IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,

THE HAGUE, NETHERLANDS

THE 2018 PHILIP C JESSUP INTERNATIONAL MOOT COURT COMPETITION

# CASE CONCERNING THE EGART AND THE IBRA

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PEOPLE'S DEMOCRATIC REPUBLIC OF ANDUCHENCA

(APPLICANT)

V.

FEDERAL REPUBLIC OF RUKARUKU

(RESPONDENT)

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## MEMORIAL FOR THE RESPONDENT

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## STATEMENT OF JURISDICTION

The People's Democratic Republic of Anduchenca (Anduchenca) and the Federal Republic Rukaruku (Rukaruku) hereby submit the present dispute to the International Court of Justice ("ICJ") pursuant to Article 40(1) of the Court's Statute, in accordance with the Statement of Agreed Facts for submission to the ICJ of the differences concerning the Egart and the Ibra, submitted to the Court, on the twenty-third day of August in the year two thousand and seventeen. Both States have accepted the jurisdiction of this Court pursuant to Article 20 of the FCN Treaty of 1947.

## 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 whether Anduchenca did not violate Article 7 of the FCN Treaty when it captured the Egart.

**III.** Whether Anduchenca did not violate Article 16 of the FCN treaty by commissioning and operating the Ibra.

**IV.** Whether Rukaruku violated Article 17 of the FCN treaty when it attacked the Covfefe and when it captured the Ibra.

## STATEMENT OF FACTS

### BACKGROUND

Located on opposite ends of the Odasarra Region, the Applicant and Rukaruku are both situated on the Kumatqesh Coast. Rukaruku – the dominant power in the region – is developed and maintains a strong naval presence in the Kumatqesh Ocean. The Applicant, after a *coup d'état* in 1967, has been ruled by a socialist military government and has struggled with financial instability. For years, the two States enjoyed amicable relations, secured by Rukaruku's economic aid, intelligence sharing and a bilateral Treaty of Friendship, Commerce and Navigation ("FCN Treaty").

Since 1995, Rukaruku has conducted a series of successful naval operations against suspected arms traders. In 2010, however, these activities were restricted by the Applicant's domestic law which required foreign government vessels to obtain prior authorization before entering its territorial sea – an area it claims extends 12 nautical miles from its coastline. Despite public protest by its Ambassador on the grounds that the law violated international law, Rukaruku ordered its navy to comply with the law in order to avoid conflict.

### THE EGART AND ITS ARBITRATION

In 2015, the Rukarukan navy began employing autonomous underwater vehicles within and outside the Odasarra region as part of its efforts to protect commercial ships from pirate attacks, shoals and underwater mines. The vehicles were programmed to remain at least 12 nautical miles away from the Anduchencan coast line.

One of these vehicles, the Egart, was seized by the Applicant after it was detected 11 nautical miles from the Applicant's coast line. Rukaruku issued a diplomatic notice requesting the vehicle's return to which the Applicant made no reply.

Invoking the FCN, Rukaruku sought to reclaim its vessel through arbitration. The request for arbitration was delivered to the Applicant's Embassy in Rukaruku, but the Applicant did not respond. The Applicant issued a *note verbale*, which questioned the validity of the proceedings, alleged an absence of jurisdiction, and declared its refusal to participate. It also objected to the validity of any award issued by the tribunal.

The arbitrators considered the concerns raised by the Applicant in their *note verbale* and decided to adjudicate the matter in the Applicant's absence. The Applicant was thereafter ordered to return the Egart to Rukaruku.

**THE ILSA REPORT**

On 21 March 2017, the Institute for Legal Studies and Arbitration published a report revealing communication between Judge Moyet and Bouc Chivo, legal counsel for Rukaruku. The report disclosed the appointment of an assistant who was revealed to have compiled a draft of the tribunal's award. His employment was unknown to the parties.

General Tovarish welcomed the report, alleging that it proved that the tribunal was corrupt and lacked jurisdiction. Rukaruku explained that it's counsel, now resigned, acted independently and that his actions did not materially alter the final outcome. Its officials remarked that the law was applied correctly and that the award remained legitimate.

**THE IBRA**

After news reports revealed that the Applicant had commissioned a nuclear-armed submarine, General Tovarish admitted that the Applicant had successfully developed the Ibra, a submarine equipped with the world's greatest nuclear weapons and advanced ballistic technologies. He declared that the Applicant would no longer participate in UN efforts at nuclear prohibition, nor would it sign any treaty emerging from those meetings. Soon thereafter, the UN Security Council adopted Resolution 3790 in which it identified the Ibra as a threat to international peace and security and authorised UN members to take any proportionate measures to neutralize the vessel.

