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THE 1998 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

CASE CONCERNING THE INTERNATIONAL CRIMINAL TRIBUNAL

IN THE INTERNATIONAL COURT OF JUSTICE

BETWEEN

REMORRA

(Applicant)

and

ARDEN

(Respondent)

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The parties submit the present dispute to this Court by Special Agreement, dated November 10, 1997, pursuant to Article 40(1) of the Court's Statute. The parties have agreed to the contents of the *Compromis* submitted as part of the Special Agreement. In accordance with Article 36(1) of the Court's Statute, each party shall accept the judgment of this Court as final and binding and shall execute it in good faith and in its entirety.

STATEMENT OF FACTS

The State of Remorra is a small developing nation that, until the war of liberation in 1995, formed part of the Federal Republic of Integra. The Irenic Republic of Arden is a developed island nation which is constitutionally non-aligned and geographically far removed from Remorra. Arden and Remorra have full diplomatic relations, and each has an embassy in the other's capital.

The aforementioned war of liberation began as a result of activities by an underground revolutionary movement called the Nylesian People's Army (NPA) which had, since 1990, been preparing a plan to overthrow the Government of Integra through force of arms. Malu Terraq, a leading member of the NPA Liberation Planning Committee, claimed to be the principal architect of NPA strategy. In March of 1995, armed NPA members seized public buildings in Nylesia, such as police and military stations, and killed some 5,000 Remorrans in the process. In March of 1995, Integra descended into anarchy as the ethnic Nylesian majority mobilized against their Remorran countrymen, storming houses and killing entire families. Terraq incited this massacre by sending out false reports through radio and television stations captured by his fellow members of the Nylesian People's Army (NPA). Each of the reports ended with a call to all "true Nylesians" to overthrow the "Remorran government".

On March 26, 1995, the Integran government moved to Harbaar and declared the city the new capital. The Harbaar government subsequently issued warrants for the arrest of members of the NPA, including Terraq, for treason, sedition, and murder. For the next six months, the conflict crystallized into a full-blown revolution waged between forces led by the NPA and the Integran government. Upwards of 120,000 people lost their lives in a series of large-scale military actions. Accounts by human rights organizations described instances of torture by paramilitary forces under Terraq's

control.

The conflict ended in October 1995 when Integra's fellow members of the Regional Association of Treaty States entered the conflict zone and disarmed the combatants. The warring factions signed a Peace Treaty which divided the old nation of Integra into two new countries, Nylesia and Remorra. The Peace Treaty made Nylesia the successor state for purposes of membership in international organizations. As a result, Nylesia occupied the United Nations General Assembly seat of Integra and Remorra successfully applied for a seat of its own. All other matters were to be settled by the Vienna Convention on Succession to Treaties of 1978.

In January, 1996, the United Nations Security Council established an impartial Panel of Experts to investigate accusations of grave violations of humanitarian law made by both sides in the conflict. The Report concluded that paramilitary forces under Malu Terraq and separatists in the NPA had committed crimes against the peace and crimes against humanity. The Panel also recommended to the Secretary General that an International Criminal Tribunal for the Former Integra (ICTFI) be commissioned to issue indictments and to conduct trials of the perpetrators of these crimes and other violations of law occurring in the former Integra. The Report also held that Malu Terraq had committed a number of acts in violation of international humanitarian law. The Panel branded Malu Terraq "an enemy of all mankind". The Report also raised reasonable suspicion that Terraq had diverted to his own use approximately US$20 million in cash and other liquid assets that had passed through his hands in connection with the procurement of munitions and supplies to support the Nylesian separatists.

As a result of this report the Security Council voted to establish the ICTFI pursuant to its Chapter VII powers which would issue indictments and conduct trials of the perpetrators of these

crimes. The first indictment of the ICTFI was that of Malu Terraq on the 20th of November 1996. He was indicted with charges of crimes against humanity, crimes against peace, inciting acts of violence, and murder. The charging document characterized his involvement with the NPA Revolt Planning Committee as "planning of genocide."

Terraq had been evading capture by Remorran officials since he was first charged with treason, sedition and murder on April 15, 1995. Remorra had formally issued a warrant for his arrest when the conflict in Integra ended in October 1995. On 1st July, 1996, the Remorran Intelligence Service planned and funded an illegal attempt to kidnap Terraq from his home in Nylesia and Terraq escaped. In answer to Nylesia's diplomatic protest, the Remorran Ambassador to Nylesia characterized this action as a "technical interference with the sovereignty of Nylesia". The President of Remorra announced that Remorra would bring Terraq to justice "by other means" and that it, and not any foreign or international body, would deal appropriately with the former NPA leader. In the meantime, three other members of the Revolt Planning Committee of the NPA were arrested in Harbaar and, after a brief and highly publicized trial before and Harbaar Criminal Court, were found guilty of sedition, treason, and complicity to murder. They were sentenced to death by lethal injection, and executed immediately after the court handed down its verdict.

On December 1, 1996, officials of the Arden government arrested and imprisoned Terraq. Disguised and using a forged passport, Terraq had entered Arden illegally in November 1996. The next day, a Remorran spokesperson stated that "the blood of our martyrs will be dishonoured unless such criminals receive the justice they deserve!"

On November 20, 1996, the ICTFI had formally indicted Terraq for crimes against humanity, crimes against peace, inciting acts of violence, and murder. On December 2, 1996, Remorra formally

requested that Arden extradite Terraq to stand trial in Remorra for his acts of treason, sedition, and murder committed during the revolt. This was done pursuant to Article 2 of the 1965 Extradition Treaty between Arden and the former Integra. At the same time, the ICTFI formally requested that Arden surrender Terraq to its control. Arden refused Remorra's request citing its concern for the rule of law which required all persons charged with crimes to be given a fair trial. As such, Arden decided to surrender Terraq to the ICTFI as soon as the investigation of Terraq's other activities in Arden was completed. Remorra immediately delivered a diplomatic reply, protesting Arden's failure to extradite Terraq. Remorra concluded by saying that Terraq was a fugitive from justice and an enemy of the Remorran people.

The Arden authorities had also discovered that Terraq had control over bank accounts in Arden at a value exceeding US$18 million. Remorra obtained a default judgement against Terraq in the Remorran courts for US$20 million dollars. As a result, Remorra obtained a writ of attachment enabling it to seize assets belonging to Terraq. Remorra then demanded that Arden seize ownership of Terraq's bank accounts located in that state and deliver the proceeds to the Remorran embassy. The Arden government had already frozen the accounts as it had deemed them suspicious. The freeze was lifted when an Ardenian court ordered an impounding impermissible under Arden's bank secrecy laws. In response, Arden's foreign minister denied Remorra's request for access to the funds in Terraq's bank account stating that its law does not permit bank account holders to be deprived of either their property or their privacy.

