

THE 1998 PHILIP C. JESSUP INTERNATIONAL LAW  
MOOT COURT COMPETITION  
IN THE  
INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE  
THE HAGUE, NETHERLANDS

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THE STATE OF REMORRA,

Applicant,

v.

THE IRENIC REPUBLIC OF ARDEN,

Respondent.

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Case Concerning the International Criminal Tribunal for the Former Integra

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SPRING TERM 1998  
ON SUBMISSION TO THE  
INTERNATIONAL COURT OF JUSTICE

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MEMORIAL FOR APPLICANT

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## STATEMENT OF JURISDICTION

The governments of Remorra and Arden have referred this case to the International Court of Justice pursuant to article 36(1) of the Statute of the Court. In accordance with article 40(1), the governments have also submitted a notification of special agreement indicating the dispute and the parties. There are no objections to the Court's jurisdiction in this matter.

## STATEMENT OF FACTS

After a civil war divided the Federal Republic of Integra into two sovereign states, one of the emerging nations, Remorra, sought the return of an alleged war criminal who had fled to a third state, the developed nation of Arden. Compromis (“Comp”) ¶¶ 1, 16. Prior to its dissolution, Integran society was comprised essentially of two ethnic groups. Comp. ¶ 4. The Nylesians, an agricultural people, initially populated Integra’s southern coastal and inland regions. Comp. ¶ 2. The Remorrans, dedicated to ocean trade, settled along the northern coast in the centuries that followed, and developed the seaport of Harbaar, their economic and cultural center. *Id.* Following many generations of coexistence as peaceful neighbors, each with its distinct linguistic, ethnic, and cultural identity, the two groups united peacefully to form the Federal Republic of Integra, with its capital at the inland city of Nylar. Comp. ¶¶ 3, 4. Most Integrans continued to live in areas traditionally associated with their ethnic heritage, with ethnically diverse populations in the major cities. Comp. ¶ 4.

In the decades that followed, as the domestic and international economies relied progressively less on agriculture and more on ocean-based trade, the balance of wealth and influence shifted gradually from the traditionally Nylesian regions to those traditionally Remorran. Comp. ¶ 6. As a result, Remorrans came to dominate the economic and political spheres. Comp. ¶ 7.

In 1990, an underground revolutionary movement calling itself the “Nylesian People’s Army” (“NPA”) began plotting the violent overthrow of the Integran government. Comp. ¶ 9. Malu Terraq, a Harbaar native, operated as a leading member of the NPA Revolt Planning Committee and principal architect of the NPA’s strategy to transform Integra into a Nylesian-dominated state. *Id.*

After a series of hotly debated political decisions by the Integran government, sporadic Remorran-Nylesian violence escalated into military operations and, ultimately, erupted into civil war.

Comp. ¶ 8. By all accounts, NPA activities ignited the violence. Comp. ¶ 9. On March 15, 1995, armed NPA forces seized public buildings throughout Integra, and killed 5,000 Remorrans in a single night. Comp. ¶ 10. At the same time, Terraq orchestrated a media campaign using television and radio stations captured by the NPA to broadcast false reports that Remorrans were dragging Nylesians from their homes and murdering them in the streets. Comp. ¶ 11. Each broadcast urged “true Nylesians” to take up arms against the government, demanding that “Integra must be Nylesian from the mountains to the sea!” *Id.* As a result, Nylesians throughout Integra mobilized against their Remorran neighbors, storming their homes and killing entire families. Comp. ¶ 12. The ensuing carnage claimed over 15,000 lives within 10 days. *Id.*

When Nylar fell to NPA forces, surviving government officials fled to Harbaar, declaring it Integra’s new capital. Comp. ¶¶ 13, 14. On April 15, 1995, the Harbaar government issued arrest warrants for NPA members, particularly the Revolt Planning Committee, for the crimes of treason, sedition, and murder. Comp. ¶ 14. The violence continued: during the next six months, the war claimed 120,000 more lives. Comp. ¶ 15.

On October 10, 1995, a force comprised of members of the Regional Association of Treaty States, of which Arden is not a member, entered the conflict zone and disarmed the combatants. Comp. ¶ 16; Clarifications (“Clar.”) ¶ 6. The warring factions signed a Peace Treaty dividing Integra into two new countries: the developing State of Remorra occupied one-fourth of Integra’s original territory and included the city of Harbaar and the province of Telfin; the Republic of Nylesia occupied the remaining territory. Comp. ¶ 16. The Peace Treaty determined citizenship by birthplace and provided for a five-year naturalization process. Comp. ¶ 17. Nylesia succeeded to Integra’s seat in international organizations, including the United Nations; Remorra quickly gained U.N. membership as well. Comp. ¶ 18. The Peace Treaty specifically designated the Vienna Convention on the

Succession of Treaties as the guiding instrument for all other matters relating to succession. Comp. ¶ 18; Corrections (“Corr.”) ¶ 1.

On January 4, 1996, the U.N. Security Council voted to establish a Panel of Experts to investigate grave violations of humanitarian law committed during the civil war. Comp. ¶ 19. The Panel's report of April 1996 presented substantial evidence that the NPA had engaged in torture, systematic rape, summary executions, and "ethnic cleansing." Comp. ¶ 20. The Panel reported allegations that Terraq himself had murdered the mayor of Telfin and ordered NPA forces under his command to seize food and weapons from Remorran homes, to torture and consequently murder prisoners at Telfin detention facilities, and to set Remorran civilians adrift at sea without food or water. Comp. ¶¶ 20, 21. The report also disclosed substantial reason to believe that Terraq had systematically diverted to his own use approximately US\$20 million in cash and other liquid assets that had come into his hands in connection with the procurement of munitions and supplies. Comp. ¶ 21.

At the Panel's recommendation, the Security Council invoked Chapter VII of the U.N. Charter to establish an International Criminal Tribunal for the Former Integra (“ICTFI”) in Vienna, Austria, with jurisdiction complementary to that of national courts. Comp. ¶ 22; Clar. ¶ 15. The Security Council empowered ICTFI to conduct trials for crimes committed within the territory of the former Integra after the outbreak of hostilities in 1995, and to impose a maximum penalty of life imprisonment. Comp. ¶¶ 20, 22; Corr. ¶ 3. Neither Remorra nor Arden had a seat on the Security Council at the time of ICTFI's creation, and neither state has signed any agreement regarding the extradition of criminal suspects to ICTFI. Clar. ¶¶ 11, 13.

On July 1, 1996, a Remorran Intelligence Service team attempted without success to arrest Terraq at his home in Nylar. Comp. ¶ 23. When the Nylesian government protested the event,

Remorra promptly apologized. *Id.* Nylesia accepted Remorra's apology, and the matter was resolved peacefully. Comp. ¶ 24. Meanwhile, Remorran officials continued to insist that the perpetrators of civil war abuses should be prosecuted in Remorra. Comp. ¶¶ 23, 24. Harbaar authorities arrested three other Revolt Planning Committee members for treason, sedition, and complicity to murder. Comp. ¶ 25. The Harbaar Criminal Court tried, convicted, and imposed capital sentences on the three. *Id.* The defendants did not exercise their right to appeal and were promptly executed by lethal injection. Comp. ¶ 25; Clar. ¶ 3.

As part of its program to improve relations between Nylesia and Remorra, the Nylesian Peace and Justice party, elected to power on September 22, 1996, implemented a plan to promote acceptance of responsibility for wartime abuses by pro-Nylesian combatants. Comp. ¶ 26. The plan included legislation denying Nylesian citizenship to persons who had violated humanitarian norms during the war. *Id.* The government also revoked the alien work authorizations of Terraq and several dozen others, and required them to report weekly to the authorities under penalty of deportation. Comp. ¶ 27.

