International Court of Justice

1998

The State of Remorra v. The Irenic Republic of Arden

Brief for the Respondent

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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 Civil War

2. From the late 1980s "bitter ethnic" conflict broke out in the Former Integra between the Nylesian and Remorran peoples, which in 1995 became a revolution of Nylesians against the sitting "almost entirely Remorran" government. [*Compromis*, para 8] This revolution was led by the Nylesian People's Army (NPA), and Malu Terraq claimed to be the architect of its strategy. [para 9]

3. The United Nations Panel of Experts established

4. Following the Peace Treaty which divided the former Integra into the two separate Republics of Remorra and Nylesia [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 "other violations of law". [para 20] The Panel based this recommendation on substantial evidence of torture, systematic rape, summary executions and ethnic cleansing [para 20]; and identified Malu Terraq as one of the major instigators of these *international* crimes against humanity, thus branding him "*hostis humani generis*" - an enemy of all mankind [para 21].

5. Based on Reports of Grave Breaches of International Law, the Security Council established the International Criminal Tribunal for the Former Integra

6. Upon immediate transmission of the Panel's Report and Recommendations to the Security Council, adoption of the report was unanimous and the Council voted in United Nations Security Council Resolution 1024 (UNSCR 1024) to establish an International Tribunal pursuant to its Chapter VII powers with a variety of penalties, the most extreme of which being life imprisonment [para 22].

7. Remorra Attempts to Illegally Abduct Terraq from Nylesia

8. On 1 July 1996 a band of commandos were caught in a raid on Terraq's Nylar home by the Nylesian police and taken into custody. Once there, they confessed to the attempted kidnapping and admitted the operation had been planned and funded by the Remorran Intelligence Service [para 23]. Nylesia delivered a diplomatic protest to the Remorran Ambassador, and the matter was resolved peacefully when Nylesia accepted Remorra's qualified apology [paras 23-24]. Official Remorran statements emphasised the need to bring Terraq "to justice by other means." [para 24]

9. Remorra Executes Three Members of the Revolt Planning Committee Immediately After their Trial

10. Meanwhile, three members of the Revolt Planning Committee were executed in Remorra after a brief and highly publicised trial [para 25]. While permitted by Remorran law to file an appeal, the three RPC members failed to do so even though this would have prolonged their lives as during the years 1993-96 appellant decisions were handed down 9.63 months (on average) after the judgement of the lower court [*Clarifications to the Compromis*, paras 2-3]. These same Committee members were also indicted during the civil war by those Integran government officials who had fled to Harbaar on 26 March

1995 [*Compromis*, para 14], on almost the same charges on which they were later convicted and executed under Remorran law [paras 14 and 25].

11. ICTFI handed down an indictment of Terraq and requested assistance from Nylesia for his arrest and presentation before the Tribunal

12. On 20 November 1996 the ICTFI handed down an indictment of Terraq, charged with crimes against peace, inciting acts of violence and murder. The charging document characterised his involvement with the NPA as the "*planning of genocide*" (emphasis added). Nylesia agreed to assist the tribunal in seeking Terraq's apprehension. A force dispatched the next day discovered Terraq had already fled, his whereabouts unknown [para 28].

13. Terraq taken into custody in Arden for suspected illegal entry into the country

14. On 1 December 1996 Terraq was arrested in Arden on suspicion of illegal entry into the country [*Compromis*, para 29]. The next day, a Remorran government spokesman issued a statement [para 30] which while acknowledging that Arden "promises that Terraq will be tried and punished for his crimes", stated forcefully that the "blood of our martyrs will be dishonoured unless such criminals receive the justice they deserve". [para 31]

15. The contents of Terraq's First Arden National Bank (FANB) accounts

16. During the week after Terraq's arrest [compare paras 29-37] a search of his hotel room revealed financial documents which indicated that he had control of accounts at the First Arden National Bank (FANB) totally more than US$18 million [para 36]. Evidence suggests that the contents of the accounts may be the proceed of war crimes allegedly

committed by Terraq during the break-up of the former Integra [paras 20-21, 36 and 38].

17. The Remorran court action against Terraq

18. One week after Terraq arrest, the Remorran Minister of Home Affairs brought a civil action against him in the Remorran courts, demanding US$20 million in damages. 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"[para 37].

19. Terraq was not in Remorra when the Remorran court action was commenced or throughout the entirety of the court process [paras 29, 37 and 44]. There is no indication that he was ever formally served with process. That the Remorran court issued a default judgement [para 37] indicates not only that Terraq did not defend the action, but that he also did not voluntarily submit to the court's jurisdiction. Neither Arden nor Remorra is a party to any international agreement regarding the recognition of foreign judgements or legal instruments [*Compromis*, last unnumbered para].

20. Arden's bank secrecy laws

21. Arden's Office of Bank Supervision is authorised by statute to freeze accounts deemed "suspicious" pending proof by the claimants to the funds that they are legally entitled them [*Clarifications to the Compromis*, para 10]. In accordance with these laws Arden authorities impounded the accounts as soon as they were discovered - some time between 1-8 December 1996 [compare *Compromis*, paras 29, 36-38]. They announced that the accounts were considered "suspicious" and sought the public's help in determining who might have claims against them [para 38].

22. *Despite extensive publicity, no one came forward to claim the funds* [*Compromis*, para 38].

23. On 31 January 1997 officials of the FANB filed lawsuits to lift the freeze on the accounts. They obtained restraining orders from the Arden's courts ending any form of government restriction on their use and directing that all requests for additional information about the accounts would be refused on the grounds of Arden's bank secrecy laws [para 39].

24. Arden's Foreign Minister made the following response to a Remorran diplomatic delivered on 4 February 1997 [paras 40 and 42]:

25. While my Government understands the concerns that certain liquid assets found in our capital may represent funds unlawfully diverted from Remorra, Arden law does not permit the banks to deprive the record owners of those assets of their property rights ... we firmly believe that, in the long run, the consistent and uniform conformity to the law is in the interest of everyone, including those who might seek expectations in certain cases [para 43].

