

INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE 2004 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

CASE CONCERNING
THE INTERNATIONAL CRIMINAL COURT

KINGDOM OF ARKAM
(APPLICANT)

v.

STATE OF RANDOLFIA
(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

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List of Abbreviations

| | |
|-----------------------------|--|
| ACHR | American Convention on Human Rights |
| AI | Amnesty International |
| AJIL | American Journal of International Law |
| Ad.Op. | Advisory Opinion |
| A-G | Attorney General |
| Ann. | Annual |
| Ann. Surv. Int'l & Comp. L. | Annual Survey of International and Comparative Law |
| Ariz. J. Int'l & Comp. L. | Arizona Journal of International and Comparative Law |
| Art. | Article(s) |
| Aspen Inst. Q | Aspen Institute Quarterly |
| B.U. Int'l L.J. | Boston University International Law Journal |
| BYIL | British Yearbook of International Law. |
| Cal. L. Rev. | California Law Review |
| CARICOM | Caribbean Community |
| CDR | Coalition pour la Defense de la République |
| Charter | Charter of the United Nations |
| Chi. L. Rev. | Chicago Law Review |
| CJEC | Court of Justice of the European Community |
| Cornell Int'l L.J. | Cornell International Law Journal |
| Dalhousie L.J. | Dalhousie Law Journal |
| Dick. J. Int'l L. | Dickinson Journal of International Law |
| Diss.Op | Dissenting Opinion |
| Doc. | Document(s) |
| Duke L. J. | Duke Law Journal |

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| ed./eds. | Editor(s) or edition |
| <i>e.g.</i> | <i>ex gratia</i> |
| EJIL | European Journal of International Law |
| Emory Int'l L. Rev. | Emory International Law Review |
| ETS | European Treaty Series |
| Fl. Int'l L. J. | Florida International Law Journal |
| Fla. L. Weekly | Florida Law Weekly |
| Fordham Int'l L. J. | Fordham International Law Journal |
| GALA | Greater Arkamian Liberation Army |
| Genocide Convention | Convention on the Prevention and Punishment of the Crime of Genocide |
| Germ. L. J. | German Law Journal |
| Harv. Hum. Rts. J. | Harvard Human Rights Journal |
| Harv. Int'l L.J. | Harvard International Law Journal |
| Hawaii L. Rev. | Hawaii Law Review |
| Hum. Rts. Q. | Human Rights Quarterly |
| HRW | Human Rights Watch |
| I/A.Ct.HR | Inter American Court of Human Rights |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights. |
| ICJ | International Court of Justice |
| ICJ Rep. | International Court of Justice Reports |
| ICTR | International Criminal Tribunal of Rwanda |
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| IFLEN | Multinational Force for Leningian relief created by SC Res. 2241 |

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|--------------------------|--|
| ILSA J. Int'l & Comp. L. | International Law Students Associations International and Comparative Law Review |
| ILC | International Law Commission |
| ILR | International Law Reports |
| IMT | International Military Tribunal |
| Indian J. Int'l L. | Indian Journal of International Law |
| L. & Contemp. Probs. | Law and Contemporary Problems |
| Melb. J. Int'l L. | Melbourne Journal of International Law |
| McGill L.J. | McGill Law Journal |
| Mich. J. Int'l L. | Michigan Journal of International Law |
| Mil. L. Rev. | Military Law Review |
| Mont. L. Rev. | Montana Law Review |
| New Eng. L. Rev. | New England Law Review |
| No. | Number or Numbers |
| NY Int'l L. Rev. | New York International Law Review |
| NY L. Sch. J. Hum. Rts. | New York Law School Journal of Human Rights |
| NYU J. Int'l L. | New York University Journal of International Law |
| OAS | Organization of American States |
| Op. | Opinion |
| Op.¶7 | Operative Paragraph 7 |
| ¶ | Paragraph or paragraphs |
| PCA | Permanent Court of Arbitration |
| PCIJ | Permanent Court of International Justice |
| RAA | Royal Arkamian Army |
| Rep. | Report(s) |
| Res. | Resolution or resolutions |

| | |
|----------------------------|--|
| RIAA | Recueil of International Arbitral Awards |
| RTLTM | Radio Television de Milles Collines |
| SC | Security Council |
| Sep.Op | Separate Opinion |
| Sask. L. Rev. | Saskatchewan Law Review. |
| Stan. L. Rev. | Stanford Law Review |
| Suffolk Transnat'l L. Rev. | Suffolk Transnational Law Review |
| Temp. Int'l & Comp. L.J. | Temple International and Comparative Law Journal |
| Tex. Int'l L. J. | Texas International Law Journal |
| TRC | Truth and Reconciliation Commission |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNCIO | United Nations Conference on International Organization |
| UNHRC | United Nations Human Rights Committee |
| UNGA | United Nations General Assembly |
| UNGAR | United Nations General Assembly Reports |
| UNSG | United Nations Secretary-General |
| UNTAET | United Nations Transitional Administration in East Timor |
| v. | Versus |
| Va. J. Int'l L. | Virginia Journal of International Law |
| Vand. J. Transnat'l L. | Vanderbilt Journal of Transnational Law |
| VCLT | Vienna Convention on the Law of Treaties |
| Vol. | Volume or volumes |
| Yale J. Int'l L. | Yale Journal of International Law |

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Statement of Facts

In 1918, the monarch of the Duchy of Lengians and Arkamians abdicated, resulting in the creation of three new States: Randolfia (Respondent); the Kingdom of Arkam (Applicant); and the Kingdom of Leng. All are developing States, each with a population of approximately one million. All States share common borders. The populations of Arkam and Leng are made up of two ethnic groups: Arkamians and Lengians. In Arkam, Arkamians constitute nearly 90% of the population, while in Leng, Lengians constitute slightly more than 90%. There haven't been a significant number of intermarriages between members of each ethnic group, and their relationship has been highlighted by episodes of armed conflict. Randolfia has a multi-ethnic population, with an equal numbers of Lengians and Arkamians.

Arkam and Leng are constitutional monarchies, with the thrones and legislative controls held by the ethnic majorities. Randolfia is a democracy which parliament has been peacefully contested by several ethnic-based political parties, and the Lengian party is currently in power. Randolfia's annual trade with Arkam constitutes about 40% percent of Randolfia's worldwide commerce.

In January 2003, a trans-border armed conflict erupted between ethnic Lengians and Arkamians in Leng and Arkam, for which the U.N. convened an international peace conference in the Randolfian capital. The conflict in Arkam ceased, but no accord was reached over the conflict in Leng. Ethnic Arkamians in Arkam continued to provide support to Arkamians in Leng who continued to fight ethnic Lengians there.

Under the terms of the Peace Agreement, on March 1, 2003 Arkam established a TRC which is empowered to grant a full amnesty for all crimes committed during and in furtherance of the armed conflict between the ethnic Arkamians and Lengians. This TRC has so far granted 11 amnesties.

In Leng, fighting continued in the province of Yuggott, spurred by GALA, a militia whose purpose was the secession of Yuggott from Leng and its unification with Arkam. On May 1, 2003 the Rome Statute entered into force for Leng and Randolfia but not for Arkam, the government of which characterized the Court as illegal. Randolfia has enacted domestic legislation implementing the Rome Statute.

Dr. Herbert West is an Arkamian and a leader of GALA. In April 2003, West recorded an audiotape, urging Arkamians to “rid Yuggott of its Lengian occupiers” and to “eliminate them all”. West gave the only copy to his neighbor, a fellow GALA member. The audiotape was copied, distributed and broadcasted through Radio Yuggott –a radio station which was controlled by and supported GALA- between May 15 and May 25th. On May 16, bands of ethnic Arkamians began conducting raids in Yuggott reportedly chanting “Eliminate them all!” while massacring ethnic Lengians. By the end of May, around 10% of the Lengian population had been massacred. On June 20, 2003, the Security Council, adopted SC Res. 2241, which created “IFLEN”, a multinational force, to enter Yuggott, shut down Radio Yuggott, and put a stop to the bloodshed. Op.¶ 7 of Resolution 2241 excluded from the ICC’s jurisdiction officials of IFLEN who were nationals of contributing States not parties to the Rome Statute. Several delegates stated that Op.¶ 7 was not consistent with the Rome Statute or international law.

Lieut. Joseph Curwen is a citizen and resident of Arkam. On June 28, 2003, GALA attacked an IFLEN platoon under Curwen’s command; 12 soldiers were killed and 4 injured. Lieut. Curwen ordered his platoon to attack Exhamtown, an undefended village, resulting in the killing of 200 ethnic Lengians and Arkamians. On June 30, GALA and the Lengian government agreed to a U.N.-monitored ceasefire, which continues to this day.

Liut. Legrasse, IFLEN’s commander in chief, dismissed Lieut. Curwen, and Arkam ordered him to appear before the TRC within 30 days. Curwen and West both traveled to Randolfia

afterwards. Between July 20 and July 22, Both Curwen and West were arrested there. On July 23, Randolphia's media urged the government of Randolphia to send these individuals to the ICC. Eliza Tillinghast, the Randolphian Minister of Justice, dispatched a communiqué on July 25, 2003 informing ICC's Registrar that Randolphia held these international criminals in custody and requested the ICC to exercise jurisdiction over them.