In order to present further escalation of this conflict, Remorra and Arden have agreed to submit the dispute to the International Court of Justice. Terraq remains in custody in Arden, pending the outcome of this case.

QUESTIONS PRESENTED

I.

Whether the Extradition Treaty is in effect as between Arden and Remorra.

II.

Whether, if the Extradition Treaty is in effect, Arden should be required to extradite Terraq

III.

Whether Arden's surrender of Terraq to the International Criminal Tribunal For the Former Integra is consistent with international law.

IV.

Whether Remorra is entitled to damages for losses suffered as a result of Arden's refusal to extradite Terraq to Remorra.

V.

Whether Arden is obligated to provide an accounting and payment of funds in the First Arden National Bank.

SUMMARY OF PLEADINGS

In the absence of any existing obligations to the contrary, Arden has a duty to deliver Malu Terraq to the International Criminal Tribunal for the Former Integra (ICTFI). Remorra cannot rely on the Extradition Treaty to establish an obligation on Arden to deliver Terraq to Remorra. Remorra, as a new state, is not a party to the Treaty under customary international law. Furthermore, Remorra cannot rely on the Vienna Convention on Succession of States to assert its succession to the Treaty with Arden. Arden is not a party to the Convention and the Convention does not represent customary international law.

In any event, the crimes Terraq is charged with are political in nature and therefore, fall within the political offence exception contained in the Extradition Treaty. Furthermore, extradition of Terraq to Remorra would be inconsistent with international norms of due process. Therefore, Arden has no obligation to extradite even if the Extradition Treaty is in effect.

Regardless of the binding force of the Extradition Treaty, Arden's compliance with the ICTFI's request for Terraq is compatible with international law. Resolution 1024 conferred upon the ICTFI the requisite jurisdiction to try Terraq. This court does not have the power to review a decision of the Security Council. Even if its decisions were reviewable, the Security Council has validly responded to a threat to international peace by establishing the ICTFI through its powers under Chapter VII of the UN Charter. Finally, past practice of the United Nations confirms the legality of the ICTFI.

Furthermore, the ICTFI has jurisdiction complementary to domestic courts and Terraq's prosecution is precisely the sort of task the ICTFI was designed to address. Moreover, the Integran Conflict has rendered Remorra an inappropriate forum in which to try Terraq. The ethnic tensions

which have emerged from the civil war will make a fair trial of a Remorran national like Terraq unlikely. Finally, an international tribunal is a more suitable arena in which to prosecute crimes against humanity.

Even if Arden has breached an international legal obligation, Remorra is not entitled to an award for damages. An award for damages is available only where an injury can be established. Remorra has not suffered any injury as a result of Arden's actions. Furthermore, pecuniary damages should only be awarded where a direct monetary loss can be established with both certainty and precision. Remorra has not suffered a direct monetary loss. The only appropriate remedy would be a formal or diplomatic apology.

Finally, Arden is under no international obligation to provide either an accounting or payment of Terraq's funds located in Arden's First National Bank. Arden exercised its undisputed authority to exercise jurisdiction over banking matters within its territory by enacting bank secrecy laws. In the absence of a mutual assistance convention between Arden and Remorra, Arden is under no duty to cooperate and disclose confidential financial information, particularly where there is only a tenuous link between the funds and any illegal activity. Even if an applicable assistance convention had existed between the parties, assistance under these agreements has typically been granted only where the action to be taken would not violate the domestic laws of the requested state. An accounting and payment of funds is unavailable as Arden has breached no international obligation to provide assistance. In any event, the requested remedy of an accounting and payment should not be granted because such an order would be a breach of Arden's domestic laws.

I. THE EXTRADITION TREATY IS NOT IN EFFECT AS BETWEEN ARDEN AND REMORRA.

A. REMORRA, AS A NEW STATE, IS NOT A PARTY TO THE EXTRADITION TREATY.

1. A "newly independent state" is a state, the territory of which, immediately before the date of succession, was dependent on the predecessor state for international relations.[1] Remorra was a distinct territorial and ethnic area of Integra. While some individual Remorrans may have had influence on international relations through their participation in government, the Remorran people, as a distinct ethnic minority, depended on the Integran government, located in what is now Nylesia, to conduct their international relations. As a newly independent state, Remorra is subject to the "clean slate" doctrine and succeeds to none of its predecessor's treaties[2], including the Extradition Treaty between Arden and Integra.

2. Even if Remorra was not a dependent territory, it is still subject to the "clean slate" doctrine. Under customary international law, a new state with a new international personality also begins life with a "clean slate."[3] The Peace Treaty has deemed Nylesia the successor state for purposes of membership in international organizations and as such, Nylesia has assumed Integra's seat at the UN

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[1] Vienna Convention on Succession of States in Respect of Treaties, U.N. Doc. A/CONF.80/31 (1978), 17 I.L.M. 1488, art. 2(f) [hereinafter VCSS]; Williamson and Osborne, A US Perspective on State Succession (1993) 33 Va. J. Int. L. 261 at 262; R. Kearney, The Twenty-Sixth Session of the International Law Commission (1975) 69 Am. J. Int. L. 591 at 599.

[2] VCSS supra note 1, art. 24; Lord McNair, Law of Treaties (1963) [hereinafter McNair] 625-630; A. Beato, Newly Independent and Separating States' Succession to Treaties (1994) 9 Am. U.J. Int. & Pol'y 525 at 536; Report of the I.L.C. on the Work of its 26th Session, U.N. GAOR, 29th Sess., Supp. No. 10, at 52 U.N. Doc A/9610/Rev.1 (1974).

[3] McNair, supra note 2, at 593; I. Brownlie, Principles of Public International Law, 4th ed. (1990) at 668.

General Assembly.[4] Additionally, Nylesia is the larger state in both area and population.[5] Remorra is a new state which was required to apply for membership in the United Nations and to accede separately to the Statute of the International Court of Justice (ICJ). As a new state, *ex hypothesi* a non-party, Remorra cannot be bound by the Extradition Treaty and cannot bind Arden to it without Arden's express declaration of acceptance[6], which has not been given. If any state succeeds to Integra's rights under the Extradition Treaty, it would be Nylesia, the successor state.

B. REMORRA CANNOT INVOKE THE VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT TO TREATIES (VCSS).

3. Arden has not ratified the VCSS[7], so Remorra cannot rely on that convention to assert rights against Arden.[8] If Arden has any obligation, it is merely not to defeat the objects and purposes of the VCSS[9]. The purpose of the VCSS is to apportion treaty rights and obligations between predecessor and separating successor states.[10] Arden has done nothing to interfere in the apportionment of treaty rights and obligations between Nylesia and Remorra. While the Peace Treaty refers to the VCSS, it is only to determine rights as between Nylesia and Remorra and it has no implications for the

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[4] *Compromis* at para. 7.

[5] *Compromis* at paras. 7, 18.

