

**The 2004 Philip C. Jessup
International Law Moot Court Competition**

Kingdom of Arkam

v.

State of Randolfia

The Case Concerning the International Criminal Court

BEST OVERALL MEMORIAL—APPLICANT

First Place
Richard R. Baxter Award

Universidad Catolica Andres Bello
Venezuela (Team #847)

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 APPLICANT

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List of Abbreviations

AJIL	American Journal of International Law
Ad.Op.	Advisory Opinion
AI	Amnesty International
Am. J. Comp. L.	American Journal of Comparative Law
Ann. Surv. Int'l & Comp. L.	Annual Survey of International and Comparative Law
AP	Associated Press
Ariz. J. Int'l & Comp. L.	Arizona Journal of International and Comparative Law
ARS	Articles on the Responsibility of States for Internationally Wrongful Acts
ASIL	American Society of International Law
art.	Article or articles
Austrian J. Pub. Int'l L.	Austrian Journal of Public International Law
B.C. Third World L.J.	Boston College Third World Law Journal
B.U. Int'l L.J.	Boston University International Law Journal
Cal. L. Rev.	California Law Review
Can. J.L. Rev. & Juris.	Canadian Journal of Law Review & Jurisprudence
CDR	Coalition pour la Defense de la République
Chap.	Chapter or Chapters
Charter	Charter of the United Nations
CIC	Commander in Chief
CJEC	Court of Justice of the European Community
Clarif.	Clarification or clarifications
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Const.	Constitution

Cornell Int'l L.J.	Cornell International Law Journal
Criminal L. Rev.	Criminal Law Review
Dalhousie L.J.	Dalhousie Law Journal
Diss.Op	Dissenting Opinion
Doc.	Document(s)
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
Eng. H.L.	England House of Lords
ETS	European Treaty Series
GALA	Greater Arkamian Liberation Army
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
Harv. Int'l L.J.	Harvard International Law Journal
Hawaii L. Rev.	Hawaii Law Review
HRW	Human Rights Watch
I/A. C.H.R.	Inter American Commission on Human Rights
I/A.Ct.HR	Inter American Court of Human Rights
ICC	International Criminal Court
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 Lengan relief created by SC Res. 2241

ILSA J. Int'l & Comp. L.	International Law Students Associations International and Comparative Law Review
ILC	International Law Commission
ILR	International Law Reports
L. & Contemp. Probs.	Law and Contemporary Problems
Man. L.J.	Manitoba Law Review
Melb. J. Int'l L.	Melbourne Journal of International Law
Miami Inter-Am. L. Rev.	Miami Inter-American Law Review
Mich. J. Int'l L.	Michigan Journal of International Law
Mont. L. Rev.	Montana Law Review
New Eng. L. Rev.	New England Law Review
No.	Number or Numbers
N.Y. L. Rev.	New York Law Review
N.Y.U. J. Int'l L.	New York University Journal of International Law
Op.¶7	Operative Paragraph 7
¶	Paragraph or paragraphs
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Prov.	Provisional
RAA	Royal Arkamian Army
Rep.	Report(s)
Res.	Resolution or resolutions
RIAA	Recueil of International Arbitral Awards
RTLTM	Radio Television de Miles Colines
San Diego L. Rev.	San Diego Law Review
SC	Security Council

SC Res.	Security Council Resolution
Sep.Op	Separate Opinion
SMU L. Rev.	Southern Methodist University Law Review
Stan. L. Rev.	Stanford Law Review
Tex. Int'l L. J.	Texas International Law Journal
TRC	Truth and Reconciliation Commission
U.C. Davis L. Rev.	University of California Davis Law Review
UCLA L. Rev.	University of California in Los Angeles Law Review
UNCIO	United Nations Conference on International Organization
UN	United Nations
UNMIBH	United Nations Mission in Bosnia and Herzegovina
USAFA J. Leg. Stud.	United States Air Force Academy Journal of Legal Studies
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 whose 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 both 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. Under the Peace Agreement, on March 1, 2003 Arkam established a TRC, empowered to grant a full amnesty for all crimes committed during the armed conflict between the two ethnic groups. The TRC has been cited as "a shining example of how truth and reconciliation can bring peace to a troubled region."

In Leng, sporadic small-scale fighting continued in the primarily Arkamian province of Yuggott, spurred by GALA, a militia dedicated to 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. Although Randolfia has enacted domestic legislation implementing the Rome Statute, it lacks domestic legislation criminalizing genocide, crimes against humanity, or war crimes committed by non-Randolfian nationals outside its borders.

Dr. Herbert West, a citizen of Arkam, is a professor at a University in Arkam, whose scholarship is recognized around the world. In April 2003, West recorded an audiotape in Arkam, urging his Arkamians to achieve Arkam's unity with Yuggott. West gave the only copy to his neighbor, also a member of GALA, but nothing evidences that he gave any instructions as to what use, if any, should be made of it. GALA members duplicated the recording, which was then played on Radio Yuggott. On May 16, bands of ethnic Arkamians began to conduct nighttime raids, attacking ethnic Lengians in several towns in Yuggott. By the end of May, a percentage of the Lengian population of Yuggott had been killed. On June 20, 2003, the Security Council, adopted Res. 2241, which created "IFLEN", a multinational force, with a threefold mandate: to enter Yuggott, shut down Radio Yuggott, and put a stop to the bloodshed. Op.¶ 7 of Resolution 2241 read, in part: "officials or personnel of contributing States, not parties to the Rome Statute, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions related to . . . IFLEN, unless such exclusive jurisdiction has been expressly waived by that contributing State." The Res. was adopted with ten votes in favor, and five abstentions.

Lieut. Joseph Curwen, a citizen and resident of Arkam, led one of IFLEN's platoons. On June 28, 2003, GALA attacked Curwen's platoon, killing 12 soldiers and injuring 4 others. As a response, Curwen ordered his platoon to attack Exhamtown, a village which was a GALA stronghold. On June 29, 2003, the platoon killed a number of ethnic Lengians and ethnic Arkamians. On June 30, GALA and the Lengian government agreed to a U.N.-monitored cease-fire, which continues to this day.

IFLEN dismissed Curwen, and Arkam ordered him to return home. On July 3, the RAA CIC ordered him to resign, and to appear before the TRC within 30 days. Between July 20 and 22, Curwen and West, while in Randolfia for different reasons, were arrested for minor offences. On July 23, Randolfia's press urged the government of Randolfia to send these individuals to the ICC. Eliza Tillinghast, the Randolfian Minister of Justice, dispatched a communiqué on July 25, 2003 informing the ICC's Registrar about Randolfia's holding in custody of West and Curwen and requesting the ICC to take jurisdiction over these two men.

On July 26, 2003, the King of Arkam sent a diplomatic note to the President of Randolfia, indicating that Arkam would not appear before the ICC to challenge admissibility in light of its well-publicized characterization of the ICC as an illegal court. On July 29, the Prosecutor of the ICC sent written notifications to Arkam, Leng and Randolfia, establishing that there was reasonable basis to commence investigations pursuant to the allegations contained in Tillinghast's communiqué. In August 2003, the ICC's Prosecutor carried out investigations and two Pre-Trial Chambers were constituted. On September 1, 2003, the ICC's Prosecutor charged West with incitement to genocide and attempted genocide and, Curwen with war crimes and acts of violence in Leng. The Pre-Trial Chambers issued arrest warrants for both individuals. On the same day the arrest warrants were issued, the King of Arkam sent a diplomatic note to Randolfia's President, indicating the possible adoption of economic restrictions toward Randolfia, in response to such Government's decision to attempt the surrender of both Arkamian nationals to the ICC. As a consequence, the two States entered into negotiations, agreeing to submit their dispute to the ICJ. Leng declined to intervene in this case.

Statement of Jurisdiction

The Kingdom of Arkam and the State of Randolfia have submitted by Special Agreement their differences concerning the International Criminal Court, 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. It is illegal under international law for Randolfia to surrender Curwen to the ICC pursuant to the warrant for his arrest because:

A. Arkam has not waived its jurisdiction to try Curwen, as is expressly required under SC Resolution 2241. Indeed, SC Resolution 2241, adopted under Chapter VII of the UN Charter for the purpose of maintaining peace and security in Leng, was adopted in accordance with international law, as it complied with SC voting procedures and was a perfectly justified measure in light of the wide powers conferred upon the SC under the Charter, and as evidenced from past practice of such UN body in similar situations. In any case, the ICJ itself has recognized that it does not have the power of judicial review over SC decisions. Hence, Randolfia must comply with SC Resolution 2241 and must therefore abstain from surrendering Curwen to the ICC, as it would otherwise be acting contrary to its international obligations under the UN Charter, which must prevail over all other obligations it may have, including obligations under the ICC Statute.