On July 26, 2003, the King of Arkam sent a diplomatic note to the President of Randolphia indicating that Arkam would not appear before the ICC. On July 29, the Prosecutor of the ICC sent a written notification to Arkam, concluding that there was reasonable basis to commence investigations into the allegations contained in Tillinghast's communiqué. In August 2003, ICC's Prosecutor carried out investigations and two Pre-Trial Chambers were constituted. On September 1, 2003, the ICC's Prosecutor charged West and Curwen with incitement to genocide and attempted genocide, and with the commission of war crimes and acts of violence in Leng, respectively. The Pre-Trial Chambers issued arrest warrants for both individuals. On the same day, the King of Arkam sent a diplomatic note warning Randolphia that if it delivered either West or Curwen to the ICC, Arkam would close their common border, and impose an embargo on Randolphia. Faced with imminent economic disaster, Randolphia entered into negotiations and agreed with Arkam to submit the dispute to the ICJ. Leng is not intervening in this case.

Statement of Jurisdiction

The Republic of Arkam and the Republic of Randolfia have submitted by Special Agreement the dispute concerning the jurisdiction of the ICC over Mr. Joseph Curwen and Mr. Herbert West for their acts related to the ethnic conflict in Leng and transmitted a copy thereof to the Registrar of the Court, pursuant to article 40(1) of the Statute. Therefore, both parties have accepted the jurisdiction of the ICJ pursuant to Article 36(1) of the Statute of the Court.

Summary of Pleadings

I. Randolfia's decision to surrender Mr. Joseph Curwen to the custody of the ICC is consistent with international law because:

A. The ICC is not barred from exercising jurisdiction over Curwen by Res. 2241. Indeed, although this Court has never expressly recognized it, SC decisions can be subject to judicial review. Especially, since Res. 2241 breaches the Charter by being *ultra vires*, thus it is not binding upon Randolfia. The *ultra vires* character of the Res. 2241 derives from the fact that it breaches *ius cogens*, it amends the ICC Statute, and it contradicts the principle of *pacta sunt servanda*. Moreover, the interpretation of the powers of the SC made in the adoption of Res. 2241 is not generally accepted by States. Alternatively, Randolfia is under a *ius cogens* obligation to prosecute war crimes, which prevails over obligations under the Charter.

B. The exercise of ICC jurisdiction over a national of a State not party to the ICC Statute does not violate the VCLT or customary international law. Indeed, the ICC Statute does not abrogate the rights of third States not parties to the ICC Statute. Moreover, no rule of customary law is breached by Randolfia's compliance with the ICC Statute. Finally, the ICC's jurisdictional regime has created instant customary law binding on Randolfia, as well as Arkam.

C. The exercise of ICC jurisdiction does not violate the principle of Complementarity, since Arkam's creation of a TRC with powers to grant amnesty demonstrate said State's unwillingness to investigate or prosecute. Indeed, the Arkamian TRC does not meet the standards of genuine willingness to investigate or prosecute. Finally, granting amnesties for war crimes breaches humanitarian law and undermines principles enshrined in UN Resolutions.

II. It is legal under international law for Randolfia to surrender West to the ICC pursuant to the warrant for his arrest because:

A. West's alleged acts constitute crimes within the jurisdiction of the ICC. Indeed, West's conduct constitutes incitement to commit genocide, since both the physical and mental elements of the crime are fulfilled. Moreover, West is responsible of incitement to commit genocide under the superior responsibility doctrine, since: (i) there is a superior-subordinate relationship between West and other GALA members; and (ii) he knew, or at least should have known, about the illegal conduct of his subordinates, and did nothing to prevent it or punish it. Additionally, West's responsibility derives from his complicity in the incitement to commit genocide, since he instigated the crime, and had the intent to incite, and the required *dolus specialis*. Finally, under the *Nahimana* decision, West is responsible for attempted genocide.

B. West's allegedly criminal conduct demonstrates the necessary nexus with a State party, since the crime was either committed solely in Leng, or in Arkam and Leng combined.

C. West's alleged actions do not precede the date in which the ICC Statute entered into force with respect to Leng and Randolfia. Indeed, under the ICC's jurisdiction *ratione temporis*, and under the principle of intertemporal law, conduct was perpetrated between May 15 2003, and May 25, 2003. Hence, it was perpetrated after the entry into force of the ICC Statute.

Questions Presented

1. Whether Randolfia's decision to surrender Mr. Joseph Curwen to the custody of the International Criminal Court would be consistent with international law, and whether on that basis, the Court should reject Applicant's request for relief concerning Mr. Curwen.
2. Whether Randolfia's decision to surrender Mr. Herbert West to the custody of the International Criminal Court would be consistent with international law, and whether on that basis, the Court should reject Applicant's request for relief concerning Mr. West.

I. RANDOLFIA'S DECISION TO SURRENDER MR. JOSEPH CURWEN TO THE CUSTODY OF THE ICC IS CONSISTENT WITH INTERNATIONAL LAW.

A. The ICC Is Not Barred From Exercising Jurisdiction Over Curwen By Res. 2241.

Although in the *Namibia Case* the ICJ expressed that it lacked the power of judicial review with respect to SC decisions,¹ it proceeded to review the validity of one such decision,² clearly contradicting its previous assertion. Indeed, ICJ Justices have expressed that examining the validity and effect of SC decisions relevant to a case is paramount to its judicial function,³ particularly because the political intervention of the SC in certain matters does not prevent the exercise of the ICJ's judicial functions.⁴ Historically the ICJ has taken a broader interpretation of its powers to review the legality of SC Resolutions. Res. 2241 (that Randolfia holds to breach the Charter), presents a perfect opportunity for the ICJ to review the validity of a SC Resolution, declaring the ICC's jurisdiction over Curwen.

1. Res. 2241 Breaches the Charter and Therefore is not Binding upon Randolfia.

SC Resolutions enjoy only a *prima facie* presumption of validity,⁵ which –as recognized by

¹ *Case Concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, (Namibia Case), (Ad.Op.), ICJ Rep., 1971, ¶89.

² *Namibia Case*, *supra* note 1, ¶115.

³ *Namibia Case*, *supra* note 1, Sep.Op. of Judges Petren ¶131; Oneyama ¶143-45 and Dillard ¶151,152; *Case Concerning East Timor*, (Port. v. Austl.), (Dis.Op. Judge Skubiszewski), ICJ Rep. 1995, ¶86.

⁴ *Case Concerning United States Diplomatic and Consular Staff in Tehran*, (Hostages Case), (US v. Iran), ICJ Rep. 1980, ¶40; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua Case) (Jurisdiction), (Nicar. v. US), ICJ Rep. 1984, ¶93; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Genocide Case), (Bosn.& Herz. v. Yugo.), ICJ Rep., 1993, ¶33.

⁵ *Case Concerning Certain Expenses of the United Nations*, (Expenses Case), (Ad.Op.), 34 ILR, 1962, ¶168; *Case Concerning Questions of Interpretation and Application of the Montreal Convention Arising out of the Aerial Incident at Lockerbie*, (Lockerbie Case), (Request for Prov. Meas.), (Libya v. US), ICJ Rep., 14 Apr. 1992, ¶42.

several ICJ Justices⁶ may be rebutted on proof that they are *ultra vires*.⁷ Indeed, despite its political character,⁸ the SC is subject under Article 24(2) of the Charter to observe certain limitations⁹ imposed by UN principles and purposes. One such purpose is to establish conditions under which respect for treaty obligations and other sources of international law can be maintained.¹⁰ In fact, failure to adopt a decision in accordance with said purpose relieves UN Members from their duty of compliance.¹¹ Thus, Res. 2241 as a manifestly *ultra vires* act does not enjoy a presumption of validity,¹² and is thus not binding upon States.

a. Res. 2241 is *ultra vires* by breaching the *ius cogens* obligation to prosecute war crimes.

To abide by the above stated UN purpose, the SC must exercise its powers consistently with

⁶ *Lockerbie Case*, *supra* note 5, Diss.Op. of Judges Shahabuddeen, Bedjaoui, Ajibola and Weeramantry.

⁷ Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, 5 EJIL, 1994, 2; Lauterpacht, *The Legal Effect of Illegal Acts of International Organizations*, In: *Cambridge Essays in International Law: Essays in Honor of Lord McNair*, 1965, 117.

⁸ *Conditions of Admission of a State to Membership in the United Nations*, (Ad.Op.), ICJ Rep., 1948, 336; Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter*, Kluwer Law International, 2001, 165.

⁹ *Prosecutor v. Tadic*, (Decision on Defense Motion for Interlocutory Appeal on Jurisdiction), (Appeals Chamber), ICTY, 2 Oct. 1995, ¶28; Delbrück, *Article 24*, In: *The Charter of the United Nations, A Commentary*, (Simma ed.), Oxford, 1994, 401.

