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THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE,
THE HAGUE, THE NETHERLANDS,
THE 2018 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

CASE CONCERNING THE EGART AND THE IBRA



PEOPLE'S DEMOCRATIC REPUBLIC OF ANDUCHENCA
(APPLICANT)

v.

FEDERAL REPUBLIC OF RUKARUKU
(RESPONDENT)
2018

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The People's Democratic Republic of Anduchenca (Anduchenca) and the Federal Republic of Rukaruku (Rukaruku) hereby agree to submit the present dispute to the International Court of Justice (the Court) in accordance with Article 40 (1) of the Statute of the Court, in accordance with Article 10 and 20 of the Treaty of Friendship, Commerce and Navigation between Anduchenca and Rukaruku for submissions to the Court of the disputes concerning the validity of arbitral awards under Article 10 and the interpretation and application of Articles 11-19 of the Treaty of Friendship, Commerce and Navigation, signed on the 15th day of September in the year nineteen hundred forty-seven. The parties have accepted the jurisdiction of the Court pursuant to Article 36(1) of its Statute.

QUESTIONS PRESENTED

- I. Whether the arbitral award of 2 March 2017 is valid.
- II. Whether Rukaruku violated Article 6 of the FCN Treaty when the Egart operated in Anduchenca's territorial sea and Anduchenca violated Article 7 of the FCN Treaty when it captured the Egart.
- III. Whether Anduchenca violated Article 16 of the FCN Treaty by commissioning and operating the Ibra.
- IV. Whether Rukaruku violated Article 17 of the FCN Treaty by attacking the Covfefe or by capturing the Ibra.

STATEMENT OF FACTS

ANDUCHENCA AND RUKARUKU

Anduchenca, a developing country, and Rukaruku, a developed country, are two of the five States of the Odasarra Region. Both States are coastal States, however, they do not share a land or maritime boundary. Rukaruku has been the dominant military and economic power in the Region for centuries.

WORLD WAR II IN THE ODASARRA REGION

After the War, the Odasarran States, with the exception of Rukaruku, were left with devastated infrastructure and economies. Rukaruku introduced a program to promote stability in the Region. It provided economic aid, helped to implement disarmament programs, and deployed its Navy along the Kumatqesh Ocean.

THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION

On 12 March 1947, Anduchenca and Rukaruku signed an FCN Treaty to ensure friendly relations, which entered into force on 22 May 1947.

THE NUCLEAR NON-PROLIFERATION TREATY

On 1 July 1968, all of the Odasarran States, except for Anduchenca, signed the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Anduchenca has stated on numerous occasions in the past 50 years that the Treaty establishes inherent inequality between nuclear-weapon States and non-nuclear-weapon States.

REGIME CHANGE IN ANDUCHENCA

On 26 October 1967, General Rafiq Tovarish was installed as Anduchenca's socialist leader. In 1969, Rukaruku terminated its economic assistance to and disarmament programs in

Anduchenca, while Anduchenca started to develop its military with the help of other socialist countries.

THE MARITIME SECURITY LAW

In August 2010, Anduchenca adopted a maritime security law requiring that any foreign government vessel proposing to enter its territorial sea, considered to have a breadth of 12 nautical miles (nm), obtain prior authorization. Rukaruku's Ambassador objected to this law, nevertheless, Rukaruku ordered its vessels to remain at least 12 nm from the Anduchencan coast.

AUTONOMOUS UNDERWATER VEHICLES

In August 2015, the Rukarukan Navy began employing autonomous underwater vehicles (AUVs) equipped with an integrated technology outfit, including sophisticated optical acoustic and sonar systems. The AUVs were programmed to remain at least 12 nm from Anduchenca's coastline and to navigate autonomously for one week, and then return to the deploying ship.

GENERAL TOVARISH'S DECLARATION

On 25 September 2015, General Tovarish declared before the UN General Assembly that Anduchenca will not tolerate espionage in their waters and gave notice that if they find spy drones in their territorial sea, they will be captured and not returned.

THE CAPTURE OF THE EGART

On 29 October 2015, Anduchenca took possession of the Egart, which operated without permission less than 11 nm from their coast. They identified that the Egart had been collecting optical and acoustic data, usable to undermine the national security of Anduchenca. Rukaruku stated that the Egart had been programmed to remain at least 12 nm from the shore, its aim was the collection of optical and acoustic data and was not engaged in anything illegal. They insisted on the return of the Egart.

ARBITRATION PROCEEDINGS

On 20 December 2015, Rukaruku instituted arbitration proceedings against Anduchenca under Article 10(a) FCN Treaty. Rukaruku claimed the violation of Article 7 FCN Treaty and requested the return of the Egart. Rukaruku appointed Judge Moyet, a judge of Rukarukan nationality.

Anduchenca sent a Note Verbale that it will not participate, nor recognize the validity of an award, as the dispute does not fall within the scope of Article 7 FCN Treaty. The tribunal stated that it will treat the Note Verbale as an objection to its jurisdiction and will consider questions on jurisdiction, admissibility and the merits together.

THE AWARD

On 2 March 2017, the tribunal rendered an award, concluding that it had jurisdiction and resolved the case in favor of Rukaruku. It addressed the issue of jurisdiction in a sole paragraph. The tribunal concluded that the capture of the Egart violated Article 7 of the FCN Treaty and it ordered the return of the Egart. Anduchenca considered the award null and void for the manifest lack of jurisdiction.

THE ILSA REPORT

On 21 March 2017, the ILSA published a report of the summary of the arbitration - supported by facts accepted by both parties - and concluded that the tribunal's jurisdictional holding was questionable and insufficiently supported. First, it reported transcripts of three private telephone conversations between Judge Moyet and Mr. Chivo, Rukaruku's counsel in the arbitration. On each call, Mr. Chivo requested that Judge Moyet emphasize Rukaruku's arguments to the other arbitrators and Judge Moyet agreed to do so.

Second, the report revealed that the tribunal appointed an assistant, Mr. Orvindari, without the

disclosure of his assignment to either Anduchenca or Rukaruku until the submission of the tribunal's final accounting. The accounting showed that Mr. Orvindari spent 522 hours working on the case, whereas the arbitrators billed between 57 and 62 hours each. The tribunal sought payment for Mr. Orvindari's time for numerous activities including the drafting of the award.

Third, the ILSA discovered a draft of the award, identical to the final version, with a cover note from Judge Tong to President Bacal reading that he had reviewed Mr. Orvindari's draft and has nothing to add.

THE IBRA

In April 2017, Anduchenca augmented its military power through the nuclear submarine that was named Ibra. Anduchenca issued a statement, stating that it was 'our right and duty to possess nuclear weapons if in our discretion we believe we need them to defend our interests.'

SECURITY COUNCIL RESOLUTION 3790

On 8 May 2017, the Security Council adopted Resolution 3790 by a vote of nine to six. In part, it called upon all Member States to implement the NPT. It also authorized Member States to take all measures commensurate in confronting the Ibra, with the goal of neutralizing the threat it poses to international peace and security. Anduchenca attended the May Session of the Security Council and opposed the draft of Resolution 3790.

ATTACKS ON COVFEFE AND CAPTURE OF THE IBRA

On 6 June 2017, two Rukarukuan warships fired 12 cruise missiles at the Covfefe. The Covfefe was an unarmed supply vessel transferring 10 Anduchencan sailors, seven civilian employees, as well as cargo to the Ibra. The Covfefe was hit by four missiles, it sank within an hour of the attack and no survivors were found. On 14 June 2017, six Rukarukuan warships began enclosing the submarine and fired series of torpedoes that forced the Ibra to surface. After the Ibra showed

no signs of activity a boarding party seized operational control of the submarine.

**UNITED NATIONS CONFERENCE TO NEGOTIATE A LEGALLY BINDING INSTRUMENT TO PROHIBIT
NUCLEAR WEAPONS**

Anduchenca sent a representative to the conference in March 2017, but declined to attend the second substantive session in June and July 2017. It also refused to sign any Treaty that might emerge from those meetings.

RATIFICATION OF INTERNATIONAL TREATIES

Anduchenca and Rukaruku are Member States of the United Nations and parties to the Statute of the International Court of Justice, the Vienna Convention on the Law of Treaties, the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. Rukaruku has been elected to serve as a non-permanent member of the Security Council four times while Anduchenca has never been elected to the Security Council. Rukaruku is party to the UNCLOS, while Anduchenca is not.

SUMMARY OF PLEADINGS

THE VALIDITY OF THE ARBITRAL AWARD

The arbitral award of 2 March 2017 is invalid on several grounds. First, the Tribunal manifestly exceeded its powers when it established its jurisdiction as the dispute obviously does not fall within the territorial and material scope of Article 7 FCN Treaty. Also, the Tribunal failed to state reasons to support its jurisdiction. Second, the conduct of Judge Moyet qualifies as serious departure from a fundamental rule of procedure since he was partial in the proceedings and partiality of an arbitrator amounts to such departure. Third, the involvement of Mr. Orvindari also constitutes a serious departure from a fundamental rule of procedure as he was not appointed properly and his involvement in the drafting was excessive. In any event, the systematic violations undermine international due process and procedural fairness.