B. The exercise of jurisdiction by the ICC over Curwen is in breach of Article 34 of the VCLT. Indeed, Arkam, Curwen's State of nationality, is not a party to the ICC Statute, and Article 34 provides that treaties cannot modify existing rights of third party states. In this case, the ICC is modifying Arkam's right to exercise exclusive jurisdiction over its nationals. In addition, there is no customary rule of international law which allows the delegation of criminal jurisdiction by states to international tribunals, and thus Randolfia may not argue that Article 12 of the ICC codifies customary international law. In any case, should Article 12 of the ICC Statute be deemed customary, Arkam is a persistent objector to said rule.

C. Given the ongoing investigation by the Arkamian TRC into the acts of Mr. Curwen, the exercise of jurisdiction over him by the ICC would violate the principle of Complementarity,

since Arkam has exclusive jurisdiction over Curwen, and it is carrying out a genuine investigation through a TRC, which cannot be mistaken for unwillingness to investigate or prosecute, since TRCs have been supported by the UN as valid alternative forms of justice. Moreover, the granting of amnesty by the TRC should not be regarded as unwillingness, since international law today does not support a general duty to prosecute international crimes. Finally, the amnesty does not shield Curwen from punishment, which has been delivered by ordering him to resign his commission without benefits.

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

A. Neither West nor his allegedly criminal conduct demonstrate the necessary nexus with a State party to the ICC Statute. Indeed, West's alleged crime was committed in Arkam, since all of his actions took place in said State, and the result theory and the continued crime doctrine do not apply. Further, West's alleged complicity was perpetrated in Arkam.

B. West's actions preceded the date on which the Rome Statute entered into force with respect to Leng and Randolfia, and are thus barred from the ICC's consideration, as established under the doctrine of Intertemporal Law and by the ICC Statute.

C. West's alleged acts do not constitute a crime of the competence of the ICC. Indeed, the evidence does not support a *prima facie* case of West's guilt, since the physical and mental elements of the crime of incitement to genocide are not fulfilled. Furthermore, West cannot be held responsible under the doctrine of superior responsibility, nor as an accomplice. Additionally, there is no causal link between West's acts and the actual commission of the crime. Finally, West is not responsible for genocide or attempted genocide under the *Nahimana* decision.

Questions Presented

1. Whether it would be illegal under international law for Randolphia to surrender Joseph Curwen to the International Criminal Court pursuant to the warrant for his arrest given that:
 - a. Arkam has not waived its exclusive jurisdiction to try Joseph Curwen, pursuant to Security Council Resolution 2241.
 - b. The exercise of the jurisdiction of the ICC over a national of a State not a party to the Rome Statute violates the Vienna Convention on the Law of Treaties and Customary International Law.
 - c. Given the ongoing investigation by the Arkamian TRC into the acts of Mr. Curwen described in the indictment, the exercise of jurisdiction over him by the ICC would violate the principle of complementarity.

2. Whether it would be illegal under international for Randolphia to surrender Herbert West to the ICC pursuant to the warrant for his arrest given that:
 - a. Neither Mr. West nor his allegedly criminal conduct demonstrates the necessary nexus with a State Party to the Rome Statute.
 - b. Mr. West's actions preceded the date upon which the ICC Statute entered into force with respect to Leng and Randolphia, and are thus barred from the ICC's consideration.
 - c. Mr. West's alleged conduct does not constitute a crime within the competence of the ICC.

I. IT WOULD BE ILLEGAL UNDER INTERNATIONAL LAW FOR RANDOLFIA TO SURRENDER JOSEPH CURWEN TO THE ICC PURSUANT TO THE WARRANT FOR HIS ARREST.

A. Arkam Has Not Waived Its Exclusive Jurisdiction To Try Joseph Curwen, Pursuant To Res. 2241 And Therefore The ICC Is Without Jurisdiction To Try Him.

On June 2003, the SC adopted Res. 2241, Op.¶7 of which provides that States contributing with IFLEN that are non-parties to the ICC Statute enjoy exclusive jurisdiction over their agents, unless expressly waived. Arkam, a contributing State non-party to the ICC Statute, has not waived its exclusive jurisdiction over Curwen, hence he may not be tried by the ICC.

1. Res. 2241 is in Accordance with and Justifiable under International Law.

In the UN system, each organ is empowered to define its own competence.¹ However, the Charter confers upon UN organs the powers required to duly discharge their functions,² including those which, though not expressly provided, are conferred by necessary implication as being essential to the performance of their duties.³ This holds true for the SC,⁴ which holds primary responsibility for the maintenance of international peace and security.⁵ In discharging this crucial duty, the SC enjoys a wide margin of discretion,⁶ as it is empowered

¹ Case Concerning Certain Expenses of the United Nations, (Expenses Case), (Ad.Op.), 34 ICJ Rep., 1962, 168; 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.), (Sep.Op. Judge De Castro), ICJ Rep., 1971, 170.

² Reparation for Injuries Suffered In The Service of The United Nations Case, (Reparations Case), (Ad.Op.), ICJ Reports, 1949, 322.

³ Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, (Ad.Op.), ICJ Rep., 1954, 57; Legality of the Use by a State of Nuclear Weapons in Armed Conflict, (Ad.Op.), ICJ Rep. 1996, ¶25; Reparations Case, *supra* note 2, 322-3.

⁴ Namibia Case, (Ad.Op.), ICJ Rep., 1971, ¶110.

⁵ UN Charter, TS 993, entered into force 24 Oct. 1945, Art. 24 (1).

⁶ Case Concerning Questions of Interpretation and Application of the Montreal Convention Arising Out of the Aerial Incident at Lockerbie, (Lockerbie Case), (Libya v. USA), (Dis.Op. Judge Weeramantry), ICJ Rep., 14 April 1992; Schweigman, The Authority of the Security Council under Chapter VII of the UN Charter, Kluwer Law International, 2001, 190;

to take whatever measures it deems necessary to fulfill its responsibility.⁷ In that context, its actions enjoy a presumption of legality, as recognized by this Court.⁸ In adopting Res. 2241, the SC acted explicitly under Chapter VII of the Charter, hence it enjoyed the most ample discretion to decide which measures were necessary in order to maintain peace and security.

Moreover, on previous occasions, US pressure has led the SC to include provisions similar to Op.¶7 in its Resolutions in order to safeguard the continuity of UN missions.⁹ Such was the case of Res. 1422, where the extension of the UN mandate in Bosnia and Herzegovina was threatened by a US veto, unless UN peacekeepers who were nationals of contributing non-party States were exempted from ICC jurisdiction.¹⁰ Under such circumstances, SC members acceded to adopt the provision in order to guarantee extension of the UNMIBH mandate.¹¹ Similarly, the US successfully exercised this kind of pressure in the Liberia affair.¹² After 12 votes in favor and 3 abstentions, France –who disagreed with Op.¶7- did not veto the

Herdegen, The Constitutionalization of the UN Security System, 27 Vand. J. Transnat'l L., 1994, 152; McPherson, Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings, ASIL Insights, 2002, <http://www.asil.org/insights/insigh89.htm>.

⁷ Namibia Case, *supra* note 4, ¶110; Lockerbie Case, (Libya v. US), ICJ Rep., 1992; Delbrück, Article 24, In: Simma, The Charter of the United Nations, A Commentary, Oxford University Press, 1994, 403; Schweigman, *supra* note 6, 301.

⁸ Expenses Case, *supra* note 1, 168.

⁹ SC Res: 1422, adopted 12 Jul. 2002; 1487, adopted 12 Jun. 2003; 1497, adopted 1 Aug. 2003.

¹⁰ BBC News, UN fights to save Bosnia Mission, 01 Jul. 2002, <http://news.bbc.co.uk/1/hi/world/americas>; AP, U.S. May Veto Bosnia Peace Mission, 28 Jun. 2002, <http://www.balkanpeace.org/hed/archive/june02/hed5055.shtml>; The Guardian, US Threat to Balkans Peace Force, 27 Jun. 2002, <http://guardian.co.uk/international>.

¹¹ Provisional Verbatim Record of the 4573rd SC Meeting, UN Doc. S/PV.4573, 12 Jul. 2003, 2; SC Res. 1487, *supra* note 9, Op.¶1.

¹² Draft Resolution S/2003/784, submitted by the US, 1 Aug. 2003; SC Res. 1497, *supra* note 9, Preamble, Op.¶7.

resolution, recognizing as did others, the urgent need to authorize deployment of troops.¹³ In the present case, the insistence of one permanent SC member led it to include Op.¶7 in Res. 2241 as a necessary condition to authorize IFLEN operations in Yuggott. Hence the adoption of SC Res. 2241 is one more instance where States have confirmed the necessity of investing the SC with the power to exclude certain agents from ICC jurisdiction.