¹⁰ UN Charter, UNTS 993, entered into force 24 Oct. 1945, Preamble, ¶3.

¹¹ UN Charter, *supra* note 10, Art. 25; UNCIO Doc. 5-97, III/1/30, 1945; Lamb, *Legal Limits to United Nations Security Council Powers*, In: *The Reality of International Law: Essays in Honor of Ian Brownlie*, (Goodwin-Gill and Talmon eds.), Oxford, 1999, 366; Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 S. Ill. U. L. J., 1994, 141.

¹² *Expenses case*, *supra* note 5, (Sep.Op. Judge Morelli), ¶216, 223; Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations*, 77 AJIL, 1983, 249; Watson, *Constitutionalism, Judicial Review and The World Court*, Harv. Intl. L.J., 1993, 16.

peremptory norms of international law.¹³ One such *ius cogens* norm dictates that serious violations of humanitarian law, including war crimes, shall be prosecuted.¹⁴ In this case, Res. 2241 allows Arkam to subject Arkamian IFLEN agents to its exclusive jurisdiction. However, Arkam has implemented a TRC empowered to grant amnesty for criminal acts committed during the conflict. Noting that the TRC has subpoenaed Curwen and will presumably grant him amnesty, Res. 2241 favors impunity over the genuine prosecution of war crimes. Thus, Res. 2241 breaches *ius cogens* and must be deemed manifestly *ultra vires*.

b. Additionally, Res. 2241 is *ultra vires* because it amends the ICC Statute.

As stated, one of the purposes of the UN is to establish conditions to maintain treaty obligations. Since the SC must act in accordance with such precept, it is not empowered to amend, rewrite or alter the content of international treaties freely entered into by States.¹⁵ Indeed, while debating a US proposal to exempt UN Peacekeepers from ICC jurisdiction, several States recognized that the SC is not vested with this treaty-amending power.¹⁶ Nevertheless, Res. 2241 modifies the jurisdictional basis of the ICC Statute excluding from

¹³ Herdegen, The “Constitutionalization” of the UN Security System, 27 Vand. J. Transnat’l L., 1994, 156; Gowlland-Debbas, The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, 88 AJIL, 1994, 673.

¹⁴ Wise, Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite, In: Bassiouni, International Criminal Law, Vol. II, Transnat’l Publishers, 1999, 28; Martin, 2001 Ariel F. Sallows Conference: Human Rights and the Hierarchy of International Law Sources and Norms: Delineating a Hierarchical Outline of International Law Sources and Norms, 65 Sask. L. Rev., 2002, 346.

¹⁵ El Zeidy, The United States Dropped the Atomic Bomb of Article 16 of the Rome Statute: Security Council Power of Deferrals and Resolution 1422, Vand. J. Transnat’l L., 1529; Letter from UNSG Kofi Annan to US Sec’y of State Colin Powell, 03 Jul. 2002, <http://www.iccnw.org/html/SGlettertoSC3July2002.pdf>; AI, The Unlawful Attempt by the Security Council to Give US Citizens Permanent Impunity from International Justice, 2003, 59.

¹⁶ UN Doc. S/PV.4568, 10 Jul. 2002, 3, 22; UN Doc. S/PV.4568 (Resumption 1), 10 Jul. 2002, 2, 3, 4, 5, 8, 10, 14, 15, 16, 20, 22, 30; UN Doc. S/PV.4772, 12 Jun. 2003, 6, 7, 25.

its jurisdiction crimes committed by IFLEN agents from a non-party State to the ICC Statute, even if committed in the territory of a State-party. Thus, the SC has exceeded its powers by amending the ICC Statute. This renders Res. 2241 *ultra vires*.

c. Finally, Res. 2241 is *ultra vires* since it contradicts the *pacta sunt servanda* principle.

As a fundamental principle of customary law,¹⁷ States must comply with their treaty obligations in good faith.¹⁸ In this case, the ICC Statute binds State-parties (including Randolfia) to surrender persons in their custody when so requested.¹⁹ However, Res. 2241 impedes the surrendering of Curwen to the ICC, calling on Randolfia to disobey its obligations under the ICC Statute. Thus, Res. 2241 undermines Randolfia's intention to comply with its treaty obligations in good faith, departing from the purposes and principles of the UN. Clearly this renders Res. 2241 *ultra vires* and thus, not binding upon States.

2. Res. 2241's Interpretation of SC Powers is not Generally Accepted.

As seen in the deliberations at the UN constituent conference, States deem that any interpretation of the Charter made by an UN organ but not generally accepted is without binding force.²⁰ By adopting Res. 2241, the SC has interpreted its powers under the Charter in an overly extensive manner that has not been generally accepted. Indeed, the SC has sought to limit ICC jurisdiction exercising powers that it does not possess. However, legal experts,²¹ the UNSG and several States have denied said power of the SC.²² So did one

¹⁷ Oppenheim, International Law, (Jennings & Watts) Longman, 9th ed., 1996, 1206; Cheng, General Principles of Law as Applied by International Courts and Tribunals, Cambridge, 1994, 113; Watts, The International Law Commission 1948-1998, Vol. II, Oxford, 1999, 667.

¹⁸ VCLT, 1155 UNTS 331, entered into force 27 Jan. 1980, Art. 26.

¹⁹ ICC Statute, entered into force 01 Jul. 2002, Art. 89(1).

²⁰ UNCIO Doc. 933, IV/2/42(2), 13 UNCIO 710; Watson, *supra* note 12, 13.

²¹ Lattanzi, La Corte Penale Internazionale: Una Sfida per le Giurisdizioni degli Stati, Diritto Pubblico Comparato ed Europeo, 2002, 1372-74; Ambos, International Criminal Law has

permanent member of the SC and the Lengian Ambassador by strongly objecting the content of Op.¶7 in Res. 2241, indicating that an interpretation of the powers of the SC to limit the jurisdiction of the ICC is not generally accepted and, thus, not binding upon States.

3. Randolfia is under a *Ius Cogens* Obligation to Prosecute War Crimes.

Arkam may argue that Randolfia must comply with Res. 2241 since observance of SC decisions prevails over any other treaty obligation.²³ However, said obligation cannot prevail over *ius cogens* obligations,²⁴ which includes the duty to prosecute war crimes.²⁵ Indeed, by complying with Res. 2241, Randolfia would allow Curwen, an alleged war criminal, to be subjected to the jurisdiction of a State that offers him amnesty. Thus, Randolfia shall not comply with Res. 2241 in order to fulfill its prevalent *ius cogens* obligations.

B. The Exercise Of ICC Jurisdiction Over A National Of A State Not Party To The ICC Statute Does Not Violate The VCLT Or Customary International Law.

1. The Exercise of Jurisdiction Over Curwen does not Breach the VCLT.

Arkam claims that the ICC breaches Article 34 of the VCLT by exercising jurisdiction over nationals of non-parties, said article establishing that treaties cannot create obligations for non-party States without their consent.²⁶ However, the sole obligation imposed upon States

Lost its Innocence, 10 Germ L. J., 2002,13; Stahn, The Ambiguities of Security Council Resolution 1422, 1 EJIL, 2003, 28-9.

²² UN Doc. S/PV.4772, *supra* note 16, 5-26; UN Doc. S/PV.4568, *supra* note 16, 8.

²³ UN Charter, *supra* note 10, Art. 103.

²⁴ Scott *et al*, A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of The United Nations Security Council's Arms Embargo on Bosnia and Herzegovina, 16 Mich. J. Int'l L. 123.

²⁵ Bassiouni, Accountability For International Crimes And Serious Violations Of Fundamental Human Rights: International Crimes, Jus Cogens and Obligations Erga Omnes, 59 Law & Contemp. Prob., 1996, 66; Steven, Genocide and the Duty to Extradite or Prosecute: Why the US is in Breach of Its International Obligations, 39 Va. J. Int'l L., 447.

²⁶ VCLT, *supra* note 18, Art. 34.

by the ICC Statute regards cooperation with the ICC,²⁷ and for third parties such cooperation is merely based on comity.²⁸ Hence, the ICC imposes no burden upon Arkam as a non-party. Nonetheless, Arkam may claim that the ICC's exercise of jurisdiction over non-party's nationals abrogates pre-existing rights of third States,²⁹ namely their sovereign right to exercise jurisdiction over nationals.³⁰ Accordingly, the ICC would be precluding Arkam from exercising jurisdiction over Curwen, its national. However, State practice evidences that, when dealing with certain crimes, jurisdiction over non-nationals does not require the acceptance of the national state.³¹ Specifically for war crimes (the crime allegedly committed by Curwen), every State has a right to prosecute offenders without the consent of the perpetrator's national State.³² Consequently, the ICC is neither imposing obligations nor abrogating Arkam's rights as a non-party to the ICC Statute, thus not breaching the VCLT.

²⁷ ICC Statute, *supra* note 19, Art. 86.