THE OPERATION AND CAPTURE OF THE EGART

The operation of the Egart violated the sovereignty of Anduchenca and accordingly, Article 6 FCN Treaty, as the Maritime Security Law is in accordance with international law and the Egart entered the territorial sea of Anduchenca without prior authorization. Furthermore, the operation of the Egart in Anduchenca's territorial sea did not qualify as innocent passage since the Egart was not engaged in passage and its operation was not innocent. The capture of the Egart did not violate Article 7 FCN Treaty as it did not operate under that Article. Even if the Egart operated under Article 7, its application was suspended because of the material breach of FCN Treaty. In any event, Anduchenca's wrongfulness is precluded by countermeasure as Rukaruku committed a previous breach of international law. The capture of the Egart was a necessary, proportionate

and reversible countermeasure in response to Rukaruku's breach, therefore, Anduchenca's wrongfulness is precluded.

NUCLEAR DISARMAMENT OBLIGATIONS

Commissioning and operating of the Ibra did not violate the Article 16 FCN Treaty because Anduchenca is not subject to nuclear disarmament obligations under international law. First, the Security Council Resolution 3790 does not confer disarmament obligation on Anduchenca. The Security Council must comply with international law, therefore it is barred from imposing treaty obligations upon a State which has never ratified the Treaty on the Proliferation of Nuclear Weapons. Requiring Anduchenca to comply with disarmament constitutes an *ultra vires* decision of the Council. In the event Resolution 3790 is valid, it cannot qualify as a legally binding resolution due to its wording. Second, the obligation of nuclear disarmament is not part of customary international law, as the practice of nuclear weapon States bars the emergence of a customary rule in this regard. In any event, Anduchenca constitutes a persistent objector to the obligation of disarmament. In case Anduchenca is bound by the obligation of disarmament either by virtue of Resolution 3790 or customary law, she did not violate it. It negotiated in good faith on measures relating to disarmament.

ATTACKS ON THE COVFEFE AND THE IBRA

Rukaruku resorted to the use of force unlawfully, and therefore violated Article 17 FCN Treaty. First, Rukaruku cannot rely on Resolution 3790. The Council must respect the *jus cogens* right to self-defence. Authorizing the neutralization of Ibra, fails to respect Anduchenca's right to self-defence, therefore the Resolution is void. In any event, Rukaruku exceeded the scope of the Resolution when it attacked the Covfefe and captured the Ibra. Second, Rukaruku cannot rely on self-defence to justify its attacks because it was not subject to an armed attack. In case, Rukaruku

may invoke anticipatory self-defence, the Ibra did not pose imminent threat. In any event, the Rukaruku violated the principle of international humanitarian law, which renders Rukaruku's attacks against the Covfefe and the Ibra unlawful.

PLEADINGS

I. THE ARBITRAL AWARD OF 2 MARCH 2017 IS NOT VALID.

The validity of an arbitral award may be challenged in case of (1) a manifest excess of powers or lack of jurisdiction, (2) corruption on the part of the member of a tribunal, (3) a serious departure from a fundamental rule of procedure or failure to state reasons for the award, or (4) if the undertaking to arbitrate is null.¹ These grounds ensure control over the fundamental integrity of the arbitral process and the award rendered therein.²

The award of 2 March 2017 is invalid since the Tribunal manifestly exceeded its powers when it determined its jurisdiction, and the conduct of Judge Moyet and the involvement of Mr. Orvindari constitute serious departures from fundamental rules of procedure. In any event, these violations undermine due process and procedural fairness.

A. The Tribunal manifestly exceeded its powers when it established its jurisdiction.

When a tribunal issues a decision on the merits while lacking competence, such a defect is the most obvious example of an excess of powers.³ Manifest excess means an obvious breach of competence.⁴ However, in some cases, the excess of powers may not be apparent from a cursory

¹ ILC Model Rules on Arbitral Procedure with a general commentary, YBILC, 1958 Vol. II., Article 35; ICSID Convention, Article 52(1).

² *Soufraki v. The United Arab Emirates*, ICSID ARB/02/7, Decision on Annulment, ¶23.

³ SCHREUER ET AL., *The ICSID Convention: A Commentary*, CUP (2nd ed. 2009) [‘ICSID Commentary’] 943.

⁴ DOLZER–SCHREUER, *Principles of International Investment Law*, OUP, (2nd ed. 2012) 305 referring to the *Vivendi* Annulment Decision.

reading of the award in question and may take ‘some deciphering to understand.’⁵ The Tribunal clearly violated the Parties’ consent to arbitrate by adjudicating a dispute that manifestly fell outside the FCN Treaty’s territorial and material scope. Furthermore, the Tribunal failed to state reasons to support its jurisdictional findings.

1. The Tribunal did not have jurisdiction.

Under Article 10(a) FCN, a dispute may be submitted to arbitration if it concerns the application and interpretation of Articles 1 to 9.⁶ As stated in *M/V Louisa*, when the tribunal determines its jurisdiction, it must establish a link between the facts and the relevant provision of the underlying treaty.⁷ If a party merely invokes a provision, such invocation does not itself mean the existence of a dispute concerning the treaty.⁸ Thus, the dispute must concern Article 7 FCN. This condition is not fulfilled based on two grounds.

The operation of the Egart falls outside the territorial scope of Article 7.

Freedom of navigation under Article 7 only applies between the territories of Anduchenca and Rukaruku. The Egart’s activities clearly fall outside the territorial scope of Article 7, as it was captured in Anduchenca’s territorial sea⁹ forming part of state territory.¹⁰ A similar

⁵ *Ibid.*

⁶ FCN Treaty, Article 10(a).

⁷ *The M/V ‘Louisa’ Case* (Saint Vincent and the Grenadines v. Spain) Judgment, ITLOS, 28 May 2013, ¶¶99.

⁸ *Duzgit Integrity Arbitration*, Award, PCA, 2014-07, 5 September 2016, ¶¶127.

⁹ C(16).

¹⁰ United Nations Convention on the Law of the Sea [‘UNCLOS’], Article 2(1); JENNINGS–WATTS, *Oppenheim’s International Law*, OUP, 9th Ed. 2008, Vol. 1, 572.

territorial limitation was accepted in *Oil Platforms*, where the Court applied an article with the same wording to activities taking place outside the territorial sea.¹¹ Consequently, the application or interpretation of this Article is manifestly unrelated to the current dispute.

The operation of the Egart falls outside the material scope of Article 7.

Article 7 FCN concerns freedom of navigation. It can be concluded, that the parties could not have intended freedom of navigation to include governmental spying activities. That would contravene the object and purpose of the Treaty which aims to strengthen friendly relations between the two States.¹² Furthermore, AUVs did not exist at the time of conclusion.¹³

It is *prima facie* obvious that the dispute concerns the intelligence gathering of an AUV as opposed to navigation as part of the friendly relation of the two State. Thus, analogically to the widely criticized *Oil Platforms* approach, the Tribunal established its jurisdiction on a treaty different from the basis of the merits judgment.¹⁴

As the dispute does not concern the application or interpretation of Article 7 FCN, the Tribunal manifestly lacked jurisdiction to rule on the matter.

¹¹ *Oil Platforms* (Iran v. United States of America), Judgment, I.C.J. Reports 2003, ¶119.

¹² FCN Treaty, Preamble.

¹³ C(13).

¹⁴ GORDON, *The Oil Platforms Opinion: An Elephant in the Eye of a Needle*, 1(2) Amsterdam Law Forum 132, 2009, 134-136.

2. The Tribunal failed to state reasons to support its jurisdiction.

As stated in *King of Spain*, an award shall contain ample reasoning and explanations in support of the conclusions arrived at by the arbitral tribunal.¹⁵ As emphasized in *Klöckner*, reasons must be substantial, “allowing the reader to follow the arbitral tribunal's reasoning, on facts and on law.”¹⁶

Specifically, matters of jurisdiction may call for a more rigorous approach than other grounds for annulment, simply because a tribunal ought not to be allowed to exercise a judicial power it does not have’.¹⁷

The Tribunal failed to sufficiently reason its jurisdictional findings, as it addressed the question in a sole paragraph, without substantive arguments countering Anduchenca’s objection.¹⁸ Thus, annulment is due for the Tribunal’s failure to state reasons.

B. The conduct of Judge Moyet constitutes a serious departure from a fundamental rule of procedure.

The conduct of Judge Moyet renders the award invalid as (1) he was partial during the arbitration, which tainted the proceedings, and (2) constitutes a serious departure from a fundamental rule of procedure.

¹⁵ *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*, 18 November 1960, I.C.J. Reports 1960, 192 [‘King of Spain’] ¶216.

¹⁶ *Klöckner v. Cameroon*, ICSID ARB/81/2, Decision on Annulment, 3 May 1985 [‘Klöckner’] ¶119.

¹⁷ *Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela*, ICSID ARB/07/27, Decision on Annulment, ¶110.

¹⁸ C(26); Clarifications, ¶4.

1. Judge Moyet was partial in the proceedings.

Arbitrators must be independent and impartial during the proceedings.¹⁹ Judges shall exercise appropriate caution in their personal contacts with counsels.²⁰ Personal communication must be compatible with their judicial function and may not reasonably appear to affect their impartiality.²¹ If they act in the contrary, justifiable doubts emerge as to their impartiality.

The *IBA Guidelines on Conflicts of Interest* codify the best practices of international arbitration on the impartiality of arbitrators.²² Accordingly, a judge must refuse to act in the procedure if his or her impartiality is doubted,²³ and he or she can be disqualified by applying an objective test.²⁴ Doubts are justifiable if, from a reasonable third person's perspective, there is a likelihood that the arbitrator is influenced by factors other than the merits of the case.²⁵ Therefore, instead of actual bias, the mere appearance of bias suffices the test.²⁶

¹⁹ IBA Guidelines on Conflict of Interest in International Arbitration, International Bar Association, 2014 [‘IBA Guidelines’]; LAWSON, *Impartiality and Independence of International Arbitrators*, 23(1) ASA Bulletin 23, Kluwer 2005.

