

THE 2004 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

CASE CONCERNING THE INTERNATIONAL CRIMINAL COURT

IN THE INTERNATIONAL COURT OF JUSTICE

Kingdom of Arkam,

Applicant

versus

State of Randolfia,

Respondent

MEMORIAL FOR THE RESPONDENT

January 2004

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CASES

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<i>Prosecutor v. Blaskic</i> , Case No. IT-95-14-T, Judgment (3 Mar. 2000).....	20
<i>Prosecutor v. Delalic et al.</i> , Case No. IT-96-21-A, Judgment (Appeals Chamber) (20 Feb. 2001)	16, 24, 25
<i>Prosecutor v. Kordic and Cerkez</i> , Case No. IT-95-14/2-T, Judgment (26 Feb. 2001).....	16, 20
<i>Prosecutor v. Musema</i> , Case No. ICTR-96-13-A, Judgment (27 Jan. 2000).....	24
<i>Prosecutor v. Nahimana, Barayagwiza, and Ngeze</i> , Case No. ICTR-99-52-T, Judgment (3 Dec. 2003).....	17, 18, 24
<i>Prosecutor v. Niyitegeka</i> , Case No. ICTR-96-14-T, Judgment (16 May 2003).....	25
<i>Simpson v. State</i> , 17 S.E. 984 (Ga. 1893).....	14
<i>Steamship Lotus, The (France v. Turkey)</i> (1927) P.C.I.J. (Ser. A) No. 10	7, 14

UN DOCUMENTS

<i>Charter of the United Nations</i> , 26 June 1945, Can. T.S. 1945, No. 7.	1, 3
GA Res. 96 (I), UN GAOR, 1 st Sess., Resolutions at 188, UN Doc. A/64/Add. 1 (1946).	23

<i>Universal Declaration of Human Rights</i> , GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810(1948) 71	23
<i>U.N. Model Treaty on Extradition</i> , G.A. Res. 116, U.N. Doc. A/RES/45/116	7
UN SC Mtg., 58 th Year, 4803 rd Mtg., (2003).....	2
UN SC Res. 1497, UN SCOR, UN Doc. S/RES/1497 (2003)	2
TREATIES AND CONVENTIONS	
<i>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> , Dec. 7, 1984, U.N. Doc. A/Res/39/46	5, 6
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<i>Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation</i> , Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177.....	5, 6
<i>Convention for the Suppression of Unlawful Seizure of Aircraft</i> , Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105	5, 6
<i>Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents</i> , Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532	5, 6
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<i>Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field</i> , Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 ...	5, 6, 8
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<i>Geneva Convention Relative to the Protection of Civilian Persons in Time of War</i> , Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.....	5, 6, 8
<i>Geneva Convention Relative to the Treatment of Prisoners of War</i> , Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135	5, 6, 8
<i>International Convention Against the Taking of Hostages</i> , Dec. 18, 1979, U.N. G.A. Res. 34/145 (XXXIV), 34 U.N. GAOR Supp. (No. 46), at 245, U.N. Doc. A/34/146	5, 6
<i>International Convention for the Suppression of Terrorist Bombings</i> , 37 I.L.M. 249 (1998)....	5, 6
<i>Restatement (Third) of the Foreign Relations Law of the United States</i> , American Law Institute (1987).....	14

Rome Statute of the International Criminal Court, U.N. Doc. A/CONF 183/9, 17 July 1998
.....4, 5, 6, 7, 8, 10, 13, 14, 15, 16, 17, 19, 20, 22, 23, 24

Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th
Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994) 18

Vienna Convention on the Law of Treaties, (1969) 1155 U.N.T.S. 331.....5, 6

OTHER AUTHORITIES

Bassiouni, “Proposed Guiding Principles for Combating Impunity for International Crimes” in
M. Bassiouni, *Post-Conflict Justice* (New York: Transnational Publishers, 2002)..... 12

Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability” (1996) 59
Law & Contemp. Probs. 9 8, 9, 12

Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and
Contemporary Practice,” (2001) 42 *Va. J. Int’l L.* 81 8, 9

Brownlie, *Principles of Public International Law*, 6th ed., (Oxford University Press, 2003).....8

Cassese, *International Criminal Law* (Oxford University Press, 2003) 14, 19, 24

Currie, *Public International Law* (Irwin Law, 2001).....9

Defeis, “Freedom of Speech and International Norms: A Response to Hate Speech” (1992) 29
Stan. J. Int’l L. 57 24

Gallant, “Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal
Courts” (2003) 48 *Villanova Law Review* 763..... 13, 14, 15

Gerhard, “A “Response to the American View as Presented by Ruth Wedgwood” (1999) 10 *Eur.*
J. Int’l L. 109 10, 11

Ghandi, “The Human Rights Committee and the Right of Individual Communication” (1986) 57
Brit. Y.B. Int’l L. 201 24

Goldstone, “Justice as a Tool for Peace-Making: Truth Commissions and International Criminal
Tribunals,” (1996) 28 *New York University J. Int’l L. & Politics* 485 12

Hayner, “Fifteen Truth Commissions – 1974 to 1994: A Comparative Study” (1994) 16 *Hum.*
Rts. Q. 597 12

Kirsh, “The Rome Conference of the International Criminal Court: A Comment” (Nov./Dec.
1998) *ASIL Newsletter* 1 5

MacPherson, “Authority of the Security Council to exempt peacekeepers from international
proceedings” *Insights* (July 2002), online: American Society of International Law
<<http://www.asil.org/insights/insigh89.htm>> 4

Opotow, “Psychology of Impunity and Injustice: Implications for Social Reconciliation” in M. Bassiouni, <i>Post-Conflict Justice</i> (New York: Transnational Publishers, 2002)	11
Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” (1991) 100 Yale L.J. 2537.....	11, 12
Paust, “The Reach of ICC Jurisdiction over Non-Signatory Nationals” (2000) 33 Vanderbilt Journal of Transnational Law 1	5, 13
Randall, “Universal Jurisdiction Under International Law” (1988) 66 Tex. L. Rev. 785	9
Reydam, <i>Universal Jurisdiction International and Municipal Legal Perspectives</i> (Oxford University Press, 2003).....	9
Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court” (2003)14 Eur. J. Int'l L. 481	8, 10
Sadat, <i>The International Criminal Court and the Transformation of International Law</i> (Transnational Publishers, 2002).....	12, 13
Sadat, “Redefining Universal Jurisdiction” (2001) 35 New Eng. L. Rev. 241	8, 9
Sadat, <i>Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable</i> (University of Pennsylvania Press, 2003).....	8, 10
Sadat and Carden, “The New International Criminal Court: An Uneasy Revolution” (2000) 88 Georgetown L. J. 381	6, 12
Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court” (1999) 32 Cornell Int'l L. J. 507.....	8, 9, 10, 11
Scharf, “Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States” (2001) 35 New Eng. L. Rev. 363	9
Scharf, “The United States and the International Criminal Court: The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position” (2001) 64 Law & Contemp. Prob. 67.....	5, 6, 8, 9
Shabacker, “Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses” (1999) 12 N.Y. Int'l L. Rev. 1	12
Van Schaack, "Command Responsibility: The Anatomy of Proof in <i>Romagoza v. Garcia</i> " (2003) 36 U.C. Davis Law Review 1213.....	25

MISCELLANEOUS

International Law Commission, “Draft Code of Crimes Against the Peace and Security of Mankind” Report (1996) Chp. 2, Art. 2, para. 16, online: International Law Commission < http://www.un.org/law/ilc/reports/1996/chap02.htm >	22
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STATEMENT OF JURISDICTION

The Kingdom of Arkam and the State of Randolfia have submitted the present dispute to the International Court of Justice pursuant to Article 36(1) of the *Statute of the International Court of Justice*, which provides that the Court's jurisdiction comprises all cases referred to it by the parties concerned. The parties have jointly prepared a Special Agreement and transmitted it to the Court pursuant to the procedure established in Article 40(1). There is no dispute as to the Court's jurisdiction to hear this matter.