On 6 June 2017, Rukarukan warships fired 12 cruise missiles at the Covfefe - a ship carrying supplies to the Ibra - killing 10 Anduchencan sailors and 7 civilians in an effort to force the Ibra to surface. This attack was followed up by a strike on Ibra itself, which occurred with no casualties. Rukaruku seized and destroyed the submarine, disposing of all nuclear materials under the guidance and supervision of the IAEA. The vessel's crew were questioned before being delivered to the Anduchencan Embassy for repatriation.

## **RELEVANT CONVENTIONS**

Both the Applicant and Rukaruku are members of the United Nations; parties to the Statute of the International Court of Justice; the Vienna Convention on the Law of Treaties; as well as 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 United Nations Council four times, and has always been a non-nuclear weapon State Party to the 1968 Non-Proliferation Treaty as well as a State Party to the 1982 United Nations Convention on the Law of the Sea. The Applicant has never been elected to the United Nations Security Council, and has not

signed, ratified or acceded to the Non-Proliferation Treaty, nor to the United Nations Convention on the Law of the Sea.

Neither the Applicant nor Rukaruku has signed, ratified or acceded to any of the four Geneva Conventions on the Law of the Sea of 1958.

## SUMMARY OF PLEADING

**THE ARBITRAL AWARD IS VALID.**

The tribunal was granted subject-matter jurisdiction over the matter by both States in Article 10(a) of the FCN Treaty which allows the tribunal to rule on disputes concerning Article 7 of the FCN Treaty. Due to its role in protecting freedom of commerce, the capture of the Egart impedes freedom of commerce and the matter of its capture falls within the scope of Article 7 of the FCN Treaty. Furthermore, in accordance with the principle of *kompetenz-kompetenz*, this tribunal has the right to decide on the matter of its own jurisdiction. Factors such as the *ex parte* communication, failure of a party to participate in proceedings and appointment of an assistant do not render the award invalid. *Ex parte* communication only renders an award invalid where it has a material impact on the award. The communication between Judge Moyet and a party representative did not materially affect the outcome of the tribunal. Given that all possible steps were taken to ensure procedural fairness, the award must be upheld despite the Applicant's failure to participate in the proceedings. International tribunals allow for the appointment of an assistant, such as Mr Orvindari, with the assistant's role subject to the discretion of the tribunal.

**THE OPERATION OF THE EGART IN THE APPLICANT'S TERRITORIAL WATERS WAS NOT A VIOLATION OF ARTICLE 6 OF THE FCN TREATY BUT THE CAPTURE OF THE EGART WAS A VIOLATION OF ARTICLE 7.**

The operation of the Egart was not a violation of the Applicant's sovereign territory as it was exercising the right to innocent passage to which it is entitled. The Applicant's attempt to

restrict this right by demanding prior authorization is invalid under international law. Furthermore, the Egart played a vital role in Rukarukan efforts to promote the safe passage of commercial ships in the region. Its capture therefore violated its own right to freely navigate as well as the freedom of navigation and commerce between the territories of the parties. It also violated the principle of immunity to which it is entitled as State property. As a result, the appropriate form of reparation would be the return of the Egart to Rukaruku.

**THE APPLICANT ACQUIRED AND OPERATED THE IBRA IN BREACH OF THE NUCLEAR DISARMAMENT OBLIGATIONS BINDING ON IT.**

The Applicant's commissioning of the Ibra violates Article 16 of the FCN Treaty. By creating the Ibra, the Applicant acted in bad faith and breached the CIL obligation to negotiate nuclear disarmament, to which it is not a persistent objector. Further, its acquisition of nuclear weapons contravenes the Applicant's obligation to refrain from acts that threaten international peace and security. Lastly, Resolution 3790 imposed a nuclear disarmament obligation duly violated by the Applicant's continued operation of the Ibra.

**RUKARUKU'S USE OF FORCE TO DISABLE THE COVFEFE AND NEUTRALISE THE IBRA IS CONSISTENT WITH ARTICLE 17 OF THE FCN TREATY AND COMPLIES WITH THE LAW OF ARMED CONFLICT AT SEA.**

Rukaruku's use of force did not violate Article 17 of the FCN Treaty. It acted under Article 42 authorisation from the UN Security Council, whose determination of political developments in Odassara is not subject to judicial review by this Court.