²⁰ The Burgh House Principles On The Independence Of The International Judiciary, ILA Study Group on the Practice and Procedure of International Courts and Tribunals, 4.

²¹ *Ibid.*, Part 8.1.

²² IBA Guidelines, Introduction ¶4; MOSES, *The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges*, Kluwer Arbitration, 2017.

²³ IBA Guidelines, ¶(2)(a).

²⁴ *Ibid.*, Explanation to General Standard 2(b); *PTCI v Franciscus Wongso and others and another matter*, Singapore High Court, [2014] SGHC 190, 30 September 2014. [‘PTCI v. Franciscus’] ¶14.

²⁵ IBA Guidelines, Explanation to General Standard 2(b); *PTCI v. Franciscus*, ¶18.

²⁶ DE WITT WIJNEN–VOSER–RAO, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5(3) BLI 433 (2004); KECK–DHALL, *Setting Aside of*

Judge Moyet created a strong appearance of bias with the private telephone conversations²⁷ as he engaged in ex-parte communications and agreed to emphasize arguments of Rukaruku to the Tribunal.²⁸ These circumstances give a reasonable third party justifiable doubts as to his impartiality.

2. Partiality is a serious departure from a fundamental rule of procedure.

Partiality is not only a ground for disqualification, but for setting aside the award.²⁹ Ex-parte communications without authorization can be basis for annulment on the ground of a serious departure from a fundamental rule of procedure,³⁰ as affecting the integrity and fairness of the arbitral process.³¹ *First*, as a fundamental procedural rule, the parties have to be heard before an independent and impartial tribunal.³² *Second*, partiality must *ab ovo* be considered to constitute a serious departure.³³

Arbitral Award Due to Improper Constitution of the Tribunal, Kluwer Arbitration, 27 August 2015; *Fey v. Austria*, Judgment, ECHR, 24 February 1993, ¶¶28-30; *Pullar v. United Kingdom*, Judgment, ECHR, 10 June 1996., ¶¶30, 33; *Findlay v. United Kingdom*, Judgment, ECHR, 25 February 1997, ¶73.

²⁷ C(31).

²⁸ *Ibid.*

²⁹ *PTCI v. Franciscus*, ¶51; *Klöckner*, ¶84.; Cour d'appel de Paris, Pôle 1-Chambre 1, Judgment, RG No. 13/13278, 17 February 2015 (No. 77).

³⁰ ICSID Commentary, 978.

³¹ ICSID Background Paper on Annulment, 59, ¶98.

³² *Wena Hotels Limited v Egypt*, Decision on Annulment, ICSID ARB/98/4, 5th February 2002, ¶57; ICSID Background Paper on Annulment, 59, ¶99; *CDC v. Seychelles*, Decision on Annulment, ICSID ARB/02/14, 29 June 2005, ¶49.; ICSID Commentary, 982.

³³ *Klöckner*, ¶84.

In *Croatia v. Slovenia*, the tribunal could continue the procedure as impartiality emerged before rendering the award and the procedural misconduct could be remedied.³⁴ Conversely, if a tribunal renders an award before impartiality surfaces, there is no opportunity to address concerns and take remedial actions.³⁵ This distinction is applicable in the present case. In order to provide procedural fairness to Anduchenca by ensuring that procedural misconducts are remedied, the award must be annulled.

C. The involvement of Mr. Orvindari constitutes a serious departure from a fundamental rule of procedure.

The award is rendered invalid by the involvement of Mr. Orvindari since (1) he was not properly appointed, and (2) his involvement in the drafting was excessive.

1. Mr. Orvindari was not appointed properly.

The practice of arbitral tribunals outline the requirements of appointing tribunal secretaries.³⁶ *First*, a secretary should be appointed with the knowledge and consent of the parties.³⁷ *Second*, the tribunal needs to inform the parties of the expected role and involvement of

³⁴ *Croatia v. Slovenia*, Partial Award, 30 June 2016, PCA, ¶¶178, 196.

³⁵ *Ibid.*, ¶179.

³⁶ ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries, ICC, 2014.

³⁷ Young ICCA Guide on Arbitral Secretaries, Article 1(2) [‘ICCA Guide’]; *Hulley Enterprises Ltd., Yukos Universal Ltd and Veteran Petroleum Ltd. v. The Russian Federation*, United States District Court for the District of Columbia. Expert opinion of Prof. G. A. Bermann [‘Bermann opinion’] ¶85.

the secretary.³⁸ This notification requirement is necessary to allow parties to file objections without undue delay.³⁹

As the parties were not informed of such assistance and did not consent to the appointment.⁴⁰ Mr. Orvindari's assistance became known after rendering the award when the Tribunal submitted its final accounting for payment.⁴¹ As a result, Anduchenca had no opportunity to raise objections to the appointment.

2. Furthermore, Mr. Orvindari's involvement in the drafting was excessive.

Mr. Orvindari's participation violated the parties' agreement on the composition of the Tribunal. Parties' autonomy extends to the selection of arbitrators, which was confirmed by Professor Bermann's opinion in the landmark *Yukos case*.⁴² Accordingly, an arbitrator receives a personal mandate which cannot be delegated to a third party.⁴³ Therefore, the tribunal's freedom to use secretaries is strictly limited.⁴⁴

³⁸ Bermann opinion, ¶85.

³⁹ ICCA Guide, Article 1(3).

⁴⁰ C(32).

⁴¹ *Ibid.*

⁴² Bermann opinion, ¶14.

⁴³ *Ibid.*, ¶80.; PARTASIDES, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18(2) *Arbitration International* 147, 2002; WOLFF, 'Rights and Duties of Arbitrators' in ARROYO (ed), *Arbitration in Switzerland, The Practitioner's Guide*, Kluwer, 2013, 1419–1432.

⁴⁴ Bermann opinion, ¶84; UNCITRAL, *Notes on Organizing Arbitral Proceedings* 1996, ¶27; ICC, *Note on the Appointment, Duties and Remuneration of Administrative Secretaries*, ¶2; LCIA, *Frequently Asked Questions*, 'What is the LCIA's position on the appointment of Secretaries to Tribunals'; HKIAC, *Guidelines on the Use of a Secretary to the Arbitral Tribunal*, 2014, 3.4, 3.6; Bermann opinion, ¶87.

In *P v Q*, Justice Popplewell stated that the use of tribunal secretaries must not involve tribunal abrogating or impairing their non-delegable and personal decision-making function.⁴⁵ In *Sacheri v Robotto*, the court also emphasized the non-delegable nature of legal decision-making.⁴⁶

Furthermore, It is generally viewed that secretaries are not allowed to write even the preliminary draft of substantive parts of the award.⁴⁷ Official legal surveys confirm the powerful consensus on the matter.⁴⁸ The ILSA Report revealed that Mr. Orvindari wrote the draft of the award and the lack of any substantive involvement of Judge Tong in draft preparation.⁴⁹ This involvement confirms his substantial participation, which is also demonstrated by the disproportionate working hours.⁵⁰ Therefore, Mr. Orvindari played an important role in writing the substantive parts of the award, by which party autonomy and their agreement was not respected. As it is one of the cornerstones of arbitral principles, this leads to the serious violation of a fundamental procedural rule rendering the award invalid.

⁴⁵ HIRST, When Does a Tribunal Secretary Overstep the Mark?, Kluwer Arbitration, 18 April 2017.

⁴⁶ *Sacheri v Robotto*, Corte di Cassazione, 7 June 1989, XVI YBCA 156 (1991).

⁴⁷ Bermann opinion, ¶¶ 80, 94.

⁴⁸ *Ibid.*, ¶95.; 2015 Queen Mary/White & Case International Arbitration Survey, 42-44; 2012 Queen Mary/White & Case International Arbitration Survey, ¶12; International Disputes Committee–Committee on Arbitration of the NY Bar Association, Secretaries to International Arbitral Tribunals, 17 ARIA, 575, 2016, 585.

⁴⁹ C(33).

⁵⁰ *Ibid.*

D. In any event, the systematic violations undermine international due process and procedural fairness.

An annulment procedure aims to safeguard the integrity and legitimacy of the arbitral process.⁵¹ The annulment body therefore “*must carefully consider whether the tribunal ensured the correctness, fundamental fairness and hence the legitimacy of the arbitration proceedings*”.⁵² In the *Yukos, Croatia v Slovenia* and the *South China Sea* cases, concerns of procedural fairness led to the denial of the award’s validity by one of the Parties.⁵³ These concerns addressed not only a sole procedural violation, but systematic violations undermining the integrity of the process generally.⁵⁴

The fundamental integrity of the process was entirely disregarded as (1) the jurisdiction was denied by Anduchenca from the very beginning of the procedure and the Tribunal failed to state sufficient reasons for establishing its jurisdiction, (2) the conduct of Judge Moyet irrevocably damaged the impartiality and integrity of whole process, and (3) the substantive involvement of Mr. Orvindari violated the autonomy of parties.

Whereas all of the above grounds suffice, in and of themselves, to annul the award in its entirety, these conducts together gravely violate the most fundamental principles of procedural fairness, due process, impartiality and integrity of the arbitral process.

⁵¹ *Adem Dogan v. Turkmenistan*, ICSID case No. ARB/09/09, Decision on Annulment, 16 January 2016, ¶28; *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID, ARB/04/7, Decision on Annulment, December 10, 2010, ¶236.