26. Both Remorra and ICTFI formally request Terraq's extradition

27. By this time ICTFI, pursuant to its indictment, had formally requested Terraq's surrender; simultaneously Remorra had requested Terraq's extradition citing the 1965 Extradition Treaty concluded between Arden and the Former Integra on charges of treason, sedition and murder.[para 32] Arden, balancing its recognition of the right to a fair trial and its "valued friendship" with the "new Republic of Remorra", concluded that "preservation of the rule of law" required Terraq's surrender to ICTFI. [para 34] Remorra

protested through diplomatic channels immediately. [para 35] Subsequently Remorra expressed "regret" at this decision, protesting that it was "a flagrant violation of international law" that Terraq "an enemy of Remorra's people" had not been *delivered "into the hands of those he had so grievously wronged*" (emphasis added). [paras 41]

Questions Presented

1. Whether the Extradition Treaty between Arden and the former Integra is no longer in effect.

2. Whether the proposed surrender of Terraq by Arden to the International Criminal Tribunal for the Former Integra, and the ICTFI's jurisdiction to try this case, is consistent with international law.

3. Whether the Court should award Remorra any monetary damages.

4. Whether international law requires the abrogation of Arden's bank secrecy laws in the case of the accounts allegedly held in the name of Malu Terraq.

Summary of Pleadings

Arden submits: first, that Terraq must be surrendered to the International Criminal Tribunal for the Former Integra (ICTFI) (question 2); second, that Arden is not obliged to extradite Terraq to Remorra under the 1965 Extradition Treaty between Arden and the former Integra ("the treaty") (question 1); third, that Arden is not obliged to pay compensation to Remorra (question 3); fourth that International Law does not require an accounting and a transfer to Remorra of the contents of Terraq's accounts in Arden (question 4).

Regarding ICTFI, Arden submits *firstly*, that the Court has previously held that it lacks jurisdiction to review United Nations Security Council Resolutions, which enjoy a strong *prima facie* assumption of validity. *Secondly* that the Security Council's powers regarding international peace and security under Article 41 of the UN Charter extend to creating a judicial body (such powers are general, extending beyond current military crises, and not limited by Chapter VII, establishing ICTFI was within the Council's capacity to establish subsidiary organs). *Thirdly*, that UNSCR 1024 does not violate the limitations upon the Security Council's power as it falls within the exception to Charter Article 2.7. *Fourthly*, that ICTFI has superior jurisdiction over Terraq to Remorra (in humanitarian law matters international bodies should take primacy over domestic jurisdiction, and due to the operation of Articles 48 and 49 (or 25) of the UN Charter, UNSCR 1024 overrides any obligations owed by Arden under any extradition treaty with Remorra).

Regarding the treaty, Arden submits *firstly* that is not obliged to extradite Terraq to Remorra under the treaty as it is no longer in effect by the operation of Article 34 of the Vienna Convention on Succession of States in respect of Treaties. *Secondly*, that even if the

treaty is in effect (as discussed in relation to ICTFI) that ICTFI would have superior jurisdiction. *Thirdly*, and in the alternative, that Arden is not required to extradite Terraq under the terms of the treaty because: the political offence exemption in Article 7(c) of the Treaty applies to politically motivated requests; considerations of Terraq's right to a fair trial preclude his extradition to Remorra; and that Terraq's extradition to Remorra would violate his right to life.

Regarding compensatory damages, Arden submits that it is not obliged to pay any compensation to Remorra because: Remorra has suffered no damage; establishing a "Truth and Reconciliation Commission" is an inappropriate form of reparation; and a declaration by the Court of any "unlawful conduct" on Arden's part would be adequate reparation in the circumstances.

Regarding Remorra's bank secrecy laws, Arden submits that international law does not require an accounting and transfer to Remorra of the contents of Terraq's accounts, *firstly* because Arden is under no international obligation to recognise or enforce Remorran domestic judgements. *Secondly*, because Arden is under no general international obligation to render up funds in Terraq's accounts. *Thirdly*, because rendering up the contents of Terraq's accounts would be a breach of laws protecting the internationally recognised human rights to property and privacy.

Pleadings

A. Terraq must be surrendered to the International Criminal Tribunal for the Former Integra (ICTFI)

The Court should reject Remorra's prayer for relief and declare that the proposed surrender of Terraq by Arden to ICTFI and ICTFI's jurisdiction to try him is consistent with international law. Only such a decision is consistent with individuals responsibility for globally significant crimes such as genocide.[1] This would follow the precedents of the Nuremberg and Tokyo War Crimes Trials, the Former Yugoslavia Tribunal, and the International Tribunal for Rwanda that impartial *ad hoc* international tribunals operating under international rather than municipal law should try international humanitarian law violations.[2]

A.1 The Court lacks jurisdiction to review United Nations Security Council Resolution 1024 (UNSCR 1024) establishing ICTFI

A Security Council decision that a threat to international peace and security exists is not justiciable.[3] In the *Certain Expenses* Advisory Opinion the Court held that, because there

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[1] Gerry J Simpson, "War Crimes: A Critical Introduction" in Timothy L H McCormack and Gerry J Simpson, *The law of war crimes: national and international approaches* (1997) 1, 10; Ian Brownlie, *Principles of Public International Law*, 4th ed, (1990), 561.

[2] Jonathon M Weig, "Enforcing the Lessons of History: Israel Judges the Holocaust" in Timothy L H McCormack and Gerry J Simpson, *The law of war crimes: national and international approaches* (1997) 103, 114; Robert K Woetzel, "The Eichmann Case in International Law" in Gerhard O W Mueller and Edward M Wise, *International Criminal Law*, Vol 2 (1965), 360, 361-2; Arthur K Kuhn, "International Criminal Jurisdiction" (1949) 41 AJIL 430, 431.