Alternatively, the attacks were a lawful exercise of Rukaruku's inherent right to self-defence, triggered by the catastrophic threat posed by the nuclear weapons on board the Ibra. The

attacks were necessary as the Applicant refused negotiation, and were proportionate to the aims of locating and eliminating the submarine.

In any event, the use of force complied with international humanitarian law (IHL). Rukaruku took feasible precautions and only attacked military objectives. Given its causal link to the Ibra's attack, the civilian harm caused by the strike on the Covfefe was proportionate to the anticipated military advantage. The attack on the Ibra, which give rise to no casualties, was also IHL compliant.

**PLEADINGS**

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

An arbitral award is final and binding on the parties since[1] the tribunal had the requisite jurisdiction to hear the matter [A]. Moreover, there are insufficient grounds to invalidate the award on the basis of the *ex parte* communication [B], the appointment of Mr Orvindari [C] or the Applicant's absence from the proceedings [D].

### A. The tribunal had the requisite jurisdiction to rule on the matter.

In order to hear and decide on the merits of a case, the tribunal must have jurisdiction over the dispute.[2] Jurisdiction here arises from a valid arbitration agreement[3] in terms of Article 10(a) of the Treaty of Friendship, Commerce and Navigation ("FCN Treaty") [a], further the tribunal is entitled to decide on the matter of its own jurisdiction [b].

#### *a. The tribunal had subject matter jurisdiction in terms of Article 10(a) of the FCN Treaty.*

At Article 10(a) of the FCN Treaty, both States grant the tribunal competence to adjudicate any dispute "concerning the interpretation or application of Article 7 of the FCN

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[1] *Societe Commerciale de Belgique* (Belgium v Greece) (Judgment) (1939) PCIJ Series A/B No 78 ("*Societe Commerciale"*), [66].

[2] Julio C. Betancourt, 'Understanding the "Authority" of International Tribunals: A Reply to Professor Jan Paulsson' (2013) 4(2) JIDS 227, 227.

[3] Malcolm N. Shaw, *International Law* (6th edn, CUP 2008) ("Shaw (2008)"), 1051; *Status of the Eastern Carelia* (Advisory Opinion) (1923) PCIJ Series B No 5, 27, 94; *Ambatielos Case* (Greece v United Kingdom) (Merits) (1953) ICJ Rep 10, 19.

Treaty" which governs freedom of navigation and commerce.[4] In *Oil Platforms*, this Court found that activities and functions ancillary to navigation and commerce were protected by a treaty's protection of freedom of commerce and navigation.[5] The collection of acoustic and optical data to promote safety and to facilitate friendly trade and commerce is ancillary to the freedom of commerce in the Kumatqesh Coast.[6] In capturing the Egart, whose function, taken in context,[7] was to promote safety and to facilitate trade and commerce, the Applicant created an insecure environment which impeded freedom of commerce and navigation.[8] Thus, the Egart's capture, which creates an impediment to navigation and commerce, falls within the scope of Article 7 – consequently vesting the tribunal with jurisdiction to, at the very least, interpret the parameters of Article 7.

*b. The tribunal is entitled to decide on the matter of its jurisdiction.*

In *Nottebohm*, this Court held that tribunals possess *kompetenz-kompetenz;* that a "tribunal has a right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction."[9] Accordingly, the arbitral tribunal in

[4] Treaty of Friendship, Commerce and Navigation between the People's Democratic Republic of Anduchenca and the Federal Republic of Rukaruku (People's Democratic Republic of Anduchenca-Federal Republic of Rukaruku) ("FCN Treaty"), Article 10(a).

[5] *Case concerning Oil Platforms* (Islamic Republic of Iran v United States of America) (Preliminary Objection) (1996) ICJ Rep 814 ("1996 *Oil Platforms*), [46].

[6] F[17].

[7] F[5].

[8] *Case concerning Oil Platforms* (Islamic Republic of Iran v United States of America) (Preliminary Objection) (Separate Opinion of Judge Simma) (1996) ICJ Rep 814, [49].

[9] *Nottebohm* (Liechtenstein v Guatemala) (Preliminary Objections) (1953) ICJ Rep 111, [119]. See also *Arbitral Award of 31 July 1989* (Guinea-Bissau v Senegal) (Judgment) (1991) ICJ Rep 53 ("*Arbitral Award"*), [65].

this case concluded that its jurisdiction was properly founded.[10] The tribunal was therefore entitled to declare itself properly seized of the dispute and decide the matter.