⁵² *Dogan v. Turkmenistan*, ¶30.

⁵³ TZENG, *The Annulment of Interstate Arbitral Awards*, July 1, 2017, Kluwer Arbitration; *Croatia v Slovenia*, ¶¶ 84, 175.

⁵⁴ *Ibid.*

II. RUKARUKU VIOLATED ARTICLE 6 OF THE FCN TREATY WHEN THE EGART OPERATED IN ANDUCHENCA'S TERRITORIAL SEA, BUT ANDUCHENCA DID NOT VIOLATE ARTICLE 7 OF THE FCN TREATY WHEN IT CAPTURED THE EGART.

A. The operation of the Egart breached the sovereignty of Anduchenca.

Rukaruku violated the sovereignty of Anduchenca by operating the Egart in its territorial seas, as (1) the maritime security law (MSL) is in accordance with international law, (2) Rukaruku violated the MSL, and (3) the operation of the Egart did not constitute innocent passage.

1. The Maritime Security Law is in accordance with international law.

Under the MSL, if a government vessel enters Anduchenca's territorial sea, the vessel must obtain prior authorization.⁵⁵ Since a coastal State may adopt laws regulating innocent passage in its territorial sea,⁵⁶ the MSL is a legitimate restriction of foreign vessels' customary right.⁵⁷

When foreign ships exercise the right of innocent passage, they must comply with these laws.⁵⁸ Numerous states interpret the UNCLOS as entitling them to require prior authorization from foreign warships⁵⁹ and additional States have made declarations to the same effect.⁶⁰

⁵⁵ C(12).

⁵⁶ UNCLOS, Article 21.

⁵⁷ UNCLOS, Article 17; HAKAPÄÄ, Innocent Passage, MPEPIL, May 2013 ['HAKAPÄÄ'] ¶2.

⁵⁸ UNCLOS, Article 21(4).

⁵⁹ Declarations of Algeria, China, Egypt, Iran, Oman, Saudi Arabia and Yemen at *Declarations and statements to UNCLOS*, Division for Ocean Affairs and the Law of the Sea, UN, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Sao%20Tom%20e%20and%20Principe%20Upon%20signature ['Declarations and statements to UNCLOS'].

Rules and state practice distinguish between ships and warships due to their specified characteristics and different functional ends.⁶¹

Although certain government vessels do not qualify as warships, States reasonably limit certain freedoms for national security reasons by taking a similarly narrow approach.⁶² Such limitation is particularly crucial if the vessel is an underwater vehicle with sophisticated technological outfit.⁶³ Consequently, Anduchenca acted in accordance with CIL when introducing the MSL.

2. The Egart violated the Maritime Security Law.

AUVs are either considered components of their support ships by the component theory, or construed as vessels outright.⁶⁴ The Egart navigates autonomously for one week and then returns to the ship from which it was deployed.⁶⁵ This navigation proves its inseparable connection to the ship.⁶⁶ Other approaches confirm that AUVs could be deemed vessels in their own right.⁶⁷

⁶⁰ Declarations of Bangladesh, Romania, China, Croatia, Egypt, Malta, Montenegro, Serbia, Saudi Arabia, Yemen at *Declarations and statements to UNCLOS*.

⁶¹ O'CONNELL, *The International Law of the Sea*, Shearer ed., 1984 ['O'CONNELL'] ¶274.; KRASKA, *Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters*, CJTL 54, 2015, 220.

⁶² SCHMITT-GODDARD, *International law and the military use of unmanned maritime systems*, 98(2) IRRC, 567, 2016 ['SCHMITT-GODDARD'] 577.

⁶³ *Ibid.*

⁶⁴ HENDERSON, *Murky waters, The Legal Status of Unmanned Undersea Vehicles*, JAGC, USN, *Naval Law Review*, 2006 ['HENDERSON'] 5-6.

⁶⁵ C(14).

⁶⁶ HENDERSON, 6.

⁶⁷ *Ibid.*

Therefore, the Egart is subject to rules of both international and domestic maritime law, including the MSL.

As the MSL is in accordance with international law, Rukaruku had an obligation to require prior authorization from Anduchenca. As the Egart entered the territorial sea without such authorization, Rukaruku violated the MSL and unlawfully entered Anduchenca's territorial sea.

3. Furthermore, the operation of the Egart did not qualify as innocent passage.

Coastal states exercise sovereignty over their territorial sea.⁶⁸ Under Article 7 FCN, the vessels of Anduchenca and Rukaruku have freedom of navigation. Freedom of navigation in the territorial sea is embodied in the right of innocent passage,⁶⁹ which is part of CIL.⁷⁰ In *Namibia*, the Court emphasized that “*an international instrument has to be interpreted (...) within the framework of the entire legal system*” and “*the Court must take into consideration the changes (...) occurred in the supervening half-century.*”⁷¹ Therefore, freedom of navigation under the

⁶⁸ MALANCZUK, Akehurst's Modern Introduction to International Law, 1997, 176; *North Sea Continental Shelf*, I.C.J. Reports 1969, 51, ¶96; *Aegean Sea Continental Shelf*, I.C.J. Reports 1978, 36, ¶86.

⁶⁹ UNCLOS, Article 17; Statement by ITLOS President Wolfrum, Freedom of navigation: New challenges ('Statement by Wolfrum') 2.

⁷⁰ *Corfu Channel Case*, Judgment, 9 April 1949, I.C.J. Reports 1949, 28; *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1986, 11–112, ¶214; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgment, I.C.J. Reports 2001, 74, ¶223; CRAWFORD, Brownlie's Principles of Public International Law, OUP, 8th ed., 2012, 265; WEGELEIN, Innocent Passage after the coming into force of the UN Convention on the Law of the Sea, Seattle, 1999; ROACH, Today's Customary International Law of the Sea, 45 ODIL 239, 2014, 243.

⁷¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971 ['Namibia'], ¶53.

FCN shall be interpreted in line with UNCLOS and CIL, as the authentic sources of innocent passage. The provisions of innocent passage are in accordance with a long and consistent general practice among States.⁷²

Innocent passage in the territorial sea is composed of two elements,⁷³ and the Egart's operation was not in compliance with either.

The operation of the Egart does not qualify as passage.

Innocent passage means 'continuous and expeditious passage' through the territorial sea, *en route* to or from the high seas.⁷⁴ A ship is not permitted to carry out any activity unrelated to passage when traversing the territorial sea.⁷⁵ 'Continuous' passage does not include unnecessary manoeuvring, hovering or engaging in any activity which does not constitute passage.⁷⁶

The Egart was not transiting through Anduchencan territorial seas, but collecting optical and acoustic data⁷⁷ which was admitted by Rukaruku's Ministry of External Relations.⁷⁸ Thus,

⁷² CHURCHILL–LOWE, *The Law of the Sea*, 3d ed., 82, MUP, 1998 ['CHURCHILL–LOWE'] 82.

⁷³ HAKAPÄÄ, ¶5.

⁷⁴ UNCLOS, Article 18(2); HAKAPÄÄ, ¶5.

⁷⁵ AQUILINA, 'Territorial sea and Contiguous Zone' in ATTARD–FITZMAURICE–GUTIÉRREZ, *The IMLI Manual of International Law*, Volume 1, OSAIL, 2014, 40.

⁷⁶ *Ibid.*, 41.

⁷⁷ C(16).

⁷⁸ C(17).

when the Egart was present in the territorial sea of Anduchenca, its operation did not qualify as passage.

The operation was not innocent.

Passage must be innocent, meaning it must not be prejudicial to the peace, good order and security of the coastal state.⁷⁹ Article 19(2) UNCLOS objectively defines this condition, and it is ‘rapidly’ becoming CIL as many States have incorporated the definition in internal laws.⁸⁰

An activity is considered non-innocent if it is aimed at collecting information to the prejudice of the defence or security of the coastal State,⁸¹ when it involves research or survey activities, or any other activity not having a direct bearing on passage.⁸² Accordingly, the Egart’s activities of collecting optical and acoustic data usable to undermine Anduchenca’s national security⁸³ is inconsistent with the applicable customary rules.

Furthermore, underwater vehicles must navigate on the surface in the territorial sea.⁸⁴ This rule was accepted as customary, since underwater vehicles are expected to adhere to the same practice as ships during peacetime.⁸⁵ It is reasoned by the fact that it is impossible for the coastal state to verify the pacific character of passage unless the vehicle is on the surface.⁸⁶ The same

⁷⁹ UNCLOS, Article 19(1); HAKAPÄÄ, ¶5.

⁸⁰ CHURCHILL–LOWE, 87.

⁸¹ UNCLOS, Article 19(2c).

⁸² UNCLOS, Article 19 (2j-k-l).

⁸³ C(16).

⁸⁴ UNCLOS, Article 20.

⁸⁵ O’CONNELL, 294; CHURCHILL–LOWE, 90-91.

⁸⁶ *Ibid.*; REISMAN, The Regime of Straits and National Security, 74 AJIL 48, 65 (1980).

regime shall apply analogously to AUVs.⁸⁷ Since the Egart did not operate on the surface,⁸⁸ its operation was not innocent.

Consequently, Rukaruku violated the sovereignty of Anduchenca as (1) innocent passage is the only restriction of state sovereignty in the territorial sea⁸⁹ and (2) the operation of the Egart did not qualify as innocent passage.

B. Capturing the Egart did not violate Article 7 FCN Treaty.

1. The Egart did not operate under Article 7.

Navigational rights in the territorial sea are restricted to innocent passage.⁹⁰ Since the Egart was not operated in a manner that qualifies as innocent passage, it was not entitled to freedom of navigation. As a result, Anduchenca's capture did not violate Article 7.