²⁸ Swart, Arrest and Surrender, In: The Statute of the International Criminal Court: A Commentary, Cassese, Gaeta & Jones (eds.), Vol. II, Oxford, 2002, 1686; Harhoff, Phakiso & Mochochoko, International Cooperation and Judicial Assistance, In: The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence, (Lee, ed.), Transnat'l Publishers, 2001, 642-43.

²⁹ Morris, The US and the ICC: High Crimes and Misconceptions: The ICC and Non-Party States, L. & Contemp. Probs., 2001, 27; Holcombe, The United States Becomes a Signatory to the Rome Treaty Establishing the International Criminal Court: Why are so many Concerned by this Action?, Mont. L. Rev., 2001, 314; Arnaut, When in Rome...? The International Criminal Court and Venues of U.S. Participation, Va. J. Int'l L., 2003, 550.

³⁰ Oppenheim, *supra* note 17, 457; Shaw, International Law, Cambridge, 3rd ed., 1995, 403.

³¹ A-G Israel v. Eichmann, Israel Sup.Ct., 1961; Public Prosecutor v. the Butare Four, Assize Court of Brussels, 2001; US v. Noriega, US District Ct., Fla., 99 ILR 145, 8 Jun. 1992, 145-6.

³² Zaid & Esq, Universal Jurisdiction: Myths, Realities, And Prospects: Will Or Should The United States Ever Prosecute War Criminals?: A Need For Greater Expansion In The Areas Of Both Criminal And Civil Liability, New Eng.L. Rev, 2001, 450; Joyner, Arresting Impunity: The Case For Universal Jurisdiction In Bringing War Criminals To Accountability, Law & Contemp. Prob., 1996, 146; Marler, The International Criminal Court: Assessing The Jurisdictional Loopholes In The Rome Statute, Duke L.J., 1999, 847.

2. The Exercise of ICC Jurisdiction over Curwen does not Breach Customary Law.

Treaties only bind non-party States through international custom.³³ In the case of the ICC, jurisdiction over nationals of non-parties is based on States' customary right to delegate their universal and territorial jurisdiction. Indeed, customary law recognizes States' right to exercise universal jurisdiction over international crimes, including war crimes,³⁴ and to delegate their universal jurisdiction on international tribunals by treaty. This was the case of previous international tribunals, such as the delegation of territorial and universal jurisdiction on the Nuremberg Tribunal by the Allied parties,³⁵ or the creation of the ICTR and ICTY through SC resolutions on behalf of the international community.³⁶ In the case of the ICC, the majority of States supported Germany's proposal to empower the ICC to exercise universal jurisdiction on their behalf, but the proposal was rejected to attract the vote of few powerful States. Notwithstanding, scholars have stated that ICC jurisdiction results from a delegation of State-parties' universal jurisdiction through the ICC Statute.³⁷ Consequently, the ICC can exercise universal jurisdiction on behalf of States, as accepted by customary law.

Moreover, States have delegated their right to exercise territorial jurisdiction on the ICC, as

³³ VCLT, *supra* note 18, Art. 38.

³⁴ Kaul, Preconditions to the Exercise of Jurisdiction, In: Cassese, Gaeta & Jones (eds.), *supra* note 28, 591; Document Submitted by the German Delegation to the Preparatory Committee of the ICC Statute, A/AC.24971998/DP.2, 23 Mar. 1998.

³⁵ UN Doc. S/25274, 1993, 73; Van der Vyver, Prosecution And Punishment Of The Crime Of Genocide, Fordham Int'l L.J., 1999, 322; Scharf, United States and the International Criminal Court: the ICC's Jurisdiction over the Nationals of Non-Party States. A Critique of the US Position, Law & Contemp. Prob., 2001, 103-7.

³⁶ Harris, The United States and the International Criminal Court: Legal Potential for Non-Party State Jurisdiction, Hawaii L. Rev., 2000, 299-300.

³⁷ Paust, The Reach of ICC Jurisdiction over Non-Signatory Nationals, Vanderbilt J. Transnat'l L., 2000, 7; Chibueze, United States Objection to the International Criminal Court: A Paradox or Operation "Enduring Freedom", Ann. Surv. Int'l & Comp. L., 2003, 36.

recognized by scholars.³⁸ Indeed, if delegation of territorial jurisdiction from one State to another without the consent of the State of nationality of the defendant is possible under international law,³⁹ nothing precludes a State from delegating its territorial jurisdiction to an international tribunal, as done in Nuremberg.⁴⁰ Consequently, State practice endorses the exercise of this power by the ICC,⁴¹ even in the case of nationals of non-party States.⁴² Further, international law permits everything that is not prohibited⁴³ and no rule prohibits the delegation of territorial jurisdiction to international tribunals, rendering such delegation consistent with the law. Thus the ICC can exercise jurisdiction over Curwen without Arkam's consent, since Leng has delegated its territorial jurisdiction to the ICC.

3. The ICC's Jurisdictional Regime has created Instant Customary International Law.

Arkam may claim that there is not enough State practice and time passage to assert that the ICC's jurisdictional regime is customary. However, the ICJ has already stated that custom can be established within a short period of time.⁴⁴ Under the instant custom theory, there is no

³⁸ Goldsmith, The Self-Defeating International Criminal Court, Chi. L. Rev., 2003, 91; Brown, U.S. Objections to the Statute of the International Criminal Court: A Brief Response, NYU J. Int'l L. & Pol., 1999, 874.

³⁹ European Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 73, entered into force 30 Mar. 1978; Seguin, Denouncing The International Criminal Court: An Examination Of US Objections To The Rome Statute, B.U. Int'l L.J., 2000, 104.

⁴⁰ Schwelb, Crimes Against Humanity, British Y.B, Int'l L., 1946, 210; Clark, Nuremberg and Tokyo in Contemporary Perspective, in The Law of War Crimes, (McCormack & Simpson, eds.), 1997, 172.

⁴¹ ICC Statute, *supra* note 19, Art. 12(2)(a).

⁴² McIntire, Be Careful What You Wish For Because You Just Might Get It: The United States And The International Criminal Court, Suffolk Transnat'l L. Rev., 2001, 261; Summers, A Fresh Look at the Jurisdictional Provisions of the Statute of the International Criminal Court: The Case for Scrapping the Treaty, Wis. Int'l L.J., 2001, 70.

⁴³ SS Lotus Case, (Fr. v. Turk.), PCIJ, 1927, 19.

need for repeated practice, provided that *opinio juris* for the States concerned can be clearly established.⁴⁵ In this case, *opinio juris* concerning the ICC's jurisdictional regime is evidenced from the fact that, to date, the ICC Statute has been signed by 139 out of 192 States. Additionally, despite US efforts to exclude ICC jurisdiction over its nationals by signing immunity agreements, many States have declined, and those that have signed, have done so under the fear of losing military and financial aid.⁴⁶ Lastly, SC resolutions that excluded ICC jurisdiction over military personnel of non-party nationals in Bosnia-Herzegovina and Liberia have been harshly criticized by experts, and regarded as *ultra vires*. Thus, current State practice reinforces the will to support ICC jurisdiction by condemning efforts to undermine its power⁴⁷ creating instant customary international law.

C. The ICC Exercise Of Jurisdiction Does Not Violate The Complementarity Principle.

The Complementarity Principle is the governing principle upon which the operation of the ICC is based. Its main premise is that ICC jurisdiction is complementary to that of national courts,⁴⁸ so that -in the presence of a national and international criminal justice systems- if the former fails, the latter ensures that perpetrators do not go unpunished.⁴⁹ Hence, the ICC can

⁴⁴ North Sea Continental Shelf Cases, (FRG v. Den. & Neth.), ICJ Rep., 1969, ¶ 74.

⁴⁵ Cheng, UN Resolutions on Outer Space: Instant International Customary Law?, *Indian J. Int'l L.*, 1965, 23; Van Hoof, Rethinking the Sources of International Law, Kluwer 1983, 86.

⁴⁶ Quijera, The United States' Isolated Struggle Against the ICC, 4 Aug. 2003, <http://www.globalpolicy.org/intljustice/icc>; The Medical Foundation, Illegal US Campaign Against International Justice, 16 Jul. 2003, <http://www.torturecare.org.uk/news14.htm>; Coalition for the ICC, NGO Coalition Condemns US Bullying to Gain Exception from ICC, <http://www.iccnw.org/pressroom/ciccmmediastatements/2002/08.13.2002art98.pdf>.

⁴⁷ Threats to the International Criminal Court, Parliamentary Assembly of the Council of Europe, Res. 1336, 2003; Statement by the Caribbean Community (CARICOM), 4 Jul. 2003; Costa Rica on Behalf of the Rio Group, Statement made by B. Stagno, Ambassador and Permanent Representative of Costa Rica to the UN, 9-10 Sept. 2002.

⁴⁸ ICC Statute, *supra* note 19, Preamble & Art. 1

only be involved if the national court with jurisdiction over a crime is unwilling or unable to prosecute it.⁵⁰ In this case, Arkam's TRC demonstrates said State's unwillingness to investigate and prosecute Curwen and other war criminals, thus allowing for ICC jurisdiction.