Finally, to be deemed valid, SC resolutions must observe SC rules of voting procedure –be adopted by 9 affirmative votes, including the concurring votes of permanent members-¹⁴, and be in accordance with the Charter.¹⁵ In this case, Res. 2241 was approved with 10 affirmative votes and 5 abstentions. Further, the SC was validly exercising its wide discretionary powers under Chapter VII to maintain international peace and security. Moreover, although not always necessary,¹⁶ a possible third requisite –as argued among scholars- consists in the prior determination of the existence of a threat to the peace when the SC acts under Chapter VII.¹⁷ In this case, though the text of Res. 2241 is not available, such determination is inferrable, since: (i) no one contested the Resolution’s validity, which has been done before when such

¹³ Prov. Verb. Record of the 4803rd SC Meeting, UN Doc. S/PV.4803, 1 Aug. 2003, 3-7.

¹⁴ UN Charter, *supra* note 5, Art. 27(3).

¹⁵ *Namibia Case*, *supra* note 4, ¶20.

¹⁶ SC Res.: 687, adopted 3 Apr. 1991; 724, adopted 15 Dec. 1991; 771, adopted 13 Aug. 1992; 819, adopted 16 Apr. 1993; 820, adopted 17 Apr. 1993; 824, adopted 6 May 1993; 833, adopted 27 May 1993; 834, adopted 1 Jun. 1993.

¹⁷ Conforti, The Law and Practice of the United Nations, Kluwer Law International, 2000, 173-4; Bailey and Daws, The Procedure of the UN Security Council, Oxford, 1998, 271; Freudenschuß, Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council, 46 *Aus. J. Pub. Int’l L.*, 1993, 31; Frowein, Article 39, In: Simma, *supra* note 7, 613.

determination was omitted;¹⁸ (ii) Yuggott's situation was a threat to peace, since civil war or internal strife are considered as such;¹⁹ and (iii) the SC acted explicitly under Chapter VII, which sufficiently implies such a threat.²⁰ Hence, SC Res. 2241 was validly adopted.

2. Alternatively, Res. 2241 is not Subject to Judicial Review.

The SC has ample powers to determine the existence of threats to peace,²¹ and such determination cannot be questioned.²² Indeed, no procedures exist for determining the validity of acts of UN organs.²³ Moreover, this Court has recognized the inherent limitations to its judicial function,²⁴ and that it lacks the power of judicial review of SC decisions.²⁵ In fact, neither the Charter nor the ICJ Statute nor their *travaux préparatoires* indicate that such

¹⁸ Prov. Verb. Record of the 4568th SC Meeting, UN Doc. S/PV.4568, 10 Jul. 2002, 7,9; Prov. Verb. Record of the 4772nd SC Meeting S/PV.4772, 12 Jun. 2003, 15.

¹⁹ SC Res.: 161, adopted 21 Feb. 1961; 688, adopted 5 Apr. 1991; 733, adopted 23 Jan. 1992; 751, adopted 24 Apr. 1992; 1497, *supra* note 9.

²⁰ Conforti, *supra* note 17, 173.

²¹ *Prosecutor v. Tadic*, (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction), ICTY, 2 Oct. 1995, ¶54; *Prosecutor v. Kanyabashi*, (Decision on Defense Motion on Jurisdiction), ICTR, 18 Jun. 1997, ¶20; *Lockerbie Case*, (Dis.Op. Judge Weeramantry), *supra* note 6, 176; *Lockerbie case*, (Libya v. US), (Dis.Op. Judge Jennings), ICJ Rep., 1992, 9; Lamb, *Legal Limits to United Nations Security Council Powers*, In: Goodwin-Gill and Talmon eds., *The Reality of International Law: Essays in Honour of Ian Brownlie*, Oxford, 1999, 375.

²² *Lockerbie Case*, (Dis.Op. Judge Weeramantry), *supra* note 6; Akehurst, *A Modern Introduction to International Law*, Allen and Unwin, 6th ed., 1996, 219; Conforti, *supra* note 17, 173-74; Frowein, *supra* note 17, 610.

²³ *Expenses Case*, *supra* note 1, 168; *Lockerbie Case*, (Dis.Op. Judge Weeramantry), *supra* note 6.

²⁴ *Case Concerning the Northern Cameroons*, (Cameroun v. UK), ICJ Rep., 1963, 30.

²⁵ *Namibia Case*, *supra* note 4, ¶89.

power was to be attributed to the Court.²⁶ Even those who argue that such power exists, limit its application to pronouncements on the validity of SC determinations of legal responsibility,²⁷ which is not the case here. Hence, Res. 2241 is not subject to judicial review.

3. Randolfia is Bound to Comply with Res. 2241.

To ensure the maintenance of international peace and security, the SC enjoys a binding decision-making power,²⁸ evidenced by a specific provision imposing on UN members the obligation to accept and carry out SC decisions.²⁹ The binding nature of SC resolutions depends on the wording and the Charter provisions invoked.³⁰ In Res. 2241, the SC acted explicitly under Chapter VII, and imperative language, such as the word decides, was used. Hence, Res. 2241 is binding upon Randolfia under Article 25 of the Charter. Moreover, States must comply with treaty obligations in good faith,³¹ including their obligations under the Charter,³² including compliance with SC decisions directly and through their action in international agencies,³³ including UN specialized agencies and other international

²⁶ UN Doc. 664, IV/2/33, 13 UNCIO Docs. 633, 1945; Lamb, *supra* note 21, 363; Gowland-Debbas, The Relationship Between the International Court of Justice and the Security Council in Light of the Lockerbie Case, 88 AJIL, 1994, 664.

²⁷ Bowett, The Impact of Security Council Decisions and Dispute Settlement Procedures, 5 EJIL, 1994, 14.

²⁸ Namibia Case, *supra* note 4, ¶116; Schweigman, *supra* note 6, 49; Delbrück, *supra* note 7, 413.

²⁹ UN Charter, *supra* note 5, Art. 25.

³⁰ Namibia Case, *supra* note 4, 114.

³¹ VCLT, entered into force 27 Jan. 1980, Art. 26.

³² UN Charter, *supra* note 5, Art. 2(2); Müller, Article 2(2), In: Simma, *supra* note 7, 91.

³³ UN Charter, *supra* note 5, Art. 48(2).

organizations,³⁴ such as the ICC. Curwen's surrender to the ICC would subject him to a jurisdiction other than Arkam's, which is contrary to Res. 2241. Hence, by executing the ICC arrest warrant, Randolfia would breach its obligation under the Charter to accept and carry out Res. 2241.

Finally, Randolfia may argue that its obligation under the ICC Statute to surrender Curwen collides with Res. 2241. However, in the event of conflict, obligations under the Charter prevail over those assumed by virtue of other agreements.³⁵ Indeed, measures deriving from binding SC decisions give rise to obligations that members must fulfill irrespective of any other commitments.³⁶ Thus, obligations deriving from Res. 2241 prevail over any other obligation binding upon Randolfia, including its obligation to surrender Curwen to the ICC.

4. Arkam has Exclusive Jurisdiction over Curwen, Which it has not Expressly Waived.

Under Res. 2241, Arkam has exclusive jurisdiction over its IFLEN agents, unless expressly waived. This entails that Arkam would have to make a clear and unambiguous statement to that effect, and no inference of action would establish an implicit waiver. The *Compromis* shows no evidence of such waiver by Arkam; rather, it has asserted jurisdiction over Curwen by taking disciplinary measures and serving upon him a subpoena. Moreover, the granting of amnesty by the TRC does not represent an implicit waiver, since TRCs are recognized as legitimate exercises of jurisdiction, constituting an alternative form of justice.³⁷ Hence, in the

³⁴ Bryde, Article 48, In: Simma, *supra* note 7, 653.

³⁵ UN Charter, *supra* note 5, Art. 103; VCLT, *supra* note 31, Art. 30(1).

³⁶ *Lockerbie Case*, *supra* note 7, 126; Bernhardt, Article 103, In: Simma, *supra* note 7, 1120; Franck, The Powers of Appreciation: Who is the Ultimate Guardian of the UN Legality?, 86 AJIL, 1992, 521.

³⁷ Zeldy, The Principle of Complementarity: A New Machinery to Implement International Criminal Law, 23 Mich. J. Int'l L., 2002, 870; Klosterman, The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?, Ariz. J. Int'l & Comp. L., 1998, 840;

absence of an express waiver by Arkam, Randolfia may not surrender Curwen to the ICC.