2. Even if the Egart operated under Article 7, the application of Article 7 was suspended because of material breach.

Under Article 60 VCLT, it is possible to suspend the operation of a treaty by invoking material breach.⁹¹ These rules are of a customary nature,⁹² therefore are applicable to the FCN Treaty. In case of bilateral treaties, a material breach by one party entitles the other to invoke it

⁸⁷ SCHMITT-GODDARD, 578.

⁸⁸ C(16).

⁸⁹ CHURCHILL-LOWE, 87.

⁹⁰ Statement by Wolfrum, 2.

⁹¹ VCLT, Article 60(1).

⁹² *Gabčíkovo-Nagymaros Project* (Hungary v Slovakia), Judgment, I.C.J. Reports 1997, 38 [‘Gabčíkovo’] ¶46; *Namibia*, ¶94; DÖRR-SCHAMELENBACH, *Vienna Convention On The Law Of Treaties, A Commentary*, Springer, 2012, 1048.

as a ground for suspending the operation in whole or in part.⁹³ A material breach is “the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”⁹⁴ The term ‘essential’ suggests the provision to have been at the heart of the treaty.⁹⁵ This Court accepted the preamble of a given treaty as guidance for its object and purpose.⁹⁶

The object and purpose of the FCN Treaty is to strengthen the friendly relations between the two States and to ensure perpetual peace and stability in the region.⁹⁷ Article 6 FCN codifies the obligation to respect the sovereignty of the other contracting party. As a State violating another State’s sovereignty hampers friendly relations,⁹⁸ Article 6 FCN is a provision essential to ensure the object and purpose of the Treaty.

When Rukaruku operated the Egart in the territorial sea of Anduchenca, it violated Article 6 and therefore violated a provision essential to the accomplishment of the FCN’s object and purpose. Consequently, it constitutes a material breach and Anduchenca was entitled to suspend the application of Article 7.

⁹³ VCLT. Article 60(1).

⁹⁴ VCLT, Article 60(3).

⁹⁵ HOLLIS: *The Oxford Guide to Treaties*, OUP, 2012, 584.; GOMAA, *Suspension or Termination of Treaties on Grounds of Breach*, Martinus Nijhoff, Leiden, 1996, 31.

⁹⁶ *Gabčikovo*, ¶15; *Armed Activities (Congo v. Rwanda)* (New Application: 2002) Jurisdiction and Admissibility, I.C.J. 2006, 67 [‘Congo v. Rwanda’]; *Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951, 23, 19; ILC, *Guide to Practice on Reservations to Treaties*, YBILC, 2011, vol. II, Part Two, Draft Guideline 3.1.5.1.

⁹⁷ FCN Treaty, Preamble.

⁹⁸ Friendly Relations Declaration, General Assembly Resolution 2625 (XXV), A/RES/25/2625.

Furthermore, the procedural requirements of suspension are not part of CIL.⁹⁹ In any event, Anduchenca gave notification in time that fits the special circumstances of the situation.¹⁰⁰

As stated in *WHO and Egypt*, the period of notice of termination is a matter which varies according to the requirements of the particular case¹⁰¹ and what is ‘reasonable and equitable’ must depend on the particular circumstances of the case.¹⁰² In *Gabčíkovo*, the Court considered the notification and the termination premature because there was no breach when the termination took effect.¹⁰³ The judgment implies that if a breach occurred by the time the termination took effect, the prior notification itself would have been accepted.

Accordingly, Anduchenca’s notification, given prior to the occurrence of the actual breach, is reasonable. Therefore, Anduchenca safeguarded all procedural obligations, and the suspension of Article 7 is justified by invoking material breach.

C. Should the Court find the capture of the Egart unlawful, Anduchenca’s wrongfulness is precluded by countermeasure.

Countermeasures aim to induce the wrongdoing State to comply with its obligations and restore the situation that would have existed had there been no violation of international law.¹⁰⁴

⁹⁹ FITZMAURICE, *Treaties*, MPEPIL, ¶84; *Gabčíkovo*, ¶109.; *Congo v. Rwanda*, ¶125; *Racke GmbH and Co v Hauptzollamt Mainz*, Case C-162/96, 1998, 52-59; HOLLIS, 593-594.

¹⁰⁰ C(15).

¹⁰¹ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, ¶49.

¹⁰² *Ibid.*, ¶49.

¹⁰³ *Gabčíkovo*, ¶109.

¹⁰⁴ HOLLIS, 581.

The rules on countermeasures are part of CIL.¹⁰⁵ In *Gabčíkovo*, the Court stated that violation of treaty obligations may justify the taking of countermeasures by an injured State.¹⁰⁶ Anduchenca's wrongfulness is precluded by countermeasure as *first*, Rukaruku committed a previous breach of international law, *second*, the capture was a proportionate response, and *third*, the action taken is reversible.

1. Rukaruku committed a previous breach of international law.

As Rukaruku operated the *Egart* in the territorial sea of Anduchenca, it violated Article 6 of the FCN Treaty. The internationally wrongful act of Rukaruku fulfils Article 49(1) ARSIWA.

2. The capture of the *Egart* was a proportionate response.

Countermeasures must be commensurate with the injury suffered,¹⁰⁷ taking into account the gravity of the IWA and the rights in question.¹⁰⁸ As stated in in *Air Services Arbitration*, countermeasures are more likely to satisfy the proportionality requirement if taken in relation to the same obligation.¹⁰⁹ Anduchenca's capture of the *Egart* aimed to restore the balance between the parties after Rukaruku's breach of Article 6.¹¹⁰ Furthermore, the infringed rule protected an interest of great importance, as Article 6 concerns State sovereignty.

¹⁰⁵ ARSIWA, Article 22; *Gabčíkovo*, ¶¶83-84.

¹⁰⁶ *Gabčíkovo*, ¶106.

¹⁰⁷ ARSIWA, Article 51; *Gabčíkovo*, ¶85-87.

¹⁰⁸ ARSIWA, Article 51.

¹⁰⁹ *Air Service Agreement Case* (Fr. v. U.S.), 18 R.I.A.A., 1978, 416, ¶40; ARSIWA Commentary, ¶129.

¹¹⁰ C(16).

3. The capture of the Egart is reversible and it was necessary to preserve Anduchenca's rights.

As stated in *Gabcikovo*, States should take countermeasures that are reversible.¹¹¹ As it is possible to return the Egart after obtaining unlawfully collected data, the countermeasure is reversible.

Furthermore, the capture of the Egart was necessary to preserve Anduchenca's rights.¹¹² The aim of the capture was to ascertain the safety of Anduchenca's national security.¹¹³ Had Anduchenca let the Egart go, it would have been impossible to determine to what extent its operations violated Anduchenca's sovereignty.

Therefore, the capture of the Egart was a necessary, proportionate and reversible countermeasure in response to Rukaruku's breach, and Anduchenca's wrongfulness is precluded.

¹¹¹ ARSIWA Commentary, ¶131(9); *Gabčikovo*, ¶87.

¹¹² ARSIWA, ¶52(2).

¹¹³ C(16).

III. COMMISSIONING AND OPERATING THE IBRA DID NOT VIOLATE DISARMAMENT OBLIGATIONS UNDER ARTICLE 16 FCN TREATY.

Under Article 16 FCN, the Parties agreed to comply with the disarmament obligations binding on them under international law. Anduchenca complied with Article 16 FCN. *First*, the Security Council (SC) Resolution 3790 does not confer disarmament obligations upon Anduchenca (A). *Second*, Anduchenca is not bound by disarmament obligations under CIL (B). Should this Court find that Anduchenca is bound by disarmament obligations, she did not violate them (C).

A. Security Council Resolution 3790 does not confer disarmament obligation upon Anduchenca.

1. Security Council Resolution 3790 is ultra vires.

The SC is bound by the rules and principles of international law, which is also supported by scholarly opinion¹¹⁴ and case-law.¹¹⁵ Since the SC has to act in accordance with well-established principles of law, these constitute a limitation on the exercise of its powers.¹¹⁶

¹¹⁴ GORDON, *The Sword of Damocles: Revisiting the Question of whether the UN is bound by International Law*, 12(2) CJIL, 605 2012 [‘GORDON’] 608; JOYNER, *The Security Council as a Legal Hegemon*, 43 *Geo. J. Int’l L.* 225, 2012, 250; AKANDE, *Dan Joyner on ‘What if Iran withdrew from the Nuclear Non-Proliferation Treaty?’*, EJIL Talk, 9 January 2013, <https://www.ejiltalk.org/dan-joyner-on-what-if-iran-withdraws-from-the-nuclear-non-proliferation-treaty/> Last visited: 10 January 2018.

¹¹⁵ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, 3, Separate opinion of Judge Weeramantry [‘Lockerbie’] 65; *Prosecutor v. Tadic*, Case No. IT-94-1-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ICTY, ¶28.

¹¹⁶ *Lockerbie*, 65.

One of those limitations is the universally recognized principle of voluntary consent, which¹¹⁷ means that no Treaty can create rights or obligations for a third State without its consent.¹¹⁸ Thus, the SC cannot impose treaty obligations upon States against their will.¹¹⁹

In the same vein, the SC cannot confer disarmament obligations on Anduchenca, since it never signed or ratified the NPT.¹²⁰ Failing to adhere to the limitations conferred upon the Council, its decision constitutes an *ultra vires* act and Member States are justified in refusing to implement it.¹²¹

2. In any event, Security Council Resolution 3790 does not bind Anduchenca.

Should the Court find that Resolution 3790 is valid, it is not a binding decision under Chapter VII. A SC Resolution is binding only if the Council has taken a decision within the meaning of Article 25 UN Charter.¹²² In determining whether the SC has done so, the language of the resolution should be carefully analysed.¹²³

¹¹⁷ VCLT, Preamble 3.

