

**THE 2004 PHILIP C. JESSUP INTERNATIONAL LAW  
INTERNATIONAL LAW MOOT COURT COMPETITION**

***CASE CONCERNING THE INTERNATIONAL CRIMINAL COURT***

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**IN THE INTERNATIONAL COURT OF JUSTICE**

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**BETWEEN:**

**KINGDOM OF ARKAM**

**(Applicant)**

**and**

**STATE OF RANDOLFIA**

**(Respondent)**

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**MEMORIAL FOR THE APPLICANT**

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## STATEMENT OF JURISDICTION

The Kingdom of Arkam [Applicant] and the State of Randolfia [Respondent] submit their dispute by Special Agreement dated November 1, 2003, and without reservation, to the International Court of Justice pursuant to Article 40(1) of the *Statute of the International Court of Justice*. The parties have agreed to the contents of the *Compromis*, subject to the *Corrections and Clarifications* issued November 26, 2003. In accordance with Article 36(1) of the Court's Statute, each party shall accept any Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

## **QUESTIONS PRESENTED**

### **I**

Whether the Kingdom of Arkam is entitled to a declaration that it would be illegal under international law for Randolfia to surrender Joseph Curwen to the International Criminal Court pursuant to the warrant for his arrest because Arkam has not waived its exclusive jurisdiction to try him, pursuant to Security Council Resolution 2241, and therefore the International Criminal Court is without jurisdiction to try him.

### **II**

Whether the Kingdom of Arkam is entitled to a declaration that it would be illegal under international law for Randolfia to surrender Joseph Curwen to the International Criminal Court pursuant to the warrant for his arrest because the exercise of jurisdiction by the International Criminal Court over a national of a state not a party to the Rome Statute violates the Vienna Convention on the Law of Treaties and customary international law.

### **III**

Whether the Kingdom of Arkam is entitled to a declaration that it would be illegal under international law for Randolfia to surrender Joseph Curwen to the International Criminal Court pursuant to the warrant for his arrest because, given the ongoing investigation by the Arkamian Truth and Reconciliation Commission into the acts of Joseph Curwen described in the indictment, the exercise of jurisdiction over him by the International Criminal Court would violate the principle of complementarity.

### **IV**

Whether the Kingdom of Arkam is entitled to a declaration that it would be illegal under international law for Randolfia to surrender Herbert West to the International Criminal

Court pursuant to the warrant for his arrest because neither Herbert West nor his allegedly criminal conduct demonstrates the necessary nexus with a state party to the Rome Statute.

## V

Whether the Kingdom of Arkam is entitled to a declaration that it would be illegal under international law for Randolfia to surrender Herbert West to the International Criminal Court pursuant to the warrant for his arrest because Herbert West's actions preceded the date upon which the Rome Statute entered into force with respect to Leng and Randolfia, and are thus barred from the International Criminal Court's consideration.

## VI

Whether the Kingdom of Arkam is entitled to a declaration that it would be illegal under international law for Randolfia to surrender Herbert West to the International Criminal Court pursuant to the warrant for his arrest because Herbert West's alleged acts do not constitute a crime within the competence of the International Criminal Court.

## STATEMENT OF FACTS

In 1918, three independent states, Arkam, Randolfia and Leng, were established from the territory of the Duchy of Lengians and Arkamians. The three states share common borders. The Lengian province of Yuggott borders Arkam. In Arkam nearly 90 percent of the population is ethnic Arkamian, while in Leng more than 90 percent of the population is ethnic Lengian. Over the centuries the relations between these two ethnic groups have been tense, highlighted by periodic instances of armed conflict.

In January 2003, armed conflict broke out between ethnic Arkamians and ethnic Lengians in both Arkam and Leng. The conflict in Arkam ended on February 14, 2003 when the United Nations [hereinafter UN] brokered the Cimmeria Peace Agreement [hereinafter the Peace Agreement]. In accordance with the Peace Agreement, the Parliament of Arkam established a Truth and Reconciliation Commission [hereinafter TRC]. The TRC is modeled after that of South Africa, although it is not limited to acts associated with a political objective. The TRC is empowered to grant full amnesty for all criminal charges arising from any acts committed during the armed conflict, provided the person makes full disclosure of all the relevant facts related to the acts. The TRC commenced operations in April 2003, and has been favorably endorsed by numerous international human-rights organizations.

The delegates to the Cimmeria Peace Conference were unable to reach an accord to end the conflict in Leng, and sporadic fighting continued in the province of Yuggott. Beginning on May 16, 2003, there was a series of nighttime raids carried out by ethnic Arkamians, which resulted in the deaths of 10 percent of the ethnic Lengians in Yuggott.

It is not known if the people associated with causing the deaths were associated with an organized group.

Herbert West is a citizen of Arkam and a well-respected professor at an Arkam University. He is also one of the leaders of the Greater Arkamian Liberation Army [GALA]. In April 2003, West recorded an audiotape at his home in Arkam. On the tape he expressed his view that Yuggott was an integral part of the Arkamian homeland and ridding Lengian occupiers from Yuggott was necessary to unite the land. In the recording he stated, "Eliminate them all." West gave the audiotape to his neighbor, another GALA member, without providing specific instructions for its use. The audiotape was eventually broadcast on Radio Yuggott, a GALA radio station.

The Security Council, through Operative Paragraph VII restricted the jurisdiction of the International Criminal Court [ICC] and adopted Resolution 2241. The Resolution authorized the deployment of a multilateral force, designated "IFLEN", to enter Yuggott. IFLEN's mandate was threefold: to enter Yuggott, to shut down Radio Yuggott and to stop the bloodshed. Operative Paragraph 7 of the Security Council Resolution restricted the jurisdiction of the International Criminal Court [ICC]. The Resolution provided that IFLEN members from contributing states that are not party to the Rome Statute are subject solely to the exclusive jurisdiction of that contributing state for all acts or omissions arising out of the conflict. Arkam is not a party to the Rome Statute and has repeatedly opposed the jurisdiction of the ICC.

Joseph Curwen, a citizen of Arkam and a veteran UN peacekeeper, was appointed commander of an IFLEN platoon. On June 28, 2003, Curwen's platoon was attacked by GALA snipers. The attack killed and injured 16 soldiers. IFLEN intelligence reported

that the nearby village of Exhamtown was a GALA stronghold. Curwen immediately ordered the remaining members of his platoon to attack. The village was not defended by GALA troops and the attack resulted in the death of 200 civilian Lengians and Arkamians. On June 30, 2003, GALA leaders and the Lengian government agreed to a UN monitored ceasefire. Curwen returned home to Arkam and was stripped of his command, ordered to resign from the Arkamian army and deprived of all wages and benefits. He was issued a subpoena to appear before the TRC as part of a full investigation into the incident.

In July 2003 West and Curwen traveled separately to Randolfia. While in Randolfia both men were arrested and charged with minor domestic offences unrelated to the conflict in Leng. They are currently in the custody of Randolfia.

On July 25, 2003, the Randolfian Minister of Justice issued a communiqué to the Registrar of the ICC proposing that both men be extradited to the custody of the ICC. The Government of Randolfia proposed extradition due to a lack of domestic legislation to prosecute the men for alleged international crimes related to the conflict. Despite a bilateral extradition treaty ratified by Arkam and Randolfia in February 1991, the Minister stated in the communiqué that the Randolfian Government would not repatriate the men to Arkam because of the TRC amnesty process.

Arkam, Leng and Randolfia are parties to the Vienna Convention on the Law of Treaties, the International Covenant on Civil and Political Rights, the Genocide Convention, the 1949 Geneva Conventions, and the two additional protocols of 1977. Moreover, the Rome Statute, establishing the ICC, entered into force in Randolfia and Leng on May 1, 2003. Arkam is not a party to the Rome Statute. Accordingly, on July 26,

2003 the King of Arkam sent a diplomatic note to the President of Randolfia protesting the request for the ICC to exercise jurisdiction.

