

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

**THE STATE OF REMORRA,
Applicant,
v.
THE IRENIC REPUBLIC OF ARDEN,
Respondent.**

Case Concerning the International Criminal Tribunal for the Former Integra

**SPRING TERM 1998
ON SUBMISSION TO THE
INTERNATIONAL COURT OF JUSTICE**

MEMORIAL FOR RESPONDENT

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STATEMENT OF JURISDICTION

The Governments of Remorra and Arden have submitted the present dispute to the International Court of Justice pursuant to Articles 36(1) and 40(1) of the Statute of the Court.

STATEMENT OF FACTS

After a bitter ethnic conflict dissolved the Republic of Integra, the two emerging nations, the Republics of Remorra and Nylesia, became embroiled in a diplomatic endeavor to obtain the return of an alleged war criminal who fled to a third state, the Republic of Arden. Compromis (“Comp.”) ¶¶ 16, 1, 8. Prior to dissolution, Integra consisted of two ethnic factions. Comp. ¶¶ 2, 4. Nylesians, an agricultural people, settled Integra in early sixth century A.D. Comp. ¶ 2. Remorrans, an ocean trading people, arrived centuries later and developed northern Integra. *Id.* Although they lived as peaceful neighbors, the two factions maintained their distinct linguistic, ethnic and cultural identities. Comp. ¶ 3. Upon Integra’s establishment in 1854, Integra was predominantly Nylesian. As the balance of wealth and influence shifted to Remorrans, an economic rift ruptured along ancient ethnic lines. Comp. ¶¶ 4-6. By the 20th century, the economic and political control of Integra was almost exclusively Remorran. Comp. ¶¶ 2, 6, 7. Although ethnic groups lived in areas traditionally associated with their ethnic heritage, the capital city of Nylar was predominantly Remorran controlled. Comp. ¶ 4.

After a series of political decisions, which are still hotly debated, sporadic Remorran-Nylesian violence erupted into a series of large-scale military actions, forcing a Nylesian revolution. Comp. ¶ 8. An underground revolutionary movement, the Nylesian People’s Army (“NPA”), had planned for five years to overthrow the virtually all Remorran government; the NPA sought control of their homeland, not secession. Comp. ¶¶ 9-10. A native Harbaar innkeeper, Malu Terraq, claimed to be the architect of the NPA movement. *Id.*

On March 15, 1995, the NPA seized police and military installations, killing some 5,000 Remorrans. Comp. ¶ 10. The NPA circulated leaflets blaming the “Remorran elite” and encouraging

Nylesians to stop the Remorran plunder of their homeland. *Id.* Terraq concurrently orchestrated a ruse through false television and radio reports announcing that Remorrans were slaughtering innocent Nylesians, and urging Nylesians to take up arms against them. Comp. ¶ 11. This resulted in over 15,000 deaths. Comp. ¶ 12. When Nylar fell to NPA forces, many Remorran governmental officials fled to Harbaar and declared it their new capital. Comp. ¶¶ 13-14. On April 15, 1995, the Harbaar government issued arrest warrants for all NPA members for treason, sedition, and murder. Comp. ¶ 14. Over 120,000 people died during the next six months. Comp. ¶ 15.

On October 10, 1995, a multinational force, comprised of the Regional Association of Treaty States' members, entered the conflict zone and disarmed most, but not all, of the combatants. Comp. ¶ 16; Clarifications ("Clar.") ¶ 6. The warring factions signed the Peace Treaty dissolving Integra and creating two new countries: Remorra, occupying one-fourth of the original territory, and Nylesia, occupying three-fourths. Comp. ¶ 16. The Peace Treaty determined citizenship by birthplace and provided for naturalization within five years; it also characterized Nylesia, the larger in both population and area, as the "successor state" for purposes of membership in international organizations, such as the United Nations, and resolved other matters under the Vienna Convention on Succession of Treaties of 1978. Comp. ¶¶ 17-18; Clar. ¶ 12; Corrections ("Corr.") ¶ 1. Arden is only a signatory to the 1978 Convention; it never filed a ratification. Corr. ¶ 1; Comp. ISSUES/CLAIMS. Remorra immediately obtained membership in the United Nations and acceded to the International Court of Justice statute. Comp. ¶ 18.

On January 4, 1996, the U.N. Security Council voted unanimously to establish an impartial Panel of Experts ("Panel") to investigate and report on accusations of grave violations of humanitarian law committed by both sides during the revolution. Comp. ¶ 19. The Panel submitted

its report in April 1996, presenting substantial evidence of torture, systematic rape, summary executions, and "ethnic cleansing" by Nylesian separatists associated with the NPA. Comp. ¶ 20. The Panel recommended that an International Criminal Tribunal for the Former Integra ("ICTFI") be commissioned in Vienna, Austria with complementary jurisdiction to national criminal courts. Comp. ¶¶ 20, 22; Clar. ¶ 15. ICTFI can impose a maximum penalty of life imprisonment. Comp. ¶¶ 20, 22; Corr. ¶ 3. The Panel specifically catalogued Terraq's involvement in the revolution and branded Terraq "*hostis humani generis*," an enemy of all mankind, deeming his actions crimes against peace and humanity. Comp. ¶¶ 20-21. The Panel reported on Terraq's overseeing the confiscation of weapons and food from civilians in Telfin, issuing a standing order to set civilians to sea without food, water, or fuel, allegedly killing the mayor of Telfin for protesting the detention camps' creation, and allegedly ordering the torture, and resulting murder, of two ethnic Remorrans. Comp. ¶ 21. The report also disclosed substantial reason to believe that Terraq systematically appropriated US\$20 million in cash and other liquid assets passing through his hands in connection with the procurement of munitions and supplies for the Nylesian separatists. *Id.* The U.N. Secretary General transmitted the Panel's Report and Recommendations to the Security Council which unanimously adopted it pursuant to Chapter VII of the U.N. Charter. Comp. ¶ 22.

Although the exact date is unknown, Remorra issued a warrant for Terraq's arrest shortly after independence. Clar. ¶ 16. On July 1, 1996, a Remorran Intelligence Service team invaded Nylesia to abduct Terraq. Comp. ¶¶ 21, 23. Terraq escaped, but the invaders were arrested by police. Comp. ¶ 23. Nylesia accepted Remorra's formal apology for violating its sovereignty, although Remorra asserted that it will "deal appropriately" with Terraq. Comp. ¶ 24-25. Meanwhile, three members of the Revolt Planning Committee ("RPC") were arrested in Harbaar, but never

indicted because Remorran law fails to require an indictment. Comp. ¶ 25; Clar. ¶ 16. After a brief and highly publicized trial, the Harbaar Criminal Court convicted them of sedition, treason, and complicity in murder and sentenced them to death. Comp. ¶ 25. Although appeals were permitted by law and, on average, appellate decisions were handed down 9.63 months after judgment, the RPC members did not appeal and were executed by lethal injection immediately after the verdict. *Id.*; Clar. ¶¶ 2-3.

On November 20, 1996, ICTFI indicted Terraq, charging him with crimes against humanity and peace, inciting acts of violence and murder, and characterizing his involvement with the RPC as "planning genocide." Comp. ¶ 28. ICTFI requested that Nylesia arrest Terraq and present him to ICTFI; Nylesia immediately agreed to cooperate. *Id.* The next day, Nylesia dispatched a force to arrest Terraq only to discover that he disappeared. Comp. ¶ 28. On November 21, 1996, Terraq illegally entered Arden, where he was arrested on December 1, 1996 for suspected illegal entry. Comp. ¶ 29. Although conducted without legal formalities, a search of Terraq's hotel room immediately following his arrest revealed financial documents showing his control over accounts in the privately owned First Arden National Bank, valued at more than US\$18 million. Comp. ¶ 37; Clar. ¶ 4. Arden authorities determined that Terraq made four separate deposits of US\$4.5 million during the revolution's most intense periods. Comp. ¶ 37.