¹¹⁸ VCLT, Article 35.

¹¹⁹ *Ibid.* 98; TALMON, The Security Council Treaty Action, 62 RHDI 65, 116, 2009 [‘TALMON’] 97.

¹²⁰ C(9).

¹²¹ GORDON, 641.

¹²² WOOD, The Interpretation of Security Council Resolutions, Revisited, 20 UNYB, 2017 [‘WOOD’] 4.

¹²³ KIRSCH, ‘Actions with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression, Introduction to Chapter VII: The General Framework’ in SIMMA ET. AL., The Charter of the United Nations: A Commentary, OUP 2012 [‘KIRSCH’] 1264; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Report, 16, ¶114.

When imposing binding obligations, the SC applies expressions that are clear and explicit such as ‘*decides*’ and ‘*demands*’.¹²⁴ In contrast, the term ‘*calls upon*’ is not regarded as sufficiently clear and explicit to bind Member States,¹²⁵ rather it merely has a hortatory nature.¹²⁶

This view is supported by the SC’s practice. For instance, when the SC was dealing with Iran’s nuclear programme, the SC ‘*decided*’ that Iran shall not undertake any activity related to ballistic missiles capable of delivering nuclear weapons.¹²⁷ After Iran agreed to constrain its nuclear programme, the SC merely ‘*called upon*’ Iran to refrain from missile activity, indicating that it was not prohibited. Thus, a change in words reinforces the different meaning that the SC accords to each term.¹²⁸ In present case, Resolution 3790, first uses the term ‘*calls upon*’ to impose the NPT then ‘*decides*’ to authorize the use of force. Since it found necessary to apply distinct wording, it did not intend to accord binding force to both terms.

Hence, when the SC applied the term ‘*calls upon*’, it did not impose a binding obligation on Anduchenca to implement the NPT.

¹²⁴ JOYNER, *Iran’s Nuclear Program and International Law: From Confrontation to Accord*, OUP 2016 [‘JOYNER, 2016’] 196.

¹²⁵ *Ibid.* 198; JOYNER, *The Legal Bindingness of Security Council Resolutions Generally, and Resolution 2334 on the Israeli Settlements in Particular*, EJIL Talk, 9 January 2017, <https://www.ejiltalk.org/legal-bindingness-of-security-council-resolutions-generally-and-resolution-2334-on-the-israeli-settlements-in-particular/> Last visited: 8 January 2018; WOOD, 18; KIRSCH, 1265.

¹²⁶ AKANDE–MILANKOVIC, *The Constructive Ambiguity of the Security Council ISIS*, EJIL Talk, 21 November 2015, <https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/comment-page-1/#comments> Last visited: 8 January 2018.

¹²⁷ JOYNER, 2016, 240.

¹²⁸ *Ibid.* 241.

B. Anduchenca is not bound by a customary obligation of nuclear disarmament.

1. Nuclear disarmament does not form part of customary international law.

In order for a rule to become part of CIL, it must satisfy two conditions: general practice and *opinio juris* of States.¹²⁹

As to the first condition, State practice must be extensive and virtually uniform, and it must include the practice of those States whose interests are specially affected.¹³⁰ In fact, the practice of specially affected States should weigh heavily, to the extent that it may prevent a rule from becoming CIL.¹³¹ With regards to this, nuclear weapon States (NWSs) are considered to be specially affected by Article VI NPT, because they are in the possession of nuclear weapons whose elimination must be negotiated.¹³² However, these States cannot be regarded as supporting disarmament. They consider that Article VI NPT is recommendatory and does not prescribe any legal obligation to adopt concrete measures towards the elimination of nuclear

¹²⁹ Special Rapporteur of the International Law Commission, Second Report on Identification of Customary International Law, U.N.Doc.A/CN.4/672 (May 2014) [‘ILC’] ¶21; *North Sea Continental Shelf, Judgement*, I.C.J Reports, 1969, 3 [‘North Sea Continental Shelf’] ¶77.

¹³⁰ *North Sea Continental Shelf*, ¶74, ILC, ¶54.

¹³¹ ILC, ¶54.

¹³² ROSCINI, ‘On Certain Legal Issues Arising from Article VI of the Treaty on The Proliferation of Nuclear Weapons’ in CARACCILO–PEDRAZZI–VASSALLI DI DACHENHAUSEN, *Nuclear Weapons Strengthening the Legal International Regime*, Eleven International Publishing 2016 [‘ROSCINI’] 21.

weapons.¹³³ Hence, they continue to modernize their nuclear capabilities and plan to retain them for the indefinite future.¹³⁴

Similarly, the non-NPT NWSs have increased the size of their nuclear arsenals with Pakistan having the most rapidly growing nuclear stockpile.¹³⁵ Therefore, the practice of specially affected States goes against the emergence of a customary rule of nuclear disarmament. The practice of certain non-nuclear weapon States appears to be unsupportive towards nuclear disarmament as well. In fact, these States allow nuclear weapons to be deployed on their territory thereby accepting that the NWSs may indeed possess such weapons.¹³⁶ Therefore, the criterion of extensive and uniform practice is not fulfilled.

Opinio juris of States can be deduced from their attitude towards General Assembly (GA) Resolutions.¹³⁷ In a series of Resolutions, all States were called upon to eliminate their nuclear arsenals.¹³⁸ However, abstentions and negative votes by specially affected States effectively bar

¹³³ FANIELLE, Towards Nuclear Disarmament: State of affairs in the International Legal Framework, 97 Nuclear Law Bulletin, 35 2016, 45.

¹³⁴ KRISTENSEN–MCKINZIE, Nuclear Arsenals: Current Developments, Trends and Capabilities, 97(899) IRRC, 563 2015, 599.

¹³⁵ *Ibid.* 586.

¹³⁶ *Ibid.* 588.

¹³⁷ ILC, 65.

¹³⁸ Obligations concerning negotiations relating to cessation of nuclear arms race and to nuclear disarmament (Marshall Islands v. India), Judgement, Dissenting Opinion Judge Cancado Trindade, ¶53; U.N.Doc.A/Res/70/56 (2015); U.N.Doc.A/RES/68/41 (2013); U.N.Doc.A/RES/67/33 (2012).

the emergence of opinion juris.¹³⁹ Furthermore, as a large number of GA Resolutions repeated the same obligation, these circumstances demonstrate that no such rule has passed into CIL.¹⁴⁰ In the absence of relevant State practice and opinion juris, no customary rule of Article VI can be established. This conclusion is also supported by highly qualified publicists.¹⁴¹

2. Disarmament obligation is not a regional custom in the Odassaran region.

Anduchenca is not bound by it as a regional custom of the Odassaran Region. As the Court stated in the *Asylum case*, in order for a regional custom to exist, the custom has to be established in such a manner that it has become binding on the party and there must be constant and uniform usage practiced by all States in question.¹⁴² In 1968, all Odassaran States have signed and ratified the NPT, except for Anduchenca.¹⁴³ Thus, in the present case not all of the States concerned have consented to the rule, which is necessary in case of regional custom.¹⁴⁴

In addition, Anduchenca has begun to develop its military while its disarmament programs were terminated as in 1969.¹⁴⁵ Consequently, there has been no constant and uniform usage to

¹³⁹ ILC, 65; Reference the question posed by Judge Trindade at the conclusion of oral hearings on 16 March 2016 in the case Marshall Islands v. India, ¶14.

¹⁴⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 226. Dissenting Opinion Judge Schwebel, 319-320.

¹⁴¹ JOYNER, *International Law and the Proliferation of Weapons of Mass Destruction*, OUP 2009,69; ROSCINI, 20.

¹⁴² *Columbian-Peruvian asylum case*, Judgement of November 20, 1950, I.C.J. Reports 1950, 266, 276.

¹⁴³ C(9).

¹⁴⁴ D'AMATO, *The Concept of Special Custom in International Law*, 2010, Faculty Working Papers, Paper 116, 9.

¹⁴⁵ C(8).

which all regional States have consented, and thus the formation of regional custom of disarmament obligation in the Odassarran Region cannot be established.

3. Even if, there exists a customary obligation to disarm, Anduchenca qualifies as a persistent objector.

A State qualifies as a persistent objector if she consistently objects to a customary rule during its formation.¹⁴⁶ Such a State is also required to actively, consistently and unambiguously reject the rule.¹⁴⁷ In the present case, Anduchenca had rejected the NPT already before its entry into force. Over the past 50 years, Anduchenca stated on numerous occasions that the Treaty ‘establishes and aggravates an inherent inequality between nuclear-weapon States and non-nuclear-weapon States.’¹⁴⁸ As Anduchenca always opposed all provisions of the NPT, she qualifies as a persistent objector in respect of the customary obligation of nuclear disarmament.

C. In any event, Anduchenca did not violate disarmament obligations.

Should the Court find that the Anduchenca was bound by disarmament obligation either under Resolution 3790 or customary international law, Article VI NPT is an obligation of conduct (1) and Anduchenca did not violate this obligation (2).

1. Article VI NPT is an obligation of conduct.

Under Article VI NPT, all States agreed to pursue negotiations in good faith on effective measures relating to disarmament.¹⁴⁹ Article VI NPT is an obligation to put forth good faith

¹⁴⁶ DUMBERRY, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 95 ICLQ, 779 2010, 781.

