

INTERNATIONAL COURT OF JUSTICE

2004

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CASE CONCERNING THE INTERNATIONAL CRIMINAL COURT

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THE KINGDOM OF ARKAM

Applicant

v.

THE STATE OF RANDOLFIA

Respondent

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MEMORIAL FOR THE RESPONDENT



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## **STATEMENT OF JURISDICTION**

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

## QUESTIONS PRESENTED

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

## STATEMENT OF FACTS

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

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

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

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

Dr Herbert West, an Arkamian national, is a leader of GALA. In April 2003, West recorded an audiotape in Arkam, in which he urged his “Arkamian brothers and sisters to rid Yuggott ... of its Lengian occupiers. Eliminate them all: men, women and children. Eliminate them all!”. West passed the audiotape to another member of GALA. The recording was subsequently duplicated and circulated. Between 15 May and 25 May 2003,

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

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

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

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

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

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

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

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

## SUMMARY OF PLEADINGS

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A1. The International Court of Justice has jurisdiction to review the operation of United Nations Security Council Resolutions. The exercise of power by the Security Council is limited by the principles and purposes of the UN Charter and general international law. Randolfia has no obligation to comply with Resolutions 1487 or 2241. The assertion of exclusive jurisdiction by Arkam through its TRC would undermine the *jus cogens* prohibition of war crimes. Resolution 2241 is therefore not binding upon Randolfia. Resolution 1487, which invokes the Rome Statute, is not binding upon Randolfia due to its inconsistency with that Statute.

A2. The surrender of Curwen to the ICC is consistent with the *Vienna Convention on the Law of Treaties* and customary international law. The Rome Statute does not create obligations for Arkam. The surrender of Curwen to the ICC does not abrogate Arkam's rights. Accordingly, the surrender of Curwen does not violate of the principle of *pacta tertiis nec nocent nec prosunt*.

A3. The surrender of Curwen to the ICC would not violate the principle of complementarity. An investigation of Curwen by the Arkamian TRC is incompatible with a genuine willingness to investigate or prosecute. Furthermore, a Randolfian surrender of Curwen to the ICC would not give rise to State responsibility.

B1. The issue of jurisdiction of the ICC is distinct from the merits of any claim of criminal responsibility before the ICC. Consequently, it is only necessary for the International Court of Justice to be satisfied that there is a sufficiently plausible case of ICC jurisdiction in order to justify the surrender of West to the ICC. There is a sufficiently plausible case that the

crimes for which West is responsible occurred within the territory of Leng. This satisfies the nexus requirement.

B2. There is a sufficiently plausible case that West's acts fall within the temporal jurisdiction of the ICC. He is charged with responsibility for the genocide, which occurred in Yuggott after the entry into force of the Rome Statute for Leng. Furthermore, West's conduct constitutes continuing crimes, which fall within the temporal jurisdiction of the ICC.

B3. In order to justify the surrender of West to the ICC, it is only necessary to establish a sufficiently plausible case that a crime within the jurisdiction of the ICC has occurred. Genocide has occurred in Yuggott. Whilst it is not necessary for this Court to establish West's individual criminal responsibility, there is sufficient evidence to support each of the charges against West under Articles 25 and 28 of the Rome Statute.

## PLEADINGS

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### **A. RANDOLFIA'S DECISION TO SURRENDER JOSEPH CURWEN TO THE CUSTODY OF THE INTERNATIONAL CRIMINAL COURT IS CONSISTENT WITH INTERNATIONAL LAW.**

#### **A1. ARKAM DOES NOT HAVE EXCLUSIVE JURISDICTION OVER CURWEN.**

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

#### **(a) The International Court of Justice has jurisdiction to review the operation of Security Council Resolutions**

Security Council resolutions are subject to international law.<sup>1</sup> Obligations created by the Security Council are limited by the purposes and principles of the UN Charter and rules of

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<sup>1</sup> Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) (Preliminary Objections) 1998 ICJ 115, 154 (Judge Rezek Sep. Op.) [Lockerbie (1998) US]; Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Provisional Measures) 1992 ICJ 114, 155 (Judge Bedjaoui Diss.Op.), 171, 174-5 (Judge Weeramantry Diss.Op.) [Lockerbie (1992) US]; Legal Consequences for State of the continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) ICJ 1971, 294 (Judge Fitzmaurice

general international law.<sup>2</sup> The obligations under Article 25<sup>3</sup> to carry out decisions of the Security Council are limited to those decisions made in accordance with the Charter.<sup>4</sup> The International Court of Justice, as the principal judicial organ of the UN, has jurisdiction to review obligations created under the Charter.<sup>5</sup>

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Diss.Op.), 340 (Judge Gros Diss.Op.), [Namibia]; Conditions of Admissions of a State to Membership of the United Nations 1948 ICJ 57, 64-5; The Prosecutor v Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) Case No. IT-94-1-AR72, ICTY App.Ch., 1995, Para. 32-34 [Tadic: Interlocutory Appeal]; LAUTERPACHT, E. *The legal effect of illegal acts of international organisations*, in Cambridge Essays in Honour of Lord McNair (Stevens & Sons 1965), 89; FRANCK, T.M. *The Security Council and Threats to "The Peace": Some Remarks on Remarkable Developments*, in DUPUY, R-J (ed). *The Development of the Role of the Security Council: Peace-Keeping and Peace-Building: Workshop*, The Hague Academy of International Law (Martinus Nijhoff 1993), 84 [DUPUY]; DUGARD, J. *Judicial Review of Sanctions*, in Gowlland-Debbas, V.(ed) *United Nations Sanctions and International Law* (Kluwer Law International 2001), 85-6 [DUGARD]; BOTHE, M. *Les limites des pouvoirs du Conseil de Sécurité*, in DUPUY, 69; Secretary-General's Statement to the Security Council, in Security Council Official Record Second Year, No.3, Ninety-First Meeting, 44-45.

<sup>2</sup> UN Charter, Article 24(2); *Norwegian Amendment*, Documents of the United Nations Conference on International Organisations, Vol.11 (United Nations Information Organizations 1945), 379 (Delegate of the United States), 379-80 (Delegate of the Ukraine); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro) (Provisional Measures) 1993 ICJ Reps 325, 440 (Judge Lauterpacht, Sep.Op.)