On November 20, 1996, ICTFI indicted Terraq for crimes against peace and humanity, incitement to violence, and murder. Comp. ¶ 28. In response to ICTFI's request for assistance in capturing Terraq, Nylesia dispatched a force to arrest Terraq at his house, only to discover that he had already fled. *Id.*

Terraq entered Arden on November 21, 1996; eleven days later, Arden authorities arrested him for suspected illegal entry. Comp. ¶ 29. Pursuant to the 1965 Extradition Treaty between Arden and Integra, Remorra formally requested that Terraq be extradited to stand trial in Remorra for treason, sedition, murder, and his conduct in the management of the Telfin stations. Comp. ¶¶ 14, 33; Clar. ¶¶ 16, 18. ICTFI also requested Terraq's extradition. Comp. ¶ 33. Despite Arden's

previous cooperation with Integra in the extradition of 63 individuals. Arden rejected Remorra's request and indicated its intention to deliver Terraq to ICTFI. Comp. ¶¶ 34, 35; Clar. ¶ 5. Remorra protested immediately through a diplomatic note to Arden. Comp. ¶ 36.

The following week, the Remorran Minister of Home Affairs brought a class action suit against Terraq in Remorran courts for US\$20 million in damages on behalf of Remorran citizens and nationals for injuries suffered during the civil war. Comp. ¶ 38. On December 28, 1996, the court entered a default judgment and issued a writ of attachment entitling the Minister to seize Terraq's assets to satisfy the award. *Id.*

A search of Terraq's room immediately following his arrest, conducted without legal formalities, revealed documents demonstrating Terraq's control over certain accounts in the First Arden National Bank, valued at over US\$18 million. Comp. ¶ 37. Neither Terraq's total income during the last ten years, nor his bare claim of an inheritance, accounted for the US\$18 million. Comp. ¶¶ 37, 39. The funds had arrived in Arden in four deposits of US \$4.5 million during the most intense periods of the Integran conflict. Comp. ¶ 37. Arden authorities impounded the accounts, declaring them "suspicious." *Id.* Arden also publicized these funds in its own media, but no one came forward to claim them. Comp. ¶ 39. At the request of bank officials, a local court lifted the restrictions on the use of the funds, and ordered that any requests for information regarding the accounts be refused. Comp. ¶ 40.

On February 4, 1997, upon learning of the bank accounts in Arden, the Remorran Ambassador formally requested that the funds be returned to Remorra. Comp. ¶¶ 41, 42. Arden's Foreign Minister admitted that the accounts may contain funds stolen from Remorra; nonetheless, Arden rejected the request and refused to reveal any information or make any further communication regarding the accounts. Comp. ¶¶ 43, 44.

In addition to those international agreements mentioned above, Arden is a party to the Statute of the International Court of Justice, the Vienna Convention on the Law of Treaties, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Protocols, and the 1977 Protocols Additional to the Geneva Conventions. Comp. Issues/Claims; Clar. ¶ 9. Terraq remains in detention in Arden, pending the outcome of this case. Comp. ¶ 45.

## QUESTIONS PRESENTED

- (1) Whether international law requires Arden to extradite Malu Terraq to Remorra.
- (2) Whether international law precludes Arden from relying on ICTFI to evade its obligations to Remorra.
- (3) Whether international law requires Arden to provide for a Truth and Reconciliation Commission as compensation for violating its international duties to Remorra.
- (4) Whether international law requires Arden to provide an accounting for the US\$18 million in dispute and return these funds to Remorra.

## SUMMARY OF PLEADINGS

Under the principle of sovereign equality, the State of Remorra has the right to prosecute Malu Terraq, a Remorran national, for crimes committed on Remorran soil. Remorra also has the sovereign right to conduct its own program for national reconciliation in the aftermath of the Integran civil war. The complete restoration of peace between Remorra and Nylesia obviates the need for external involvement in Remorra's domestic affairs. Arden's refusal to return Terraq to Remorra based on its purported international obligations and concern for Terraq's rights interferes with Remorran sovereignty at its most fundamental level.

Arden must extradite Terraq to Remorra pursuant to its treaty and customary law obligations. Both the letter and the spirit of the Succession Treaty, which Arden has duly signed, provide that the Extradition Treaty between Arden and Integra continues in force with Remorra. Even in the absence of a treaty, customary law requires Arden to extradite Terraq to Remorra for the international crimes that Arden ascribes to him. The gravity of Terraq's crimes preclude Arden from invoking the political offense exception to deny Remorra's extradition requests. Arden's concerns for Terraq's rights are unfounded and do not warrant its refusal to extradite.

Arden wrongfully relies on the International Criminal Tribunal for the Former Integra ("ICTFI") to justify its refusal of Remorra's extradition requests, as it has no overriding duty to extradite Terraq to ICTFI. Even if such a duty exists, the prosecution of Terraq falls outside the scope of ICTFI's authority. Absent an ongoing breach of peace, the establishment of ICTFI under Chapter VII of the U.N. Charter is an *ultra vires* act of the Security Council that will not achieve true peace in Remorra. Such a derogation of Remorra's sovereignty requires Remorra's treaty-based consent.

ICTFI lacks subject matter jurisdiction over Terraq, as international criminal law does not reach crimes committed in purely internal conflicts. Moreover, according to the principle of

“complementarity,” ICTFI must defer to Remorran national courts. In its appeal to ICTFI’s authority, Arden indeed advocates an unprecedented incursion into Remorra’s sovereign jurisdiction.

Arden’s breach of its treaty and customary international law obligations give rise to a duty to make necessary reparations. International law recognizes the validity of “moral” damages for interstate indignities, as well as emotional damages on an individual level. Remorra adheres to basic principles of restitution by seeking an award to establish a Truth and Reconciliation Commission, an essential “second-best” alternative to prosecution.

Arden must provide an accounting for the funds claimed by Terraq and restore them to Remorra. These funds constitute illegal war booty and must be returned. A pervasive network of international agreements and practices evince a customary law duty of mutual legal assistance owed by Arden to Remorra. Arden also should recognize Remorra’s valid damages judgment against Terraq. Arden may not hide behind its internal bank secrecy laws to evade these obligations. Indeed, by protecting these funds even as it characterizes Terraq as an international criminal, Arden itself becomes an accessory to his crimes.

## PLEADINGS AND AUTHORITIES

### I. ARDEN'S REFUSAL TO RETURN TERRAQ TO REMORRA VIOLATES BASIC PRINCIPLES OF STATE SOVEREIGNTY.

#### A. Remorra Has the Primary Right to Prosecute Terraq.

Universally recognized norms of international law demand that Remorra prosecute Terraq in its own tribunals. The territorial<sup>1</sup> and nationality<sup>2</sup> principles of jurisdiction -- grounded in the bedrock principle of international law, the sovereignty and equality of states<sup>3</sup> -- grant Remorra primary jurisdiction over crimes committed by Terraq, a Remorran national, in Remorran territory.<sup>4</sup> Arden may characterize these crimes as international and subject to universal jurisdiction; even under this analysis, however, the primary right to prosecute Terraq lies with Remorra as the situs state of his crimes.<sup>5</sup> By refusing to return Terraq for trial in the proper forum, Arden contravenes fundamental principles of state sovereignty.

#### B. Remorra Has Sovereign Rights over Its Own Rebuilding Efforts.

Remorra's sovereignty also encompasses the right to conduct its own program for national

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<sup>1</sup> *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) no. 10, 4, 30-33; *Oppenheim's International Law* § 137 (R. Jennings & A. Watts, eds., 9th ed. 1992). *See also Restatement (Third) Foreign Relations Law of the United States*, §§ 402-03 (1987) [hereinafter *Restatement*].

<sup>2</sup> Ian Brownlie, *Principles of Public International Law* 303 (4th ed. 1990); *S.S. Lotus*, 1927 P.C.I.J. at 92 (separate opinion of Judge Moore).

<sup>3</sup> Charter of the United Nations, June 26, 1945, art. 2, §§ 1, 7, 24 U.S.T. 2225, 3 Bevans 1153 [hereinafter *Charter*]; *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.) (Merits), 1986 I.C.J. 14, 185; *North Atlantic Fisheries*, 11 R.I.A.A. 167 (1910).

<sup>4</sup> Comp. ¶¶ 9, 15-17.

