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Statement of Jurisdiction

The State of Remorra and the Irenic Republic of Arden have brought their case before this Court by notification of the Special Agreement as provided for by Article 40, paragraph 1, of the Statute of the International Court of Justice. Having submitted their dispute to this Court, Article 36, paragraph 2, of the Statute provides that the Courts jurisdiction extends to all cases which the parties refer to it. The Court therefore has jurisdiction in the present matter and may resolve all legal questions raised before it by the respective parties.

Statement of Facts

1. The Nylesian Revolution

2. The Nylesian People's Army (NPA), led by the Liberation Planning Committee, staged an attempted revolution against the Government of Integra on 15-16 March 1995. The NPA's objective was to change Integra into a Nylesian-dominated state, to this end the NPA killed 5000 members of the Remorran ethnic minority [*Compromis*, paras 8-10] .

3. Malu Terraq, self-declared architect of NPA strategy, orchestrated a campaign of disinformation, resulting in Nylesians murdering many Remorrans [*Compromis*, paras 10-12]. Up to 120 000 people were killed over six months [para 15]. A Panel of Experts appointed by the United Nations Security Council later reported that serious violations of international humanitarian law, including torture, systematic rape, summary executions and "ethnic cleansing" were carried out by the NPA [para 20].

4. The Panel reported that particularly serious violations, including torture and mass expulsions of Remorrans, occurred in the region of Telfin where the NPA forces were under Terraq's control. Terraq was personally accused of murder and ordering torture, and it was found "he had issued a standing order" that ethnic Remorrans whose property was confiscated by his troops "be set afloat in boats to drift at sea with without food, water or fuel". The Panel branded Terraq *hostis humani generis* - an enemy of all mankind [*Compromis*, para 21].

5. Following a multilateral intervention beginning on 10 October 1996, the Nylesian and Remorran forces signed a Peace Treaty under which three quarters of Integra's territory

was ceded to the new State of Nylesia [*Compromis*, paras 16-18]. Remorra forms the rest of the former Integra's territory. The majority of Remorran people have traditionally lived in those northern "areas traditionally associated with their ethnic heritage" around their "economic and cultural centre" the port of Harbaar [paras 2-4]. This "area around Harbaar" is now within the territory encompassed by Remorra, which also includes the region of Telfin [para 16]. Anyone born in these areas has automatic Remorran citizenship under the Treaty of 1995. [para 17]

6. United Nations Action

7. Following the Peace Treaty which divided the former Integra into the two separate Republics of Remorra and Nylesia [*Compromis*, para 16], the United Nations Security Council on 4 January 1996 established a Panel of Experts to investigate violations of humanitarian law during the civil conflict [para 19]. Their report, submitted in April 1996, recommended to the Secretary General that an International Criminal Tribunal for the Former Integra be commissioned to bring to trial the perpetrators of crimes "against humanity", "against the peace" as well as the perpetrators of any "other violations of law" [para 20].

8. The Security Council, on the recommendation of the Panel of Experts, decided in Resolution 1024 to establish, under Chapter VII of the Charter, the International Criminal Tribunal for the Former Integra (ICTFI). The Council decided that "the jurisdiction of this Tribunal shall be complementary to that of national criminal courts, and shall be interpreted in a manner not inconsistent with pre-existing obligations under treaties and customary international law" [*Compromis*, para 22].

9. NPA Prosecutions, Terraq Taken into Custody in Arden

10. The new Government of Remorra sought to arrest and try the leaders of the NPA, including Terraq, who had been charged by the Government of the former Integra with treason, sedition and murder [*Compromis*, paras 14, 23-25]. ICTFI issued its own indictment of Terraq [para 28]. Malu Terraq, accused of being an enemy of all mankind for his crimes against the Remorran people [para 21], was arrested on 1 December 1996 in Arden and taken into custody for suspected illegal entry into the country [para 29]. When Terraq was arrested in Arden, Remorra sought his extradition to answer the serious charges against him laid under Remorran law [para 32]. A day later a formal request from the Remorran Government to extradite the "Terror of Telfin" [para 31] under the 1965 Extradition Treaty between Arden and the former Integra [para 32] was refused by the Foreign Minister of Arden on the grounds that "the rule of law *requires* that Malu Terraq stand trial before the International Criminal Tribunal for the Former Integra" (emphasis added) [para 34]. Remorra formally protested Arden's refusal to extradite Terraq in December 1996 and February 1997 [paras 35, 40].

11. Impact of Arden's Decision on Remorra

12. On 4 February 1997, Remorra's Ambassador delivered another diplomatic note to Arden stating:

13. The Government of Remorra regrets, and considers to be in flagrant violation of international law principles, the decision of Arden to deliver Malu Terraq - a fugitive Remorra's justice and an enemy of Remorra's people - into the custody of a so-called international tribunal rather than into the hands of those he has so grievously wronged. [*Compromis*, para 41]

14. Arden's response to this note informed Remorra that "no further communication on this subject will be issued by my Government" [*Compromis*, para 43] and thus ended all positive diplomatic communication between the two States.

15. The Contents of Terraq's First Arden National Bank Accounts

16. In the week after Terraq's arrest in Arden on 1 December 1996 [compare *Compromis*, paras 29-37] a search of his hotel room revealed documents which indicated that he had control of accounts at the First Arden National Bank (FANB) containing more than US$18 million [para 36].

17. The report of the UN Panel of Experts disclosed substantial reason to believe that Terraq had appropriated approximately US$20 million in cash and other liquid assets that had passed through his hands through the procurement of munitions and supplies to support the Nylesian separatists [*Compromis*, para 21]. This finding was based upon other, more definite findings that forces under Terraq's command had seized weapons, food and other property from Remorran houses in Telfin on several occasions [paras 20-21]. Furthermore there were reports from the conflict area between April and October 1995 that forces under Terraq's control were seizing of weapons and food from Remorran houses in Telfin [paras 14 and 15].

18. The figure of US$20 million was arrived at by the Panel at least seven months *before* the discovery of the more than US$18 million in Terraq's FANB accounts - the Panel's report was released in April 1996 and the accounts were discovered after terraq's arrest in Arden on December 1, 1996 [*Compromis*, paras 20, 21 and 36]. Without being aware of Terraq's bank accounts the Panel was able to come to a figure for the proceeds of

Terraq's crimes within US$2 million of the contents of his FANB accounts - a discrepancy explicable by Terraq's post-conflict expenses. especially his escape to Arden under a false Remorran passport.

19. Furthermore, the funds had been deposited in four increments of approximately US$4.5 million at times corresponding to the most intense periods of the conflict [*Compromis*, para 36]. Uncontradicted press reports indicate that prior to the break-up of Integra Terraq never reported to the Integran Revenues Service a gross income from his hotel or any other legal source of more than US$130, 000 in any year - a total of US$1.1 million over the last decade [para 36]. Terraq was quoted in the press as claiming the money was an inheritance but reporters quickly determined that no deceased member of his family owned wealth anywhere near the amount in the accounts [para 38].