<sup>3</sup> UN Charter, Article 25; Repertory of United Nations Practice, Supplement No 5 (1970 - 1978), volume 2, 34, 38; Namibia, note 1, 53; 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) 1992 ICJ 3, 47 (Judge Bedjaoui Diss.Op.) [Lockerbie (1992) UK]; GOODRICH, L.M. & HAMBRO, E. Charter of the United Nations: Commentary and Documents (2<sup>nd</sup> ed. Stevens & Sons 1949), 209.

<sup>4</sup> Portugal v Australia (Case Concerning East Timor) ICJ 1995 90, 155 [East Timor]; Lockerbie (1992) US, note 1, 175 (Judge Weeramantry Diss.Op.).

<sup>5</sup> UN Charter, Article 92; Lockerbie (1998) US, 152, 154 (Judge Rezek Sep. Op.); Application of the Genocide Convention Case, 439 (Judge Lauterpacht, Sep.Op.); Namibia, note 1, 303-304 (Judge Fitzmaurice, Diss.Op.); 143-145 (Judge Onyeama, Sep.Op.); East Timor, *ibid*, 251 (Judge Skubiszewski Diss.Op.).

**(b) Grounds of review - purposes and principles of the UN Charter and rules of general international law**

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

Principles of justice and international law require that States prohibit the commission of war crimes, and extradite or prosecute those accused of war crimes.<sup>6</sup> *Randolfia and Arkam*, as parties to the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* [*Compromis* ¶30], are obliged to extradite or prosecute those accused of war crimes.<sup>7</sup> In particular, such an obligation exists in relation to the crime of intentionally directing attacks against a civilian population.<sup>8</sup> Furthermore, under general international law there is a

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<sup>6</sup> Rome Statute, Preamble; Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity 1973, UN Doc. A/9030; Question of the Punishment of War Criminals and Persons who have committed Crimes Against Humanity 1971, UN Doc. A/8429; United Nations Commission on Human Rights RES 2002/79, para.11; BUERGENTHAL, T. *To Respect and Ensure: State Obligations and Permissible Derogations*, in HENKIN, L.(ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981), 77; Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment (Nicaragua v. USA) 1986 ICJ 14, 113 [Nicaragua]; BASSIOUNI, M.C & WISE, E.M. *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff 1995), 52-3 [BASSIOUNI]; Velasquez Rodriguez Case (1989) 28 ILM 291, [Velasquez]; *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University (2001) [Princeton Principles], Principle 7.

<sup>7</sup> [Geneva Convention IV] 75 UNTS 287, Article 146.

<sup>8</sup> Article 8(2)(b)(i) of the Rome Statute; Geneva Convention IV *ibid*; Illegality of the Threat or Use of Nuclear Weapons Advisory Opinion 1996 ICJ 226, 257 [Nuclear Weapons Advisory Opinion].

duty to extradite or prosecute individuals accused of war crimes committed in both international<sup>9</sup> and non-international<sup>10</sup> armed conflicts.

Resolution 2241 purports to confer exclusive jurisdiction on States not party to the *Rome Statute of the International Criminal Court* (“Rome Statute”) in relation to crimes committed by their nationals whilst serving in the IFLEN peacekeeping mission. The prohibition of war crimes is a peremptory norm (*jus cogens*) of international law.<sup>11</sup> Article 103, which addresses conflicts between the Charter and other treaty obligations, does not apply to conflicts involving rules of general international law.<sup>12</sup> *A fortiori*, Article 103 has no application in relation to peremptory norms.<sup>13</sup>

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<sup>9</sup> Geneva Convention IV *ibid*; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 970 [Geneva Convention I], Article 49; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 971 [Geneva Convention II], Article 50; Convention relative to the Treatment of Prisoners of War; 75 UNTS 972 [Geneva Convention III], Article 129; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) International Court of Justice, 14 February 2002 [Arrest Warrant], (Judge Van Den Wyngaert Ad Hoc Diss.Op.), 30-31, 40; BASSIOUNI, note 6, 21; International Law Commission’s Draft Code of Crimes Against Peace and Security of Mankind 1996 , Articles 9, 20, [ILC Draft Code of Crimes]; Princeton Principles, Principle 7.

<sup>10</sup> ILC Draft Crimes Code, *ibid*, Articles 9, Commentary on Article 20, para.14. DUGARD, J. *Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?* 12 Leiden Journal of International Law 1001, 1003 (1999); *Security Council Resolution 955 UN. Doc. S/RES/955 (1994)*; Tadic: Interlocutory Appeal, note 1, (Judge Abi-Saab Sep.Op.).

<sup>11</sup> Nuclear Weapons Advisory Opinion, note 7, 273 (Judge Bedjaoui), 496 (Judge Weeramantry Diss.Op.), 574 (Judge Koroma Diss. Op.); The Prosecutor v Kupreskic et al. Case No.IT-95-16, ICTY Tr.Ch.II. (2000) para.520; BASSIOUNI, M.C. *Normative Framework of International Humanitarian Law*, 8 Transnational Law and Contemporary Problems, 199, 201 (1998); BASSIOUNI, M.C. *International Crime: Jus Cogens and Obligatio Erga Omnes*, 59(4) Law and Contemporary Problems 63, 68 (1996); HANNIKAINEN, L. *Peremptory norms (jus cogens) in international law: historical development, criteria, present status* (Finnish Lawyers' Pub. Co., 1988), 621-2.

<sup>12</sup> Lockerbie (1998) US, note 1; 152 (Judge Rezek Sep.Op.).

<sup>13</sup> Application of the Genocide Convention Case, note 2, 440 (Judge Lauterpacht Sep.Op.).

The Arkamian TRC was established on 1 March 2003 [Compromis ¶7]. Curwen ordered the destruction of Exhamtown on 29 June 2003 [Compromis ¶17]. This assertion of jurisdiction in a prospective manner by the Arkamian TRC in relation to Curwen is contrary to Arkam's obligation to prohibit war crimes. Resolution 2241 thus effectively obliges member States having custody of an accused to become "supporters"<sup>14</sup> of Arkam's non-fulfilment of its *jus cogens* obligation to prohibit war crimes. Notwithstanding Articles 25 and 103 of the UN Charter, "in strict logic"<sup>15</sup> Resolution 2241 is not binding on Randolfia.