On July 29, 2003, the Prosecutor of the ICC sent notification of an intention to investigate. The Prosecutor expressly identified Arkam, Leng and Randolfia as states which would normally exercise jurisdiction over the crimes concerned. On September 1, 2003, the Prosecutor further announced that West was charged with the following crimes under the Rome Statute: Articles 6(a), 25(3)(b), 25(3)(e), 25(3)(f), and Article 28. Curwen was charged with the commission of war crimes in Leng under Article 8(2) subparagraphs (a)(i),(a) (iv), (b)(i), (b)(iv), b(v), and in the alternative (c)(i) and (e)(i) of the Rome Statute. Pre-Trial Chambers arrest warrants were issued on September 9, 2003.

When the arrest warrants were issued, Arkam immediately responded with a second diplomatic note of protest to the President of Randolfia. As a result, the parties have agreed to submit their dispute to this Court and to act consistently with the Court's legal conclusions regarding West and Curwen. Leng has declined to intervene in this matter.

## SUMMARY OF PLEADINGS

Randolfia's proposed surrender of Joseph Curwen to the International Criminal Court [ICC] is internationally unlawful because Arkam has exclusive jurisdiction over him by virtue of Security Council Resolution 2241, which created immunity for peacekeepers in Yuggott. Security Council decisions are *prima facie* presumed valid and binding on members of the UN, including Randolfia, a member of the UN.

Furthermore, the exercise of jurisdiction over Curwen is a violation of the Vienna Convention on the Law of Treaties [VCLT] and customary international law. The exercise is inconsistent with *pacta sunt servanda*, the fundamental principle of the law of treaties, and with the duty not to impose obligations on a non-party state to the Rome Statute.

The exercise of jurisdiction over Curwen is also inconsistent with the principle of complementarity. Randolfia cannot argue that the amnesty provisions under the Arkamian Truth and Reconciliation Commission [TRC] fail to satisfy the requirements of effective prosecution under the Rome Statute. Even if the TRC fails to satisfy the requirements of effective prosecution, Arkam is in the process of investigating the acts of Joseph Curwen, and the investigation satisfies the principle of complementarity under the Rome Statute. Finally, the acts of Joseph Curwen do not constitute a plan or policy to commit war crimes. As a result the ICC is not entitled to exercise jurisdiction in this instance.

Randolfia's proposed surrender of Herbert West to the custody of the ICC is internationally unlawful, as his alleged acts do not constitute the crime of attempted

genocide. West did not take any “substantial step” toward commencing the execution of a crime. Similarly, his alleged acts do not constitute the crimes of ordering, soliciting or inducing the commission of genocide or attempted genocide. Nor do his alleged acts constitute the crime of incitement to genocide. Finally, West did not have a duty, nor did he fail in any duty, to prevent or punish the commission of offences under the Rome Statute.

The proposed surrender of Herbert West is also internationally unlawful because the required nexus between Herbert West’s alleged acts and a state party to the Rome Statute does not exist. Arkam is both the state in which the alleged acts occurred and the national state of West. The Rome Statute does not give the ICC jurisdiction on the basis of objective territoriality, as the language of the Rome Statute does not contemplate the exercise of jurisdiction based on such a principle. Nor is the ICC entitled to assert jurisdiction over West on the basis of universality. The ICC’s jurisdiction is limited to a territorial or national nexus.

In any event, the proposed surrender of West is internationally unlawful as a violation of the principle against retroactivity. The Rome Statute strictly limits the jurisdictional reach of the ICC. Randolfia cannot justify the surrender on the basis that the alleged acts continued after the entry into force of the Rome Statute.

Consequently, Randolfia’s proposed surrender of Joseph Curwen and Herbert West to the custody of the ICC is internationally unlawful.

## PLEADINGS

### I. RANDOLFIA'S PROPOSED SURRENDER OF JOSEPH CURWEN TO THE CUSTODY OF THE INTERNATIONAL CRIMINAL COURT [ICC] IS INTERNATIONALLY UNLAWFUL.

A. The proposed surrender of Joseph Curwen is internationally unlawful because Arkam has exclusive jurisdiction over him.

*i. The surrender is internationally unlawful because Arkam has exclusive jurisdiction by virtue of Security Council Resolution 2241.*

1. The UN Security Council is entitled, by virtue of Chapter VII of the United Nations Charter [hereinafter UN Charter], to take action in response to the existence of threats to international peace, breaches of peace or acts of aggression.<sup>1</sup> International tribunals<sup>2</sup> and learned authors<sup>3</sup> confirm that, in fulfilling its mandate, the Security Council has broad discretion to choose appropriate courses of action and to evaluate the suitability of any measures adopted for the restoration and maintenance of international

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<sup>1</sup> Charter of the United Nations, adopted by the United Nations Conference on International Organization, San Francisco, June 25, 1945, becoming effective on October 24, 1945; as amended. Min-Chuan Ku, ed., *A Comprehensive Handbook of the United Nations* (1978) [hereinafter UN Charter].

<sup>2</sup> *The Prosecutor v. Dusko Tadic, Opinion and Judgment*, No. IT-94-1-T (Feb. 13, 1995), amended, No. IT-1-T (Sept. 1, 1995), amended, No. IT-94-1-T (Dec. 14, 1995), *Opinion and Judgment*, No. IT-94-1-T (May 7, 1997), reported in 35 I.L.M. 32 (1996) at 28-48.

<sup>3</sup> I. BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS* (1998) 214 [hereinafter BROWNLIE, *RULE OF LAW*]; THE UNITED NATIONS LAW AND PRACTICE 75 (Franz Cede and Lilly Sucharipa-Behrmann, eds., 1999); Susan Lamb, *Legal Limits to United Nations Security Council Powers*, in *ESSAYS IN HONOUR OF IAN BROWNLIE* 378 (1999) [hereinafter Lamb, *Legal Limits*]; T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, 26 *NETHERLANDS YEARBOOK OF INTERNATIONAL LAW* 33, 61 (1995); Derek Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures* 5 *EJIL* 1, 6(1994) [hereinafter Bowett, *The Impact*].

peace and security. In particular, the Rome Statute<sup>4</sup> and publicists<sup>5</sup> support the proposition that the Security Council may interfere with the International Criminal Court's [hereinafter the ICC] exercise of jurisdiction by requesting a deferral of investigation or prosecution. The Security Council's ambit of authority is evidenced in two recent resolutions that limit the ICC's exercise of jurisdiction by creating immunity for UN peacekeepers.<sup>6</sup> Finally, the UN Charter<sup>7</sup>, the Statute of the International Court of Justice<sup>8</sup>, and the jurisprudence of this Court<sup>9</sup> suggests there is no power of judicial review or appeal regarding the legality of Security Council action under Chapter VII.

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<sup>4</sup> The Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/conf.183/9th, art.16 [hereinafter Rome Statute].

<sup>5</sup> Stéphane Bourgon, *Jurisdiction Ratione Loci*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOLUME I 563-565 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds., 2002) [hereinafter Stéphane Bourgon, *Ratione Loci*]; Condorelli, Luigi and Villalpando, Santiago, *Relationship of the Court with the United Nations*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOLUME I 230 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, ed., 2002); Richard S. Carden, & Leila Nadya Sadat, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 412 (2000) [hereinafter Carden & Sadat, *ICC: Uneasy Revolution*]; M. Bergsmo, *Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council*, 69 NORDIC JOURNAL OF INTERNATIONAL LAW 87, 91,107,112-113 (2000); M. Bergsmo & J. Pejic, *Article 16 Deferral of Investigation or Prosecution*, in 377-382 COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., 1999).