B. The Exercise Of Jurisdiction By The ICC Over A National Of A State Not Party To The Rome Statute Violates The VCLT And Customary International Law.

Under Article 12 of its Statute, the ICC has jurisdiction over crimes: (i) committed in the territory of a State party, regardless of the nationality of the offender; or (ii) committed by a national of a State party. In this case, Randolfia intends to surrender Curwen, an Arkamian, to the jurisdiction of the ICC for crimes committed in Leng, a party to the ICC Statute. However, this exercise of ICC jurisdiction would breach international law, as proven *infra*.

1. The Exercise of Jurisdiction over Curwen Would Breach Article 34 of the VCLT.

Under Article 34 of the VCLT, ratified by both parties to the present case, treaties cannot create obligations or rights for third non-party States.³⁸ This rule is considered a codification of customary law,³⁹ and has been acknowledged by this court and its predecessor.⁴⁰ The ILC and international tribunals have interpreted this rule to mean that treaties cannot modify legal rights of States not parties to them.⁴¹ One of such customary rights of States that derives from State sovereignty is the right to exercise jurisdiction over nationals.⁴² This implies that States

Llewellyn, A Comment on the Complementarity Jurisdiction of the Court: Adding Insult to Injury in Transitional Contexts, Dalhousie L.J., 2001, 194.

³⁸ VCLT, *supra* note 31, Art. 34.

³⁹ Aust, Modern Treaty Law and Practice, Cambridge University, 2000, 11; Shaw, International Law, 3rd ed, Grotious Cambridge, 1995, 561; Schachter, International Law in Theory and Practice, Kluwer Law International, 1995, 69; Cassese, International Law, Oxford, 2001, 126.

⁴⁰ Asylum Case, (Col. v. Perú), ICJ Rep., 1950, 273-6; Free Zones of Upper Savoy and the District of Gex Case, (Second Phase), (Fr. v. Sweden), PCIJ, 1932; Status of Easter Carelia Case, (Ad.Op.), PCIJ, 1923, 27; Territorial Jurisdiction of the River Ode Commission, PCIJ, 1929, 19; Aerial Incident of July 27 1955, (US v. Bul.), ICJ Rep., 1959, 127.

⁴¹ Watts, The International Law Commission 1949-1998, Vol.II, Oxford, 1999, 698; Island of Palmas Case, (Neth. v. US), PCA, 2 RIAA 829, 1928, 842.

must expressly consent to their nationals being tried by other jurisdictions either by ratifying a treaty creating such jurisdiction or by giving *ad hoc* consent. Accordingly, the exercise of ICC jurisdiction over nationals of third parties, such as Curwen, abrogates pre-existing rights of such States, and thus breaches Article 34 of the VCLT.⁴³

2. The Exercise of Jurisdiction over Curwen Cannot be Accepted under Custom.

The provisions of a treaty that has not been ratified by a State will only bind it through international custom.⁴⁴ In order to justify ICC jurisdiction, Randolfia will argue that Article 12 of the ICC Statute codifies customary law, based on the theories of delegated universal jurisdiction or delegated territorial jurisdiction.⁴⁵ However, no customary rule binds States to delegate their criminal jurisdiction to international tribunals.

First, Randolfia may argue that the exercise of jurisdiction over nationals of non-parties is based on the theory that the signatory States have delegated their customary right to exercise universal jurisdiction over the crimes prescribed in the ICC Statute.⁴⁶ However, this argument

⁴² Oppenheim, International Law, (Jennings & Watts eds.), 9th ed., Longman, 1996, 456; Wallace, International Law, Sweet & Maxwell, 3rd ed., 1997, 111; Shaw, International Law, Cambridge, 1995, 403.

⁴³ Holcombe, Comment: 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; Morris, The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-Party States, L. & Contemp. Probs., 2001, 26-27; Arnaut, When in Rome...? The International Criminal Court and Venues of U.S. Participation, Va. J. Int'l L., 2003, 550.

⁴⁴ Chinkin, Third Parties in International Law, Oxford, 1993, 34; Reuter, Introduction to the Law of Treaties, Kegan Paul International, 1995, 140; Cassese, International Law, *supra* note 39, 119.

⁴⁵ Scheffer, Address at the Annual Meeting of the American Society of International Law: "International Criminal Law: The Challenge of Jurisdiction", 1-9; 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, L. & Contemp. Probs., 2001, 76,109.

is not accepted under international law for three reasons: (i) Article 12 of the Statute was not drafted with the intention of establishing universal jurisdiction.⁴⁷ In fact, Germany's universal jurisdiction proposal was expressly rejected by the majority of States (*e.g.*, Colombia, Indonesia, India, Russia, France, Brazil, Uruguay, Sweden, Norway, Israel, Iraq, Iran, Qatar); (ii) no precedent under international law supports the delegation of universal jurisdiction by treaty.⁴⁸ Indeed, delegation of jurisdiction on previous international tribunals was based on States' consent (*i.e.* Germany and Japan consented to the Nuremberg and Tokyo tribunals,⁴⁹ and the ICTR and ICTY were created by SC resolutions),⁵⁰ and (iii) some crimes of the ICC Statute are not subject to universal jurisdiction.⁵¹ Moreover, the exercise of universal jurisdiction is questionably a customary rule,⁵² as recognized by most Justices of this Court.⁵³

⁴⁶ Harris, The United States and the International Criminal Court: Legal Potential for Non-Party State Jurisdiction, Hawaii L. Rev., 2000, 302; Chibueze, United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom", Ann. Surv. Int'l & Comp. L., 2003, 36; Arnaut, *supra* note 43, 552.

⁴⁷ Haffner *et al*, A Response to the American View as Presented by Ruth Wedgwood, EJIL, 1999, 116-117; Strapatsas, Universal Jurisdiction and the International Criminal Court, Man. L.J., 2002, 30; Brown, U.S. Objections to the Statute of the International Criminal Court: A Brief Response, N.Y.U. J. Int'l L., 1999, 874.

⁴⁸ Brown, *supra* note 47, 874; Morris, *supra* note 43, 37; Haffner *et al*, *supra* note 47, 116-7.

⁴⁹ Scheffer, *supra* note 45, 1-9; Morris, *supra* note 43, 37.

⁵⁰ SC Res.: 827, adopted 25 May 1993; 955, adopted 18 Nov. 1994.

⁵¹ Statement by Judge Eli Nathan Head of the Delegation of Israel at the Rome Conference, July 18 1998; Morris, *supra* note 43, 28; Scheffer, *supra* note 45, 8.

⁵² Scharf, Universal Jurisdiction: Myths, Realities, and Prospects: Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States, New Eng. L. Rev., 2001, 373; Kaul, Preconditions to the Exercise of Jurisdiction, In: Cassese, Gaeta & Jones, The Statute of the International Criminal Court: A Commentary, Vol. I, Oxford, 2002, 587; Summers, The International Court Of Justice's Decision In Congo V. Belgium: How Has It Affected The Development Of A Principle Of Universal Jurisdiction That Would Obligate All States To Prosecute War Criminals?, BU Int'l L.J., 2003, 98; Regina v. Bartle ex parte Pinochet, Lord Slynn of Hadley, Eng. H.L..

Second, Randolph may argue that State parties to the ICC Statute have delegated their territorial jurisdiction to the ICC in the same way that a State can delegate its territorial jurisdiction to another State. However, delegation of territorial jurisdiction from one State to another is only possible with the consent of the defendant's national State.⁵⁴ Thus, the same should apply to the delegation of territorial jurisdiction to an international court. Hence, said argument would be unreasonable in the absence of State practice to that effect.

Finally, any effort to argue the customary status of the ICC's power to exercise jurisdiction over nationals of non-parties is futile, since State practice is clearly against it. Indeed, several States have not ratified the ICC Statute precisely for this reason, and numerous contracting parties at the Rome conference considered this rule excessive (e.g., India, Russia, France, Libya, Japan, Colombia, Sudan, Indonesia, Brazil, Sweden and Spain). Accordingly, many contracting parties have executed treaties with non-parties to the ICC Statute (specifically the US) to exclude its jurisdiction over their nationals (e.g., Argentina, Australia, Belgium, Colombia, Cameroon, Egypt, Georgia, Honduras, Israel, Ireland, Thailand, Uganda). Furthermore, SC resolutions have excluded ICC jurisdiction over UN peacekeeping personnel who are nationals of non-party States, not only in the case of Yuggott, but also in the cases of Bosnia-Herzegovina and Liberia.⁵⁵ Therefore, State practice shows that Article 12 of the ICC Statute establishes a jurisdictional regime that many States unequivocally reject, and thus it is not a codification of customary jurisdictional principles.