20. The region of Telfin is now a part of Remorra [*Compromis*, para 16] and thus Terraq's alleged victims are now residents of Remorra or, under the term of the 1995 Treaty [para 17] Remorran citizens if they were born in any part of what is now Remorran territory.

21. The Remorran Court Action against Terraq

22. One week after Terraq's arrest, the Remorran Minister of Home Affairs brought a civil action against him in the Remorran courts, demanding US$20 million in damages "on behalf of the class of all of those Remorran citizens and nationals injured through conduct illegal in international law during the war of liberation." On 28 December 1996 a default judgement was entered in favour of the plaintiff and the court issued a writ of attachment entitling the Minister "to seize and to appropriate assets belonging to the defendant up to the amount awarded in the judgement"[*Compromis*, para 37]. Terraq was

in Arden throughout the entirety of the court process [paras 29, 37 and 44].

23. Neither Arden nor Remorra is a party to any international agreement regarding the recognition of foreign judgements or legal instruments [*Compromis*, last unnumbered para].

Questions Presented

1. Whether the Extradition Treaty between the Former Intergra and Arden requires that Malu Terraq be extradited to Remorra forthwith.

2. Whether, under binding provisions of international law. the International Tribunal for the Former Integra has a basis in law; and whether Arden has a right to deliver a Remorran national to the custody of the international tribunal when he is accused of crimes in Remorra.

3. Whether, in the alternative, Remorra should be awarded compensatory damages equivalent to US$100 million, to be used for the establishment of a Truth and Reconciliation Commission, charged with investigating charges of violations of human rights during the Integran Conflict.

4. Whether an accounting should be provided of the funds in the First Arden National Bank to which Malu Terraq is record owner, and whether such funds, with interest, should be paid over to Remorra as its own property.

Remorra submits: first, that Arden has no right to deliver a Remorran national into the custody of the International Criminal Tribunal for the Former Integra (ICTFI), an international tribunal with no basis in law (question 2); second, that Arden is obliged to Extradite Terraq to Remorra under the 1965 Extradition Treaty between Arden and Integra ("the treaty") (question 1); third, that if Terraq is not extradited to Remorra, Arden should pay compensatory damages (question 3); and that Arden is obliged to provide an accounting of Terraq's First Arden National Bank accounts and transfer their contents to Remorra (question 4).

Regarding ICTFI, Remorra submits that, *firstly* consistent with the decisions of this Court and other international judicial bodies, United Nations Security Council Resolution 1024 (UNSCR 1024) establishing ICTFI is justiciable. *Secondly*, that it is therefore open for the Court to declare ICFTI invalid as UNSCR 1024 has breached the fundamental Charter Principle contained in Article 2.7 (there was no threat to international peace and security at the time of the resolution, nor was the situation was sufficiently urgent to justify departure from the normal means of setting up an international body, therefore there was no valid use of Chapter VII powers). *Thirdly*, the Security Council lacks competence to set up a judicial body under Chapter VII and the powers granted in UNSCR 1024 violate the principle nullum crimen sine lege. *Fourthly*, if UNSCR is invalid Remorra cannot claim that adherence to the rule of law *requires* Terraq's surrender to ICTFI. *Fifthly*, Remorra submits in the alternative, that ICTFI lacks principle jurisdiction over Terraq (as even the mandatory jurisdiction of the Former Yugoslavia Tribunal is qualified by state practice; and that in ICTFI's complementary jurisdiction, defined by analogy with the proposed International Criminal

Court, is not superior to Remorra's jurisdiction).

Regarding the treaty, Remorra submits that, *firstly* Remorra has principle jurisdiction to try its own national for offences committed on its own territory against its own citizens. *Secondly*, that Arden must acknowledge Remorra's status as a successor to the treaty, and that the treaty's terms require Terraq's summary extradition. *Thirdly*, Remorra submits in the alternative, if the treaty is not in effect that the Genocide Convention requires Terraq's extradition to Remorra.

Regarding compensatory damages, Remorra submits *firstly*, that the Court has demonstrated in the past, and has under its statute, that it jurisdiction to award the reparation claimed. *Secondly*, that liability can arise for state actions in the absence of material loss. *Thirdly*, that in the circumstances US$100million is an appropriate reparation.

Regarding Arden's bank secrecy laws, Remorra submits *firstly*, that Arden is obliged to provide an accounting of Terraq's First Arden National Bank funds and transfer them to Remorra, as Arden is obliged to return the proceeds from the war crime of pillage held within its jurisdiction to the State which best represents the victims. *Secondly*, that the funds were taken, or are proceeds of assets wrongfully taken, by Terraq from persons best represented by Remorra. *Thirdly*, that the taking of these assets was a wrongful act at international law. *Fourthly*, that Arden cannot use its domestic bank secrecy laws as a lawful defence for not fulfilling its international law obligation to return the funds.

Pleadings

A. Arden has no right to deliver a Remorran national into the custody of an international tribunal with no basis in law

Arden must extradite Terraq to Remorra, rather than surrender him to an illegally established international tribunal.

A.1 United Nations Security Council Resolution 1024 (UNSCR 1024) establishing ICTFI is justiciable

The Court's capacity to consider the legality of Security Council Resolutions was affirmed in the *Lockerbie* Case where it held that its decision did not prejudge Libya's contention that UNSCR 748 breached international law.[1] Individual judgments in the *Lockerbie* Case suggested that the Court could determine if the Security Council had exceeded its powers.[2] In the *Genocide in Bosnia* Case, Judge Lauterpacht affirmed that the Council could not act free of judicial controls.[3] The Appeals Chamber in the *Tadic* case decided that the Former Yugoslavia Tribunal could examine the alleged invalidity of its own establishment by the Security Council.[4]

A.2 Judicial review of Security Council decisions

A.2.1 UNSCR 1024 has breached Charter Article 2.7

Several judges of the Court have suggested that the Court can consider whether a UNSCR

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[1] *Aerial Incident at Lockerbie* 1992 ICJ Reports 3, 14.

[2] *Aerial Incident at Lockerbie* 1992 ICJ Reports 3, 32 per Judge Shahabuddeen, 44 per Judge Bedjaoui.

[3] *Genocide in Bosnia Case* 1993 ICJ Reports 325, 439 per Judge Lauterpacht.

[4] *The Prosecutor v Dusko Tadic* 35 ILM 32 (1996) 41.

infringes the only limitations upon the Council's powers,[5] which are: "the fundamental principles and purposes found in Chapter I of the Charter [Article 24.2]"[6] UNSCR 1024 has infringed Article 2.7:

> Nothing ... shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ... but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Article 2.7 should not be construed as giving the Council discretion to circumvent its manifest intent. Several judges of the Court have said that the Council's action under its Article 24 responsibility for international peace and security must be based on a genuine threat to international peace and security, "not a mere figment or pretext".[7] The Council's duty to observe the distinction between inter-State and internal conflicts was acknowledged by the former Secretary-General in his *Agenda for Peace.*[8]

UNSCR 1024 infringes Article 2.7 for two reasons. First, setting up ICTFI is an intervention in Remorra's domestic jurisdiction over unlawful acts committed on its territory by its own nationals (see A.2.1), for which they had been charged by the Government of the former Integra and which the Government of Remorra was duly prosecuting [Compromis

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[5] *Certain Expenses Advisory Opinion* 1962 ICJ Reports 151, 196-7 per Judge Spender, 217-8 per Judge Morelli, 288-90 per Judge Bustamente; *Namibia Advisory Opinion* 1971 ICJ Reports 16, 292-4 per Judge Fitzmaurice; *Genocide in Bosnia Case* 1993 ICJ Reports 325, 440 per Judge Lauterpacht.

