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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 RESPONDENT

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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, even if the arbitral award is not valid, 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 by capturing the Egart, which it therefore must return to Rukaruku.

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 and the Rukaruku are two coastal states in the Odasarra Region, without sharing land or maritime boundaries. Rukaruku, a developed nation, has been the dominant power of the region for centuries, while Anduchenca is a developing country.

AFTER WORLD WAR II

After World War II, the undamaged Rukaruku provided economic aid to Odasarran states and deployed its Navy to ensure safety of navigation. It shared the maritime data it collected with all other states.

Anduchenca and Rukaruku signed a bilateral Treaty of Friendship, Commerce and Navigation in 1947. In the following twenty years, Rukaruku provided significant economic aid to Anduchenca, partially earmarked to disarmament programs.

In 1967, General Rafiq Tovarish was installed as Anduchenca's leader. As the state adopted a socialist ideology and developed its military, Rukaruku terminated its economic assistance to Anduchenca.

MARITIME SECURITY LAW

In August 2010, Anduchenca adopted a maritime security law requiring foreign government vessels to obtain prior authorization to enter its territorial waters. Rukaruku, although objected to the law, ordered its vessels to remain at least 12 nautical miles away from the Anduchencan coast.

AUTONOMOUS UNDERWATER VEHICLES

In August 2015, Rukaruku began employing autonomous underwater vehicles (AUVs), which navigate autonomously for one week, then return to the ship which deployed them. AUVs were programmed to respect Anduchencan territorial waters.

General Tovarish declared that Anduchenca would not tolerate espionage in its waters, and 'spy drones' would be captured and not returned.

THE CAPTURE OF THE EGART

On 29 October 2017, Anduchenca has taken possession of a Rukarukan AUV, the Egart, which was collecting optical and acoustical data 11 nautical miles from the coast. It was directed to the shore by jamming its communication links and transmitting false GPS signals. Rukaruku stated that the AUV, was operating lawfully it was collecting data to ensure the safe passage of all ships. Rukaruku's formal demand for the return of the Egart remained unanswered.

THE ARBITRATION

On 20 December 2017, Rukaruku instituted arbitration proceedings against Anduchenca under the FCN Treaty. Rukaruku claimed that capturing the Egart violated the Treaty, therefore, it requested its return from the tribunal. Anduchenca did not respond. Rukaruku named Judge Moyet as arbitrator. As Anduchenca did not appoint anyone, the President of the ICJ, Judge Bacal appointed Judge Tong on behalf of Anduchenca and herself as the presiding arbitrator. Anduchenca declared in a Note Verbale, that it would not participate in the arbitration proceedings, nor recognize the validity of any award from it. The tribunal decided to continue the proceedings in absence of Anduchenca, treating the Note Verbale as an objection to its jurisdiction. The tribunal rendered its award on 2 March 2017, affirming its jurisdiction and

concluding that the capture of the Egart violated the FCN Treaty and ordered its return. Anduchenca considered the award 'null and void'.

THE 'ILSA' REPORT

The Institute for Legal Studies of Arbitration published a report on 21 March 2017, finding that the jurisdictional holding was 'questionable and insufficiently supported'. It revealed three pieces of information. Transcripts of private telephone calls proved that at the request of Mr. Chivo, a Rukarukan counsel, Judge Moyet agreed to emphasize certain Rukarukan arguments to the other judges. It was also disclosed that an 'assistant', Mr. Orvindari, who billed 522 hours on the case, was hired by the tribunal without disclosing it to the parties. Finally, a draft award, identical to the final version, was discovered with a note from Judge Tong to President Bacal, stating that he has nothing to add to Mr. Orvindari's draft. Rukaruku declared that the award is lawful, as Mr. Chivo was acting on his own initiative, and there was no serious irregularity in the proceedings or in the award.

THE ANDUCHENCAN SUBMARINE

The *Sydney Morning Herald* revealed the existence of the Ibra, Anduchenca's nuclear-armed submarine on 2 April 2017. The missiles on board had a range over 5,500 kilometres, capable of accurately striking targets throughout the region. The information was confirmed a week later by General Tovarish. He added that Anduchenca, which had sent a representative to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons at the end of March 2017, would not attend the second session and would not sign any treaty emerging from the meetings. Anduchenca issued a statement on 23 April 2017, voicing that the Ibra is not a threat to peace and security, and would never give up the possession of nuclear weapons.

THE RESOLUTION OF THE SECURITY COUNCIL

On 8 May 2017, the Security Council, in the presence of Anduchenca, adopted Resolution 3790, calling upon member states to restrict the proliferation of nuclear weapons and support the implementation of the Treaty on the Non-Proliferation of Nuclear Weapons [NPT]. It also deemed the Ibra a threat to international peace and security, and authorized member states to take measures to neutralize its threat.

Anduchenca denied the authority of the Security Council in this regard and denied that the Ibra would pose any threat. Anduchenca also declined that the Security Council could require compliance with the NPT, and stated that the resolution had not authorized any coercive measures.

THE ATTACK ON THE COVFEFE

On 6 June 2017, Rukarukan warships fired cruise missiles at the Covfefe, a supply ship, after six unsuccessful attempts to communicate via radio. The Covfefe was located on the high seas, delivering provisions and personnel to the Ibra. 10 Anduchencan sailors and 7 civilians, employed by a private contractor, were killed, no survivors were found. On the same day, the Rukarukan Prime Minister declared that he ordered the attack, under the authorization of Resolution 3790 to neutralize the threat of the Ibra. It aimed to deprive the Ibra of its supplies, to force it to the surface and capture it. General Tovarish responded that the Security Council did not authorize the killing of civilians and military personnel.

THE CAPTURE OF THE IBRA

On 14 June 2017, the Ibra was encircled by Rukarukan warships 20 nautical miles from the Anduchencan Coast. It was forced to the surface by torpedoes, then a boarding party seized control of the submarine. The personnel on board surrendered immediately. The Ibra was taken

to a naval base and the crew after questioning was returned to Rukaruku. On 19 June 2017, the Security Council affirmed an agreement between Rukaruku, the International Atomic Energy Agency and nuclear-weapon states to dismantle the Ibra. The agreement was carried out six weeks later. It was also found that the nuclear weapons had been manufactured in Anduchenca.

RATIFICATION OF INTERNATIONAL TREATIES

Both Anduchenca and Rukaruku have been Member States of the United Nations and parties to the Statue 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 at all relevant times a non-nuclear-weapon State Party to the NPT and a State Party to United Nations Convention on the Law of the Sea. Neither Anduchenca nor Rukaruku has signed, ratified or acceded to any of the four Geneva Conventions on the Law of the Sea of 1958.

SUMMARY OF PLEADINGS

THE VALIDITY OF THE ARBITRAL AWARD

The arbitral award of 2 March 2017 is valid. First, there was no manifest excess of powers as the Tribunal had jurisdiction based on Article 10(a) of the FCN Treaty. Furthermore, as an annulment forum, the Court's standard of review is limited. Second, the conduct of Judge Moyet does not amount to a serious departure from a fundamental rule of procedure as he was impartial in the proceedings. Importantly, Judge Moyet was neither corrupt during the arbitration. Third, the contribution of Mr. Orvindari to the arbitral proceedings does not render the award invalid as his appointment was in accordance with international law and his contribution to the drafting was not excessive. Even in case of procedural violations the principle of finality prevails.

THE OPERATION AND CAPTURE OF THE EGART

Rukaruku did not violate the sovereignty of Anduchenca as the Maritime Security Law is contrary to international law, and therefore the Egart did not have an obligation to comply with it. Furthermore, the Egart operated under Article 7 FCN Treaty as the Egart was entitled to innocent passage and its passage was innocent. Even if the Egart's passage was not innocent, it was lawful. Therefore, by operating under Article 7 FCN Treaty, the Egart was prevented from breaching Article 6. On the other hand, the capture of the Egart violated Article 7 FCN as Anduchenca deprived it from innocent passage. Moreover, the Egart was in the territorial waters due to technical error or Anduchenca's operation. In any event, the Egart enjoyed immunity. Importantly, there was no material breach on the side of Rukaruku which would justify Anduchenca's non-compliance with Article 7 FCN Treaty. Furthermore, the wrongfulness of Anduchenca cannot be precluded by invoking countermeasures. Therefore, the Egart must be returned to Rukaruku.

THE COMMISSION AND THE OPERATION OF THE IBRA

Anduchenca is under the obligation of nuclear disarmament, therefore commissioning and operating the Ibra violated Article 16 of the FCN Treaty. Firstly, Anduchenca is under the obligation of nuclear disarmament by virtue of Security Council Resolution 3790, as it fulfils the criteria of a legally binding resolution, and imposes the provisions of the NPT upon Anduchenca. In any case, Anduchenca is under the obligation of nuclear disarmament, as it has become part of customary international law. Anduchenca cannot be considered a persistent objector to this obligation, as her objection was not persistent. Nuclear disarmament is an obligation of result, therefore, the augmentation of a nuclear arsenal is contrary to it. Should the Court find that the obligation is one of conduct, at a minimum it requires Anduchenca to enter into disarmament negotiations with a view to arriving at an agreement, which she failed to do.