⁵³ *Arrest Warrant of April 11 Case*, (Arrest Warrant Case), (Congo v. Bel.), (Sep.Op. Judge Guillaume), ICJ Rep., 2000, ¶16; *Arrest Warrant Case*, (Sep.Op. Judges Higgins, Kooijmans, Buergenthal), ICJ Rep., 2000, ¶44-6.

⁵⁴ European Convention on the Transfer of Proceedings in Criminal Matter, ETS No. 73, entered into force 30 March. 1978; Morris, *supra* note 43, 43-47; Zemach, Fairness and Moral Judgments in International Criminal Law: The Settlement Provision in the Rome Statute, Colum. J. Transnat'l L., 2003, 907; Scheffer, *supra* note 45, 1-9.

⁵⁵ SC Res.: 1422, *supra* note 9; 1497, *supra* note 9.

3. Arkam is a Persistent Objector to the ICC's Jurisdictional Regime.

As often recognized by this Court,⁵⁶ the persistent objector is a State that constantly objects to a customary rule during its development, and is thus not bound by it.⁵⁷ In this case, Arkam has rejected the existence of the ICC since its developing stages and thus neither signed nor ratified its Statute. Therefore, arguments suggesting that the ICC Statute has created instant customary law must be dismissed, since Arkam is unquestionably a persistent objector. Hence, Randolfia's surrendering of Joseph Curwen to ICC jurisdiction would violate the VCLT and customary international law.

C. Given The Ongoing Investigation By The Arkamian TRC Into The Acts Of Mr. Curwen Described In The Indictment, The Exercise Of Jurisdiction Over Him By The ICC Would Violate The Principle Of Complementarity.

The principle of Complementarity -the governing principle upon which the operation of the ICC is based-⁵⁸ implies that in the presence of an international and national criminal justice systems, only if the former fails shall the latter intervene.⁵⁹ Hence, ICC jurisdiction may not be invoked if a national court with jurisdiction over a certain matter is willing and able genuinely to investigate or prosecute.⁶⁰ In this case, there is a State with jurisdiction which is

⁵⁶ Anglo Norwegian Fisheries Case, (UK v. Nor.), ICJ Rep. 1951, 131; North Sea Continental Shelf Case, (Ger. v. Den & Neth), ICJ Rep., 1969, 26-7; Asylum Case, *supra* note 40, 277-8.

⁵⁷ Stein, The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law, Harv. Intl. L. J., 457, 1985; Cassese, International Law, *supra* note 39, 123-124; Brownlie, Principles of Public International Law, 5th ed., Oxford, 1998, 10.

⁵⁸ ICC Statute, UN Doc. A/CONF.183/9, 1 Jul. 2002, Preamble & Art. 1; Zeldy, *supra* note 37, 870.

⁵⁹ Zeldy, *supra* note 37, 870.

⁶⁰ Van der Vyver, Personal and Territorial Jurisdiction of the International Criminal Court, Emory Int'l L. Rev., 2000, 66; Schabas, An Introduction to the International Criminal Court, Cambridge, 2001, 67; Llewellyn, *supra* note 37, 194.

able and willing to investigate the matter of Curwen's alleged crimes. Consequently, the ICC should not exercise jurisdiction over him.

1. Arkam has Jurisdiction over Curwen.

Generally, adjudicatory jurisdiction –the jurisdiction to subject persons to the process of the courts of a State-⁶¹ is based on territoriality or nationality.⁶² Under the nationality principle, a State may exercise jurisdiction over its nationals wherever they may be and in respect of offences committed abroad.⁶³ In this case, although Curwen has allegedly committed a crime in Leng, said State –which would have jurisdiction under the territoriality principle- has chosen not to intervene in Curwen's prosecution. Therefore, Arkam, Curwen's national State, has uncontested jurisdiction over Curwen and his conduct.

2. Arkam is Carrying out a Genuine Investigation.

Under the ICC Statute, a case shall be inadmissible if a State with jurisdiction over said case is carrying out or has carried out an investigation or prosecution, unless said State is unwilling or unable genuinely to carry out the investigation or prosecution.⁶⁴ The use of the conjunction “or” in this rule reflects that the primacy of national process is preserved through either investigation or prosecution, hence an investigation –regardless of its nature- suffices.⁶⁵

As has been done in numerous previous cases,⁶⁶ Arkam has created a TRC to investigate

⁶¹ Schachter, *supra* note 39, 255; Oppenheim, *supra* note 42, 462; Wallace, *supra* note 42, 114; Schabas, An Introduction to the International Criminal Court, *supra* note 60, 59.

⁶² Ratner and Abrams, Accountability for Human Rights Atrocities in International Law, Oxford, 2001, 161; Strapatsas, *supra* note 47, 1; Schachter, *supra* note 39, 255.

⁶³ Brownlie, *supra* note 57, 306; Wallace, *supra* note 42, 114; Oppenheim, *supra* note 42, 462; Cassese, International Criminal Law, Oxford, 2003, 288.

⁶⁴ ICC Statute, *supra* note 58, Art. 17(1).

⁶⁵ Llewellyn, *supra* note 37, 203.

crimes committed during and in furtherance of the ethnic conflict. Indeed, following Argentina's example, at least 25 States have implemented TRCs to facilitate transitions to a public order of human dignity.⁶⁷ States such as Chile, Argentina, South Africa and Guatemala have created these panels to investigate human rights abuses of prior regimes or resolve civil conflict emerged from political agreement.⁶⁸ The validity of these TRCs as investigative bodies has been supported by the UN. In El Salvador, a TRC was appointed and administered by the UN to investigate the abuses of a 12-year civil war.⁶⁹ Another example of a successful TRC is South Africa's, a unique UN-supported and NGO praised tripartite institution with powers to prepare a record of the apartheid era, recommend reparations, and grant amnesty on the basis of individual application.⁷⁰ Arkam's TRC is modeled after South Africa's, hence it constitutes a genuine form of investigation established to perform as a psychological balm for victims of human rights violations and their families,⁷¹ and in the interest of the legitimate

⁶⁶ Jody, Truth Commission in El Salvador and Guatemala, B.C. Third World L.J., 1997, 30; US Institute of Peace, Truth Commissions Digital Collection, <http://www.usip.org/library/truth.html>; A Culture of reconciliation in Africa: Transformative Justice, the Restoration of Dignity and Reconciliation, <http://www.jiia.or.jp/pdf/lax.pdf>.

⁶⁷ Vasallo, Truth and Reconciliation Commissions: General Considerations and a Critical Comparison of the Commissions of Chile and El Salvador, 33 Miami Inter-Am. L. Rev., 2002, 156; Dugard, Possible Conflicts of Jurisdiction with Truth Commissions, In: Cassese, Gaeta & Jones, Vol. I, *supra* note 52, 694; Wiessner & Willard, Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity, 93 AJIL, 1999, 330-1.

⁶⁸ McHugh, The Truth About Truth Commissions, 1996; Hayner, Truth Commissions: Exhuming the Past, 1998, Vol. 32 Issue 2, 30; Americas Watch, Human Rights and the Politics of Agreement, 1991; Sachs, Truth and Reconciliation, 52 SMU L. Rev. 1563, 1999.

⁶⁹ Hayner, Truth Commissions: Exhuming the Past, *supra* note 68, 30-2.

⁷⁰ AI & HRW, Truth and Justice: Unfinished Business in South Africa, <http://www.hrw.org/backgrounder/africa/truthandjustice.htm>, 2003.

⁷¹ Ratner & Abrams, *supra* note 62, 229,238; Zeldy, *supra* note 37, 2002

goals of peace and national healing,⁷² which the Court should not mistake for unwillingness.

3. The Granting of Amnesty should not be Regarded as Unwillingness to Prosecute.

Unwillingness to prosecute exists when proceedings are undertaken for the purpose of shielding the accused from criminal responsibility.⁷³ However, TRCs do not fit this description, since they are deemed alternative forms of justice.⁷⁴ Moreover, the granting of amnesty within the context of a recognized TRC has been accepted as a form of achieving peacekeeping, nation-building and reconciliation.⁷⁵ Although some question the validity of amnesties, as international law stands today, a general duty to prosecute international crimes is not supported by State practice.⁷⁶ In fact, modern history is replete with cases where amnesty has been granted for serious international crimes,⁷⁷ such as in Guatemala, Uruguay, Cambodia, El Salvador, South Africa, Haiti, and more recently Colombia.⁷⁸ Furthermore, the UN encouraged and helped negotiate amnesties in several cases as a means of restoring

⁷² Schabas, An Introduction to the International Criminal Court, *supra* note 60, 69.