1. Arkam's Unwillingness to Investigate or Prosecute Curwen rises ICC Jurisdiction.

Unwillingness to prosecute is shown when: (i) proceedings are being undertaken to shield the accused from criminal responsibility; or (ii) proceedings are not being conducted independently or impartially in a manner inconsistent with an intent to bring the person concerned to justice.⁵¹ The establishment of TRCs is an inferior substitute for prosecution⁵² as they do not have the authority to prosecute.⁵³ In fact, even the more effective TRC - established in South Africa- has been questioned by NGOs because its final recommendations are not being seriously and fully implemented by the South African government.⁵⁴ To avoid further impunity, scholars recommend that an extra-judicial commission of inquiry (such as a TRC) should go hand in hand with prosecution and punishment of gross human rights violators.⁵⁵ In this case, Arkam has established a TRC that, instead of paving the way for fair

⁴⁹ Zeldy, The Principle of Complementarity: A New Machinery to Implement International Criminal Law, Mich. J. Int'l L., 2002, 870.

⁵⁰ Llewellyn, A Comment on the Complementarity Jurisdiction of the Court: Adding Insult to Injury in Transitional Contexts, Dalhousie L. J., 2001, 194; Van der Vyver, Personal and Territorial Jurisdiction of the International Criminal Court, Emory Int'l L. Rev., 2000, 66.

⁵¹ ICC Statute, *supra* note 19, Art. 17(2)(c).

⁵² Aukerman, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice, Harv. Hum. Rts. J., 2002, 40; Orentlicher, Settling Accounts: the Duty to Prosecute Gross Human Rights Violations of a Prior Regime, Yale L. J., 1991, 2546.

⁵³ Klosterman, The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? To Late?, Ariz. J. Int'l & Contemp. L., 1998, 835; Cassel, International Truth Commissions and Justice, Aspen Inst. Q., 1993, 69.

⁵⁴ AI & HRW, Truth and Justice: Unfinished Business in South Africa Summary.

prosecutions, has the power to grant amnesties to anyone disclosing their crimes. Hence, it does not meet the standards of a genuine willingness to investigate or prosecute. Moreover, a TRC that includes a provision of amnesty precludes prosecution, thus implying a State's unwillingness to prosecute even before the beginning of investigations.⁵⁶ In fact, a South African-style TRC foregoes prosecution if conditions for an amnesty are met, even if the investigation reveals evidence that the individual committed a heinous crime.⁵⁷ Since Curwen has been subpoenaed by the Arkamian TRC, it is likely that his appearance before this TRC would grant him amnesty, hence he is guaranteed impunity for his acts.

2. The Granting of Amnesty Shields Curwen from his Criminal Responsibility.

Finally, granting amnesties for war crimes breaches humanitarian law and undermines principles enshrined in UN Resolutions.⁵⁸ In fact, in the disclaimer attached to the 1999 Lomé Peace Accord, the UN asserted that the amnesty did not include war crimes,⁵⁹ and the UN has subsequently rejected amnesties.⁶⁰ Likewise, the regulation establishing a TRC in East Timor, and the Law on the Extraordinary Chambers in Cambodia expressly prohibit amnesties for

⁵⁵ Joinet, Question of the Impunity of Perpetrators of Human Rights Violations, E/CN.4/sub.2/1997/20/Rev.1, 1997; Stephen's Commission, UN Doc. A/53/850, 1999, 199-208, 219; Robinson, Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court, EJIL, 2003, 484.

⁵⁶ Zeldy, *supra* note 49, 942.

⁵⁷ Llewellyn, *supra* note 50, 202.

⁵⁸ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGAR 40/34, adopted 29 Nov. 1985; UNGAR 2840, adopted 18 Dec. 1971; Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, UNGAR 3074, adopted 3 Dec. 1973.

⁵⁹ UN Observer Mission in Sierra Leone, UN Doc. S/1999/836, 1999, ¶7; UN Daily Press Briefing, July 5-7, 1999; Africa Recovery, Vol. 13, No. 2-3, Sep. 1999, 8.

⁶⁰ Statute of the Special Court of Sierra Leone, SC Res. 1315, 14 Aug. 2000, Art. 10; Agreement Between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan., 2002.

serious international crimes.⁶¹ Moreover, decisions by international human rights systems⁶² affirm that amnesties for serious violations are incompatible with basic human rights obligations.⁶³ The practice of States has begun to abide by this view. Recently, in Argentina, the Congress revoked longstanding amnesty laws that protected military officers from prosecution for the kidnapping, torture, and killing of opponents during the war in the 1970s.⁶⁴ Consequently, Arkam's granting of an amnesty would breach humanitarian law, and shield Curwen from his criminal responsibility, thus giving rise to ICC jurisdiction.

II. IT WOULD BE LEGAL UNDER INTERNATIONAL LAW FOR RANDOLFIA TO SURRENDER WEST TO THE ICC PURSUANT TO THE WARRANT FOR HIS ARREST.

West has been charged with incitement to genocide under Article 25(3)(e) and attempted genocide under Articles 6(a) and 25(3)(f) of the ICC Statute. The charges are based on Article 28 of the ICC Statute (responsibility of superiors), and Article 25(3)(b) (responsibility

⁶¹ Regulation No. 2001/10 on the Establishment of a Commission for the Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 2001, §22.2; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 2001, Art. 40.

⁶² UNHRC, UN Doc. CCPR/C21/Rev.1/Add.3, 1992, ¶15; *Velásquez Rodríguez Case*, (Merits), I/Act.HR, Series C, No. 4, 29 July 1988, ¶147; *Barrios Altos Case*, (Merits), I/Act.HR, Series C, No. 75, 14 Mar. 2001, ¶41-5; Cassel, *Lessons for the Americas: Guidelines for the International Response to Amnesties for Atrocities*, L. Contemp. Probs., 1996; Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, B. U. Int'l L. J., 1994, 362; Van Boven, *Studies Concerning the Right to Restitution, Compensation and Rehabilitation for the Victims of Gross Violations of Human Rights and Fundamental Freedoms*, L. Contemp. Probs., 1996, 284.

⁶³ Rhot-Arriaza and Gibson, *The Developing Jurisprudence on Amnesty*, Hum. Rts. Q., 1998, 843; Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, Cornell Int'l L. J., 1999, 512-14; Schabacker, *Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offences*, NY Int'l L. Rev., 1999.

⁶⁴ Diario El Clarín, *El Senado Anuló las Leyes de Punto Final y Obediencia Debida*, <http://old.clarin.com/diario/2003/08/21/p-01001.htm>, 2003.

for ordering, soliciting or inducing). West's conduct –rather than his acts or actions– establishes a *prima facie* case of West's responsibility –that is, a credible case which would, if not contradicted, be sufficient legal basis to maintain the proposition affirmed,⁶⁵ and in the field of international criminal law, to convict an accused.⁶⁶ The reference to West's conduct (which comprises both acts and omissions) given the articles on which his charges are based, establish criminal responsibility both for positive acts (Art. 25) and omissions (Art. 28), hence Randolfia will refer to West's conduct, rather than merely his acts.

A. West's Alleged Acts Constitute Crimes Within The Jurisdiction Of The ICC.

1. West's Conduct Constitutes Incitement to Commit Genocide.

Incitement to commit genocide is defined as the direct provocation of the commission of genocide, either by calls to the general audience in a public place, or through the sale, dissemination, and display in public places of written material or any means of audiovisual communication, such as videotapes and audiotapes.⁶⁷ Incitement is an inchoate offence,⁶⁸ that is, a crime punishable irrespective of the results achieved.⁶⁹ However, to establish that the

⁶⁵ Cheng, General Principles of Law as applied by International Courts and Tribunals, *supra* note 17, 323.

⁶⁶ Prosecutor v. Milosevic, ICTY (Trial Chamber) (Decision on Application to Amend Indictment and on Confirmation of Amended Indictment), 2001, ¶3; Ambos, Establishing an International Criminal Court and an International Criminal Code, EJIL, 2001.

⁶⁷ Jones, The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, 2nd Ed., Transnational Publishers, 200, 488.

⁶⁸ Prosecutor v. Nahimana et al., ICTR (Trial Chamber I), 3 Dec. 2003, ¶1013; Prosecutor v. Akayesu, ICTR (Trial Chamber I), 2 Sep. 1998, ¶562; Prosecutor v. Musema, ICTR (Trial Chamber I), 27 Jan. 2000, ¶120; Spiteri, L'Infraction Formelle, *Revue de Science Criminelle et de Droit Pénal Comparé*, N°3, Juillet-Septembre, 1966, 497.