<sup>6</sup> S.C. Res. 1422, U.N. SCOR, 57<sup>th</sup> Year, U.N. Doc. S/RES/1422 (2002); U.N. SCOR, 57<sup>th</sup> Year, 4572<sup>nd</sup> mtg., U.N. Doc. S/PV.44572 (2002); S.C. Res. 1497, U.N. SCOR, 58<sup>th</sup> Year, U.N. Doc. S/RES/1497 (2003); U.N. SCOR, 58<sup>th</sup> Year, 4803<sup>rd</sup> mtg., U.N. Doc. S/PV.4803 (2003).

<sup>7</sup> UN Charter, *supra* note 1, art. 97.

<sup>8</sup> *Statute of the International Court of Justice*, 26 June 1945, article 1.

<sup>9</sup> *Certain Expenses of the United Nations*, [1962] I.C.J. Rep. 151 at 168 [hereinafter *Expenses Case*]; *Namibia Case*, [1971] I.C.J. Rep. 16 at 21-22; *Case concerning*

2. On June 20, 2003, the Security Council adopted Resolution 2241 authorizing a multilateral force to be deployed in Yuggott pursuant to Chapter VII [*Compromis* ¶13]. Under Operative Paragraph 7 of that Resolution, Arkam, a non-party state to the Rome Statute, has exclusive jurisdiction over Joseph Curwen such that he is immune from the jurisdiction of the ICC unless Arkam expressly waives its jurisdiction [*Compromis* ¶14]. Arkam has made no such waiver [*Compromis* ¶23]. Consequently, Curwen must be returned to Arkam so that he can appear before its Truth and Reconciliation Commission [hereinafter TRC] in accordance with the subpoena issued to him [*Compromis* ¶14,19]. Therefore, Randolfia's proposed surrender of Curwen to the ICC contravenes Security Council Resolution 2241, infringes on Arkam's exclusive jurisdiction and violates international law.

*ii. Randolfia cannot dispute the binding effect of Security Council Resolution 2241.*

3. This Court<sup>10</sup> and learned authors<sup>11</sup> have confirmed that Security Council decisions are *prima facie* presumed valid and binding on members of the UN, pursuant to Article 25 of the UN Charter. At most, their binding force can only be rebutted on proof that such decisions are *ultra vires* or contrary to the purposes and principles of the UN

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*Questions of Interpretation and Application of the Montreal Convention arising out of the Aerial Incident at Lockerbie (Provisional Measures)* (Libya v. United States), [1992] I.C.J. Rep. 114 [hereinafter *Lockerbie Case*].

<sup>10</sup> *Expenses Case, id.*, at 168; *Lockerbie Case, id.*, at 20; *Namibia Case, id.*, at 20.

<sup>11</sup> Bowett, *The Impact*, *supra* note 3, 95; Watson, Geoffrey R., *Constitutionalism, Judicial Review, and the World Court*, 34 HVILJ 1, 7 (1993); BROWNLIE, *RULE OF LAW*, *supra* note 3, at 218-219.

Charter.<sup>12</sup> Moreover, in the event of a conflict between obligations that UN members have under other international agreements and those under the Charter, Charter obligations prevail.<sup>13</sup>

4. Under Operative Paragraph 7 of Resolution 2241, the Security Council decided that states not party to the Rome Statute, and contributing officials to a multilateral force designated “IFLEN”, have exclusive jurisdiction for “all alleged acts or omissions arising out of or related to IFLEN [Compromis ¶14]. Randolfia is a member of the UN [Compromis ¶30] and is therefore bound to “accept and carry out decisions of the Security Council”.<sup>14</sup> Furthermore, Randolfia’s obligation to respect Arkam’s exclusive jurisdiction over Joseph Curwen, by virtue of Operative Paragraph 7 [Compromis ¶14], prevails over any other obligations it holds under the Rome Statute.<sup>15</sup> Consequently, Randolfia’s proposed surrender of Joseph Curwen to the ICC violates international law.

B. The exercise of jurisdiction by the ICC is a violation of the Vienna Convention on the Law of Treaties and customary international law.

*i. The exercise of jurisdiction by the ICC is inconsistent with the principle of pacta sunt servanda.*

5. The ICC may not exercise jurisdiction when doing so requires a state party to violate international obligations to a non-party state.<sup>16</sup> Additionally, where the

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<sup>12</sup> UN Charter, *supra* note 1, arts. 1, 2, & 24; Lamb, *Legal Limits*, *supra* note 3, at 365-366; BROWNLIE, *RULE OF LAW*, *supra* note 3, at 214; Bowett, *The Impact*, *supra* note 3, at 95 (1994); PHILIPPE SANDS & PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* (2001) 43.

<sup>13</sup> UN Charter, *supra* note 1, art. 103; Rome Statute, *supra* note 4, art. 98.

<sup>14</sup> UN Charter, *supra* note 1, art. 25.

<sup>15</sup> U N Charter, *supra* note 1, art. 103; Rome Statute, *supra* note 4, art. 98.

<sup>16</sup> Rome Statute, *supra* note 4, art. 98(2).

international obligations to a non-party state are violated, the Rome Statute<sup>17</sup> and learned writers<sup>18</sup> confirm that the ICC is obliged to seek cooperation from the non-party state or abandon the request for surrender. The ICC is obliged to seek cooperation because of *pacta sunt servanda*, the rule that treaties are binding and must be performed in good faith, which is a fundamental principle of the law of treaties.<sup>19</sup> International jurisprudence<sup>20</sup>, an arbitral tribunal<sup>21</sup> and learned writers<sup>22</sup> confirm that this principle is a norm of customary international law and is codified under Article 26 in the Vienna Convention on the Law of Treaties [hereinafter VCLT].<sup>23</sup> The ILC<sup>24</sup> and the

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<sup>17</sup> *Id.*

<sup>18</sup> Kimberly Prost & Angelica Schlunck, *Article 98 Cooperation with respect to waiver of immunity and consent to surrender*, in 1132-1133 COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVER'S NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., 1999); Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 AM. J. INT'L L. 773, 786 (2000); Ruth Wedgwood, Harold K. Jacobson & Jonathon Charney, *International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT'L L. 120, 123 (2001).

<sup>19</sup> *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly* [1966] 2 Y.B. INT'L L. 220, U.N. Doc. A/CN.4/SER.A.

<sup>20</sup> *Case Concerning Rights of Nationals of the United States of America in Morocco (U.S. v. Morocco)*, [1952] I.C.J. Rep. 212.

<sup>21</sup> *North Atlantic Fisheries Arbitration (U.S. v. Gr. Brit.)* (1910), 2 R.I.A.A.167, 181, 188.

<sup>22</sup> Jianming Shen, *The Bases of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 287, 323 (1999); Dinesh D. Banani, *International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction*, BCICLR 355, 369 (2003); ROSENNE SHABTAI, DEVELOPMENT IN THE LAW OF TREATIES: 1945-1986 (1989) at 39 [hereinafter SHABTAI, TREATY DEVELOPMENT]; ROSENNE SHABTAI, BREACH OF TREATY (1985) at 50 [hereinafter SHABTAI, BREACH OF TREATY].

<sup>23</sup> Vienna Convention on the Law of Treaties, *entered into force* 27 January 1980, 1155 U.N.T.S. 331, art. 26 [hereinafter VCLT].