ATTACKING THE COVFEFE AND CAPTURING THE IBRA

Rukaruku rightfully resorted to the use of force, and therefore did not violate Article 17 of the FCN Treaty, when attacking the Covfefe or capturing the Ibra. Rukaruku was acting under Security Council authorization, as Security Council Resolution 3790 authorized Member States to take all measures commensurate with their specific circumstances in confronting the Ibra. Rukaruku's acts were within the resolution's mandate. Alternatively, Rukaruku was acting in self-defence. Anticipatory self-defence is part of customary international law, therefore Rukaruku's attacks on the Covfefe and the Ibra were justified as a necessary and proportionate response to the imminent threat posed by the Ibra. International humanitarian law has no bearing on the legality of Rukaruku's use of force, as *jus ad bellum* and *jus in bello* are distinct bodies of law. In any case, Rukaruku acted in compliance with international humanitarian law, as she complied with the principles of distinction and proportionality, and acted in military necessity.

PLEADINGS

I. THE ARBITRAL AWARD OF 2 MARCH 2017 IS VALID.

The finality of arbitral awards is a general principle of international arbitration ensuring the certainty and integrity of the arbitral process.[1] Awards can be annulled in exceptional cases to ensure the effectiveness of the procedure.[2]

The validity of an award may be challenged in case of (1) manifest excess of powers, (2) corruption on the part of a member of the tribunal, (3) a failure to state reasons or a serious departure from a fundamental rule of procedure, or (4) if the undertaking to arbitrate is null.[3] As Anduchenca cannot successfully invoke these grounds, the award of March 2, 2017 is valid.

A. There was no manifest excess of powers as the Tribunal had jurisdiction based on Article 10(a) of the FCN Treaty.

The ICJ's standard of review is limited when determining the validity of the Award. It shall find that the Tribunal did not manifestly exceed its powers since it properly determined its jurisdiction.

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 330 U.N.T.S. 38; LALIVE, Absolute Finality of Arbitral Awards? ICCA, 5; REDFERN–HUNTER, Law and Practice of International Commercial Arbitration 318, 1986, 387-405.

[2] *Eco-Swiss v Benetton International*, 1 June 1999, C-126/97, CJEU, ¶35.

[3] ILC Model Rules on Arbitral Procedure with a general commentary, 1958, Article 35; ICSID Convention, Article 52(1); *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']; *Arbitral Award of 31 July 1989*, I.C.J. Reports 1991, 53 ['Guinea-Bissau v Senegal'].

1. The Court's standard of review is limited.

Rukaruku instituted arbitration by claiming that Anduchenca violated Article 7 FCN by capturing the Egart.[4] The Tribunal determined its jurisdiction and ruled in favor of Rukaruku.[5]

When assessing the validity of the Award, the ICJ acts as an annulment forum, therefore it is not allowed to reconsider how the Tribunal interpreted the FCN Treaty when deciding upon its jurisdiction. Such reconsideration would fall in the competence of an appeal court.[6] This distinction was crystallized by the Court in *King of Spain*[7] and *Guinea-Bissau v Senegal.*[8] In the latter, the Court stated that the ICJ's scope of review is limited only to ascertain whether the tribunal acted in manifest breach of its competence.[9] Consequently, the Court is permitted only to decide whether the Tribunal *prima facie* manifestly exceeded its powers when stating that the issue falls under Article 7.

2. There was no manifest excess of powers on the side of the Tribunal.

Manifest excess means an obvious and clear breach of competence,[10] which must be decided by interpreting the arbitration agreement according to its natural and ordinary

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[4] C(20).

[5] C(26)(27).

[6] *Amco v. Indonesia*, ICSID, ARB/81/1, First Annulment Decision, ¶23.

[7] *King of Spain*, 214.

[8] *Guinea-Bissau v Senegal*, ¶47.

[9] *Ibid*; *Impregilo S.p.A. v. Argentine Republic,* ICSID, ARB/07/17 ['Impregilo'] ¶140; *SGS v Paraguay*, ICSID, ARB/07/29, ¶¶119, 130.

[10] DOLZER–SCHREUER, Principles of International Investment Law, 2012, 305.

meaning.[11] Under Article 10(a) FCN, the Tribunal's jurisdiction is defined in relation to the interpretation or application of Articles 1 to 9 FCN. The Tribunal would have manifestly exceeded its competence only if it is obvious that the dispute does not fall under Article 7.

The Tribunal properly decided the dispute to concern the interpretation and application of Article 7 *prima facie,* because (1) Article 7 codifies freedom of navigation, (2) the Egart conducted navigational activities in Anduchencan territorial waters, and (3) the Parties disputed the lawfulness of such activities.[12]

Additionally, all procedural requirements were safeguarded, since Anduchenca consented to the arbitration by the Arbitration clause,[13] and the Tribunal ensured all procedural requirements regarding Anduchenca's non-appearance.[14]

B. The conduct of Judge Moyet and Mr Chivo does not render the award invalid.

1. There was no serious departure from a fundamental rule of procedure as Judge Moyet was impartial in the proceedings.

Arbitrators must be independent and impartial during the proceedings.[15] Although the lack of impartiality may be ground for annulment if it amounts to a serious violation,[16] the standard is much higher than those applicable to challenging an arbitrator.[17]

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[11] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, 8; Vienna Convention on the Law of Treaties ['VCLT'], Articles 31-32.

[12] C(19)(26).

[13] C(23); SCHREUER, Consent to Arbitration, OUP 2007, 1.

[14] C(20)(22)(25).

[15] IBA Guidelines on Conflict of Interest in International Arbitration, IBA, 2014; LAWSON, Impartiality and Independence in International Arbitration, ASA Bulletin, Volume 23, Kluwer 2005, 23.

Ad hoc tribunals assessed the threshold of seriousness on several instances.[18] A departure qualifies as serious if it is more than minimal and caused the tribunal to render an award substantially different from what it would have awarded had the rule been observed.[19]

The threshold of impartiality is not met with the mere appearance of bias, but bias that is direct, definite and capable of demonstration, rather than remote, uncertain, or speculative.[20]

In *Croatia v. Slovenia*, a landmark case in this respect, the PCA pronounced the violation of the impartiality requirement.[21] However, this case must be distinguished from the present one, as Slovenia's agent provided the arbitrator with arguments, facts and documents, while receiving draft summaries of the Parties' arguments and information about deliberation.[22] These facts and arguments were proved to be communicated to the Tribunal.[23]

Anduchenca cannot point to any evidence that Judge Moyet had influence on the Tribunal,

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[16] New York Convention, ICSID Convention, Model Rules, *MINE v. Guinea*, Decision on Annulment, 22 December 1989 ['MINE'] ¶4.06.

[17] *Nordström/Nievelt Goudriaan & Co.*, Dutch Supreme Court, 18 February 1994, 765; TSOUMPAS, Second Circuit Adopts "Abundantly Clear" Standard for Evidence of Corruption Under the Federal Arbitration Act, Debevoise Arbitration Quarterly, Issue 4, Dec 2013, 10.

[18] *CDC v. Seychelles*, Annulment, 29 June 2005, ¶49; *Wena Hotels v. Egypt*, Annulment, 5 February 2002, ¶58; *MINE*, ¶5.05-06; *Fraport*, ¶186.

[19] SCHREUER et al, The ICSID Convention: A Commentary, 2nd ed., CUP, 2009 ['ICSID Commentary'], 982; *Wena Hotels v. Egypt*, ¶58; *CDC v. Seychelles*, ¶49; *Impregilo*, ¶164; *Micula*, ¶134.

[20] *Morelite Const. Corp. v. NYC Dist. Council Carpenters Benefit Funds*, 748 F.2d, 82 (2d Cir. 1984) 83, *Reed Martin*, 439 F.2d, 1275.

[21] *Croatia v Slovenia*, Partial Award, PCA, ¶175.

[22] *Ibid.*, ¶¶173-174.

[23] *Ibid.*, ¶169.

and no such exchange of information took place between him and Mr Chivo. Thus, the Court must declare that Judge Moyet was not impartial and the proceedings were not tainted.

2. Judge Moyet was not corrupt in the proceedings.

Corruption means improper conduct by an arbitrator induced by personal gain.[24] Its threshold is higher than for impartiality, since the fact of corruption must be established and not inferred to constitute a ground for annulment.[25] If the arbitrator is merely biased towards a party's arguments, without improper payment, such circumstances cannot be regarded as corruption.[26]

In *Kolel*, the court ruled out corruption allegations by stating that a party must show abundantly clear evidence of arbitrator corruption and base bias on clear and convincing evidence.[27] Furthermore, the court based its decision on the lack of any proof of gain on the side of arbitrator Kaufmann.[28]

Corruption is not well-founded since Anduchenca (1) cannot establish any causal link between the phone calls and the award's substance, and (2) cannot prove financial or other gain on the side of Judge Moyet.