<sup>5</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. VI, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, arts. 5, 7, G.A. Res. 39/46, U.N. Doc. A/39/51, [hereinafter *Torture Convention*]; European Convention on Extradition, Dec. 13, 1957, art. 17, Europ. T.S. 24; Inter-American Convention on Extradition, Feb. 25, 1981, art. 2, 20 I.L.M. 723.

reconciliation in the aftermath of the Integran civil war. “[I]nternational laws, including international laws of human rights, always look to national law and national tribunals. They were never intended to replace national law.”<sup>6</sup> In addition to the right to prosecute crimes committed by its own nationals in its territory, every state has an “inalienable right to choose its political, economic, social and cultural systems without interference in any form by another state.”<sup>7</sup> Remorra has not consented to international control over its rebuilding efforts, nor does the present situation in Remorra require an international presence.<sup>8</sup> The war concluded in a Peace Treaty duly implemented by both Nylesia and Remorra.<sup>9</sup> Nylesia, represented by the Peace and Justice Party, has fully cooperated with Remorra in the peace-building process by denying citizenship to prior human rights violators and revoking their alien work authorizations.<sup>10</sup> Under the guise of deference to the International Criminal Tribunal for the Former Integra (“ICTFI”) and concern for Terraq’s rights, Arden fundamentally undercuts Remorra’s efforts not only for justice, but also for national catharsis and lasting peace.

Arden’s appeal to ICTFI as justification for its interference with Remorra’s rebuilding process also fails on practical grounds. As the international community has come to recognize, especially since the abortive peace-building mission in Somalia,<sup>11</sup> “the internalization of [the acknowledgment

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<sup>6</sup> *Panel II: Comparative Analysis of International and National Tribunals*, 12 N.Y.L. Sch. J. Hum. Rts. 545, 579 (1995) (Louis Henkin) [hereinafter *Tribunal Panel*].

<sup>7</sup> *Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter *Friendly Relations Declaration*].

<sup>8</sup> *See infra* Part III.

<sup>9</sup> Comp. ¶¶ 16-17.

<sup>10</sup> Comp. ¶¶ 26-27.

<sup>11</sup> *See generally* UN SCOR, 3188th mtg., U.N. Doc. S/RES/814 (1993).

of past war crimes] is vital in changing a culture to avoid future atrocities.”<sup>12</sup> The statute of ICTFI, like the draft statute of the proposed international criminal court, provides for “complementary” jurisdiction in recognition of the paramount need for a process inspired and led from within, rather than imposed from without.<sup>13</sup> Under the same rationale, publicists support truth and reconciliation commissions as necessary second-best alternatives to national prosecutions.<sup>14</sup> Arden’s interpretation of ICTFI’s role will lead to contradictory results, confusion, and ineffectiveness, and ultimately deprive Remorra of a critical opportunity for national reconciliation.<sup>15</sup> According to the principle of sovereign equality, therefore, Arden must either extradite Terraq to Remorra or provide Remorra with the means to pursue the truth commission route to internal reconstruction.<sup>16</sup>

## **II. INTERNATIONAL LAW REQUIRES ARDEN TO EXTRADITE TERRAQ TO REMORRA.**

### **A. Arden Must Extradite Terraq to Remorra Pursuant to Its Treaty Obligations.**

Pursuant to the terms of the Extradition Treaty between Arden and Integra,<sup>17</sup> Remorra has properly requested Terraq’s extradition for treason, sedition, murder, and his conduct in the

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<sup>12</sup> *Tribunal Panel*, *supra* note 6, at 623 (Neil Kritz).

<sup>13</sup> *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. Doc. A 49/10 (1994) [hereinafter Draft Statute].

<sup>14</sup> Richard Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. Int’l L. & Pol. 485, 491-96 (1996); Michael Scharf, *The Case for a Permanent International Truth Commission*, 7 Duke J. Comp. & Int’l L. 375, 377-80 (1997); Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 Vand. J. Transnat’l L. 497, 539-544 (1994).

<sup>15</sup> *See infra* Part III.B.

<sup>16</sup> *See infra* Part IV.B.

<sup>17</sup> Comp. ¶ 33; Clar. ¶ 18.

management of the Telfin stations, which included the torture of prisoners.<sup>18</sup> The Vienna Convention on Succession of States in Respect of Treaties (“Succession Treaty”) provides that any treaty in force at the time a state separates to form new states shall continue in force in each successor state.<sup>19</sup> The Extradition Treaty therefore continues to bind both Remorra and Nylesia, the successor states of Integra, as well as Arden.

As a signatory to the Succession Treaty,<sup>20</sup> Arden has a duty to comply with the treaty’s provisions even if it has not yet completed the ratification process. “Every state must fulfill its good faith obligations under valid treaties”<sup>21</sup> and, even where a treaty has not yet entered into force,<sup>22</sup> a state must refrain from acts that defeat the treaty’s purpose until it has clearly rejected ratification.<sup>23</sup>

In this case, Arden’s refusal to extradite Terraq to Remorra plainly defeats the objectives of continuity and stability underlying the Succession Treaty. The reliability of the established treaty network is essential to the functioning of the international legal system. States incur costs and forego opportunities in committing themselves to treaties, and are therefore entitled to rely on commitments made by other states. Successor states should not be deprived of the benefits for which their predecessor states have paid. For these reasons, even a fundamental, unforeseen change of circumstances precludes termination of a treaty unless the change radically transforms the parties’

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<sup>18</sup> Comp. ¶¶ 21, 33.

<sup>19</sup> Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, art. 34, U.N. Doc. A/CONF.80/31 (1978) [hereinafter Succession Treaty].

<sup>20</sup> Comp. Issues/Claims.

<sup>21</sup> Vienna Convention on the Law of Treaties, May 23, 1969, arts. 26, 42, U.N.T.S. 331 [hereinafter VCLT]; Friendly Relations Declaration, *supra* note 7.

<sup>22</sup> Succession Treaty, *supra* note 19, art. 7.

<sup>23</sup> VCLT, *supra* note 21, art. 18.

obligations.<sup>24</sup> A change in regime, whether by constitution or revolution, does not terminate a treaty,<sup>25</sup> particularly where officials of the former regime form the core of the successor government.<sup>26</sup>

In determining a treaty's continuing validity, states defer to the parties' intentions and past interactions.<sup>27</sup> Between 1965 and 1995, Arden and Integra relied unequivocally on the treaty, cooperating in 63 extraditions.<sup>28</sup> Indeed, this case presents precisely the situation that the treaty was intended to address: Terraq, a Remorran citizen, has fled to Arden to evade prosecution for crimes on Remorran soil against Remorran victims. Arden must therefore observe its continuing duty to surrender Terraq for trial in Remorra under Remorran law.

**B. Arden Must Extradite Terraq to Remorra Even in the Absence of an Extradition Treaty.**

Even if Arden should characterize Terraq's crimes as international offenses,<sup>29</sup> Arden has a "well-established"<sup>30</sup> duty to extradite him to Remorra, since a proper request has been made and

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<sup>24</sup> Succession Treaty, *supra* note 19, art. 34(b)(2); VCLT, *supra* note 21, art. 62; 1973 I.C.J. 3, 21; Brownlie, *supra* note 2, at 619-21.

<sup>25</sup> *State v. DeVoy*, (S. Afr. Sup. Ct. 1971), 55 I.L.R. 89; *Arnbjornsdottir-Mendler v. U.S.*, 721 F.2d 679 (9th Cir. 1983); *Terlinden v. Ames*, 184 U.S. 270 (1902); *Restatement*, *supra* note 1, § 208 cmt. a, Reporters' note 2.

<sup>26</sup> Comp. ¶ 14.

<sup>27</sup> *M v. Federal Department of Justice and Police*, 75 I.L.R. 107 (Switz. 1979); *D.C. v. Public Prosecutor*, 73 I.L.R. 38 (Neth. 1972); *Terlinden*, 184 U.S. 270.

<sup>28</sup> Clar. ¶ 5.

<sup>29</sup> Comp. ¶ 28.

<sup>30</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. U.S.), 1992 I.C.J. 114, 179 (separate opinion of Judge Weeramantry).