### B. The *ex parte* communications are insufficient to invalidate the award.

*Ex parte* communications only render an award invalid where they have a material impact on the award.[11] In *Croatia v Slovenia*, the Permanent Court of Arbitration ("PCA") concluded that where the only procedural benefit to one party was the emphasis of facts already on the record,[12] the procedural balance between the two parties was not affected.[13]

In this case, Judge Moyet agreed to emphasise certain parts of the arguments that had already been mentioned before the tribunal.[14] At this stage in the proceedings, these arguments were readily available to the other judges who in any event would have considered them independently, long before Moyet made the "emphasis" alleged by The Applicant.[15] The procedural disadvantage resulting from this form of *ex parte* communication is minor if not non-existent.[16] While a procedural violation existed, the effect of it is not sufficient to render the tribunal's award invalid.

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[10] F[26].

[11] *Arbitration between the Republic of Croatia and the Republic of Slovenia* (Republic of Croatia v Republic of Slovenia) (Partial Award) (2016) PCA Case Nº 2012-04 ("*Croatia v Slovenia*"), [191]-[192].

[12] *Croatia v Slovenia*, [191]-[192].

[13] *Croatia v Slovenia*, [194].

[14] F[31].

[15] F[31].

[16] Matko Ilic, 'Croatia v. Slovenia: The defiled proceedings' (2017) 9 ArbLRev Review 347, 387.

In a 2015 case before the *Cour d'appel de Paris*, the procedural violation stemmed from a lack of independence and impartiality that lead to one of the arbitrators exerting a dominant influence on the tribunal through actions including preparing terms of reference for the tribunal, drafting questions to be put to the parties and writing most of the award.[17] The effect of the lack of independence and impartiality was sufficient there for the award to be declared invalid. In contrast, in cases where no clear effect on the proceedings could be proven, as is the case here, the award must be upheld.[18]

### C. The Applicant's absence from the proceedings is insufficient to invalidate the award.

In *South Sea China*,[19] as well as a number of other cases,[20] it was held that a tribunal has the discretion to continue with proceedings even if a party fails to appear or participate in the proceedings.[21] Rukaruku "should not be put at a disadvantage"[22] by the Applicant's attempts to

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[17] *Décision déférée à la Cour : Sentence rendue à Paris le 24 octobre 2014 par le tribunalarbitral ad hoc composé de MM. Hobér et Schiersing, arbitres, et de M. Paulsson, président* Cour d'appel de Paris, Pôle 1-Chambre 1, Judgment of 17 February 2015 (No. 77), RG No. 13/132.

[18] *HSN Capital LLC v Productora y Comercializador de Television*, S.A. de C.V., 2006 WL 1876941; *Scandinavian Reinsurance Company Limited v Saint Paul Fire and Marine Insurance Company*, 668 F.3d 60 (2d Cir. 2012); *Schreter v Gasmac Inc* (1992) 7 OR (3d) 608, [47].

[19] *The South China Sea Arbitration* (Republic of Philippines v People's Republic of China) (Award on Jurisdiction and Admissibility) PCA Case Nº 2013-19 ("*South China Sea Arbitration*"), [113]-[123].

[20] *Nuclear Tests* (Australia v France) (Judgment) (1947) ICJ Rep 253, [15]; *Nuclear Tests* (New Zealand v France) (Judgment) (1947) ICJ Rep 475, [15]; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v United States of America) (Merits) (1986) ICJ Rep 14 ("1986 *Nicaragua*"), [28]; *The "Arctic Sunrise" case* (Kingdom of the Netherlands v Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013 ("*Arctic Sunrise* Order"), [51]-[57].

[21] *South China Sea Arbitration*, [113]-[123].

frustrate proceedings through non-appearance.[23] Despite its non-appearance and non-participation, the Applicant remains a party to the arbitration, and is bound by any decision of the Tribunal.[24]

Moreover, as was the case in *Arctic Sunrise*,[25] all possible steps were taken to ensure procedural fairness. The arbitrators delivered all communications to the Applicant; granted it equal time to appoint an arbitrator and to submit written responses. The Applicant was further invited to advance oral arguments in reply to those of Rukaruku.[26] Moreover, the Applicant was not prejudiced by the default judgment as the tribunal took the Applicant's protests into consideration when it determined the issue of its jurisdiction.[27]

### D. Mr Orvindari's involvement does not affect the validity of the award.

In international arbitrations, the appointment of an arbitral assistant is commonplace,[28] and their tasks often go beyond mere procedural duties and extend to involvement in substantive

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[22] *Arctic Sunrise* Order, [56].