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[24] ICSID Commentary, 978.

[25] *Ibid.*

[26] *Ibid.*

[27] *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust et al.*, 729 F.3d 99 ['Kolel'] 106; *Karppinen v. Karl Kiefer Mach. Co.,* 187 F.2d 32, 34.

[28] *Kolel*, 106.

C. The contribution of Mr Orvindari to the arbitral proceedings does not render the award invalid.

1. The appointment of Mr Orvindari was in accordance with international law.

Assistants may be appointed in arbitrations,[29] and Parties have a possibility to exclude their appointment.[30] This appointment right is part of the best practices of international arbitration,[31] since leading arbitration rules include such provisions[32] and States apply them in arbitrations.[33] As the *ad hoc* rules did not contain any provisions concerning arbitral assistance,[34] they did not rule out the possibility of applying one. Whereas, it remains a widespread practice to have tribunal assistance without formal appointment.[35]

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[29] UNCITRAL, Notes on Organizing Arbitral Proceedings 1996, ¶27; *Clement C. Ebokan v. Ekwenibe & Sons Trading Co*., 2001, 2 NWLR 32; BORN: International Commercial Arbitration, Kluwer 2014, 2045; TERCIER, 'The Role of the Secretary to the Arbitral Tribunal' in NEWMAN–HILL, The Leading Arbitrators' Guide to International Arbitration, Juris 2014, 531, 544.

[30] FEIT–CHASSOT, The Swiss Federal Supreme Court Provides Guidance on the Proper Use of Arbitral Secretaries and Arbitrator Consultants under the Swiss lex arbitri, ASA Bull. 4/2015, 879 ['FEIT–CHASSOT'] 902.

[31] ICCA, Young ICCA Guide on Arbitral Secretaries, ICCA Reports No. 1, 2014, vii; VOSER, Harmonization by Promulgating Rules of Best International Practice in International Arbitration, SchiedsVZ 113, 2005, 116.

[32] 2012 ICC Note on Secretaries; JAMS Guidelines for Tribunal Secretaries; 2013 FAI Note on Secretaries; 2014 HKIAC Guidelines on Secretaries; 2015 SIAC Practice Note; 2015 LCIA Notes.

[33] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA, AA 226 ['Hulley']; *Methanex Corporation v. United States*, Final Award, 44 ILM 1345, 3rd August 2005, UNCITRAL.

[34] Clarifications, ¶3.

[35] Young ICCA Guide, 5; SHAUGNESSY-TUNG, The Powers and Duties of an Arbitrator: The Problem of Undisclosed Assistance to Arbitral Tribunals, Kluwer Arbitration 2017, 163.

In *Yukos*, the Russian Federation requested annulment partly for the non-disclosure of appointment, however the court did not even address this submission.[36] Thus, an award is not rendered *ab ovo* invalid for non-consultation with the parties.

In a factually similar case, the Swiss Supreme Court ruled that disclosure of appointment to the parties is not obligatory if it is not established in the *ad hoc* rules.[37] The present *ad hoc* rules did not involve such restriction.[38]

Consequently, Mr. Orvindari's appointment cannot serve as ground for non-validity, since (1) the Parties did not rule out such possibility, (2) the Tribunal did not address the exclusion of assistance in the *ad hoc* rules, (3) there is no applicable rule requiring the parties' consent, and (4) case law exemplifies similar practice of tribunals.

2. The contribution of Mr. Orvindari to the draft was not excessive.

Mr. Orvindari's contribution was lawful and proportionate since (1) there is no proof that the decision of the Tribunal was influenced substantially in any way by Mr. Orvindari, and (2) it is accepted in international arbitration to have the assistant prepare the first draft.

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[36] The Russian Federation v. VPL, YUL and Hulley Enterprises, Hague District Court, 20 April, 2016.

[37] Swiss Federal Supreme Court, DFC Case No. 4A_709/2014 ['Swiss case']; MARGUERAT–BLAKEMORE, 'Note: A. SA v. B. Sàrl, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, Case No. 4A_709/2014, 21 May 2015', Kluwer 2016, Volume XIII Issue 52, 199–205, ['Note on the Swiss case'] 203; FEIT–CHASSOT, 907-908.

[38] Clarifications, ¶3.

In the *Swiss case*, secretary contribution was deemed lawful since the arbitrator himself decided the case, without any influence by the secretary.[39] Analogically, there is no evidence that Mr. Orvindari influenced the tribunal's decision-making.

Furthermore, legal scholars distinguish between secretaries and assistants, enabling assistants to be involved in more substantial matters.[40] Their substantial and draft preparation involvment was accepted by legal scholars[41] and is evidenced by case law.[42] As assistant, draft preparation fell in Mr. Orvindari's competence.[43] This, however, does not mean that he was involved in the decision-making process. A similar reasoning was accepted in *ConocoPhillips v Venezuela* in relation to *Yukos*.[44] Although the Tribunal impermissibly allowed the secretary to participate in the deliberations, the court did not annul the ICC award.[45] Accordingly, the validity of the award cannot be contested for assistant involvement.

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[39] Note on the Swiss case, 203.

[40] *Yukos* case, Expert Opinion of Professor Bermann, ¶83.

[41] Young ICCA Guide – 2012 Survey; HKIAC, Guidelines on the Use of a Secretary to the Arbitral Tribunal, 2014, Articles 3.4-3.6:

[42] *Hulley,* ¶78; *Methanex*, 1345.

[43] International Disputes Committee–Committee on Arbitration of the NY Bar, Secretaries to International Arbitral Tribunals, 17 ARIA, 575, 2016, 584-85; HYANG, Introduction: Musings on International Arbitration, 16 SIAC 2013; JAMS, Guidelines for Use of Clerks in Arbitrations, May 5, 2012.

[44] *ConocoPhillips v Venezuela*, ICSID, ARB/07/30, December 15, 2015, ¶40.

[45] *Sonatrach v Statoil*, EWHC 875 (2 April 2014), ¶¶46–50.

D. Even in case of procedural violations, the principle of finality prevails.

In inter-state arbitration, the principle of finality takes precedence over the principle of correctness.[46] Courts and tribunals elaborated on the balance of the standards on several instances.

In *CDC*, the award was not annulled in the lack of any evidence that procedural violations prejudiced the Seychelles.[47] In *Soufraki*, the tribunal set a high threshold for annulment by holding that it can be resorted to only when egregious violations of basic principles take place.[48] The tribunal explained such a restrictive interpretation with the ultimate goal of preserving the finality of the award.[49] In *Loewen v United States*, the court stated that an award has to satisfy only the minimum standards since "mistakes and errors will occur" even before the most even-handed judge, and international law neither anticipates "perfect trials."[50] Additionally, even if an annullable error is found, the tribunal has discretion to consider annulment based on the significance of the error relative to the rights of the Parties.[51]

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[46] TZENG, The Annulment of Interstate Arbitral Awards, July 1, 2017, Kluwer Arbitration; SCHMITTHOFF, Finality of Arbitral Awards and Judicial Review, Lew ed. 1986, 235; ICSID Commentary, 903; *Dogan*, ¶28.

[47] *CDC*, ¶¶63-65.

[48] *Soufraki,* ¶¶27-28.

[49] *Ibid; Tidewater,* ¶¶123-124.

[50] *Loewen v. United States*, ICSID, ARB(AF)/98/3, ¶¶120, 137; KOTUBY–SOBOTA, General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes, OUP 2017, 77.

[51] *Vivendi*, ¶66; *Dogan*, ¶25; *MINE*, ¶4.10.

Even if Anduchenca proves procedural violations, they are not significant enough to be a ground for annulment as (1) their substantial influence on the award lacks evidence, and (2) they were not proved to provide Rukaruku with advantage regarding the arbitration.

II. EVEN IF THE ARBITRAL AWARD IS NOT VALID, RUKARUKU DID NOT VIOLATE ARTICLE 6 OF THE FCN TREATY WHEN THE EGART OPERATED IN ANDUCHENCA'S TERRITORIAL SEA, BUT ANDUCHENCA VIOLATED ARTICLE 7 OF THE FCN TREATY BY CAPTURING THE EGART, WHICH IT THEREFORE MUST RETURN TO RUKARUKU.

Anduchenca is obliged to return the Egart due its wrongful capture since, *first,* Rukaruku did not have an obligation to have authorization under the Maritime Security Law, and *second,* Anduchenca interfered with innocent passage lawfully exercised by the Egart. Furthermore, Anduchenca cannot prove the existence of a material breach on the side of Rukaruku, and cannot preclude her wrongfulness by invoking countermeasures.

A. Rukaruku did not violate the sovereignty of Anduchenca.

1. The MSL is contrary to international law, and therefore the Egart did not have an obligation to comply with it.

Under the United Nations Convention on the Law of the Sea (UNCLOS), States' right to adopt laws relating to innocent passage is subject to restrictions.[52] *First*, such laws may restrict the right of innocent passage only on limited grounds.[53] *Second*, they shall not hamper innocent passage by posing requirements denying or impairing the right.[54]

Rukaruku is entitled to innocent passage based on the customary rules of UNCLOS[55] and Article 7 FCN on freedom of navigation. The MSL is contrary to both requirements which

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[52] UNCLOS, Article 21(1).