QUESTIONS PRESENTED

1. Has Arkam waived its exclusive jurisdiction to try Mr Curwen, pursuant to Security Council Resolution 2241?
2. Does the exercise of jurisdiction by the International Criminal Court over Mr Curwen violate the *Vienna Convention on the Law of Treaties* or customary international law?
3. Does the exercise of jurisdiction by the International Criminal Court over Mr Curwen violate the principle of complementarity?
4. Does Mr West or his allegedly criminal conduct demonstrate the necessary nexus with a State Party to the *Rome Statute* to allow for the exercise of jurisdiction by the International Criminal Court?
5. Is the exercise of jurisdiction by the International Criminal Court over Mr West's allegedly criminal conduct barred by the non-retroactivity of the *Rome Statute*?
6. Does Mr West's alleged conduct constitute a crime within the competence of the International Criminal Court?

STATEMENT OF FACTS

The states involved in this dispute are the Kingdom of Arkam (“Arkam”) and the State of Randolfia (“Randolfia”) (collectively, “States”). Prior to 1918, Arkam and Randolfia, together with the Kingdom of Leng (“Leng”), were constituent elements of the Duchy of Lengians and Arkamians [*Compromis*, ¶ 1]. Today, Arkam, Randolfia, and Leng are developing states which each share a border with the other two [¶ 1]. Arkam and Leng are constitutional monarchies [¶ 2] comprised primarily of ethnic Arkamians and Lengians, respectively [¶ 3]. Randolfia is a democracy [¶ 4] with a highly multi-ethnic population [¶ 2].

The relations between Arkam and Leng are traditionally tense and have been interspersed with instances of armed conflict [¶ 2]. One such armed conflict erupted between ethnic Lengians and ethnic Arkamians in Leng and Arkam in January 2003 [¶ 5]. The conflict in Arkam ended on 14 February 2003 with a peace agreement brokered by the United Nations Secretary-General [¶ 6]. Pursuant to the terms of this agreement, Arkam established the Arkamian Truth and Reconciliation Commission (“Arkamian TRC”) [¶ 7]. The mandate of the Arkamian TRC was not limited to acts associated with a political objective, but rather granted full amnesty for all criminal charges for both past and future conduct [¶ 7].

The conflict in Leng continued in the majority-Arkamian province of Yuggott, spurred on by the activities of the Greater Arkamian Liberation Army (“GALA”) [¶ 8]. It is a militia composed of ethnic Arkamians agitating for the secession of Yuggott and its annexation to Arkam [¶ 8]. The GALA is an independent organization which has both political and military functions, although no clear division exists between these two functions within its formal hierarchy [Clarification 2].

Dr Herbert West, a leader of the GALA and a professor of Arkamian history in Arkam, made an audiotape recording in April 2003, urging his “Arkamian brothers and sister to rid Yuggott ... of its Lengian occupiers. Eliminate them all: men, women, and children. Eliminate them all!” [¶ 10]. Mr West, who has frequently recorded audiotapes with messages denouncing ethnic Lengians, gave the copy of the recording to another member of the GALA [¶ 10; Clarification 4]. The recording was duplicated, was widely circulated to members of the GALA, and was repeatedly played on Radio Yuggott, a GALA-controlled radio station in Yuggott, from 15 to 25 May 2003 [¶ 11]. Commencing on 16 May 2003, bands of ethnic Arkamians massacred the minority Lengian population of Yuggott, chanting “Eliminate them all!” as they conducted their attacks [¶ 12].

On 17 June 2003, the Lengian ambassador to the United Nations formally requested that the United Nations Security Council deploy troops to Yuggott in order to quell the raids against ethnic Lengians [¶ 13]. In response, the Security Council adopted Resolution 2241, which created the multilateral force “IFLEN” to enter Yuggott, to shut down Radio Yuggott, and to end the massacre of Lengians [¶ 13]. Operative Paragraph 7 (“Paragraph 7”) of the Resolution states that officials or personnel from a contributing State not party to the *Rome Statute* of the International Criminal Court (“ICC”) are subject to the exclusive jurisdiction of that State for alleged acts or omission connected with IFLEN, unless that state waives its jurisdiction [¶ 14]. Paragraph 7 was included in the Resolution 2241 at the insistence of one Permanent Member of the Security Council [¶14]. Although all Security Council representatives strongly supported deploying troops to Yuggott, several delegates expressed deep concern with Paragraph 7, and the representative of one Permanent Member noted that his delegation did not believe the provision

was consistent with the *Rome Statute* or with international law [¶ 15]. Ten Members of the Security Council voted in favour of Resolution 2241, but five States abstained [¶ 15].

On 28 June 2003, GALA snipers attacked an IFLEN platoon under the command of Lieutenant Joseph Curwen, a Arkamian citizen [¶ 16]. Mr Curwen ordered his platoon to attack and destroy Exhamtown, which was undefended [¶ 17]. Mr Curwen's platoon killed 200 unarmed men, women, and children on 29 June 2003 in what media throughout the world termed the "Massacre at Exhamtown" [¶ 17-18]. The Randolfian commander of IFLEN immediately dismissed Mr Curwen, who then returned to Arkam, where he resigned his commission and was subpoenaed to appear before the Arkamian TRC within thirty days [¶ 13, 19].

Mr Curwen travelled to Randolfia on his own accord as a private citizen on 20 July 2003 and was arrested by Randolfian police after his car struck and injured a pedestrian while he was allegedly driving in an inebriated state [¶ 20]. Mr West was also arrested by Randolfian police for possession of illegal drugs on 22 July 2003 while attending to a GALA fundraising effort in Randolfia [¶ 21]. Both Mr Curwen and Mr West were charged, indicted, and jailed in Randolfia in a manner consistent with domestic law and with applicable international norms [¶ 22].

The Randolfian Minister of Justice dispatched a communiqué to the Registrar of the ICC on 25 July 2003, proposing to extradite both Mr Curwen and Mr West to the custody of the ICC and requesting that the Registrar indicate "the Court's willingness to exercise its jurisdiction under Article 13(a) of its Statute" [¶ 22]. On 29 July 2003, the Prosecutor of the ICC sent written notification to Arkam and to all State Parties to the *Rome Statute*, concluding the existence of a reasonable basis to commence an investigation pursuant to the *Rome Statute* into the allegations of allegedly criminal conduct on the part of Mr Curwen and Mr West [¶ 24; Correction 5]. The Prosecutor identified Arkam, Leng, and Randolfia as States which would normally exercise

jurisdiction over the crimes concerned [¶ 24]. As of the date of the *Compromis*, none of these States had replied to the notification [¶ 24].

After conducting investigations and pre-trial proceedings in conformity with the *Rome Statute*, the Prosecutor announced on 1 September 2003 that Mr Curwen was charged with the commission of a serious war crime in Leng under sections of Article 8(2)(a)(i), (a)(iv), (b)(i), (b)(iv), (b)(v), (c)(i), and (e)(i) of the *Rome Statute* [¶ 26; Clarification 12]. In accordance with the *Rome Statute*, the Prosecutor also charged Mr West with ordering, soliciting, or inducing the commission of genocide under Article 25(3)(b); with direct and public incitement to genocide under Article 25(3)(e); and with attempted genocide under Article 25(3)(f) [¶ 26; Correction 2]. On 9 September 2003, the Pre-Trial Chamber of the ICC issued arrest warrants for Mr Curwen and Mr West in conformity with Article 58 of the *Rome Statute* [¶ 27]. The warrants were delivered to the Randolfian Minister of Justice since both men remained in the custody of Randolfian authorities [¶ 27].