[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzogovina v Yugoslavia) (Serbia and Montenegro)* 1993 ICJ Reports 325, 439 per Judge Lauterpacht.

was no procedure for determining the validity of actions of UN organs "each organ must, in the first place at least, determine its own jurisdiction."[4] The *Namibia* case affirmed that "undoubtedly, the Court does not possess powers of judicial review" over Security Council and General Assembly decisions.[5] In both cases, the Court found that there was a strong *prima facie* assumption that Council resolutions are valid.[6] In the *Namibia* case, it found that as the Council had acted within "its primary responsibility, the maintenance of peace and security" and had invoked Article 25, its decisions were adopted in conformity "with the purposes and principles of the Charter" and with Articles 24 and 25, and were therefore valid.[7]

A.2 Security Council powers regarding international peace and security extend to creating a judicial body

In current state practice, threats to international peace and security include humanitarian crises.[8] The list of measures to maintain or restore peace and security "not involving the use of armed force" in Article 41 is illustrative, not exhaustive; such measures could include setting up a judicial body.[9]

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[4] *Certain expenses of the United Nations Advisory Opinion* 1962 ICJ Reports 151, 168.

[5] *Namibia Advisory Opinion* 1971 ICJ Reports 16, 45.

[6] *Certain expenses of the United Nations Advisory Opinion* 1962 ICJ Reports 151, 168; *Namibia Advisory Opinion* 1971 ICJ Reports 16, 22.

[7] *Namibia Advisory Opinion* 1971 ICJ Reports 16, 51-3.

[8] Statement by the President of the Security Council at the conclusion of the meeting of the Council at the level of Heads of State and Government, 31 January 1992, UN Document S/23500.

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

(a) Such powers are not limited by Chapter VII

The *Namibia* Advisory Opinion held that the Council has general powers beyond Chapter VII:

> the Security Council [has] powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.[10]

(b) The Council's general powers are broad

The Security Council's role goes beyond situations of current military hostilities, encompassing under Article 39 action "to *maintain or restore* international peace and security" (emphasis added). Thus, the Council in establishing the International Tribunal for Rwanda (UNSCR 955) stated that prosecutions of grave humanitarian law violations in that *internal* conflict "*would contribute to the process of national reconciliation* and to the restoration and maintenance of peace"(emphasis added).[11] Here, the need for national reconciliation is shown by Remorra's alternate claim for damages to establish a "Truth and Reconciliation Commission". Therefore, the Council's establishment of ICTFI as a contribution to national reconciliation was consistent with maintaining international peace and security.

(c) Establishing ICTFI was within competence

The Court stated in the *Certain Expenses* case that under Article 29 the Security Council may establish subsidiary organs.[12] UNSCR 1024 conforms with the process used to establish the Former Yugoslavia Tribunal (UNSCR 827) and the International Tribunal for Rwanda

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

[11] Compare with UNSCR 827 establishing the Former Yugoslavia Tribunal.

.[12] *Certain expenses of the United Nations Advisory Opinion* 1962 ICJ Reports 151, 177.

(UNSCR 955) (see above). In the *Tadic* case the Appeals Chamber of the Former Yugoslavia Tribunal found that the Tribunal was validly established by law.[13] The Chamber, referring to this Court's finding in the *Effect of Awards* case which rejected a challenge to the General Assembly's power to set up a judicial body, found that there is no doctrine of separation of powers in international law to restrict the Council's competence to establish a judicial body.[14] The Appeals Chamber decision should be applied here as a judicial decision under Article 38 (1)(d) of the Court's statute. The Court and its predecessor have previously drawn upon decisions of international arbitral tribunals.[15]

A.3 UNSCR 1024 does not violate the limitations upon the Security Council's power

UNSCR 1024 does not violate the "only limitations" on Security Council powers: "the fundamental principles and purposes found in Chapter I of the Charter".[16] Though Article 2.7 of the Charter, provides:

> 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.

UNSCR 1024 as a decision under Chapter VII [*Compromis* paragraph 22] comes within the latter exemption.

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[13] *The Prosecutor v Dusko Tadic* 35 ILM 32 (1996), 48.

[14] *United Nations Administrative Tribunal Advisory Opinion* 1954 ICJ Reports 4, 61; *The Prosecutor v Dusko Tadic* 35 ILM 32 (1996), 45.

[15] *Legal Status of Eastern Greenland* PCIJ (1933) Ser A/B, no.53, p 46; *Reparations for injuries suffered in the service of the United Nations Advisory Opinion* 1949 ICJ Reports 174, 186.

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

A.4 ICTFI has superior jurisdiction to Remorra

A.4.1 In humanitarian law matters international bodies have primacy over domestic jurisdiction

The primary judicial finding on conflicts of international and domestic jurisdiction is the Permanant Court of International Justice (PCIJ) decision in the *Nationality Decrees* case which interpreted the parallel limitation to Article 2.7 in the League of Nations Covenant (Article 15.8). The Court held that the "question whether a certain matter is ... solely within the jurisdiction of a State" was "relative", depending "upon the development of international relations".[17]

The Court said in its *Barcelona Traction* judgment that respect for fundamental human rights was an obligation *erga omnes* ("obligation flowing to all"), and it found in its *Namibia* Advisory Opinion that respect for fundamental human rights constituted an international obligation.[18] Claims that human rights matters are essentially within domestic jurisdiction, although subject to international law and treaties, have not been admitted by United Nations organs, notably regarding South Africa's apartheid regime.[19] UNSCR 688 of 5 April 1991, which did *not* invoke Chapter VII, demanded that Iraq end repression of its population and insisted that Iraq allow entry to international relief agencies.