<sup>24</sup> *Supra*, note 19, at 211.

predecessor<sup>25</sup> to this Court confirm that any attempt by a state to evade the performance of treaty obligations is a breach of the duty to act in good faith. A violation of the good faith requirement may arise through an anticipatory breach of a treaty obligation.<sup>26</sup> An anticipatory breach may be established when a government official indicates a treaty obligation will not be performed.<sup>27</sup> Finally in the event of an anticipatory breach of a continuing character, the state in breach is under an obligation to cease the conduct causing that breach.<sup>28</sup>

6. Arkam and Randolfia are both parties to the VCLT [*Compromis* ¶30] and to a bilateral extradition treaty [*Compromis* ¶9]. Randolfia’s Minister of Justice stated in the request to surrender Joseph Curwen to the ICC that “my government believes that it would be inappropriate to repatriate...Curwen to Arkam...” [*Compromis* ¶22]. These words, and the request to surrender Joseph Curwen to the ICC, demonstrate an anticipatory breach by Randolfia of its obligation to consider in good faith the extradition of Joseph Curwen to Arkam. Given this breach is continuing, Arkam is entitled to insist that Randolfia withdraw its request to surrender Joseph Curwen to the ICC. Therefore, any failure, by Randolfia, to withdraw its request to surrender Curwen is inconsistent

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<sup>25</sup> *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (1932), P.C.I.J., Series A/B, No. 44, at 28; *Minority Schools in Albania* (1935), P.C.I.J., Series A/B, No. 64, at 19, 20.

<sup>26</sup> Shabtai, *Breach of Treaty*, *supra* note 22.

<sup>27</sup> LORD MCNAIR, *THE LAW OF TREATIES* (1961) at 550 [hereinafter MCNAIR, *TREATIES*]; SHABTAI, *TREATY DEVELOPMENT* *supra* note 22, at 45-50, 94, 105-107; SHABTAI, *BREACH OF TREATY*, *supra* note 22; PAUL REUTER, *INTRODUCTION TO THE LAW OF TREATIES* (1989) at 296-307.

<sup>28</sup> ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE*, (2000) at 301 [hereinafter AUST, *MODERN TREATY*]; MCNAIR, *TREATIES*, *supra* note 27 at 553.

with the principle of *pacta sunt servanda*, and any exercise of jurisdiction by the ICC in this instance is in violation of international law.

ii. *The exercise of jurisdiction by the ICC is inconsistent with the principle prohibiting the imposition of obligations on non-party states to a treaty.*

7. Pursuant to Article 98 of the Rome Statute, the ICC may not exercise jurisdiction when doing so requires a state party to violate international obligations to a non-party state. Under Article 34 of the VCLT, a treaty cannot create either obligations or rights for a third state without its consent. Moreover, this Court<sup>29</sup>, its predecessor<sup>30</sup>, other international jurisprudence<sup>31</sup>, the ILC<sup>32</sup> and learned writers<sup>33</sup> agree that this is a norm of customary international law. Publicists<sup>34</sup> and state practice<sup>35</sup> confirm that any exercise of

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<sup>29</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, [1996] I.C.J. Rep. 226 [hereinafter *Nuclear Weapons*]; *Aerial Incident of July 27 1955*, [1959] I.C.J. Rep. 127.

<sup>30</sup> *S.S. Lotus (Fr. v. Turk.)*(1927), P.C.I.J., Series A, No. 10, at 18; *Free Zones of Upper Savoy and the District of Gex* (1932) P.C.I.J., Series A/B, No. 46, p. 141; *Territorial Jurisdiction of the International Commission of the River Oder* (1929), P.C.I.J., Series A, No. 23, pp. 19-22.

<sup>31</sup> *Island of Palmas* (1928), 2 R.I.A.A. 829, 831.

<sup>32</sup> *Report of the International Law Commission on the Work of its Eighteenth Session, Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. INT'L L. Comm'n 226.

<sup>33</sup> Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 366-368 (Winter 2001); Gennady M. Danilenko, *ICC Statute and Third States*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOLUME II at 1871 [hereinafter Danilenko, *ICC Statutes and Third States*]; M. Tia Johnson, *The American Service Members Protection Act: Protecting Whom?*, 43 VAJIL 405, 448 (2003) at 444 [hereinafter Johnson, *American Service*].

<sup>34</sup> Madeline Morris, *The United States and the International Criminal Court: High Crimes and Misconceptions*, 64 Law and Contemporary Problems. 13, 27 (Winter 2001) [hereinafter Morris, *High Crimes*]; Johnson, *American Service*, *id.*, at 448; William K. Lietzau, *International Criminal Law After Rome: Concerns From a U.S. Military*

jurisdiction by the ICC over a national of a non-party state to the Rome Statute amounts to an imposition of obligations under conventional and customary international law. Obligations can be imposed on a state either directly or indirectly<sup>36</sup>, and may include the modification or removal of existing state rights.<sup>37</sup>

8. Arkam is not a party to the Rome Statute [*Compromis* ¶30]. Randolfia's proposed surrender of Curwen to the ICC would effectively force Arkam to abandon its exclusive jurisdiction over Curwen's alleged conduct [*Pleadings* ¶4]. This breach is in violation of the conventional and customary norms prohibiting the imposition of obligations on non-party states to a treaty.

C. The exercise of jurisdiction by the ICC is internationally unlawful because it is inconsistent with the principle of complementarity.

*i. The exercise of jurisdiction by the ICC is unlawful because the Arkamian Truth and Reconciliation Commission satisfies the requirements for effective prosecution under the principle of complementarity.*

9. The principle of complementarity requires that the ICC defer to the jurisdiction of a state so long as the requirements for effective prosecution in the Rome Statute are

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*Perspective*, 64 LAW AND CONTEMPORARY PROBLEMS 1 (2001); Ruth Wedgewood, *The Irresolution of Rome*, 64 Law and Contemporary Problems 1 (2001); John R. Bolton, *The Risks and Weaknesses of the International Criminal Court From America's Perspective*, 64 Law and Contemporary Problems 1 (2001); COMMANDER DONALD J. BOLAND, UNITED STATES NAVY, NATIONAL SOVEREIGNTY AND THE INTERNATIONAL CRIMINAL COURT (1999).

<sup>35</sup> David Scheffer, U.S. Ambassador at Large for War Crimes Issues, *The International Criminal Court: The Challenge of Jurisdiction*, Address to the Annual Meeting of the American Society of International Law (Mar. 26, 1999) cited in Morris, *High Crimes*, *id.*, at 14.

<sup>36</sup> AUST, MODERN TREATY, *supra* note 28, at 366-368.

<sup>37</sup> RONALD F. ROXBURG, INTERNATIONAL CONVENTIONS AND THIRD STATES 32 (L. Oppenheim, ed., 1917) at 29.

satisfied.<sup>38</sup> Under the Rome Statute, the principles of due process, recognized by international law, govern whether there is an effective prosecution.<sup>39</sup> Under international law, the core elements of due process are accountability and democratic procedure.<sup>40</sup> Treaties<sup>41</sup>, state practice<sup>42</sup>, and publicists<sup>43</sup> demonstrate that amnesties are consistent with achieving the objectives of accountability and due process. In particular, the international community has recognized and even endorsed the South African TRC as a valid means of prosecuting those accused of crimes arising out of apartheid.<sup>44</sup> Moreover, state practice<sup>45</sup>,

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<sup>38</sup> Rome Statute, *supra* note 4, art. 17(1).

<sup>39</sup> Rome Statute, *supra* note 4, art. 17(2).

<sup>40</sup> Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a legitimate Amnesty Possible?*, 43 VA. J. INT'L. L. 173, 187 (2002); Jennifer Llewelyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49(3) U. TORONTO L.J. 355 (1999).

<sup>41</sup> Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts, June 1977, U.N.T.S. 609, 614, art. 6(5).

<sup>42</sup> *Azanian Peoples Organization (AZAPO) v. The President of the Republic of South Africa*, 1996 (4) S.A.L.R. 671, at 30 (South African Constitutional Court); *Regina v. Bartle and the Comm'r of Police for Metropolis and Others, ex parte Pinochet*, 38 I.L.M. 581, 605-06 (H.L. 1999); *Remarks at the White House Press Conference* (Sept. 19, 1994).