[6] McNair, supra note 2, at 661.

[7] *Compromis* at para. 12.

[8] M.M. Whiteman, Digest of International Law (1970) at 41.

[9] VCSS supra note 1, art.18; B. Cheng, General Principles of Law (1990) at 109; McNair supra note 2 at 199; J.B. Moore, History and Digest of International Arbitrations , Vol 4 (1895) at 3798-3803.

[10] Y. Makonnen, International Law and the New States of Africa (1983) at 137; R. Mullerson, New Developments in the Former USSR and Yugoslavia (1993) 33 Va. J. Int. L. 299 at 315.

resolution of issues as between Arden and Remorra.[11]

4. The VCSS is in many respects a codification of customary international law. However, Article 34 was considered by the drafters to be progressive development, and is still not customary international law.[12] The VCSS has been ratified by only 20 states and has only been in force since November of 1996[13]. Therefore Article 34 cannot have achieved the status of a customary norm.

C. EVEN UNDER THE VCSS, REMORRA WOULD NOT BE A PARTY TO THE EXTRADITION TREATY.

5. Even if the principle of automatic succession applies, it pertains only to state disintegration or the formation of a state by one part of the territory leaving the whole.[14] Because Remorra is a "newly independent state," the more appropriate provision is Article 24, which provides that a "newly independent state" is subject to the "clean slate" doctrine.

6. In any event, Article 34 does not apply if application to the successor state would radically change the conditions of operation of the treaty.[15] Remorra is an ethnic state radically different from the bicultural state of Integra. Past treatment of ethnic Nylesians in Remorran courts raises serious doubts about the impartiality of the Remorran justice system. The possible negative implications

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[11] *Compromis* at para. 18.

[12] United Nations Conference on Succession of States in Respect of Treaties, U.N. Doc. A/CONF. 80/16/Add.2 (1974) at 89; Case Concerning Application of the Genocide Convention (Preliminary Objections) (1996) I.C.J <http://www.un.org.law.icjsum/9625.htm>; N. Schrijver, Sovereignty Over Natural Resources (1997) at 5; M. Nash (Leich), Contemporary Practice of the United States Relating to International, (1995) 89 Am. J. Int. L. 761 at 761.

[13] Resolution 31/18 United Nations Conference on Succession of States in Respect of Treaties, U.N. Doc. A/CONF.80/16, at 1.

[14] VCSS, supra note 1, art. 16.

[15] Id., art. 34(2)(b).

for extradited Nylesians radically changes the conditions of operation of the Extradition Treaty.

D. EVEN IF THE EXTRADITION TREATY WOULD OTHERWISE BE IN EFFECT AS BETWEEN REMORRA AND ARDEN, IT IS VOID UNDER THE PRINCIPLE OF *REBUS SIC STANTIBUS*.

7. Under customary international law, a treaty is voidable where circumstances constituting an essential basis of consent have changed in a manner unforseen by the parties, and the effect of the change is to radically transform the obligations under the treaty.[16] The principle is also reflected in the Vienna Convention on the Law of Treaties[17], which, while not applicable to the 1965 Extradition Treaty, because of the provisions against retroactive application,[18] is evidence of customary law.

8. The civil war in Integra was unforseen by the parties to the Extradition Treaty. The result of the civil war has been the creation of an international tribunal to which Arden has obligations pursuant to the UN Charter. Also, there are grave concerns that the new state of Remorra will not afford ethnic criminal defendants the rights to due process which were available in the Integran courts.[19] These changes go to the essential basis of consent and radically change the obligations contemplated when the Extradition Treaty was concluded between Arden and Remorra.

II. EVEN IF THE TREATY IS IN EFFECT, IT DOES NOT REQUIRE EXTRADITION OF TERRAQ TO REMORRA.

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[16] Free Zones Case (1932), P.C.I.J., Ser. A/B, No. 46 at 96; Fisheries Jurisdiction Case (1973) I.C.J. Rep.33 at 128 [hereinafter Fisheries]; Brownlie supra note 3, at 616; A.E. David, The Strategy of Treaty Termination (1975) at 201; W. Levi, Contemporary International Law (1991) at 213 [hereinafter Levi]; McNair, supra note 2, at 690;

[17] Vienna Convention on the Law of Treaties (1969) 1155 U.N.T.S. 331, art. 62.

[18] Id., art. 4.

[19] Infra, at para. 24, 25.

A. TERRAQ IS EXEMPT FROM THE TREATY UNDER THE POLITICAL OFFENCE EXCEPTION.

9. Article 7(c) of the Extradition Treaty gives Arden full discretion to refuse extradition for offences it regards as political.[20] In any event, the alleged crimes are within the international legal definition of political offences.

10. Terraq is accused of the crimes of treason and sedition, which are clearly political offences.[21] These crimes are outside the Extradition Treaty concluded between Arden and Integra. Although Terraq is also accused of the common crime of murder, that offence, in these circumstances, has a political element meeting any accepted test of political incidence.

11. The French test for political incidence denies extradition when it is requested for political ends or where the crimes were committed with a political objective.[22] Terraq committed the crimes he is accused of while seizing public buildings, police stations, and military installations, in an attempt to overthrow the Nylesian government,[23] a valid political objective.[24] Further, it is unlikely that Terraq's trial would be a typical criminal trial. Rather it would be a purely retaliatory exercise by his political adversaries, the Remorran government, which has tried to kidnap him, and is

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[20] *Compromis Clarifications* at para. 18.

[21] M.R. Garcia-Mora, Treason, Sedition, and Espionage as Political Offences (1964) 26 U. Pitt. L. Rev. at 65; J.A. Shearer, Extradition in International Law (1971) at 169.

[22] M.R. Garcia-Mora, The Nature of Political Offenses: A Knotty Problem of Extradition Law (1962) 48 Va. L. Rev. 1226 at 1249; In Re: Henin Paris, La Semaine Judique, No. 15274 (Fr. Ct. of App. 1967) [hereinafter Henin].

[23] *Compromis* at para. 10, 11.

[24] In Re: Holder and Kerhow, Dig. of US Int. L. at 124 (Fr. Ct. of App. 1976); In Re: Gonzales (1967) US Dis. Ct., 34 I.L.R. at 139; Henin, supra note 22.

awaiting "the moment to bring Terraq and his accomplices to justice by other means."[25] Protection from retaliation from political foes goes to the very *raison d'être* of the political offence exception.[26]

12. The Swiss test requires a nexus between the common crimes and a political struggle.[27] Terraq committed crimes in an attempt to further his political goal of overthrowing the Integran government.[28] Thus, a nexus is established between the commission of the crimes and a political struggle to change the sitting government in Nylar.

13. The Anglo-American test exempts crimes committed during the course of a political uprising.[29] Terraq committed his crimes during a struggle to overthrow the Integran government. Even under the narrowest reading of this test, which requires the criminal to be "at odds with the government in power,"[30] Terraq's offences are clearly political.