ICTFI formally requested the transfer of Terraq again, this time from Arden. Comp. ¶ 33. Concurrently, Remorra finally requested extradition of Terraq, citing the 1965 Extradition Treaty between Arden and the former Integra (which contains a provision for the political offense doctrine), to try him for acts of treason, sedition, and murder committed during the revolt, including his management of the detention camps. Comp. ¶ 33; Clar. ¶¶ 16, 18. Arden's Foreign Minister formally

responded by condemning the crimes and stressing its commitment to the fundamental right to a fair trial; the minister concluded that preservation of international peace and fundamental rights required the surrender of Terraq to ICTFI, although no extradition agreement with ICTFI exists. Comp. ¶¶ 34-35; Clar. ¶ 11. Remorra protested diplomatically. Comp. ¶ 36. One week later, the Remorran Minister of Home Affairs brought a class action suit against Terraq in Remorra, demanding US\$20 million in damages for injuries sustained during the revolution. Comp. ¶ 38. On December 28, 1996, 21 days after the class action was filed, the court entered a default judgment in favor of the Remorran Minister and issued a writ of attachment. Comp. ¶¶ 29, 38.

Meanwhile, consistent with Arden laws, Arden authorities impounded Terraq's bank accounts, announcing that it considered them "suspicious." Comp. ¶ 39; Clar. ¶ 10. Uncontradicted press reports indicated that Terraq never reported an annual gross income of more than US\$130,000. Comp. ¶ 37. Arden sought the public's help in determining any claims to them. Comp. ¶ 39. Despite extensive publicity in Arden, no one came forward. *Id.* On January 31, 1997, the First Arden National Bank obtained a restraining order from a local court ending the Government restriction on the accounts; all additional information requests were prohibited. Comp. ¶ 40.

Upon learning of the bank accounts, Remorra's Ambassador delivered a threatening note to Arden, on February 4, 1997, demanding that the funds and accounting be delivered to Remorra. Comp. ¶¶ 41-42. Arden's Foreign Minister acknowledged that the accounts may represent unlawfully diverted funds from Remorra, but stated that Arden law does not permit the banks to deprive the record owners of their property rights or share with anyone, including their own authorities, information regarding their disposition. Comp. ¶¶ 43-44. Arden refused further communications on the subject. Comp. ¶ 44. Terraq remains in detention in Arden, pending the outcome of this case.

Comp. ¶ 45. In order to prevent further escalation of the conflict, Remorra and Arden submitted the dispute to the ICJ. Comp. ¶ 45.

In addition to those international agreements mentioned above, Arden is a party to the U.N. Charter, the ICJ Statute, the Vienna Convention on the Law of Treaties, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions, and the 1977 Protocols to the Geneva Conventions. Comp. ISSUES/CLAIMS; Clar. ¶ 9.

QUESTIONS PRESENTED

- I. Whether Arden's decision to surrender Terraq to ICTFI and ICTFI's jurisdiction over Terraq are supported by the U.N. Charter and customary international law.

- II. Whether the 1965 Extradition Treaty remains in effect or whether Arden complied with its treaty obligations in refusing to extradite Terraq to Remorra based upon superseding duties under the U.N. Charter.

- III. Whether Arden is liable under international law to make reparations to Remorra for a Truth and Reconciliation Commission.

- IV. Whether Arden violated international law by not providing the bank funds or accounting to Remorra and relying upon its domestic laws absent a treaty obligation.

SUMMARY OF PLEADINGS

Arden's Charter-based obligations require the surrender of Terraq to ICTFI. The U.N. Charter mandates that all members shall carry out Security Council enforcement measures and cooperate with all subsidiary organs established by the Security Council to carry out that goal. ICTFI, established under Chapter VII of the Charter, is such a subsidiary organ and Arden's duty to comply with its request supersede any other international obligation.

As demonstrated in Yugoslavia and Rwanda, internal conflicts can breach international peace. Even if the Integran war is "internal," ICTFI has proper subject matter jurisdiction to prosecute Terraq's atrocities under the Geneva Conventions, its accompanying Protocols, and universal jurisdiction, which covers crimes against humanity. Remorra's inability to provide Terraq with an impartial tribunal undercuts any legitimate primacy claim to prosecute Terraq. Remorra seeks to exact vengeance on Terraq, an ethnic Nylesian, by cloaking its intentions under the mantle of territorial sovereignty--the very principle Remorra trampled by invading Nylesia to abduct Terraq.

Arden owes no treaty-based obligation to comply with Remorra's extradition demand. Arden has no extradition treaty with Remorra, nor has the bilateral extradition treaty between Remorra and the former Integra survived Integra's dissolution. The personal nature of the extradition treaty and the temporal limitations of the Succession Treaty preclude any valid succession claim. Furthermore, the politically charged climate, evinced by the hasty executions of three NPA members, demonstrates that Terraq will not receive a fair trial in Remorra. Hence, Terraq properly belongs before a neutral international tribunal for crimes that offend the collective conscience of humanity.

Under principles of state responsibility, Arden need not pay restitution to the State of Remorra or compensatory damages to its citizens. International law does not require reparations for a breach of an international duty absent actual damages. The evidence regarding both the nationality of the individuals purportedly harmed by Arden's refusal to extradite Terraq, as well as the extent of the harm suffered, fails to provide reasonable proof of Arden's responsibility. Without proof of injury, international law does not support Remorra's demand.

Remorra's request of US\$100 million for Arden's compliance with its Charter-based obligations is excessively punitive, inappropriate and premature. International tribunals traditionally have refused to award punitive damages. Moreover, the purpose for which it has been requested, a Truth and Reconciliation Commission, is not a recognized remedy in international law and is inappropriate, considering Remorra's lack of consensus for a Commission. Remorra's request must be denied.

The Compromis fails to provide sufficient evidence that international law requires Arden to turn over the bank funds or accounting. First, the Compromis fails to delineate whether the funds, systematically diverted by Terraq, are private or public. Second, this distinction implicates a plethora of international law areas, including property obtained during war, state succession, state secession, and self-determination. Absent a clear international duty, Arden is not obligated to abrogate its domestic laws, which fully comply with international law. Arden may also decline to recognize and enforce the default judgment, considering the mere 21 days between the class action suit's filing and the default judgment. Comity grants Arden the discretion to decline recognition and enforcement of this judgment.

PLEADINGS AND AUTHORITIES

I. ARDEN'S REFUSAL TO EXTRADITE TERRAQ FULLY COMPLIES WITH INTERNATIONAL LAW.

A. Terraq Will Not Receive a Fair Trial in Remorra.

Under customary international law, criminal defendants have a fundamental right to a fair trial.¹ A state may refuse to extradite a fugitive if there is "substantial ground for believing that the individual will not receive a fair trial."² In *Barcelona Traction, Power and Light Co.*, this Court characterized the protection of fundamental human rights as obligations *erga omnes*--owed by all states to all persons.³ In *Soering v. United Kingdom*, the European Court of Human Rights suggested that the requested state may be liable in an extraordinary circumstance where extradition would expose the fugitive to a risk of "a flagrant denial of a fair trial in the requesting country."⁴

This case presents the Court with such an extraordinary circumstance. Remorra's actions demonstrate its resolve to exact revenge. The Remorran Intelligence Service violated Nylesia's territorial integrity by orchestrating a predawn raid on Terraq's home.⁵ International condemnation

¹ See Universal Declaration of Human Rights, Dec. 10, 1948, art. 10, G.A. Res. 217A (III), 71, U.N. Doc. A/810; International Convention on Civil and Political Rights, Dec. 16, 1966, art. 14(1), 999 U.N.T.S. 171 [hereinafter ICCPR].