<sup>43</sup> A. Cassese, *Reflections on International Criminal Justice*, 61 MODERN LAW REVIEW 1 at 1 (January, 1998); Jonathon Black-Branch, *Sovereign Immunity Under International Law: The Case of Pinochet*, in 111 THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS (Diana Woodhouse, ed., 2000); Justin M. Schwartz, *South Africa's Truth and Reconciliation Commission: A Functional Equivalent to Prosecution*, 3 DEPAUL DIGEST OF INTERNATIONAL LAW 13 (1997) [hereinafter Schwartz, *A Functional Equivalent to Prosecution*]; Richard Goldstone, *Past Human Rights Violations: Truth Commissions and Amnesties or Prosecutions*, 51 NORTHERN IRELAND LEGAL QUARTERLY 164, 166-167 (2000).

<sup>44</sup> ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003) at 9-11 [hereinafter CASSESE, ICL]; Schwartz, *A Functional Equivalent to Prosecution*, *id.* Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INTERNATIONAL LEGAL

international jurisprudence<sup>46</sup> and learned writers<sup>47</sup> confirm that the Rome Statute does not preclude a state from utilizing amnesty as an effective means of prosecution. Indeed, several provisions of the Rome Statute anticipate the use of amnesty and thereby recognize that amnesty may meet the due process requirements under international law.<sup>48</sup>

10. Arkam's TRC is modelled after the internationally recognized South African TRC [*Compromis* ¶7], and has been favourably endorsed by numerous international human-rights organizations [*Compromis* ¶7]. The TRC was passed pursuant to a valid Act of Parliament [*Compromis* ¶17] and imposes a form of public procedure and accountability for the actions of Joseph Curwen [*Compromis* ¶7]. Thus, the amnesty provisions under

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PERSPECTIVES 73, 155-156 (2002); Kader Asmal, *International Law & Practice: Dealing with the Past and the South African Experience*, 15 AM. U. INT'L L. REV. 1211, 1228 (2000); Laura Hall & Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARVARD INT'L LAW. J. 287, 290-291 (2003); Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKLEY J. INT'L L. 436, 455-456 (2002).

<sup>45</sup> U.S. Delegation Draft (Rev.) to the ICC PrepCom (Aug. 1997) in Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L. J. 507 (1999) [hereinafter Scharf, *Amnesty Exception*]; The National Unity and Reconciliation Act, Act No. 34, (1995), Republic of South Africa, Government Gazette, vol. 361, No. 16579 (Cape Town, July 26, 1995); Statement of the President of the Security Council, U.N. SCOR, 48th Sess., 3238th mtg. at 120, U.N. Doc. S/INF/49 (1993).

<sup>46</sup> *Prosecutor v. Tadic, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, No. IT-94-1-AR72 (Oct. 2, 1995) at 6.

<sup>47</sup> Leila Nadya Sadat, *Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable*, in Stephen Macedo, UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (2003); Scharf, *Amnesty Exception*, *supra* note 45; John T. Holmes, *The Principle of Complementarity*, in 41-79 THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (Roy S. Lee., ed., 1999); Michael P. Scharf, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 4-5 (1996).

<sup>48</sup> Rome Statute, *supra* note 4, preamble para 10, arts. 16, 17, 20 & 53.

Arkam's TRC meet the Rome Statute requirements of effective prosecution. Therefore, any exercise of jurisdiction by the ICC is inconsistent with the principle of complementarity.

*ii. At a minimum, the exercise of jurisdiction by the ICC is unlawful because Arkam is entitled to investigate the acts of Joseph Curwen.*

11. Learned writers<sup>49</sup> confirm that, pursuant to the principle of complementarity under the Rome Statute, the ICC must defer to investigations conducted by states.<sup>50</sup> The ICC has the competence to exercise jurisdiction only when a state is investigating in bad faith.<sup>51</sup> A state is acting in bad faith when the purpose of the investigation is designed to shield the individual from the acts committed.<sup>52</sup> Through the establishment of the TRC, Arkam has initiated a good-faith investigation into the acts of Joseph Curwen [*Pleadings* ¶10]; indeed, Curwen has been stripped of his command, deprived of benefits and ordered to appear before the Commission [*Compromis* ¶19]. Consequently, the ICC does not have the competence to exercise jurisdiction, and the prosecutorial exercise of jurisdiction is inconsistent with the *Rome Statute* and international law.

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<sup>49</sup> Bertram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U.J. J. INT'L L & POL. 855, 879 (1999); H. Von Hebel, *An International Criminal Court: A Historical Perspective*, in 22-31 REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT H. (Von Hebel, J.G. Lammers & J Schukking eds., 1999); Susan Hannah, *The Effectiveness of the Exercise of Jurisdiction By the International Criminal Court: The Issue of Complementarity*, ECMI Working Paper #12 (August 2001); KRISTINA MISKOWIAK, THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY, AND COOPERATION, (2000) 40 [hereinafter MISKOWIAK, CONSENT, COMPLIMENTARITY AND COOPERATION].

<sup>50</sup> Rome Statute, *supra* note 4, article 17; U.N.S.C. Res 827, U.N Doc. S/Res 827 (1993); U.N.S.C. Res 955 U.N. SCOR, 3453d mtg. (1994).

<sup>51</sup> Rome Statute, *supra* note 4, art. 17(1).

<sup>52</sup> Rome Statute, *supra* note 4, art. 17(2)(a).

D. Moreover, the exercise of jurisdiction by the ICC is internationally unlawful as the acts of Joseph Curwen are not part of a plan or policy to commit war crimes.

12. Under Article 1 of the Rome Statute, the ICC has the power to exercise jurisdiction over only the most serious crimes of international concern. Article 8(1) demonstrates that the ICC's jurisdiction is limited to war crimes committed with intent,<sup>53</sup> as part of a plan or policy on a large scale.<sup>54</sup> In order to meet the threshold for intent under the Rome Statute, the perpetrator must be aware of the factual circumstances establishing that protected persons were being attacked.<sup>55</sup> The perpetrator must be aware that any destruction of property was not justified by military necessity, and that the object of the attack was a civilian population.<sup>56</sup> Finally, the perpetrator must have attacked a town that was open for unresisted occupation.<sup>57</sup>

13. Joseph Curwen acted entirely within the confines of the mandate of Security Council Resolution 2241 [*Compromis* ¶13]. Curwen was commanding a multinational IFLEN platoon when it suffered a deadly attack by GALA snipers [*Compromis* ¶16]. On the basis of IFLEN intelligence reports that the village of Exhamtown was a GALA stronghold [*Compromis* ¶17], he responded by ordering a single attack on the village.

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<sup>53</sup> *Elements of Crimes*, adopted September 9, 2002, Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 Sept. 2002, Official Records, ICC-ASP/1/3 [hereinafter *ICC Elements of Crimes*], art. 8.

<sup>54</sup> Hermna Von Hebel & Darryl Robison, *Crimes Within the Jurisdiction of the Court*, in 125 THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (Roy S. Lee, ed., 1999); Michael Bothe, *War Crimes*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOLUME I 563-565 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, ed., 2002).

<sup>55</sup> Preparatory Commission for the International Criminal Court, *Addendum*, UN PCNICC, 2000, UN Doc. No. 724/27, at 18.

<sup>56</sup> *Id.*, at 20, 23.

<sup>57</sup> *Id.*, at 25.

The order was intended to quell further raids and was not given with the intent or knowledge that civilians would be killed. At all times he thought the attack was justified by military necessity. Therefore, the acts were not committed as part of a plan or policy, and the exercise of jurisdiction by the ICC is internationally unlawful.

## **II. RANDOLFIA’S PROPOSED SURRENDER OF HERBERT WEST TO THE CUSTODY OF THE ICC IS INTERNATIONALLY UNLAWFUL.**

A. The proposed surrender is internationally unlawful because Herbert West’s alleged acts do not constitute crimes within the competence of the ICC.