B. THE EXTRADITION TREATY CANNOT BE APPLIED SO AS TO DENY TERRAQ HIS INTERNATIONAL RIGHTS TO DUE PROCESS.

14. A treaty should be interpreted to yield an effect in conformity with, rather than contrary to,

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[25] *Compromis* at para. 24.

[26] C. Van den Wijanguert, The Political Offense Exception to Extradition (1980) at 113 [hereinafter Van den Wijanguert].

[27] Id., at 127; In Re: Peperno 93 J. Trib. at 52 (Fr. Ct of App. 1978).

[28] *Compromis* at paras. 8, 9, 10, 11.

[29] Re: Castroni [1891] 1QB 149; R.v. Governor of Brixton Prison, ex p. Kolozyski [1955] 1 QB 540 [hereinafter Kolozyski]; Lubet and Czaches, The Role of the American Judiciary in the Extradition of Political Terrorists(1980) 71 J. Cr. L.& Crim'y 193 at 201 [hereinafter Lubet].

[30] R. v. Governor of Brixton Prison, ex p. Schtraks (1962) 3 All ER 529 (HL) at 538; C.F. Amerasinghe, The Schtraks Case, Defining Political Offences and Extradition (1965) 28 Mod. L. Rev. at 27.

existing international law.[31] The right to due process is a fundamental principle of conventional and customary international law,[32] especially in a capital case.[33] The Extradition Treaty should be read so as not to apply where Remorra intends to deprive Terraq of his right to due process. In their past treatment of NPA members, Remorran courts have shown little or no concern with fair procedure and have not provided adequate opportunities to appeal death sentences.[34]

15. Arden cannot send Terraq to Remorra as it would be a breach of existing conventional obligations. Sending Terraq to Remorra would be a breach of Arden's obligations under the Geneva Convention.[35] It would also be a violation of Arden's obligations under the UN Charter as Arden has a duty to promote human rights,[36] including the right to due process.[37] Where there is a conflict between a multilateral treaty, like the Geneva Convention, which establishes permanent rules, and contains no power of denunciation, and another international agreement, the former shall prevail.[38]

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[31] Rights of Passage Case (1960) I.C.J Rep. 6 at 120; McNair, supra note 2, at 466; Levi, supra note 16, at 211.

[32] Infra para. 24, 25.

[33] Protocol Additional to the 1949 Geneva Convention, and Relating to the Protection of Victims of Non-International Armed Conflicts, U.N.T.S 17513, 16 I.L.M. 1391, art. 6(4) [hereinafter Protocol II]; Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, U.N. ESCOR, 8th Sess., U.N. Doc. 1984/50/Annex(1984) [hereinafter Safeguards]; L. Hannikainen, Peremptory Norms in International Law (1988) at 436 [hereinafter Hannikainen].

[34] *Compromis* at para. 25.

[35] Protocol II, supra, note 33, art. 6.

[36] Charter of the United Nations, [hereinafter UN Charter], 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (1945), arts. 55, 56.

[37] Id.

[38] McNair, supra note 2, at 221.

Similarly, where there is a conflict between the obligations of a member of the United Nations and any other international obligation, the Charter shall prevail.[39]

III. IN ANY EVENT, ARDEN'S PROPOSED SURRENDER OF TERRAQ TO THE INTERNATIONAL TRIBUNAL FOR THE FORMER INTEGRA (ICTFI) IS CONSISTENT WITH INTERNATIONAL LAW.

A. THE ICTFI HAS JURISDICTION TO TRY TERRAQ.

i. The Security Council's decision to create the ICTFI is not subject to review.

16. Security Council resolutions passed in accordance with established practice and rules of procedure are presumed to be valid.[40] Resolution 1024 was adopted with no negative votes.[41] Also, the Security Council was comprehensively informed of the nature of the situation in the former Integra before it voted to pursue Chapter VII action.[42] As such, Resolution 1024 meets the requirements, as established in the Namibia decision, for a procedurally valid resolution.[43]

17. Because Resolution 1024 was adopted pursuant to the Security Council's determination under Chapter VII,[44] this Court should refrain from pronouncing on its substantive validity. Procedurally valid Security Council resolutions, enacted to address threats or breaches of the peace,

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[39] UN Charter, supra note 36, art. 103.

[40] Namibia Case (1971) I.C.J. Rep. 16 at 22 para. 22.

[41] *Compromis* at para. 22.

[42] *Compromis* at paras. 19, 20.

[43] Infra, paras. 18-22.

[44] *Compromis* at para. 22.

pursuant to Article 39,[45] are not subject to appeal or judicial review.[46] Under Articles 39 and 41, the decision to act and the measures to be adopted are matters within the exclusive discretion of the Security Council.[47] Unlike some domestic systems, the international legal system has no procedure for determining the validity of executive action.[48] Nor did the framers of the Charter intend to effect such a mechanism, as evidenced by their rejection of proposals to vest the ICJ with such powers.[49] As Justice Lachs observed in the Lockerbie Case, the non-reviewability of Chapter VII determinations, ought not be viewed "as an abdication of the Court's powers ...[but as] a reflection of the system within which the Court is called upon to render justice."[50] If it were otherwise, the United Nations scheme for the maintenance of international peace and security could fail.[51]

ii. In any event, the creation of the ICTFI was a legitimate exercise of the Security Council's Chapter VII powers.

a) The Integran conflict was a threat to international peace and security justifying Chapter VII action by the Security Council.

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[45] UN Charter, supra note 36, arts. 39-51.

[46] Namibia Case, supra, note 40 at 45 at para. 89; Military and Paramilitary Activities In and Against Nicaragua, 1984 I.C.J. Rep. 392 at 436 at para. 98 [hereinafter Nicaragua]; Aerial Incident at Lockerbie , Provisional Measures 31 I.L.M. 662 at 673, 678, 680, 703, [hereinafter Lockerbie Case]; T. Gill, "Remarks", American Society of International Law, Contemporary International Law Issues: Opportunities at a Time of Momentous Change (1994) at 283, 284.

[47] Id.

[48] Certain Expenses of the United Nations 1962 I.C.J. Rep. 69 at 151 [hereinafter Expenses Case].

[49] Id.,at 168.

[50] Lockerbie, supra, note 46 at 678.

[51] W.M. Reisman, The Constitutional Crisis in the United Nations (1993) 87 Am. J. Int. Law 83 at 88.

18. While the Security Council must discern a threat to international peace and security in order to exercise its powers under Chapter VII,[52] this requirement is certainly satisfied in the case at bar. The international dimension of this conflict was demonstrated by the intervention of the multilateral force.[53] In addition, the recognition of the new states by the international community, their admission into the United Nations, and their agreements with respect to succession of treaties[54], are all factors which reflect the international dimension of this conflict[55].