[6] *Namibia Advisory Opinion* 1971 ICJ Reports 16, 52.

[7] *Namibia Advisory Opinion* 1971 ICJ Reports 16, 293-4 per Judge Fitzmaurice, 340-1 per Judge Gros; *Aerial Incident at Lockerbie* 1992 ICJ Reports 3, 43 per Judge Bedjaoui.

[8] 'An Agenda for Peace', Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, UN Document A/47/277 - S/2411, 17 June 1992, paragraph 27.

paragraphs 14 and 25]. Secondly, the Tribunal was improperly set up as a Chapter VII measure because: (a) the Council did not make the essential finding that the situation in Nylesia and Remorra constituted a threat to international peace and security; and (b) there was no situation of urgency to justify departure from the normal means of setting up an international body by treaty.

(a) There was no threat to international peace and security

To justify Chapter VII action the Council must make the "necessary determinations" [9] of the existence of "a threat to ... [or] breach of the peace or act of aggression" [Article 39]. There is no evidence the Council did so regarding UNSCR 1024.

(b) The situation was not sufficiently urgent to justify departure from the normal means of setting up an international body

The normal process for establishing such a body would be through the process of negotiating a treaty.[10] The rationale for establishing the Former Yugoslavia Tribunal under Chapter VII was the need (indicated in UNSCR 808) for swift establishment of a tribunal, given the *continuing* violations of international humanitarian law in the Former Yugoslavia. Similarly, the International Tribunal for Rwanda was established under Chapter VII due to the *continuing* humanitarian emergency and unresolved conflict and the need to put an end to crimes against international humanitarian law (UNSCR 955). By contrast, there was no reference in the Report of the Panel of Experts to continuing violations in the former Integra [*Compromis* paragraphs 20-21].

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[9] *Namibia Advisory Opinion* 1971 ICJ Reports 16, 294 per Judge Fitzmaurice.

[10] Report of the Secretary-General on proposed Former Yugoslavia Tribunal 3 May 1993, UN Document S/25704.

A.2.2 The Security Council lacks competence to set up a judicial body using Chapter VII

Though the Appeals Chamber in the *Tadic* concluded that establishing a judicial body was within the Council's Article 41 powers[11], the creation of the Former Yugoslavia Tribunal and the International Tribunal for Rwanda have not established that judicial bodies may be established under Article 41. The establishment of the Former Yugoslavia Tribunal was "the most far-reaching use of Article 41".[12] There is no consensus amongst jurists that Article 41 can establish a judicial body: the International Law Commission itself cannot reach a consensus on the issue, and *expressly* refrains from dealing with it in its Draft Statute for an International Criminal Court. [13]

A.2.3 UNSCR 1024 violates the principle nullum crimen sine lege

Terraq has been charged with exceptionally serious crimes [Compromis paragraphs 14, 32], now within Remorra's jurisdiction (see A.2.1). The Panel of Experts' report, as adopted by the Council in UNSCR 1024, was wrong in international law to recommend that ICTFI receive a mandate to prosecute any and all "violations of law" [Compromis paragraph 20]. This provision is contrary to the precedent of the Former Yugoslavia, where the Council accepted the principle *nullum crimen sine lege* (no crime without law), deciding that the Former Yugoslavia Tribunal should prosecute only offences which were customary international law.[14] It has been explained that:

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[11] *The Prosecutor v Dusko Tadic* 35 ILM (1996) 32, 44-45.

[12] B Simma (ed), *The Charter of the United Nations: A Commentary* (1994) 626.

[13] Report of the International Law Commission on the work of its forty-sixth session, UN Document A/49/10, 44.

[14] Secretary-General's Report on proposed Former Yugoslavia Tribunal 3 May 1993, UN

> The fact that the Security Council is not a legislative body ... [effectively prevents it] creating a new international law binding upon parties to the conflict.[15]

The same approach was followed for the International Tribunal for Rwanda.[16] By legislating plenary competence for ICTFI the Council violated *nullum crimen sine lege.*

A.3 Is UNSCR 1024 binding on UN members?

That the Council's mandate for ICTFI was therefore *ultra vires* does not *necessarily* indicate that members of the United Nations were not bound to carry out the terms of UNSCR 1024.[17] However, should the Court decide that UNSCR 1024 was *ultra vires*, it would be untenable and illogical for Arden to claim that the preservation of the rule of law *requires* that Malu Terraq stand trial before ICTFI [Compromis paragraph 34].

A.4 In the alternative, ICTFI lacks principle jurisdiction over Terraq

Even if it were found that ICTFI was legally established, Remorra submits that Terraq should be extradited to Remorra, because: (a) even the primacy of the Former Yugoslavia Tribunal's jurisdiction is qualified by state practice; (b) as ICTFI can claim no superior jurisdiction Arden wrongfully asserts an obligation to deliver Terraq to ICTFI.

(a) Even mandatory jurisdiction is qualified by state practice

Regarding surrender of persons to the Former Yugoslavia Tribunal, despite the provisions

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Document S/25704, paragraphs 9-11, 33-49; UNSCR 827, paragraph 2.

[15] D Shraga and R Zacklin (the United Nations Office of Legal Affairs) "The International Criminal Tribunal for the Former Yugoslavia" (1994) 5 *European Journal of International Law* 360, 363.

[16] Letter of Secretary-General to President of Security Council 4 April 1994, UN Document S/1994/1125, 2; UNSCR 955, para 1.

[17] *Certain Expenses Advisory Opinion* 1962 ICJ Reports 151, 168.

that it should have primary jurisdiction over that of national courts (Article 9), and that all States have a duty to surrender persons for trial (Article 29),[18] most countries legislating their domestic obligations under UNSCR 827 have provided for a government or judicial discretion in deciding whether to surrender such fugitives.[19]

State practice allows for "rights of refusal under national law" and the proper approach is to legislate "a power to refuse where it is very clear that no purpose would be served in surrendering the person to the Tribunal."[20] A survey of European countries' responses to surrendering persons to the Tribunal concluded that there are differing approaches to norms of international humanitarian law and that they "feel competent to determine for themselves to what extent they abide by these rules".[21]

(b) ICTFI's lack of superior jurisdiction by analogy with the proposed International Criminal Court

The statement in UNSCR 1024 indicating that ICTFI's jurisdiction is "complementary to that of national criminal courts, and shall be interpreted in a manner not inconsistent with pre-existing obligations under treaties and customary international law" [Compromis paragraph 22] imply that bilateral extradition requests should be considered before any

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[18] Report of the Secretary-General on proposed Former Yugoslavia Tribunal 3 May 1993 (Annex) UN Document S/25704.