[23] *South China Sea Arbitration*, [115].

[24] 1986 *Nicaragua*, [28]; *Arctic Sunrise* Order, [51]; *Arctic Sunrise Arbitration* (Kingdom of the Netherlands v Russian Federation) (Award on the Merits) (2015) PCA Case Nº 2014-02 ("*Arctic Sunrise Arbitration*"), [10]; *Nuclear Tests Case* (Australia v France), [15]; *Nuclear Tests Case* (New Zealand v France), [15].

[25] *Arctic Sunrise* Order, [243].

[26] F[25].

[27] F[26].

[28] *The Rompetrol Group N.V. v The Republic of Romania* (Preliminary Objections on Jurisdiction and Admissibility) (2008) ICSID Case No. ARB/06/3, [21].

matters including involvement in the drafting of the award.[29] For instance, the Swiss Supreme Court has held that an arbitral assistant may participate in the drafting of the award so long as this drafting is done within the parameters set by the arbitrator.[30]

Further, the principle that parties are allowed to choose the law and processes that apply to the arbitration between them is a foundational principle of arbitration law.[31] When drafting the arbitration clause, the parties chose not to be bound by any of the rules that impose restrictions on the appointment or role of arbitral assistants nor did the tribunal adopt any relevant provisions in its set of procedural rules.[32]

Moreover, there exist no general principles regarding the appointment and role of arbitral assistants.[33] Various sets of arbitral rules impose different restrictions on arbitral secretaries. For example, a tribunal must submit the CV of the assistant and a declaration of independence and impartiality to the parties before appointing an assistant who performs tasks including attending deliberations, research, proofreading awards and preparing memoranda according to the ICC.[34] A secretary who organises papers, highlights relevant authorities, maintains factual chronologies

[29] International Council for Commercial Arbitration, Young ICCA Guide on Arbitral Secretaries ICCA Reports No. 1, Article 3(1).

[30] Bundesgericht [BGer] Judgment 4A_709/2014 of the Swiss Federal Supreme Court (2015).

[31] Thomas E. Carbonneau, 'The exercise of contract freedom in the making of arbitration agreements' (2003) VandJTransnatlL 1189, 1190; John R. Crook 'Applicable Law in International Arbitration: the Iran-US Claims Tribunal Experience' (1989) 83 AJIL 278, 279.

[32] Clarifications to the Statement of Agreed Facts ("Clarifications") [3].

[33] Discussion of Bin Cheng in Harold C. Gutteridge, 'The Meaning and Scope of Article 38(l)(c) of the Statute of the International Court of Justice' (1953) 38 Grot. Soc. Trans. for the year 1952 125, 132 stating that general principles are "cardinal principles of the legal system, in the light of which international law is to be interpreted and applied".

[34] ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries.

and keeps timesheets must be agreed upon by the parties according to the LCIA.[35] In contrast, the Secretary General of ICSID appoints a secretary to keep minutes and perform requested functions, but not to attend deliberations unless the tribunal consents according to the International Chamber of Commerce International Court of Arbitration Rules of Arbitration.[36] Other sets of arbitral rules do not offer any restrictions.[37] Even suggestions for the adoption of a uniform set of rules vary greatly in their intentions and provisions, indicating that there is no consensus as to the proper role and procedure for appointment of assistants nor any general principles or common practice that could bind the tribunal.[38]

The arbitrators nevertheless discharged their duties by engaging in deliberation, reviewing the final draft and satisfying themselves that it represented their judgment on the matter.[39] As such, the tribunal was acting within its powers when it appointed Mr Orvindari and delegated certain functions to him.

[35] London Court of International Arbitration Notes to Arbitrators

[36] International Chamber of Commerce International Court of Arbitration, Rules of Arbitration.

[37] The Stockholm Centre of Commercial Arbitration Rules, Swiss Rules of International Arbitration, Cairo Regional Centre for International Commercial Arbitration Rules; the Arbitration Rules of the Nordic Arbitration Centre do not address the role of the secretary; the Netherlands Arbitrage Instituut Arbitration Rules allow the arbitrators to request a secretary from the NAI and allow the tribunal to determine the role of the secretary.