(c) Resolution 1487 is not applicable

The Security Council, in paragraph one of Resolution 1487, adopted in purported reliance on Article 16 of the Rome Statute, "requests"<sup>16</sup> that the ICC not commence investigations or prosecutions of members of UN peacekeeping missions for a renewable period of twelve months, commencing 1 July 2003. The Security Council in paragraph three of the same Resolution decided that member States take no action inconsistent with such a Security Council request, or with their international obligations. As paragraph one explicitly envisages consistency with Article 16 of the Rome Statute, the scope of any obligation imposed by paragraph three of the resolution is dependent on such consistency. It is inconsistent with the intention of the drafters of Article 16 of the Rome Statute to allow a broad, prospective deferral of ICC jurisdiction in respect of a general class of conflicts.<sup>17</sup> Article 16 only envisages a Security Council request for deferral of investigation or

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<sup>14</sup> Application of the Genocide Convention Case, *ibid*, 441 (Judge Lauterpacht Sep.Op.)

<sup>15</sup> Application of the Genocide Convention Case, *ibid*.

<sup>16</sup> *Security Council Resolution 1487*, UN. Doc. S/RES/1487 (2003), para.1.

<sup>17</sup> Amnesty International, *The unlawful attempt by the Security Council to Give US Citizens Permanent Impunity from International Justice*, AI Index: IOR 40/006/2003, 47.

prosecution on a case-by-case basis.<sup>18</sup> The request contained in Resolution 1487 is inconsistent with Article 16, and therefore, Randolfia's surrender of Curwen to the ICC would not be inconsistent with paragraph three of the Resolution. Furthermore, Randolfia has an obligation under international law to surrender Curwen to the ICC [Rome Statute, Article 89(1)].

**A2. THE SURRENDER OF CURWEN TO THE ICC IS CONSISTENT WITH THE VIENNA CONVENTION ON THE LAW OF TREATIES AND CUSTOMARY INTERNATIONAL LAW.**

It is a general rule of customary international law that a treaty cannot impose obligations or confer rights on States not party to the treaty without their consent (*pacta tertiis nec nocent nec prosunt*).<sup>19</sup> Article 34 of the *Vienna Convention on the Law of Treaties* ("VCLT") embodies this principle. For the purposes of the *pacta tertiis* rule, however, non-party States have no grounds of complaint<sup>20</sup> regarding "incidentally unfavourable effects of lawful and valid treaties".<sup>21</sup>

The Rome Statute does not create obligations for Arkam. The obligations created by the Rome Statute are expressly limited to State parties.<sup>22</sup> The principle of complementarity [Rome Statute, Articles 17 and 18] recognises Arkam's entitlement to exercise criminal

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<sup>18</sup> UN Doc S/PV.4568 (2002) Statements of State Representatives at pp: 4 (Canada), 5 (New Zealand), 8 (Denmark, EU Representative), 14 (Costa Rico, Rio Group Representative), 23 (Switzerland), 25 (Mauritius), 26-27 (Mexico), Resumption 1, 6-7 (Samoa), 9 (Germany); UN Doc. S/PV4772 (2003) Statements of State Representatives at pp: 2 (Secretary General), 5 (New Zealand), 6 (Jordan), 7 (Switzerland), 7 (Liechtenstein), 9 (Greece, EU Representative), 15 (Trinidad and Tobago), 18 (Nigeria), 20 (Netherlands).

<sup>19</sup> Case Concerning German Interests in Polish Upper Silesia (Merits) 1926 PCIJ (Ser.A) No. 7, 28 and 29; Case of the Free Zones of Upper Savoy and the District of Gex (Judgments, Orders and Advisory Opinions) 1932 PCIJ (Ser.A/B) No.46, 141; Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder (Judgments) 1929 PCIJ (Ser.A) No.23, 21; Island of Palmas Case II RIAA 831, 842, 850, 870.

<sup>20</sup> FITZMAURICE, G, in [1960] YBILC II , 84; SINCLAIR, I, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> ed. Manchester University Press, 1983), 99-100.

<sup>21</sup> FITZMAURICE, *ibid*, 100-101.

<sup>22</sup> Rome Statute, Part 9 *International Cooperation and Judicial Assistance*.

jurisdiction over Curwen, but does not impose any obligations on Arkam. To the extent that Arkam is obliged to extradite or prosecute persons accused of war crimes, this is a pre-existing obligation under general international law.

The surrender of a national of a non-party State to the ICC does not violate the *pacta tertiis* rule. States are entitled under customary international law to exercise jurisdiction over foreign nationals without the consent of the State of nationality.<sup>23</sup> States are entitled to delegate this jurisdiction to an international tribunal.<sup>24</sup> States are also entitled to extradite foreign nationals to third States without the consent of the State of nationality of an accused.<sup>25</sup> The “incidental” and potentially “unfavourable effect” of a Randolfian surrender of Curwen to the ICC is consistent with international law.

A foreign visiting military force does not enjoy immunity from the jurisdiction of the receiving state.<sup>26</sup> Arkam is therefore unable to claim that the Rome Statute abrogates its

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<sup>23</sup> RESTATEMENT (THIRD) of the Foreign Relations Law of the United States (1987), §404 [RESTATEMENT]; Filartiga v Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980); United States v Yunis, 724 F.2d 1086, 1092 (DC Cir. 1991); Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention), 974 UNTS 177; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 UNTS 167; International Convention against the Taking of Hostages, annexed to GA Res 34/146 adopted 17 Dec 1979; International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, annexed to GA Res 39/46 adopted 10 December 1984; Convention on Psychotropic Substances, 1019 UNTS 174; International Convention for the Suppression of Terrorist Bombings, annexed to GA Res. 52/164 adopted 15 December 1997.

<sup>24</sup> Judgement of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946, 38 (London: H.M.S.O. Cmd. 6964, 1946); SCHARF, M. *The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States* 64 *Law and Contemporary Problems* 67, 103-104 (2001).