⁶⁹ Akhavan, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment, 90 AJIL 501, 1996, 506; Wallenstein, Punishing Words: An Analysis of the Necessity of The Element of Causation in Prosecutions for Incitement to Genocide, 54 *Stan. L.Rev.*, 2001, 36;

crime has been committed, two elements must be fulfilled: the *actus reus* and the *mens rea*.⁷⁰

The *actus reus* of incitement to genocide comprises two elements: directness and publicity.⁷¹

The first implies the existence of a direct message that specifically provokes others to engage in the crime of genocide.⁷² This message must be analyzed in its context and in the light of the cultural and linguistic content of the addressees.⁷³ Publicity entails a call for criminal action to a number of individuals or to members of the general public by such means as the mass media.⁷⁴ Regarding the *mens rea*, incitement requires first, the intention to prompt others to commit genocide,⁷⁵ and second, specific genocidal intent.⁷⁶ In this case, the facts indicate that the tape recorded by West contained a direct message, referring to a specific offence to be committed against a targeted and protected group: the elimination of all Lengians living in Yuggott. Moreover, the cultural and linguistic content of the message

⁷⁰ *Prosecutor v. Tadic*, ICTY (Trial Chamber), 27 May 1997, ¶692; *Prosecutor v. Delalic, Mucic, et al.*, *supra* note xx, ¶326; Neressian, The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals, 37 *Tex. Int'l L.J.*, 257.

⁷¹ Genocide Convention, entered into force Jan. 12th 1951, Art. III(c); ICTR Statute, SC Res. 955, 8 Nov. 1994, Art. 2(3)(e); ICC Statute, *supra* note 19, Art. 25(3)(e);

⁷² *Prosecutor v. Nahimana*, *supra* note 68, ¶1012; *Prosecutor v. Akayesu*, *supra* note 68, ¶557; *Prosecutor v. Niyitegeka*, ICTR (Trial Chamber I), 16 May 2003, ¶431; Amann, International Decisions: Prosecutor v. Akayesu, 93 *AJIL* 195, 1999, 197.

⁷³ Schabas, Hate Speech in Rwanda: The Road to Genocide, 46 *McGill LJ*, 2000, 161; Alvarez, Lessons from the Akayesu Judgment, 5 *ILSA J Int'l. & Comp. L.*, 1999, 361.

⁷⁴ Draft Code of Crimes Against the Peace and Security of Mankind, ILC, 1996, Art. 2(3)(f); *Prosecutor v. Ruggiu*, ICTR (Trial Chamber I) 1 June 2000, ¶17; *Prosecutor v. Nahimana*, *supra* note 68, ¶1012; *Prosecutor v. Musema*, *supra* note 68 ¶120.

⁷⁵ Curtin, Comment: Genocide in East Timor? Calling for an International Criminal Tribunal in Light of Akayesu, 19 *Dick. J. Int'l L.*, 2000, 200-201.

⁷⁶ Magnarella, Some Milestones and Achievements for the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases, 11 *Fla. J. Int'l L.*, 1997, 524; Ratner & Abrams, Accountability for Human Rights Atrocities in International Law, Oxford, 2nd ed., 36-37.

reveal that it was directed to all Arkamians living in Yuggott, in furtherance of an international ethnic conflict between Lengians and Arkamians, spurred primarily by members of GALA, an organization of which West was a leader. The public element of the message was fulfilled when the tape was broadcasted through Radio Yuggott, a radio station controlled by GALA members, which is an adequate mean for the dissemination of such tape.

2. West is Responsible for this Crime under the Superior Responsibility Doctrine.

An individual may be held responsible for degrees of involvement in a crime, even if not directly performing the acts that would constitute the offence.⁷⁷ In order to establish West's responsibility for the actions of other GALA members under the superior responsibility doctrine, the Court must determine: (i) that a superior-subordinate relationship exists; and (ii) that the superior had or should have had actual or constructive knowledge of the activities of his subordinates, and omitted to exercise due control to prevent or punish their illegal activities, or to inform the competent authorities.⁷⁸ In this case, all of these elements are met.

a. There is a superior-subordinate relationship between West and GALA members.

The existence of a superior-subordinate relationship can be established either *de jure* or *de facto*.⁷⁹ *De facto* authority entails a superior-subordinate relationship in the absence of a formal or legal basis for authority.⁸⁰ In this case, the formal political and military hierarchy

⁷⁷ *Prosecutor v. Delalic, Mucic, et al.*, *supra* note 70, ¶326; *Prosecutor v. Musema*, *supra* note 68, ¶117; *A-G Israel v. Eichmann*, *supra* note 31, ¶194.

⁷⁸ *Prosecutor v. Kajelijeli*, ICTR, (Trial Chamber II), 1 Dec. 2003, ¶773; *Prosecutor v. Delalic, Mucic, et al.*, *supra* note 70, ¶324; Vetter, Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC), 25 Yale J. Int'l L., 2000, 97-98; UNSC, Letter from the UNSG to the President of the SC, UN Doc. S/1994/673, at 16-17, 24 May 1994.

⁷⁹ *Prosecutor v. Niyitegeka*, *supra* note 72, ¶472; Bantekas, The Contemporary Law Of Superior Responsibility, AJIL, N°3, July 1999, 578.

⁸⁰ *Prosecutor v. Musema*, *supra* note 68, ¶144; *Prosecutor v. Blaskic*, ICTY (Trial Chamber), 3 Mar. 2000, ¶301.

within GALA by definition entails the existence of subordinates and superiors. Hence, such relationship exists between West -expressly identified as a leader of the organization- and other members of GALA. Additionally, West must *prima facie* have had effective control and authority over members of GALA, in light of GALA's organized command-structure. In similar organizations, such as the CDR in Rwanda, effective control and authority of superiors over their subordinates is usually present.⁸¹ Consequently, a superior-subordinate relationship exists between West –a recognized GALA leader- and its members.

b. West knew, or should have known about the illegal conduct of his subordinates.

Superior responsibility requires that the superior have either actual or constructive knowledge of crimes committed by his subordinates, or is negligent in his duty to prevent, punish or bring the perpetrators to the competent authorities, thus contributing to the commission of the crimes.⁸² In this case, West –as a leader of GALA– must have had at least constructive knowledge that his subordinates could use the tape to make his message public, as evidenced from the following: (i) West was a professor of Arkamian history and must have had knowledge of the historic and cultural factors relating to the conflict between the two ethnic groups; (ii) he should have known that someone of his position and authority could influence another GALA member by sharing the tape with him; (iii) he knew that Radio Yuggott, controlled by members of his organization, had previously supported GALA's goals through its broadcasts; (iv) the tape was an ideal means for making his message public. Thus, West should have known that GALA members could transmit his message through Radio Yuggott.

⁸¹ *Prosecutor v. Nahimana*, supra note 68, 341, 976.

⁸² Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, 1996, p.661; *Prosecutor v. Krnojelac*, ICTY (Trial Chamber II), 15 Mar. 2002, ¶493; Ching, *Comment: Evolution of the Command Responsibility Doctrine in*

Having reason to know that GALA members could or would publicize the recording, thus inciting genocide, West failed to take the necessary or reasonable measures to prevent such acts or punish its perpetrators, or at least bring the facts to the competent authorities. Thus, he omitted to exercise due control and authority to prevent or punish GALA's illegal actions. Finally, since the criminal intent of the superior need not be proven to render him responsible for acts committed by his subordinates,⁸³ West is responsible for the publication of his recorded message even if he never intended it to reach Radio Yuggott.

3. West's Responsibility also Derives from his Complicity in the Incitement to Genocide.

An accomplice is a person who participates in and contributes to a crime, affecting the commission of the crime directly and substantially,⁸⁴ such participation being sufficiently linked to a crime that is perpetrated or attempted.⁸⁵ International tribunals have acknowledged that instigation –defined as prompting another person to commit an offence⁸⁶ through, *inter alia*, ordering, soliciting or inducing-⁸⁷ is a way of consummating the *actus*

Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia, 25 N.C.J. Int'l L. & Com. Reg., 184.

⁸³ Prosecutor v. Galic, ICTY (Trial Chamber I), 5 Dec. 2003, ¶169.

⁸⁴ Prosecutor v. Simic et al. (Trial Chamber II), 2003, ¶135; Prosecutor v. Kayishema and Ruzindana, ICTR (Appeals Chamber), 2001, ¶185; Prosecutor v. Tadic, *supra* note 70, ¶688; Prosecutor v. Musema, *supra* note 68, ¶180.

⁸⁵ Gimbernat, Autor y Complice en Derecho Penal, Universidad de Madrid, Facultad de Derecho, Seccion de Publicaciones de Intercambio, 1966, p.168-174; Muñoz Conde, Teoria General del Delito, Editorial Temis, 1990, p. 207-209; Soler, Derecho Penal Argentino, Vol. II, Tipografica Editora, 1953, p. 266-280.

⁸⁶ Prosecutor v. Kajelijeli, *supra* note 78, ¶762; Prosecutor v. Semanza, ICTR, (Trial Chamber), 15 May. 2003, ¶381.