[38] Tracy Timlin, 'The Swiss Supreme Court on the Use of Secretaries and Consultants in the Arbitral Process' (2016) ArbLawRev 268 ("Timlin (2016)"), 274.

[39] F[26],[33].

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

If the arbitral award is valid, the claim relating to the merits of the capture of the Egart is *res judicata* and this Court has no jurisdiction over the matter. [40] A valid arbitral award is definitive and binding on both parties.[41] However, even if the award is invalid, the operation of the Egart in the Applicant's territorial waters was not a violation of the Applicant's sovereign waters [A]. The Applicant has violated the principle of freedom of navigation and commerce by capturing the Egart [B] and must return it to Rukaruku [C].

### A. The operation of the Egart in the Applicant's territorial waters was not a violation of Article 6 of the FCN Treaty.

The Egart is entitled to innocent passage through the sovereign waters of the Applicant [a] and its operation through the Applicant's territorial sea complies with the requirements of innocent passage [b].

#### *a. Egart is entitled to innocent passage through the Applicant's territorial waters.*

The Applicant is entitled to establish its territorial sea and exercise its sovereignty over it, however the right of freedom of navigation through innocent passage through the territorial

[40] *Societe Commerciale*, [63].

[41] *Arbitral Award*, [65]; *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906* (Honduras v Nicaragua) (Judgment) (1960) ICJ Rep 192, 205, 217.

waters of a coastal State without acquiring prior permission may be enjoyed by the vessels of all other States under customary international law of the sea.[42]

*b. The Egart was engaged in innocent passage.*

The Egart was engaged in passage through the Applicant's territorial sea [i] and the passage was innocent in nature [ii]. This is permitted under freedom of navigation and so Rukaruku has not violated Article 6 of the FCN.

*i.The Egart was engaged in passage.*

The Egart's activities are consistent with the definition of passage at Article 18 of UNCLOS,[43] which has been confirmed as CIL by this Court.[44] While the Egart was found 11 nautical miles from the Applicant's coastline,[45] it had not entered the Applicant's internal waters, nor had it called at any roadstead or port.[46] Further, the Applicant has not asserted that the Egart had stopped or anchored anywhere within the Applicant's territorial sea.[47] The Egart was instead traversing the Applicant's territorial sea and was therefore engaged in passage.[48]

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[42] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v Bahrain) (Judgment) (2001) ICJ Rep 40 ("*Maritime Delimitation*"), [223].

[43] United Nations Convention on the Law of the Sea, 1833 UNTS 397 ("UNCLOS"), Article 18.

[44] 1986 *Nicaragua*, [214].

[45] Clarifications [1].

[46] F[16].

[47] F[16].

[48] UNCLOS, Article 18(2).

*ii.The Egart's passage was innocent.*

As a matter of CIL confirmed by this Court in the *Qatar v Bahrain* case, passage shall be innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.[49] The non-innocence of passage cannot merely be asserted by the Applicant. Instead, a presumption of innocence exists unless the coastal State can supply proof of non-innocence.[50]

In establishing the innocence of passage, the Applicant's assertions regarding the motive of the Egart and the fact that the Egart was mistakenly in the territory of the Applicant are irrelevant. Instead it is the manner in which passage was conducted that must be interrogated.[51]

The Egart was engaged in the collection of GPS coordinates required for safe navigation by commercial vessels – to facilitate the implementation of the FCN treaty.[52] The effect of the collection of data here is not collected to prejudice the coastal State.[53]

The Egart was further engaged in the gathering of information in the high seas for the purpose of facilitating and promoting safety and commerce in the Odasarra Region.[54] This is consistent with Rukaruku's long history of using its Navy to promote the safety of the region by

[49]Convention on the Territorial Sea and the Contiguous Zone 516 UNTS 205 ("Territorial Sea Convention"), Article 14 which has been recognised as customary international law in *Maritime Delimitation,* [223].

[50] *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v Albania) (Judgment) (1949) ICJ Rep 4 ("*Corfu Channel*"), 30; Donald R. Rothwell and Sam Bateman, *Navigational Rights and Freedoms and the New Law of the Sea* (Martinus Nijhoff Publishers 2000) ("Rothwell (2000)"), 30.

[51] *Corfu Channel* 30; Rothwell (2000), 30.

[52] F[17].

[53] Stuart Kaye, 'Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral' (2005) 24 AustYBIL 93 ("Kaye (2005)"), 96.

[54] F[17].

protecting ships from pirate attacks, dangerous shoals and leftover mines[55] in accordance with its FCN obligations.