*i. The alleged acts of Herbert West do not constitute the crime of attempted genocide.*

14. In order for the crime of attempted genocide to take place, a “substantial step toward commencing the execution of the crime” must be taken.<sup>58</sup> A substantial step must be more than preparatory<sup>59</sup> and must constitute a significant step toward the completion of the crime.<sup>60</sup> Herbert West recorded an audiotope in his home in Arkam [*Compromis* ¶10]. He made no attempt to distribute the audiotope widely; indeed he made only one copy and gave it to his neighbor with no evidence that specific instructions were given for its use [*Compromis* ¶10]. The mere act of recording an audiotope and giving it to a neighbor does not constitute a preparatory step, and certainly not a “significant step” toward the crime of genocide. Therefore, West’s acts do not constitute the crime of attempted genocide and are not within the competence of the ICC.

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<sup>58</sup> Rome Statute, *supra* note 4, Art. 25(3)(f).

<sup>59</sup> *Summary of Records of the Meetings of the thirty-eighth Session* [1986] 1 Y.B.INT’L L. 49, A/CN.4/SER.A/1986.

<sup>60</sup> *Summary of Records of the Meetings of the forty-eighth Session* [1996] 1 Y.B.INT’L L. 27, A/CN.4/SER.A/1996.

ii. *The alleged acts of Herbert West do not constitute the crime of ordering, soliciting or inducing genocide or attempted genocide.*

a) There was no genocide or attempted genocide

15. In order for the crime of ordering, soliciting, or inducing genocide to occur, attempted or actual genocide must also have occurred.<sup>61</sup> The requirements for attempted genocide are set out above [*Pleadings* ¶14]. Genocide is defined in the Rome Statute which adopts the definition in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter Genocide Convention].<sup>62</sup> This Court<sup>63</sup> has held, and international tribunals<sup>64</sup> and learned writers<sup>65</sup> confirm that the substantive provisions of genocide as defined in the Genocide Convention have become norms of customary international law. This Court<sup>66</sup> and international tribunals<sup>67</sup> have held and learned

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<sup>61</sup> Rome Statute, *supra* note 4, art. 25(3)(b).

<sup>62</sup> *Id.*, art. 6.

<sup>63</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, [1951] I.C.J. 15, 23; *Case Concerning the Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, [1970] I.C.J. Rep. 3 at 32 [hereinafter *Barcelona Traction*].

<sup>64</sup> *Prosecutor v. Akayesu*, Trial Chamber I, No. ICTR-96-4-T (Sept. 2, 1998) at 495 [hereinafter *Akayesu*]; *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber II, No. ICTR-95-1-T (May 21, 1999) at 88 [hereinafter *Kayishema*]; *Prosecutor v. Krstic*, Trial Chamber, No. IT-98-33-T (Aug., 2, 2001) at 551 [hereinafter *Krstic*].

<sup>65</sup> CASSESE, ICL, *supra* note 44, at 98; Valerie Oosterveld, *The Elements of Genocide*, in THE INTERNATIONAL CRIMINAL COURT 41 (Roy S. Lee, ed., 2001); MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES (1997) 94; JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (1996) 303; LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS (1992) 73.

<sup>66</sup> *Nuclear Weapons*, *supra* note 29, at 240.

<sup>67</sup> *Akayesu*, *supra* note 64, at 498; *Kayishema*, *supra* note 64, at 91. *Prosecutor v. Goran Jelusic*, Trial Chamber I, No. IT-95-10-T (Dec. 14, 1999) at 65-68 [hereinafter *Jelusic*].

publicists<sup>68</sup> have confirmed, that genocide by killing members of a group requires both the intent to commit the underlying offence of killing and the special intent to destroy the group in whole or in part. The Elements of Crimes<sup>69</sup>, published pursuant to the Rome Statute<sup>70</sup> to assist the ICC with the application of Article 6, confirm these two requirements and further clarifies that there must be the special intention to destroy a group. The Elements of Crimes also requires that the conduct takes place in the context of a manifest pattern of similar conduct against that group or that the conduct itself could effect such destruction.<sup>71</sup>

16. There was no attempted genocide [*Pleadings* ¶14]. Neither on the facts was there genocide. Though the loss of life in this conflict is tragic and may constitute murder, here there was no special intention. The goal of GALA is the unification of Yuggott with the Arkam; GALA's military activities were in pursuit of this goal not the goal destroy ethnic Lengians as a specific ethnic group [*Compromis* ¶8]. Furthermore, the raids in Yuggott were carried out by various bands in the context of ongoing, sporadic fighting; it is not even known whether GALA members participated in the raids [*Compromis* ¶8, 12; *Clarifications* ¶2]. Consequently, there is also no evidence of the "manifest pattern of similar conduct" necessary to categorize killing as genocide.

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<sup>68</sup> CASSESE, ICL, *supra* note 44, at 103; KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW (2001) 72 [hereinafter KITTICHAISAREE, ICL]; William Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgements of the International Criminal Tribunal for the Former Yugoslavia*, 25 Fordham Int'l L.J.23, 50 (2001); David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 Tex. Int'l L.J. 231, 264 (2002).

<sup>69</sup> *Supra* note 55, art. 6(a)(1), (2)&(3).

<sup>70</sup> *Supra* note 4, art. 9.

<sup>71</sup> *Supra* note 55, art. 6(a)(4)

- b) Even if others engaged in attempted genocide or genocide, Herbert West did not order, solicit or induce genocide.

17. Ordering, soliciting or inducing genocide can take place only when the accused has the intention to engage in the conduct of exerting influence with intent and knowledge to cause a person to commit the crime with genocidal intent, or is aware that the consequence will occur in the ordinary course of events.<sup>72</sup> Further, the accused must know that a circumstance exists or that a consequence will occur in the ordinary course of events.<sup>73</sup>

18. Herbert West has not been charged with perpetrating genocide [*Compromis* ¶26]. Nor is there any evidence that West ordered, solicited or induced genocide. In particular, there is not the requisite intent. West merely gave an audiotape to his neighbor, “with no evidence” that he issued any instruction for its use [*Compromis* ¶10]. Nor could West have known that the consequences of genocide would occur in the ordinary course of events; he frequently had audiotapes in the past [*Clarifications* ¶4], apparently without consequences.

*iii. The alleged acts of Herbert West do not constitute the crime of incitement to genocide.*

19. Incitement to genocide can take place only when the accused has the specific intention to act publicly and with a direct inciting effect.<sup>74</sup> The ILC<sup>75</sup>, international

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<sup>72</sup> *Rome Statute*, *supra* note 4, art. 30(2)(a)(b); Albin Eser, *Individual Criminal Responsibility in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOL. I*, 804 (Antonio Cassese, Paula Gaeta, and John R.W.D. Jones, eds., 2002) [hereinafter Eser, *Individual Criminal Responsibility*].

<sup>73</sup> *Id.*, art. 30(3).

<sup>74</sup> *Id.*, art. 25(3)(e).

<sup>75</sup> *Supra* note 60, at 26.

jurisprudence<sup>76</sup> and learned writers<sup>77</sup> confirm that “public” means communication to a number of people in a public place or to the public generally. “Direct” means a specific provocation directed at the commission of genocide; a vague suggestion, general advocacy or creating an atmosphere of hate is not enough.<sup>78</sup> Additionally, for incitement to be found, the accused must have the special intention of knowing and desiring that the persons incited would, if carrying out the crime, act with the intent to destroy the group in whole or in part.<sup>79</sup>

20. There is no evidence that West intended for the audiotape he recorded to be made public. He made only one copy and privately gave it to his neighbor with no specific instructions for its use [*Compromis* ¶10]. Without even the basic intention to act publicly, West’s acts cannot constitute incitement to genocide. Moreover, nothing in the audiotape suggests a specific provocation directed at genocide. The phrase “eliminate them all” is vague. For example, it could equally be interpreted as suggesting physical removal. Consequently, Herbert West did not publicly or directly incite genocide.