² *Restatement (Third) of the Foreign Relations Law of the United States* § 476, cmt. h (1987) [hereinafter *Restatement*]; see *Soering v. United Kingdom*, 28 I.L.M. 1063, 1101 (Eur. Ct. H.R. 1989); M. Cherif Bassiouni, 2 *International Criminal Law* 415 (1986).

³ *Barcelona Traction, Power and Light Co. (Second Phase) (Belg. v. Spain)*, 1970 I.C.J. 3, 32-33.

⁴ *Soering*, 28 I.L.M. at 1101.

⁵ Comp. ¶ 23.

of state-sponsored abduction in the aftermath of the *Eichmann*⁶ and *Alvarez-Machain*⁷ cases demonstrates that international law does not permit invasion of a state's territorial sovereignty to kidnap a fugitive.⁸ In its zeal for revenge, Remorra executed three members of the NPA's Revolt Planning Committee without even indicting them.⁹ Although Remorran criminal procedure provides a right to an appeal that usually takes about nine months, all three were executed immediately after the court's verdict.¹⁰ The next day, a Remorran spokesperson declared, "Your government promises that Terraq will be tried and punished for his crimes. The blood of our martyrs will be dishonored unless such criminals receive the justice they deserve!"¹¹ The politically explosive context of this case provides "substantial ground" for Arden to believe that Terraq will not receive a fair trial. Accordingly, Arden properly denied Remorra's extradition demand.

In complying with customary international law, Arden is not vindicating Terraq's right to a fair trial purely for the sake of the right itself. Rather, the prospect of any lasting peace is inextricably linked to the neutral, evenhanded disposition of justice.

⁶ *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 I.L.R. 5 (Isr. Sup. Ct. 1962).

⁷ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

⁸ See U.N. SCOR, 15th Sess., 868th mtg., U.N. Doc. S/PV. 868 (1960); *Report of the Working Group on Arbitrary Detention*, U.N. Commission on Human Rights, 50th Sess., Agenda Item 10, at 139-140, U.N. Doc. E/CN.4/1997/27 (1993); *Inter-American Juridical Committee Legal Opinion in United States v. Alvarez-Machain*, 32 I.L.M. 277 (Inter-Am. Ct. H.R. 1993).

⁹ Comp. ¶ 25; Clar. ¶ 16; see also ICCPR, *supra* note 1, art. 14(3)(a).

¹⁰ Clar. ¶ 2; Comp. ¶ 25.

¹¹ Comp. ¶ 31.

B. Arden Must Deliver Terraq to the International Criminal Tribunal for the Former Integra Pursuant to Its U.N. Charter Obligations.

As a member of the United Nations, Arden must implement U.N. Security Council enforcement measures and cooperate with subsidiary organizations created to enforce those measures.¹² These obligations supersede any other international law duty.¹³ The Statutes of both the Former Yugoslavia and Rwanda Tribunals illustrate the obligation of all U.N. members to cooperate with criminal tribunals established by the Security Council.¹⁴ The Secretary-General of the United Nations reinforced this obligation by mandating that any request by the Yugoslavia Tribunal to surrender an individual shall be considered to be a binding enforcement measure under Chapter VII of the Charter.¹⁵ This Court has held that all U.N. members must carry out Security Council decisions, which “prevail over . . . any other international agreement[.]”¹⁶

¹² Comp. ISSUES/CLAIMS; *see* Charter of the United Nations, June 26, 1945, arts. 25, 29, 39, 48, 49, 24 U.S.T. 2225 [hereinafter Charter].

¹³ *See* Charter, *supra* note 12, art. 103.

¹⁴ Statute of the International Tribunal for the Former Yugoslavia, art. 29, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (1993) [hereinafter Yugoslavia Tribunal Statute]; Statute of the International Tribunal for Rwanda, art. 28, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, 3453rd mtg., U.N. Doc. S/RES/955 (1994) [hereinafter Rwanda Tribunal Statute].

¹⁵ *See Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808*, 32 I.L.M. 1159, 1188 (1993); *Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 35 I.L.M. 32, 43 (Yugoslavia Appeals Chamber 1996) [hereinafter *Yugoslavia Appeals Chamber*].

¹⁶ *See 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, 126.

Pursuant to Chapter VII of the Charter, the Security Council established ICTFI¹⁷ which, in turn, formally requested that Arden surrender Terraq to its custody.¹⁸ Arden's Charter obligations mandate compliance. If Remorra opposes the Security Council's executive decision, Remorra's quarrel is with the Security Council, not with Arden.

1. ICTFI Represents a Legitimate Exercise of the Security Council's Chapter VII Powers.

“The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression,” and shall take appropriate measures to maintain international peace and security.¹⁹ The Security Council acted properly under Article 39 of the Charter because the Integran conflict threatened international peace.²⁰ The Integran war claimed the lives of over 120,000 people and the killing temporarily ceased only after a regional force from an association of neighboring states disarmed most, but not all, of the combatants.²¹ Thus, it is reasonable to infer that the regional association of neighboring states reacted to a flood of refugees²² into their own states, or out of fear that the Integran conflict would spill over into their territories.

¹⁷ Comp. ¶ 22.

¹⁸ Comp. ¶ 33.

¹⁹ Charter, *supra* note 12, arts. 39, 41, 42.

²⁰ See *Yugoslavia Appeals Chamber*, 35 I.L.M. at 42-45.

²¹ Comp. ¶¶ 15, 16.

²² See Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 189 U.N.T.S. 137; 1 *Oppenheim's International Law* § 399 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter *Oppenheim*].

Remorra's attempt to label this war as an "internal armed conflict" does not bar the Security Council's authority to determine a "threat to peace."²³ The Security Council, with the support of the General Assembly, found that the civil wars in the Congo, Liberia, Somalia, and Rwanda constituted threats to international peace and security.²⁴ The Appeals Chamber for the International Criminal Tribunal for the Former Yugoslavia ("Yugoslavia Appeals Chamber") recognized that the practice of the U.N. membership at large reflects a common understanding that a "threat to peace" may include internal armed conflicts.²⁵

Article 41 lists non-forcible implementation measures of the Security Council, but the list is not exhaustive.²⁶ The Yugoslavia Appeals Chamber held that "the establishment of an International Tribunal falls squarely within the powers of the Security Council under Article 41."²⁷ This Court has never struck down a Security Council resolution as a violation of the Charter.²⁸

In this case, the maintenance of a lasting peace depends on the neutral disposition of justice. The Security Council acted within its discretion to maintain peace by establishing ICTFI.²⁹ Even the cessation of hostilities does not bar the invocation of Chapter VII.³⁰

²³ See *Yugoslavia Appeals Chamber*, 35 I.L.M. at 43.

²⁴ *Id.*; S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

²⁵ See *Yugoslavia Appeals Chamber*, 35 I.L.M. at 43.

²⁶ See *id.* at 44-45; Charter, *supra* note 12, art. 41.

²⁷ *Id.* at 45.

²⁸ Geoffrey Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic*, 36 Va. J. Int'l L. 687, 703 n.120 (1996).

²⁹ See *Yugoslavia Appeals Chamber*, 35 I.L.M. at 44.

³⁰ See S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

2. ICTFI Has Subject Matter Jurisdiction Over Terraq's Crimes.

The former Integra was and Arden is a party to the Geneva Conventions and Protocols.³¹ At the time of Terraq's alleged crimes, Integra still existed³² and these treaties were in force. Even if the Court characterizes the Integran war as "internal," Common Article 3 and Protocol II of the Geneva Conventions govern this conflict.³³ As demonstrated in the International Criminal Tribunal for Rwanda, violations of Common Article 3 and Protocol II, which proscribe, *inter alia*, torture, taking hostages, and pillage, are subject to individual criminal culpability.³⁴ The international community has realized that individual responsibility for such offenses should not hinge on whether the atrocities occurred technically within a country's boundaries.³⁵

Customary humanitarian norms prohibiting crimes against peace and humanity apply equally to internal conflicts.³⁶ Those slaughtered in civil wars deserve no less protection than those killed in

³¹ Clar. ¶ 9.