Arden does not intend to prosecute him.<sup>31</sup> “Every state has the right to try its own nationals for war crimes or crimes against humanity,”<sup>32</sup> and every major treaty governing the humanitarian law of war confers primacy of jurisdiction upon the state in whose territory the crimes were committed.<sup>33</sup> The fact that the state of Remorra did not yet exist at the time of Terraq’s offenses does not bar Remorra’s present exercise of jurisdiction.<sup>34</sup>

**C. The Political Offense Exception Does Not Bar Terraq’s Extradition.**

The characterization of Terraq’s crimes as “political” offends the very principles that the political offense exception was intended to protect. This doctrine developed in the wake of the American and French revolutions, as new democracies sought to ensure political freedom by refusing to extradite those engaged in struggles against tyranny.<sup>35</sup> Here, the gravity of Terraq’s crimes outweighs any political motivation he may have had, and Arden wrongfully invokes the doctrine to shield conduct that flouts human dignity and freedom.

Three distinct standards have emerged to determine whether an act constitutes a “political offense” barring extradition. Under the “political incidence” test, an offense is deemed political if it

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<sup>31</sup> *Id.*; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 147, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Genocide Convention, *supra* note 5, arts. VI, VII; Torture Convention, *supra* note 5, arts. 5, 7; Principles of International Co-operation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, art. 5, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/3926, (1973) [hereinafter Co-operation Resolution]; M. Cherif Bassiouni, 1 *International Criminal Law* 3 (1986).

<sup>32</sup> Co-operation Resolution, *supra* note 31, art. 2.

<sup>33</sup> *See supra* note 5.

<sup>34</sup> *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th Cir. 1985); *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 I.L.R. 5 (Isr. Sup. Ct. 1962).

<sup>35</sup> Geoff Gilbert, *Aspects of Extradition Law* 115 (1991).

occurs during and is incidental to an armed uprising or political disturbance.<sup>36</sup> The “political purpose” test focuses on the perpetrator’s political motivation.<sup>37</sup> The “proportionality” test prohibits extradition only if a crime is committed in the course of a political struggle and bears a close, direct, and clear relationship to the political purpose.<sup>38</sup>

Courts in recent years have used these tests as springboards for an equitable analysis of the facts in each case, and have sought to use the political offense exception to protect only those people who truly face biased courts, and whose actions seem genuinely motivated by idealism. In the United States, for example, the “magnitude” of a crime may now exclude it from the political offense exception.<sup>39</sup> Thus in 1986, the United States extradited a Nazi collaborator for crimes against humanity,<sup>40</sup> even though it had previously refused his extradition on the ground that the crimes were committed during the “political” conflict of World War II.<sup>41</sup> Similarly, France has reformulated its approach so that the “gravity” and “odious criminal character” of an offense preclude consideration of the perpetrator’s motives.<sup>42</sup>

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<sup>36</sup> *In re Castioni*, 1 L.R.Q.B. 149, 153 [Eng. 1891].

<sup>37</sup> *In re Giovanni Gatti*, 70 Ann. Dig. 145 (Fr. 1947).

<sup>38</sup> Swiss Extradition Act, art. 10 (1892), *quoted in* Christine Van den Wijngaert, *The Political Offense Exception to Terrorism* 126 (1980).

<sup>39</sup> *Quinn v. Robinson*, 783 F.2d 776, 799 (9th Cir. 1986); *Eain v. Wilkes*, 641 F.2d 504, 519-20 (7th. 1981).

<sup>40</sup> *Artukovic v. Rison*, 784 F.2d 1354 (9th Cir. 1986).

<sup>41</sup> *United States ex rel. Karadzole v. Artukovic*, 170 F.Supp. 383 (S.D. Cal. 1959).

<sup>42</sup> Thomas Carbonneau, *Terrorist Acts: Crimes or Political Infractions?*, 3 *Hastings Int'l & Comp. L. Rev.* 265 (1980).

Many states specifically exclude murder and torture from the category of “political” crimes,<sup>43</sup> particularly when such acts aim to oppress a certain segment of the population.<sup>44</sup> The deliberate targeting of civilians, including those who perform political functions, is a crime even during times of armed conflict.<sup>45</sup> The murder of the mayor and the torture of prisoners were acts so remote from the political objective of Nylesian self-determination that Terraq cannot reasonably have believed they would have a direct political effect on the Integran government.<sup>46</sup>

**D. Arden Wrongfully Invokes Human Rights Concerns to Justify Its Refusal to Extradite Terraq.**

International law permits extradition in all cases except where the accused has carried the burden of showing “substantial grounds” for believing that he will be targeted specifically for cruel treatment.<sup>47</sup> General evidence of political violence and persecution, and exposure to a “mere possibility of ill-treatment,” do not bar the return of an individual even to a country where security forces have previously tortured him.<sup>48</sup> Terraq faces no such risks. Throughout the civil war, Nylesian separatists, not the Integran government or its Remorran leaders, committed the atrocities at issue here. Remorran officials and Security Council representatives have expressed a profound desire for

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<sup>43</sup> Additional Protocol to the European Convention on Extradition, Mar. 17, 1978, art. 1, Europ. T.S. 98; European Convention on the Suppression of Terrorism, Jan. 27, 1977, art. 2, Europ. T.S. 90; Swiss Extradition Act, *supra* note 38, art. 3(2).

<sup>44</sup> Genocide Convention, *supra* note 5, art. VII; Swiss Extradition Act, *supra* note 38, art. 3(2).

<sup>45</sup> Geneva Convention IV, *supra* note 31, art. 3; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, art. 4, U.N. Doc. No. A/32/144 (1977) [hereinafter Protocol II].

<sup>46</sup> *See Eain*, 641 F.2d at 520-23.

<sup>47</sup> *Vilvarajah and Others v. United Kingdom*, 215 Eur. Ct. H. R. (ser. A) (1991) ¶ 137; *Soering Case*, 28 I.L.M. 1063, 1091-93 (1989).

<sup>48</sup> *Vilvarajah*, 215 Eur. Ct. H.R. at ¶ 104, 111.

redress for human rights abuses,<sup>49</sup> but even fervent condemnation of such abuses has not precluded fair trials in national judicial systems.<sup>50</sup>

Moreover, recent experience does not substantiate the argument that an international tribunal provides greater protection of defendants' rights. The Yugoslavia Tribunal itself has departed from internationally recognized due process guarantees,<sup>51</sup> notably by withholding the identity of prosecution witnesses from defendant Dusko Tadic.<sup>52</sup> Arden has little basis to claim that ICTFI will render any less of a "victor's justice" than Remorra's national courts.

Having agreed explicitly to extradition for capital crimes,<sup>53</sup> Arden may not now invoke the death penalty as a bar to extraditing Terraq. International law permits capital punishment.<sup>54</sup> In 1993, the U.N. Human Rights Committee allowed extradition to Pennsylvania, where, as in the present case, the accused was subject to execution by lethal injection.<sup>55</sup> The Committee has held that even thirteen years on death row awaiting execution do not amount to "cruel, inhuman or degrading treatment."<sup>56</sup>

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<sup>49</sup> Comp. ¶¶ 23, 24, 30; U.N. SCOR, 3175th mtg., U.N. Doc. S/PV.3175 (1993) (Mr. Erdos).

<sup>50</sup> *Eichmann*, 36 I.L.R. at 7; Jon Van Dyke & Gerald Berkley, *Redressing Human Rights Abuses*, 20 Denv. J. Int'l L. & Pol'y 243, 260, 265 (1992).

<sup>51</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>52</sup> *Prosecutor v. Tadic, Trial Chamber, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses*, IT. Doc. IT-94-1-T (Aug. 10 1995).

<sup>53</sup> Clar. ¶ 18.

<sup>54</sup> ICCPR, *supra* note 51, art. 6; Protocol II, *supra* note 45, art. 6(4).

<sup>55</sup> Comp. ¶ 25; *Kindler v. Canada*, Communication No. 470/1991, Views of July 30, 1993, *reprinted in* 14 Hum. Rts. L.J. 307 (1993).

<sup>56</sup> *International Human Rights* 760 (Richard Lillich & Hurst Hannum eds., 3d ed. 1995).

