aspects of the definition and, particularly, the perpetrator's *mens rea* require further elaboration. Genocide is a special intent crime and requires a very specific intent

[75] *Compromis,* para. 26, supplemented by Corrections and Clarifications, Correction 2

by the perpetrator. First, the perpetrator must intend to eliminate in whole or in part. This does not mean that the perpetrator intends to eliminate every individual in the group on the planet. But it is something more than desiring to kill a few individuals. Intent to kill all members of a particular group in a specific region is generally considered sufficient.[76] Second, the group must be defined by national, ethnic, racial or religious characteristics. Political groups are expressly excluded. Third, is the definition of the group itself. The best definition of "group" for these purposes was provided by the ICTR in the *Akayesu* case, in which it held that groups are "constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of more mobile groups which one joins through individual voluntary commitment."[77]

Proving the intent of a particular accused can be very difficult given the subjective nature of the *mens rea.* However, in *Akayesu*, the ICTR found that "absent a confession from the accused, his intent can be inferred from a certain number of presumptions of fact."[78] Thus, various acts and statements of the accused can be used to prove intent.

West is charged not with genocide itself, but rather with incitement to genocide and attempted genocide. While Article 6 of the Rome Statute defines genocide, Article 25 provides that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person... In respect of the crime of genocide, directly and publicly incites others to commit genocide . . . Attempts to commit such a crime". Each of these two offences – incitement and attempt – will be considered in turn.

According to Article 25 of the Rome Statute, an individual is liable for the crime of genocide if they "directly and publicly incite others to commit genocide." First, it is important to note that unlike other inchoate offences and other crimes such as war crimes or crimes against humanity, incitement to genocide does not require that genocide actually occur. Thus, to prove incitement in this case it is not necessary to demonstrate that the actual crimes committed in Leng in mid-May 2003 constitute genocide.

There are two separate elements to the crime of incitement to genocide. First, the *actus reus,* namely acts that are intended to cause others to perpetrate genocide. Drawing on both common and civil law traditions, the ICTR thus defined incitement as "directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination... or through any other means of audiovisual communication."[79] Second, the accused must have a *mens rea*, namely the intent that the recipient of the speech actually commit genocide. Again the ICTR elucidates the point: The accused must have

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[76] *See* Prosecutor v. Krstic, No.: IT-98-33, Trial Chamber I, Judgement 2 August 2001, in which the ICTY considered Bosnian Muslim men of Srebrenica a protected group.
[77] Akayesu at para 511
[78] Akayesu at para 523. This approach has been followed in other cases including *Kayishema* and *Rutuganda*, also before the ICTR.
[79] Akayesu at 559.

the "intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging."[80] Here, the general definition of genocide discussed above comes into play. It must be shown that Mr. West had the intent through his speech for others to kill members of an ethnic, racial, or religious group so as to eliminate that group in whole or in part.

Incitement to genocide must also be both public and direct. This was conscious choice of both the drafters of the Genocide Convention and the Rome Statute, so as to avoid limitations on private speech. Private incitement was specifically excluded from the Convention. The International Law Commission's commentary to its Draft Code of Crimes states that public incitement requires "communicating the call to action in a public place or to members of the general public at large," including through the radio. In *Akayesu*, the ICTR found that incitement was public where words were "spoken aloud in a place that was public by definition."[81] A significant area of debate on this issue will thus turn on whether West's acts were public. If he was merely making a recording for his own personal use or without the intent that it cause others to act, he can not be guilty of public incitement. Privately spoken, the words to his neighbor would likewise be insufficient. If, on the other hand, he intended the tape be used publicly, he may be have committed the offense. The students may wish to cite recent cases concerning the issue of genocide from the ICTY, such as the *Stakic* case (in which an accused was acquitted of genocide because intent had not been proven),[82] or from the ICTR, such as the *Nahimana* case (in which accused media executives were convicted of incitement to crimes against humanity).[83]

Similarly, incitement must be direct. Again, in *Akayesu*, the ICTR found that for incitement to be direct it must "specifically provoke another to engage in a criminal act."[84] Incitement need not appear direct to outside observers, rather the words of the accused must be interpreted in their relative linguistic and cultural contexts on a case-by-case basis. West's words encouraging others to eliminate Lengians presumably are sufficiently direct.