[19] Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on International War Crimes Tribunal Bill (1994)* June 1994, 8-9.

[20] Professor I Shearer, Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs (Parliament of Australia), *Advisory Report on International War Crimes Tribunal Bill (1994)*, June 1994, 10.

[21] A Marschik, "The Politics of Prosecution" in T L H McCormack and G J Simpson (eds) *The Law of War Crimes: National and International Approaches* (1994) 65, 100-1.

request for surrender to ICTFI is made. In this respect, ICTFI's jurisdiction is similar to that of the proposed International Criminal Court. The preamble to the ICC Draft Statute states that the court "is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective". The commentary states the court would be set up:

> "as a body which will *complement* existing national jurisdictions and ... procedures for international judicial cooperation in criminal matters and which *is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition* and other forms of judicial assistance *under existing arrangements.*(emphasis added)[22]

This can be taken as an expert statement of the meaning of complementary jurisdiction.

B. Arden is obliged to Extradite Terraq to Remorra

Remorra's principle submissions are that: (1) Remorra has primary jurisdiction to try Terraq; (2) Arden must acknowledge Remorra's status as a successor to the treaty, and the treaty requires Terraq's summary extradition. Remorra submits in the alternative, if the treaty is not in effect: (3) that the Genocide Convention requires Terraq's extradition.

B.1 Remorra has jurisdiction over Terraq's crimes

Remorra has all five recognised heads of jurisdiction over Terraq's alleged crimes: nationality, territorial, protective principle, passive personality (though this shall not be argued here) and universal.[23] Remorra's ability to claim nationality and territorial jurisdiction

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[22] Report of the International Law Commission, UN Document A/49/10, 27.

[23] See generally the Harvard Draft Convention on Jurisdiction With Respect to Crime 29 AJIL 435 (Supplement 1935); Martin Dixon, *Textbook on International Law*, 1990, 74-79; I Brownlie, *Principles of Public International Law*, 4th ed (1990) 300-5; Geoff Gilbert, *Aspects of Extradition Law*, 1991, 39-47.

are closely related. Every state has the right to define which persons shall be its citizens.[24] In respect of its citizens, a state may by virtue of its sovereignty prescribe conduct as criminal.[25] It may even prosecute unpunished crimes committed in what is now its territory before it held sovereignty over that territory,[26] even where the previous sovereign over that territory has not been extinguished.[27] Therefore, a sovereign may engage in retroactive prosecution or legislation in order to punish crimes committed on what is now its territory, provided such acts were crimes at either municipal or international law at the time, and does not impose harsher penalties than were then available (thus not criminalising previously innocent conduct in violation of the *ex post facto* or *nullum crimen sine lege* principles).[28] Hence, Remorra may prosecute Terraq for unpunished crimes committed on what is now its territory. (Offences under the Geneva and Genocide Conventions are discussed below.) Further, the former Integra had capital punishment for "aggravated murder" and "serious

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[24] *Nottebohm Case (Liechtenstein v Guatamala) (Second Phase)* (1959) 22 ILR 349, 357.

[25] On the controversy on the extent to which municipal law is subject to 'higher' rules of international law, see: M C Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1992, 433; Ian Brownlie, *Principles of Public International Law*, 4th ed (1990) 32-35.

[26] See: *Katz-Cohen v Attorney-General of Israel* 16 ILR 68, 70 ff; *Arar v Governor of Tel Mond Prison* 19 ILR 141, 142; *In re Schwend* [1949] Annual Digest 81, 81-2.

[27] *In re Schwend* [1949] Annual Digest 81, 81-2.

[28] *Eichmann v Attorney-General of Israel* 36 ILR 5, 287 and 289-97; Irene Nemes, "Punishing Nazi War Criminals in Australia: Issues of Law and Morality", 4 *Current Issues in Criminal Justice* (1992) 141, 152-3; Theresa M Beiner, "Due Process for All? Due Process, the Eight Amendment and Nazi War Criminals", 80 *The Journal of Criminal Law and Criminology*, 293, 355; A. T. Richardson, "Legislation: War Crimes Act 1991", 55 *The Modern Law Review* 73, 76-78; Sarah Cornelius, "Fair trials and effective policing", *New Law Journal* (1995) 1232, 1232-3; these principles are also embodied in Article 15, International Covenant on Civil and Political Rights, 78 UNTS 277; and in Article 6(2)(c), Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) 1125 UNTS 608.

crimes against national security" [*Clarifications*, para 8], so the fact that Terraq faces capital charges for murder, sedition and treason does not violate the cited principles.

It is also well established that a state may assert, under the protective principle, jurisdiction over crimes which threaten its vital interests.[29] Terraq committed crimes against ethnic Remoras as a class [Compromis paragraphs 11, 12, 15, 20 and 21], and as the state which is home to most Remorran people (see the Statement of Facts, paragraphs 5 and 20), Remorra may claim protective principle jurisdiction to prosecute him. The supreme court of Israel held that it had such jurisdiction in the *Eichmann* case[30] to prosecute crimes committed by a non-national, on foreign soil, before Israel's creation. *A fortiori*, Remorra must thus have jurisdiction to prosecute crimes of such a kind committed by someone now its national, which occurred on territory it now occupies. Further, as in the *Eichmann* case, Remorra is the *forum conveniens* for Terraq's trial as all witnesses to his crimes are to be found there (along with any other evidence).

Further, in so far Terraq's acts also constituted crimes against humanity or the law of nations, Remorra may claim (as could any state) universal jurisdiction to prosecute him on behalf of "all nations"[31], though as *forum conveniens* it has the strongest claim to do so. Such prosecution could be carried out under the Genocide and Geneva Conventions (which give rise to individual liability for their violation) and were specifically in force for the former

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[29] Geoff Gilbert, *Aspects of Extradition Law*, 1991, p.45; Iain Cameron, *The Protective Principle of International Criminal Jurisdiction*, 1994, 2-4 ; *Eichmann v Attorney-General of Israel* 36 ILR 5, 54-55, 304.

[30] *Eichmann v Attorney-General of Israel* 36 ILR 5.

[31] *Demjanjuk v Petrovsky* (6th Cir., 1985) 776 F 2d 571, 583; and cf. *Eichmann v Attorney-General of Israel* 36 ILR 5, 304.

Integra; and while the principles of the Genocide convention are binding upon Remorra, Arden has specifically endorsed the limited principle of territorial jurisdiction it contains.[32]

B.2 Remorra is a successor to the 1965 Extradition Treaty between Arden and the Former Integra

The Vienna Convention on the Law of Treaties' expresses its subject matter as "treaties between states"[33], and states a belief in "the development of friendly relations and the achievement of co-operation among nations."[34] Giving these words their "ordinary meaning", interpreting them in the light of the treaty's "object and purpose"[35], it would appear that the treaty must govern the conduct of all parties to it *in respect of all their treaty dealings*. The Convention must be intended to confer rights upon third parties, and gives rise to an automatic presumption that third parties will accept such rights.[36] To interpret the rules it contains as applying only amongst contracting parties would defeat its object of furthering international cooperation.