The King of Arkam protested the request by the Randolfian Minister of Justice for the ICC to exercise jurisdiction over Mr Curwen and Mr West on 26 July 2003 in a diplomatic note to the President of Randolfia [¶ 23]. The note also indicated that Arkam would not appear before the ICC Chamber to challenge the Court's jurisdiction over Mr Curwen and Mr West [¶ 23]. On 9 September 2003, the King of Arkam issued another diplomatic note to the President of Randolfia, threatening to recall its Ambassador to Randolfia, to close the Arkamian-Randolfian border, and to impose a complete embargo on trade with Randolfia if Mr Curwen and Mr West were surrendered to the custody of the ICC [¶ 28]. Confronted with crippling economic consequences, Randolfia entered into diplomatic negotiations with Arkam to end the impasse, and both Arkam and Randolfia concluded an agreement to submit the issues discussed in the

Compromis to the International Court of Justice (“ICJ”) [¶ 29]. Pending the outcome of this case, Randolfia has agreed not to surrender Mr Curwen or Mr West to the ICC [¶ 29; Correction 1]. Leng has declined to intervene in this case [¶ 29].

Arkam, Randolfia, and Leng are all original members of the United Nations (“UN”) and are parties with no reservations to the *Vienna Convention on the Law of Treaties* (“*Vienna Convention*”), the *International Covenant on Civil and Political Rights* (“*ICCPR*”), the *Convention on the Prevent and Punishment of the Crime of Genocide* (“*Genocide Convention*”), the 1949 Geneva Conventions (“*Geneva Conventions*”), and the two Additional Protocols of 1977 [¶ 30; Clarification 7]. Arkam and Randolfia have a bilateral extradition treaty [¶ 30]. Randolfia and Leng are State Parties to the *Rome Statute*, which entered into force for both States on 1 May 2003 [¶ 9, 30]. Arkam is not a State Party to the *Rome Statute* [¶ 30]. The three States are neither signatories nor parties to any other treaties pertinent to this case [¶ 30].

SUMMARY OF PLEADINGS

- I. Security Council Resolutions are only binding when they pertain to the maintenance of international peace and security. The purpose of Paragraph 7 was merely to provide a political concession to one Permanent Member of the Security Council. Paragraph 7 does not accord with the purpose of maintaining peace and security and can be severed. If Paragraph 7 cannot be severed, Akram cannot rely on Resolution 2241 because Paragraph 7 does not accord with the *United Nations Charter* (“*Charter*”). The ICJ has jurisdiction to determine whether Resolution 2241 complies with the *Charter*. Resolution 2241 does not correspond with the Security Council deferral provision in Article 16 of the *Rome Statute*.
- II. Pursuant to the *Rome Statute*, Randolphia has jurisdiction to surrender Mr Curwen to the ICC. The exercise of this jurisdiction is in accordance with the *Vienna Convention*, while the failure to surrender Mr Curwen would constitute a breach of the *Vienna Convention*. There is no issue of competing requests because Arkam has not requested the extradition of Mr Curwen. It is consistent with customary international law for Randolphia to exercise jurisdiction over Mr Curwen. In fact, international customary law established through treaties and the principle of universal jurisdiction supports Randolphia’s exercise of jurisdiction.
- III. The principle of complementarity in the *Rome Statute* is limited by the requirement that the interests of justice must be protected. Surrendering Curwen to the Arkamian TRC is tantamount to granting him impunity and will neither serve the interests of justice nor positive results for Arkam, Leng, or the international community. In addition, granting amnesty for war crimes is not consistent with international law.

- IV. The ICC can exercise jurisdiction over Mr West because his allegedly criminal conduct is properly considered to have occurred on the territory of Leng by virtue of the effects doctrine. This approach is supported by a purposive interpretation of the *Rome Statute*. Moreover, Mr West's responsibility as a commander or superior under Article 28 incurred for the acts of his subordinates in Leng.
- V. The prosecution of Mr West by the ICC is not barred by the principle of non-retroactivity. The *Rome Statute* entered into force in Leng on 1 May 2003. Even if Mr West delivered the audiotape recording before that date, his conduct is still subject to the exercise of jurisdiction by the ICC because the inchoate offences with which he is charged under Article 25(3) continued until the commission of the genocide with which they are associated. Moreover, his responsibility as a commander or superior incurred after the entry into force of the *Rome Statute* in Leng.
- VI. Mr West's alleged conduct constitutes crimes within the jurisdiction of the ICC. He was complicit in the circulation of his audiotape recording, thereby substantially contributing to the genocide in Leng and incurring liability under Article 25(3)(b) for ordering, soliciting, or inducing genocide. Mr West is also liable for direct and public incitement to genocide under Article 25(2)(e) given that he called upon Arkamians to eliminate the Lengians in Yuggott in a message propagated by means of mass communication. Moreover, he is liable for an attempt to commit genocide under Article 25(3)(f) because his recorded message is properly considered the commencement of genocide by means of a substantial step. His conduct is not protected by the right to freedom of expression. Mr West is also responsible under Article 28 as a commander or superior for the acts of subordinates within the GALA.

PLEADINGS

I. SECURITY COUNCIL RESOLUTION 2241 DOES NOT GIVE ARKAM EXCLUSIVE JURISDICTION OVER MR CURWEN

A. Paragraph 7 of Security Council Resolution 2241 is contrary to international law

i) Security Council Resolutions are only binding when they pertain to the maintenance of peace and security

Security Council Resolutions are binding upon members of the United Nations as per Article 25 of the *Charter*.¹ However, Article 25 must be read in accordance with Article 24 of the *Charter* which gives the Security Council the legal basis to take action under Article 25.² Article 24 “confers on the Security Council primary responsibility for the maintenance of international peace and security.”³ In discharging its duties under Article 24(1), the Security Council “shall act in accordance with the Purposes and Principles of the United Nations.”⁴ The ICJ affirmed the importance of the Security Council acting in accordance with international peace and security in *Namibia* when they stated, “[t]he only limitations [on the Security Council] are the fundamental principles and purposes found in Chapter 1 of the Charter.”⁵ Maintaining international peace and security is the first purpose listed in Chapter 1.⁶

¹ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945, No. 7, Art. 25 [hereinafter *UN Charter*].

² *Legal Consequences For States of the Continued Presence of South Africa Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Reports 16 at para. 109 [hereinafter *Namibia*].

³ *UN Charter*, *supra* note 1, Art. 24.

⁴ *Case Concerning Questions of Interpretation and Application of the Montreal Convention Arising Out of the Aerial Incident at Lockerbie (Provisional Measures) (Libya v. U.K.)*, [1992] I.C.J. Reports 3 at 5. [hereinafter *Lockerbie I*].

⁵ *Namibia*, *supra* note 2 at 109.

⁶ *UN Charter*, *supra* note 1, Art. 1.

ii) Paragraph 7 of Security Council Resolution 2241 is not in accordance with international peace and security

The purpose of adding Paragraph 7 to Resolution 2241 was to appease one Permanent Member of the Security Council; it was not aimed at creating peace and security. While all Security Council representatives supported the deployment of troops to Yuggott, several delegates expressed deep concerns about Paragraph 7.⁷ The respondent maintains that it was the gravity of the situation in Leng which forced five members of the Security Council to abstain, instead of voting against the Resolution. Security Council Resolution 1497⁸ concerning the situation in Liberia is instructive. Paragraph 7 of Resolution 1497 contained the same wording as Paragraph 7 of Resolution 2241, and Mexico, France and Germany expressly stated that they abstained solely on the basis of Paragraph 7.⁹

iii) Paragraph 7 should be severed from Security Council Resolution 2241

Since Paragraph 7 is not in accordance with international peace and security, it is ultra vires the Security Council and should be severed from Resolution 2241. Judge Lauterpacht in the *Norwegian Loans Case* held that it is acceptable to sever the invalid portion of an international instrument from the valid part, so long as the severed portion does not pertain to the essence of the undertaking.¹⁰ Paragraph 7 does not form the essence of the Resolution 2241, which is to quell the massacres in Leng.¹¹

⁷ *Compromis*, at para. 15.

⁸ UN SC Res. 1497, UN SCOR, UN Doc. S/RES/1497 (2003) at para. 7.