<sup>25</sup> SHEARER, I.A. *Extradition in International Law* (Manchester University Press, 1971), 130.

<sup>26</sup> JENNINGS, R. & WATTS, A. *Oppenheim's International Law* (9<sup>th</sup> ed., Longman, 1992) [OPPENHEIM], 1157.

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

**A3. THE EXERCISE OF JURISDICTION OVER CURWEN DOES NOT VIOLATE THE PRINCIPLE OF COMPLEMENTARITY**

Arkam contends, in the alternative, that “given the ongoing investigation by the Arkamian TRC into the acts of Mr. Curwen, ... the exercise of jurisdiction over him by the ICC would violate the principle of complementarity” [Compromis ¶31], and that therefore any prosecution by the ICC is inadmissible.

In order to succeed on the issue of admissibility, Arkam must establish that the case against Curwen is inadmissible under the Rome Statute, and that the surrender of an accused in relation to an inadmissible case would give rise to State responsibility. The obligation to surrender and the issue of admissibility are distinct legal questions.

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

In order to determine whether or not there is an unwillingness to investigate or prosecute for the purposes of the Rome Statute, the ICC is required to consider several factors. These include: whether national proceedings have been taken for the purpose of shielding the accused from criminal responsibility; and whether the proceedings are being conducted independently or impartially, and consistently with an intent to bring the accused to justice [Rome Statute, Article 17(2)].

**(a) Investigations by Truth and Reconciliation Commissions do not preclude admissibility of cases before the ICC.**

For the purposes of Article 17 an investigation by a TRC is not sufficient to render a case inadmissible before the ICC.<sup>27</sup> An “investigation” within the terms of Article 17(1)(a) must be undertaken with a view to subjecting an accused to criminal prosecution.<sup>28</sup> The preamble to the Rome Statute affirms the need for effective prosecution of international crimes, and recalls the duty of every State to exercise its criminal jurisdiction.<sup>29</sup> If Curwen makes full disclosure to the TRC<sup>30</sup> then he will be granted amnesty in respect of his alleged war crimes [*Compromis* ¶7]. The preclusion of the possibility of prosecution is incompatible with a genuine willingness to investigate.

**(b) Investigation of Curwen by the Arkamian TRC does not preclude admissibility of his case before the ICC.**

Furthermore, in relation to the Arkamian TRC, the following factors evince an unwillingness to investigate or prosecute. First, unlike the South African<sup>31</sup> and other TRCs,<sup>32</sup> which have only been able to investigate crimes that have occurred prior to their

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<sup>27</sup> DUGARD, J., *Possible Conflicts of Jurisdiction with Truth Commissions*, in CASSESE, A., GAETA, P. & JONES, J. *The Rome Statute of the International Criminal Court: A Commentary* (Vol. I) (Oxford University Press, 2002), 702 [CASSESE].

<sup>28</sup> Rome Statute, Preamble, Article 20; HOLMES, J.T. *The Principle of Complementarity*, in LEE, R.S. *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International 1999), 77; ROBINSON, D. *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court* 14 *European Journal of International Law* 481, 499-500 (2003) [ROBINSON].

<sup>29</sup> DUGARD, J., note 27, 701; SCHARF, M.P. *The Amnesty Exception to the Jurisdiction of the ICC*, 32 *Cornell International Law Journal* 507, 522, (1999).

<sup>30</sup> *Promotion of National Unity and Reconciliation Act*, Act No 34 1995 (South Africa), s20(1)(c).

<sup>31</sup> *Ibid*, s20(2).

<sup>32</sup> Law on General Amnesty for Consolidation of Peace Decree No. 486 1993 (El Salvador) Article 1; Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone 1999 (Sierra Leone), Article 16; The

establishment, the jurisdiction of the Arkamian TRC is prospective [*Clarification 6*]. The TRC was established on 1 March 2003 [*Compromis ¶7*]. Curwen ordered the destruction of Exhamtown on 29 June 2003 [*Compromis ¶17*]. The prospective jurisdiction of the Arkamian TRC creates *carte blanche* to commit war crimes.

Secondly, the purported exercise of extraterritorial jurisdiction by the Arkamian TRC in respect of crimes committed against Lengian nationals, and the evidentiary difficulties created thereby,<sup>33</sup> demonstrate the inappropriateness of an exercise of TRC jurisdiction in these circumstances. The granting of an amnesty to Curwen is not conducive to the national healing and reconciliation for which the Arkamian TRC was established. The determination of the Arkamian authorities to proceed with the TRC process notwithstanding these considerations demonstrates an unwillingness genuinely to investigate or prosecute.

**(c) The surrender of Curwen to the ICC does not give rise to State responsibility**

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

**B. RANDOLFIA'S DECISION TO SURRENDER DR HERBERT WEST TO THE CUSTODY OF THE INTERNATIONAL CRIMINAL COURT WOULD BE CONSISTENT WITH INTERNATIONAL LAW.**

The ICC is entitled to exercise jurisdiction over West, as the following jurisdictional requirements are satisfied. First, the conduct in question occurred on the territory of Leng,

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Commissions of Inquiry Act Legal Notice No.5 (May 16 1986) (Uganda); Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have caused the Guatemalan Population to Suffer, 23 June 1994 UN. Doc. A/48/954-S/1994/751; L'arrêté présidentiel du 28 Mars 1995 (Haiti) Article.2.

<sup>33</sup> ROBINSON, note 28, 501-502; HOLMES, note 28, 49.

and thus demonstrates a territorial nexus to a party to the Rome Statute (*ratione loci*). Secondly, the crimes for which West is accused occurred after the entry into force of the Rome Statute for Leng (*ratione temporis*). Finally, West has been charged with responsibility for crimes within the jurisdiction of the ICC (*ratione materiae*). However, before addressing these jurisdictional issues in more detail, it is necessary to consider, as a preliminary matter, the role of this Court in examining the jurisdiction of the ICC.

**THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN THE DETERMINATION OF THE JURISDICTION OF THE ICC.**

The issue of the jurisdiction of the ICC is distinct from the merits of any claim of criminal responsibility before the ICC. Consequently, Randolfia is not required to establish before this Court that it has an “unassailable legal basis”<sup>34</sup> for its arguments regarding ICC jurisdiction. Furthermore, the International Court of Justice has drawn a distinction between the determination of its own jurisdiction, and the determination of the jurisdiction of another body.<sup>35</sup> This Court considered the jurisdiction of an arbitral body in the *Ambatielos*<sup>36</sup> case, and effectively concluded that a claim of a “sufficiently plausible character”<sup>37</sup> would establish that body’s jurisdiction. Therefore, Randolfia need only establish a sufficiently plausible basis for ICC jurisdiction over West in order to justify his surrender.

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<sup>34</sup> Ambatielos Case (Greece v United Kingdom) Merits: Obligation to Arbitrate [Ambatielos Case] ICJ May 19 1953, 10, 18.

<sup>35</sup> *Ibid*, 14.

<sup>36</sup> *Ibid* 10-35.

<sup>37</sup> *Ibid*, 18, Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objection) 1996 ICJ 803, 824, 833 (Judge Shahabuddeen Sep.Op); 869 (Judge Rigaux, Sep. Op) [Oil Platforms]; Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Jurisdiction of the Court and Admissibility of the Application) 1984 ICJ 428, 637 (Judge Schwebel, Diss. Op).

**B1. WEST’S CONDUCT DEMONSTRATES THE NECESSARY NEXUS WITH A STATE PARTY TO THE ROME STATUTE.**

The ICC is entitled to exercise jurisdiction where there is a sufficiently plausible claim that the requirements of Article 12(2) of the Rome Statute have been satisfied. Pursuant to Article 12(2)(a), jurisdiction arises when conduct proscribed under the Rome Statute has “occurred” on the “territory” [Rome Statute, Article 12(2)(a)] of a State party to the Statute. This requirement of a territorial nexus is based<sup>38</sup> on the principle of territorial jurisdiction under general international law.<sup>39</sup> In accordance with the territorial principle, States have jurisdiction to prescribe laws, adjudicate and enforce in relation to crimes committed “in whole or in part”<sup>40</sup> within their territory. A crime is committed “in part” within the territory of a State if a constituent element of the crime occurs, or if the crime is consummated, within the State’s territory.<sup>41</sup>

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

West has been charged [*Corrections* ¶2] with ordering, inducing or soliciting genocide [Rome Statute, Article 25(3)(b)], as well as command responsibility for genocide [Rome Statute, Article 28]. These offences were all consummated within the territory of Leng when

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<sup>38</sup> KAUL, H-P. *Preconditions to the exercise of Jurisdiction*, in CASSESE, note 27, 583, 607-8.

<sup>39</sup> North Atlantic Fisheries Case (1910) 11 RIAA 167, 180; RESTATEMENT, note 23, 402(1)(b); OPPENHEIM, note 26, 458; *Harvard Research Project: Jurisdiction with Respect to Crime* 29 American Journal of International Law Supplement 435, 445, 578-9 (1935) [Harvard Research Project], Article 3.

<sup>40</sup> Harvard Research Project, *ibid*, Article 3, 495; RESTATEMENT, *ibid*, §402(1)(a).

<sup>41</sup> SS Lotus (France v Turkey) 1927 PCIJ (Ser.A) No.10, 23; Harvard Research Project, 495; OPPENHEIM, note 26, 460, 472; MANN, F. *The Doctrine of International Jurisdiction*, 111 *Recueil des Cours* 1, 9 (1964) [MANN (1964)], 84.

the killing of ethnic Lengians occurred. West has also been charged with direct and public incitement to genocide [Rome Statute, Article 25(3)(e)], and attempted genocide [Rome Statute, Article 25(3)(f)]. The consummation of these offences occurred in Leng when the audiotape was broadcast on Radio Yuggott [*Compromis* ¶11]. There is a “sufficiently plausible” case that West has directed the broadcast in Leng, and that he is responsible for conduct that occurred in Leng.

**B2. WEST’S ACTIONS FALL WITHIN THE TEMPORAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT.**

In order for the ICC to exercise jurisdiction, there must be a “sufficiently plausible” claim that the crimes alleged fall within the Court’s temporal jurisdiction. Article 11(2) of the Rome Statute provides that “[i]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State.”

This Article should be read in conjunction with the general principle of law embodied in Article 24, which prohibits the Rome Statute from having retrospective effect. Article 24 is inapplicable in this case because it only restricts the Statute from having retrospective effect prior to 1 July 2002, the day on which the Statute came into force generally. All the relevant acts of West occurred in 2003.

In April 2003, West recorded the relevant audiotape [*Compromis* ¶10]. The Rome Statute entered into force for Leng on 1 May 2003 [*Compromis* ¶9]. Radio Yuggott began broadcasting West’s audiotape on 15 May 2003 [*Compromis* ¶11]. The massacres in Yuggott commenced on 16 May 2003 [*Compromis* ¶12].

Notwithstanding the date of the recording, West is charged with responsibility for genocide, which occurred after the entry into force of the Rome Statute with respect to Leng. The ICC’s temporal jurisdiction is therefore established.

**(a) The charges of command or superior responsibility are within the temporal jurisdiction of the ICC.**

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

**(b) The continuing crimes of inciting, ordering, soliciting, inducing and attempted genocide are within the temporal jurisdiction of the ICC.**

Certain crimes are, by their very nature, continuing.<sup>42</sup> The International Criminal Tribunal for Rwanda (“ICTR”), in considering its temporal jurisdiction, has accepted that the crime of conspiracy to commit genocide constitutes a “continuing crime”.<sup>43</sup> The Trial Chamber of the ICTR has endorsed<sup>44</sup> the following passage from a decision of the English House of Lords:

When the conspiratorial agreement has been made, the offence of conspiracy is complete, ... But [that] ... does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged...<sup>45</sup>

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<sup>42</sup> Regina v Bow Street Stipendiary Magistrate and Others Ex Parte Pinochet Ugarte (No.3) [2000] 1 A.C. 147, 153; BOURGON, S. *Jurisdiction Ratione Temporis*, in CASSESE, note 27, 550; PANGALANGAN, R. *Article 24*, in TRIFFTERER, O (ed). *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Nomos Verlagsgesellschaft, 1999), 471-2 [TRIFFTERER].