The permeability of domestic jurisdiction respecting human rights violations is most readily established regarding genocide, potentially involved in the current case. The Court has said

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[17] *Tunis and Morocco Nationality Decrees Case* PCIJ (1923) Series B, no. 4, pp 23-24.

[18] *Barcelona Traction, Light and Power Company Limited* 1970 ICJ Reports 3, 32; *Namibia Advisory Opinion*, 1971 ICJ Reports 16, 57.

[19] L M Goodrich, E Hambro and A P Simons, *Charter of the United Nations*, 3rd ed, (1969), 68.

that the principles underlying the Genocide Convention are "binding on States, even without any conventional obligation", being of universal character.[20]

Therefore, that given the Security Council's broad powers to maintain international peace and security, and the wide definition of this phrase in contemporary practice, the Council needs to be accorded a wide discretion in determining the boundary between domestic and international jurisdiction, and therefore that UNSCR should not be held to infringe upon Remorra's domestic jurisdiction.

A.4.2 Due to the UN Charter, UNSCR 1024 overrides any obligations on Arden to Remorra

The Court should confirm the *Lockerbie* principle that a Chapter VII decision of the Security Council prevails over the obligations of the parties under any other international agreement.[21] Therefore, the obligations of Arden to surrender Terraq to ICTFI under UNSCR 1024 prevails over any obligations to Remorra under the extradition treaty with the former Integra.

As UNSCR 1024 was adopted pursuant to Chapter VII powers [*Compromis*, para 22], members of the United Nations are compelled to implement it under Articles 48 and 49 of the Charter; or, alternately, under Article 25 as the Court has found that members obligations under Article 25 are not confined to enforcement measures under Chapter VII.[22] Whether or not Remorra acceded to the UN Charter before the passage of UNSCR 1024, it is bound to

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[20] *Reservations to the Convention on Genocide, Advisory Opinion* 1951 ICJ Reports 15, 23.

[21] *Aerial Incident at Lockerbie* 1992 ICJ Reports 3, 15.

[22] *Namibia Advisory Opinion* 1971 ICJ Reports 16, 53.

carry out UNSCR 1024 because Article 2.6 of the Charter provides that the United Nations is obliged to ensure that non-members act in accordance with the Principles of the United Nations "so far as may be necessary for the maintenance of international peace and security".[23] The Court held in its *Namibia* Advisory Opinion that the Council's decisions on Namibia which were taken " in the exercise of ... its responsibility for maintenance of peace and security "were opposable *erga omnes*" including to non-member States.[24]

Though UNSCR 1024 states that "the jurisdiction of this Tribunal shall be *complementary* to that of existing courts" (emphasis added) [*Compromis*, para 22] this language does not imply that extradition agreements take precedence. In the *Namibia* Advisory Opinion the Court held that the question of whether Security Council powers have been exercised under Article 25 "is to be determined in each case, having regard to the terms of the resolution ... the Charter provisions invoked and ... all [relevant] circumstances".[25] The Court's interpretation also took account of the combined effect of antecedent resolutions of the Council.[26] Accordingly, the following is relevant in interpreting UNSCR 1024: (1) The Security Council's original resolution commissioning a Panel of Experts to investigate humanitarian violations and recommend whether creating an "international tribunal to ... try the perpetrators ... is warranted" [*Compromis* paragraph 19]; (2) the Panel's conclusion that NPA acts including "ethnic cleansing" constituted crimes against peace and crimes against

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[23] Indeed, Article 2.6 may create obligations for non-members: Ian Brownlie, *Principles of Public International Law*, 4th ed (1990), 623; H Kelsen, *The Law of the United Nations* (1951), 106-10; B Simma (ed), *The Charter of the United Nations* (1994), 138.

[24] *Namibia Advisory Opinion* 1971 ICJ Reports 16, 51, 56.

[25] *Namibia Advisory Opinion* 1971 ICJ Reports 16, 53.

[26] *Namibia Advisory Opinion* 1971 ICJ Reports 16, 51.

humanity and that Terraq had committed violations of international humanitarian law [paragraphs 20-1]; (3) that such reported crimes represented grave breaches of the 1949 Geneva Conventions, would support charges of genocide against Terraq and other NPA leaders, and represented crimes against humanity in terms of the Charter and Judgment of the Nuremberg Tribunal[27]; (4) the establishment of ICTFI in UNSCR 1024 pursuant to the Council's Chapter VII powers; (5) the establishment of the Former Yugoslavia Tribunal and the International Tribunal for Rwanda under the same powers, with the provisions that "all States shall cooperate fully with the International Tribunal ... including ... [compliance] with requests for assistance ... issued by a Trial Chamber"[28] and "The International Tribunal shall have primacy over national courts."[29] Therefore, the Security Council reserved jurisdiction for ICTFI over serious breaches of international humanitarian law.[30]

Given these circumstances, employing the Court's analysis in the *Namibia* Advisory Opinion, the Security Council could not have intended that members of the United Nations "would be free to act in disregard" of the authority of the Tribunal and its necessary procedures.[31] Further, there is no settled state practice regarding discretion whether to

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[27] Secretary-General's Report on proposed Former Yugoslavia Tribunal, UN Document S/25704, paragraphs 9-11, 33-49.

[28] UNSCR 827, para. 4; UNSCR 955, para. 2.

[29] Article 9.2, Statute of Former Yugoslavia Tribunal, annexed to Report of Secretary-General, UN Document S/25704; Statute of International Tribunal for Rwanda Article 8.2, annexed to UNSCR 955.

[30] Reflecting the jurisdictional structure in the Draft Statute for an International Criminal Court: Report of the International Law Commission on the work of its forty-sixth session (1994), UN Document A/49/10 at 27.