The two significant cases on point come from the International Criminal Tribunal for Rwanda and are likely to be referenced by competitors.. The leading case is *Prosecutor v. Jean Paul Akeyesu*. Akeyesu was the mayor of the Taba commune in Rwanda. Among other crimes, on April 19, 2994, Akeyesu led a meeting of Hutus and "urged the population to eliminate accomplices of the RPF, which was understood by those present to mean Tutsis." Soon thereafter, the 100 men at the meeting began the systematic murder of the local Tutsi population. He was convicted of, among other things, direct and public

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[80] Akayesu at 559.
[81] Akayesu at 556.
[82] Prosecutor v. Stakic, No.: IT-97-24-T, Trial Chamber II, Judgement 31 July 2003.
[83] Prosecutor v. Nahimana, et al. "Media" Case, No. _____, Trial Chamber I, Judgement 3 December 2003. (The decision is unpublished at the time of this Memorandum. However, a summary is *available online* at http://www.nytimes.com/2003/12/03/international/africa/03CND-RWAN.html).
[84] Akayesu at 557.

incitement to genocide. A second significant case is *Prosecutor v. Georges Ruggiu.* Ruggiu was a social worker who worked for the Belgian Social Security Administration. After moving to Rwanda in 1993, he took up employment at *Radio Television Libre des Milles Collines,* where he was a journalistic broadcaster. He made several radio broadcasts during the period of the genocide that encouraged Hutus to "go to work," interpreted as killing Rwandan Tutsis. Based on these radio broadcasts, he pled guilty to direct and public incitement to genocide.

West is also charged with attempted genocide. Note that he is not charged with attempted incitement, but with attempted genocide itself. Attempt is defined at Article 25(f) of the Rome Statute, according to which an individual shall be liable for the crime if he "Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions." There is no case law on point as no one has ever been tried for attempted genocide. West must have himself taken a substantial step toward his own personal commission of genocide. West himself must have failed to commit genocide. The fact that others – such as the perpetrators in of the massacres in Leng – may have actually committed genocide is unrelated to West's attempt.

The largest area of dispute with respect to attempted genocide is what constitutes a "substantial step" in the terms of the Rome Statute. The "substantial step" test draws on various national legislation so as to avoid conviction for innocent preparatory acts. This appears to be a relatively low threshold – at least compared to some national jurisdictions that require the accused to have taken the "final step before commission." The Preparatory Commission defined "substantial step" as requiring that the "act amount to more than mere preparation" for the crime.[85] The key area of dispute on this issue will be whether West's recording constitutes such a substantial step in his own perpetration of genocide. The Compromis is only of limited use here, but from the facts available there is no indication that West had a plan to actually perpetrate genocide and that his recording was a substantial step in that direction.

Likely Arguments

Astute Respondents may recognize that they are not limited by the crimes charged by the prosecutor and that West may well have abetted the perpetration of genocide under Article 25(c) of the Rome Statute. According to that passage, individuals may be liable if "For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission." The ICTY has stated, "[A]iding and abetting includes all acts of assistance by words, by acts, by encouragement, support or again by presence."[86] Generally, abetting a crime is defined by *Black's Law Dictionary* as "to encourage, incite, or set another to commit a crime." In the context of the Rome Statute, abetting can be distinguished from incitement in two key ways. First, abetting need not be public. This helps Respondent and avoids the problem that West's

[85] UN DOC PCNICC/1999/DP.4/Add.3 at para 3 (February 1999).
[86] Prosecutor v. Tadic, No. IT-94-1, Trial Chamber II, Opinion & Judgement of 7 May 1997.

remarks were somewhat private. Second, abetting requires a purpose of facilitation. Thus, West would have to do more than just incite and in some way facilitate the crime. While there is no real evidence that West had the purpose of facilitation, this is a novel and potentially useful argument for Respondent.

Finally, as discussed in relation to the *rationae temporis* issue, Respondent may again observe that it is under no legal obligation to Arkam not to surrender West to the ICC. As such, the decision to surrender is consistent with international law, particularly given Randolfia's obligations under the Rome Statute to give preference to a request for surrender from the ICC when it has determined the case is admissible.