⁹ UN SC Mtg., 58th Year, 4803rd Mtg., (2003).

¹⁰ *Norwegian Loans Case (France v. Norway)* (1957) I.C.J. Reports 9 at 12.

¹¹ *Compromis*, at para. 13.

iv) If Paragraph 7 is not severed, Randolfia’s international obligation under the Rome Statute supersedes Security Council Resolution 2241

When determining disputes between treaties, Article 103 of the *Charter* settles the conflict in the favour of the *Charter*.¹² Resolution 2241 is contrary to the *Charter* because it does not meet the requirement of maintaining international peace and security; therefore, it cannot trump the *Rome Statute*. In reference to Article 103, Justice Rezek stated in *Lockerbie II*: “it is not designed to operate to the detriment of customary international law and even less so to the detriment of the general principles of the law of nations.”¹³

B. The ICJ has jurisdiction to review Security Council Resolutions

In determining whether Resolution 2241 is valid, the ICJ is primarily interpreting the *Charter*. Judge Weermantry held in *Lockerbie I* that the interpretation of the *Charter* is a matter of law which the ICJ should determine.¹⁴ In addition, the *Charter* does not expressly restrict the ICJ from making determinations in regards to the Security Council; however, Article 12 does expressly forbid the General Assembly from doing so.¹⁵ In *Lockerbie II*, Judges Kooijman and Rezek expressly supported the ICJ’s jurisdiction to review Security Council Resolutions, and President Schwebel acknowledged, in his dissent, that the majority in *Lockerbie II* set the precedent for States to seek review of Security Council Resolutions by the ICJ.¹⁶

¹² *UN Charter*, *supra* note 1, Art. 103.

¹³ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie* (Libya v. U.S.A) [1998] I.C.J. Report 115 at 152 [hereinafter *Lockerbie II*].

¹⁴ *Lockerbie I*, *supra* note 4 at 5.

¹⁵ *Ibid.*, at 6.

¹⁶ *Lockerbie II*, *supra* note 18 at 147 (Separate Opinion of Kooijman J), 152 (Separate Opinion Rezek J), 163 (Dissenting Opinion of President Schwebel).

C. Security Council deferral provisions in the *Rome Statute* do not apply to Security Council Resolution 2241

Article 16 of the *Rome Statute* allows for the deferral of an investigation brought forward by the Security Council.¹⁷ Its applicability is limited to specific situations where ICC proceedings could interfere with efforts to restore or maintain international peace and security.¹⁸ Resolution 2241 is not situation specific, but rather it is a blanket amnesty for the entire IFLEN mission. Article 16 is properly applied after the alleged crime has occurred and the Security Council determines that prosecution is not in the interests of maintaining international peace and security.

II. SURRENDERING MR CURWEN TO THE ICC IS CONSISTENT WITH THE VIENNA CONVENTION ON THE LAW OF TREATIES AND CUSTOMARY INTERNATIONAL LAW

A. Randolphia has jurisdiction pursuant to Article 12 and 14 of the *Rome Statute*

As a Party to the *Rome Statute*, Article 14 gives Randolphia authority to refer Mr Curwen to the Prosecutor of the ICC.¹⁹ Since the crimes occurred in Leng, which is party to the Statute, Randolphia complies with the precondition to the exercise of jurisdiction in Article 12(2) which restricts jurisdiction to crimes committed on the territory of a State which is party to the *Rome Statute*²⁰ and nationals of States which are party to the *Rome Statute*.²¹ While the nationality of the accused is one means of bringing an individual within the jurisdiction of the court, there is no

¹⁷ *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF 183/9, 17 July 1998, Art. 16 [hereinafter *Rome Statute*].

¹⁸ MacPherson, "Authority of the Security Council to exempt peacekeepers from international proceedings" *Insights* (July 2002), online: American Society of International Law <<http://www.asil.org/insights/insigh89.htm>> (last accessed: 13 Jan. 2004).

¹⁹ *Rome Statute*, *supra* note 17, Art. 14.

²⁰ *Ibid.*, Art. 12(2)(a).

²¹ *Ibid.*, Art. 12(2)(b).

requirement that this be the case.²² The Preamble of the *Rome Statute* requires “that the most serious crimes of concern to the international community...not go unpunished... their effective prosecution must be ensured.”²³ Not prosecuting Mr Curwen who committed a crime on the territory of a State party would “entirely thwart” these ends.²⁴

B. Surrendering Mr Curwen to the ICC does not violate the Vienna Convention

Randolfia acknowledges that, as per Article 34 of the *Vienna Convention*, “[a] treaty does not create either obligations or rights for a third party state without its consent.”²⁵ Surrendering Mr Curwen to the ICC does not impose obligations or rights on Arkam. Mr Curwen, a private citizen, freely chose to travel to Randolfia. In doing so he chose to accept the criminal jurisdiction of Randolfia. Surrendering Mr Curwen to the ICC “simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising out of treaty obligations.”²⁶ There are various treaties which empower a State to assert jurisdiction over someone found within their borders, regardless of whether the national’s home State was party to the treaty.²⁷

²² J. Paust, “The Reach of ICC Jurisdiction over Non-Signatory Nationals” (2000) 33 *Vanderbilt Journal of Transnational Law* 1 at 6; M. Scharf, “The United States and the International Criminal Court: The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position” (2001) 64 *Law & Contemp. Prob.* 67 at 69 [hereinafter Scharf, “The United States”].

²³ *Rome Statute*, *supra* note 17, Preamble.

²⁴ Paust, *supra* note 22 at 8.

²⁵ *Vienna Convention on the Law of Treaties*, (1969) 1155 U.N.T.S. 331, Art. 34 [hereinafter *VCLT*].

²⁶ P. Kirsh, “The Rome Conference of the International Criminal Court: A Comment” (Nov./Dec. 1998) *ASIL Newsletter* 1.

²⁷ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31, Geneva

C. Failing to surrender Mr Curwen would violate the Vienna Convention

i) Failing to surrender Mr Curwen violates the principle of *pacta sunt servanda*

Failing to surrender Mr Curwen to the ICC would violate the principle of *pacta sunt servanda* expressed in Article 26 of the *Vienna Convention*, which states that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”²⁸ It is contrary to the very purpose of the *Rome Statute* to not surrender Mr Curwen to the ICC;²⁹ this would allow the killing of 200 unarmed civilians to go unpunished.³⁰

ii) Arkam has not made a valid request for surrender

Arkam has not formally requested that Mr Curwen be extradited; therefore, the provisions in the *Rome Statute* pertaining to competing requests do not apply.³¹ The subpoena issued for Mr

Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; Geneva Convention of the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; [hereinafter *Geneva Conventions*] Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532; International Convention Against the Taking of Hostages, Dec. 18, 1979, U.N. G.A. Res. 34/145 (XXXIV), 34 U.N. GAOR Supp. (No. 46), at 245, U.N. Doc. A/34/146; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 7, 1984, U.N. Doc. A/Res/39/46; International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249 (1998) in Scharf, “The United States”, *supra* note 22 at 99.

²⁸ *VCLT*, *supra* note 25, Art. 26.

²⁹ Scharf, “The United States”, *supra* note 22 at 77; L. Sadat and S. Carden, "The New International Criminal Court: An Uneasy Revolution," (2000) 88 Georgetown L. J. 381 at 451.

³⁰ *Compromis*, at para. 17.

³¹ *Rome Statute*, *supra* note 17, Art. 90.

Curwen does not engage these provisions because Article 90, pertaining to competing requests, specifically requires that the state “request...extradition.”³²

In the alternative, if the subpoena was found to be akin to an extradition request, the *Rome Statute* gives priority to the exercise of jurisdiction by the ICC. Article 90(4) of the *Rome Statute*, establishes that where the state is not a party to the *Rome Statute* and not under an international obligation to extradite, priority shall be given to the Court.³³

An extradition treaty exists between Randolphia and Arkam which is identical to the *Model Extradition Treaty*.³⁴ This does not constitute an international obligation to extradite because Article 4(g) of the *Model Extradition Treaty* provides parties with the option not to extradite if the requesting state will try the individual in an “extraordinary ad hoc court or tribunal.”³⁵ The Arkamian TRC is an extraordinary and ad hoc tribunal.