<sup>43</sup> Hassan Ngeze and Ferdinand Nahimana v The Prosecutor (Decision on the Interlocutory Appeals) Case No. ICTR-97-27-AR72 & ICTR-96-11-AR72, ICTR App. Ch. (2000), paras. 13-15 (Judge Shahabudeen Sep. Op.) [Ngeze and Nahimana: Interlocutory Appeals]; The Prosecutor v Gratien Kabiligi and Aloys Ntabakuze [Kabiligi and Ntabakuze] Case No. ICTR-96-34-1, ICTR Tr. Ch. III (2000) para. 39; The Prosecutor v Anatole Nsengiyeumva [Nsengiyeumva], Case No. ICTR-96-12-1, ICTR Tr. Ch III (2000), para 28.

<sup>44</sup> Kabiligi and Ntabakuze, ibid, para.41; Nsengiyeumva, ibid, para.30.

<sup>45</sup> Director of Public Prosecutions v Doot and Others [1973] AC 807, 827.

The ICTR has applied this reasoning to the crime of incitement to genocide.<sup>46</sup> By parity of reasoning, a similar approach should apply in relation to the crimes of ordering, soliciting or inducing genocide. These crimes continue “to the time of the commission”<sup>47</sup> of the genocide. The ICC is therefore not precluded from exercising jurisdiction over West as his acts constitute continuing crimes, which resulted in the commission of genocide after the entry into force of the Rome Statute.

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

### **B3. THE ICC HAS JURISDICTION OVER WEST.**

#### **(a) The role of the International Court of Justice in determining the jurisdiction of the ICC.**

This Court was established to adjudicate upon disputes between States, and to provide advisory opinions to certain international organisations.<sup>48</sup> It is not empowered to determine individual guilt or innocence. Accordingly, the Respondent need not make submissions on the merits of West’s individual criminal responsibility. It is only required to establish a “sufficiently plausible” case that a crime within the jurisdiction of the ICC has occurred. On this basis, the case against West may then be submitted to the ICC for a determination on its

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<sup>46</sup> The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze Case (Judgement and Sentence) Case No. ICTR 99-52-T, ICTR (2003), 28, para.104 [Nahimana, et al].

<sup>47</sup> *Ibid.*

<sup>48</sup> Statute of the International Court of Justice, Articles.34, 64.

merits. Arguments set out below that appear to relate to the merits “are clearly designed as measures of defence”<sup>49</sup> which it would be necessary to examine only *in the alternative* that the Court adopts a standard of proof other than that submitted by the Respondent.

**(b) ICC jurisdiction over the crime that occurred in Yuggott**

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

Pursuant to Article 9 of the Rome Statute, the *Elements of Crimes*<sup>50</sup> assists the ICC in the interpretation and application of the crime of genocide. The *Elements of Crimes* elaborates upon Article 6(a) of the Rome Statute, and sets out the following requirements for the crime of genocide.<sup>51</sup>

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

**(i) The perpetrator killed one or more persons**

On 16 May 2003, ethnic Arkamians began to conduct a series of nighttime raids, massacring ethnic Lengians in Yuggott. By the end of May, nearly ten percent of the

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<sup>49</sup> Anglo-Iranian Oil Co. Case (United Kingdom v Iran) (Preliminary Objection) 1952 ICJ 93, 114.

<sup>50</sup> *Report of the Preparatory Commission for the International Criminal Court: Finalized draft text of the Elements of Crimes*, UN Doc. PCNICC/2000/1/Add.2 (2000) [*Elements of Crimes*].

<sup>51</sup> *Elements of Crimes, ibid, Article 6(a) Genocide by Killing.*

Lengian population of the province had been killed [*Compromis* ¶12]. Such killings are sufficient to satisfy this element.

(ii) Such person or persons belonged to a particular national, ethnical, racial or religious group.

The massacred Lengians were part of a particular ethnical, racial, and religious group.<sup>52</sup>

Lengians share a common culture, distinctive physical characteristics, and religious beliefs [*Compromis* ¶2, 3; *Clarification* ¶1].

(iii) The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

The ethnic Arkamians who carried out the massacres intended to destroy, in part, the group of ethnic Lengians. There is evidence that they possessed the special intent (*dolus specialis*) required for genocide, “which demands that the perpetrator clearly seeks to produce the act charged”.<sup>53</sup> Intent may be inferred<sup>54</sup> from their “words or deeds”.<sup>55</sup>

Intent can be inferred from the fact that the Arkamians conducted a series of night-time raids in several towns in which ethnic Lengians were targeted and massacred.<sup>56</sup> Within three

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<sup>52</sup> The Prosecutor v Jean-Paul Akayesu (Judgement) Case No. 96-4-T, ICTR Tr. Ch. I (1998), paras.170, 512-515 [Akayesu].

<sup>53</sup> *Ibid*, 498.

<sup>54</sup> *Elements of Crimes*: General Introduction, note 50, para.3; The Prosecutor v Goran Jelusic (Judgement) Case No. IT-95-10-A, ICTY App.Ch. (2001), para.47; The Prosecutor v Milomir Stakic (Judgement) Case No. IT-97-24-T, ICTY Tr.Ch.II (2003), para.526; The Prosecutor v Dusko Sikirica, Damir Dosen, and Dragan Kolundzija (Judgement on the Defence Motions to Acquit) Case No. IT-95-8 Tr.Ch.(2001), para.61; Nahimana, et al, note 46, para.957; The Prosecutor v Laurent Semanza (Judgement and Sentence) Case No. ICTR-97-20-2, ICTR Tr.Ch. (2003), para.313; The Prosecutor v Alfred Musema (Judgement and Sentence) Case No. ICTR-96-13-A, ICTR Tr.Ch.I (2000), para.167 [Musema]; The Prosecutor v Georges Anderson Nderubumwe Rutaganda (Judgement and Sentence) Case No. ICTR-96-3, ICTR Tr.Ch.I (1999), para.63 [Rutaganda]; The Prosecutor v Clément Kayishema and Obed Ruzindana (Judgement) Case No. ICTR-95-1-2 Tr.Ch.II (1999), para.93 [Kayishema and Ruzindana]; Akayesu, ibid, para.523.