Furthermore, in *Corfu Channel* this Court found that passage may be innocent even where the coastal State asserts that ships in its territorial sea are carrying out a political mission and observing and reporting on the coastal State's defences.[56] Not all intelligence is intended to have the objective of prejudicing international peace and security.[57]

Article 19(2) of UNCLOS, which concerns non-innocent passage, has not yet acquired customary status.[58] Moreover, since one of the parties to the dispute is not a State Party to UNCLOS,[59] only the CIL position applies to determine the innocence of passage here.[60]

Finally, the Applicant is precluded from arguing that since the Egart did not surface, as required for submarines and underwater vessels in terms of Article 20 of UNCLOS, its passage is not innocent. Article 20 does not enjoy CIL status, instead the accepted rule is that submarines specifically must surface to enjoy innocent passage.[61] The Egart is an auxiliary vessel rather than

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[55] F[5].

[56] *Corfu Channel*, 30.

[57] Kaye (2005).

[58] Robin Churchill and Vaughan Lowe, *The Law of the Sea* (MUP, 1999), 87.

[59] F[10].

[60] *Maritime Delimitation*, [167].

[61] Written Statement of William H. Taft, Legal Adviser US Dept, before the Senate. Select Comm. on Intelligence on June 8, 2004 Concerning Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part IX of the Law of the Sea Convention, S. EXEC. REP NO 110-9, at 34, 36 (2007); Territorial Sea Convention, Article 14(6).

a submarine and so is subject to less regulation when exercising its right to innocent passage.[62] This rule of custom does not therefore apply to the Egart and so its underwater operation does not preclude it from enjoying innocent passage.

*iii. The Applicant is not entitled to require that vessels obtain prior authorisation in order to enter its territorial sea*

The fact that the Egart did not obtain permission has no bearing on its right to navigate through the Applicant's territorial sea. The right of a coastal State to require prior authorisation or notification for vessels entering the territorial sea is not expressly included in custom or UNCLOS, while the right to uninhibited innocent passage is.[63] Therefore by demanding prior authorisation, the Applicant is attempting to unlawfully restrict the right to innocent passage under CIL.[64] Subsequent State practice is consistent with this interpretation.[65] The USA and USSR stated that "All ships, including warships, regardless of cargo, armament, or means of propulsion enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required."[66]

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[62] David Froman, 'Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea' (1984) 21 SanDiegoLRev 625, 629.

[63] UNCLOS, Article 17; *Maritime Delimitation*, [223].

[64] William K. Agyebeng, 'Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea.' (2006) 39(2) CornellIntlLJ 371 ("Agyebeng (2006)"), 371, 390.

[65] John W. Rolph, 'Freedom of Navigation and the Black Sea Bumping Incident: How Innocent must Innocent Passage Be?' (1992) 135 MilLRev 137, 140.

[66] Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage (United States of America-Union of Soviet Social Republics) ("USA-USSR Joint Statement") 28 ILM 1444.

While many States have adopted domestic legislation that requires ships to acquire prior notification or authorisation, they have only done so with regards to warships.[67] As an AUV owned by and under the control of the Rukarukan Navy, the Egart is an auxiliary vessel rather than a warship.[68]

## B. The Applicant has violated the principle of freedom of navigation and commerce by capturing the Egart.

The principle of freedom of navigation allows for vessels to navigate through the territorial waters of a coastal State without interference or restriction,[69] provided passage is innocent.[70] Since the Egart was engaged in innocent passage through the Applicant's territorial sea, the Applicant had the obligation in terms of CIL and the FCN Treaty to refrain from interfering with the Egart. Capturing the Egart violates the Egart's right to freedom of navigation [a] and impedes freedom of commerce and navigation between the territories of Rukaruku and the Applicant [b]. Furthermore, as State property, the Egart is entitled to immunity from capture [c].

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[67] J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims* (3rd edn, Martinus Nijhoff Publishers 2012), 239.

[68] Andrew H. Henderson, 'Murky Waters: The Legal Status of Unmanned Undersea Vehicles' (2006) 53 NavalLRev 55, 65.

[69] Agyebeng (2006).

[70] Jane Dalton 'Future Navies – Present Issues' (2006) 59(1) NavalWarCollRev 17 ("Dalton (2006)"), 304.