D. It is consistent with customary international law to surrender Mr Curwen to the ICC

i) Customary international law does not restrict Randolphia’s jurisdiction

It is not inconsistent with customary international law for Randolphia to assert jurisdiction over Mr Curwen. In the *Steamship Lotus* Case, the Permanent Court of International Justice (“PCIJ”) stated that “[r]estrictions upon the independence of States cannot ... be presumed,” and “it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.”³⁶ This principle is widely accepted as a principle of international law and was

³² *Ibid.*

³³ *Ibid.*, Art. 90(4).

³⁴ Clarification 8.

³⁵ *U.N. Model Treaty on Extradition*, G.A. Res. 116, U.N. Doc. A/RES/45/116.

³⁶ *The Steamship Lotus (France v. Turkey)* (1927) P.C.I.J. (Ser. A) No. 10 at 18 [hereinafter *Lotus*].

recently confirmed by the ICJ in the *Nuclear Test Case*.³⁷ The application of this principle in the context of the ICC means that “sovereign states are free to collectively establish an international jurisdiction applicable to the nationals of non-party states unless it can be shown that this violates a prohibitive rule of international law.”³⁸ There is no rule of international law prohibiting Randolphia from exercising jurisdiction over individuals in its territory.

ii) International custom establishes Randolphia’s right to punish Mr Curwen for war crimes

Randolfia’s has a right to prosecute Mr Curwen for war crimes under the *Geneva Convention* and the two Additional Protocols of 1977. The ICC has charged Mr Curwen under Article 8(2)(a) of the *Rome Statute* which replicates the crimes in the *Geneva Convention*.³⁹ Randolphia and Arkam are signatories to the *Geneva Conventions*, which establishes a duty to provide effective penal sanctions for war crimes.⁴⁰ It is accepted that the obligations in the *Geneva Conventions* have become customary international law and that breaches “may be punished by any state which obtains custody of persons suspected of responsibility.”⁴¹

³⁷ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 at 238; M. Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice” (2001) 42 Va. J. Int’l L. 82 at 90 [hereinafter Bassiouni, “Universal Jurisdiction”]; I. Brownlie, *Principles of Public International Law*, 6th ed., (Oxford University Press, 2003) at 300; L. Sadat, “Redefining Universal Jurisdiction” (2001) 35 New Eng. L. Rev. 241 at 258 [hereinafter Sadat, “Universal Jurisdiction”]; Scharf, “The United States”, *supra* note 22 at 72.

³⁸ Scharf, “The United States”, *supra* note 22 at 73.

³⁹ *Rome Statute*, *supra* note 17, Art. 8(2)(a); *Geneva Conventions*, *supra* note 27.

⁴⁰ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31, Art. 49.

⁴¹ Brownlie, *supra* note 37 at 303; L. Sadat, *Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable* (University of Pennsylvania Press, 2003) [hereinafter Sadat, *Amnesties*]; D. Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court” (2003) 14 Eur. J. Int’l L. 481; M. Bassiouni,

iii) International law allows states to exercise universal jurisdiction over war criminals

In addition to this right of Randolphia to prosecute Mr Curwen, international custom allows the exercise of universal jurisdiction for war crimes. Universal jurisdiction over international crimes concerns the jurisdiction to suppress activity deemed criminal as a matter of international criminal law.⁴²

Since the Nuremberg Tribunals, it has been uniformly recognized that war crimes are crimes of universal jurisdiction.⁴³ Support for universal jurisdiction is evidenced by multiple domestic courts enacting domestic legislation providing for the exercise of universal jurisdiction.⁴⁴ Even the United States, which opposes the ICC, has enacted expanded war crimes legislation which allows for universal jurisdiction.⁴⁵ European Union Parliament expressed support for universal jurisdiction when they congratulated the Spanish and British parliaments for their “commitment to the principle of universal justice to protect human rights” following the *Pinochet* decision.⁴⁶

“Searching for Peace and Achieving Justice: The Need for Accountability” (1996) 59 *Law & Contemp. Prob.* 9 [hereinafter Bassiouni, “Searching for Peace”]; M. Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court” (1999) 32 *Cornell Int’l L. J.* 507 [hereinafter Scharf, “Amnesty”].

⁴² J. Currie, *Public International Law* (Irwin Law, 2001) at 306.

⁴³ Bassiouni, “Universal Jurisdiction”, *supra* note 37 at 151; Sadat, “Universal Jurisdiction”, *supra* note 37 at 245; M. Scharf, “Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States” (2001) 35 *New Eng. L. Rev.* 363; K. Randall, “Universal Jurisdiction Under International Law” (1988) 66 *Tex. L. Rev.* 785 at 802.

⁴⁴ L. Reydam, *Universal Jurisdiction International and Municipal Legal Perspectives* (Oxford University Press, 2003).

⁴⁵ Scharf, “The United States”, *supra* note 22 at 91.

⁴⁶ Reydam, *supra* note 44 at 72.

III. THE ICC'S EXERCISE OF JURISDICTION OVER MR CURWEN DOES NOT VIOLATE THE PRINCIPLE OF COMPLEMENTARITY

A. The Arkamiam TRC does not meet the requirements of Complementarity in the *Rome Statute*

i) The principle of complementarity in the Rome Statute is limited to protecting the interests of justice

The principle of complementarity expressed in Article 17(1)⁴⁷ of the *Rome Statute* is expressly limited by Article 17(2)(c), which requires that the proceedings have “an intent to bring the person concerned to justice.”⁴⁸ The preamble of the *Rome Statute* suggests that amnesty is incompatible with the interest of justice.⁴⁹ The preamble “[a]ffirm[s] that the most serious crimes...must not go unpunished and that their effective prosecution must be ensured and “[r]ecall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”⁵⁰ The negotiators of the *Rome Statute* debated including a provision regarding amnesty; however, the delegates expressly rejected including amnesties in Article 17.⁵¹

⁴⁷ *Rome Statute*, *supra* note 17, Art. 17(1).

⁴⁸ *Ibid.* Art. 17(2).

⁴⁹ Scharf, “Amnesty”, *supra* note 41 at 522; Sadat, *Amnesties*, *supra* note 41; H. Gerhard, “A Response to the American View as Presented by Ruth Wedgwood” (1999) 10 *Eur. J. Int'l L.* 108.

⁵⁰ *Rome Statute*, *supra* note 17, Preamble.

⁵¹ Robinson, *supra* note 41 at 483.

ii) The interests of justice will not be served by submitting Mr Curwen to the Arkamian TRC

The Arkamian TRC was created to foster peace and security following the trans-border conflict between ethnic Lengians and Arkamians,⁵² not to deal with war crimes committed during a United Nations peacekeeping mission.

Mr Curwen is merely required to make full disclosure of the massacre in order to be granted amnesty by the Arkamian TRC.⁵³ This is akin to granting him impunity.⁵⁴ The UN Commission on Human Rights concluded that “impunity is a major reason for continuing human rights violations throughout the world.”⁵⁵ The ICC asserts that the punishment of war crimes is nonderogable. Allowing such crimes to go unpunished in certain circumstances would be contrary to the very purpose of creating the ICC.⁵⁶

B. International law does not support amnesty for war crimes

The *Geneva Convention* contains a clear duty to prosecute war criminals, and allowing amnesty for such crimes would be contrary to international law.⁵⁷ International custom establishes that truth and reconciliation commissions are not appropriate for war crimes; truth and reconciliation

⁵² *Compromis*, at para. 7.