Arden is bound by Article 18 of the Vienna Convention on the Law of Treaties to "refrain from acts which would defeat the object and purpose of a treaty" which it has signed. As

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[32]Article 4, Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 278; Article 6, Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) 1125 UNTS 608; *Reservations to the Convention on Genocide, Advisory Opinion* 1951 ICJ Reports 15, 23; M C Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1992, 520; *Eichmann v Attorney-General of Israel* 36 ILR 5, 303-4.

[33] Article 1, Vienna Convention on the Law of Treaties, 1237 UNTS 449.

[34] Preamble to Vienna Convention on the Law of Treaties, 1237 UNTS 449.

[35] Article 31, Vienna Convention on the Law of Treaties, 1237 UNTS 449.

[36] Article 36, Vienna Convention on the Law of Treaties, 1237 UNTS 449.

Arden has signed the Vienna Convention on Succession of States in Respect of Treaties[37] it is obliged to acknowledge Remorra's successor status to the treaty between Arden and the former Integra (Remorra's succession occurring after Arden signed the Convention). Failure to recognise succession would defeat its essential purpose by preventing the recognition of any successor states, *prima facie* non-parties.[38] Succession here follows from Article 34 of the Vienna Convention on Succession (drawing upon international law principles[39]) which, anticipating the present circumstances, provides that:

> 1. When a part or parts of the territory of a state separate to form one or more states, whether or not the predecessor state continues to exist:
>
> (a) any treaty in force at the date of succession of states in respect to the entire territory of the predecessor state continues in respect of each successor so formed . . .[40]

Extradition treaties, relating to criminal jurisdiction, are clearly within Article 34's scope. The only exceptions are where:

> (a) the states concerned otherwise agree; or
>
> (b) it appears from the treaty or is otherwise established that application of the treaty in regard to the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

The burden lies upon Arden to show such conditions exist in order to denounce Remorra's succession. The application of the treaty to Remorra is compatible with the "object and

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[37] Vienna Convention on Succession of States in respect of Treaties, as found in Australian Department of Foreign Affairs, Select Documents on International Affairs (1978) No. 26, 133. (Not yet in force).

[38] Ian Brownlie, *Principles of Public International Law*, 4th ed (1990) 668.

[39] *Opinion No.1 (Conference on Yugoslavia, Arbitration Commission)* 92 ILR 162, 165.

[40] Article 34, Vienna Convention on Succession of States in respect of Treaties, as found in Australian Department of Foreign Affairs, Select Documents on International Affairs (1978) No. 26, 133

purpose" of extradition, which is mutual assistance in criminal matters. Further, succession does not "radically change the conditions for its operation" as the treaty did not provide for dual criminality through a list of offences for which extradition could be requested. Any substantial differences between the former Integra's criminal law and that of Remorra do not affect the operation of the treaty, as Article 2 provides: "extradition shall be granted for an offence . . . punishable under the laws of both states by . . . detention for one year, or by the death penalty." [*Clarifications*, para 18] These are its fundamental conditions for operation: mutual assistance in criminal matters where both States recognise a serious offence, and they remain the same.

B.3 Operation of the Treaty requires Terraq's extradition to Remorra

The treaty requires Terraq's extradition to Remorra as Article 2 (see above) uses the language of obligation, saying "extradition shall be granted" if the other criteria are met. Arden must recognise, amongst the charges against Terraq, murder at least as extraditable. Thus, discretion only arises if the requested fugitive is a national of the requested state (Article 4), or if the offence is "of a political character" or if the fugitive "proves that the request for his extradition has in fact been made with a view to try or to punish him for [such] an offence" (Article 7(c)). [*Clarifications*, para 18]

Terraq has not, on the facts in the Compromis, proved that Remorra's intentions are to try him for offences other than those specified. To refuse extradition Arden must show Terraq has been requested for offences "of a political character". The offences in the request do not constitute political offences, but do satisfy the dual criminality requirement for mandatory extradition.

The requirements of dual criminality are met provided that the acts in question are criminal in both jurisdictions: the actions forming the basis of the charge are far more important than their formal definition in each municipal criminal system.[41] Thus the mere fact that *inter alia* Terraq has been charged with treason and sedition (offences commonly understood to be "inherently political"[42]) is irrelevant provided that the acts cited are criminal in both jurisdictions. Here his "sedition" (attacks upon the state) are better understood as crimes against society: his incitement to genocide against an ethnicity he associated with the ruling class being the prime example [Compromis, paragraphs 10-12]. Though hereafter Remorra refers to "acts" of Terraq's, this should not be taken to presume his guilt at criminal law but merely as indicating the *prima facie* case against him. Accordingly, Remorra submits that Terraq's NPA activities were criminal acts under common Article 3 of the Geneva Conventions and the Genocide Convention.[43] (It is accepted that there is universal jurisdiction to prosecute such war crimes.[44]) Under Common Article 3 in the case of non-

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[41] *Oen Yin Choy v Robinson* 104 ILR 43, 44, 47; *R v Governor of Pentonville Prison* [1980] 1 All ER 701, 710; Gilbert, *Aspects of Extradition Law*, 1991, p.52.

[42] Christopher L. Blakesly, *Terrorism, Drugs, International Law and the Protection of Human Liberty: A comparative Study of International Law, Its Nature, Role, and Impact I Matters of Terrorism , Drug Trafficking, War and Extradition*, 1992, 78; Gilbert, *Aspects of Extradition Law*, 1991, 118.

[43] Article 3, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (1949) 75 UNTS 31; Article 3, Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (1949) 75 UNTS 85; Article 3, Geneva Convention Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135; Article 3, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287; Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 278; *Reservations to the Convention on Genocide, Advisory Opinion* 1951 ICJ Reports 15, 23; and cf. Geoff Gilbert, *Aspects of Extradition Law*, 1991, 46.

[44] M C Bassiouni and Edward M Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or*

international conflicts certain minimum provisions apply. Prohibited acts against persons "taking no active part in the hostilities" in Article 3(1) include: (a) "murder ... cruel treatment and torture"; (c) "humiliating and degrading treatment"; and (d) the "carrying out of executions without previous judgement pronounced by a regularly constituted court." Article 4(2) of the Second Additional Protocol[45] re-states these crimes and adds "(g) Pillage". Such crimes against non-combatant as Terraq has committed [Compromis paragraphs 11, 12, 15, 20 and 21], cannot be recognised as "political offences" (see below). Specifically, the political offence exemption is excluded for any crimes under the Genocide convention.[46] The Swiss approach to political offences requires that the offences were committed in the course of an armed struggle against the government; bore close and direct relation to the political object in view, and the harm inflicted was proportionate to this object.[47] In the case of murder, it must be the only means to achieve the political end.[48] Here, Terraq's incitement of the murder of innocents, and acts of murder [Compromis, paragraphs 10-12, 21], were not proportionate to the object of toppling an ethnically Remorran ruling class, but were proportionate to a genocidal intent. (This Swiss approach is favoured by

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Prosecution in International Law, 1995, 44; Christopher L. Blakesly, *Terrorism. Drugs, International Law and the Protection of Human Liberty: A comparative Study of International, Its Nature, Role, and Impact In Matters of Terrorism , Drug Trafficking, War and Extradition*, 1992, 140, see n.167.