¹⁴⁷ *Ibid.* 781.

¹⁴⁸ C(9).

¹⁴⁹ NPT, Article VI.

efforts towards negotiation on disarmament,¹⁵⁰ but it does not commit parties to conclude an agreement.¹⁵¹ This is supported by the fact that even the drafters of the stated that it is ‘obviously impossible to predict the exact nature and results of such negotiations.’¹⁵²

2. Anduchenca did not violate this obligation of conduct.

Anduchenca’s representative took part in the UN Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons (Conference).¹⁵³

While there is no obligation to conclude a final agreement, parties have to bargain and in good faith attempt to reach a result acceptable for both sides.¹⁵⁴ It means to re-consider previously held positions with a view to settle.¹⁵⁵

While Anduchenca has always rejected the NPT,¹⁵⁶ it nevertheless made a good faith effort to negotiate,¹⁵⁷ being the only nuclear-weapon possessing State who was present at the

¹⁵⁰ JOYNER, *Interpreting the Nuclear Non-Proliferation Treaty*, OUP 2011, 72.

¹⁵¹ FORD, *Debating Disarmament: Interpreting Article VI of the NPT*, 14 *Nonproliferation Review*, 401 2007, 408.

¹⁵² TURNER, *Nuclear Weapons and the World Court: The ICJ Advisory Opinion and its Significance for US Strategic Doctrine*, 72 *International Law Studies*, 309, 330.

¹⁵³ C(39).

¹⁵⁴ *Case Concerning Claims Arising out of Decisions of the Mixed Graeco-German Arbitral Tribunal (Greece v Federal Republic of Germany)* 19 R.I.A.A ¶62., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgement, I.C.J. Reports, 2011, 70, ¶131.

¹⁵⁵ *Ibid.* ¶71.

¹⁵⁶ C(9).

¹⁵⁷ C(39).

Conference.¹⁵⁸ As Anduchenca has complied with its disarmament obligation, it did not breach Article 16 FCN Treaty.

¹⁵⁸ Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France Following the Adoption of a Treaty Banning Nuclear Weapons, 7 July 2017.

IV. RUKARUKU VIOLATED ARTICLE 17 OF THE FCN TREATY WHEN IT ATTACKED THE COVFEFE AND CAPTURED THE IBRA.

When Rukaruku attacked the Covfefe and captured the Ibra, it acted unlawfully under international law. *First*, Rukaruku cannot lawfully rely on SC Resolution 3790 to justify its actions (A). *Second*, Rukaruku's acts cannot be justified as self-defence (B). In any event, Rukaruku failed to comply with its obligations under international humanitarian law (IHL) (C). Therefore, Rukaruku violated Article 17 of the FCN Treaty.

A. Resolution 3790 is unlawful, and in any event, the attack on the Covfefe and the capture of the Ibra did not fall within its scope.

1. Resolution 3790 is unlawful because it deprives Anduchenca from its inherent right to self-defence.

The SC has violated Anduchenca's inherent right to self-defence, when it authorized Member States to neutralize the Ibra for two reasons. *First*, the right to self-defence is a *jus cogens* norm, and *second*, the SC has failed to respect it. With regard to the first criteria, the right to self-defence operates as an exception to the *jus cogens* prohibition on the use of force. Their interdependence suggests that not only Article 2(4) is a *jus cogens* norm but also Article 51.¹⁵⁹ With regard to the second criteria, the SC shall not unduly restrict a *jus cogens* norm. Such norm is binding on the SC itself¹⁶⁰ and prevails over obligations contained in SC Resolutions.¹⁶¹ As a

¹⁵⁹ KAHGAN, *Jus Cogens and the Inherent Right to Self-defence*, 3 ILSA J. Int'l & Comp. L., 7671997, 791., RUYLS, 'Armed Attack' and Article 51 of the UN Charter, CUP, 2010, 27.

¹⁶⁰ KIRSCH, 1256.

¹⁶¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 13 September 1993, I.C.J. Reports, Separate Opinion of Judge Lauterpacht, ¶100.

result, if the SC enacts a Resolution which fails to comply with a *jus cogens* norm, it is void and UN Members are free to disregard it.¹⁶²

Self-defence is inherent in the quality of States¹⁶³ and it is not possible to conceive statehood which lacks that characteristic.’¹⁶⁴ Therefore, the SC can only impose limitations on the exercise of the right but not on the right itself.¹⁶⁵ For instance, in situations of armed conflict, the SC can suspend the exercise of self-defence by imposing ceasefire-obligation, or an arms embargo on parties to the conflict.¹⁶⁶ In present case, when the SC issued the Resolution Anduchenca was not a party to an armed conflict and did not engage in defensive actions. Therefore, the SC did not impose limitations on the exercise of self-defence but on the right itself. When the SC authorized the neutralization of the Ibra, it went beyond what could be permissible restraints on Anuchenca’s inherent right to defend itself. Hence, as the SC failed to observe a *jus cogens* norm, Resolution 3790 is rendered unlawful.

2. In any event, the attack on the Covfefe and the capture of the Ibra did not fall within Resolution’s scope.

Under 3790 Resolution, Member States were authorized to ‘*use all measures commensurate with their specific circumstances in confronting the Ibra.*’ The SC has consistently used such wording in order to enforce embargos and to combat mass-migration at

¹⁶² *Ibid.*, ¶103.

¹⁶³ ROSCINI, *The Inherent Right to Self-Defence*, 4 *CJICL*, 634 2016, 647.

¹⁶⁴ *Ibid.*, 646.

¹⁶⁵ *Ibid.*, 634.

¹⁶⁶ ROSCINI, 655, 658.

sea.¹⁶⁷ Enforcement actions include halting, boarding, searching and diverting a vessel on the high seas.¹⁶⁸ Accordingly, the SC has authorized Member States only for taking particular enforcement actions in confronting the Ibra.¹⁶⁹

In SC Resolutions ‘commensurate measures’ have been interpreted to authorize the use of minimum force for the purpose of taking enforcement actions.¹⁷⁰ As stated in the *Saiga case*, in order to halt a vessel, States may be justified in using disabling fire as a last resort,¹⁷¹ with minimum injury to personnel or damage to the vessel.¹⁷² The unarmed Covfefe was hit by four missiles, causing it to sink, eventually killing 17 Anduchencan citizens, leaving no survivors.¹⁷³ Such use of force clearly exceeds the Resolution’s mandate and relying on Resolution 3790 does not excuse Rukaruku’s attacks against the Covfefe and the Ibra.

¹⁶⁷ FROSTAD, ‘United Nations Authorized Embargos and Maritime Interdiction: A Special Focus on Somalia’ in Andreone, *The Future of the Law of the Sea*, Springer 2017, 216. Security Council Resolution 655, U.N.Doc.S/RES/655 (25 Aug. 1990) Security Council Resolution 1973, U.N.Doc.S/RES/2240 (9 Oct. 2015).

¹⁶⁸ MCLAUGHLIN, *Authorization for Maritime Law Enforcement Operations*, 98(2) *IRRC*, 465 2016, 480.

¹⁶⁹ C, Annex II. ¶4.

¹⁷⁰ FINK, *UN-mandated Maritime Arms Embargo Operations in Operation Unified Protector*, 50(1-2) *The Military Law and Law of War Review*, 237 2011, 242.

¹⁷¹ *M/V ‘Saiga’ (No. 2) (Saint Vincent and the Grenadines v Guinea)*, International Tribunal for the Law of the Sea, Judgment (Merits) of 1 July 1999, ¶155.

¹⁷² DINSTEIN-DOMB, 35 *Israel Yearbook on Human Rights*, 2005, 133.

¹⁷³ C(43). Clarifications, 9.

B. Furthermore, Rukaruku cannot rely on self-defence to justify its actions.

1. Rukaruku may exercise self-defence only if it is subject to an armed attack.

Under Article 51 of the Charter, a State can lawfully exercise self-defence, if an armed attack occurs against a Member of the United Nations. Accordingly, this Court has confirmed that the existence of an armed attack is a condition *sine qua non* for self-defence.¹⁷⁴ Therefore, Rukaruku can only justify self-defence in response to an actual attack. In line with this Court, an armed attack exists when the most grave uses of force take place.¹⁷⁵ Consequently, the mere possession of weapons of mass destruction does not fulfil this requirement.¹⁷⁶

2. Anticipatory self-defence is not part of customary international law.

In the absence of an actual armed attack States cannot justify self-defence in response to an ‘anticipated’ or ‘imminent’ threat of armed attack.¹⁷⁷ Such an ‘anticipatory self-defence’ departs from the Charter, thus constitutes a violation of international law, rather than a formation of new customary law.¹⁷⁸ Furthermore, this Court has already rejected Uganda’s claim to justify ‘anticipatory self-defence’ in order to secure its legitimate security interests. It confirmed that

¹⁷⁴ NOLTE, RANDELZHOFFER, ‘Actions with respect to Threats to Peace, Breaches of Peace and Act of Aggression, Article 51 in SIMMA ET. AL., The Charter of the United Nations: A Commentary, OUP 2012, 1404; *Nicaragua*, ¶195; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgement, I.C.J. Reports 2003, [‘Oil Platforms’] ¶51; *Legal Consequences of the Construction of Wall in the Occupied Palestinian Territory* Advisory Opinion, I.C.J Reports 2004, ¶139.

¹⁷⁵ *Ibid.*, 31, *Nicaragua*, ¶194.