⁸⁷ Eser, Individual Criminal Responsibility, in Cassese, Gaeta & Jones (eds.), *supra* note 28, 796; Ambos, Article 25, in Commentary on the Rome Statute of the International Criminal Court, (Triffterer Ed.), 1999, Margin N°13.

reus of complicity.⁸⁸ Hence, whenever a person orders, solicits or induces the commission of a crime that is in fact perpetrated or at least attempted, he becomes an accomplice.⁸⁹ In this case, the facts *prima facie* indicate that West instigated incitement, a crime that was in fact perpetrated. Indeed, based on the content of the message, West's position in GALA, and the fact that GALA had the perfect means for the publication of the tape (Radio Yuggott), presumably any GALA member who received the tape would have felt prompted by his/her leader to make it reach its addressees. Thus, the *actus reus* of complicity in the crime of incitement is *prima facie* fulfilled in this case.

As regards *mens rea*, the accomplice of incitement to genocide requires a double intent: (i) to prompt another to commit the crime, and (ii) the *dolus specialis* -or special intent- of genocide, or at least the knowledge of the instigated person's genocidal intent.⁹⁰ The first element is met, since West's message clearly called on Arkamians to eliminate Lengians residing in Yuggott. As for the *dolus specialis* of genocide, International Tribunals have established that it can be inferred through circumstantial evidence, such as a person's words or deeds.⁹¹ In this case, West issued his message while being aware of the killing of ethnic Lengians. The same situation arose before the IMT at Nuremberg –in the first known case of incitement- where Julius Streicher, a German newspaper editor, was found guilty of incitement to genocide for publishing propaganda calling for extermination of Jews while

⁸⁸ *Prosecutor v. Bagilishema*, ICTR (Trial Chamber), 7 Jun. 2001, ¶70; *Prosecutor v. Akayesu*, *supra* note 68, ¶533, 537; *Prosecutor v. Krstic*, ICTY (Trial Chamber I), 2 Aug. 2001, ¶638.

⁸⁹ ICC Statute, *supra* note 19, Art. 25(3)(b).

⁹⁰ *Prosecutor v. Krstic*, *supra* note 88, ¶638; *Prosecutor v. Musema*, *supra* note 68, ¶180.

⁹¹ *Prosecutor v. Jelusic*, ICTY (Appeals Chamber), 5 Jul. 2001, ¶47; *Prosecutor v. Karadzic and Mladic*, Rule 61 Decision of 11 July 1996, ICTY (Appeals Chamber), ¶523; *Prosecutor v. Tadic*, *supra* note 70 ¶676.

knowing that Jews were being systematically killed.⁹²

4. Alternatively, West is Responsible for Attempted Genocide in Leng.

Although sufficient evidence exists of a *prima facie* case of West's responsibility for genocide, Randolfia will limit its claim to the charge of attempted genocide formulated by the ICC prosecutor, on the basis of West's instigation to commit such crime. Indeed, instigation – a form of complicity in the crime of genocide- may be carried out through diverse means, such as machinations or culpable artifices,⁹³ all of which are directed to prompt another person to commit a crime. In this case, West used GALA and Radio Yuggott as means to instigate genocide, thus becoming an instigator of said crime. A similar reasoning was followed by the ICTR in the *Nahimana Case: Barayagwiza and Nahimana* were found guilty of genocide for using as their “weapons of choice” a political organization and a radio station. CDR, founded and lead by *Barayagwiza*, was an organization with both a political and a military branch, whose aim was the promotion of ethnic hatred against the Tutsi. During CDR meetings, its members sang “let's exterminate them” (the Tutsi). *Nahimana*, a history professor in a national university in Rwanda, was a *de facto* director of RTL, the radio station that incited genocide with its broadcasts.⁹⁴ Similarities exist between the *Nahimana Case* and the case at hand. Indeed, West is a leader of GALA, which has both a political and a military branch. Moreover, GALA controls Radio Yuggott, known to support GALA's goals. Additionally, ethnic Arkamians who chanted “eliminate them all” as a reference to West's message carried out the killing of ethnic Lengians. Finally, the newspaper articles

⁹² *Trial of the Major War Criminals before the IMT at Nuremberg*, Blue Series, Vol. 1, 1947, 301-304.

⁹³ *Prosecutor v. Akayesu*, *supra* note 68, ¶536; *Prosecutor v. Bagilishema*, *supra* note 88, ¶70

⁹⁴ *Prosecutor v. Nahimana*, *supra* note 68, ¶949, 951, 972, 1035.

relating these facts are admissible evidence under the principle that all evidence should be assessed.⁹⁵ Hence, West is responsible for attempting genocide.

B. West's Allegedly Criminal Conduct Demonstrates The Necessary Nexus With A State Party To The ICC Statute.

The ICC may exercise its jurisdiction if the crime is committed in the territory of a State party,⁹⁶ irrespective of the nationality of the offender.⁹⁷ In this case, West's conduct, which *prima facie* constitutes both incitement to commit genocide and genocide as stated *supra*, was consummated in Leng (a party to the ICC Statute). Indeed, according to the principle of territoriality, which has earned universal recognition,⁹⁸ a crime is considered to have been committed in the territory of a State when it is consummated within its territory,⁹⁹ even if the perpetrator is not physically there.¹⁰⁰ Moreover, it is a principle of criminal law that the liability of the accomplice is accessorial to that of the principal perpetrator,¹⁰¹ and thus, all

⁹⁵ ICC Rules of Procedure and Evidence, Article 63(2).

⁹⁶ ICC Statute, *supra* note 19, Art. 12(2).

⁹⁷ Kaul, *supra* note 34, 607-08; Schabas, An Introduction to the International Criminal Court, Cambridge, 2001, 62; Cassese, The Statute Of The International Criminal Court: Some Preliminary Reflections, 10 EJIL, 1999, 160; Lirola & Martín, La Corte Penal Internacional Justicia versus Impunidad, Ariel Derecho, 2001, 153; Bourgon, Jurisdiction Ratione Loci, In: Cassese, Gaeta & Jones (eds.), Vol. I, *supra* note 28, 564.

⁹⁸ Código Bustamante, 1928, 302; and Criminal Codes of: Alb.: Art. 6; Arg.: Art. 1(1); Bol.: Art. 1(1); Chile: Art. 5; Fin.: Section 1; Fr.: Art. 113(2); Ger: § 3; Italy: Art. 6; Latvia: § 2(1); Mex.: Art. 1; Nig: Art. 12; Phil.: Art. 2; Swed.: Chapter II, § 1; Switz.: Art. 3(1), 7(1).

⁹⁹ Akehurst, Jurisdiction in International Law, in Jurisdiction in International Law (Reisman ed.), The Library of Essays in International Law, 1999, 32; Antolisei, Manual de Derecho Penal Parte General, Uteha Arg., 105.

¹⁰⁰ Brierly, The Laws of Nations, (Waldock ed.), Oxford, 6th ed., 1963, 299; SS Lotus Case, *supra* note 43, (Dis.Op. Moore), 69.

¹⁰¹ Prosecutor v. Bagilishema, *supra* note 88, ¶30; Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Calif L Rev, 1985, 337; Robinson, A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under 924(c), 96 Mich L Rev, 1997, 790; Henning, Individual Liability For Conduct By Criminal

persons who participated in the commission of a crime are deemed responsible in the territory where it is consummated.¹⁰² Additionally, all actions directed to the commission of the crime must be considered as a temporal and spatial unity, and not separately.¹⁰³ Therefore, although West was outside Leng, he is responsible of the crimes consummated within.

1. Incitement To Commit Genocide Was *Prima Facie* Committed Solely In Leng.

Incitement to commit genocide, which comprises two elements –directness and publicity-¹⁰⁴ is an inchoate crime,¹⁰⁵ thus the act alone is punishable,¹⁰⁶ irrespective of the result achieved.¹⁰⁷ Furthermore, inchoate crimes are instantaneous,¹⁰⁸ hence incitement to commit genocide is instantaneously consummated when the act constituting it is concurrently direct and public (*i.e.*, through mass media).¹⁰⁹ In this case, the crime of incitement was

Organizations In The United States: XVI International Congress of Penal Law, 44 Wayne L Rev, 1998, 1307.

¹⁰² Mendoza Troconis, Curso de Derecho Penal Venezolano. Parte General, Vol. I, 5th ed, El Cojo, 1969.

¹⁰³ Jescheck, Tratado de Derecho Penal Parte General, Vol. II, Bosch, 1981, 996.

¹⁰⁴ ICC Statute, *supra* note 19, Art. 25(3)(e); Genocide Convention, *supra* note 71, Art. III(c); Statute of the ICTY, UNSC Res. 827, 25 May 1993, Art. 4(3)(c); Statute of the ICTR, *supra* note 71, Art. 2(3)(c).

¹⁰⁵ Prosecutor v. Niyitegeka, *supra* note 72, ¶431; Prosecutor v. Nahimana et al, *supra* note 68, ¶1013; Schabas, Hate Speech in Rwanda: The road to genocide, *supra* note 73, 149.

¹⁰⁶ Grispigni, L'Evento Come Elemento Costitutivo del Reato, Annali di Diritto e Procedura Penale II, 1934, 858; Maggiore, Derecho Penal, Vol. I, Temis, 2nd ed., 1982, 294.