[45] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) 1125 UNTS 608.

[46] Article 7, Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 278.

[47] *Della Savia v Ministere Publique Federal* 72 ILR 618, 625.

[48] *Ktir v Ministere Publique Federal* 34 ILR 143, 145.

international jurists.[49]) Similarly, the US approach requires, *inter alia*, that the acts in question would not be punishable in the context of a declared war.[50] Here, Terraq's actions are clearly so punishable. Thus it is said, "crimes aimed at civilians rather than the military opposition" constitute an humanitarian exception to the political offence doctrine.[51]

B.4 In the alternative, the Genocide Convention requires Terraq's extradition to Remorra

Arden is also obliged by Article 6 of the Genocide to extradite Terraq to either the "State in ... which the act was committed" or an "international penal tribunal" with jurisdiction. As at A.1 above, Remorra submits that ICTFI is invalidly constituted or lacks principle jurisdiction, thus requiring Terraq's extradition to Remorra. Even if ICTFI had a competing source of jurisdiction, Terraq should be extradited to Remorra as the *forum conveniens*. It would defeat effective prosecution of the universally recognised prohibition on genocide to deny Terraq's extradition to Remorra, merely because Remorra has not yet notified succession to the Geneva Convention under Article 17 of the Vienna Convention on Succession. The only acceptable objection would be if Arden's domestic law prohibits such

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[49] Geoff Gilbert, *Aspects of Extradition Law*, 1991, 46; cf. Christopher L. Blakesly, *Terrorism, Drugs, International Law and the Protection of Human Liberty: A comparative Study of International, Its Nature, Role, and Impact In Matters of Terrorism , Drug Trafficking, War and Extradition*, 1992, 266.

[50] *Extradition of Atta; Ahmed v Wigen*, 104 ILR 52, 55.

[51] Christopher L. Blakesly, *Terrorism, Drugs, International Law and the Protection of Human Liberty: A comparative Study of International, Its Nature, Role, and Impact I Matters of Terrorism , Drug Trafficking, War and Extradition*, 1992, 270; *cf Della Savia v Ministere Publique Federal* 72 ILR 618, 626; Article 13(2), Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) 1125 UNTS 608.

extradition as a matter of comity.[52]

C. If Terraq is not extradited to Remorra, Arden should pay compensatory damages

Arden has breached its international legal obligations either under the 1965 Extradition Treaty [*Compromis* para 32], or such international legal obligations as require Terraq's extradition to Remorra as the *forum conveniens* in preference to ICTFI.[53] On the basis of such a breach, Remorra claims US$100 million to be used for the establishment of a Truth and Reconciliation Commission, charged with investigating violations of human rights during the Integran Conflict.

C.1 The Court has Jurisdiction to award the Reparation Claimed

This Court has jurisdiction concerning the "nature or extent of the reparation to be made for the breach of an international obligation."[54] Thus it has jurisdiction to award compensatory remedies[55] as an alternative to, or "in combination"[56] with, *restitutio in integrum*.

C.2 Liability Arises in the Absence of Material Loss

Breaching international law obligations need not result in material loss by the aggrieved

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[52] Article 7, Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 278; M C Bassiouni and Edward M Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecution in International Law*, 1995, 123.

[53] *Yearbook of the ILC*, 1976, vol II, Part 2, 96 para 2.

[54] Art 36 (2)(d) Statute of the International Court of Justice.

[55] See: *Factory at Chorzow (Claim for Indemnity) Case (Germany v Poland)*, PCIJ Ser A (1928) No 17, 27-28.

[56] Article 6 bis.(1) Draft Articles of Part 2 of the ILC Draft on State Responsibility, *Yearbook of the ILC*, 1993, Vol II, Part 2, 54, 58.

State to give rise to liability and as such "[u]unlawful action against non-material interests, such as acts affecting the honour, dignity or prestige of a State, entitles the victim State to receive adequate reparation, even if those acts have not resulted in pecuniary or material loss ..."[57]

C.3 US$100million is an appropriate reparation

The Court should consider Arden's "gross infringement of the rights of the injured State"[58] with reference to their "flagrant violation of international law principles" [Compromis, para 41], subsequent to two formal diplomatic letters of protest [paras 35 and 41], and award reparation based on the substantial moral damage[59] caused to Remorra. This should include consideration that if Terraq is returned it will be more likely that Remorra can recover the US$20 million in damages awarded against Terraq in the Remorran civil action [para 37] (see above re the judgement) and punitive damages in the order of US$80 million as Arden's actions do not constitute "purely a technical breach of a treaty, but a breach causing deep offence to the honour, dignity and prestige of the State."[60] Thus the full amount of US$100million [Remorran Claim 3] is appropriate compensation.

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[57] The *Rainbow Warrior Arbitration* (France-New Zealand) 82 ILR 569; see also Article 10 (1) & (2) ILC Draft articles of Part 2 of the Draft on State Responsibility, *Yearbook of the ILC*, 1993, Vol II, Part 2, 76-81.

[58] Article 10(2)(c) Draft articles of Part 2 of the Draft on State Responsibility, *Yearbook of the ILC*, 1993, Vol II, Part 2, 76-81.

[59] Article 10(1) Draft articles of Part 2 of the Draft on State Responsibility, *Yearbook of the ILC*, 1993, Vol II, Part 2, 76-81; See also The *Rainbow Warrior Arbitration* (France-New Zealand) 82 ILR 569.

[60]The *Rainbow Warrior Arbitration* (France-New Zealand) 82 ILR, 569.

D. Arden is obliged to provide an accounting of Terraq's First Arden National Bank funds and transfer them to Remorra

The Applicant asks for an accounting of the funds in the First Arden National Bank (FANB) of which Terraq is the record owner and the transfer of such funds, with interest, to Remorra. The Court should do so on the following grounds: (1) Arden is obliged to return the proceeds from the war crime of pillage held within its jurisdiction to the State which best represents the victims; (2) the funds were taken, or are proceeds of assets wrongfully taken, by Terraq from persons best represented by Remorra; (3) The taking of these assets was a wrongful act at international law (pillage); (4) Arden cannot use its domestic bank secrecy laws as a lawful defence for not fulfilling its international law obligation to return the funds.