### III. ARDEN WRONGFULLY RELIES ON ICTFI TO EVADE ITS INTERNATIONAL OBLIGATIONS TO REMORRA.

Even as it refuses Remorra's treaty-based request for Terraq's extradition, Arden intends to deliver Terraq to ICTFI, with which Arden has not signed an extradition agreement.<sup>57</sup> Arden thus not only contradicts itself, but also ignores the declaration of the Security Council in Resolution 1024 that ICTFI's jurisdiction "shall be interpreted in a manner not inconsistent with pre-existing obligations under treaties and customary international law."<sup>58</sup> The Draft Statute of the International Criminal Court, which uses the same "complementarity" language as ICTFI, similarly provides that "the Statute will not undermine existing and functional extradition agreements."<sup>59</sup> Arden's claim of "duties" to ICTFI to evade its treaty-based obligations to Remorra is indeed born out of pure convenience rather than principle. Furthermore, whether or not Arden has an overriding duty to extradite Terraq to ICTFI, the tribunal's proper role in this case does not include the prosecution of Terraq. Arden's appeal to ICTFI's authority fails on three grounds: ICTFI exceeds the Security Council's powers, lacks subject-matter jurisdiction, and ultimately defers to national tribunals.

#### A. This Court May Examine the Legality of Security Council Action.

As a threshold matter, this Court may properly review any decision made by the Security Council that infringes upon the sovereignty of states.<sup>60</sup> The Council is subject to the constitutional limitations of the Charter of the United Nations ("Charter"), and accordingly must refrain from intervening in matters that lie properly within a state's domestic jurisdiction.<sup>61</sup> The I.C.J. "acts as

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<sup>57</sup> Clar. ¶ 11.

<sup>58</sup> Comp. ¶ 22.

<sup>59</sup> Draft Statute, *supra* note 13, art. 53 cmt. 6.

<sup>60</sup> *Lockerbie*, 1992 I.C.J. at 168-69 (separate opinion of Judge Weeramantry).

<sup>61</sup> Charter, *supra* note 3, arts. 2, ¶¶ 1,7.

guardian of the Charter” in the interpretation and application of international law,<sup>62</sup> and is “an important, and sometimes decisive, factor in promoting the peaceful settlement” of international disputes.<sup>63</sup>

**B. The Establishment of ICTFI under Chapter VII of the Charter Violates International Law.**

**1. The Establishment of ICTFI Exceeds the Scope of the Security Council’s Authority.**

The Security Council’s authority to take measures under Chapter VII is restricted to situations involving an ongoing threat to or breach of international peace. The international community recognizes an internal disturbance as a threat to international peace only when the conflict directly affects other states. The United Nations “cannot intervene in an internal affair of a member state unless the two protagonists of the dispute agree [to intervention].”<sup>64</sup> Accordingly, the Security Council refrained from intervening in the “purely internal” conflicts in Chechnya and Fiji.<sup>65</sup>

The Integran civil war presented none of the factors that have given rise to genuine threats to international peace in other parts of the world. In Haiti and Rwanda, for example, floods of refugees overwhelmed neighboring states.<sup>66</sup> In Iraq, belligerents engaged in cross-border military

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<sup>62</sup> *Lockerbie*, 1992 I.C.J. at 166 (separate opinion of Judge Weeramantry).

<sup>63</sup> *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 22.

<sup>64</sup> Larry King Live: Interview with Boutros Boutros Ghali (CNN television broadcast, Dec. 22, 1994), Transcript No. 1312, *available in* LEXIS, News Library, Curnws File.

<sup>65</sup> *Id.*; Javier Pérez de Cuéllar, presentation on Multilateralism: A Continuing Necessity, May 19, 1987.

<sup>66</sup> U.N. SCOR, 3413th mtg., U.N. Doc. S/RES/940 (1994); U.N. SCOR, 3183rd mtg., U.N. Doc. S/RES/812 (1993).

incursions.<sup>67</sup> The Security Council exercised its Chapter VII power in Somalia and Rwanda only after those states requested intervention,<sup>68</sup> and intervened in Yugoslavia only after the European Community's attempts to establish a cease-fire proved unsuccessful.<sup>69</sup> Here, regional efforts were sufficient to end the violence in Integra.<sup>70</sup>

No precedents in international law support the creation of a tribunal under Chapter VII where peace has already been restored. The Yugoslavia and Rwanda Tribunals were established in view of "continuing . . . widespread violations of international humanitarian law" in Yugoslavia and ongoing violence directed at refugees in camps outside of Rwanda's borders.<sup>72</sup> In contrast, the violence in Integra ended in 1995, and Remorra and Nylesia have taken concrete steps toward reconciliation, eliminating any justification for peace-time intervention by the Security Council.<sup>73</sup>

Even where the Security Council faces a real and ongoing threat to international peace, Article 41 of the Charter limits the kinds of non-forceful measures it may take. As an executive organ, the Security Council does not possess judicial powers which can be exercised through ICTFI as a

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<sup>67</sup> U.N. SCOR, 2982nd mtg., U.N. Doc. S/RES/688 (1991).

<sup>68</sup> U.N. SCOR, 3039th mtg., U.N. Doc. S/RES/733 (1992); U.N. SCOR, 3183rd mtg., U.N. Doc. S/RES/812 (1993).

<sup>69</sup> U.N. SCOR, 3009th mtg., U.N. Doc. S/RES/713 (1991).

<sup>70</sup> Comp. ¶ 16.

<sup>71</sup> Statute of the International Tribunal for the former Yugoslavia, UN SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993), pmb. [hereinafter Yugoslavia Tribunal Statute].

<sup>72</sup> Statute of the International Tribunal for Rwanda, U.N. SCOR, U.N. Doc. S/RES/955 (1994), Preamble [hereinafter Rwanda Tribunal Statute].

<sup>73</sup> Comp. ¶¶ 16-17, 26-27.

“measure” under Article 41, or as a subsidiary organ under Article 29 of the Charter.<sup>74</sup>

Moreover, no measure may be taken unless it directly furthers and is “commensurate” to the preservation of peace.<sup>75</sup> The Security Council itself has recognized that peace requires “genuine reconciliation among all members of the . . . society,”<sup>76</sup> not merely the suppression of violence. The establishment of ICTFI is inconsistent with the objective of lasting peace in several respects. First, its temporal jurisdiction covers only the period after the 1995 outbreak of hostilities.<sup>77</sup> The atrocities committed after 1995 were the product of a long period of premeditation and conspiracy, which under international law also constitute criminal violations.<sup>78</sup> By failing to address the roots of the violence, ICTFI creates conditions for future conflict.<sup>79</sup> Second, like the Yugoslavia and Rwanda Tribunals, ICTFI will likely focus on high-profile criminals who orchestrated the atrocities, leaving lower ranking offenders to Remorran courts. The resulting disparity in sentencing will create a perception of impunity, as Terraq and other leaders face only imprisonment<sup>80</sup> while those who carried out their orders are subject to execution.<sup>81</sup> Third, ICTFI’s location in Vienna denies Remorran

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<sup>74</sup> *Lockerbie*, 1992 I.C.J. at 167; Letter Dated 19 May 1993, from the Chargé d’affaires a.i. of the Permanent Mission of Yugoslavia to the Secretary-General, U.N. Doc. S/25801 (1993).

<sup>75</sup> See Charter, *supra* note 3, art. 39; Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, ¶ 39, U.N. DOC. S/25266 (1993).

<sup>76</sup> U.N. SCOR, 3542nd mtg., U.N. Doc. S/RES/997 (1995), Preamble.

<sup>77</sup> Comp. ¶ 20.

<sup>78</sup> Comp. ¶ 9; Genocide Convention, *supra* note 5, art. III.

<sup>79</sup> Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 Am. J. Int’l L. 501, 507-8 (1996).

<sup>80</sup> Comp. ¶ 22.