19. Moreover, the crimes committed are most properly characterized as crimes against humanity, and, as such, are in and of themselves representative of the international dimension of the Integran conflict.[56] In the Lockerbie situation, the Security Council acted under Chapter VII to combat international terrorism even though the resolution was passed more than three years after the bombing.[57] If a single act of international terrorism is sufficient to support Chapter VII action by the Security Council, then surely the widespread crimes against humanity committed during the Integran conflict would be as well.

20. Crimes against humanity are also a threat to international peace and security in so far as they

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[52] UN Charter, supra note 36, art.39.

[53] *Compromis* at para. 16.

[54] *Compromis* at para. 18.

[55] T. Meron, War Crimes in Yugoslavia and the Development of International Law (1994) 88 Am. J. Int. L. 78 at 81.

[56] J.C. O'Brien, The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia (1993) 87 Am. J. Int. L. 639 at 643.

[57] Lockerbie, supra note 46, at 666 and 670.

have a considerable destabilizing effect on regions. During the conflicts in Yugoslavia,[58] Rwanda,[59] Somalia,[60] and Cambodia,[61] crimes against humanity played a very significant role in regional destabilization. Moreover, in the first three cases, the regional destabilization and the violations of international humanitarian law led to substantial direct intervention by the United Nations.[62] Furthermore, the United Nations intervened in Rwanda[63] even though the conflict was characterized by all concerned as internal.[64] The Security Council held that genocide and other violations of international humanitarian law, committed in Rwanda, constitutes a threat to international peace and security.[65]

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[58] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, at para 6. UN Doc. S/25704(1993) [hereinafter Yugoslavia Report].

[59] Final Report of the Commission of Experts established pursuant to Security Council resolution 935, UN Doc. S/1994/1405/Annex (1994) [hereinafter Rwanda Report].

[60] G. Simpson, Conceptualizing Violence: Present and Future Developments in International Law, (1997) 60 Alb. L. Rev. 801 at 810 [hereinafter Simpson]; M. Stopford, Locating the Balance: The United Nations and the New World Disorder (1994) 34 Va. J. of Int. L.686 at 691; R. Wedgwood, War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal (1994) 34 Va. J. of Int. L. 267 at 270.

[61] T. Meron, International Criminalization of Internal Atrocities, (1995) 89 Am. J. Int.. L. 554 at 554 [hereinafter Meron, International Criminalization]; D.F. Orentlicher, International Criminal Law and the Cambodian Killing Fields (1997) 3 ILSA J. of Int. and Comp. L. No. 2 705 at 707; Simpson Id., at 809.

[62] Yugoslavia Report, supra note 58; Rwanda Report, supra note 59; supra note 60.

[63] Security Council Resolution 955, S/RES/955 (1994) U.N. Doc. S/1994/1168 [hereinafter S.C. Res. 955].

[64] Meron, International Criminalization supra note 61 at 556; M.J. Matheson, ASIL International Law Weekend: Panel on Internal Conflicts (1997) Vol.3:2 523 at 524.

[65] S.C. Res. 955, supra, note 63.

b) The creation of the ICTFI was an appropriate response to the threat to international peace and security in Integra.

21. The creation of the ICTFI by the Security Council was an appropriate measure to deal with the grave violations of international humanitarian law that occurred in the former Integra. Article 39 provides that the Security Council shall decide what measures shall be taken, in accordance with Articles 41 and 42, to maintain or restore international peace and security.[66] Under Article 41, the Security Council may decide what measures, not involving the use of armed force, are to be employed to give effect to its decisions.[67] The measures listed in Article 41 are merely illustrative and are non-exhaustive.[68] If the Security Council has the right to wage war under Chapter VII, then it must surely have the authority to establish a judicial body aimed at bringing persons to justice accused of international crimes.[69]

c) Furthermore, the use of Chapter VII powers by the Security Council to set up the international tribunals in Yugoslavia and Rwanda supports the constitutionality of the ICTFI.

22. Under international law, the practice of the United Nations may be used to interpret the

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[66] UN Charter, supra note 36.

[67] Id.

[68] Id.; Prosecutor v. Dusko Tadic Appeal (Preliminary Motion), Case No. IT-94-I-AR72, Balkans War. Cr. Trib. (October 2, 1995) at para.35 [hereinafter Tadic Appeal].

[69] J.C. O'Brien, The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, (1993) 87 Am. Int. L. 639 at 643.

Charter.[70] The Chapter VII powers have been used to set up tribunals in the former Yugoslavia[71] and Rwanda[72]. The constitutionality of the ICTFI is therefore supported by this accepted practice.

iii. The ICTFI possesses subject matter jurisdiction over Terraq's crimes.

23. In its report, the Panel of Experts concluded that the Integran conflict involved crimes against the peace and crimes against humanity. The report recommended the creation of an international criminal tribunal to try the perpetrators of these crimes and other violations of law occurring in the territory of the former Integra since 1994.[73] The Security Council adopted the report with no negative votes.[74] The irresistible conclusion is that the Security Council must have granted the ICTFI jurisdiction in its Charter over crimes against peace, crimes against humanity "and other violations of law" committed in Integra. This conclusion is supported by the practice of the Security Council for the Yugoslavia[75] and Rwanda[76] tribunals, where the Security Council utilized the reports of the panels of experts, and provided jurisdiction to the tribunal for the specific crimes in the reports. In any event, a challenge to the subject matter jurisdiction of the ICTFI is most properly

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[70] Competence of the General Assembly for the Admission of a State to the United Nations, (1950) I.C.J. Rep. 1 at 8-9; Expenses Case, supra note 48 at 157; Namibia, supra note 40 at 22 para. 22.

[71] Yugoslavia Report, supra note 58.

[72] Rwanda Report, supra note 59.

[73] *Compromis*, at para. 20.

[74] Id., at para. 20.

[75] Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992) U.N. Doc. S/1994/674(1994).

[76] Letter dated 9 December 1994 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/1994/1405/Annex at para. 7.

argued by the accused before the ICTFI, rather than by a state before this Court.

B. FURTHERMORE, THE ICTFI IS A MORE APPROPRIATE FORUM THAN REMORRA TO TRY TERRAQ.

i. The ICTFI should be allowed to try Terraq as there are substantial concerns regarding the fairness of the trial that he could receive in Remorra.