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

surrender a person to an international tribunal. Domestic procedural safeguards have been interposed in some other cases[32] but there is no assumption of a political discretion whether to surrender a person requested by the International Tribunal. The only refusal to transfer cases to the Tribunal occurred when Yugoslavia announced its Constitution does not permit the extradition of nationals.[33] This does not undermine any customary rule of surrender arising from state practice; rather such exception pleading acknowledges the rule's force.[34]

B. Arden is not obliged to extradite Terraq to Remorra under the Extradition Treaty Between Integra and Arden ('the Treaty')

Arden's primary submissions are that: (1) the treaty between Arden and the former Integra is no longer in effect, at least regarding Remorra as a successor; (2) that in the absence of such a treaty it is appropriate that Arden deliver Terraq to ICTFI. Remorra submits in the alternative (if ICTFI is held to be in validly constituted, or not to have principal jurisdiction, and that the treaty remains in force) that: (3) even if the treaty remains in force ICTFI has superior jurisdiction (as above); (4) if the treaty remains in force and Remorra has superior jurisdiction to ICTFI, that Arden is not required to extradite Terraq because: (i) it would violate the treaty's political offence exemption, (ii) Arden is not required to extradite Terraq

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[32] State practice is surveyed in: Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on International War Crimes Tribunal Bill (1994)*, June 1994, 6, 9; and note A Marschik, "*The Politics of Prosecution: European National Approaches to War Crimes*" in Timothy L H McCormack and Gerry J Simpson, *The law of war crimes: national and international approaches* (1997), 65, 96-97.

[33] A Marschik, "*The Politics of Prosecution: European National Approaches to War Crimes*" in Timothy L H McCormack and Gerry J Simpson, *The law of war crimes: national and international approaches* (1997), 65, 99.

[34] *Nicaragua v United States* 1986 ICJ 14, para 186.

to a jurisdiction where there is a substantial risk that he would not receive a fair trial, or (iii) because it would violate Terraq's right to life.

B.1 The treaty between Arden and the former Integra is no longer in effect

Arden has ratified the Vienna Convention on the Law Treaties[35] and is thus bound by Article 18 not to undermine the object and purpose of any treaty to which it is a signatory. As Arden is a signatory to the Vienna Convention Succession to Treaties[36] it would ordinarily have to acknowledge (by operation of Article 34(1)) Remorra's alleged succession to the treaty. (If indeed, Remorra as a non-party has any enforceable rights under the Vienna Conventions.) However, Article 34(2) provides that such succession shall not occur where "application of the treaty in regard to the successor state ... would radically change the conditions for its operation." Doubts must exist as to the administration of justice in Remorra's territory, following the dissolution of Integra (see below). Further, succession in respect to extradition treaties has been criticised as "unreasonable", given that the "municipal criminal law of the predecessor state" may not be that of its successor.[37] Given these considerations and the lack of any clear customary international law on succession to treaties[38], Arden should not be found in breach of its Article 18 obligations if it does not acknowledge Remorra's succession

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[35] Vienna Convention on the Law of Treaties, 1237 UNTS 449 (1974).

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

[37] I A Shearer, *Starke's International Law*, 11th ed (1994), 296-7.

[38] I A Shearer, *Starke's International Law*, 11th ed (1994), 294; Ian Brownlie, *Principles of Public International Law*, 4th ed (1990), 671-3; *Espionage Prosecution Case* 94 ILR 69, 78.

to the treaty. There are special circumstances surrounding extradition treaties in general, as well as the present situation regarding the administration of justice in Remorra (see below).

B.2 Arden should deliver Terraq to ICTFI

Where violations of an international character occur, they should be accorded status over lesser national charges: it would be preferable that ICTFI try Terraq as an international humanitarian offender, rather than Remorra try him simply as a murderer.[39] Only an international forum will be seen as trying war crimes impartially, as victors are seldom held to the same standards imposed upon the vanquished.[40]

B.3 Even if the treaty remains in force ICTFI has superior jurisdiction

See discussion above at A.4.

B.4 Alternately, Arden is not required to extradite Terraq under the terms of the treaty

B.4.1 The political offence exemption applies to politically motivated requests

Arden submits that the scope of the political offence exception contained in treaty Article 7(c) extends to the motives of the requesting government. [41] The political offence exemption

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[39] Jonathon M. Weig, "Enforcing the Lessons of History: Israel Judges the Holocaust" in Timothy L H McCormack and Gerry J Simpson, *The law of war crimes: national and international approaches* (1997) 103, 114; Robert K. Woetzel, "The Eichmann Case in International Law" in Gerhard O W Mueller and Edward M Wise, *International Criminal Law*, Vol 2 (1965) 360, 361-2; Arthur K. Kuhn, "International Criminal Jurisdiction", (1949) 41 AJIL 430, 431.

[40] Gerry J Simpson, "War Crimes: A Critical Introduction" in Timothy L H McCormack and Gerry J Simpson, *The law of war crimes: national and international approaches* (1997), 1, 4-5.

[41] A category recognised in British, French and United Kingdom jurisdictions: Geoff Gilbert, *Aspects of Extradition Law*, 1991, 137-8.

formula in the treaty here appears borrowed from the standard British drafting considered in *Schtracks v Government of Israel*,[42] which the court may consider under Article 38(1)(d) of the ICJ Statue. This formulation anticipates:

> "that the requesting state is after him for reasons other than the enforcement of its criminal law in its ordinary, ... its common or international, aspect."[43]

It has been held that "one of the most important factors in deciding whether an offence is of a political character is to see whether the requesting authority are (sic) minded to [ab]use their right of extradition for some ulterior and political motive ..."[44] Thus, the political offence exemption exists to prevent a fugitive being surrendered to a jurisdiction where there exists a "risk that his trial . . . might be unfairly influenced by political considerations."[45] This could well apply to situations where a state may "treat as political offences and punish more severely, acts ... [otherwise] ordinary crimes."[46]

Here, there is a substantial risk that not only is Terraq's extradition being requested for political motives, but that if convicted in Remorra he would not be allowed adequate time to

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[42] *Schtracks v Government of Israel* [1962] 3 All ER 529, 553; compare with the clause in the United Kingdom/Netherlands extradition treaty considered in *McF v Public Prosecutor* 100 ILR 415, 420-1.