⁷³ ICC Statute, *supra* note 58, Art. 17(2).

⁷⁴ Zeldy, *supra* note 37, 943; Klosterman, *supra* note 37, 840; Llewellyn, *supra* note 37, 198.

⁷⁵ Young, Amnesty and Accountability, 35 UC Davis L. Rev., 2002, 434; Schabacker, Reconciliation or Justice and Ashes Amnesty Commissions and the Duty to Punish Human Rights Offences, 12 N. Y. L. Rev., 1999, 1.

⁷⁶ Dugard, *supra* note 67, Vol. 1, 2002, 698; Slye, The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?, Virginia J. Int'l L., 2002, 182-83.

⁷⁷ Hayner, Unspeakable Truths, Confronting State Terror and Atrocity, Appendix I, 2001; Dugard, *supra* note 67, 694; Cassese, International Criminal Law, *supra* note 63, 302.

⁷⁸ Scharf, Swapping Amnesty for Peace: Was there a Duty to Prosecute Human Rights in Haiti?, Tex. Int'l L. J., 1996, 15-6; Rhot-Arriaza, State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law, Cal. L. Rev., 1990, 451, 458-61; Boed, The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations, 33 Cornell Int'l L. J., 298; Col. Decree 128, Decreto sobre Reincorporación a la Vida Civil, 2003, Art. 11(5).

peace.⁷⁹ Accordingly, the granting of amnesty to Curwen and other individuals in the context of the Arkamian TRC constitutes a valid alternative form of justice and should not be regarded as unwillingness to prosecute on the part of Arkam.

Finally, Randolfia may argue that an amnesty would shield Curwen from punishment. However, punishment can take many non-criminal forms, including removal from office and reduction of ranks.⁸⁰ In this case, Curwen was ordered to resign his commission without benefits, hence, even the TRCs amnesty would not shield him from punishment. Consequently, the Arkamian TRC is a valid and effective assertion of jurisdiction over Curwen that precludes the complementary intervention of the ICC.

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

West has been charged with incitement to genocide under Article 25(3)(e) of the ICC Statute, and attempted genocide under Articles 6(a) and 25(3)(f). Such charges are based on Article 28 (responsibility of superiors), and Article 25(3)(b) (responsibility for ordering, soliciting or inducing). Noting that under Article 28 responsibility only derives from omissions,⁸¹ Arkam will refer to West's conduct, rather than merely his actions or acts, to establish that the facts do not support a *prima facie* case – *i.e.* evidence amounting to an overwhelming body of

⁷⁹ Dugard, *supra* note 67, 694; Scharf, Swapping Amnesty for Peace: Was there a Duty to Prosecute Human Rights in Haiti?, *supra* note 78, 507.

⁸⁰ Scharf, Swapping Amnesty for Peace: Was there a Duty to Prosecute Human Rights in Haiti?, *supra* note 78, 518; Velásquez Rodríguez Case, I/ACt.HR, Series C, No. 4, 29 Jul. 1988; Gary Hermosilla et al, Case No. 10843, I/AC.HR, 1996.

⁸¹ Prosecutor v. Delalic et al, (Trial Chamber), ICTY, 16 Nov. 1998, ¶333; Prosecutor v. Blaskic, (Trial Chamber), ICTY, 3 Mar. 2000, ¶339.

proof of potential guilt⁸² of his criminal responsibility for said charges.

A. Neither West Nor His Allegedly Criminal Conduct Demonstrate The Necessary Nexus With A State Party To The ICC Statute.

The ICC may exercise its jurisdiction if: (i) the crime is committed in the territory of a State party to the ICC Statute, or (ii) the perpetrator is a national of a State party to said Statute.⁸³

Randolfia will argue that the ICC has jurisdiction since West's alleged crime took place in Leng, a party to the ICC Statute. However, as proven *infra*, should West's conduct be considered as criminal, it occurred in Arkam, excluding the ICC's jurisdiction.

1. West's Alleged Crime of Incitement to Genocide was Committed in Arkam.

Under the principle of territoriality, a crime is deemed to have been committed in the territory of the State where it is consummated.⁸⁴ In this case, West's alleged responsibility must be established by determining the territoriality of his conduct –*i.e.* where the conduct took place,⁸⁵ noting that the conduct under analysis is the recording of a tape and its delivery to a neighbor. This is done by adopting the reasoning of the Quebec Superior Court in the case of *US v. Novick*, where the Court restricted the territoriality of the crime to the place where the act was executed (in that case, since the crime was mail fraud, where the letter was posted).⁸⁶

⁸² Mueller & Besharov, Evolution and Enforcement of International Criminal Law, In: Bassiouni (ed.), International Criminal Law, Vol. I, Transnat'l Publishers, 2nd ed., 1999, 278.

⁸³ ICC Statute, *supra* note 58, Art. 12(2).

⁸⁴ Ahlström Osakeyhtiö and Others v. Commission (In re Wood Pulp Cartel), Op. Darmon, CJEC, 1988, ¶19; Joyner, Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability, 59 L. & Contemp. Prob., 1996, 164; Akehurst, Jurisdiction in International Law, In: Reisman, Jurisdiction in International Law, The Library of Essays in International Law, 1999, 32; Antolisei, Manual de Derecho Penal Parte General, Uteha Argentina, 105.

⁸⁵ Metzger, Tratado de Derecho Penal, Madrid, 1955, 331-2.

⁸⁶ US v. Novick, Quebec Sup. Ct., 128, 1960, 319, 330.

As with mail fraud, incitement to commit genocide is an inchoate crime,⁸⁷ meaning that the act alone is punishable,⁸⁸ irrespective of its results.⁸⁹ Such crimes are consummated instantaneously when the criminal conduct is performed.⁹⁰ Additionally, criminal responsibility is individual,⁹¹ and a person can only be liable for conducts performed voluntarily.⁹² Thus, West will only be responsible for conduct in which he voluntarily engaged, even though the crime might have been committed in Leng, since conduct in Leng was performed by others, as proven in §C.

Notwithstanding, Randolfia may argue that the *locus commissi delicti* must be determined according to the result theory, which considers the crime as committed where its result takes

⁸⁷ *Prosecutor v. Ruggiu*, (Trial Chamber I), ICTR, 1 Jun. 2000, ¶16; *Prosecutor v. Kajelijeli*, (Trial Chamber II), ICTR, 1 Dec. 2003, ¶855; *Prosecutor v. Niyitegeka*, (Trial Chamber I), ICTR, 16 May 2003, ¶431; *Prosecutor v. Nahimana et al.* (Trial Chamber I), ICTR, 3 Dec. 2003, ¶1013; *Prosecutor v. Akayesu*, (Trial Chamber I), ICTR, 2 Sep. 1998, ¶562; Schabas, *Hate Speech in Rwanda: The road to genocide*, 46 McGill LJ, 2000, 149; Wallenstein, *Punishing Words: an Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide*, 54 Stan L Rev, 2001, 388.

⁸⁸ Grispiigni, *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; Soler, *Derecho Penal Argentino*, Vol. I, 2nd ed., Tipográfica Editora Argentina, 1953, 279; Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 Tex Int'l LJ, 2002, 256.

⁸⁹ Spitéri, *L'Infraction Formelle*, 3 *Revue de Science Criminelle et de Droit Pénal Comparé*, 1966, 497; Akhavan, *The International Criminal Tribunal for Rwanda: the Politics and Pragmatics of Punishment*, 90 AJIL, 1996, 506; Schabas, *Principios Generales del Derecho Penal*, In: Ambos & Guerrero (eds.), *El Estatuto de Roma de la Corte Penal Internacional*, Universidad Externado de Colombia, 1999, 290.

⁹⁰ Arteaga, *Derecho Penal Venezolano*, 9th ed., McGraw Hill, 2001, 135; Sosa, *Teoría General de la Ley Penal*, 2nd ed., Ediciones Liber, 2000, 248; Maggiore, *supra* note 88, 295.

⁹¹ *Prosecutor v. Tadic*, (Appeals Chamber) ICTY, 2 Oct. 1999, ¶186; *Prosecutor v. Kordic and Cerkez*, (Trial Chamber III), ICTY, 26 Feb. 2001, ¶364.