Even if Arden was under a general international obligation to recognise foreign judgements, Remorra accepts that the Remorran judgement against Terraq is unenforceable as he was not in Remorra during the court process and has not submitted to the court's jurisdiction.[61]

D.1 Arden is obliged to return the proceeds of war crimes held within its jurisdiction

There is a rule of customary international law[62] that a State discovering assets held within its territorial jurisdiction were taken from their rightful owners as a result of war crimes is

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[61] For example *Foreign Judgement (Reciprocal Enforcement) Act 1973* (NSW) s8(1)(a)(ii) (Australia); Articles 27 (2) and 28 of the Brussels Convention 29 ILM (1990) 1413 (Europe); Uniform Foreign Country Money-Judgements Recognition (USA) Act, s4(a)(2) 13 ULA 261 (1986); *Oppenheimer v Cattermole*, [1976] AC 278 (UK). See generally Bradford A Caffrey *Enforcement of Foreign Judgements* (1985); Charles Platto and William G Horton (eds) *Enforcement of Foreign Judgements Worldwide* (2nd ed) (1993). For a good discussion of the Australian and (British Commonwealth) common law position see P E Nygh, *Conflict of Laws in Australia* (6th ed) (1995) 137-145.

[62] Regarding the formation of customary international see *North Sea Continental Shelf cases*, 1969 ICJ Rep 3, 39; *Nicaragua v United States* 1986 ICJ Rep 14, 97-8.

obliged to: (1) transfer the looted assets to their rightful owners or the State which best represents them; or (2) if direct restitution is impractical, to use the assets for a purpose which benefits the rightful owners or to transfer them to a State or an international body which will do so.

The rule is evidenced primarily by state practice concerning: (a) the recovery of Nazi German funds (including the proceeds of war crimes) from neutral States directly after the Second World War; and by (b) international co-operative action regarding money laundering.

(a) Recovery from the neutral States of assets looted by Nazi Germany

During and after the Second World War the Allied powers made several statements - supported by eminent public international lawyers - declaring the Axis powers' transfer of persons' property in the occupied territories to be invalid at international law (even when transferred to innocent third parties) and calling upon the neutral States to prevent the disposal or transfer within their territories of such looted property.[63] Agreements were entered into with defeated States and neutral States to recover looted property, or provide compensation.[64] Because of the difficulty in tracing the original owners, funds were often

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[63] Declaration Regarding Forced Transfers of Property in Enemy Occupied Territory, London, 5 January 1943 (US Department of State Bulletin, Vol VIII, No 185, 9 January 1943, at 21); United Nations Monetary and Financial Conference, 1-22 July 1944, Resolution No VI, see *Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, July 1-22, 1944* (1950) Vol I, 939-941; London International Law Conference (10-12 July 1943) Article 7, see W R Bischop, "London International Law Conference, 1943" 38 AJIL (1944) 291, especially 292. See also Inter-American Conference on the Problems of War and Peace, Mexico City, March 1945, Resolution 29 [US Department of State Bulletin (1943) No 11, 383]. See generally L J Simpson, "The Liquidation of German Assets in Neutral Countries" 34 BYIL (1958) 374, 375; Issa Nakleh, *Encyclopedia of the Palestine Problem* (1991) at 924-6.

[64] Paris Agreements on Reparation from Germany, on the Establishment of the Inter-Allied Reparations Agency and on the Restitution of Monetary Gold, 14 January 1946, Part I, Art 6

used to benefit refugees and Stateless persons, a class which largely coincided with the victims of Axis looting.[65] The neutral governments co-operated with these efforts (with the exception of Argentina).[66] The Swiss claim that it paid voluntarily, rather than subject to a legal obligation, is contrary to the recent discovery that Switzerland entered a secret treaty with Poland to recover compensation for assets looted from Swiss nationals living in Poland.[67]

Recent practice supports the rule's existence. In 1996 Switzerland legislated for an investigation, bypassing their strict bank secrecy laws, of assets deposited in Switzerland by the Nazi government, and established in 1997 a Holocaust survivor's fund with money from

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(c) 956 (UKTS 1947, Cmd 7173); Liquidation of German Property in Switzerland, 25 May 1946 (13 UST 1118). See generally Deltev F Vagts, "Editorial Comment: Switzerland, International Law and World War II" 91 (3) AJIL (1997) 466, 473; L J Simpson, "The Liquidation of German Assets in Neutral Countries" 34 BYIL (1958) 374, 375.

[65] For example see Liquidation of German Property in Switzerland, 25 May 1946 (13 UST 1118); Deltev F Vagts, "Editorial Comment: Switzerland, International Law and World War II" 91 (3) AJIL (1997) 466, 473.

[66] US Departments of State and Commerce, *US and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II* (1997) available online at the home page of the United States Holocaust Memorial Museum at [www.ushmm.org/assets/state/], see especially the "Report Summary" [www.ushmm.org/assets/state/report.htm] and Chapter VII, "Allied Negotiations with Other Neutral Countries" [www.ushmm.org/assets/state/six.htm].

[67] Deltev F Vagts, "Editorial Comment: Switzerland, International Law and World War II" 91 (3) AJIL (1997) 466, 473-4. On the Swiss denial of liability generally see L J Simpson, "Liquidation of German Assets in Neutral Countries" (1958) 34 BYIL 374, 377 and US Departments of State and Commerce, *US and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II* (1997) available online from the home page of the United States Holocaust Memorial Museum at [www.ushmm.org/assets/state/], see especially the "Report Summary" at [www.ushmm.org/assets/state/report.htm] and Chapter IV, "The Allied-Swiss Negotiations at Washington, March-May 1946" at [www.ushmm.org/assets/state/four.htm].

dormant wartime bank accounts.[68] In 1996 Argentina's President announced an investigation of his country's wartime conduct.[69]

(b) International conventions with respect to money laundering

Over the last 40 years a body of state practice has developed of international co-operation in criminal matters to combat the "laundering" of criminal proceeds.[70] The recommendations of the Financial Action Task Force (FATF), convened in Paris in July 1989, have been accepted

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[68] Charles Poncet (ed) "Switzerland: Decree on the Legal Investigation of the Assets Deposited in Switzerland after the Advent of the National-Socialist Regime and Decree on Special Fund for Needy Victims of the Holocaust" 36 ILM 1272 (1997); "Swiss Federal Banking Commission - Independent Committee of Eminent Persons - Swiss Bankers Association: Statement on Comprehensive Claims Resolution Process for Dormant accounts in Swiss Banks dating for prior to the end of World War II and Announcement on Claims Resolution Process" 36 ILM (1997) 1379.

[69] American Public Broadcasting Corporation, "A Chronology of Events Surrounding the Lost assets of Victims of the Nazis" available online at the American PBS home page (as at 22 January 1998) at [www2.pbs.org/wgbh/pages/frontline/shows/nazis/etc/cron.html]. For the admissibility of media reports of state practice which is public knowledge, see *USA v Iran* (the "*Hostages Case*") 1980 ICJ Rep 3, especially 9-10 (paras 12 and 13) and *Nicaragua v United States* 1986 ICJ Rep 1, especially 50, 52-53, 80 and 87 (paras 84, 89, 92, 146, 163-4); Keith Highet, "Evidence, the Court and the Nicaragua Case" 81 AJIL (1987) 1, 39-40.