<sup>55</sup> Kayishema and Ruzindana, ibid, para.93.

<sup>56</sup> *Ibid*, para.535.

weeks, nearly ten percent of the Lengian population of the province had been killed [*Compromis* ¶12]. Intent can also be inferred from evidence that the perpetrators were chanting “Eliminate them all” whilst carrying out the massacres.

(iv) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”

This element contains two alternative limbs, the second of which appear to be satisfied in the present case. Approximately ten percent of the Lengian population of Yuggott were killed within a three week period by ethnic Arkamians. [*Compromis* ¶12]. These killings, in themselves, effected the destruction required to constitute genocide.<sup>57</sup>

**(c) West’s criminal responsibility for genocide.**

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

West has been charged with responsibility for the crime of genocide that has occurred in Yuggott. A critical requirement of any criminal responsibility for genocide under Article 25 of the Rome Statute is that West possessed the necessary genocidal intent (*dolus specialis*).<sup>58</sup>

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<sup>57</sup> Prosecutor v Radislav Krstic Case No. IT-98-33, ICTY Tr.Ch.I (2001), paras.80-84 [Krstic].

<sup>58</sup> *Ibid*, paras.544, 569-580; Akayesu, note 52, paras. 498-499, 517, 540; The Prosecutor v Ignace Bagilishema Case No. ICTR-95-1, Tr.Ch.I (2001), paras.61-62 [Bagilishema]; Musema, note 54, paras.164-166; The Prosecutor v Georges Anderson Nderubumwe Rutaganda (Judgement and Sentence) Case No. ICTR-96-3, ICTR Tr.Ch.I (1999), paras.59-61; Kayishema and Ruzindana, note 54, para.91.

This special intent is not necessary however, for the charge of command/superior responsibility under Article 28 of the Rome Statute.

(i) Genocidal Intent

There is evidence that West intended to destroy, in part, the distinct group of ethnic Lengians. He possessed the *dolus specialis* required for genocide, “which demands that the perpetrator clearly seeks to produce the act charged”.<sup>59</sup> In the absence of a confession, the intent of an accused may be inferred from his “words or deeds”. There are two key inferences that may be drawn from West’s actions and words. First, the language in the audiotape evinces an intent to destroy the ethnic Lengians. Secondly, West’s intention to destroy can also be evidenced by the fact that he intended that the audiotape be disseminated.

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

Furthermore, West’s intention to destroy may be evidenced by the fact that he has “frequently recorded audiotapes with messages denouncing ethnic Lengians and supporting GALA” [*Clarification* ¶4]. The repetition of destructive or discriminatory acts is a fact from which intention to destroy may be inferred.<sup>60</sup>

West’s intention to disseminate his audiotape can be inferred from his language and from his actions. West specifically addressed his audio recording to “my Arkamian brothers and sisters” [*Compromis* ¶10]. By necessary implication, his intention was that the recorded message be communicated to a wider audience than the GALA member to whom he handed

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<sup>59</sup> *Akayesu, ibid.*,498.

<sup>60</sup> *Ibid.*, para.524.

the audiotope. The medium through which West communicated his message further demonstrates an intention that the message be widely disseminated. An audio recording can be readily re-produced and re-played.

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

(ii) Charges pursuant to Article 25 and Article 28 of the Rome Statute

West has been charged with ordering, soliciting or inducing genocide; directly and publicly inciting genocide; attempted genocide; and command responsibility for genocide. In relation to each of these individual charges, the *Elements of Crimes* addressed above will be modified “*mutatis mutandis*” as necessary.<sup>61</sup> That is, the elements that define the crime of genocide in relation to Article 6(a) of the Rome Statute, vary according to the type of criminal responsibility charged.

*Ordering, Soliciting or Inducing Genocide.*

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

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<sup>61</sup> *Elements of Crimes*, General Introduction, note 50, Paragraph 8.

Ordering implies a superior-subordinate relationship,<sup>62</sup> in which “the person in a position of authority uses it to convince another to commit the offence”.<sup>63</sup> West is a leader of GALA, which has a “formal hierarchy with corresponding command structures” [*Compromis* ¶10, *Clarification* ¶2]. West’s employment of imperative language reflects his position of authority, and constitutes an order.

Soliciting means to “command, authorise, urge, incite, request or advise”<sup>64</sup> another to commit a crime.<sup>65</sup> Inducing is broader and encompasses solicitation as well as any other behaviour that would influence another person to commit a crime.<sup>66</sup> There is evidence that West solicited and induced genocide, by urging Arkamians to rid Yuggott of its “Lengian occupiers”. His precise words were “[e]liminate them all: men, women, and children. Eliminate them all!” [*Compromis* ¶10]. West provided a justification for a potential genocide, and in doing so, influenced the ethnic Arkamians to carry out the killings in Yuggott. Contemporaneous media reports surmised that the killings in Yuggott were influenced by West [*Compromis* ¶12].

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

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<sup>62</sup> Akayesu, note 52, para.483; Musema, note 54, para.121; Rutaganda, note 58, para.39; The Prosecutor v Tihomir Blaskic (Judgement) Case No.IT-95-14, ICTY Tr.Ch.I. (2000), paras.281-282; ESER, A. *Individual Criminal Responsibility*, in CASSESE, note 27, 796-797; AMBOS, K. *Article 25*, in TRIFFTERER, note 42, 475, 480.

<sup>63</sup> Akayesu, *ibid*, para. 483.

<sup>64</sup> ESER, note 62, 796.

<sup>65</sup> Bagilishema, note 58, para.30.

<sup>66</sup> ESER, note 62, 796; AMBOS, note 62, 480-481.