24. The right to due process is a fundamental principle of conventional and customary international law.[77] Due process encompasses the right to an impartial hearing as well as fair procedure.[78] The ethnically homogeneous state of Remorra has just emerged from a war with Nylesia, which raises serious concerns about the impartiality of the Remorran justice system when dealing with ethnic Nylesians. The Remorran government's actions since the Integran conflict have confirmed these concerns. The Remorran Intelligence Service tried to kidnap Terraq, and various government spokespersons, including the President, have made clear their interest in pursuing vengeance before justice, culminating in the statement: "The blood of our martyrs will be dishonoured unless such criminals receive the justice they deserve!"[79]

25. In addition to ensuring impartial trials, due process requires fair procedures.[80] In particular,

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[77] European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) Eur. T.S. No. 5, 213 U.N.T.S. 222, art. 6; Universal Declaration of Human Rights UNGA Res. 217 (III), U.N. GAOR, 3rd Sess., Supp. No. 13, U.N. Doc. A/810 (1949) arts. 5, 10-13; International Covenant on Civil and Political Rights (1966) 999 U.N.T.S. 171, art.14; Protocol II supra note 33, art. 6; Report of the I.L.C. on the Work of its Forty-Ninth Session, Chapter II Draft Code of Crimes Against the Peace and Security of Mankind U.N. Doc. A/52/10 (1996) art. 11 [hereinafter Draft Code].

[78] L. Hand, The Bill of Rights (1958) at 52; R. Pound, Justice According to Law (1951) at 59; W. J. Brennan, International Due Process and the Law, (1962), 48 Va. L. Rev. 1258 at 1259.

[79] *Compromis* at paras. 30, 31.

[80] Supra note 78.

there must be an opportunity to appeal a death sentence before it is carried out.[81] The trials of the other three members of the Revolt Planning Committee in Harbaar were brief, and they were executed immediately after the verdict.[82] While there was a formal opportunity for appeals, the immediate execution amounts to a violation of the right to due process. Therefore, to send Terraq to Remorra would deprive him of his procedural rights guaranteed at international law.

ii. As crimes against humanity, the alleged offenses should be judged in an international court.

26. Crimes against humanity are properly defined as "those acts of a very serious nature committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[83] Terraq claimed to be a principal architect of the NPA strategy to transform Integra into a state dominated by Nylesians, which resulted in the deaths of 5,000 Remorrans.[84] Terraq also orchestrated a media campaign which encouraged Nylesians to commit acts of violence against Remorrans. In addition to these crimes, Terraq personally issued a standing order that any Remorrans that had owned property requisitioned by his forces were to be set afloat in boats to drift at sea without food, water or fuel.[85] In light of these acts of atrocity, an

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[81] Protocol II, supra note 33, art. 6(4); Safeguards, supra note 33; Hannikainen, supra note 33.

[82] *Compromis*, at para. 25.

[83] Prosecutor v DuskoTadic (Preliminary Motion, Trial Div.) Case No. IT-94-I-T, Balkans War Cr. Trib. (August 10, 1995); Draft Code, supra note 77, art. 18.

[84] *Compromis* at para. 10.

[85] *Compromis* at para. 21.

independent panel of experts named Terraq *hostis humani generis.*[86]

27. Terraq's crimes were committed against the world at large and should be tried in a forum where the international community can see they will not be tolerated[87]. Furthermore, the ICTFI would have the specific expertise in dealing with these kinds of crimes[88], and the resources to provide a thorough, fair and impartial trial. Finally, an international trial would attract world attention[89] much more effectively than could one in Remorra.

iii. Remorra cannot argue that the use of the words "complementary jurisdiction" in Resolution 1024 provides a basis for the national courts taking precedence.

28. It is crucial that the application of the principle of complementary jurisdiction strike a proper balance between national courts and international tribunals.[90] A blanket application of this principle in favour of the national courts would render the international criminal tribunal meaningless.[91] Furthermore, there is no clear consensus in the world community with regard to the meaning of the term "complementary" and how it pertains to the relationship between national courts and

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[86] *Compromis* at para. 21.

[87] M.C. Bassiouni, Crimes Against Humanity in International Criminal Law (1992) at 14; M.P. Scharf, The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg (1997) 60 Alb. L. Rev. 861 at 864 [hereinafter Tadic Appraisal].

[88] Fédération Nationale de Déportés et Internés v. Barbie (1983) 78 I.L.M. 125 at 130.

[89] D.A. Martin, Reluctance to Prosecute War Crimes: Of Causes and Cures (1994) 34 Va. J. Int. L. 255 at 264; Scharf, Tadic Appraisal, supra note 87 at 863.

[90] I.L.C. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Committee) U.N. GAOR-51st Sess., Supp. No. 22 at para. 153, U.N. Doc. A/51/22(1996) [hereinafter ILC Proceedings]; M.C. Bassiouni & C.L. Blakesley, The Need for an International Criminal Court in the New International World Order (1992) 25:2 Vand. J. of Tr. Nat. L.151 at 171.

[91] ILC Proceedings, id.

international criminal tribunals.[92] As a result, this principle should be applied in a similar manner to concurrent jurisdiction.[93] Moreover, the subject matter of Terraq's crimes and the serious concerns regarding the fairness of the Remorran justice system require that the application of the principle of complementary jurisdiction be applied to support the jurisdiction of the ICTFI in the case at bar.

IV. ALTERNATIVELY, IF THIS COURT FINDS ARDEN HAS BREACHED THE EXTRADITION TREATY, IT SHOULD REJECT ANY CLAIM FOR MONETARY DAMAGES.

A. REMORRA SHOULD NOT BE AWARDED MONETARY DAMAGES BECAUSE THERE HAS BEEN NO INJURY.

29. An award for damages will be made only where there is an injury.[94] In the case at bar, if the loss of information can be construed as an injury, no such injury has been suffered by the state of Remorra or its nationals. Any information which Terraq may hold will be available as a direct result of the investigations of the ICTFI. Furthermore, there is no insult to Remorra in extraditing Terraq to a body created by the Security Council. On the contrary, this demonstrates Arden's concern that international attention be drawn to the atrocities committed against the Remorran people.

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[92] ILC Proceedings, supra note 90 at paras. 154, 157 & 158; E.T. Bloom, Comments on the International Criminal Court (1996) 2 ILSA J. Int. & Comp. L. No.3 649 at 650; Meron, International Criminalization, supra note 61 at 555.

[93] ILC Proceedings, supra note 90 at para. 158.

[94] Mavromatis Palestine Concessions Case (1924) P.C.I.J., Ser. A, No. 5. Chorzów Factory (Jurisdiction) (1928) P.C.I.J., Ser. A, No. 17, at 47 [hereinafter Chorzów]; Spanish Zone of Morocco Claims (1925) 2 R.I.A.A. 615 at 641; American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, Vol. II at §901 and 341[hereinafter Restatement]; Brownlie, supra note 3, at 434; F.V. Garcia-Amador, The Changing Law of International Claims,Vol. II (1984) at 559 [hereinafter Garcia-Amador]; D.W. Grieg, International Law, 2nd ed. (1976) at 596-597 [hereinafter Grieg]; G. Schwarzenburger, International Law as Applied by International Courts and Tribunals, Vol. I (1957) at 563, 653-655 [hereinafter Schwarzenburger].