⁵³ *Ibid.*

⁵⁴ S. Opatow, “Psychology of Impunity and Injustice: Implications for Social Reconciliation” in M. Bassiouni, *Post-Conflict Justice* (New York: Transnational Publishers, 2002) at 202.

⁵⁵ Scharf, “Amnesty”, *supra* note 41 at 513.

⁵⁶ Gerhard, *supra* note 49 at 111; D. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime (1991) 100 Yale L.J. 2537 at 2608

⁵⁷ See text accompanying note 41.

commissions in other countries have predominately been for the punishment of crimes against humanity, not war crimes.⁵⁸

Professor Bassiouni states that truth commissions “should not be deemed a substitute for prosecution of...war crimes.”⁵⁹ Noted scholars support the view that war crimes are crimes for which amnesties are most inappropriate.⁶⁰ Even Justice Goldstone, a staunch supporter of truth and reconciliation commissions, agrees that the most serious crimes should be prosecuted internationally, not through domestic truth and reconciliation commissions.⁶¹

C. Surrendering Mr Curwen to the Arkamian TRC will not further justice

While there remains considerable debate over the benefits of the South African Truth and Reconciliation Commission⁶² (“South African TRC”), surrendering Mr Curwen to the Arkamian TRC will not further justice as it is argued that the South African TRC did.⁶³

First, the South African TRC was limited to political acts as was necessary to ensure peace and stability for the transitional regime.⁶⁴ Mr Curwen going before the Arkamian TRC would not produce any benefit in terms of peace and security for Arkam especially since Arkam is not a

⁵⁸ P. Hayner, “Fifteen Truth Commissions – 1974 to 1994: A Comparative Study” (1994) 16 Hum. Rts. Q. 597.

⁵⁹ Bassiouni “Searching for Peace”, *supra* note 41 at 20.

⁶⁰ Sadat and Carden, *supra* note 29; Orentlicher, *supra* note 56; M. Bassiouni, “Proposed Guiding Principles for Combating Impunity for International Crimes” in Bassiouni Post Conflict, *supra* note 54 at 255.

⁶¹ R. Goldstone, “Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals” (1996) 28 New York University J. of Int’l L. & Politics 485 at 496.

⁶² W. Shabacker, “Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses” (1999) 12 N.Y. Int’l L. Rev. 1 at 1.

⁶³ L. Sadat, *The International Criminal Court and the Transformation of International Law* (Transnational Publishers, 2002) at 60 [hereinafter Sadat, *Transformation*].

⁶⁴ Goldstone, *supra* note 61.

transitional regime. Second, surrendering Mr Curwen also will not produce any acknowledgement for the suffering of the victims, as they are Lengians who are not participants in Arkamian TRC. Third, the South Africa TRC was limited to acts, omissions, and offences which occurred in the past;⁶⁵ Arkam's TRC permits amnesty for future conduct.⁶⁶ This creates an incentive to commit war crimes, since potential perpetrators know that there will be no penal sanction as a result. This is not in the interest of justice which the ICC requires.

IV. MR WEST'S ALLEGEDLY CRIMINAL CONDUCT DEMONSTRATES THE NECESSARY NEXUS WITH THE A STATE PARTY TO THE ROME STATUTE FOR THE ICC TO EXERCISE JURISDICTION

The jurisdiction of the ICC to adjudicate over individuals varies under the *Rome Statute* with the source of the referral of a situation to the Court.⁶⁷ The situation regarding Mr West and his allegedly criminal conduct was referred to the Prosecutor of the ICC in accordance with Article 14(1) of the *Rome Statute* by the Randolfian Minister of Justice.⁶⁸

Considering that the referral was made by a State Party of the *Rome Statute*, Article 13(a) provides for the jurisdiction of the ICC over Mr West,⁶⁹ subject to the limitation articulated in Article 12(2).⁷⁰ Accordingly, the jurisdiction of the ICC is permissible by virtue of Article 12(2)(a), such that Leng, "the State on the territory of which the conduct in question occurred" is a State Party to the *Rome Statute*.

⁶⁵ Sadat, *Transformation*, *supra* note 63 at 54.

⁶⁶ *Compromis*, at para. 7.

⁶⁷ K. Gallant, "Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts" (2003) 48 Villanova Law Review 763 at 800.

⁶⁸ *Rome Statute*, *supra* note 17, Art. 14(1); *Compromis*, at para. 23.

⁶⁹ *Rome Statute*, *supra* note 17, Art. 13.

⁷⁰ Paust, *supra* note 22 at 6; Gallant, *supra* note 67 at 809-810.

A. The ‘effects doctrine’ establishes a connection with the territory of Leng

Although Mr West made the audiotape recording at issue in Arkam, the conduct for which he is charged is properly considered to have occurred in the territory of Leng on the basis of the ‘effects doctrine’, which is established in international law by the decision of the PCIJ in *Lotus*.⁷¹ The Court noted therein that criminal law may be interpreted such that “offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.”⁷² This statement is generally regarded as establishing that “*even where a crime is committed outside the territory, if its effects will be felt in the territory, then it is amenable to the State’s jurisdiction.*”⁷³

Although the *Rome Statute* does not expressly authorize the utilization of the effects doctrine, Kenneth Gallant asserts that “the ‘effects’ doctrine is sufficiently well established that ... [the] Statute should be read to permit the Court to exercise jurisdiction over persons supporting crime within the territory of an accepting State, even if they are not within such territory when they acted.”⁷⁴ This conclusion is supported by Article 21(1)(b) of the *Rome Statute*, which provides that the ICC shall apply “the principles and rules of international law.”⁷⁵

⁷¹ *Lotus*, *supra* note 36.

⁷² *Ibid.*, at 23.

⁷³ A. Cassese, *International Criminal Law* (Oxford University Press, 2003) at 278 [emphasis in original]; *Restatement (Third) of the Foreign Relations Law of the United States, American Law Institute* (1987), §421(2)(j); *Simpson v. State*, 17 S.E. 984 (Ga. 1893).

⁷⁴ Gallant, *supra* note 67 at 814.

⁷⁵ *Rome Statute*, *supra* note 17, Art. 21(1)(b).

Moreover, this utilization of the effects doctrine is consistent with the *Rome Statute*, which notes that the ICC was established to confront “the most serious crimes of concern to the international community as a whole” by putting “an end to impunity for the perpetrators of these crimes and thus [contributing] to the prevention of such crimes.”⁷⁶ Having regard for this purpose, Article 12(2)(a) should not be narrowly construed so as to preclude the utilization of the effects doctrine.⁷⁷

Admittedly, Gallant notes that the effects doctrine likely extends “only to those who knew or intended that their acts would have effect in a State that has accepted the Court’s jurisdiction.”⁷⁸ Yet, this limitation does not bar the application of the doctrine in the case of Mr West – indeed, *prima facie*, his stated desire that Yuggott be “rid ... of its Lengian occupiers” suggests that he intended for his actions to have effect in the territory of Leng.⁷⁹

Thus, given that Mr West is charged with three inchoate offences under Article 25 which allegedly had the effect of contributing to or causing the commission of genocide in Leng, his conduct is properly considered to have occurred in Leng on the basis of the effects doctrine. As such, Article 12(2)(a) is hereby fulfilled, and Article 13(a) empowers the ICC to exercise jurisdiction to adjudicate over Mr West with regard to these offences.⁸⁰

⁷⁶ *Ibid.*, Preamble.

⁷⁷ Gallant, *supra* note 67 at 814-815.

⁷⁸ *Ibid.*, at 815.

⁷⁹ *Compromis*, at para. 10.

⁸⁰ *Rome Statute*, *supra* note 17, Art. 12(2)(a).

B. Mr West incurred responsibility as a commander or superior in the territory of Leng

Mr West is also charged under Article 6(a) in conjunction with Article 28 as a commander or superior.⁸¹ Notwithstanding substantive considerations as to whether Mr West was in a position to incur responsibility as a commander or superior of the GALA members in control of Radio Yuggott or of any GALA forces which participated in the genocide, any command or superior responsibility for these acts is connected to Leng.