PART III: POSSIBLE QUESTIONS FOR ORALISTS

INTERNATIONAL LAW GENERALLY

1. Is there any priority or hierarchy of the sources of international law mentioned in Art. 38?
2. If a State has conflicting obligations under these two treaties (or under treaty on the one hand and customary international law on the other), which obligation controls? What principles does the Court use to determine which obligation controls?
3. What is customary international law? What are the elements of customary international law?
4. *When a student attempts to assert that a given rule is or is not an obligation under customary international law, the court should ask the student to demonstrate (1) widespread and consistent practice by States consistent with that rule, and (2) that the State practice is, in fact, motivated by a sense of obligation* (opinion juris)?
5. *Whenever a student enunciates a standard of law, (s)he should be pressed to enunciate where the standard comes from and why it binds the parties?*
6. What is *opinio juris*? How is it proven?
7. Where can we find evidence of State practice? What State practice is relevant?
8. Is this Court bound by its prior decisions?
9. If this Court makes specific findings of fact or law which are relevant to the underlying criminal charges against West or Curwen, are these findings binding (or even persuasive) at the eventual trial at the ICC? Are they binding or persuasive before municipal tribunals or the TRC?
10. Do Resolutions of the U.N. General Assembly create binding obligations?
11. What are *travaux preparatoires*? When are the records of the drafting and negotiations of the treaty relevant?
12. What specific remedies is your Party looking for? Is this Court permitted by its Statute to grant those remedies?
13. If this Court determines (notwithstanding, of course, Agent's compelling arguments) that the paucity of facts allows multiple, conflicting inferences, what should this Court do then?
14. What is the standard of proof with respect to this issue? Which party bears the burden of proof?
15. Does the fact that Leng – a State with a definite interest in this case -- is not here, before the Court, preclude us from hearing and adjudicating this case?
16. What is the legal relationship between this Court and the ICC? To what degree are decisions of this Court binding upon the ICC?
17. What is the legal significance of the fact that the ICC pretrial chamber has already determined that these cases are admissible?

SUGGESTED QUESTIONS -- CONCERNING LT. CURWEN

A. Personal Jurisdiction: The Security Council Resolution and the ICC

1. For both teams: Are Security Council Resolutions binding upon the States before this Court?
2. For both teams: Is the ICC an organ of the United Nations, such that it might be bound by the United Nations Charter?
3. For both teams: Is Resolution 2241 a "request" to the ICC under Article 16 of the Rome Statute?
4. For Arkam: Are Security Council Resolutions binding upon the ICC?
5. For Arkam: *If Arkam raises Security Council Resolution 1487 (2002), which is not in the Compromis.* Is Resolution 1487 even a valid Article 16 "request?" Namely, does Article 16 of the Rome Statute anticipate that the Security Council may request general, prospective deferrals of entire classes of cases that haven't even arisen yet (as happened in Resolution 1487)? Or did it anticipate that the Council would make specific requests to defer investigation of specific crimes that have already occurred?
6. For Randolfia: Are you familiar with the 2002 Security Council Resolution 1487? Does that Resolution preclude the Randolfia from surrendering Curwen to the ICC?

B. Rights and obligations of third-party States: the Vienna Convention

1. For both teams: What is the basis of the ICC's jurisdiction over the nationals of non-party states: delegated territorial jurisdiction, delegated universal jurisdiction; or customary international law?
2. For both teams: How does the *Lotus* Principle (described above) effect the outcome of this case? Is the *Lotus* Principle still good law? Is it applicable to this situation?
3. For Arkam: How does the Rome Statute impose obligations on Arkam or modify its rights in violation of the Vienna Convention? Does Arkam have exclusive jurisdiction over its nationals?
4. For Arkam: If the United States has an extradition treaty with France, but not with Libya, and the United States grants France's request for the extradition of a Libyan found in U.S. territory, isn't this just as much a case of a treaty modifying the rights of a non-party State as is the case of the ICC exercising jurisdiction over a national of Arkam? Yet, extradition treaties are used to extradite the nationals of non-party states all the time without any argument that this violates the Vienna Convention. How are the two situations distinguishable?
5. For Randolfia: Is there any precedent for an international criminal court created by treaty to exercise jurisdiction over the nationals of non-party states without the consent of such states? Didn't the Nuremberg and Tokyo Tribunals actually operate with the consent of the sovereigns?
6. For Randolfia: Could Sudan and Libya enter into a treaty creating an international criminal court to try Americans who bombed Tripoli in 1986 and the Sudan Chemical Weapons plant in 1998? How is the ICC distinguishable from this?