⁹² Eser, *Individual Criminal Responsibility*, In: Cassese, Gaeta & Jones, Vol. I, *supra* note 52, 774; Cassese, *International Criminal Law*, *supra* note 63, 137; Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Calif L Rev, 1985, 330.

place (Leng).⁹³ Nonetheless, as incitement is an inchoate crime, it is not be subject to this doctrine. Accordingly, Randolfia may try to further argue that, under the effects doctrine – which determines the territoriality of crimes by the place where their effects occur-⁹⁴ the crime was consummated in Leng. However, said doctrine is highly controversial, as it implies the extraterritorial application of the law,⁹⁵ which is not contemplated in the ICC Statute. Finally, Randolfia may argue that incitement is a continuous crime, perpetuated in time and space into Leng. Such assertion is incorrect, since a continuous crime only exists when all of its elements is present throughout its duration,⁹⁶ while incitement, as indicated *supra*, are consummated instantaneously. Consequently, West’s conduct was performed entirely in Arkam, thus it represents no nexus with a State party to the ICC Statute.

2. West’s Alleged Complicity was Perpetrated in Arkam.

The conduct of the accomplice is subject to the jurisdiction of the State in the territory of which it takes place.⁹⁷ Should West be found responsible for participating in the commission of incitement to genocide and genocide, only Arkam would have jurisdiction because West’s conduct took place entirely in Arkam, hence there would be no territorial nexus. Consequently, West’s conduct –whether considered as constituting an inchoate crime, or an act of participation– was entirely executed in Arkam, which excludes ICC jurisdiction, since

⁹³ Sosa, *supra* note 90, 282, 283; Arteaga, *supra* note 90, 87, 88.

⁹⁴ Paust *et al*, International Criminal Law, Carolina Academic Press, 1996, 125; Cassese, International Criminal Law, *supra* note 63, 280; Schabas, An Introduction to the International Criminal Court, *supra* note 60, 63.

⁹⁵ Shaw, *supra* note 42, 423; Brownlie, *supra* note 57, 310; Oppenheim, *supra* note 42, 472.

⁹⁶ Regina v. Treacy, (Dis.Op. Judge Reid), Eng.Ct.App., 1970, 55 ILR, 1979, 116; Arteaga, *supra* note 90, 136; Balderson Jr, Temporal Units of Prosecution and Continuous Acts: Judicial and Constitutional Limitations, 36 San Diego L Rev, 1999, 199.

⁹⁷ Jiménez de Asúa, Tratado de Derecho Penal, Vol. III, 3rd ed., Losada, 1964, 846-7.

the necessary nexus is not fulfilled.

B. West's Actions Preceded The Date On Which The Rome Statute Entered Into Force With Respect To Leng And Randolfia And Are Thus Barred From The ICC's Consideration.

Under the principle of Intertemporal Law, when dealing with different legal systems prevailing at successive periods of time, a juridical fact must be appreciated in light of the law contemporary with it.⁹⁸ This principle is embraced by the ICC Statute, which provides that no one shall be criminally responsible for conduct prior to its entry into force.⁹⁹ Accordingly, even if West's actions, which are limited to the recording of a tape and delivery to his neighbor, were considered crimes within the competence of the ICC, such acts –which took place in April of 2003- are not contemporary with the jurisdiction *ratione temporis* of the ICC, since its Statute entered into force for Leng and Randolfia on May 1st 2003. Consequently, it would breach international law for Randolfia to surrender West to the ICC.

C. West's Alleged Acts Do Not Constitute A Crime of The Competence Of The ICC.

In order to justify West's surrender to the ICC under international law, Randolfia must establish, and this Court declare, that there is a *prima facie* case of West's responsibility. However, evidence does not support the construction of a *prima facie* case against West, since analysis of his actions in relation to the killings in Leng does not prove his guilt beyond the reasonable doubt required by international tribunals.¹⁰⁰

1. West is not Responsible for the Crime of Incitement to Commit Genocide.

⁹⁸ *Island of Palmas Case*, *supra* note 41, 1928; *Minquiers and Ecrehos Case*, (Merits), (Fr. v. UK), ICJ Rep., 1953, 47; Jennings, *The Acquisition of Territory in International Law*, Manchester, 1963, 28-31; Elias, *The Doctrine of Intertemporal Law*, 74 AJIL, 286.

⁹⁹ ICC Statute, *supra* note 58, Art. 11.

¹⁰⁰ ICC Statute, *supra* note 58, Art. 66(3); ICTY Rules of Procedure and Evidence, UN Doc IT/32, 2002, Rule 87(a); ICTY Statute, SC Res. 827, 1993, Art. 19(1); ICTR Statute, SC Res. 955, 1994, Art. 18(1); *Prosecutor v. Delalic*, *supra* note 81, ¶601.

As stated *supra*, West has been charged with incitement to genocide and attempted genocide. Said charges are based on two forms of participation: (i) responsibility of superiors; and (ii) participation by order, solicitation or induction. Although Arkam will not rebut the commission of the crime of incitement to commit genocide, it is submitted that West cannot be held responsible for said crime under either form of participation, as proven *infra*.

a. West cannot be held responsible under the doctrine of superior responsibility.

The superior responsibility doctrine requires proof of three elements: (i) a superior-subordinate relationship; (ii) knowledge by the superior of his subordinates' actions; and (iii) failure by the superior to exercise due control over his subordinates or inform of their illegal actions.¹⁰¹ However, at least two of these elements are not fulfilled.

i. There is no superior-subordinate relationship between West and GALA members.

A superior-subordinate relationship implies that the perpetrator of the underlying offence is under a superior's effective control and authority,¹⁰² which entails that the latter be in position –political or military- to order the commission of a crime or punish the perpetrators thereof.¹⁰³ However, mere leadership does not imply that a person has such authority or can

¹⁰¹ *Prosecutor v. Kajelijeli*, *supra* note 87, 2003, ¶773; *Prosecutor v. Aleksovski*, (Trial Chamber I), ICTY, 25 Jun.1999, ¶69; *Prosecutor v. Galic*, (Trial Chamber I), ICTY, 5 Dec. 2003, ¶173; 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.

¹⁰² Aptel & Williamson, A Commentary on the Musema Judgment Rendered by the United Nations International Criminal Tribunal for Rwanda, 1 Melbourne J. Int'l L., 140-141; *Prosecutor v. Musema*, (Trial Chamber), ICTR, 27 Jan. 2000, ¶141; *Prosecutor v. Delalic*, *supra* note 81, ¶646; *Prosecutor v. Kajelijeli*, *supra* note 87, ¶773.

¹⁰³ *Prosecutor v. Bagilishema*, (Trial Chamber I), ICTR, 17 Jun. 2001, ¶61; *Prosecutor v. Musema*, *supra* note 102, ¶137, *Prosecutor v. Delalic*, *supra* note 81, ¶378; *Prosecutor v. Kajelijeli*, *supra* note 87, ¶774.

exercise effective control and authority over others.¹⁰⁴ Moreover, in the specific case of non-military leadership, the civilian superior's degree of control must be similar to that of a military commander,¹⁰⁵ and the "material ability" to intervene to prevent or punish offences is required.¹⁰⁶ In the *Musema* case, the ICTR set certain parameters to the Doctrine of Superior Responsibility applied to civilians, finding that Musema, as director of the Gisovu Tea Factory, had "legal and financial control over [his] employees, particularly through his power to appoint and remove these employees from their positions in the tea factory",¹⁰⁷ and used this authority and power to order his employees to kill Tutsis in the surrounding communities. The ICTR used these facts to determine that Musema had the "material ability" to order crimes as well to prevent them. In this case, West's abilities and competencies are not sufficiently demonstrated to establish that he had such a control over GALA members. Indeed, the facts show that West's leadership was more ideological than military. Consequently, he cannot be deemed guilty under the superior responsibility doctrine.

ii. West had no reason to know that other GALA members would incite genocide.

In order to be held responsible for the actions of subordinates, the superior must know or disregard information indicating that the subordinates are committing or about to commit a

¹⁰⁴ *Prosecutor v. Ntakirutimana et al.* (Trial Chamber I), ICTR, 21 Feb. 2003, ¶821; *Prosecutor v. Niyitegeka*, *supra* note 87, ¶474-76; *Prosecutor v. Semanza*, (Trial Chamber), ICTR, 15 May 2003, ¶415.

¹⁰⁵ *Prosecutor v. Bagilishema*, *supra* note 103, ¶43; *Prosecutor v. Delalic*, *supra* note 81, ¶378; Vetter, *supra* note 101, 117.

¹⁰⁶ *Prosecutor v. Blaskic*, *supra* note 81, ¶302; *Prosecutor v. Kunarac et al.* (Trial Chamber), ICTY, 22 Feb. 2001, ¶396; *Prosecutor v. Naletilic and Martinovic*, ICTY, (Trial Chamber), 31 Mar. 2003, ¶76; *Prosecutor v. Galic*, *supra* note 101, ¶176; *Prosecutor v. Kayishema and Ruzindana*, (Trial Chamber), ICTR, 21 Jun. 1999, ¶511; *Prosecutor v. Delalic*, *supra* note 81, ¶395.