³² Comp. ¶ 16.

³³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 75 U.N.T.S. 135 [hereinafter Civilian Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; see *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.) (Merits), 1986 I.C.J. 14, 113-114.

³⁴ Rwanda Tribunal Statute, *supra* note 14, art. 4; see Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554, 558 (1995).

³⁵ See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994); *Yugoslavia Appeals Chamber*, 35 I.L.M. at 64.

³⁶ See *id.* at 69-70, 72; *Report of the Secretary-General*, 35 I.L.M. at 1173.

international conflicts.³⁷ In establishing ICTFI, the Security Council ensured that the atrocities in the former Integra would receive the full attention of the international community.

3. Delivering Terraq to ICTFI is Consistent With Its Complementary Jurisdiction.

ICTFI's jurisdiction is "complementary" to that of Remorra.³⁸ The International Law Commission's Draft Statute of the International Criminal Tribunal ("ILC Draft") uses the same "complementary" jurisdiction language.³⁹ The ILC Draft preamble provides "the [International Criminal Tribunal] is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective."⁴⁰ Although the Draft Statute is silent on what "unavailable" or "ineffective" means, one commentator defines "ineffectiveness" as either "(1) the forum provides a standard of guilt or punishment which is incompatible with international norms; or (2) the State in question has not demonstrated an actual intention to prosecute or to conduct a full and prompt investigation."⁴¹ Extraditing Terraq to Remorra would violate

³⁷ See Richard Goldstone, *Symposium: Prosecuting International Crimes: An Inside View*, 7 *Transnat'l L. & Contemporary Probs.* 1, 4 (1997); G.A. Res. 2675, U.N. GAOR, 25th Sess., 1922nd plen. mtg., Supp. No. 28, U.N. Doc. A/8028 (1970); *Yugoslavia Appeals Chamber*, 35 I.L.M. at 63.

³⁸ Comp. ¶ 22.

³⁹ See *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. Doc. A 49/10 (1994).

⁴⁰ *Id.* at pmbl., ¶ 3.

⁴¹ Jeffrey Bleich, *Complementarity*, 13 *Nouvelles Etudes Penales* 231, 238, 241 (1997).

Arden's obligation to safeguard his fundamental right to a fair trial.⁴² Remorra's lust for revenge renders its judicial process ineffective and undercuts its primacy claim.

II. DELIVERING TERRAQ TO ICTFI DOES NOT BREACH ANY INTERNATIONAL LAW OBLIGATIONS.

Extradition depends on the existence of a treaty obligation.⁴³ Absent a treaty, *aut dedere, aut judicare*, try or extradite, is a moral obligation rooted in comity.⁴⁴ Even assuming that Arden does have a duty under international law to investigate and try alleged perpetrators of crimes against humanity,⁴⁵ Arden is complying with this obligation by sending Terraq to ICTFI.⁴⁶

A. The Extradition Treaty Between Arden and the Former Integra Does Not Survive Integra's Dissolution.

Under the Vienna Convention on Succession of States in Respect to Treaties ("Succession Treaty"), a successor state assumes the treaty obligations in force that apply to its territory at the time the successor state separates from an existing state.⁴⁷ The Succession Treaty is not a codification of the law of state succession and does not reflect state practice.⁴⁸

⁴² See *supra* part I.A.

⁴³ See Geoff Gilbert, *Aspects of Extradition Law* 157 (1991).

⁴⁴ *Id.*; see Oppenheim, *supra* note 22, § 17.

⁴⁵ See *Velasquez Rodriguez*, Judgment of July 29, 1988, 28 I.L.M. 291 (Inter-Am. Ct. H.R. 1989); Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L. J. 2537 (1991).

⁴⁶ See Kenneth Gallant, *Securing the Presence of Defendants Before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 Crim. L. F. 557, 569 (1994).

⁴⁷ Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, art. 34, U.N. Doc. A/CONF.80/31 [hereinafter Succession Treaty].

⁴⁸ Detlev Vagts, *State Succession: The Codifiers' View*, 33 Va. Int'l L. 275, 294-95 (1993).

Article 7 of the Succession Treaty limits its application “to a succession of States which has occurred after the entry into force of the Convention except as may be otherwise agreed.”⁴⁹ Remorra signed the Peace Treaty and formally assumed the governmental responsibility over its territory no later than April 1996.⁵⁰ Because the Succession Treaty entered into force on November 6, 1996,⁵¹ its provisions do not apply in the present case.

Even if this Court finds that the Succession Treaty applies, Arden has not yet ratified the Succession Treaty,⁵² and therefore is not bound to recognize Remorra as a successor to the extradition treaty between Arden and the former Integra. As a signatory to the Successor Treaty, Arden is cognizant of its duty not to defeat the object of the Succession Treaty.⁵³ Arden’s refusal to recognize Remorra as a successor to the extradition treaty, however, does not defeat the Succession Treaty’s goal of “ensuring greater juridical security in international relations.”⁵⁴ Arden objects to Remorra’s succession claim because of the intimate, predominately political nature of the bilateral extradition treaty. Without such an agreement, no state could obtain jurisdiction over a fugitive located in another state without violating that state’s territorial sovereignty.⁵⁵ The decision to enter

⁴⁹ Succession Treaty, *supra* note 47, art. 7(1).

⁵⁰ Comp. ¶¶ 16, 20.

⁵¹ *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1996*, at 878, U.N. Doc. ST/LEG/SER.E/15 (1997).

⁵² Comp. ISSUES/CLAIMS.

⁵³ *Id.*; Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331.

⁵⁴ Succession Treaty, *supra* note 47, pmbl.

⁵⁵ See *R. Governor of Brixton Prison, ex parte Soblen*, 33 I.L.R. 255, 277-78 (Eng. 1963); Ivan Shearer, *Extradition in International Law* 28-29 (1971).

into a bilateral extradition agreement is a deliberate exercise of autonomy based on the consent of the sovereign governments involved.

There is a distinction between “personal” and “dispositive” treaties in the area of state succession.⁵⁶ “Personal treaties,” such as those involving judicial cooperation, military alliances, or economic aid, are fundamentally contractual in nature and premised upon the continued existence of the contracting parties.⁵⁷ “Dispositive treaties,” such as those establishing borderlines, run with the land and are intended to be permanent.⁵⁸ Because extradition treaties are analogous to judicial cooperation treaties, they are “personal” and do not survive the dissolution of a contracting party. State practice supports this conclusion. When Czechoslovakia emerged as a new state after the dissolution of the Austro-Hungarian Empire, it was neither bound nor entitled to claim the benefits of the personal bilateral treaties of the Austro-Hungarian Empire.⁵⁹ Similarly, when Singapore seceded from the Federation of Malaysia, it did not succeed to any prior bilateral extradition treaty absent mutual consent of Singapore and third parties.⁶⁰ Absent mutual consent, Remorra does not succeed to the extradition treaty between Arden and the former Integra.

⁵⁶ See 3 Emmerich de Vattel, *The Law of Nations or The Principles of Natural Law* § 203 (James Scott ed. & Charles Fenwick trans., 1758 ed.) (1916); Daniel O’Connell, *The Law of State Succession* 15 (1956) [hereinafter *State Succession*].

⁵⁷ See *State Succession*, *supra* note 56, at 15; Daniel O’Connell, *State Succession in Municipal Law and International Law* 212 (1967); *Oppenheim*, *supra* note 22, § 63.