### *Directly and Publicly Inciting Genocide*

Pursuant to Article 25(3)(e) of the Rome Statute, West has been charged with directly and publicly inciting genocide. In the context of Article 6(a), the *Elements of Crimes*, as modified *mutatis mutandis* for this charge, does not require that West actually killed any Lengians, nor that genocide occurred or was attempted.<sup>67</sup> The *Elements of Crimes* requires that West possessed the requisite intent to destroy Lengians, as a distinct group, which has been dealt with above.

The element of direct incitement requires “specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion”.<sup>68</sup> West’s language constitutes a direct incitement. He calls for the elimination of Lengians living in Yuggott. His words were “Eliminate them all – men, women and children” [*Compromis* ¶10]. He urged the commission of genocide against a specific group in a specific area. This is not a vague or indirect suggestion. It was acted upon immediately.

Euphemistic language can satisfy the directness requirement.<sup>69</sup> However, in inciting the “elimination” of Lengians, West did not appear to have relied upon euphemism.

Public incitement “requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large”.<sup>70</sup> The employment of technological means of mass communication such as radio constitutes a

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<sup>67</sup> Akayesu, note 52, para.562; Nahimana et al, note 46, para.1029; The Prosecutor v Georges Ruggiu (Judgement and Sentence), Case No. ICTR-97-32-1, ICTR Tr.Ch.I. (2000), para.16 [Ruggiu]; Musema, note 54, para.120; Rutaganda, note 54, para.38; ESER, note 62, 803-805.

<sup>68</sup> ILC Draft Code of Crimes, note 9, Commentary to Article 2, para.16.

<sup>69</sup> Report of the Special Rapporteur of the Commission of Human Rights on the situation of human rights in Rwanda, UN Doc. E/CN.4/1995/71 (1995), para.24; The Prosecutor v Jean Kambanda (Judgement and Sentence) Case No. ICTR-97-23-S, ICTR Tr.Ch.I (1998), para.39(x); Akayesu, note 52, para.557; Mugesera v Canada (The Minister of Citizenship and Immigration) 2003 FCA 25, para.17; ESER, note 62, 805; AMBOS, note 62, 487.

<sup>70</sup> ILC Draft Code of Crimes, note 9, Commentary to Article 2, para.16.

public incitement.<sup>71</sup> Indeed, “this public appeal for criminal action ... encourages the kind of mob violence in which a number of individuals engage in criminal conduct”.<sup>72</sup>

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

#### *Attempted genocide*

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

Article 25(3)(f) provides for criminal responsibility where a person “forms the intent to commit a crime, commits an act to carry out this intention and fails to successfully complete the crime only because of some independent factor”.<sup>73</sup> As previously established, West had the intention to destroy, in part, the relevant group. West committed acts to carry out this intention through his involvement in the recording and dissemination of his message.

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<sup>71</sup> *Ibid*; Nahimana et al, note 46, para.1031; Akayesu, note 52, para.556; Ruggiu, note 67, para.17; ESER, in CASSESE, 805.

<sup>72</sup> ILC Draft Code of Crimes, *ibid*.

<sup>73</sup> *Ibid*, para 17.

West's actions thus constitute "a substantial step" [Rome Statute, Article 25(3)(f)] in relation to the crime of genocide and the non-occurrence of that genocide could only conceivably be "for reasons that are independent of [West's] intentions" [Rome Statute, Article 25(3)(f)].

#### *Command/Superior Responsibility*

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

Pursuant to Article 28(a), there is evidence that West effectively acted as a military commander. Whilst GALA has no clear distinction between its military and political organs [*Clarification* ¶2], this lack of distinction implies an indivisibility of the two functions. Regardless of what official title West holds, his order – to attack Yuggott, eliminate the Lengians within the territory of Yuggott and subsume the territory into Arkam – is a statement of a military nature. Furthermore, the perpetrators of the genocide appear to have acted in response to GALA commands and in a manner consistent with GALA objectives, which is sufficient to satisfy the requirement that the forces were under the effective command and control of West.<sup>74</sup>

There is evidence that West knew, or should have known<sup>75</sup> of the massacres in Leng. Radio Yuggott is a radio station controlled by members of GALA. It is a reasonable inference that West, as a leader of GALA, knew of the broadcasts which were played

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<sup>74</sup> VAN SCHAACK, B. *Command Responsibility: The Anatomy of Proof In Romagoza v Garcia* 36 UC Davis Law Review 1214, 1236 (2003).

<sup>75</sup> The Prosecutor v Zlatko Aleksovski (Judgement), Tr.Ch.I, IT-95-14/1-T, para 80 1999; Prosecutor v Zejnir Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo (Judgement) Case No. IT-96-21, ICTY Tr.Ch.II (1998), para.386 [Celebici]; FENRICK W. Article 28 in TRIFFTERER, note 42, 515, 519; *Re Yamashita* (1946) 13 ILR 255 at 256; KEITH K. *The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence* 14 Leiden Journal of International Law 617 (2001).

repeatedly for a ten day period [*Compromis* ¶11]. There is no evidence that West took any action to prevent or repress the commission of the massacres.

In the alternative, if the ICC finds that West is not a military commander, he may still be liable as a non-military superior under Article 28(b) of the Rome Statute. Non-military superiors can include political leaders, business leaders, and senior civil servants.<sup>76</sup> West clearly falls within the category of a non-military superior.

The Arkamians who committed the massacres in Yuggott were subordinates acting under West's "effective authority and control" [Rome Statute, Article 28(b)]. This is evidenced by the fact that his instructions to "eliminate" Lengians were acted upon immediately. West's recording was first broadcast on 15 May, and the massacres began the next day.

West's recording was repeatedly broadcast over a period of ten days on Radio Yuggott. Furthermore, there was media coverage of the massacres being committed in Yuggott [*Compromis* ¶12]. Therefore, it may reasonably be inferred that West "consciously disregarded information which clearly indicated" [Rome Statute, Article 28(b)(i)] that the massacres were occurring and failed to take "all necessary and reasonable measures" to "prevent or repress" [Rome Statute, 25(b)(iii)] the commission of the massacres.

#### **PRAYER FOR RELIEF**

The Respondent respectfully requests that the International Court of Justice:

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

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<sup>76</sup> *Celebici*, *ibid*, paras.371, 377; *Kayishema and Ruzindana*, note 54, para.214.