*iv. Nor does Herbert West’s conduct constitute a failure to act under Article 28 of the Rome Statute.*

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<sup>76</sup> *Akayesku*, *supra* note 64, at 556-8.

<sup>77</sup> Kai Ambos, *Individual Criminal Responsibility in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, 486 (Triffterer ed., 1999) [hereinafter Ambos, *Individual Criminal Responsibility*]; Eser, *Individual Criminal Responsibility*, *supra* note 72, 804.

<sup>78</sup> Ambos, *Individual Criminal Responsibility*, *id.*; Eser, *Individual Criminal Responsibility*, *supra* note 72, 804-806; 1 Trial of the Major War Criminals before the International Military Tribunal 223, 336 (1947); Ameer F. Gopalani, *The International Standard of Direct and Public Incitement to Commit Genocide: An obstacle to U.S.A. Ratification of the International Criminal Court Statute?*, 32 CAL.W. INT’L L.J. 87, 99 (2001).

<sup>79</sup> *Id.*

21. Under the Rome Statute military and non-military superiors can only be liable for a failure to prevent or punish the commission of offences when they have effective control over the perpetrators of a crime.<sup>80</sup> International tribunals<sup>81</sup> and learned writers<sup>82</sup> confirm that effective control can only exist when a relationship of authority exists between the parties. Obligations resting with non-military superiors to prevent or punish the commission of offences are more limited than those for military commanders.<sup>83</sup> The obligation exists only in circumstances where the superior knew crimes were occurring, or consciously disregarded information, which clearly indicated that subordinates were committing such crimes. Further, the liability for non-military superiors is limited to only those crimes associated with activities that were within the effective responsibility and control of the superior.<sup>84</sup>

22. There is no evidence that an offence within the competence of the ICC took place such that Herbert West had an obligation under the Rome Statute, to prevent or punish an offenders [*Pleadings* ¶14, 16]. Even if there is a crime, West does not have the requisite relationship of authority with the perpetrators of any crime. West is a leader of GALA. While the raids in Yuggott were carried out by ethnic Arkamians [*Compromis* ¶12], there is no evidence that any GALA members were involved in the raids in Leng

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<sup>80</sup> *Rome Statute*, *supra* note 4, art. 28(a), (b).

<sup>81</sup> *Prosecutor v. Delalic*, *Trial Chamber*, No. IT-96-21-T, (Nov. 16, 1998) at 354; *Kayishema*, *supra* note 64, at 490-492.

<sup>82</sup> Beth Van Schaak, *Command Responsibility*, 36 U.C. DAVIS L. REV. 1213, 1221-1222 (2003); Ambos, *Individual Criminal Responsibility*, *supra* note 77, at 858.

<sup>83</sup> *Rome Statute*, *supra* note 4, art. 28(b)(i).

<sup>84</sup> *Rome Statute*, *supra* note 4, art. 28(b)(ii).

[*Clarifications* ¶2]. Even if GALA members were involved, West is one of several leaders of GALA [*Compromis* ¶10]. The GALA organization has both political and military functions [*Clarifications* ¶2]. There is no evidence that West's leadership in GALA extends beyond political leadership in Arkam, nor that it is as far reaching as the GALA militia in Leng. At most, West is a non-military commander and he did not have the requisite knowledge of the crimes. West lived in Arkam and the raids took place in Leng and were reported only in local newspapers [*Compromis* ¶12]. Without the required responsibility and effective control over the perpetrators of the crime, and without the required knowledge that any crime was being perpetrated, Herbert West's conduct can not constitute a failure to prevent or punish the commission of a crime.

B. The proposed surrender is internationally unlawful because the required nexus between Herbert West's alleged conduct and a state party to the Rome Statute does not exist.

*i. The surrender is unlawful because Arkam is both the state in which the alleged conduct occurred and the national state of Herbert West.*

23. When a state party refers a situation to the ICC, the ICC's jurisdiction exists only if there is a nexus between the alleged conduct and either the state of the territory where the conduct was committed [hereinafter the territorial state] or the national state of the accused, and then only if either state is a party to the Rome Statute or has otherwise accepted *ad hoc* the jurisdiction of the ICC with respect to the crime in question.<sup>85</sup>

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<sup>85</sup> Rome Statute, *supra* note 4, art. 12; Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 801 (2003) [hereinafter Gallant, *Jurisdiction to Adjudicate*]; Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 MICH. J. INT'L L. 445, 456 (2000); Leila N. Sadat, *Redefining Universal Jurisdiction*, 35(2) NEW ENG. L. REV. 241, 252 (2001); Micaela Frulli, *Jurisdiction Ratione Personae*, in 535, 540 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOL.I (Antonio Cassese, Paola Gaeta, John R.W.D. Jones eds., 2002) [hereinafter, Frulli, *Jurisdiction*

Learned writers<sup>86</sup> confirm that mere custody of an accused by a state party to the Rome Statute is not sufficient to create a jurisdictional nexus.

24. Herbert West did nothing more than record an audiotape; this was done in Arkam, a non-party state to the Rome Statute [*Compromis* ¶9, 10]. Indeed, there is no evidence to suggest that he ever went to Leng [*Compromis* ¶10]. Therefore, there can be no territorial nexus between West and a state party to the ICC. Moreover, by declining to intervene, Leng has implicitly conceded that Arkam is the only state that can claim a territorial nexus with West [*Compromis* ¶24, 29]. Furthermore, there is no nationality nexus, as West is a national of Arkam [*Clarifications* ¶10]. Arkam is both the territorial state and West's national state [*Compromis* ¶10]. In addition, far from accepting the jurisdiction of the ICC, Arkam has vehemently protested it [*Compromis* ¶9, 23]. As such, Randolfia is merely the custodial state, and its proposed surrender of West to the custody of the ICC, absent any jurisdictional nexus and without Arkam's consent, is inconsistent with the Rome Statute and international law.

ii. *The ICC is not entitled to assert jurisdiction over Herbert West on the basis of objective territoriality.*

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*Ratione Personae*]; Sharon A. Williams, *Article 12 Jurisdiction Ratione Temporis*, in 341 COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OBSERVER'S NOTES, ARTICLE BY ARTICLE (Triffterer, ed., 1999) [hereinafter, Williams, *Jurisdiction Ratione Temporis*]; Daniel D. Ntanda Nsereko, *The International Criminal Court: Jurisdictional and Related Issues*, 10 CRIMINAL LAW FORUM 87, 107 (1999).

<sup>86</sup> Frulli, *Jurisdiction Ratione Personae*, *id.*, at 535, 540; Williams, *Jurisdiction Ratione Temporis*, *id.* at 341; MISKOWIAK, CONSENT, COMPLIMENTARITY AND COOPERATION, *supra* note 49, at 25; Carden & Sadat, *ICC: Uneasy Revolution*, *supra* note 5, at 414; Danilenko, *ICC Statute and Third States*, *supra* note 33, at 1876; Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOL. II 1612 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones eds., 2002) [hereinafter Hans-Peter Kaul, *Preconditions*].

25. Neither the Rome Statute<sup>87</sup>, nor the Rules of Procedure and Evidence<sup>88</sup>, nor the Elements of Crimes<sup>89</sup> contemplate conferring jurisdiction on the ICC on the basis of mere effects on the territory of a state party. Learned authors<sup>90</sup> confirm that the language of article 12(2)(a) of the Rome Statute cannot be extended to include the principle of objective territoriality. Even if one could construe that the Rome Statute accommodated some version of objective territoriality, this Court<sup>91</sup>, state practice<sup>92</sup> and publicists<sup>93</sup> support the proposition that deference ought to be given to the state with the predominant interest in regulating the conduct.