⁵⁸ See *State Succession*, *supra* note 56, at 49.

⁵⁹ Shearer, *supra* note 55, at 46.

⁶⁰ *Succession of States in Respect of Bilateral Treaties, Study Prepared by the Secretariat*, [1970] 2 Y.B. Int’l L. Comm’n 122, 118.

B. Even Assuming That the Extradition Treaty Applies, the Political Character of Terraq's Offenses Jeopardizes His Right to a Fair Trial.

Extradition requires a state to balance the need to ensure that no serious crime goes unpunished with the concern that persons accused obtain a fair trial.⁶¹ A primary justification for the political offense exception is to safeguard the accused's right to an impartial trial.⁶²

States have drawn distinctions between "pure" and "relative" political crimes.⁶³ "Pure" political offenses are acts against the State including treason, sedition, and espionage.⁶⁴ Individuals accused of such crimes traditionally have received protection from extradition.⁶⁵ States, however, apply three distinct tests to determine "relative" political transgressions.⁶⁶ The Political Incidence Test centers on two primary elements: whether the act occurred during a political uprising and whether action was incidental or in furtherance of that uprising.⁶⁷ The Proportionality Test focuses

⁶¹ *Restatement*, *supra* note 2, § 476, cmt. a.

⁶² See Christine Van den Wijngaert, *The Political Offence Exception to Extradition* 3, 203 (1980); Miriam Defensor-Santiago, *Political Offences in International Law* 28 (1977).

⁶³ See *Quinn v. Robinson*, 783 F.2d 776, 793-96 (9th Cir. (Cal.) 1986); *In re Campora*, 24 I.L.R. 518, 521 (Chile Sup. Ct. 1957); *In re Giovanni Gatti*, 14 Ann. Dig. 145 (Fr. Ct. App. 1947); *In re Ockert*, 7 Ann. Dig. 369, 370 (Switz. Fed. Trib. 1953).

⁶⁴ See Manuel Garcia-Mora, *Crimes Against Humanity and the Principle of Nonextradition of Political Offenders*, 62 Mich. L. Rev. 927, 942 (1964); *Quinn*, 783 F.2d at 793-94.

⁶⁵ See *Quinn*, 783 F.2d at 793-94; *Gatti*, 14 Ann. Dig. 145; Manuel Garcia-Mora, *Treason, Sedition and Espionage as Political Offenders Under the Law of Extradition*, 26 U. Pitt. L. Rev. 65, 65 (1964).

⁶⁶ See Gilbert, *supra* note 43, at 120-29.

⁶⁷ See, e.g., *Quinn*, 783 F.2d at 795-96.

on the predominance of the actor's underlying political motivation,⁶⁸ and the Objective Test focuses on the identity of the victim and the nature of the rights harmed.⁶⁹

Here, Remorra charged Terraq with treason, sedition, and murder.⁷⁰ "Pure" political offenses include treason and sedition and are non-extraditable.⁷¹ The alleged murders happened during a political uprising.⁷² Although Terraq's political motivations do not absolve him of accountability, they affect his right to a fair trial and must be considered.

The U.N. panel of experts accused Terraq of personally killing the Mayor of Telfin and ordering the torture of two ethnic Remorrans that resulted in their death.⁷³ These constitute political incidents because they occurred during a political revolt whose objective was to transform the Remorran dominated power structure into one dominated by Nylesians.⁷⁴ The Mayor openly opposed the NPA and his death occurred in furtherance of a bona fide political power struggle. In the *Castioni* case,⁷⁵ a British Court refused to extradite a fugitive to Switzerland for killing a state council member

⁶⁸ See, e.g., *Della Savia v. Ministero Public de la Confederation*, 72 I.L.R. 618, 625 (Switz. Fed. Trib. 1969).

⁶⁹ See, e.g., *Gatti*, 14 Ann. Dig. at 145-46.

⁷⁰ Comp. ¶ 33.

⁷¹ See *supra* note 65.

⁷² Comp. ¶ 33.

⁷³ Comp. ¶ 21.

⁷⁴ Comp. ¶ 9.

⁷⁵ *In re Castioni*, 1. L.R.Q.B. 149 [1891].

during the course of a politically motivated riot because his conduct met the requirements of the Political Incidence Test.⁷⁶

The charges regarding Terraq's alleged ordering of torture causing the death of two Remorrans are similar to the *Artukovic* case.⁷⁷ Artukovic ordered the slaughter of more than 200,000 people in concentration camps in the former Yugoslavia.⁷⁸ From 1951 to 1959, U.S. courts refused to grant the former Yugoslavia's request for extradition because the complaint failed to demonstrate that Artukovic committed "murder" and, alternatively, because such conduct fell within the scope of the Political Incidence Test.⁷⁹ Pursuant to a renewed extradition request charging him with "war crimes," a U.S. court ultimately extradited Artukovic to the former Yugoslavia in 1986, but the court acknowledged that Artukovic's right to a fair trial was a factor in deciding whether to extradite.⁸⁰ About 45 years had elapsed between the time Artukovic was initially charged with murder and his extradition. The passage of time and the subsequent change in the former Yugoslavia's political climate significantly decreased the likelihood of an unfair proceeding.

The political character of Terraq's alleged crimes in this case, combined with the highly charged political climate in Remorra, ensure that Terraq will be denied a fair trial. His political motivations impact his right to a fair trial.

⁷⁶ *Id.* at 150, 153.

⁷⁷ *United States v. Artukovic*, 170 F. Supp. 383, 383, 388 (S.D. Cal. 1959).

⁷⁸ *Artukovic v. Boyle*, 140 F. Supp. 245, 247 (S.D. Cal. 1956).

⁷⁹ *Artukovic*, 170 F. Supp. at 389, 392-393.

⁸⁰ *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. (Cal.) 1986).

C. As an Enemy of All Humanity, Terraq Injured the International Community and Should Be Held Accountable Before ICTFI.

The decision to extradite a fugitive must also consider the substantial interest of the international legal order to make sure that serious atrocities are punished.⁸¹ The U.N. expert panel branded Terraq as an enemy of all humanity for violating international humanitarian law.⁸² The Security Council unanimously adopted the panel's report accusing Terraq of expelling Remorrans from their homes in Telfin; setting them out to sea without food, water or fuel; killing the Mayor of Telfin; ordering the torture of Remorran prisoners that caused their deaths; and seizing weapons and food from Remorran homes in Telfin.⁸³ As an enemy of all humanity, Terraq injured not only Remorra, but the entire international community,⁸⁴ and should answer for his actions before an international tribunal. Universal crimes that shock the conscience of the international community do not lie within the exclusive jurisdiction of any one state.⁸⁵ If Remorra's objective is lasting peace, a neutral disposition of justice is critical to its goal. Accordingly, the best interest of both the international community and Remorra demands that Terraq obtains a fair proceeding before ICTFI,

⁸¹ *Restatement*, *supra* note 2, § 476, cmt. a.

⁸² *Comp.* ¶ 21.

⁸³ *Comp.* ¶¶ 20-22.

⁸⁴ See M. Cherif Bassiouni, *Crimes Against Humanity and International Criminal Law* 512-13 (1992); Jordan Paust, *Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals*, 11 *Hous. J. Int'l L.* 337, 340 (1989).

⁸⁵ *Prosecutor v. Tadic, Trial Chamber, Decision on the Defence Motion on Jurisdiction*, Case No. IT-94-1-T, Aug. 10, 1995, ¶¶ 42-43, available on World Wide Web at <http://www.igc.apc.org/tribunal>; see Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 *Am. J. Int'l L.* 78, 80 (1993); Draft Articles on the Code of Crimes Against the Peace and Security of Mankind, art. 22(2)(a) at 50, U.N. GAOR, 46th Sess., Supp. No. 10, at 238-50, U.N. Doc. A/46/10 (1991).

an international trier of fact in a neutral location.⁸⁶ In light of Arden's compliance with international law, questions of state responsibility and reparation do not arise.