[53] *Ibid.*

[54] UNCLOS, Article 24(1).

[55] ROACH, Today's Customary International Law of the Sea, ODIL, 2014, 239-259, 242; CRAWFORD, Brownlie's Principles of Public International Law, 8th ed., OUP 2012, 265.

results in Anduchenca's wrongfulness and Rukaruku's justified non-compliance. *First*, because Anduchenca failed even to mention any of the listed reasons in the Article[56] for the implementation of the MSL.[57] *Second*, leading maritime powers interpret UNCLOS as not allowing parties to require prior authorization, not even from warships entering territorial waters.[58] In case of other government vessels, the obligation to obtain consent would imply the possibility of denial,[59] and thereby hamper the essence of innocent passage.[60] Anduchenca rendered innocent passage purposeless when depriving foreign States of the presumption of innocence in territorial waters.[61]

The test of *reasonableness* should be applied to decide whether a coastal state regulation impairs and denies innocent passage.[62] A decision is unreasonable if it '*plainly and unambiguously flies in the face of fundamental reason and common sense.*'[63] MSL's requirements were not reasonable, as no government vessel threatened Anduchenca's national security or navigation.

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[56] UNCLOS, Article 21(1).

[57] C(12).

[58] 1989 USA-USSR Joint Statement, 23 September, 1989, ¶2; Declarations of Germany, Italy, the Netherlands to the UNCLOS; KAYE, The Innocent Passage of Warships in Foreign Territorial Seas: A Threatened Freedom, 15 SDLR, 1978, 573, 578-80.

[59] HAKAPÄÄ–MOLENAAR, Innocent Passage: Past and Present, 23 Marine Policy 131 (1999), 138.

[60] UNCLOS, Article 24(1).

[61] AGYEBENG, Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea, Cornell Law, 18.

[62] MOLENAAR, Coastal State Jurisdiction Over Vessel Source Pollution (1998), 202.

[63] *The State (Keegan) v. The Stardust Victims Compensation Tribunal* (1986) I.R. 642.

Consequently, lacking prior authorization obligation, Rukaruku did not violate Anduchenca's sovereignty and Article 6 by entering the territorial sea.

2. The Egart operated under Article 7 FCN.

The Egart was entitled to innocent passage.

Article 7 FCN codifies CIL as freedom of navigation in the territorial sea is embodied in the customary right of innocent passage,[64] provided to all ships under Article 17 UNCLOS. UNCLOS uses the terms ship and vessel interchangeably.[65] AUVs are either considered components of support ships, or construed as vessels outright.[66] Interpreting UNCLOS in light of state practice, the customary status of UNCLOS results in AUVs entitlement to rights under the Convention.[67]

As 'freedom of navigation' evolved since the FCN's conclusion, the material scope of Article 7 must be interpreted evolutionarily to include the operation of the Egart. Rules of

[64] Statement by ITLOS President Wolfrum, Freedom of navigation: New challenges, 2.

[65] PROELSS, UNCLOS: A Commentary, 1st edition, Beck/Hart, 2017 ['PROELSS'] 180; SCHMITT–GODDARD, International Law and the Military Use of Unmanned Maritime Systems, IRRC (2016), 98(2), ['SCHMITT–GODDARD'] 575.

[66] HENDERSON, Murky Waters: The Legal Status of Unmanned Undersea Vehicles, NAVLR 2006, 6.

[67] SCHMITT–GODDARD, 578; DoD, Office of the General Counsel, Law of War Manual, December 2016, 13.1.2.

interpretation in VCLT codify CIL.[68] The Court applied evolutionary interpretation to safeguard the developments of international law.[69]

In *Aegean Sea,* the Court stated that the meaning of a generic term was intended to follow the evolution of law.[70] Article 7 FCN must include regular naval operations of AUVs in order to correspond to technological advancements and the customary rules of UNCLOS.[71]

The passage of the Egart was innocent.

A vessel engages in innocent passage so long as it is not prejudicial to the peace, good order or security of the coastal state.[72] Article 19(2) UNCLOS objectively defines this condition.

The Egart was not collecting data prejudicial to the defence and security of Anduchenca.[73] The Egart collected optical and acoustic data to ensure the safe passage of all ships.[74] This collection goal fulfills the requirement of the activity to have direct bearing on the passage.[75] As the US emphasized in the *Black Sea Bumping* case, only unusual intelligence gathering renders

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[68] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion), ITLOS, 1 February 2011, ¶57; *Loizidou v Turkey*, 15318/89, ECHR 1996-VI ['Loizidou'] ¶43.

[69] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) *notwithstanding Security Council Resolution 276*, Advisory Opinion, I.C.J. Reports 1971 ['Namibia'] ¶53; *Kasikili/Sedudu Island* (Botswana/Namibia), I.C.J. Reports 1999, ¶25.

[70] *Aegean Sea Continental Shelf* (Greece v. Turkey), I.C.J. Reports 1978, ¶77.

[71] VCLT Commentary, 535; *Loizidou* (Preliminary Objections), ¶71.

[72] UNCLOS, Article 19(1).

[73] UNCLOS, Article 19(2)(c).

[74] C(17).

[75] UNCLOS, Article 19(2)(l).

the passage non-innocent.[76] The Egart engaged in intelligence operations to promote the region's safety.[77]

Additionally, since the obligation to operate on the surface is regulated under a separate article from the innocence of passage,[78] the submerged nature of vehicles was not intended to render passage non-innocent.[79] State practice further shows the non-compliance of states with this obligation.[80] Therefore, even if the Egart operated submerged, it does not result in its non-innocence.

Even if the Egart's passage was not innocent, it was lawful.

States are allowed to do anything not prohibited under international law.[81] The Egart's passage was lawful since neither non-innocent passage, nor peacetime surveillance activities are prohibited under international law.

If an underwater vehicle engages in non-innocent passage, it opens the possibility for the coastal state to act in accordance with UNCLOS. [82] However, this possibility does not render the

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[76] HITT, Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea, 29 VJIL 713 (1989) 738.

[77] C(17).

[78] UNCLOS, Articles 19-20.

[79] FROMAN, Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea, SDLR 21 (1983), 663; SADURSKA, Foreign Submarines in Swedish Waters: The Erosion of an International Norm, YaleJIntL 10, 1984-1985, 34, 57; TREVES, Navigation, in DUPUY–VIGNES, A Handbook on the New Law of the Sea, vol. II, 1991, 928.

[80] PROELSS, Article 20.

[81] *S.S. Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, 18-20.

[82] KRASKA, Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters, CJTL 54, 2015 ['KRASKA'] 226.

passage unlawful.[83] Similarly, neither CIL, nor UNCLOS requires AUVs to navigate on the surface as a general obligation.[84] The treaty only excludes submerged vehicles from innocent passage.[85]

Should the Court find the activities of the Egart not innocent, it does not render them unlawful under international law. States engage in peacetime intelligence gathering to ensure national security[86] which is not regarded as a violation of international law.[87] According to scholarly opinion[88] and State practice,[89] States are entitled to conduct surveillance activities due to the lack of any positive rule on peacetime espionage. This form of espionage is not regulated in the law of the sea context either.[90] Therefore, even if the Egart conducted intelligence activities submerged, the activities were lawful.

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[83] KRASKA, 227.

[84] *Ibid.*

[85] *Ibid.*

[86] MCDOUGAL–LASSWELL–REISMAN, The Intelligence Function and World Public Order, 46 TEMPLE L.Q., 367.

[87] FLECK, Individual and State Responsibility for Intelligence Gathering, 28 MJIL, 2007, 687, 687–88; BRIERLY, The Law of Nations, Waldock ed., 1963, 59–61.

[88] PARKS, The International Law of Intelligence Collection, NSLJ, 433, 433–34; RADSAN, The Unresolved Equation of Espionage and International Law, 28 MJIL, 2007, 595.

[89] SMITH, Symposium: State Intelligence Gathering and International Law, 28 MJIL, 2007, 544.

[90] Letter from J.M. McConnell, Director of National Intelligence, to Senators Rockefeller IV and Bond (Aug. 8, 2007), Exec. Rep. 110-9, 32-33; Statement of William H. Taft, the Committee on Intelligence, June 8, 2004, Rep. 110-9, 34-37.

3. By operating under Article 7 FCN, the Egart was prevented from breaching Article 6.

Freedom of navigation is a legitimate restriction on State sovereignty.[91] As a result, Article 7 FCN serves as a limit for the rights under Article 6 FCN. In *Costa Rica v. Nicaragua*, Nicaragua could only exercise its sovereignty to the extent that it did not prejudice Costa Rica's right of free navigation.[92] The Egart was prevented from violating the sovereignty of Anduchenca, as it exercised free navigation under Article 7 in accordance with the FCN Treaty.