[43] *Schtracks v Government of Israel* [1962] 3 All ER 529, 540; endorsed in *R v Secretary of State for the Home Department, ex parte Fininvest SpA and others* [1997] 1 All ER 942, 961.

[44] *R v Governor of Winson Green Prison, Birmingham, ex parte Littlejohn* [1975] 3 All ER 208, 211 and compare with. 208-9 and *Tzu-Tsai Cheng v Governor of Pentonville Prison* [1973] 2 All ER 204, 208; endorsed in *R v Governor of Winson Green Prsion, Birmingham, ex parte Littlejohn* [1975] 3 All ER 208, 211.

[45] *Tzu-Tsai Cheng v Governor of Pentonville Prison* [1973] 2 All ER 204, 209-210.

[46] *Schtracks v Government of Israel* [1962] 3 All ER 529, 536.

lodge an appeal against his conviction. Remorra appears to treat accused form the NPA more severely than ordinary criminals tried for the murder, given that NPA members' executions were carried out almost instantly, while an ordinary Remorran criminal appeal lasts over nine months [*Clarifications to the Compromis*, para 2), and it would appear that there may be political motives in such prosecutions (*Compromis*, para 31). Such motives constitute sufficient grounds for denying extradition, as they give the offences for which Terraq is requested a political character.

B.4.2 Considerations of a fair trial preclude Terraq's extradition

Further, as there is universal recognition of the right to a fair trial,[47] Arden cannot be required to extradite Terraq to a jurisdiction where there is a substantial risk that he will not receive a fair trial. None of Terraq's fellow members of the NPA who have been tried in Remorra exercised their municipal law right to appeal before their execution, as they were entitled to under municipal law (*Clarifications to the Compromis*, para 3). In both *Pratt v Attorney General for Jamaica* and *Soering v United Kingdom* it was stated to be part of the "human condition" or "human nature" that condemned persons will exhaust all avenues of appeal in attempting to prolong their lives.[48] This raises the inference that the speed with which Remorra executes NPA members effectively denies a right to appeal. [49] This lack of "reasonable time for appeal" is incompatible with capital punishment under the rule of

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[47] S Chernichenko and W Treat, The Right to a Fair Trial, Report to the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc. E/CN 4/Sub2/1991/29, para 21.

[48] *Pratt v Attorney-General for Jamaica* [1994] 2 AC 1, 33 (Privy Council); *Soering v United Kingdom* 11 EHRR 439, 475 (European Court of Human Rights).

law.[50] Alternately, the right to appeal which Remorra effectively denies NPA defendants is a fundamental element of a fair trial, as acknowledged in numerous international conventions.[51]

Further, Remorra has by its acts undermined the "integrity of justice" by exceeding "the bounds of [its] jurisdiction", failure to respect the sovereignty of other states and failure to respect Terraq's own human rights by involving itself in an attempt to forcibly abduct him [*Compromis*, paras 23-24], as was said in the *Ebrahim* case:

> [w]hen a state is party to a dispute, as for example in criminal cases, it must come to the court with 'clean hands' ... [when] involved in an abduction across international borders, as in the present case its hands are not clean.[52]

Though the *Ebrahim* case involved an actual case of state-sponsored abduction here Remorra still: exceeded its jurisdiction, flaunted sovereignty, and violated Terraq's right to privacy and security of person in its attempt, all relevant factors in *Ebrahim*.[53] Further, the

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[49] The Court may make inferences form the facts: see *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.

[50] *Pratt v Attorney-General for Jamaica* [1994] 2 AC 1, 2, 17 and 33.

[51] International Covenant on Civil and Political Rights Article, 78 UNTS 277, 14(5); The American Convention on Human Rights Article 8(2)(h) (OAS Treaty Series 36) (1969); and the Seventh Additional Protocol to the European Convention on Human Rights, Article 2 (European Treaty Series 117) (1984).

[52] *State v Ebrahim* 31 ILM 888 (1992), 896; these comments were endorsed by the Supreme Court of Zimbabwe in *Beehan v State* 103 ILR 203, 211.

[53] Also note concerns for an accused's right to the protections of formal extradition: *R v Horseferry Road Magistrates Court, ex parte Bennett* [1993] 3 All ER 138, 150-1. Note also the minority in *United States v Alvarez-Marchain*, 31 ILM 900 (1992), 910,913, 915 and *amicus curiae*, 922-4.

declarations of Remorran government officials [*Compromis*, para 31) may have jeopardised Terraq's right to a presumption of innocence.[54]

B.4.3 Terraq's extradition to Remorra would violate his right to life

Article 6 of the International Covenant on Civil and Political Rights acknowledges the individual's right to life, and Article 6(4) recognises the right to appeal a sentence of death, which was effectively denied NPA members tried in Remorra (see above). The separate concurring opinion of de Meyer J in the *Soering* case noted the "evolution of legal conscience and practice towards the universal abolition of the death penalty" and held the death penalty to be "unlawful".[55] Though the majority in the *Soering* case were reluctant to accept such conclusions, they entertained the possibility that changing values might effectively alter treaty provisions.[56] Since 1965 when the extradition treaty was signed numerous conventions have shown that the death penalty is repugnant to the modern global community.[57]

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[54] Universal Declaration of Human Rights, Article 11, UN Doc. A/810, 7 (1948); International Covenant on Civil and Political Rights Article 14(2), 78 UNTS 277. On the duties of public officials in respect of this right see: Draft Declaration on the Right to a Fair Trial and Remedy, UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, 25 June 1993, UN Doc E/CN 4/Sub 2/1993/24/Ad 1.