¹⁰⁷ Spitéri, *supra* note 68, 497; Schabas, Principios Generales del Derecho Penal, in El Estatuto de Roma de la Corte Penal Internacional, (Ambos & Guerrero ed.) Univ. Externado, 1999, 290; Alvarez, *supra* note 73, 361.

¹⁰⁸ Arteaga, Derecho Penal Venezolano, 9th ed., McGraw Hill, 2001, 135; Maggiore, *supra* note 106, 295; Soler, Vol. I, *supra* note 106, 273.

¹⁰⁹ ILC Rep., 1996, A/51/10, 16; Cassese, International Criminal Law, Oxford, 2003, 198; Arzola, Derecho Supranacional Humanitario y Penal La Nueva CPI, Caracas, 2002, 397; Green, Fifteenth Waldemar A. Solf Lecture in International Law, 175 Mil L Rev, 2003, 370.

consummated in Leng, since both elements of the crime concurred in that State's territory. Indeed, the directness element depends on its publicity, since directness must be viewed in the context in which the message is made public.¹¹⁰ Moreover, since there can be no private incitement,¹¹¹ publicity suffices to determine the consummation of the incitement. National courts have reached a similar solution. For instance, English Courts have established that England had jurisdiction over an attempted crime of deception in which the accused had sent letters from Northern Ireland to England, since letters are intended to act on the mind of the recipient, and this only occurs when the letter is received, not when it is sent.¹¹² Thus, West's crime was committed at the time and place that his message was made public *-i.e.* when it was broadcasted and reached its intended recipients in Leng.

Arkam may argue that regard must be paid to the place where the conduct of the perpetrator takes place, since, presumably, the crime is consummated there.¹¹³ According to such theory, the crime would have been committed in Arkam. However, such assertion is incorrect, since the crime is not with the mere recording of the tape and its delivery to West's neighbor, given the absence of publicity. The facts of the case indicate that the publicity element of West's message was accomplished when the tape was broadcasted on Radio Yuggott, thereby reaching its addressees in Leng. Hence, both elements of the crime of incitement to genocide

¹¹⁰ Schabas, Mugesera v. Minister of Citizenship and Immigration, 93 AJIL, 1999, 530; Arzt, Nuremberg, Denazification and Democracy: the Hate Speech Problem at the International Military Tribunal, 12 NYL Sch J Hum Rts, 1995, 744, 753.

¹¹¹ Lippman, The 1948 Genocide Convention on the Prevention and Punishment of the Crime of Genocide: 45 Years Later, 8 Temp Int'l & Comp LJ, 43.

¹¹² Reg. v. Baxter, (1971) England Ct. App., in ILR (Lauterpacht ed.), Vol. 55, Cambridge, 1979, 133-36; Reg. v. Treacy, (1970) England Ct. App., in ILR (Lauterpacht ed.), Vol. 55, Cambridge, 1979, 116-7, 122.

¹¹³ Metzger, Tratado de Derecho Penal, Madrid, 1955, 331-332.

were concurrently fulfilled only in Leng and thus the crime was consummated there.

2. Alternatively, the Crime was Consummated Both in Leng and Arkam.

Arkam may argue that the crime of incitement to commit genocide was consummated in Arkam, where West's tape was recorded and delivered to a neighbor, since, such circulation might fulfill the publicity element. In this case, two possibilities arise. First, that both the act of circulation of the tape in Arkam and its broadcast in Radio Yuggott fulfill the publicity element. Therefore, since incitement is an inchoate crime, there would be two different acts in which both elements concurred and thus two different crimes, one of which was consummated in Leng. Second, that incitement is a continuous crime, as interpreted by the ICTR,¹¹⁴ whereby the crime is consummated from the first publication of the message –with the circulation of the tape in Arkam and Leng– until the last broadcast in Radio Yuggott, meaning that the crime continued in time and space into Leng. Under either possibility, the crime is consummated in Leng as well. Thus, the fact that the crime may have also occurred in Arkam does not bar the ICC from exercising jurisdiction over West. The same conclusion may be reached through the effects doctrine, under which the territoriality of the crime is determined by the place where its effects are caused, even if the offender is elsewhere.¹¹⁵

C. West's Alleged Actions Do Not Precede The Date In Which The ICC Statute Entered Into Force With Respect To Leng And Randolfia.

The ICC has jurisdiction over the crimes of its competence *ratione materiae* that are committed after the entry into force of the ICC Statute for the State where the crime was

¹¹⁴ *Hassan Ngeze and Ferdinand Nahimana v. The Prosecutor*, (Appeals Chamber) ICTR, (Sep.Op. Shahabuddeen), 5 Sep. 2000; *Hassan Ngeze and Ferdinand Nahimana v. The Prosecutor*, (Appeals Chamber) ICTR, (Sep.Op. Vohrah and Nieto-Navia), 5 sep. 2000, ¶7.

¹¹⁵ Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, Villanova University, 2003, 814, 815; Paust et al., *International Criminal Law*, Carolina Academic Press, 1996, 125.

committed or that of the nationality of the offender.¹¹⁶ In this case, the crimes of which West is accused were consummated after May 1st, the date in which the ICC Statute entered into force for Leng. Indeed, the tape was broadcast beginning on May 15th, and the killing raids began on May 16th. In addition, regarding the crime of incitement, even considering only West's actions –rather than his conduct–the ICC would still have temporal jurisdiction over such crime, since it has been recognized that incitement to genocide continues in time until the completion of the acts contemplated, which occurred after May 1st. This reasoning was applied by the ICTR, which considered that it had temporal jurisdiction over the publications of Kangura newspaper and RTLM broadcasts dating back to 1990.¹¹⁷

The above conclusion is also reached by applying the principle of Intertemporal Law, according to which when dealing with different legal systems that prevail at successive periods of time, a juridical fact must be appreciated in the light of the law contemporary with it.¹¹⁸ In this case, the relevant juridical facts are contemporary with the jurisdiction *ratione temporis* of the ICC, since its Statute entered into force for Leng on May 1st 2003. Consequently, since the ICC has jurisdiction over crimes committed after its entry into force,¹¹⁹ it is in accordance with international law for Randolfia to surrender West to the ICC.

III. REMEDIES SOUGHT BY RANDOLFIA.

¹¹⁶ ICC Statute, *supra* note 19, Art. 11(1).

¹¹⁷ Prosecutor v. Nahimana, *supra* note 68, ¶104, 950, 1017.

¹¹⁸ Island of Palmas Case, (Neth. v. U.S.), PCA, Sole Arbitrator Huber, 2 RIAA 829, 1928; Minquiers and Ecrehos Case (Merits), (Fr. v. U.K.), ICJR, 1953, p.47; Jennings, The Acquisition of Territory in International Law, Manchester, 1963, 28-31; Elias, The Doctrine of Intertemporal Law, 74 AJIL, 286.

¹¹⁹ ICC Statute, *supra* note 19, Art. 11.

States are liable for the wrongful acts attributable to them in violation of international law.¹²⁰ Indeed, violations of international obligations give rise to state responsibility and the correlative duty of reparation,¹²¹ which must reestablish the situation to the conditions that would exist if the wrongful act had not been committed.¹²² *In sum*, Randolfia requests the Court to award declaratory relief. Declaratory judgments provide satisfaction for certain breaches of international obligations.¹²³ Indeed, this Court and its predecessor have willingly granted declarations as a form of satisfaction.¹²⁴ Accordingly, Randolfia requests this Court to declare that: (i) Randolfia's decision to surrender Mr. Joseph Curwen to the custody of the ICC would be consistent with international law and; (ii) Randolfia's decision to surrender Mr. Herbert West to the custody of the ICC would be consistent with international law.

IV. PRAYER FOR RELIEF.

Based on the foregoing reasons, Randolfia respectfully requests this Court to DECLARE that Randolfia's decision to surrender Curwen to the ICC would be consistent with international law, thereby rejecting Applicant's request for relief concerning Curwen; and, DECLARE that Randolfia's decision to surrender West to ICC would be consistent with international law, and thus reject Applicant's request for relief concerning West.

¹²⁰ Articles on State Responsibility, Art. 1; *Spanish Zone of Morocco Claims*, (UK v. Spain), 2 RIAA, 615, 2 ILR, (1928), ¶157; *Case of Certain Norwegian Loans*, (Fr. v. Nor.), ICJ Rep., (1956).

¹²¹ *Polish Agrarian Reform Case*, PCIJ, (1933), Interim Protection; *Reparations for Injuries Suffered in the Service of the United Nations Case*, (Ad.Op.), ICJ Rep., 1949, ¶184.

¹²² *Chorzów Factory Case*, (Ger. v. Pol.), PCIJ, Ser. A No.17, (1928), ¶29.

¹²³ Fitzmaurice, The Law and Procedure of the International Court of Justice, Cambridge, Vol. II, 1986, 584.

¹²⁴ *Aerial Incident Case*, (Isr. v. Bulg.), ICJ Rep., (1959), 127; *Mavrommatis Palestine Concessions Case*, (Greece v. UK), PCIJ, Ser.A. No. 5, (1925), 51.