¹⁷⁶ SADOFF, A Question of Determinacy: The Legal Status of Anticipatory Self-Defence, 40 *Geo. J. Int’l L.*, 523 2009, 546.

¹⁷⁷ BROWNLIE, *International Law and the Use of Force by States*, Clarendon Press 1963, 278.

¹⁷⁸ *Nicaragua*, ¶186.

Article 51 may justify self-defense only within the strict confines laid down thereunder.¹⁷⁹ This finds resonance in the fact that most States do not regard anticipatory self-defence as a widely accepted, lawful ground for justification.¹⁸⁰

3. The Ibra did not pose imminent threat.

Should this Court find that anticipatory self-defence has acquired customary status, the Ibra posed no imminent threat of an armed attack. A threat of an attack is imminent if it is instant, leaving no moment for deliberation.¹⁸¹ Further criteria for such a threat include that it has to be concrete and immediate, identified credibly, and with a high degree of certainty.¹⁸² A State would fulfil the criteria if it was about to launch an attack against the victim State.¹⁸³ Accordingly, a State does not satisfy this criteria by merely possessing weapons, but rather there has to be evidence of an intention to use them.¹⁸⁴ It is apparent that Anduchenca had no intention to attack Respondent. Even when the Respondent attacked Anduchenca, Applicant at all times refrained from engaging in hostilities.¹⁸⁵ Hence, the Ibra did not pose imminent threat.

¹⁷⁹ *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, I.C.J. Reports 2005, 168, ¶148.

¹⁸⁰ GRAY, *International Law and the Use of Force*, OUP 2013, 161.

¹⁸¹ DEEKS, 'Taming the Doctrine of Pre-emption' in WELLER, *The Oxford Handbook of the Use of Force in International Law*, OUP 2015, ['DEEKS'] 662.

¹⁸² SAPIRO, *The Shifting Sands of Self-Defense*, 97 *AJIL*, 599 2003, 600.

¹⁸³ DEEKS, 662.

¹⁸⁴ GREENWOOD, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 *San Diego Int'l L.J.* 7, 523 2009, 16.

¹⁸⁵ C(43).

4. Respondent's attack was unproportionate and unnecessary.

In order for self-defence to be justified, the criteria of necessity and proportionality must be met.¹⁸⁶ Necessity means that a State has no other means to defend itself, but to rely on force,¹⁸⁷ and proportionality, means that a State must use the force strictly confined to defensive purposes.¹⁸⁸ Rukaruku, without prior efforts to resolve the issue peacefully, stroke the Covfefe in a devastating manner, leaving no survivors.¹⁸⁹ As Rukaruku's attack was neither necessary nor proportionate, self-defence is unjustified.

C. In any event, Rukaruku violated its obligations under international humanitarian law.

Jus ad bellum governs the legality of the use of force and *jus in bello* regulates the actual conduct of hostilities.¹⁹⁰ A State only applies force lawfully if it complies with either body of law.¹⁹¹ According to *Nuclear Weapons*, a State only applies a use of force that is proportionate under *jus ad bellum*, if it also meet the requirements of the law applicable in armed conflict.¹⁹²

¹⁸⁶ *Oil platforms*, ¶194.

¹⁸⁷ MOUSSA, Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law, 90 IRRC, 963 2008, 975.

¹⁸⁸ *Ibid.*, 979.

¹⁸⁹ Clarifications, 9.

¹⁹⁰ GREENWOOD, The Relationship between Jus ad Bellum and Jus in Bello, 9 Review of International Studies, 221 1983, 221.

¹⁹¹ GREENWOOD, 'Jus ad Bellum and Jus in Bello in the Nuclear Advisory Opinion', in BOISSON DE CHAZOURNES-SANDS, *International Law, the International Court of Justice and Nuclear Weapons*, CUP, 1999 ['CHAZOURNES-SANDS'] 263.

¹⁹² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J Reports 1996, 226, ¶42.

As a result, this Court has reaffirmed the complementary application of *jus ad bellum* and *jus in bello*.¹⁹³ Accordingly, when Rukaruku attacked the Covfefe it triggered an international armed conflict (IAC) to which IHL applies (1). Rukaruku failed to comply with its obligations under IHL which renders its actions unlawful (2).

1. International humanitarian law is applicable to the attacks on Covfefe and capture of the Ibra.

IHL is applicable in situations of international armed conflict.¹⁹⁴ IAC exists in case of the unilateral use of force by one State against another. There is no requirement for armed resistance by the target State¹⁹⁵ and for the use of force to reach a certain level of intensity or duration.¹⁹⁶ When Rukaruku fired missiles and torpedoes at Covfefe and Ibra respectively, it exceeded the mandate of the 3790 Resolution and triggered an IAC.

2. Rukaruku violated the principles of international humanitarian law.

Rukaruku violated the principle of distinction.

Parties to an armed conflict must distinguish at all times between combatants and civilians. Civilians are protected against attacks unless and for such time as they take direct part in

¹⁹³ CHAZOURNES–SANDS, 265.

¹⁹⁴ Common Article 2 of the 1949 Geneva Conventions; Article 2 Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949.

¹⁹⁵ ICRC, Commentary on the Second Geneva Convention, 2017, ¶245; Article 1, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994.

¹⁹⁶ *Ibid.*, ¶258.

hostilities.¹⁹⁷ Direct participation means personally taking part in the on-going exercise of harming the enemy.¹⁹⁸ In principle, when civilians perform support functions such as provision of food, transport of weapons, they do not engage in direct participation unless they form an integral part of on-going military operations.¹⁹⁹ Thus, the manning of the Covfefe could qualify as direct participation if it was supplying military objects who respond to attacks in an on-going conflict.²⁰⁰ In the absence of such a scenario, civilians have remained immune from attack. Since, they did not take direct part in hostilities, the death of civilians have to considered under the proportionality test.²⁰¹

Rukaruku violated the principle of proportionality.

Article 51(5) of AP I prescribes a proportionality principle. It prohibits attacks which are expected to cause excessive collateral damage to civilians in relation to anticipated concrete and direct military advantages.²⁰² The death of seven civilians is excessive in relation to the capture of Ibra. Military advantages have to be ‘concrete’ and ‘direct’ excluding those that are merely

¹⁹⁷ Protocol Additional to the Geneva Conventions of 1949 and relating to the Protection of Armed Victims of International Armed Conflicts (Protocol I), 8 June 1977.

¹⁹⁸ MELZER, Interpretative Guidance on the Notion of Direct Participation in Hostilities, ICRC, 2009, [‘MELZER’] 52.

¹⁹⁹ MELZER, 53; Department of Defense Law of War Manual (United States), June 12, 2015, [‘US Law Manual’] ¶5.8.3.

²⁰⁰ CALZAS, Private Military and Security Companies: The Implications Under International Law of Doing Business in War, Cambridge Scholars Publishing, 2016, 76.

²⁰¹ MELZER, 13.

²⁰² Protocol Additional to the Geneva Conventions of 1949 and relating to the Protection of Armed Victims of International Armed Conflicts (Protocol I), 8 June 1977.

speculative or hypothetical.²⁰³ Prime Minister Dage ordered the destruction of the supply ship so that the *Ibra* would be forced to surface.²⁰⁴ It is however apparent that the destruction of *Covfefe* did not guarantee the capture of *Ibra* since further attacks were necessary for it to surface.²⁰⁵ It can be considered as a target of opportunity but not one previously identified as an appropriate military target.²⁰⁶ For these reasons, when *Rukaruku* destroyed the *Covfefe*, it constituted a speculative advantage, thus the loss of civilians is in itself excessive.²⁰⁷

Rukaruku violated the principle of military necessity.

Military necessity permits only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required to achieve the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.’²⁰⁸ The capture of *Ibra* may constitute a legitimate end.²⁰⁹ However, military necessity demands no more death, or destruction than the circumstances reasonably require for the achievement of a

²⁰³ DINSTEIN, *The Conduct of Hostilities under the Law of International Armed Conflict*, CUP 2004, 106; US Law Manual, ¶5.12.2.

²⁰⁴ C(44).

²⁰⁵ C(46).

²⁰⁶ *Oil platforms*, ¶76.

²⁰⁷ GEISS, *The Principle of Proportionality, ‘Force Protection’ as Military Advantage*, 45 *Israel Law Review*, 71 2012, 77-79.

²⁰⁸ MELZER, ‘*The Principle of Distinction between Combatants and Civilians*’ in CLAPHAM–GAETA, *The Oxford Handbook of International Armed Conflict*, OUP 2014, 330.

²⁰⁹ DOWNEY JR., *The Law of War and Military Necessity*, 47(2) *The American Journal of International Law*, 1953, 254.

lawful purpose.²¹⁰ It is evident that Rukaruku was able to achieve the legitimate purpose without having to kill Anduchencan citizens, thus it has violated the principle of military necessity.

²¹⁰ MELZER, *Targeted Killing in International Law*, OUP 2009, 289.

PRAYER FOR RELIEF

For the foregoing reasons, the Applicant respectfully requests this Honourable Court to adjudge and declare that:

- I. The arbitral award of 2 March 2017 is not valid;
- II. Rukaruku violated Article 6 of the FCN Treaty when the Egart operated in Anduchenca's territorial sea, but Anduchenca did not violate Article 7 of the FCN Treaty when it captured the Egart;
- III. Anduchenca did not violate Article 16 of the FCN Treaty by commissioning and operating the Ibra; and
- IV. Rukaruku violated Article 17 of the FCN Treaty when it attacked the Covfefe and when it captured the Ibra.