B. The capture of the Egart violated Article 7 FCN.

1. Anduchenca deprived the Egart from innocent passage.

As argued above, the Egart exercised its right to innocent passage lawfully. Therefore, the capture of the Egart constitutes a violation of the freedom of navigation in Article 7.

2. The Egart was in territorial waters due to a technical error or Anduchenca's operation.

The Egart was programmed to remain outside territorial waters, therefore its entry was not a result of a Rukarukan order.[93] Rather, a technical error or Anduchenca's own operation caused its presence, as she admitted having transmitted false GPS coordinates.[94] In any event, this technical error or GPS interference could not result in illegal intelligence gathering, merely in the Egart's presence in territorial waters.

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[91] NGANTCHA, The Right of Innocent Passage and the Evolution of the International Law of the Sea, 1990, 38.

[92] *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), Judgment, I.C.J., 2009, 213, 28.

[93] C(17).

[94] C(16).

3. In any event, the Egart enjoyed immunity.

Should the Court find the passage not innocent, Anduchenca violated and is continuously violating CIL by applying a disproportionate and inappropriate legal consequence. Under CIL, governmental AUVs operated for non-commercial purposes enjoy the same immunity as warships,[95] and are shielded from enforcement jurisdiction.[96] Anduchenca could only have called upon the Egart to leave territorial waters.[97] This position was articulated by the US in the *Pueblo*[98] and *Bowditch* incidents.[99] In the latter, the AUV was indeed returned.[100] Consequently, the capture violated the Egart's sovereign immunity.

C. There was no material breach on the side of Rukaruku which would justify Anduchenca's non-compliance with Article 7 FCN.

1. Rukaruku did not breach Article 6 FCN.

The Egart's capture cannot be justified by the suspension of the FCN Treaty since Rukaruku did not breach, much less materially breached Article 6 FCN.[101] In the lack of a breach

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[95] SCHMITT–GODDARD, 580; US Navy, US Marine Corps–US Coast Guard, The Commander's Handbook on the Law of Naval Operations, 2007, ¶2.3.6; *"ARA Libertad" Case*, ITLOS, 15 December 2012, ¶95 and Separate opinion of Judges Wolfrum and Cot, ¶43, 47–50.

[96] UNCLOS, Article 32; KRASKA, 231.

[97] SCHMITT–GODDARD, 580; UNCLOS, Article 30; KRASKA, 231; HAKAPÄÄ, Innocent Passage, MPEPIL, 2013, ¶33.

[98] The "Pueblo" Seizure: Facts, Law, Policy, 63 AM.SOC'YINT'LL.PROC. 1969, 1, 1–2.

[99] Statement by Pentagon on Incident in South China Sea, US DoD, 16 December 2016; United States Confronts China over Seizure of Unmanned Drone in the South China Sea, AJIL April 2017, 514.

[100] SCHMITT AND GODDARD, 568.

[101] VCLT, Article 60(1).

of Article 6, the condition in Article 60 VCLT was not met. Consequently, Anduchenca is erred in invoking suspension for justifying its failure to accord the Egart the right to freedom of navigation.

2. Even if Rukaruku breached the Treaty, it was not material.

Only a material breach entitles a party to unilaterally suspend treaty obligations. A material breach is (1) an unsanctioned repudiation of the treaty, or (2) the violation of a provision essential to the accomplishment of the object or purpose.[102]

First, the object and purpose[103] of the FCN Treaty is ensuring perpetual peace and stability, and encouraging mutually beneficial trade.[104] The Egart's operation was part of Rukaruku's program promoting safety and commerce in the region.[105] *Second*, since the Egart was deployed to ensure the aim of the Treaty,[106] and was operated under Article 7, Anduchenca cannot establish the existence of bad faith. Thus, the alleged breach was not material and cannot convey grounds for unilateral suspension.

D. The wrongfulness of Anduchenca cannot be precluded by invoking countermeasure.

1. Rukaruku did not commit a previous breach of international law.

As Anduchenca cannot substantiate Rukaruku's violation of Article 6 FCN, the condition of Article 49(1) ARSIWA is not fulfilled and Anduchenca's countermeasure is unlawful.

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[102] VCLT, Article 60(3).

[103] *Avena and other Mexican nationals* (Mexico v. United States of America), Judgment, 2004 I.C.J., ¶83; *Pulp Mills*, ¶89; *LaGrand,* ¶99.

[104] Compromis, Annex I.

[105] C(17).

[106] *Ibid.*

Should the Court find that Rukaruku committed a violation of international law, the preconditions of a countermeasure were not met.[107]

2. Anduchenca's response was disproportionate.

Under CIL, proportionality must be observed in the relationship between the IWA and the countermeasure invoked,[108] and countermeasures must be commensurate with the injury.[109] Furthermore, the measure should be "necessary and reasonably connected" with the purpose of countermeasures.[110]

Capturing the Egart was disproportionate since Anduchenca (1) captured the Egart on 29 October, 2015 and did not return it ever since,[111] (2) cannot prove any damage suffered due to the Egart, and (3) – as Anduchenca had no knowledge about the nature of the data when capturing the Egart – the action lacked reasonable connection to the operation.[112]

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[107] ARSIWA, Articles 47-50; *Gabčíkovo* ¶83; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986, ['Nicaragua'] ¶249; ELAGAB, The Legality of Non-Forcible Countermeasures in International Law, OUP 1988, 227–241.

[108] ARSIWA Commentary, 135; *Agreement of 27 March 1946* (United States v. France) 54 I.L.R., 1946, 304.

[109] ARSIWA, Art. 51; *Naulilaa*, UNRIAA, vol. II, 1011 (1928); *Air Services Agreement* ¶83; *Gabčíkovo* ¶¶85, 87.

[110] ARSIWA, Article 49.

[111] C(16).

[112] *Ibid.*

3. Anduchenca's response was not inducing compliance with international law.

The countermeasure should be sufficient to induce the responsible state to comply with its obligations, without having a punitive effect.[113] Countermeasures shall be accompanied by a genuine effort at resolving the dispute.[114]

Anduchenca failed to show any such effort as the actions taken were not for inducing Rukaruku's compliance, but were intended to punish Rukaruku.[115] Since the Egart mistakenly entered the Anduchencan territorial waters,[116] demanding its removal would have sufficed. Conversely, even before the operation of the Egart commenced, General Tovarish had already envisioned the consequences.[117] Accordingly, Anduchenca's countermeasure lacks the intention of inducing compliance.

4. Anduchenca failed to safeguard the procedural obligations.

Under CIL,[118] countermeasures must be preceded by the injured State calling upon the responsible State to comply with its obligations, and an offer to negotiate.[119]

When General Tovarish issued his declaration, the Egart had not yet entered territorial waters.[120] Thus, his statement cannot be interpreted as a demand for compliance under Article

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[113] ARSIWA Commentary, 135.

[114] *Air Services Agreement*, ¶91.

[115] C(15)(16).

[116] C(14)(17).

[117] C(15).

[118] ARSIWA Commentary, 129; *Air Services Agreement*, ¶85-87; *Gabčíkovo,* ¶¶84, 47.

[119] ARSIWA, Art. 52(1)(a-b).

[120] C(15)(16).

52(1)(a). Moreover, Anduchenca did not request Rukaruku to participate in any negotiations, showing lack of intention to cooperate. Therefore, Anduchenca fails to meet the procedural requirements under Article 52 ARSIWA.

E. The Egart must be returned to Rukaruku.

Anduchenca is obliged to make full reparation for breaching Article 7.[121] The adequate form is restitution[122] which is possible through the return of the Egart.

[121] ARSIWA, Article 31; *The Factory at Chorzow*, Judgment No. 8., 1927 P.C.I.J. Series A, No. 9.47.

[122] ARSIWA, Article 35; *Temple Vihear*, ¶36-37.; *Hôtel Métropole*, 1950, UNRIAA, vol. XIII, ¶219.

III. ANDUCHENCA VIOLATED ARTICLE 16 OF THE FCN TREATY BY COMMISSIONING AND OPERATING THE IBRA.

Anduchenca is under the obligation of nuclear disarmament by virtue of Security Council Resolution 3790 (UNSCR 3790). In any case, Anduchenca is bound by the obligation of nuclear disarmament under customary international law. As Anduchenca failed to comply with this obligation, she violated Article 16 of the FCN Treaty.

A. Anduchenca is under the obligation of nuclear disarmament by virtue of Security Council Resolution 3790.

1. UNSCR 3790 is a legally binding Resolution.

The Security Council (SC) has the power to adopt legally binding resolutions in accordance with the Charter of the United Nations (UN Charter).[123] Such resolutions must meet three conditions: *first*, the Resolution must be adopted under Chapter VII of the UN Charter, *second*, it must include a determination of the existence of a threat to peace, and *third*, it must be a decision within the meaning of Article 25 of the UN Charter.[124]

The first two conditions are undoubtedly met, as UNSCR 3790 explicitly states that the SC is „acting under Chapter VII", and it specifically identifies the existence of nuclear weapons as a threat to peace.[125]

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[123] United Nations, Charter of the United Nations, San Francisco, 24 October 1945, 1 U.N.T.S. XVI, Article 25, 41; KRISCH, Chapter VII – Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, in SIMMA–KHAN–NOLTE–PAULUS–WESSENDORF, The Charter of the United Nations: A Commentary, OUP, 2012. Vol. II. 1247.