<sup>81</sup> Madeline Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int’l L. 349, 362 (1997).

victims the dignity of seeing their tormentors face justice publicly in Remorra. Finally, the experience of the Yugoslavia and Rwanda Tribunals indicates that ICTFI prosecutions will be few and far between, delaying justice for Remorran victims and prolonging the nation's healing. In contrast, prosecutions within domestic judicial systems serve to restore victims' dignity and prevent private acts of revenge,<sup>82</sup> and may be one of the most successful means of redress.<sup>83</sup>

## 2. A Treaty is Required to Establish an International Tribunal.

The establishment of an international tribunal requires the negotiation and conclusion of a treaty by sovereign states, and ratification of the treaty by national legislatures in compliance with domestic constitutional procedures.<sup>84</sup> In the context of a criminal tribunal, the absence of a treaty violates the fundamental right of the accused to a fair trial in an independent court with a secure legal basis.<sup>85</sup> Accordingly, the treaty requirement was observed even in the Nuremberg and Far East Tribunals, where Germany and Japan had relinquished national sovereignty through unconditional surrender,<sup>86</sup> and is central to the current proposal for a permanent international criminal court.<sup>87</sup>

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<sup>82</sup> Michael Scharf & Valerie Epps, *First Case Before the Yugoslavia War Crimes Tribunal*, 29 Cornell Int'l L.J. 635, 641-42 (1996).

<sup>83</sup> Van Dyke & Berkley, *supra* note 50, at 265.

<sup>84</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), ¶¶ 19, 21, U.N. Doc. S/25704, May 3, 1993 [hereinafter Secretary-General's Report]; U.N. SCOR, 3175th mtg., U.N. Doc S/PV.3175 (1993) (Mr. Li Zhiaoxing and Mr. Serdenberg); *The United Nations Ad Hoc Tribunal for the Former Yugoslavia*, 87 Am. Soc'y Int'l L. Proc. 20, 27 (1993) (Hans Corell); James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 Am. J. Int'l L. 404, 416 (1995).

<sup>85</sup> ICCPR, *supra* note 51, art. 14; Crawford, *supra* note 84, at 416.

<sup>86</sup> Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter Nuremberg Charter]; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

<sup>87</sup> Draft Statute, *supra* note 13.

Acts “which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security.”<sup>88</sup> The creation of the Yugoslavia Tribunal by fiat was an irregularity “suited only to the special circumstances of the former Yugoslavia” and was “not meant to establish new norms or precedents of international law.”<sup>89</sup> Such tribunals are inherently unfair to the great majority of states without permanent membership on the Security Council, since permanent members may use veto power, as well as economic and other pressures, to shield themselves and their allies from jurisdiction.<sup>90</sup> Here, the Security Council has targeted Remorra, a small developing country, while refraining from prosecuting other breaches of humanitarian law throughout the world.<sup>91</sup> “Justice should never be undertaken on an ad hoc or political basis.”<sup>92</sup> By usurping Remorra’s sovereign right to prosecute Terraq, ICTFI undermines the very principles it purports to uphold.<sup>93</sup>

### C. ICTFI Lacks Subject Matter Jurisdiction over Terraq’s Crimes

ICTFI lacks authority to prosecute Terraq’s crimes, as nothing in the letter of the law extends international humanitarian laws to the Integran civil war. The Geneva Conventions, signed by both Arden and Integra, proscribe “grave breaches” of human rights; these provisions, however, also limit

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<sup>88</sup> U.N. SCOR, U.N. Doc. S/4349 (1960).

<sup>89</sup> Secretary-General’s Report, *supra* note 84; U.N. SCOR, 3175th mtg., U.N. Doc S/PV.3175 (1993) (Mr. Li Zhiaoxing and Mr. Serdenberg).

<sup>90</sup> R.P. Anand, *United Nations and the Gulf Crisis* 39-41 (1994); Michael Scharf, *Conceptualizing Violence: Present and Future Problems in International Law*, 60 Alb. L. Rev. 861, 880 (1997).

<sup>91</sup> Michael Scharf, *Conceptualizing Violence: Present and Future Problems in International Law*, 60 Alb. L. Rev. 861 (1997).

<sup>92</sup> Richard Goldstone, *Symposium: Prosecuting International Crimes*, in 7 *Transnat’l L. & Contemp. Probs.* 1 (1997).

<sup>93</sup> Charter, *supra* note 3, pmb1.

their scope to international wars.<sup>94</sup> Although Common Article 3 and Protocol II of the Geneva Conventions establish basic rules for internal conflicts apart from the “grave breach” norms for international conflicts, they do not provide for international criminal liability.<sup>95</sup>

The U.N. Secretary-General maintains that international criminal tribunals may only apply human rights laws that are “beyond any doubt part of customary law.”<sup>96</sup> ICTFI charges Terraq with, *inter alia*, “crimes against humanity” and “crimes against peace,”<sup>97</sup> but the only treaty-based understandings of these terms require a nexus to an international armed conflict.<sup>98</sup> The long list of lawless civil wars since the end of World War II, as well as the reservations of numerous states within the jurisdictional breadth of the Yugoslavia and Rwandan Tribunals,<sup>99</sup> confirm that customary law does not extend humanitarian law to internal conflicts. The International Committee for the Red Cross agrees: “according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict.”<sup>100</sup> Furthermore, even apart from the scope of the Integran Civil War, state practice since Nuremberg confirms that national law and tribunals remain the primary vehicle for war crime prosecutions.<sup>101</sup> Arden indeed advocates an

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<sup>94</sup> Geneva Convention IV, *supra* note 31, art. 2.

<sup>95</sup> *Id.*, art. 3; Protocol II, *supra* note 45.

<sup>96</sup> Yugoslavia Tribunal Statute, *supra* note 71, ¶ 34.

<sup>97</sup> Comp. ¶ 28.

<sup>98</sup> Nuremberg Charter, *supra* note 86, art. 6(c).

<sup>99</sup> Provisional Verbatim Record of the 3217th Mtg. of the Security Council, May 25, 1993, at 22-29, U.N. Doc. S/PV.3217 (1993).

<sup>100</sup> Virginia Morris & Michael Scharf, 1 *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* 391-92 (1995).

<sup>101</sup> Telford Taylor, *The Anatomy of the Nuremberg Trials* 640 (1992).

unprecedented abridgment of Remorra's jurisdiction without its treaty-based consent.

**D. Under Its Mandate of Complementary Jurisdiction, ICTFI Must Defer to Remorran Courts.**

The Security Council declared in Resolution 1024 that "the jurisdiction of [ICTFI] shall be *complementary* to that of national courts[.]"<sup>102</sup> thus alluding to the Draft Statute of the International Criminal Court, which employs the same term.<sup>103</sup> The author of the Draft Statute, the International Law Commission, maintains that the Court "is not intended to exclude existing national jurisdiction or to affect [s]tates' rights to seek extradition and other forms of judicial assistance under existing arrangements."<sup>104</sup> The principle of complementarity "establishes the primacy of national jurisdictions in investigating and prosecuting international crimes,"<sup>105</sup> permitting ICTFI to assert jurisdiction only where a domestic forum is "unavailable" or "ineffective."<sup>106</sup> In the absence of a defined standard for determining the "availability" and "effectiveness" of a domestic forum, the International Law Commission and a number of states take the view that a national judicial system is "unavailable" or "ineffective" only where at least one of the following elements is present: (1) the state lacks jurisdiction over the crime based either on territoriality or the nationality of the accused,<sup>107</sup> (2) the state refuses to investigate or prosecute the crime; (3) unrest in the state renders its judicial system

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<sup>102</sup> Comp. ¶ 22.

<sup>103</sup> Draft Statute, *supra* note 13, art. 21.

<sup>104</sup> Broader Access to World Court Suggested by its President in Address to Legal Committee, General Assembly Press Release, U.N. Doc. GA/L/2826, at 1 (1994).

<sup>105</sup> Jeffrey Bleich, *Cooperation with National Systems*, 13 *Nouvelles Études Pénales* 245, 250 (1997).

<sup>106</sup> Draft Statute, *supra* note 13, pmb., ¶ 3; Jeffrey Bleich, *Complementarity*, 13 *Nouvelles Études Pénales* 231, 232 (1997).