C. Complementarity: the Arkamian TRC and the ICC

1. For both teams: Doesn't the negotiating record indicate that the drafters of the Rome Statute were not able to decide whether or not the complimentarity principle (Article 17) should apply to the Arkamian Truth and Reconciliation Commission?
2. For both teams: What are the policy arguments for and against extending the complimentarity principle to South African type Truth Commissions?
3. For Arkam: While Article 17 refers to "investigations," the Preamble of the ICC Statute indicates that the ICC is to be complimentary to "national criminal jurisdictions." Why shouldn't the Preamble control this issue, in which case the Arkam Truth Commission would not qualify?
4. For Randolfia: Normally, the applicant bears the burden of proof before the ICJ, but under the framework of the Rome Statute, which reflects concerns for State sovereignty, doesn't Respondent Randolfia bear the burden of proving that the TRC does not represent a legitimate accountability mechanism under the ICC's complementarity regime?
5. For both teams: Does the Grave Breaches provision of the Geneva Convention apply to Lt. Curwen's war crimes? Specifically, were they committed in the context of an international armed conflict or an internal armed conflict? If the Grave Breaches provision applies, doesn't this require criminal prosecution as opposed to a Truth Commission process with amnesty?

SUGGESTED QUESTIONS – CONCERNING MR. WEST

A. Concerning the nexus between the crimes and a State Party to the ICC

1. For both parties: Does Article 12(2) of the Rome Statute require that the prisoner have a territorial or nationality connection with the State who *requested* the prosecution, or merely with any State Party to the ICC?
2. For Arkam: Does West bear command responsibility for the actions of GALA members who copied, distributed and broadcast his tape in Leng?
3. For Arkam: Does West bear command responsibility for the actions of GALA members who acted upon his calls to "eliminate" the ethnic Lengians?
4. For Randolfia: What are the physical elements (*actus reus*) of the specific crimes with which West stands accused? Where did those actions occur?
5. For Randolfia: What jurisdictional principles may this Court consider in determining whether the ICC may try Mr. West? May we consider jurisdictional principles not enumerated in Article 12(2)?

B. Concerning *rationae temporis* (the timing of the criminal acts)

For either party:

1. What is the *rationae temporis* jurisdiction of the ICC? (or What is the first date of crimes over which the ICC will have jurisdiction)?
2. Can you distinguish between *rationae temporis* jurisdiction and the *nullum crimen sine lege* principle?
3. What are the "events in question" for the purposes of Article 11 of the Statute?
4. Where did the "events in question" actually occur?

For Applicant:

1. Didn't West's acts have a direct effect on the crimes committed in Leng? Isn't that sufficient for the Court to exercise jurisdiction?
2. Did West have knowledge of how his tape would be used?
3. Did West's crime of incitement itself continue through the actual perpetration of genocide?
4. If the Court does not have jurisdiction over West, is there any other means for his prosecution or will he escape with impunity?
5. Does Randolfia owe any obligation to Arkam not to extradite West? Where does that obligation arise?

For Respondent:

1. Did West commit any act in Leng after 1 May 2003?
2. Is there any evidence whatsoever in the compromis that West intended or gave instructions for the tape to be played on the radio in Leng?
3. How can you link West to the acts committed in Leng?
4. Does Randolfia have any legal right to hand West to the Court or does it have a duty to extradite West to his national state?

C. The Formal Definition of West's Crimes

For both parties:

1. What are the legal elements of the crime of genocide?
2. What are the necessary elements of incitement to genocide?
3. Does incitement to genocide require that the crime of genocide actually follow?
4. What are the legal requirements for the crime of attempted genocide?
5. What is the appropriate standard for a comment to be "public" that both protects freedom of speech but also represses genocide?
6. How do you define a "substantial step" in the perpetration of genocide?

For Applicant:

1. A range of hypotheticals could be used to push applicant on what would or would not constitute incitement if West's statements are not enough. The *Akeyesu* and *Ruggiu* cases discussed above could be used.
2. If West did not intend his statement to be public, why did he record it on tape?
3. If I make a recording and give it to someone, haven't I sacrificed the "private" element of my speech?
4. If Applicant argues that West's statements were not "direct", ask "What can be more direct than "eliminate them all"?
5. Wouldn't you agree that the formulation of an intent to commit genocide (which West's tape speaks to) constitutes a substantial step in the perpetration of the crime?

For Respondent:

1. Since West made his recording in his own home and gave it only to his neighbor, how can you define it as "public" speech? Particularly since all the convictions have been for public speech in front of large audiences.
2. Do you have any evidence that West actually intended others to commit genocide? How can you know? What if he just liked to listen to himself on the tape? That may be sick, but is it incitement?
3. What is the group West intended to eliminate? Is this a protected group under the definition of genocide?
4. What is the difference between inciting a crime and abetting a crime?
5. How can the mere recording of a statement constitute a "substantial step" in the perpetration of genocide?
6. Is there any evidence that West himself intended to commit genocide? If not, how can he be convicted of attempted genocide?