[70] European Convention on Mutual assistance in Criminal Matters 1959, Strasbourg, 20 April 1959 (European Treaty Series, No 30); Single Convention on Narcotic Drugs 1961 as amended by the 1972 Protocol (UN Treaty Series Vol 976, No 14151 at 1) and the UN Convention on against Illicit Traffic in Narcotic Drugs and Psychotropic Substances at Vienna in 1988 (UN document E/CONF 82/15); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime 1990 detailed in the Attorney-General's Department (Commonwealth of Australia) *Review of Development in International Trade Law* (1992) 13-14 and "International Economic Law" 14 *Aus Yearbook of International Law* (1992) 461, 483; See generally George J Kriz, "International Co-operation to Combat Money Laundering: The Nature and Role of Mutual Assistance Treaties" 18 *Commonwealth Law Bulletin* (1992) 723, 726-9; Jeffrey M Diamond, "Foreign Bank Secret and the Evasion of United States Securities Laws" 9 *New York Journal of International Law and Politics* (1976) 417; Christopher J Kent, "The Canadian and International War Against Money Laundering: Legal Perspectives" 35 *Criminal Law Quarterly* (1992) 21, 40-46; Brent Fisse "Money laundering, Regulatory Strategy and Internal Corporate Control" 6(2) *Current Issues in Criminal Justice* (1994) 177.

by all Organisation for Economic Cooperation and Development (OECD) members and by major financial centers such as Singapore and Hong Kong.[71] These treaties and international recommendations call upon States to bypass their domestic bank secrecy laws in cooperation with other States and combat crime by attacking its proceeds. Switzerland, which like Arden has strict bank secrecy laws, has entered into such a treaty with the United States.[72]

This body of co-operative state practice has been motivated by the realisation that crime is becoming an international enterprise of international concern.[73] If there is an emerging customary norm of international cooperation with respect to the proceeds of crimes which, are becoming issues of international law enforcement; then, *a fortiori*, there is a customary norm of international cooperation with respect to crimes, especially war crimes, which are matters of international concern *by definition*, especially given state practice with respect to German war crimes. Combined with state practice regarding the Second World War, bank secrecy laws should be no obstacle to recovering the proceeds of war crimes.

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[71] Commonwealth of Australia, Attorney-General's Department, *Review of Development in International Trade Law* (1992) 13-14; "International Economic Law" 14 *Aus Yearbook of International Law* (1992) 461, 483.

[72] Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland; see Jeffrey M Diamond, "Foreign Bank Secret and the Evasion of United States Securities Laws", 9 *New York Journal of International Law and Politics* (1976) 417, 420, 437-442; On Swiss bank secrecy generally see Christopher J Kent "The Canadian and International War Against Money Laundering: Legal Perspectives" 35 *Criminal Law Quarterly* (1992) 21, 40-46.

[73] See for example George J Kriz, "International Co-operation to Combat Money Laundering: The Nature and Role of Mutual Assistance Treaties" 18 *Commonwealth Law Bulletin* (1992) 723 at 724-6.

D.2 The funds are the proceeds of assets taken from persons best represented by Remorra

The Court is able to draw inferences from the agreed facts in the *Compromis* when making findings of fact.[74] As outlined in the Applicant's Statement of Facts, there is a clear implication from the *Compromis* that the contents of Terraq's accounts were looted from ethnic Remorrans living in Telfin and are thus the proceeds of his war crimes [seethe "Statement of Facts" above, paras 15-20]. Most importantly, *seven months* before the contents of Terraq's FANB accounts were known, the Panel of Experts reached a figure for the proceeds of his crimes (US$20 million) within US$2 million of the contents of his accounts: a discrepancy explicable by Terraq's recent expenses, especially escaping to Arden under a false Remorran passport [paras 20, 21 and 36].

Terraq's victims are best represented by Remorra: Remorra is a successor State to Integra[75] and since Telfin is now a part of Remorra [para 16], Terraq's victims are residents of Remorra or, under the term of the 1995 Treaty [para 17] Remorran citizens if they were born in any part of what is now Remorran territory.

D.3 The taking of the funds and assets was a war crime

According to the Second Additional Protocol to the 1949 Geneva Conventions (to which Arden is and Integra was a party) [*Compromis*, last unnumbered paragraph and

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[74] *Nicaragua v United States* 1986 ICJ Rep 14 (for example) 51-53, 61-3, 74-5, 84-6, 87, 121-122, 124, 130; Keith Highet, "Evidence, The Court and the Nicaragua Case" 81 AJIL (1987) 1, 33-36.

[75] See *Katz-Cohen v Attorney-General of Israel* 16 ILR 68; *Arar v Governor of Tel Mond-Prison* 19 ILR 141; *In re Schwend* (1949) Annual Digest 81, 81-2; *Entscheidungen des Obstern Gerichtshofs in Zivilrechtesachen* (1919-22) Annual Digest, Case 40.

Clarifications to the Compromis, para 9] pillaging civilian property is a wrongful act at international law.[76] Thus it is submitted that Terraq's appropriation of the funds for his own personal purposes and without legal process constituted the internationally wrongful act of pillage.

D.4 Domestic bank secrecy laws do not excuse Arden from its international law obligation to deliver the funds to Remorra

Arden cannot plead its bank secrecy laws as a valid excuse for violating its international obligations.[77] In the *Applicability of the Obligation to Arbitrate* case this court underlined "the fundamental principle ... that international law prevails over domestic law" [78] and it was held in the *Westland Helicopters Ltd and AOI* case that "no State can avail itself of its domestic laws in order to escape from its international obligations."[79] The ILC Draft Declaration on the Rights and Duties of States clearly states that this principle extends to all forms of obligations under international law.[80]

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[76] Article 4(2)(g), Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) 1125 UNTS 608.

[77] *Alabama Claims Arbitration* (1872) Moore 1 Int Arb 495. Regarding treaty obligations see: Article 27, Vienna Convention on the Law of Treaties. For other obligations arising under international law see: Article 13, ILC Draft Declaration on the Rights and Duties of States 1949, *Yearbook of the ILC*, 1949, 286, 288.

[78] *The Applicability of the Obligation to Arbitrate Case* 1988 ICJ Reports 12, 43; 82 ILR 225, 252.

[79] The *Westland Helicopters Ltd and AOI Case* 80 ILR 595 at 616. See also the Separate Opinion of Judge Shahabuddeen in the *Aerial Incident at Lockerbie* 1992 ICJ Reports 3, 32; 94 ILR 478, 515.

[80] Article 13, ILC Draft Declaration on the Rights and Duties of States 1949, *Yearbook of the ILC*, 1949, 286, 288.

Furthermore, regarding the status of domestic laws before an international court, the PCIJ held that "municipal laws are merely facts which express the will and constitute the activities of States..."[81] Thus the Court should consider the domestic bank secrecy laws of Arden as evidence that Arden is breaching its international obligation to transfer the funds to Remorra.

[81] *Certain German Interests in Polish Upper Silesa* PCIJ Series A, No.7, 19.

TEAM 121A

International Court of Justice

1998

The State of Remorra v. The Irenic Republic of Arden

Brief for the Applicant

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