<sup>107</sup> Draft Statute, *supra* note 13, art. 21.

unreliable; (4) the state's standard of guilt or punishment is incompatible with international norms; (5) the state's judicial proceedings are not "bona fide."<sup>108</sup> None of these conditions is present in Remorra.

The Yugoslavia and Rwanda Tribunals offer little support for subordinating Remorran courts to ICTFI. Both tribunals enjoyed primacy by express provisions in their statutes. The Yugoslavia Tribunal sought to bring war criminals to justice in circumstances where "national court proceedings [were] not impartial or independent, were designed to shield the accused from international criminal responsibility, or were not diligently prosecuted[.]"<sup>109</sup> The Rwanda Tribunal provided critical relief to a national justice system overwhelmed and incapacitated in the aftermath of war.<sup>110</sup> In contrast, Remorra has given the international community no cause to doubt that it lacks the resources or political will to conduct prosecutions properly and diligently.

#### **IV. ARDEN MUST COMPENSATE REMORRA FOR ITS VIOLATIONS.**

##### **A. Arden Is Liable to Remorra for Its Willful Refusal to Observe Its International Duties.**

Arden has willfully breached treaty and customary law duties owed directly to Remorra.<sup>111</sup> The customary law of state responsibility determines liability and remedies for both acts and omissions that breach international obligations,<sup>112</sup> whether by treaty or customary international law.<sup>113</sup>

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<sup>108</sup> Bleich, *supra* note 106, at 232-33, 235, 241.

<sup>109</sup> Morris & Scharf, *supra* note 100, 127n.381.

<sup>110</sup> Morris, *supra* note 81, at 361.

<sup>111</sup> *See supra* Part II.

<sup>112</sup> 1 *International Law Commission's Draft Articles on State Responsibility* (Shabtai Rosenne, ed.), 162-63 (1991); *Corfu Channel* (U.K. v. Alb.) (Merits), 1949 I.C.J. 4, 23.

<sup>113</sup> Malcolm Shaw, *International Law* 484 (3d ed. 1991); *Rainbow Warrior*, 82 I.L.R. 499, 551 (1990).

Despite Remorra's proper treaty-based requests and against its formal protests, Arden has refused to abide by either its treaty or customary law obligations to extradite Terraq.<sup>114</sup> Arden's violations incur liability to Remorra for the resulting injuries.

**B. Arden Must Make Necessary Reparations.**

The central principle of damages at international law is that a "breach of an engagement involves an obligation to make reparation[.]"<sup>115</sup> In the words of this Court's predecessor, reparation "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."<sup>116</sup> To this end, the law requires "restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear."<sup>117</sup>

Arden's international law violations produce a duty to compensate Remorra for the resulting injuries.<sup>118</sup> Publicists concur that states may claim damages not only for direct injury but also for "any breach of international law whether or not the breach causes actual material damage or loss."<sup>119</sup> *The I'm Alone* case saw a damage award for the "indignity" suffered by Canada in the sinking of a

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<sup>114</sup> Comp. ¶¶ 33-36.

<sup>115</sup> *Chorzow Factory* (Ger. v. Pol.) (Jurisdiction) 1927 P.C.I.J., (ser. A), No. 9, 4, 21.

<sup>116</sup> *Chorzow Factory* (Ger. v. Pol.) (Indemnity) 1927 P.C.I.J., (ser. A), No. 17, 4, 47; *See also United States Diplomatic and Consular Staff*, 1980 I.C.J. at 45.

<sup>117</sup> *Chorzow Factory* (Indemnity) 1927 P.C.I.J., at 47.

<sup>118</sup> *See generally Nicaragua* (Merits), 1986 I.C.J. at 14; *Corfu Channel* (Merits), 1949 I.C.J. at 174.

<sup>119</sup> G.G. Fitzmaurice, *The Case of The I'm Alone*, 17 Brit. Y.B. Int'l L., 82, 109 (1936); *see also* Ian Brownlie, 1 *System of the Law of Nations: State Responsibility* 236 (1983); Shaw, *supra* note 117, at 496-97; Oppenheim, *supra* note 1, § 155.

Canadian-registered ship,<sup>120</sup> the *Rainbow Warrior* case also confirmed the availability of damages for “legal or moral harm, even though there [was] no material damage.”<sup>121</sup> International law thus contemplates reparations for the moral harm caused to the Remorra state by Arden’s violations.

Speaking directly to the present dispute, the *Janes* case involved damages for the “indignity” caused by the failure of Mexico to punish the murderer of an American citizen.<sup>122</sup> A different arbitral tribunal in the *Lusitania* cases, discussing damages for injury resulting in “mental suffering, injury to feelings, humiliation, shame, degradation,” maintained that: “the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor[.]”<sup>123</sup> Remorra should accordingly receive damages, if not as an injured state, then as the representative of every individual citizen harmed by Arden’s refusal to extradite Terraq.

Although monetary compensation is an appropriate remedy for international wrongs, Remorra further links its damage request to basic principles of restitution by requesting the award to establish a Truth and Reconciliation Commission. Arden’s interference with Remorra’s internal efforts to achieve justice and peace<sup>124</sup> gives rise to a duty to undo the effects of this breach. In more than a dozen countries, truth commissions have served as critical alternative avenues for national reconstruction in the place of full justice;<sup>125</sup> publicists concur that truth commissions bring “significant

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<sup>120</sup> *The I’m Alone*, 7 I.L.R. 203 (1935).

<sup>121</sup> *Rainbow Warrior*, 82 I.L.R. at 574.

<sup>122</sup> 4 R.I.A.A. 82 (1925).

<sup>123</sup> 7 R.I.A.A. 32 (1923).

<sup>124</sup> *See supra* Part I.B.

<sup>125</sup> *Azanian Peoples Organization v. President of the Republic of South Africa*, 91 Am. J. Int’l L 360 (1997). *See generally* Priscilla Hayner, *Fifteen Truth Commissions -- 1974 to 1994*:

satisfaction to victims” when criminal prosecution is impracticable or impossible.<sup>126</sup> The United Nations has validated truth commissions as an international remedy through its establishment of truth commissions in nations like El Salvador.<sup>127</sup> In keeping with well-settled principles of restitution, Remorra thus requests an award for the Truth Commission as the “second-best” substitute to Arden’s full observance of its legal obligations to Remorra.

**V. INTERNATIONAL LAW REQUIRES ARDEN TO PROVIDE AN ACCOUNTING FOR THE US\$18 MILLION AND TO RETURN THESE FUNDS TO REMORRA.**

**A. The Disputed Funds Constitute Illegal War Booty and Must be Returned.**

Remorra is entitled to the property in question as illegal war booty. International law prohibits the appropriation of enemy property during war aside from war material and requires the return of all confiscated property at the conclusion of peace.<sup>128</sup> The weight of evidence in this case establishes that Terraq gained these funds in connection with his crimes against the Remorran people. The Security Council Panel of Experts reported “substantial reason” to believe that Terraq had diverted US \$20 million from munitions and supplies procurement, long before evidence of these funds ever surfaced in Arden.<sup>129</sup> Neither Terraq’s unreported income over the last decade, nor his claim of an inheritance, account for the full US \$20 million transferred in US \$4.5 million increments

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*A Comparative Study, in* 1 *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* 225 (N. Kritz ed., 1995).

<sup>126</sup> *See supra* note 14.

<sup>127</sup> Report of the Commission on the Truth for El Salvador: From Madness to Hope, U.N. SCOR, 48th Sess., Annexes, U.N. Doc. S/25500 (1993); Buergenthal, *supra* note 14.

<sup>128</sup> 2 *Oppenheim’s International Law: Disputes, War and Neutrality* §§ 140-45 (H. Lauterpacht, ed., 7th ed. 1952).

<sup>129</sup> Comp. ¶ 21.

to the Arden bank during the “most intense periods” of the conflict.<sup>130</sup> Arden must therefore return these illegal funds obtained by all indications in Remorra and at the expense of the Remorran people.