III. ARDEN HAS NO DUTY TO MAKE REPARATIONS TO REMORRA.

The duty to make reparations for international law violations is only triggered when an act or omission of a state, direct or imputable, breaches an international duty, the breach causes injury, and, in the case of injury to individuals, local remedies are exhausted.⁸⁷ Here, Arden has violated no international duty;⁸⁸ this Court should decline to award compensatory damages.

A. International Law Does Not Require Reparations for International Law Violations Resulting in Direct Injury to States Absent Actual Damages.

“[T]here is no compelling authority to support the claim that a mere breach of international law without injury to nationals or material damage to the state should be met by an award of damages by a tribunal.”⁸⁹ Although some publicists suggest that “a government is always entitled to some damages . . . irrespective of whether the breach has caused any actual material damage or pecuniary

⁸⁶ Clar. ¶ 15.

⁸⁷ See *Chorzow Factory* (Ger. v. Pol.)(Jurisdiction), 1927 P.C.I.J. (ser. A) No. 9, 21; *Corfu Channel* (U.K. v. Alb.)(Merits), 1949 I.C.J. 4, 21-3, and 44-5 (sep. op. J. Alvarez); International Law Commission Draft Articles on State Responsibility, July 25, 1980, arts. 1, 3, 8(a), 11(1), 22 U.N. Doc. A/35/10 (Shabtai Rosenne, Special Rapporteur) [hereinafter State Responsibility Articles]; A. A. Cancado Trindade, *The Rule of Exhaustion of Local Remedies* 7-13 (Robert Jennings ed., 1983).

⁸⁸ See *supra* part I.B-C.

⁸⁹ Christine Gray, *Judicial Remedies in International Law* 91 (1987); see Parry [1956] 2 *Hague Recueil des Cours* 653, 657, 671-95.

loss[,]”⁹⁰ they disagree as to a state’s right to reparations absent actual loss.⁹¹ “Moral” or “political” damages are difficult to ascertain and rarely awarded.⁹²

The crystallization of international law requires both repeated conduct and *opinio juris*.⁹³ Persistent objection by one or more states prevents conduct from crystallizing.⁹⁴ Because no custom exists in this regard, this Court should decline awarding such damages.

B. Remorra Cannot Seek Representative Damages Because It Cannot Prove the Nationality of the Individuals Harmed or the Extent of the Harm Suffered.

Before it can provide diplomatic protection, a state must prove that the person concerned is its national.⁹⁵ This Court has dismissed claims when a state could not prove that the individual was its national.⁹⁶ Nationality is determined by domestic law with one caveat--the determination must not violate international law.⁹⁷ Citizenship is traditionally determined by descent from a national or by

⁹⁰ G. G. Fitzmaurice, *The Case of The I’m Alone*, [1936] Brit. Y.B. Int’l L. 82, 109; *see also* Ian Brownlie, *System of the Law of Nations: State Responsibility* (Part I) 236 (1983) [hereinafter *Brownlie on State Responsibility*].

⁹¹ Gray, *supra* note 89, at 85-92.

⁹² *See Corfu Channel*, 1949 I.C.J. at 44-7 (sep. op. J. Alvarez); Gray, *supra* note 89, at 84; *Brownlie on State Responsibility*, *supra* note 90, at 236.

⁹³ *North Sea Continental Shelf* (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 51; Ian Brownlie, *Principles of Public International Law* 6-9 (4th ed. 1990); Barry Carter & Phillip Trimble, *International Law* 143 (2d ed. 1995).

⁹⁴ Carter & Trimble, *supra* note 93, at 143.

⁹⁵ *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4, 59 (dis. op. J. Guggenheim); *Greece v. Bulgaria*, 7 I.L.R. 91, 95 (1933-34); *Oppenheim*, *supra* note 22, §§ 150, 158; Richard Lillich & Burns Weston, *International Claims: Contemporary European Practice* 1-3 (1982).

⁹⁶ *Nottebohm*, 1955 I.C.J. at 26.

⁹⁷ *Tunis and Morocco Nationality Decrees* (U.K. v. Fr.), 1923 P.C.I.J. (ser. B) No.4, 24-25; *Nottebohm*, 1955 I.C.J. at 20-21; Brownlie, *supra* note 93, at 381-84.

birth within state territory.⁹⁸ With regard to state succession, the successor states “determine to what extent former nationals of the extinct state acquire their nationality.”⁹⁹ Such determination is binding, so long as a genuine link exists and the successor states provide for the possibility of naturalization for those having a substantial connection with the territory.¹⁰⁰

Here, Remorra and Nylesia properly provided for citizenship by place of birth and naturalization within five years.¹⁰¹ By the middle of the 20th century, a large number of ethnic Remorrans had migrated to the inland capital of Nylar, where they gradually took economic and political control of Integra.¹⁰² Although during the war many Remorrans fled to former, traditionally Remorran areas, Nylar, their birthplace, was included within the new territory of Nylesia.¹⁰³ Upon the facts of the *Compromis*, one may infer that many ethnic Remorrans are Nylesian citizens. Remorra’s inability to prove the Remorran citizenship of all of the harmed individuals makes it virtually impossible to prove the extent of the harm suffered.

Restitution remains the accepted basis for damages in international law.¹⁰⁴ When damages are asserted, the Court must determine “the extent of the damage.”¹⁰⁵ To make this determination,

⁹⁸ *Nottebohm*, 1955 I.C.J. at 56; Brownlie, *supra* note 93, at 387.

⁹⁹ *Oppenheim*, *supra* note 22, § 63.

¹⁰⁰ *Nottebohm*, 1955 I.C.J. at 23; *Oppenheim*, *supra* note 22, §§ 62, 151.

¹⁰¹ *Comp.* ¶ 17.

¹⁰² *Comp.* ¶¶ 6-8.

¹⁰³ *Comp.* ¶¶ 4, 14, 21.

¹⁰⁴ *Chorzow Factory (Indemnity)*, 1927 P.C.I.J. (ser. A) No. 13, 47; Marjorie Whiteman, *Damages in International Law* 80-82 (1937).

¹⁰⁵ *Gray*, *supra* note 89, at 79.

a claimant must demonstrate an actual loss reasonably certain and ascertainable.¹⁰⁶ In *Mavrommatis Palestine Concessions*, this Court's predecessor dismissed the claim for indemnity because no loss had been proved.¹⁰⁷ This Court has awarded damages in only two cases involving claims for non-material harm: the *S.S. Wimbledon* and *Corfu Channel* cases--both of which involved substantial evidence of actual harm.¹⁰⁸ Evidence of actual damages stemming from Arden's alleged breach of international law is at best inferential. Because Remorra cannot establish actual loss caused by Arden, this Court cannot award Remorra compensation.

C. Punitive Damages Are Not Commonly Awarded in International Law.

Punitive damages conflict with the principles of restitution and sovereignty,¹⁰⁹ and "imposition of such damages goes beyond the jurisdiction conferred on the ICJ."¹¹⁰ International tribunals traditionally decline to impose punitive damages.¹¹¹ Although regional and domestic tribunals award

¹⁰⁶ *Mavrommatis Palestine Concessions* (Greece v. U.K.)(Merits), 1925 P.C.I.J. (ser. A) No. 5, 40; *Fisheries Jurisdiction* (F.R.G. v. Ice.), 1974 I.C.J. 175, 203-05.

¹⁰⁷ *Mavrommatis Palestine Concessions*, 1925 P.C.I.J. (ser. A) No. 5, at 39-40.