[55] *Soering v United Kingdom* 11 EHRR 439, 484 and 484, n.160.

[56] *Soering v United Kingdom* 11 EHRR 473-4, paragraphs 101-3.

[57] See: The Second Optional Protocol to the International Covenant on Civil and Political Rights, 999 UNTS 171; International Covenant on Civil and Political Rights, Articles 6(2) and 6(6), 78 UNTS 277; The American Convention on Human Rights, Articles 4(2) and 4(3) (OAS Treaty Series 36) (1969).

C. Arden is not obliged to pay compensation to Remorra

Arden was under no obligation to extradite Terraq to Remorra at treaty or international customary law and hence Arden has not wronged Remorra. Thus, Arden rejects Remorra's claim for reparations [*Compromis*, Remorra Claim 3] as invalid at international law.[58]

Alternatively, if it is found that an obligation did exist and that Arden breached this obligation, Arden rejects any claim for monetary damages as: (a) Remorra has suffered no damage; (b) establishing a 'Truth and Reconciliation Commission' are inappropriate as reparations; and, (c) a Court declaration that Arden's conduct was unlawful would be sufficient reparations.

(a) Remorra has suffered no damage

Arden's decision not to extradite Terraq to Remorra would cause no substantial damage, material or otherwise. Remorra would suffer no legal or moral damage by such action, as Terraq would still be tried by a competent international tribunal (ICTFI) for the crimes of which he is accused [*Compromis*, paras 34 and 44]. International tribunals confronted by cases of non-material damage have indicated a clear practice "that satisfaction should be proportioned to the seriousness of the offence or to the degree of fault ..."[59] Arden's diplomatic actions constitute no affront to Remorran dignity or honour as Arden's position from the beginning has been one of balancing a "commitment to the international rule of law" [para 34] and a "valued friendship with ... the new Republic of Remorra" [para 34].

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[58] *Chorzow Factory Case (Germany v Poland)* PCIJ (1928) Ser A, No 17, 47-48.

[59] Arangio-Ruiz (Special Rapporteur), *Second Report on State Responsibility, Yearbook of the ILC, 1989, Volume II, Part 1, 33 para 109.* See also the *I'm Alone Case 3 RIAA, 1609 (1935); The Rainbow Warrior case (New Zealand v France)* 74 ILR, 271; *Corfu Channel Case* 1949 ICJ Reports 4.

Arden's actions are consistent with Remorra's desire to see Terraq tried for his crimes. Thus, Arden rejects all monetary damages as an unreasonable claim in the circumstances.

(b) Establishing a "Truth and Reconciliation Commission" is an inappropriate form of reparation

Arden submits that a claim of US$100 million "*for the establishment of a Commission*" (emphasis added) [Remorra's claim 3] cannot be awarded by the Court as it does not have the ability to enforce such an award. Any declaration of this kind could only constitute a recommendation and would not be legally binding on either party.[60]

(c) A declaration by the Court of "unlawful conduct" is adequate reparation in the circumstances

Appropriate reparation for the nature of any breach by Arden, resulting in no damage to Remorra, is a Court declaration that Arden's conduct has been unlawful at international law and ordering an official apology[61]. Satisfaction, in the form of a judicial declaration, is a long established practice in international courts[62] and is the "the special remedy for injury to the State's dignity, honour and prestige."[63]

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[60] See M N Shaw, *International Law*, 4th ed (1997) referring to the recommendation in the *Rainbow Warrior* arbitration, 556.

[61] Article 10(2)(a), Draft Articles of Part 2 of the Draft on State Responsibility, *Yearbook of the ILC*, 1993, Volume II, Part 2, 54, 76.

[62] *Corfu Channel Case* 1949 ICJ Reports 4; *Rainbow Warrior Arbitration* (*New Zealand v France*) 82 ILR.

[63] Arangio-Ruiz (Special Rapporteur), Second ILC Report on State Responsibility, *Yearbook of the ILC*, 1989, Volume II, Part 1, 31 para 106.

D. International Law does not Require an Accounting and Transfer to Remorra of the Contents of Terraq's Accounts

Arden asks that the Court determine that international law does not require abrogation of Arden's bank secrecy laws regarding the accounts at the First Arden National Bank (FANB) allegedly held in Terraq's name. The Court should do so on the following grounds: (1) Arden is under no international obligation to recognise or enforce Remorran domestic judgements; and (2) Arden is under no general international obligation to render up funds in Terraq's accounts; and (3) rendering up the contents of Terraq's accounts would be a breach of laws protecting the internationally recognised human rights to property and privacy.

D.1 Arden is under no obligation to enforce the Remorran judgement

Neither Arden nor Remorra is party to any international agreement regarding recognition of foreign judgements [*Compromis*, final unnumbered para]. While there *might* be sufficient state practice to establish a customary norm obliging States to recognise and enforce foreign judgements,[64] such an obligation would not apply in this case. Systems of private international law will generally only enforce a foreign judgement against a natural person if

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[64] Regarding the formation of customary international see *North Sea Continental Shelf cases* 1969 ICJ Rep 3 at 39, *Nicaragua v United States* 1986 ICJ 14, 97-8. Regarding state practice see European Communities Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (Brussels Convention) 29 ILM 1413 (1990); European Free Trade Area Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention) 28 ILM 620 (1989); Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards 1979 24 ILM 449 (1985); Restatement of the Foreign Relations Law of the United States (3rd) 1986 (US Restatement (3rd)), para 481; Final Act of the 17th Session of the Hague Conference on Private International Law 32 ILM 1137 (1993). 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); P E Nygh, *Conflict of Laws in Australia* 6th ed (1995) at 137-195.

the subject of the judgement of a State's court was present in that State at the commencement of the litigation and was served with the originating process; the jurisdiction requirement is also generally satisfied if the subject voluntarily submitted to the court's jurisdiction.[65] Any international obligation to enforce foreign judgements would include such conditions.