[124] WOOD, The Interpretation of Security Council Resolutions, Revisited, 20 UNYB, 2017, 14.

[125] UNSCR 3790 (2017) Compromis, Annex II, preamble ¶4, operative ¶1.

Considering the third condition, the Court must assess whether the SC has intended to adopt a binding decision within the meaning Article 25. In order to do so, as stated in the *Namibia Case*, the Court must take into consideration the terms of the resolution.[126] UNSCR 3790 applies the phrase "calls upon"[127], which can imply the SC's intent to carry out a legally binding decision.[128] The SC has adopted numerous resolutions with this phrase that are considered binding,[129] in fact, the resolution deemed by this Court to be binding in the *Namibia Case* also used the phrase "calls upon".[130] Therefore, the third condition is also fulfilled, and UNSCR 3790 qualifies as a legally binding resolution.

2. UNSCR 3790 confers the obligation of nuclear disarmament upon Anduchenca.

The SC has the capacity to impose treaty provisions upon a State, even if that State is not party to that treaty,[131] as it has done so in numerous resolutions.[132] In fact, on one occasion, the SC has imposed the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons

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[126] *Namibia*, ¶114.

[127] UNSCR 3790, operative ¶1.

[128] ORAKHELASHVILI, Collective Security, OUP, 2011, 37-38.

[129] UNSCR 787 (1992) S/RES/787; UNSCR 875 (1993) S/RES/875; UNSCR 1132 (1997) S/RES/1132.

[130] *Namibia*, ¶108.

[131] WOOD, The Law of Treaties and the UN Security Council: Some Reflections, in CANNIZZARO, The Law of Treaties Beyond the Vienna Convention, 2011, ['WOOD'] 250; TALMON, Security Council Treaty Action, 62 RHDI 65 (2009) 98.

[132] UNSCR 1929 (2010) S/RES/1929; UNSCR 1757 (2007) S/RES/1757; UNSCR 1593 (2005) S/RES/1593.

(NPT) upon the Democratic People's Republic of Korea (DPRK),[133] even though the DPRK was not party to the NPT.[134]

Following this practice, UNSCR 3790 "calls upon all Member States to [...] support the implementation of the NPT".[135] As SC resolutions are primarily interpreted based on their wording and context, UNSCR 3790 cannot be interpreted to mean anything else than the imposition of NPT provisions upon Anduchenca.[136]

Should the Court find the resolution's wording inconclusive, it must be noted that the power of authentic interpretation lies with the Council itself.[137] Thus, subsequent resolutions must be given special weight when interpreting the SC's acts.[138] As the follow-up resolution adopted by the SC approved the complete dismantling of the Ibra,[139] the SC made clear that UNSCR 3790 was intended to impose a disarmament obligation upon Anduchenca.

Therefore, UNSCR 3790 imposes the NPT's provisions upon Anduchenca, including the obligation of nuclear disarmament, as it is enshrined in Article VI of the NPT.

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[133] Treaty on the Non-Proliferation of Nuclear Weapons, London, Moscow, Washington, 1 July 1968, U.N.T.S. Vol. 729, No. 10485, 161.; UNSCR 1718 (2006) S/RES/1718.

[134] WOOD, 250.

[135] UNSCR 3790, operative ¶1.

[136] Charter Commentary, 799.

[137] *Ibid.*, 798.

[138] PELLET, '668 (1991): Iraq', in ALBARET–DECAUX–NICOLAS–PLACIDI-FROT, Les grandes résolutions du Conseil de sécurité des Nations unies, Dalloz, 2012, 137, 140.

[139] C(47).

B. In any case, Anduchenca is under the obligation of nuclear disarmament as a rule of customary international law.

1. Nuclear disarmament is part of customary international law.

Should the Court find that UNSCR 3790 does not impose any obligations on Anduchenca, the Respondent submits that the obligation of nuclear disarmament is part of CIL. For a rule to become part of CIL, two conditions must be present: (a) the existence of an extensive and uniform State practice, and (b) that such practice is accepted as law (*opinio juris*).[140] Both conditions are fulfilled in this case.

The criterion of State practice

In relation to Article VI of the NPT, the primary evidence of State practice lies in the overwhelming support of the NPT. As of today, the NPT has 191 parties,[141] which is significant, as the Court emphasized that a "very widespread and representative participation"[142] in a convention can in itself establish the existence of a customary rule. As an evidence of State practice, it is also significant that 113 states have signed or acceded to one of the five major treaties on nuclear-weapon-free zones.[143]

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[140] *North Sea Continental Shelf*, Judgment, I.C.J. Reports, 1969 ['Continental Shelf'], ¶74-77.

[141] United Nations Office for Disarmament Affairs Treaties Database: http://disarmament.un.org/treaties/t/npt.

[142] *Continental Shelf*, ¶73.

[143] Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, Mexico City, 14 February 1967, U.N.T.S. Vol. 634, No. 9068, 281; South Pacific Nuclear Free Zone Treaty, Rarotonga, 6 June 1985, U.N.T.S. Vol. 1445, No. 24592, 177; Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Bangkok, 15 December 1995; African Nuclear Weapon Free Zone Treaty, Cairo, 11 April 1996; Treaty on a Nuclear-Weapon-Free Zone in Central Asia, Semipalantisk, 8 September 2006, U.N.T.S. No. 51633.

The Court emphasized that such practice must include the practice of specially affected States.[144] In relation to this, it must be noted that not only nuclear States are considered specially affected. In fact, non-nuclear-weapon States are the ones that are primarily interested in nuclear disarmament.[145] Should the Court find that specially affected States are those in possession of nuclear weapons, it is important that even nuclear States outside of the NPT have supported numerous General Assembly (GA) resolutions concerning the obligation of nuclear disarmament.[146] Therefore, in relation to Article VI of the NPT, State practice is extensive and uniform.

The criterion of opinio juris.

In *Nuclear Weapons*, the Court took mention of the fact that GA resolutions can provide evidence for the existence of *opinio juris*.[147] The GA adopted countless resolutions reaffirming the obligation of nuclear disarmament. Many of these resolutions have been adopted unanimously,[148] and many of them refer to nuclear disarmament as an obligation upon *all*

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[144] *Continental Shelf*, ¶73.

[145] JOYNER, Some Thoughts on Article VI NPT and its Customary Nature, (10 June 2014) https://armscontrollaw.com/2014/06/10/some-thoughts-on-article-vi-npt-and-its-customary-nature/.

[146] e.g. GA Resolutions 65/76 (A/RES/65/76, 2011), 71/58 (A/RES/71/58, 2016), supported by India and Pakistan.

[147] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), I.C.J. Reports, 1996 ['Nuclear Weapons'] ¶70.

[148] *Ibid.*, ¶100.

States,[149] not just the ones party to the NPT. According to the Court, the consent to such resolutions cannot be understood as merely that of a "reiteration or elucidation" of a treaty commitment, in fact, it can be understood as an acceptance of a principle of CIL.[150] Thus, the criterion of *opinio juris* is fulfilled.

The fulfilment of the above criteria shows that the obligation of nuclear disarmament has become part of CIL. This conclusion finds resonance in the Court's reasoning in *Nuclear Weapons,*[151] and has also been affirmed by most highly qualified scholars.[152]

2. Anduchenca cannot be considered a persistent objector to this obligation.

Anduchenca declined to sign the NPT, as it "establishes and aggravates an inherent inequality between nuclear-weapon States and non-nuclear-weapon States." Anduchenca has expressed this opinion numerous times over the past fifty years.[153] However, the Court made clear in the *Fisheries Case* that a persistent objector must have "opposed any attempt to apply" the rule in question.[154] Considering this criterion, Anduchenca cannot be considered a persistent objector in respect of the nuclear disarmament obligation enshrined in the NPT.

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[149] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. India), 2016, Dissenting opinion of Judge Cançado Trindade, 17.

[150] *Nicaragua*, ¶188.

[151] *Nuclear Weapons*, ¶¶99, 102, 105(F).

[152] *Ibid.* Declaration of President Bedjaoui, ¶23; Dissenting Opinion of Judge Oda, ¶45; ILA Committee: Nuclear Weapons, Non-proliferation and Contemporary International Law (2nd Report: Legal Aspects of Nuclear Disarmament), ILA Washington Conference (2014), ¶30, A7.

[153] C(9).

[154] *Fisheries Case*, Judgment, December 18th, 1951, I.C.J. Reports 1951, 131; GREEN, The Persistent Objector Rule in International Law, OUP, 2016. 1.