¹⁰⁸ See *S.S. Wimbledon* (U.K., Fr., Italy, and Japan v. Ger.), 1923 P.C.I.J. (ser. A) No .1, 18-32; *Corfu Channel* (U.K. v. Alb.)(Compensation), 1949 I.C.J. 244, 247-50; see also Gray, *supra* note 89, at 77-78, 83-84.

¹⁰⁹ See G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* 674 (1957); Bin Cheng, *General Principles of Law* 235-36 (1987).

¹¹⁰ Eduardo de Arechega, *International Law in the Past Third of a Century*, [1978] 159 *Hague Recueil des Cours* 1, 287.

¹¹¹ See Whiteman, *supra* note 104, at 716-23; *Fisheries Jurisdiction*, 1974 I.C.J. at 203-05; *Reparation for Injuries Suffered in the Service of the United Nations* (Adv. Op.), 1949 I.C.J. 174, 186; *Lusitania*, 1 R.I.A.A. 17, 25-32 (1924).

modest moral or non-pecuniary damages,¹¹² these awards do not begin to reach the amount requested by Remorra. An award of US\$100 million would be excessively punitive and should be denied.

D. The Requested Damages Are Inappropriate and Premature.

As the adjudicative arm of the United Nations, this Court must enforce the spirit of the U.N. Charter and support the Security Council's decision to establish ICTFI.¹¹³ In establishing ICTFI, the "Council struck a meaningful blow against impunity."¹¹⁴ Awarding damages so Remorra can establish a Truth Commission will constitute a ruling that ICTFI was improperly established. Indeed, withdrawal of support will be a license "to commit war crimes with impunity."¹¹⁵

Apart from the Truth Commission in El Salvador,¹¹⁶ Truth Commissions have been "resolutely domestic"¹¹⁷ and have never been funded by a third-party or awarded by an international tribunal. "Truth commissions have the greatest chance of success in societies that have already created a

¹¹² *Schonenberger & Durmaz v. Switzerland*, (1989) 11 EHRR 202, III.A; *Velasquez Rodriguez*, 28 I.L.M. at 328-29; *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984); *In re Estate of Ferdinand Marcos*, 32 I.L.M. 106, 108 n.4 (U.S. 1993); *Letelier v. Republic of Chile*, 31 I.L.M. 1, 11-15 (Chile-U.S. Claims Comm'n 1992).

¹¹³ See *supra* part III.C.

¹¹⁴ 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, 499 (1996).

¹¹⁵ Goldstone, *supra* note 114, at 499.

¹¹⁶ Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 Vand. J. Transnat'l L. 497, 498 (1994); see also Paul Marquardt, *Law without Borders: The Constitutionality of an International Criminal Court*, 33 Colum. J. Transnat'l L. 73, 92 (1995); Jon Van Dyke & Gerald Berkley, *Redressing Human Rights Abuses*, 20 Denv. J. Int'l L. & Pol. 243, 256 (1991-92).

¹¹⁷ *Azanian Peoples Organization v. President of the Republic of South Africa*, 91 Am. J. Int'l L. 360, 364 (1997).

powerful political consensus behind reconciliation.”¹¹⁸ Here, the lack of political consensus within Remorra indicates that a Truth Commission is premature. The Remorran people thirst for a criminal prosecution.¹¹⁹ Not until its prayer for relief does Remorra offer the Truth Commission as an option. As ICTFI is valid and the Truth Commission lacks consensus, Remorra’s request must be denied.

IV. ABSENT CLEAR EVIDENCE REGARDING THE ORIGIN OF AND TITLE TO THE BANK FUNDS AND ACCOUNTING, ARDEN MUST PROTECT THE FUNDS.

A. The Conflicting Evidence in the Compromis Does Not Establish a Clear Duty on Arden’s Part to Transfer the Funds or Accounting to Remorra.

The Compromis fails to delineate from whom the Nylesian separatists, associated with the NPA, obtained the US\$20 million, later diverted to Arden. The money may be private property seized during the war,¹²⁰ war booty,¹²¹ legitimate war contributions,¹²² property of a *de facto*

¹¹⁸ Goldstone, *supra* note 114, at 496.

¹¹⁹ Comp. ¶¶ 23-25.

¹²⁰ See Civilian Convention, *supra* note 33, art. 3; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 18, 75 U.N.T.S. 287; Protocol II, *supra* note 33, art. 4(2)(g); Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, arts. 46-8, 52, 53, 55, 56, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations]; 2 *Oppenheim’s International Law: Disputes, War and Neutrality* §§ 137-45 (H. Lauterpacht ed., 7th ed. 1952) [hereinafter *Oppenheim on War*]; *Tencer v. Mining & Industrial Corp.*, 4 I.L.R. 561, 561-62 (S.Ct. Pol. 1927); *Mazzoni v. Ministry of Finance*, 4 I.L.R. 564, 564-65 (Italy 1927).

¹²¹ See Hague Regulations, *supra* note 120, arts. 4, 14, 53; *Oppenheim on War*, *supra* note 120, § 139.

¹²² Hague Regulations, *supra* note 120, arts. 49-51; *Oppenheim on War*, *supra* note 120, §§ 146-48; *I. Vetek v. N. Durnbacher & Co.*, 4 I.L.R. 566, 566-67 (Hung. S.Ct. 1927).

provisional government,¹²³ or property of an ethnic people seeking self-determination.¹²⁴ In addition, if collected for a public purpose, the bank accounting may be viewed as state archives.¹²⁵

If this Court deems the funds private, Arden may have a duty to transfer them to ICTFI, in light of the Yugoslavian and Rwandan tribunal statutes, which enable the return of property and proceeds to their rightful owners.¹²⁶ If this Court deems the funds public, under the broad definition of state property,¹²⁷ Arden must protect them under principles of state succession. Although few well established principles of international law apply to state succession,¹²⁸ “state property located in third

¹²³ International Law Commission Draft Articles on Succession of States: Succession in Respect of Matters Other than Treaties, March 24, 1970, art. 8, cmt. § III(E), (F), U.N.Doc. A/CN.4/226, (Mohammed Bedjaoui, Special Rapporteur) [hereinafter State Succession Articles]; *Oppenheim, supra* note 22, § 167; *see Irish Free State v. Guaranty Safe Deposit Co.*, 222 N.Y.S. 182, 188 (1927).

¹²⁴ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 I.L.M. 1488, Op. 2, ¶ 4 (1992); United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, 22 I.L.M. 298, 305 (1983); *see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo.)*, 1993 I.C.J. 325, 343.

¹²⁵ Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, April 8, 1983, art. 20, 22 I.L.M. 306 (1983) [hereinafter Property Convention]; State Succession Articles, *supra* note 123, art. 7, cmts. II, III(B).

¹²⁶ Rwandan Tribunal Statute; *supra* note 14, art. 23(3); Yugoslavian Tribunal Statute, *supra* note 14, art. 23(3); Charter, *supra* note 2, arts. 25, 29, 48, 49, 103.

¹²⁷ *See* Property Convention, *supra* note 125, art. 8; State Succession Articles, *supra* note 123, art. 1, commentary; P. K. Menon, *The Succession of States in Respect to Treaties, State Property, Archives, and Debts* 79-82 (1991); Lillich & Weston, *supra* note 95, at 122; *see also supra* notes 36-40.

¹²⁸ International Conference on the Former Yugoslavia Documentation on the Arbitration Commission under the UN/EC (Geneva) Conference: Advisory Opinions Nos. 11-15 of the Arbitration Commission, 32 I.L.M. 1586, Question 4, ¶ 1 (1993) [hereinafter FYAC]; Menon, *supra* note 127, at 79; *Oppenheim, supra* note 22, § 68.

countries must be distributed equitably among the successor states in accordance with an agreement to be reached among them.”¹²⁹ Similarly, the Austrian Supreme Court recently held that surrendering property to only one successor state amounts to an expropriation without compensation.¹³⁰

Both Remorra and Nylesia have interests in the funds and accounting, whether deemed public or private. Absent clear evidence regarding the origin of and title to the bank funds and accounting,¹³¹ Arden must protect these funds. Lacking any clear international duty to send the funds and accounting to Remorra, Arden may properly uphold its domestic laws.