26. Even if one could construe some acceptance of objective territoriality in the Rome Statute, Arkam would still be entitled to assert jurisdiction as it has the predominant interest with respect to Herbert West's conduct. Arkam is West's national state [*Clarification* ¶10]. Further, bringing West before the Arkamian TRC is a necessary step

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<sup>87</sup> Rome Statute, *supra* note 4, at art.12.

<sup>88</sup> *Rules of Procedure and Evidence*, adopted September 9, 2002, Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 Sept. 2002, Official Records, ICC-ASP/1/3 para 19 at 5, 253.

<sup>89</sup> *ICC Elements of Crimes*, *supra* note 53, at 5, 253.

<sup>90</sup> Gallant, *Jurisdiction to Adjudicate*, *supra* note 85, at 809; Hans-Peter Kaul, *Preconditions*, *supra* note 86 at 607-608; Stéphane Bourgon, *Ratione Loci*, *supra* note 5, at 562.

<sup>91</sup> *Barcelona Traction*, *supra* note 63, at 105.

<sup>92</sup> RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 402, pp. 244-245 (1987); *Timberlane Lumber Co. v. Bank of America* 549 F.2d 597 (9<sup>th</sup> Cir. 1976) at 610-612; *United States of America v. Public Service Alliance of Canada et al.* 91 D.L.R. (4<sup>th</sup>) 449 (1992) S.C.C. at 469.

<sup>93</sup> Ellen S. Podgor, *Defensive Territoriality: a new Paradigm for the Prosecution of Extraterritorial Business Crimes*, 31 GAJICL 1, 18, 28 (2002); MALCOLM N. SHAW, *INTERNATIONAL LAW* (4<sup>th</sup> ed., 1997) 485; I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (6<sup>th</sup> ed., 2003) 307-308.

in facilitating the national healing process. Even if one could construe that West's conduct was criminal, one would have to accept that all of his acts occurred in Arkam, as that is where the audiotape was made and given to his neighbor [*Compromis* ¶10]. Therefore, any proposed exercise of jurisdiction by the ICC over Herbert West on the basis of objective territoriality is inconsistent with the Rome Statute and international law.

*iii. The ICC is not entitled to rely on the principle of universality to assert jurisdiction over Herbert West.*

27. The negotiating parties at the Rome Conference explicitly rejected Germany's proposal to give the ICC jurisdiction on the basis of the universality principle; indeed the exclusion of the universality principle was a vital step in securing an agreement at the Rome Conference.<sup>94</sup> Learned writers<sup>95</sup> confirm that, except for cases referred by the Security Council, the language of the Rome Statute reflects the parties' intent to limit the ICC's jurisdiction to cases where there is a territoriality or a nationality nexus.<sup>96</sup> Any surrender of Herbert West to the custody of the ICC that is predicated on the principle of universality is *ultra vires* the Rome Statute and in violation of international law.

C. In any event, the proposed surrender is internationally unlawful as a violation of the principle against retroactivity.

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<sup>94</sup> Proposal of Germany, UN Doc. A/AC.249/1998/DP.2 (1998).

<sup>95</sup> Rome Statute, *supra* note 4, arts. 12(2), 13(b).

<sup>96</sup> Gallant, *Jurisdiction to Adjudicate*, *supra* note 86, at 820; Hans-Peter Kaul, *Preconditions*, *supra* note 86, at 612; Stéphane Bourgon, *Ratione Loci*, *supra* note 5, at 563, 566; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 106 (2001); Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EJIL 144, 161 (1999).

- i. *The surrender is unlawful because the alleged conduct preceded the entry into force of the Rome Statute in Leng.*

28. The Rome Statute strictly limits the ICC's jurisdictional reach to "crimes committed" after its entry into force; in the case of a state which subsequently becomes a party, the ICC's jurisdictional reach extends only to crimes occurring after the Statute's entry into force for that state.<sup>97</sup> States accepting the ICC's jurisdiction must explicitly declare any contrary intention with respect to retroactivity.<sup>98</sup> Learned writers<sup>99</sup> confirm that article 21(3) of the Rome Statute, requiring that the application and interpretation of the law "be consistent with internationally recognized human rights," indicates the drafters' intention that the non-retroactivity principle be applied without derogation, consistent with several major international human rights treaties.<sup>100</sup>

29. Even if Herbert West's alleged conduct could be construed as a crime, the crime occurred when the audiotape was made in April 2003, one month before the Rome Statute entered into force in Leng [*Compromis* ¶9,10]. No other conduct can be attributed

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<sup>97</sup> Williams, *Jurisdiction Ratione Temporis*, *supra* note 85 at 323-324; Rome Statute, *supra* note 4, arts. 11, 24.

<sup>98</sup> Rome Statute, *supra* note 4, art. 12(3).

<sup>99</sup> MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (2002) 367 [hereinafter BOOT, GENOCIDE]; William A. Schabas, *Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals*, 11(3) EJIL 521, 522 (2000); William A. Schabas, *General Principles of Criminal Law in the International Criminal Court (Part III)*, 6(4) EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE, 84, 90 (1998) [hereinafter Schabas, *General Principles*].

<sup>100</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 art. 4(2); European Convention on Human Rights, 213 U.N.T.S. 221 *entered into force* Sept. 3, 1953 art. 15(2).

to West. Therefore, in the absence of Arkam's consent, any exercise of jurisdiction over West would violate the principle against retroactivity. Even if it could be argued that West's alleged conduct took place in some sense in Leng, no declaration has been made by Leng permitting the ICC to apply its jurisdiction retroactively [*Clarifications* ¶5]. As such, the exercise of jurisdiction by the ICC, absent Leng's declaration, would be in violation of the principle against retroactivity.

*ii. Randolfia cannot justify the surrender on the basis that the alleged conduct continued after the entry into force of the Rome Statute in Leng.*

30. The notion of continuing crimes, in which elements of a crime occur both before and after the entry into force of a treaty, was considered at the drafting stage of the Rome Statute.<sup>101</sup> Negotiating parties took a narrow constructive approach to the ICC's jurisdiction<sup>102</sup>, and any jurisdiction over continuing crimes was explicitly removed from the final draft as a necessary element in achieving a compromise among negotiating parties.<sup>103</sup> Therefore, the proposed exercise of jurisdiction over West violates the principle against retroactivity.

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<sup>101</sup> UN Doc. A/CONF.183/C.1/L.65/Rev.1, p.2; Schabas, *General Principles*, *supra* note 99, at 92.

<sup>102</sup> Mahnoush H. Arsanjani, *Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court*, in 65 REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS (Herman A.M. von Hebel, Johan G. Lammers, Jolien Schukking eds., 1999) [hereinafter Arsanjani, *Reflections on Jurisdiction*]; Schabas, *General Principles*, *supra* note 99, at 92.

<sup>103</sup> Per Saland, *International Criminal Law Principles*, in 196-197 THE INTERNATIONAL CRIMINAL COURT THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS (Roy S.Lee, ed.,1999); Arsanjani, *Reflections on Jurisdiction*, *id.* at 63-65; BOOT, GENOCIDE, *supra* note 99, at 371.

**PRAYER FOR RELIEF**

The Kingdom of Arkam respectfully requests that this Honorable Court:

**DECLARE** that it would be illegal under international law for Randolfia to surrender Joseph Curwen to the International Criminal Court pursuant to the warrant for his arrest.

**DECLARE** that it would be illegal under international law for Randolfia to surrender Herbert West to the International Criminal Court pursuant to the warrant for his arrest.

All of which is respectfully submitted.

Agents for the Kingdom of Arkam