Firstly, Anduchenca's opposition was not persistent. Anduchenca accepted economic aid for disarmament programs for 20 years,[155] and even sent a representative to a UN Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons.[156] Anduchenca's presence at the conference must be given special weight, as no other State possessing nuclear weapons participated at the conference.[157]

Secondly, Anduchenca justified her refusal to sign the NPT by referring to the "inherent inequality between nuclear-weapon States and non-nuclear-weapon States".[158] Anduchenca failed to identify which provisions of the NPT are responsible for the "inherent inequality" between States, but it must be noted that if anything, nuclear disarmament serves to create the *equality* between States, instead of inequality. Therefore, even if Anduchenca may qualify as a persistent objector in respect of some provisions of the NPT, she cannot qualify as one in respect of the disarmament obligation. In conclusion, Anduchenca is under the obligation of nuclear disarmament as part of CIL.

C. Anduchenca violated her nuclear disarmament obligations and therefore Article 16 of the FCN Treaty.

As shown above, Anduchenca is under the obligation of nuclear disarmament either by virtue of UNSCR 3790, or by virtue of CIL. The obligation of nuclear disarmament is enshrined in Article VI of the NPT, which requires States to "*pursue negotiations in good faith on effective*

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[155] C(6).

[156] C(39).

[157] United Nations Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, List of participants, A/CONF.229/2017/INF/4/Rev.1 (25 July 2017).

[158] C(9).

measures relating to [...] nuclear disarmament". 'Effective measures' covers both the reduction and the elimination of nuclear arsenals.[159] Thus, the Court stated in *Nuclear Weapons*, that this obligation "goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects".[160] As Article VI contains an obligation of result, any act bolstering a State's nuclear arsenal is contrary it.[161] Therefore, commissioning and operating the Ibra is a violation Anduchenca's disarmament obligation, and a violation of Article 16 of the FCN Treaty.

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[159] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom), 2016, Memorial of the Marshall Islands, ¶163.

[160] *Nuclear Weapons*, ¶99.

[161] BEDJAOUI, Keynote Address, Conference on Good Faith, International Law and the Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice, (Geneva, 1 May 2008), 20, http://lcnp.org/disarmament/2008May01eventBedjaoui.pdf.

IV. RUKARUKU DID NOT VIOLATE ARTICLE 17 OF THE FCN TREATY BY ATTACKING THE COVFEFE OR BY CAPTURING THE IBRA.

Rukaruku's attacks on the Covfefe and on the Ibra were lawful under international law. Rukaruku acted under SC authorization. In any event, Rukaruku's acts are justified as anticipatory self-defence. Further, Rukaruku acted in compliance with international humanitarian law. Therefore, Rukaruku did not violate Article 17 of the FCN Treaty.

A. Rukaruku acted under Security Council Resolution 3790.

1. Security Council Resolution 3790 authorized Rukaruku to use force.

The SC might, in accordance with the UN Charter authorize States to use armed force.[162] The preconditions for such authorization are a determination of a threat to peace, and a statement that the SC is acting under Chapter VII of the UN Charter.[163]

UNSCR 3790 both identified the Ibra as a threat, and stated that the SC is indeed acting under Chapter VII.[164] Therefore, the preconditions for an authorization are met.

UNSCR 3790 authorizes Member States to use "all measures commensurate with their specific circumstances".[165] This expression follows the SC's consistent practice concerning

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[162] UN Charter, Article 42.

[163] Charter Commentary 1341.

[164] Compromis, Annex II, 1.

[165] *Ibid.,* 4.

naval enforcement missions, such as the authorizations in Iraq,[166] Bosnia-Herzegovina,[167] Haiti,[168] and Libya.[169] Therefore, UNSCR 3790 authorized Rukaruku to use force.

2. Rukaruku's acts were within the Resolution's mandate.

Authorizations applying the "all measures commensurate" formula are aimed at ensuring the compliance of the targeted vessel.[170] For this purpose, the boarding and diverting of ships is allowed, and when necessary, even the use of disabling fire.[171] This is supported by the fact that hundreds of ships were boarded and disabled based on such authorizations.[172]

In the *Saiga Case*, the Court laid out the normal practice to stop a ship at sea. The first step is to give an auditory or visual signal, and if that does not succeed, warning shots may be fired.[173] After these actions fail, the pursuing vessel, as a last resort, may use force.[174]

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[166] UNSCR 665 (1990) S/RES/665.

[167] UNSCR 787 (1992) S/RES/787.

[168] UNSCR 1267 (1999) S/RES/1267.

[169] UNSCR 2240 (2015) S/RES/2240.

[170] MCLAUGHLIN, United Nations Naval Peace Operations in the Territorial Sea, Brill–Nijhoff, 2009, 133.

[171] *Ibid.*

[172] Statement by the HR/VP Federica Mogherini on the adoption of Resolution 2292 by the UN Security Council, Oslo, 14/06/2016, https://eeas.europa.eu/printpdf/4993_tk; POKRANT, Desert Storm at Sea: What the Navy Really Did, Praeger, 1999, 269-270.; STALEY, The Wave of the Future: The United Nations and Naval Peacekeeping, Lynne Rienner, 1992, 38.

[173] *M/V "SAIGA" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, ¶156.

[174] *Ibid.*

In our case, Rukaruku made six attempts to communicate via radio with the Covfefe, with no success.[175] Subsequently, twelve cruise missiles were fired at the Covfefe.[176] It must be noted however that only four of those missiles have hit their target.[177] Considering that cruise missiles have a circular error probability of 3 meters,[178] it can be presumed that Rukaruku intended those eight misfires to serve as warning shots. Therefore, as neither the radio calls nor the warning shots could ensure the Covfefe's compliance, Rukaruku rightfully resorted to the use of disabling fire.

The above procedure was kept in the Ibra's case as well. First, warships enclosed the Ibra, signalling their intent to stop the submarine. Subsequently, warning shots were fired, and a boarding party gained control over the Ibra. According to the Compromis, no loss of life occurred, and the crew surrendered immediately.[179] Therefore, Rukaruku employed the minimum force, strictly confined to the purpose of ensuring the Ibra's compliance.

Consequently, Rukaruku employed force with due respect to the Resolution's mandate.

B. In any event, Rukaruku's use of force is justified as anticipatory self-defence.

Rukaruku was justified in attacking the Covfefe and the Ibra as a form of anticipatory self-defence, being a necessary and proportionate response to the imminent threat imposed by the Ibra.

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[175] Clarifications 9.

[176] C(43).

[177] *Ibid.*

[178] National Research Council, Environmental Information for Naval Warfare, National Academies Press, 2003, 150.

[179] C(46).

1. Anticipatory self-defence is part of customary international law.

Under anticipatory self-defence, a State may use force to halt an imminent armed attack.[180] This rule is part of CIL, as it was recognized in, *inter alia*, the *Caroline* incident,[181] and by international military tribunals at Nuremberg and Tokyo.[182] In the post-Charter era, Israel also relied on anticipatory self-defence when it used force against Egypt in 1967,[183] and when it bombed al-Kibar in 2007, and received little criticism from the international community.[184]

In 2004, the Secretary General's High-Level Panel on Threats, Challenges and Change also stated that according to "long established international law", a State can take military action against imminent threats.[185] In 2005, Secretary-General Kofi Annan also endorsed the concept,[186] and it is the foundation of the Bethlehem principles as well.[187] Thus, anticipatory self-defence has long been and still is part of CIL.

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[180] CRAWFORD, The Use or Threat of Force by States, in CRAWFORD-BROWNLIE, Brownlie's Principles of Public International Law (8th Edition), OUP, 2012. 750.

[181] GREENWOOD, The Caroline, MPEPIL, 2009 ¶7.

[182] International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AJIL 172 (1947) 205; 'International Military Tribunal at Tokyo (1948)' in FRIEDMAN, The Law of War: A Documentary History, Random House, 1972, Vol. II. 1029, 1157–9.

[183] DINSTEIN, War, Aggression and Self-Defence, CUP, 6th edition, 2017 ['DINSTEIN'] 173.

[184] SPECTOR–COHEN, Israel's Airstrike on Syria's Reactor: Implications for the Nonproliferation Regime, 38(6) Arms Control Today 15 (2008) [SPECTOR–COHEN] 1.

[185] Report of the High-level Panel on Threats, Challenges and Change, UN Doc A/59/565, (2 December 2004), ¶188.

[186] ANNAN, In Larger Freedom: Towards Development, Security and Human Rights for All – Report of the Secretary-General, A/59/2005, (21 March 2005) ¶124.

[187] BETHLEHEM, Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual. Armed Attack by Nonstate Actors, 106 AJIL 769 (2012) 6.

2. The Ibra posed imminent threat.

As the precondition for anticipatory self-defence, a State must face an imminent threat of armed attack. The threshold of imminence, however, cannot be based on temporal factors only.[188] According to Greenwood, an attack with a weapon of mass destruction (WMD) "can reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded".[189] This conclusion finds resonance in al-Kibar's bombing, where the threat posed by Syria's nuclear reactor was not imminent in the word's traditional sense, yet the international community did not condemn Israel.[190]

Scholars suggest, a new test of imminence is needed in WMD context, including factors such as the nature of the threat, and the magnitude of the possible harm.[191] In our case, the Ibra posed an imminent threat due to both the nature of the threat and the magnitude of the harm, as it is capable of bringing immense destruction with just a push of a button.