B. Arden Has No Duty to Provide the Funds or Accounting to Remorra.

Arden does not wish to keep the money for its own purposes, but it is not bound by international law to deliver the accounting or funds to Remorra. Arden is not a party to any international agreements regarding the disclosure of private bank information in civil, criminal or tax contexts. Although several states have signed treaties proscribing illicit drug transfer and related money laundering,¹³² customary international law does not require such disclosure.¹³³ Moreover,

¹²⁹ FYAC, *supra* note 128, at Question 6, ¶ 1; *see* Property Convention, *supra* note 125, art. 18; *Republic of Croatia v. Girocredit Bank A.G. Der Sparkassen*, 36 I.L.M. 1520, 1529 (Aust. Sup. Ct. 1997); *see also* *Oppenheim on War*, *supra* note 120, § 316.

¹³⁰ *Girocredit*, 36 I.L.M. at 1529; FYAC, *supra* note 128, at Question 6, ¶ 4.

¹³¹ *See generally* *Kunstammlungen Zu Weimar v. Elicofon*, 20 I.L.M. 1122 (U.S. 1981), *aff'd* by 21 I.L.M. 773 (U.S. 1982).

¹³² *See* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 28 I.L.M. 493 (1989); Council of Europe: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, 30 I.L.M. 148 (1991); Model Treaty on Mutual Legal Assistance in Criminal Matters, December 14, 1990, 30 I.L.M. 1419 (1991).

¹³³ Richard Preiss, *Privacy of Financial Information and Civil Rights Issues: the Implications for Investigating and Prosecuting International Economic Crime*, 14 Dick.J. Int'l L.

numerous states have enacted bank secrecy laws prohibiting the disclosure of private bank information.¹³⁴ Even existing mutual assistance treaties give broad discretion in refusing or postponing disclosure.¹³⁵

Under international law, states have a sovereign right to decide what laws to enact within their own territories.¹³⁶ As present state practice is inconsistent and no applicable international law obligations exist, Remorra's accounting and funds request must be denied.

Absent admission of responsibility, ratification, adoption, or lack of due diligence, states are not responsible for the acts of private parties.¹³⁷ Arden has neither condoned, ratified nor been complicit as an "accessory after the fact"¹³⁸ in Terraq's actions. Instead, Arden has detained Terraq

525, 537 (1996).

¹³⁴ See Federal Law Relating to Banks and Savings Banks, arts. 47(1)-(2) (Switz. 1934), as amended Federal Law of March 11, 1971; Penal Code, art. 273 (Switz.); Banks and Trust Companies Regulations Act (Amendment), No. 3, § 2 (Bahamas 1980); Confidential Relationships (Preservation) Law, No. 16 (Cayman Is. 1976) (amended No. 26, 1979); Foreign Extraterritorial Measures Act, Can. Rev. Stat. Ch. 49, § 5(1) (1985); Law of July 16, 1980, L. No. 80-538, arts. 1-3, 75 Am. J. Int'l L. 382, 383 (1981), amending Law of July 26, 1968, L. No. 68-678, 1968 J.O. 7267, 1968 D.S.L. 248 (Fr.).

¹³⁵ U.N. Drug Convention, *supra* note 132, arts. 7(12), 7(15), 7(17); European Money Laundering Treaty, *supra* note 132, arts. 9, 18(1)-(8).

¹³⁶ See *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A.), No. 9, 18-21; *Barcelona Traction*, 1970 I.C.J. at 249-50; *Restatement*, *supra* note 2, § 403; Brownlie, *supra* note 93, at 41, 287, 291; Oscar Schachter, *International Theory and Law in Practice* 254 (1991).

¹³⁷ See *U.S. Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 56-7; *Corfu Channel*, 1949 I.C.J. at 18, 21; *Restatement*, *supra* note 2, § 702, cmt. N, and reporter's note 11; Brownlie *on State Responsibility*, *supra* note 90, at 161-62; see also Orentlicher, *supra* note 45, at 2583.

¹³⁸ *Report of the International Law Commission to the General Assembly*, [1950] 2 Y.B.Int'l L. Comm'n 364, 374-77; Telford Taylor, *The Anatomy of the Nuremberg Trials* 398 (1992).

and intends to transport him to ICTFI.¹³⁹ Arden pursued possible claims regarding the suspicious funds and is now acting under court order in compliance with certain provisions of its bank secrecy laws, enforced by the privately-owned bank.¹⁴⁰ The actions of Terraq and the bank cannot be imputed to Arden.

C. Arden Can Decline Recognition and Enforcement of the Default Judgment.

Individuals have a duty to exhaust local remedies before a state can institute international proceedings on their behalf.¹⁴¹ Arden originally impounded the questioned accounts as suspicious. Remorra then failed to come forward when Arden advertised the accounts¹⁴² and brought no claim for the accounts within Arden. Remorra cannot now claim the funds. Furthermore, absent a treaty obligation, international law requires no state to recognize or enforce foreign judgments.¹⁴³ Indeed, under principles of comity, states may decline to enforce foreign judgments that violate international law, conflict with their fundamental public policy principles, or represent the public law of a foreign state, such as revenue, penal or confiscatory legislation.¹⁴⁴

¹³⁹ Comp. ¶¶ 29, 45.

¹⁴⁰ Comp. ¶ 40; Clar. ¶ 4.

¹⁴¹ *Interhandel* (Switz. v. U.S.), 1959 I.C.J. 6, 27; C. F. Amerasinghe, *Local Remedies in International Law* 45 (1990); Trindade, *supra* note 87, at 7-13; *Oppenheim, supra* note 22, § 153.

¹⁴² Comp. ¶ 39.

¹⁴³ Michael Akehurst, *Jurisdiction in International Law*, [1972-73] 46 Brit. Y.B. Int'l L. 145, 238; *Hilton v. Guyot*, 159 U.S. 113, 229 (1895); *Godard v. Gray*, 6 L.R.Q.B. 139, 148 [1870].

¹⁴⁴ See Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 27, 29 I.L.M. 1413, 1424 (1990); Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, art. 2(h), 19 I.L.M. 1224 (1979); *In re Grand Jury Proceedings, Marsoner v. United States*, 40 F.3d 959 (9th Cir. (Ariz.) 1994) (Pregerson, J., dissenting); *Oppenheim, supra* note 22, §§ 113, 143.

Arden and Remorra are not parties to any international agreements regarding the recognition of foreign judgments or legal instruments. Here, the Remorran court entered a default judgment only 21 days after proceedings were instituted, indicating a lack of fairness to Terraq and implicating public policy concerns. Thus, Arden may decline recognition and enforcement of the default judgment against Terraq.

V. CONCLUSION AND PRAYER FOR RELIEF.

For the reasons stated above, Arden respectfully asks this Honorable Court to declare and adjudge that:

- (1) Arden's decision to surrender Terraq to ICTFI and its jurisdiction over Terraq are supported by the U.N. Charter and customary international law;
- (2) The 1965 Extradition Treaty between Arden and the former Integra is no longer in effect, and that Arden's refusal to extradite Terraq to Remorra is consistent with international law;
- (3) Arden has no duty to make reparations to Remorra or fund a Truth Commission; and
- (4) Under international law, Arden need not transfer the funds or accounting to Remorra or recognize the US\$20 million default judgment rendered in Remorra.

Respectfully submitted,

Agents for Arden