30. Nor does the fact that the ICTFI will investigate and try Terraq lead to the conclusion that Remorra will lose the opportunity to heal its damaged national psyche. A fair and impartial trial by a body established by the United Nations will equally serve to satisfy the Remorran people's desire for justice.

B. EVEN IF THERE HAS BEEN AN INJURY, REMORRA SHOULD NOT BE AWARDED MONETARY DAMAGES.

i. Remorra is not entitled to damages as the injury is too remote.

31. Compensation is not available when injury is too remote from a breach of an obligation. This principle of international law is confirmed by learned authors[95] and arbitral decisions[96]. The possibility that Remorra will not receive any relevant information is too remotely connected to Arden's decision not to extradite Terraq. Even if the ICTFI proves less effective than the Remorran courts in gathering and distributing this information, Arden could not have foreseen this when it refused to extradite Terraq.

ii. In any event, Remorra is not entitled to monetary compensation in these circumstances.

32. The usual remedy for non-material loss is a formal or diplomatic apology and/or a judicial declaration of the unlawful character of the act[97]. In the case at bar, the possible loss of information falls into this catagory. Information itself is not a material item and in any event there is no certainty

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[95] Brownlie, supra note 3, at 464; Grieg, id. at 596; E. Jiminez de Arechaga, Forms of Reparation for the Breach of an International Obligation, Recueil des Cours, International Law, Cases and Materials. (1978) at 569 [hereinafter de Arechaga].

[96] Nautilaa Incident Case and Maziua Claims (1928) 2 R.I.A.A. 1013; Garland Steamship Corporation Case (1924) 7 R.I.A.A. 73.

[97] Brownlie, supra note 3 at 459-461, 464, 465; C. Gray, Judicial Remedies in International Law (1990) at 96, 97, 100; Garcia-Amador, supra note 94 at 568-571.

that Terraq holds valuable information relevant to alleged human rights violations. In addition, damage to a state's psyche and dignity is not material. Therefore, the appropriate remedy would be an apology and/or a declaration by this Court.

33. Monetary damages are awarded by this Court for material loss only where the injury is established with certainty and precision.[98] Even if the possible loss of information can be construed as a material loss, Remorra is claiming for injures which cannot be precisely determined. It is impossible to put a price on the potential loss of information. In the case at bar, the alleged loss is speculative as it is not clear that extradition of Terraq will yield any valuable information. There is also no evidence that the injuries suffered by Remorra and its nationals can only be compensated by the establishment of an extravagant organization like the Truth and Reconcilliation Commission. In light of the uncertainty of this claim, this Court should decline to award damages to Remorra.

iii. Furthermore, Remorra's claim for damages of US$100 million is best characterized as a claim for punitive damages and is therefore unavailable.

34. Learned writers[99] and judicial decisions[100] confirm that punitive damages are not available at international law. Moreover, Remorra has asked this Court for only compensatory, not punitive, damages. In the case at bar, if any damage has been suffered by the refusal to extradite Terraq, it is minimal. The amount of US$100 million that Remorra is claiming as compensation can only be regarded as an attempt to disguise a claim for punitive damages in compensatory clothing.

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[98] Corfu Channel Case (Compensation) 1949 I.C.J. Rep. 244; Military and Paramilitary Activities In and Against Nicaragua (Merits) 1986 I.C.J. Rep. 14; de Arechaga, supra note 95 at 569.

[99] de Arechaga, supra note 95 at 569; Grieg, supra note 94 at 604.

[100] Lusitania Cases (1925-26) 7 R.I.A.A. 32 at 38-44.

V. ARDEN IS UNDER NO OBLIGATION TO PROVIDE A PAYMENT AND ACCOUNTING OF FUNDS IN THE FIRST NATIONAL BANK.

A. ARDEN IS UNDER NO OBLIGATION TO PROVIDE A PAYMENT OF FUNDS.

35. Remorra is essentially asking Arden to provide payment of a Remorran civil judgment. Any obligation to enforce foreign judgments must be found in a convention.[101] There is no such convention between Arden and Remorra. In the absence of an applicable convention, customary international law permits states to determine whether or not judgments will be enforced.[102] As there is no evidence of any special or regional custom requiring enforcement between Arden and Remorra, enforcement is only a matter of comity[103]. Therefore, Arden is under no obligation to provide a payment of funds.

36. Even states that may enforce foreign judgements out of a sense of international comity still reserve the opportunity to claim a public policy exception.[104]Arden is entitled to rely on a public policy exception in the case at bar, and, in fact, determined that enforcement would be contrary to the need for a uniform application of its laws[105].

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[101] F.A. Mann, The Doctrine of Jurisdiction in International Law I Hag. Rec. 1(1964) at 131-132.

[102] F.A. Mann, The Doctrine of Jurisdiction Revisited after Twenty Years, III Hag. Rec. 9 (1984) at 42.

[103] Hilton v. Guyot (1985) 159 U.S. 113.

[104] Restatement, supra note 94, Vol. I at § 481(2)(d), 604 & 609; P.M. North & J.J. Fawcett, Cheshire and North's Private International Law, 12th ed. (1987) at 128; I. Seidl-Hohenveldern, Extraterritorial Respect for State Acts(1988) 1 Hag. Y.B.I.L. 152 at 153.

[105] *Compromis* at para. 43.

B. ARDEN IS UNDER NO INTERNATIONAL OBLIGATION TO PROVIDE AN ACCOUNTING OF FUNDS.

37. Any obligation on states to cooperate or provide assistance in curtailing money laundering must be found in an international convention. Given the absence of a convention on point between Arden and Remorra, Remorra bears the onus of establishing a customary international norm.[106] For Remorra to argue that any international conventions have acquired the status of an international customary obligation to cooperate, it must establish: widespread and extensive uniform state practice with respect to participation in the conventions, *opinio juris* and the passage of some time.[107]

38. Remorra cannot argue that multilateral conventions regarding money laundering[108] have given rise to a new customary obligation to cooperate and provide an accounting. There has not been uniform state practice regarding participation in the multilateral conventions and their implementation has been inconsistent. Furthermore, there is insufficient *opinio juris* to evidence a general obligation regarding these conventions. Money laundering conventions are new and still lack an established body of jurisprudence.[109] Rather than creating legal obligations, these conventions

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[106] Asylum Case (1950) I.C.J. Rep. 266 at 276-7; Case Concerning the Rights of Nationals of the United States of America in Morocco (1952) I.C.J. Rep.176, at 200; Nöttebohm Case (Second Phase) (1955) I.C.J. Rep. 4, at 40; Right of Passage (Merits) (1960) I.C.J. Rep. 6 at 40, 43; North Sea Continental Shelf Case (1969) I.C.J. Rep. 3 at 43; Nicaragua, supra note 46 at 98, para. 186.