These conditions go unfulfilled in this case. Terraq was not in Remorra when the Remorran court action was commenced or at any time during the court process [*Compromis*, paras 29, 37 and 44]. That the Remorran court issued a default judgement [para 37] indicates not only that Terraq did not defend the action, but that he did not submit to the court's jurisdiction.

D.2 Arden is under no obligation to render up the alleged proceeds of war crimes

The rendering up, after the Second World War, of German assets in neutral countries allegedly looted from the occupied territories[66] was not motivated by *opinio juris* and thus

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[65] For example *Foreign Judgement (Reciprocal Enforcement) Act 1973* (NSW) (Australia), s8(1)(a)(ii); Articles 27 (2) and 28 of the Brussels Convention 29 ILM 1413 (1990) (Europe); Uniform Foreign Country Money-Judgements Recognition Act (USA), 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) at 137-145.

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

does not constitute evidence of customary international law.[67] Argentina refused to render up any assets.[68] Switzerland denied any legal obligation to do so, but paid as a voluntary contribution to European pacification and reconstruction.[69] Many nations paid over the Axis powers' assets on the basis that the occupying powers with whom they were negotiating now had sovereignty over those territories.[70] Moreover the neutral States may have entered these agreements under economic duress from the Allied States rather than belief in any legal obligation.[71] To the extent that neutral States afterwards acted as if they were bound, it was because they were bound by treaty rather than customary international law.

D.3 Arden's bank secrecy laws protect human rights

Arden accepts that it's domestic bank secrecy laws, *as such*, are not a valid defence to any international obligation to render up Terraq's accounts. However, these laws are a means of

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[67] See F A Mann, "German External Assets" 24 BYIL 239 at 255-257 (1947) and F A Mann "German Property in Switzerland" 23 BYIL 354 (1946); Deltev F Vagts, "Editorial Comment: Switzerland, International Law and World War II" 9 AJIL 466 at 472-475 (1997).

[68] 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 homepage 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].

[69] Deltev F Vagts, "Editorial Comment: Switzerland, International Law and World War II" 91 AJIL 466 at 473 (1997); L J Simpson, "Liquidation of German Assets in Neutral Countries" (1958) 34 BYIL 374 at 377; F A Mann, "German Property in Switzerland" 23 BYIL 354 (1946).

[70] L J Simpson, "Liquidation of German Assets in Neutral Countries" 34 BYIL 374 (1958) at 377 at 379 and 381.

[71] F A Mann, "German External Assets" 24 BYIL 239 (1947) at 255-257; Deltev F Vagts, "Editorial Comment: Switzerland, International Law and World War II" 91 AJIL 466 (1997) at 473-4.

fulfilling Arden's obligation to protect the human rights to property and privacy and, *in this sense*, should be balanced against any obligation to render up Terraq's funds.

The human rights to privacy and property are so well recognised at international law as to give rise to customary obligations to protect them.[72] Like Switzerland, Arden seeks to protect these rights through providing financial privacy and security legislation.[73] As in any society these rights are relative, Arden's legislation contains provision for freezing "suspicious" accounts and providing a period during which persons may lodge claims against them [*Compromis*, paras 38 and *Clarifications to the Compromis*, para 10].[74] This procedure was

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[72] See *Barcelona Traction, Light and Power Company Limited* 1970 ICJ Reports, 32; *Namibia Advisory Opinion*, 1971 ICJ Reports 16, 57. Regarding property, see Article 17, Universal Declaration of Human Rights; Article 21, American Convention on Human Rights; Article 14, African Charter on Human and Peoples' Rights; Article 1, First Protocol to the European Convention on Human Rights; Article 5, International Convention on the Elimination of All Forms of Racial Discrimination; Article 13, Convention on the Elimination of Discrimination against Women. Regarding privacy, see Article 17, International Covenant on Civil and Political Rights; Article 12, Universal Declaration of Human Rights; Article 11, American Convention on Human Rights; Article 8, European Convention on Human Rights. See generally Edward Lawson, *Encyclopedia of Human Rights* (2nd ed) (1996) at 1194-1201 and 1206-1209.

[73] On the Swiss Federal Law Relating to Banks and Savings Banks and the financial privacy provisions of the Swiss Civil Code see Jeffrey M Diamond, "Foreign Bank Secrecy and the Evasion of United States Securities Laws" (1976) 9 *New York Journal of International Law and Politics* 417 at 420-421 and Christopher J Kent, "The Canadian and International War Against Money Laundering: Legal Perspectives" (1992) 35 *Criminal Law Quarterly* 21 at 40.

[74] On the relative nature of the human right to privacy see UN Human Rights Committee Comment on the Right to Privacy in Article 17 of the ICCPR, 1988 (UN Doc A/43/40, annex VI) para 7, in generally Edward Lawson, *Encyclopedia of Human Rights* 2nd ed (1996) at 1195. On the relativity of the right to property see the text of Article 17, Universal Declaration of Human Rights, Article 21, American Convention on Human Rights and Article 14, African Charter on Human and Peoples' Rights; Article 1, First Protocol to the European Convention on Human Rights; Edward Lawson, *Encyclopedia of Human Rights* 2nd ed (1996) at 1194-1201 and 1206-1209.

followed regarding Terraq's accounts but, after extensive advertising, no claims were made [*Compromis*, para 38]. Remorra should have availed itself of this process.

Once such an investigation is completed and the accounts cleared, Arden's laws prevent continuous and arbitrary interference with rights to privacy and property by prohibiting further interference with the accounts. Thus the Court should respect Arden's protection of the human rights of privacy and property and decline to order an accounting and transfer of the contents Terraq's FANB accounts, even if a conflicting international obligation exists.