**B. International Law Requires Arden to Render Mutual Legal Assistance Regarding the Disputed Funds.**

An extensive and long-standing network of bilateral and multilateral initiatives and a wealth of state practice establish that Arden must assist Remorra in the investigation and disposition of the disputed funds.<sup>131</sup> For most of this century, treaties relating to the illegal traffic in drugs and related proceeds have required “the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings[;]”<sup>132</sup> other international agreements have extended this duty of cooperation to criminal matters in general.<sup>133</sup> States also have coordinated their efforts against the international flow of crime proceeds in myriad multinational and regional organizations and summits,<sup>134</sup> most notably the World Ministerial Conference on Organized Transnational Crime of 1994, attended by

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<sup>130</sup> Comp. ¶¶ 37, 39.

<sup>131</sup> See generally Oppenheim, *supra* note 1, § 143; Bruce Zagaris & Elizabeth Kingma, *Asset Forfeiture International and Foreign Law: An Emerging Regime*, 5 Emory Int’l L. Rev. 445 (1991).

<sup>132</sup> Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, art. 7, U.N. Doc. E/Conf.82/15 [hereinafter Drug Convention]; see also Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175; Oppenheim, *supra* note 1, § 143, p. 487n.13.

<sup>133</sup> Model Treaty on Mutual Assistance in Criminal Matters, GA Res. 45/117 (1990) [hereinafter Mutual Assistance Treaty]; Declaration against Corruption and Bribery in International Commercial Transactions, GA Res. 51/191 (1996) [hereinafter Declaration against Corruption]; Council of Europe: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, 30 I.L.M. 148 (1991) [hereinafter Crime Proceeds Convention]; U.S. Treaty with the United Kingdom on Mutual Legal Assistance on Criminal Matters, Jan. 6, 1994, 1994 WL 855115 (Treaty).

<sup>134</sup> Zagaris & Kingma, *supra* note 131, at 455-77.

113 countries.<sup>135</sup> Finally, at the domestic level, numerous countries have passed laws to combat money laundering.<sup>136</sup> These pervasive practices describe a customary international obligation<sup>137</sup> on Arden's part to cooperate with Remorra regarding funds obtained through illegal activity.

Arden's attempt to hide behind its bank secrecy laws flies in the face of this duty of mutual legal assistance. Although mutual legal assistance treaties generally condition assistance on compliance with domestic laws and practice<sup>138</sup> or conformity with the legal system,<sup>139</sup> they all include the caveat that a nation should not decline a request for assistance solely on the grounds of bank secrecy.<sup>140</sup> These provisions against obstructionist bank secrecy policies simply restate the basic rule that Arden cannot invoke internal laws to escape its international obligations.<sup>141</sup> Indeed, the recent decision by Switzerland, the archetypal bank secrecy nation, to return Marcos assets to the Philippines confirms that the priority of mutual assistance duties over bank secrecy laws has assumed the force of customary law.<sup>142</sup> Thus, Arden must release information on the US\$20 million claimed by Terraq

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<sup>135</sup> Report of the World Ministerial Conference on Organized Transnational Crime, General Assembly, 49th Sess., Agenda Item 96, at 5-14, U.N. Doc. A/49/748 (1994).

<sup>136</sup> See, e.g., Code Pénal, art. 305 Bis (Switz.); Criminal Justice (International Co-operation) Act of 1990, ch. 4 (U.K.); The Proceeds of Crime Act 1987, § 81 (Aust.); Bank Secrecy Act, 31 U.S.C. §§ 5311-44.

<sup>137</sup> *North Sea Continental Shelf Cases*, (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3; *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4; Brownlie, *supra* note 2, at 6-9.

<sup>138</sup> Mutual Assistance Treaty, *supra* note 133, art. 4(1)(e); Crime Proceeds Convention, *supra* note 133, art. 9.

<sup>139</sup> Drug Convention, *supra* note 132, art. 7(15)(d).

<sup>140</sup> Mutual Assistance Treaty, *supra* note 133, art. 4(2); Drug Convention, *supra* note 132, art. 7(5); Crime Proceeds Convention, *supra* note 133, art. 18(7); see also Declaration against Corruption, *supra* note 133, ¶ 10.

<sup>141</sup> VCLT, *supra* note 19, art 27.

<sup>142</sup> *Republic of Philippines v. Federal Office for Police Matters* (Switz. Sup. Ct. 1997).

and return the funds should investigations establish their wrongful origins.

**C. Arden Should Recognize the US\$20 Million Judgment Against Terraq.**

Remorra, on behalf of its people, also has obtained a valid US\$20 million damages award against Terraq. This judgment fully complied with international laws of jurisdiction, specifically the basic rules of territoriality and nationality.<sup>143</sup> The default nature of the judgment does not discount its ultimate validity; both international and national tribunals fully recognize default judgments.<sup>144</sup> Aside from its duties to return the money as illegal war booty or crime proceeds, Arden should recognize this judgment as consistent with its declared “valued friendship” with Remorra<sup>145</sup> and international principles of comity.<sup>146</sup>

**D. Under Its Own Analysis, Arden Furthers International Crimes by Refusing to Return the Funds.**

By refusing all requests for cooperation regarding the disputed funds even as it emphasizes the international character of Terraq’s crimes, Arden entangles itself in an irreconcilable contradiction. If Terraq’s wartime atrocities constitute international crimes, so does his plunder of private property.<sup>147</sup> As set forth in the Nuremberg Principles, complicity in international crimes is itself a

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<sup>143</sup> See *supra* Part I.A.

<sup>144</sup> *Corfu Channel* (U.K. v. Alb.) (Compensation), 1949 I.C.J. 244, 249; Statute of the International Court of Justice, June 26, 1945, art. 53, 59 Stat. 1055, T.S. No. 993; *Filartiga v. Pena-Irala*, 577 F.Supp. 860, 861 (E.D.N.Y. 1984); *Trajano v. Marcos*, 978 F.2d 493, 495 (9th Cir. 1992); Bin Cheng, *General Principles of Law* 297 (1987).

<sup>145</sup> Comp. ¶ 35.

<sup>146</sup> *Hilton v. Guyot*, 159 U.S. 133, 163-64 (1895); *Dagher v. Dagher*, 26 I.L.R. 57 (U.S. 1958); *Restatement, supra* note 1, § 481; Shaw, *supra* note 113, at 30.

<sup>147</sup> Geneva Convention IV, *supra* note 31, art. 18; Protocol II, *supra* note 45, art. 4(2)(g).

crime under international law.<sup>148</sup> The Nuremberg Tribunal thus prosecuted numerous bankers who received and disposed of illegally confiscated property.<sup>149</sup> The Rwanda Tribunal also provides for property restitution and victim compensation as well as criminal prosecutions.<sup>150</sup> Seen in this light, Arden's reliance on ICTFI as justification for its refusal to extradite Terraq is selective and self-serving. Through its insistence on bank secrecy despite irrefutable evidence of the illegal origins of the disputed funds and Arden's own recognition of their "suspicious"<sup>151</sup> character, Arden becomes a common-law "accessory after the fact" to the "international crimes" it ascribes to Terraq.

## VI. CONCLUSION AND PRAYER FOR RELIEF.

Remorra respectfully asks this Honorable Court to declare and adjudge that:

- (1) Arden must extradite Terraq to Remorra pursuant to its treaty and customary law obligations;
- (2) The establishment of ICTFI does not diminish Arden's duty to extradite Terraq to Remorra;
- (3) Failing to extradite Terraq, Arden must compensate Remorra in the form of US\$100 million for the establishment of a Truth and Reconciliation Commission; and
- (4) Arden must provide an accounting for the US\$18 million and return these funds to Remorra.

Respectfully submitted,

Agents for Remorra

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<sup>148</sup> Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, in 2 Y.B. Int'l L. Comm'n 364, 374-77, U.N. Doc. A/CN.4/Ser.A/1950/Add.1 (1950).

<sup>149</sup> Taylor, *supra* note 101, at 396-98; 14 *Trials of War Criminals Before the Nuremberg Military Tribunal* 116, 772-84 (1946-49).

<sup>150</sup> Rwanda Tribunal Statute, *supra* note 72, art. 23.

<sup>151</sup> Comp. ¶ 39.