As established by the ICTY Appeals Chamber in the *Delalic* case, a commander or superior is “one who possesses the power or authority in either a *de jure* or *de facto* form to prevent a subordinate’s crime or to punish the perpetrator of the crime after the crime is committed.”⁸² Accordingly, if Mr West incurs responsibility as a commander or superior, then his power or authority implicitly extends into Leng. That is, the acts or omissions for which Mr West is allegedly responsible as a commander or superior occurred in Leng,⁸³ and the mere fact that he was located in another state does not shield him from the jurisdiction of the ICC.⁸⁴ Accordingly, the prerequisite expressed in Article 12(2)(a) is satisfied,⁸⁵ and the ICC is empowered under Article 13(a) to adjudicate over Mr West’s responsibility in this regard.

⁸¹ *Rome Statute*, *supra* note 17, Art. 6(a), Art. 28; *Compromis*, at para. 26; Correction 2.

⁸² *The Prosecutor v. Zejnir Delalic et al.*, Case No. IT-96-21-A, Judgment (20 Feb. 2001), at para. 192 [hereinafter *Delalic* Appeals Chamber].

⁸³ *Compromis*, at para. 11, 12.

⁸⁴ *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Judgment (26 Feb. 2001), at para. 406 [hereinafter *Kordic and Cerkez*].

⁸⁵ *Rome Statute*, *supra* note 17, Art. 12(2)(a).

V. THE PRINCIPLE OF NON-RETROACTIVITY DOES NOT BAR THE PROSECUTION OF MR WEST BY THE ICC

Article 22(1) of the *Rome Statute* establishes that “a person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”⁸⁶ Furthermore, Article 11(2) stipulates that the ICC may exercise jurisdiction with respect to crimes committed in a State only after the entry into force of the *Rome Statute* in that State.⁸⁷ The *Rome Statute* entered into force in Leng on 1 May 2003.⁸⁸ This provision does not bar the exercise of jurisdiction by the ICC over the allegedly criminal conduct of Mr West.

A. The inchoate offences with which Mr West is charged continued until the commission of the associated acts

Mr West made the audiotape recording in April 2003, and Radio Yuggott began playing the tape on 15 May 2003.⁸⁹ If he gave the audiotape recording to a member of the GALA after 1 May 2003, then the prosecution of Mr West by the ICC is not barred by Article 11(2).⁹⁰ Moreover, even if Mr West gave the audiotape recording to a member of the GALA prior to 1 May 2003, the exercise of jurisdiction by the ICC for these inchoate offences is not barred by Article 11(2) by virtue of the ICTR’s *Nahimana* decision.⁹¹ Although the Statute of the ICTR limited its jurisdiction to the prosecution of “serious violations of international humanitarian law committed

⁸⁶ *Ibid.*, Art. 22(1).

⁸⁷ *Ibid.*, Art. 11(2).

⁸⁸ *Compromis*, at para. 9.

⁸⁹ *Ibid.*, at para. 10-11.

⁹⁰ *Ibid.*, at para. 10.

⁹¹ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment (3 Dec. 2003) [hereinafter *Nahimana*].

... between 1 January 1994 and 31 December 1994,”⁹² the Tribunal held that inchoate offences fell within its jurisdiction if begun prior to but continued into 1994.⁹³ This decision recognized that convictions for inchoate offences can be based upon “not just one defined event occurring on a specific date but upon a series of events or acts which took place over an extended period of time.”⁹⁴ More specifically, for the purpose of determining the temporal limitations upon the jurisdiction of an international tribunal, the ICTR held that a conspiracy agreement continues until the commission of the crimes contemplated by the conspiracy and that the crime of incitement to genocide continues to the time of the commission of the acts incited.⁹⁵

Accordingly, with regard to the inchoate offences with which Mr West is charged, the *Nahimana* decision establishes that the exercise of jurisdiction by the ICC is not barred by Article 11(2) since the genocide with which these inchoate offences are associated occurred after the entry into force of the *Rome Statute* in Leng.⁹⁶

B. Mr West incurred responsibility as a commander or superior after the entry into force of the Rome Statute in Leng

The exercise of jurisdiction by the ICC over Mr West for responsibility as a commander or superior under Article 28 of the *Rome Statute* is not barred by Article 11(2). Specifically, Article 28 establishes that a commander or superior incurs criminal responsibility for the failure to

⁹² *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994), Art. 1.

⁹³ *Nahimana*, *supra* note 91 at para. 101-102.

⁹⁴ *Ibid.*, at para. 102.

⁹⁵ *Ibid.*, at para. 104.

⁹⁶ *Compromis*, at para. 12.

exercise proper control over subordinates.⁹⁷

With regard to Mr West, commander or superior responsibility might exist for his failure as a leader of the GALA to prevent, to stop, and to rectify the airing of his audiotape recording from 15 to 25 May 2003 or to prevent, to stop, and to rectify the commission of the genocide from 16 May 2003 onward.⁹⁸ He might also incur commander or superior responsibility if evidence reveals that he ordered the circulation and propagation of his audiotape recording or that he ordered the commission of the genocide.⁹⁹ Thus, both instances of criminal responsibility occurred after the entry into force of the *Rome Statute* in Leng, and the prosecution of Mr West at the ICC under Article 28 does not violate Article 11(1).

VI. MR WEST'S ALLEGED CONDUCT CONSTITUTES CRIMES WITHIN THE JURISDICTION OF THE ICC

A. Mr West's alleged conduct constitutes, *prima facie*, a crime within the jurisdiction of the ICC under Article 25(3)(b), (e), and (f) of the Rome Statute

i) Mr West's alleged conduct constitutes a crime within the jurisdiction of the ICC under Article 25(3)(b) of the Rome Statute

Article 25(3)(b) imposes criminal responsibility where an individual “orders, solicits, or induces the commission of such a crime which in fact occurs or is attempted.”¹⁰⁰ Ordering presupposes that the individual issuing the order is the *de jure* or *de facto* superior of the individual who performs it.¹⁰¹ The ICTY held in the *Kordic and Cerkez* case that “no formal superior-

⁹⁷ *Rome Statute*, *supra* note 17, Art. 28.

⁹⁸ *Compromis*, at para. 11-12.

⁹⁹ *Rome Statute*, *supra* note 17, Art. 25(3)(b), Art. 28.

¹⁰⁰ *Ibid.*, Art. 25(3)(b).

¹⁰¹ Cassese, *supra* note 73 at 193.

subordinate relationship is required for a finding of ‘ordering’ so long as ... the accused possessed the authority to order.”¹⁰² Moreover, the ICTY has held that the order need not be given in any particular form, need not be performed by a subordinate, and can be proven through circumstantial evidence.¹⁰³

The evidence in this case strongly indicates that Mr West ordered the circulation of the audiotape recording which substantially contributed to the genocide in Leng.¹⁰⁴ Indeed, the entreaty of Mr West contained in the audiotape recording to “[e]liminate them all”¹⁰⁵ constitutes strong evidence that he did solicit the commission of the crime of genocide. Moreover, the chanting of this phrase by the perpetrators of the genocide suggests that he did in fact induce the commission of genocide. Accordingly, the facts indicate that the conduct of Mr West is within the jurisdiction of the ICC under Article 25(3)(b).

ii) Mr West’s alleged conduct constitutes a crime within the jurisdiction of the ICC under Article 25(3)(e) of the Rome Statute

Article 25(3)(e) imposes criminal responsibility where an individual “directly and publicly incites others to commit genocide.”¹⁰⁶ In the *Akayesu* case, the ICTR held that “direct and public incitement ... [involves] directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places ... or through *any other means of*

¹⁰² *Kordic and Cerkez*, *supra* note 84 at para. 388.

¹⁰³ *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgment (3 Mar. 2000), at para. 281; *Kordic and Cerkez*, *supra* note 84 at para. 388.