¹⁰⁷ *Prosecutor v. Musema*, *supra* note 102, ¶880.

crime.¹⁰⁸ Knowledge implies awareness that a circumstance exists or that a consequence will occur in the ordinary course of events.¹⁰⁹ Further, although it can be established through circumstantial evidence, knowledge cannot be presumed.¹¹⁰ In this case, nothing evidences that West had actual knowledge of the actions of other GALA members, and the recording of the tape and subsequent delivery to his neighbor do not prove that, in the normal course of events, it would have been broadcast through Radio Yugott, much less incited Arkamians to conduct killing raids. Consequently, West cannot be said to have known that such criminal actions would be committed, hence he is not guilty under the superior responsibility doctrine.

b. West was not an accomplice of the GALA members who incited genocide.

International Tribunals have considered instigation –the prompting of a person to commit an offence-¹¹¹ as a form of consummating the *actus reus* of complicity.¹¹² Ordering, soliciting and inducing are forms of instigation.¹¹³ Hence, when a person orders, solicits or induces the commission of a crime that is in fact perpetrated or attempted,¹¹⁴ he is an accomplice to such

¹⁰⁸ ICC Statute, *supra* note 58, Art. 28(b)(i); *Prosecutor v. Delalic*, *supra* note 81, ¶383; Stryszak, Command Responsibility: How Much Should a Commander be Expected to Know?, 11 USAFA J. Leg. Stud., 2000/2001, 61-3; Damaska, The Shadow Side of Command Responsibility, 49 Am. J. Comp. L., 2002, 462; May & Powles, Command Responsibility - A New Basis of Criminal Liability in English Law, *Criminal Law Review*, 2002, 371-3.

¹⁰⁹ ICC Statute, *supra* note 58, Art. 30(3).

¹¹⁰ *Prosecutor v. Blaskic*, *supra* note 81, ¶307; *Prosecutor v. Delalic*, *supra* note 81, ¶387.

¹¹¹ *Prosecutor v. Kajelijeli*, *supra* note 87, ¶762; *Prosecutor v. Semanza*, *supra* note 104, ¶381; *Prosecutor v. Bagilishema*, *supra* note 103, ¶30; *Prosecutor v. Akayesu*, *supra* note 87, ¶482.

¹¹² *Prosecutor v. Bagilishema*, *supra* note 103, ¶70; *Prosecutor v. Akayesu*, *supra* note 87, ¶533, 537.

¹¹³ Eser, *supra* note 92, 796; Ambos, Article 25, In: Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, 1999, Margin N° 13.

¹¹⁴ ICC Statute, *supra* note 58, Art. 25(3)(b).

crime. However, ordering implies a superior-subordinate relationship,¹¹⁵ and, as established *supra*, there is no evidence of such relationship. Further, soliciting or inducing imply commanding, authorizing, urging or affecting, causing or influencing a course of conduct by persuasion or reasoning,¹¹⁶ and there is also no evidence that West engaged in such conducts. Indeed, the ICTR in its *Kayishema and Ruzindanda* decision, found instigating conduct in their promises of money or food, giving weapons to the perpetrators, taking them to the places where they would commit the crimes, or being physically present while the crimes were committed.¹¹⁷ There is no evidence whatsoever that West ordered or otherwise caused by means of persuasion or reasoning the subsequent conduct of GALA members. Hence, West cannot be held responsible as an accomplice to such a crime.

Additionally, the accomplice's conduct entails individual criminal responsibility only when it presents a direct causal link to a crime which is indeed perpetrated or attempted.¹¹⁸ Indeed, under the principle of *novus actus interveniens*, in a sequence of a person's action, the intervention of another bars the causal responsibility of the first person.¹¹⁹ In this case, the existence of a causal link between West's actions and those of the broadcasters of the tape is highly questionable, given the intervention of other GALA members in the sequence of

¹¹⁵ *Prosecutor v. Akayesu*, *supra* note 87, ¶483; *Prosecutor v. Blaskic*, *supra* note 81, ¶281; *Prosecutor v. Naletilic and Martinovic*, *supra* note 106, ¶61.

¹¹⁶ Eser, *supra* note 92, 796.

¹¹⁷ *Prosecutor v. Kayishema and Ruzindana*, *supra* note 106, ¶419, 421, 463.

¹¹⁸ Gimbernat, Autor y Cómplice en Derecho Penal, Universidad de Madrid, Facultad de Derecho, Sección de Publicaciones de Intercambio, 1966, 168-74; Muñoz, Teoría General del Delito, Editorial Temis, 1990, 207-09.

¹¹⁹ Kadish, *supra* note 92, 334-336; Brudner, Owning Outcomes: On Intervening Causes, Thin Skulls, and Fault-undifferentiated Crimes, 11 *Can. J.L. & Juris.*, 1998, 91-3; Grady, Proximate Cause Decoded, 50 *UCLA L. Rev.*, 2002, 335; Moore, The Morality of Criminal Law: A Symposium in Honor of Professor Sandy Kadish: The Metaphysics of Causal Intervention, 88 *Calif. L. Rev.*, 2000, 827-9.

events (copying, distribution and broadcasting), especially given the lack of evidence of West's actual instructions. Therefore, West is not an accomplice to incitement to genocide.

2. West is not Responsible for Genocide nor Attempted Genocide.

Randolfia may try to use the ICTR's *Nahimana* decision to argue that there is a *prima facie* case of West's responsibility. In said case, the Trial Chamber evaluated a series of contextual factors that presented a strong case against *Nahimana* and *Barayagwiza*: (i) as directors of RTLM and the CDR –a radio station and a political party with militias- they set course over the purposes and actions of those organizations; (ii) they exercised *de facto* control over RTLM and the CDR; (iii) their organizations were aimed at creating ethnic violence and hatred.¹²⁰ However, unlike the *Nahimana* case, it is not sufficiently clear whether West was in a position to set course over its member's purposes or actions. In fact, there is no evidence that West exercised authority or control over GALA members or Radio Yuggott. Moreover, GALA's purpose is the secession of Yuggott from Leng to create a "Greater Arkam", not the generation of ethnic hatred or violence. Thus, the facts that were crucial to determine responsibility in *Nahimana* cannot be proven in this case, especially since the evidence provided here derives from local press, which has little evidentiary value in criminal law,¹²¹ Consequently, a *prima facie* case of West's responsibility cannot be elaborated on that basis.

III. REMEDIES SOUGHT BY ARKAM.

States are liable for the wrongful acts attributable to them in violation of international law.¹²² Indeed, violations of international obligations give rise to State responsibility and to States's

¹²⁰ *Prosecutor v. Nahimana*, *supra* note 87, ¶¶949, 951, 972.

¹²¹ Ratner and Abrams, *supra* note 62, 256.

¹²² Articles on the Responsibility of States for Internationally Wrongful Acts (ARS), UNGAR 56/83, 12 Dec. 2001, 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.

correlative duty of reparation,¹²³ which must reestablish the situation to the conditions that would have existed if the wrongful act had not been committed.¹²⁴ In this case, Randolfia intends to surrender two Arkamian citizens to the jurisdiction of the ICC, thus wrongfully intervening in Arkam's internal affairs and abrogating its right to exercise jurisdiction over its nationals. Declaratory judgements provide satisfaction for certain breaches of international obligations.¹²⁵ Indeed, this Court and its predecessor have willingly granted declarations as a form of satisfaction.¹²⁶ Accordingly, based on all that has been sufficiently proven *supra*, Arkam requests this Court to declare that it would be illegal for Randolfia to surrender Joseph Curwen and Herbert West to the ICC pursuant to the warrants for their arrest.

IV. PRAYER FOR RELIEF.

Based on the foregoing reasons, Arkam respectfully requests that this Court **DECLARE** that it would be illegal under international law for Randolfia to surrender Joseph Curwen to the ICC pursuant to the warrant for his arrest; and **DECLARE** that it would be illegal for Randolfia to surrender Herbert West to the ICC pursuant to the warrant for his arrest.

¹²³ ARS, *supra* note 122, Art. 31(1); *Polish Agrarian Reform Case*, (Interim Protection), PCIJ, 1933; *Reparations Case*, *supra* note 2, 184.

¹²⁴ *Chorzów Factory Case*, PCIJ, 1927, 29.

¹²⁵ Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge, Vol. 2, 1986, 584.

¹²⁶ *Aerial Incident Case*, (Isr. v. Bulg.), ICJ Rep., 1959, 127; *Mavrommatis Palestine Concessions Case*, (Greece v. UK), PCIJ, Series A, No. 5, 1925, 51.