The Court can also consider SC resolutions when determining the imminence of a threat.[192] Considering this, as Resolution 3790 identified the Ibra as a threat to peace and stability,[193] such identification also implies that the Ibra posed an imminent threat.

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[188] WILMHURST, The Chatham House Principles of International Law on the Use of Force in Self-Defence, 55 ICLQ 963 (2006) 967.

[189] GREENWOOD, International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq, 4 SDILJ 7 (2003) 16.

[190] SPECTOR–COHEN, 1.

[191] DEEKS, Taming the Doctrine of Pre-Emption, in WELLER, The Oxford Handbook of the Use of Force in International Law, 2015, 666.

[192] WELLER, Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups, EJIL:Talk! (25 November 2015),

3. Rukaruku used necessary and proportionate force against the Covfefe and the Ibra.

For self-defence to be justified, the criteria of necessity and proportionality must be met.[194] Necessity means that a State has no other means to defend itself, but to rely on force.[195] Even though Rukaruku went to the SC to resolve the dispute,[196] Anduchenca made clear that they insist on their "sovereign right to possess this vessel."[197] This insistence made clear that the peaceful means of resolving the dispute were exhausted, and the criterion of necessity was met.

Regarding proportionality, a State must use the force in a defensive manner, strictly confined to that defensive object.[198] Therefore, when a court assesses whether a response is proportionate, the magnitude of the likely attack must be considered.[199] Rukaruku undoubtedly engaged in a small-scale response when it confronted the Covfefe and the Ibra, considering the total obliteration a nuclear warhead is capable to bring. For these reasons, Rukaruku applied force that was both necessary and proportionate.

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https://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/.

[193] UNSCR 3790, operative ¶3.

[194] *Oil Platforms* (Iran v. United States), Judgment, I.C.J. Reports, 2003, 43; *Nicaragua,* ¶194.

[195] DINSTEIN, 232.

[196] C(41).

[197] C(42).

[198] MOUSSA, Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law, 90 IRRC 963 (2008) ['MOUSSA'] 975.

[199] GARDAM, Necessity, Proportionality, and the Use of Force by States, CUP, 2004, 180; CHRISTODOULIDOU–CHAINOGLOU, 'The Principle of Proportionality from a Jus Ad Bellum Perspective', in WELLER, The Oxford Handbook of the Use of Force in International Law, 1196.

C. International humanitarian law has no bearing on the legality of Rukaruku's use of force. In any case, Rukaruku complied with it.

1. International humanitarian law does not affect the legality of the use of force.

Article 2(4) of the UN Charter sets out the general prohibition of the threat or use of force. The exceptions from this prohibition[200] are governed by the rules of *jus ad bellum*. *Jus ad bellum*, that is, the right to resort to force, is separated from the rules of *jus in bello*, which govern the actual conduct.[201] These two distinct bodies of law apply autonomously, and their violation triggers different legal consequences.[202] Therefore, an attack that is inconsistent with *jus in bello* does not, by itself, affect the legality of the use of force under *jus ad bellum*.[203] For example, a state legally acting in self-defence under the UN Charter is no less doing so simply because their troops are committing war crimes.[204] Therefore, compliance with international humanitarian law (IHL) cannot affect the legality of Rukaruku's use of force, and thus cannot trigger a violation of Article 17 of the FCN Treaty.

2. In any case, Rukaruku complied with international humanitarian law.

Should the Court find that violation of IHL may affect the legality of the use of force, Rukaruku complied with IHL.

Rukaruku obeyed the principle of distinction.

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[200] UN Charter, Articles 42, 51.

[201] GREENWOOD, The relationship between ius ad bellum and ius in bello, 9 Review of International Studies 221 (1983) 221.

[202] MOUSSA, 965.

[203] *Ibid*; OKIMOTO, The Relationship between Jus Ad Bellum and Jus In Bello, in WELLER, The Oxford Handbook of the Use of Force in International Law, 2015, 1218.

[204] MÉGRET, Jus in bello and Jus ad bellum, 100 ASIL Proceedings 121 (2006) 123.

The principle of distinction is set out in Additional Protocol I, to which both States are parties.[205] The principle entails that States must direct their attacks only against military objectives.[206] Military objectives are those, which make an effective contribution to military action and whose destruction or capture offers a definite military advantage.[207] Under this definition, enemy warships always qualify as military objectives.[208] Supply ships also meet the requirements of military objectives, because of their function to supply naval forces.[209]

Applying these rules, the Ibra, as a warship, and the Covfefe, carrying provisions and personnel to the Ibra, [210] both qualified as military objectives, subjected to attack or capture by Rukaruku.

Rukaruku complied with the principle of proportionality.

Proportionality under IHL entails that a State must assess the expected collateral damage to civilians.[211] In our case, seven civilians were on board the Covfefe.[212] However, civilians lose their protection if they take direct part in hostilities.[213]

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[205] C(48).

[206] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), Geneva, 8 June 1977, U.N.T.S. Vol. 1125, No. 17512, 3, ['AP'] Article 48.

[207] AP, Article 52(2); San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Article 40.

[208] HEINTSCHEL VON HEINEGG, The Law of Armed Conflict at sea, in FLECK, The Handbook of International Humanitarian Law, OUP, 2013. 485.

[209] *Ibid.,* 469.

[210] C(43).

[211] AP, Article 51(5)(b).

As a person carrying military provisions can be seen as taking direct part in hostilities,[214] the civilians on board the Covfefe lost their protection, and thus there was no collateral damage.

In any case, the mere presence of civilians on a military objective does not render those objectives immune from attack, because such persons share the risk of attacks on that military objective.[215] As IHL does not prohibit attacks only because they may be expected to cause collateral damage,[216] the only restriction that proportionality imposes is that such collateral damage must not be "excessive in relation to the concrete and direct military advantage anticipated".[217]

"Concrete and direct military advantage" in this context refers to the advantage anticipated from a military attack as a *whole*, and not only from isolated parts of that attack.[218] This is supported by the Commentary on the Additional Protocols, which indicates that the advantage must only be "relatively close", in contrast with advantages appearing in the long-term.[219]

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[212] C(43).

[213] HENCKAERTS–DOSWALD-BECK, Customary International Humanitarian Law, CUP, 2009. Vol. I: Rules, ['Customary IHL'] 19.

[214] *Public Committee against Torture in Israel v. Government of Israel*, Case No. HCJ 769/02, 13 December 2006, Supreme Court of Israel, ¶35.

[215] Customary IHL, 31-32.

[216] HEINTSCHEL VON HEINEGG, Proportionality and Collateral Damage, MPEPIL, 2015, ¶3.

[217] Customary IHL, 46.

[218] *Ibid*., 49; US Department of Defense Law of War Manual, June 2015, 5.12.2.1; The Joint Service Manual of the Law of Armed Conflict, JSP 383, UK Ministry of Defence, 2004, 5.20.5.

[219] SANDOZ–SWINARSKI–ZIMMERMANN, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Martinus Nijhoff, 1987, §2209.

Attacks on the Covfefe and the Ibra were interconnected, with the unified goal of neutralizing the Ibra, which is equipped with the "world's greatest nuclear weapons".[220] Therefore, to assess whether collateral damage was excessive, it must be measured against the anticipated advantage of disarming the Ibra. As "no damage is excessive if the ultimate end is self-preservation",[221] the unfortunate death of seven civilians is definitely not excessive, compared to the mass destruction the Ibra is capable to bring. Therefore, Rukaruku has obeyed the principle of proportionality.

Rukaruku was acting in military necessity.

Military necessity permits a belligerent to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.[222] Rukaruku's attacks were necessary to achieve the neutralization of the Ibra with the least possible expenditure of resources, thus fulfilling the requirement of military necessity.

As Rukaruku obeyed the principles of IHL, it's use of force was lawful, and no violation of Article 17 has occurred.

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[220] C(38).

[221] CANNIZARO, Proportionality in the Law of Armed Conflict, in CLAPHAM–GAETA, The Oxford Handbook of International Law in Armed Conflict, OUP, 2014. 349.

[222] DINSTEIN, Military Necessity, MPEPIL, 2015, 1.

PRAYER FOR RELIEF

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

I. The arbitral award of 2 March 2017 is valid;

II. Even if the arbitral award is not valid, Rukaruku did not violate Article 6 of the FCN Treaty when the Egart operated in Anduchenca's territorial sea, but Anduchenca violated Article 7 of the FCN Treaty by capturing the Egart, which it therefore must return to Rukaruku;

III. Anduchenca violated Article 16 of the FCN Treaty by commissioning and operating the Ibra; and

IV. Rukaruku did not violate Article 17 of the FCN Treaty by attacking the Covfefe or by capturing the Ibra.