¹⁰⁴ *Compromis*, at para. 10-12.

¹⁰⁵ *Ibid.*, at para. 10.

¹⁰⁶ *Rome Statute*, *supra* note 17, Art. 25(3)(e).

*audiovisual communication.*¹⁰⁷ Furthermore, the ICTR determined that “the ‘direct’ element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act.”¹⁰⁸ As for the ‘public’ element of the offence, the ICTR referred to the International Law Commission’s finding that “public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large *by such means as the mass media.*”¹⁰⁹ Also, the *Akayesu* decision establishes that “incitement” is defined as “encouraging or persuading another to commit an offence ... [or] as an act intended to directly provoke another to commit a crime.”¹¹⁰

Thus, Mr West is, *prima facie*, criminally liable for incitement to genocide, as he directly called upon Arkamians to “eliminate” the Lengians of Yuggott in a public appeal which was transmitted by means of mass communication.¹¹¹ That is, his conduct satisfies the *actus reus* of the offence.

In the *Akayesu* case, the ICTR held that the *mens rea* of incitement to genocide “lies in the intent to directly prompt or provoke another to commit genocide.”¹¹² On the basis of the evidence available, the intention of Mr West can only be inferred – however, considering that he belonged to the GALA which was dedicated to the secession of Yuggott,¹¹³ that he freely gave

¹⁰⁷ *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (2 Sept. 1998), at para. 559 [hereinafter *Akayesu*] [emphasis added].

¹⁰⁸ *Ibid.*, at para. 557.

¹⁰⁹ *Ibid.*, at para. 556 [emphasis added].

¹¹⁰ *Ibid.*, at para. 555.

¹¹¹ *Compromis*, at para. 10-12.

¹¹² *Akayesu*, *supra* note 107 at para. 560.

¹¹³ *Compromis*, at para. 8.

the audiotape recording to a member of the GALA,¹¹⁴ and that he took no action to retract his statements or otherwise prevent the airing of his message on Radio Yuggott, the facts strongly suggest that Mr West possessed the requisite *mens rea* of the offence. Such an inference from the facts with regard to intent is permissible, per *Akayesu*.¹¹⁵ Accordingly, the conduct of Mr West falls within the jurisdiction of the ICC under Article 25(3)(e).

iii) Mr West’s alleged conduct constitutes a crime within the jurisdiction of the ICC under Article 25(3)(f) of the Rome Statute

In the alternative, the making of the audiotape recording is, *prima facie*, an attempt to commit genocide. Article 25(3)(f) provides for criminal responsibility where a person “[a]ttempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of the circumstances independent of the person’s intentions.”¹¹⁶ The International Law Commission has noted that, where an individual encourages another individual to commit a crime, he “thereby contributes substantially to the commission of that crime.”¹¹⁷

Accordingly, the exhortation by Mr West in his recorded message for other Arkamians to ‘eliminate’ the ethnic Lengians of Yuggott is properly construed as the commencement of the crime of genocide by means of a substantial step.¹¹⁸ Thus, Mr West is liable, *prima facie*, for the attempt to commit genocide.

¹¹⁴ *Ibid.*, at para. 10.

¹¹⁵ *Akayesu*, *supra* note 107 at para. 478.

¹¹⁶ *Rome Statute*, *supra* note 17, Art. 25(3)(f).

¹¹⁷ International Law Commission, “Draft Code of Crimes Against the Peace and Security of Mankind” Report (1996) Chp. 2, Art. 2, para. 16, online: International Law Commission <<http://www.un.org/law/ilc/reports/1996/chap02.htm>> (last accessed: 7 Jan. 2004).

¹¹⁸ *Compromis*, at para. 10.

iv) Mr West’s alleged conduct is not protected by the right to freedom of expression

Article 21(3) of the *Rome Statute* stipulates that the interpretation and the application of criminal law by the ICC “must be consistent with internationally recognized human rights.”¹¹⁹ Article 19 of the *Universal Declaration of Human Rights* (“*Declaration*”) establishes that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹²⁰ Although this right is not specifically limited, Article 29(3) of the *Declaration* requires that “[t]hese rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.”¹²¹

The *Convention for the Prevention and Punishment of the Crime of Genocide* clearly states that “genocide is ... contrary to the spirit of the United Nations and condemned by the civilized world.”¹²² Accordingly, no plausible ground exists to assert that the content of Mr West’s audiotape recording was protected against criminal prosecution by his right to freedom of expression. Indeed, commentators generally accept that the protection entailed in the right to freedom of expression does not extend to speech that might incite hatred, violence, or

¹¹⁹ *Rome Statute*, *supra* note 17, Art. 21(3).

¹²⁰ *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, Art. 19.

¹²¹ *Ibid.*, Art. 29(3).

¹²² *Convention for the Prevention and Punishment of the Crime of Genocide* (1951), 78 U.N.T.S. 277, Preamble, Art. 3; GA Res. 96 (I), UN GAOR, 1st Sess., Resolutions at 188, UN Doc. A/64/Add. 1 (1946).

genocide.¹²³ Thus, the imposition of criminal responsibility on this basis is not contrary to international human rights law.

B. Mr West’s alleged conduct constitutes, *prima facie*, a crime within the jurisdiction of the ICC under Article 28 of the Rome Statute

International law clearly establishes that military commanders and other superiors can incur liability for the commission of criminal acts by their subordinates.¹²⁴ The *Rome Statute* recognizes this responsibility of commanders and superiors in Article 28.¹²⁵

On this basis, Mr West is potentially responsible as a leader of the GALA both for the circulation and propagation of his audiotope recording and for the genocide in Yuggott.¹²⁶ Indeed, considering the evidence, Mr West clearly was in a position of authority within the organization.¹²⁷ Moreover, given that the GALA had no clear division between its military and political organs, the facts available do not allow for the discernment of whether he is liable as a commander or superior.¹²⁸ Yet, the present inability to make this distinction does not defeat the exercise of jurisdiction of the ICC over Mr West under Article 28. Indeed, in accordance with the decision of the Appeals Chamber in *Delalic*, if Mr West had, in his capacity as a leader of the GALA, “effective control over subordinates, to the extent that he can prevent them from

¹²³ P. Ghandi, “The Human Rights Committee and the Right of Individual Communication” (1986) 57 *Brit. Y.B. Int’l L.* 201 at 239; E. Defeis, “Freedom of Speech and International Norms: A Response to Hate Speech” (1992) 29 *Stan. J. Int’l L.* 57 at 80-84.

¹²⁴ *In re Yamashita*, Judgment (1 Oct. 1946), International Military Tribunal for the Far East, 327 U.S. 1 (1946); *Delalic* Appeals Chamber, *supra* note 82; *Nahimana*, *supra* note 91; *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment (27 Jan. 2000); Cassese, *supra* note 73 at 203-205.

¹²⁵ *Rome Statute*, *supra* note 17, Art. 28.

¹²⁶ *Compromis*, at para 10-12.

¹²⁷ *Compromis*, at para 10, 21; Clarification 4.

committing crimes or punish them after they committed crimes,” he is criminally liable as a commander or superior.¹²⁹

The facts presently available suggest that Mr West occupied an important position within the GALA. Accordingly, the ICC should be granted jurisdiction over Mr West to determine his liability under Article 28.

PRAYER FOR RELIEF

For the foregoing reasons, the Respondent respectfully requests that this Court DECLARE that:

- a) Randolfia’s decision to surrender Mr Curwen to the custody of the ICC would be consistent with international law;
- b) Randolfia’s decision to surrender Mr West to the custody of the ICC would be consistent with international law.

¹²⁸ Clarification 2.

¹²⁹ *Delalic Appeals Chamber, supra* note 82 at para. 198; *The Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-T, Judgment (16 May 2003), at para. 472; B. Van Schaack, “Command Responsibility: The Anatomy of Proof in *Romagoza v. Garcia*” (2003) 36 U.C. Davis Law Review 1213 at 1221-1225.