[107] North Sea Continental Shelf Cases, id. at 41-44; L.T. Lee, The Law of the Sea Convention and Third States (1983) 77 Am. J. Int. L. 541, at 561-62.

[108] European Council Directive on the Prevention of Money Laundering, 91/308, 1991 O.J. (1 164) 77; OAS/CICAD Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and Related Offences, AG/RES. 1198 (1992)(XXII/O-92); U.N. Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, U.N. Doc, E/Conf. 82/14 (1988)[hereinafter the U.N. Convention].

[109] J.L. Evans, The Proceeds of Crime: Problems of Investigation and Prosecution: A

have only created economic pressures to influence the conduct of states.[110] Cooperation is therefore only a matter of comity, and Arden's own sense of justice and equity, as embodied in its public policy, must prevail[111].

39. Nor can Remorra argue that bilateral conventions have given rise to a customary obligation on Arden to cooperate and provide an accounting. While states have engaged in mutual assistance conventions which permit the waiver of foreign bank secrecy privileges under certain conditions[112], these conventions do not reflect a customary obligation to cooperate. There is insufficient state practice relating to these conventions to evidence a general rule of customary law, the language employed in assistance conventions is largely permissive,[113] and there are typically articles in the conventions setting forth limits on compliance[114]. Assistance may still be refused by parties to these

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Common Law Experience in Responding to Money Laundering: International Perspectives, (1997) chap.6, at para 87 [hereinafter Evans].

[110] R.R. Baxter, International Law in 'Her Infinite Variety' (1980) 29 I.C.L.Q. 549, at 560; L.T. Gibson, The Foreign Bank Supervision Enhancement Act of 1991: Short Run Consequences En Route to the Long Term Goal, 27 C.W. Res. J.Int. L., No.1 at 142.

[111] Vladikavkazsky Ry v. NY Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934) at 460; Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.[1978] 2 W.L.R. 81 (H.L.); Uranium Cartel Litigation (Gulf Oil Corp. v. Gulf Canada Ltd.) [1980] 2 S.C.R. 39.

[112] Treaty on Mutual Assistance in Criminal Matters, Aug.18, 1987, US-Bahamas, S. Doc. No.17, 100th Cong., 2nd Sess., D.S.B. 11.87; Treaty on Mutual Assistance in Criminal Matters, US-Switzerland, May 25 1073, 27 U.S.T. 2019, T.I.A.S. No.8302 (1977); Treaty Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, US-United Kingdom, S. Doc. No.8, 100th Cong., 1st Sess., 26 I.L.M. 537 (1987)[Cayman Islands Treaty].

[113] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, arts.11 and 21, March 18, 1970, 23 U.S.T.S. 2555, T.I.A.S. No. 7444; Societé Nationale Industrielle Aerospatiale v. U.S. District Court, 482 U.S. 522 (1987).

[114] Treaty on Mutual Legal Assistance in Criminal Matters, March 18, 1985, US-Canada, S.Doc. No.14, 100th Cong., 23rd Sess., 24 I.L.M. 1092, D.S.B.5.88, art. 8; US-Japan Mutual

bilateral conventions where the action to be taken by the requested state would violate its own domestic law or where the request would prejudice the essential interests of the requested state.[115] Bilateral assistance conventions reflect no uniform approach to matters of international cooperation.

40. Nor can Remorra argue that the recent relaxation of bank secrecy laws by some states is evidence of a customary obligation on Arden to cooperate by providing an accounting. While some states with bank secrecy laws have implemented provisions for disclosure, there is no consistent practice among jurisdictions. For example, Switzerland allows disclosure regarding criminal banking activity;[116] Hungary permits disclosure where there has been a final Hungarian judicial judgment[117]; and Luxembourg permits disclosure in "double incrimination" situations but an applicable judicial assistance treaty will still usually be required[118].

41. Even if Remorra could establish some emerging norm to cooperate, it is merely permissive and relates primarily to drug trafficking, which was the impetus behind many of these conventions[119]. Furthermore, any new laws regarding the reporting of suspicious activity or assets

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Assistance Treaty, 27 UST 94, art. 9.

[115] US-Switzerland Treaty, supra note 112, art. 6.

[116] Swiss Penal Code (SPC) art. 305 bis; A. Bahl, Regional Developments (1991) International Lawyer, Vol. 25, No.2 at 526.

[117] Hungarian Civil Code [CIV.CODE] arts. 534 & 535; R.J. Gagnon Jr., International Bank Secrecy: Developments in Europe Prompt New Approaches (1990) Vand. J.Tr. Law, Vol.23, No.3, at 675.

[118] Luxembourg Penal Code, art. 458; Gagnon Jr., id. at 672.

[119] Evans, supra note 109, at para. 10; P. Solomon, Are Money Launderers All Washed Up in the Western Hemisphere? The OAS Model Regulations (1994) 17 Hstg Int. & Comp. L. Rev. at 454.

are not designed to aid foreign states in their investigations, but only to assist domestic authorities in combatting money laundering and organized crime.[120]

42. In any event, Arden is under no obligation to cooperate with Remorra by providing an accounting as Remorra has failed to demonstrate that the funds are undeniably linked to proceeds of crime or a money laundering scheme.

C. EVEN IF AN ACCOUNTING AND PAYMENT WERE AVAILABLE REMEDIES, THIS COURT SHOULD DECLINE TO GRANT THEM..

43. International law presumes primacy of domestic actions taken wholly within the territory of the state[121]. It is not the function of international law to interfere in the application of a state's own laws enacted in accordance with its constitution[122]. An order from this Court compelling an accounting and payment of funds would necessarily violate the bank secrecy laws of Arden.

44. Even if Arden is found to have breached its international obligations, this Court should exercise its discretion and refrain from ordering an accounting and payment. This Court should not issue a remedy that would be constitutionally unenforceable for Arden, as such an order would diminish the authority of the International Court of Justice[123].

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[120] M. Moser, Switzerland: New Exceptions to Bank Secrecy Laws (1995) 27 C.W. Res. J.Int. L. Nos. 2-3, at 341.

[121] Banco National de Cuba v. Sabbatino (1963), 376 U.S. 398.

[122] Grieg, supra note 94 at 54.

[123] H. Mosler, Problems and Tasks of International Judicial and Arbitral Settlement of Disputes Fifty Years after the Founding of the World Court, Judicial Settlement of International Disputes (1974) at 13.

CONCLUSION

It is respectfully submitted that this Honourable Court adjudge and declare that:

1. The Extradition Treaty between Arden and the Former Integra is no longer in effect;
2. The proposed surrender of Terraq by Arden to the ICTFI and the ICTFI's jurisdiction to try this case is consistent with international law;
3. Remorra is not entitled to any monetary damages;
4. International law does not require the abrogation of Arden's bank secrecy laws in the case of the accounts allegedly held in the name of Malu Terraq.

All of which is respectfully submitted.

Agents for the State of Arden