*a. The capture of the Egart violates its freedom of navigation.*

The principle of freedom of navigation allows for vessels to navigate through the territorial waters of a coastal State without interference or restriction,[71] provided that their passage is 'innocent'.[72] As illustrated earlier,[73] a presumption of innocence exists unless the coastal State can supply proof of non-innocence.[74] The applicant lacked proof of non-innocence prior to the capture of the Egart;[75] and has possessed and studied the Egart for more than two years,[76] in which time it failed to adduce proof that any of the information collected by it was prejudicial in nature.[77] Despite having no proof of non-innocence, the Applicant has, even before detecting the Egart, stated that it does not intend to return captured vessels at any point.[78]

*b. Freedom of commerce and navigation is impeded by the capture of the Egart.*

Ships traversing the Kumatqesh Ocean are confronted by various threats.[79] Rukaruku has a long history of using its Navy to protect commercial ships from these dangers.[80] As an AUV capable of operating underwater and gathering data, the Egart was capable of enhancing

[71] Agyebeng (2006), 377.

[72] Dalton (2006), 304.

[73] See FN 57.

[74] *Corfu Channel*, 30; Rothwell and Bateman (2000), 30.

[75] F[16].

[76] F[15],[19].

[77] F[15],[19].

[78] F[19].

[79] F[5],[11].

[80] F[5].

Rukaruku's anti-mine and anti-piracy operations.[81] It played an important role in Rukaruku's efforts by collecting optical and acoustic information vital to the safety of commercial ships traversing the Kumatqesh Ocean. Its capture impedes Rukaruku's ability to ensure the safety of commercial ships transporting goods across the region which is integral in allowing commercial vessels and activities to continue unhindered.

In *Oil Platforms,* this Court explained that freedom of commerce extends beyond the sale of goods and includes activities ancillary to commerce such as supply and transport.[82] In his separate opinion in *Oil Platforms,* Judge Simma has noted that both actions which injure current commerce as well as those that injure the potential for future commerce impede freedom of commerce.[83] If a State's actions render the environment in which commercial activities occur insecure, that State has violated freedom of commerce.[84]

*c. The Egart was entitled to immunity from capture.*

Regardless of whether or not it was engaged in innocent passage, it is a well-established principle that the property of a State enjoys immunity and therefore may not be boarded, seized or otherwise interfered with[85] so long as its operation is linked to the public service of the State.[86]

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[81] Michael N. Schmitt and David S. Goddard, 'International Law and the Military Use of Unmanned Maritime Systems' (2016) 98(2) IRRC 567 ("Schmitt (2016)"), 569.

[82] *Case concerning Oil Platforms* (Islamic Republic of Iran v United States of America) (Preliminary Objection) (1996) ICJ Rep 814 (1996 *Oil Platforms*), [49].

[83] *Oil Platforms* (Separate Opinion of Judge Simma), [26].

[84] *Oil Platforms* (Separate Opinion of Judge Simma), [49].

[85] Schmitt (2016), 578.

[86] *NV Cabolent v National Iranian Oil Co* (1968) Ct of Appeal, The Hague, 28 November 1968, 47 ILR 138.

The Egart was protecting freedom of commerce but it was employed in public service to the State as a part of Rukaruku's Navy. The correct action for the Applicant to have taken if the Egart was engaged in non-innocent conduct is to allow the vessel to correct its actions.[87] If it fails to do so, the coastal State may demand that it leave the territorial sea.[88]

### C. <u>As reparation, the Applicant must return the Egart.</u>

In *Chorzow Factory*, the PCIJ held that the State responsible for an internationally wrongful act is under a concomitant obligation to make restitution, or re-establish the situation, which existed before the wrongful act was committed.[89] By unlawfully capturing the Egart, in contravention of the FCN Treaty and international law, the Applicant is responsible for an internationally wrongful act and is therefore obliged to perform reparations. Restitution is possible through the return of the Egart to Rukaruku and does not involve a burden out of proportion to the benefit deriving from restitution.[90]

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[87] USA-USSR Joint Statement, [7].

[88] USA-USSR Joint Statement, [7].

[89] *Case Concerning the Factory at Chorzow* (Germany v Poland) (Jurisdiction) (1927) PCIJ Series A No 9, 21, 47; ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001) Supplement No. 10 (A/56/10), chp.IV.E.1 ("ARSIWA"), Article 35.

[90] ARSIWA, Article 35. See also *Forests of Central Rhodope* (Greece v Bulgaria) 3 RIAA 1405, cited in Conor McCarthy, *Reparations And Victim Support in The International Criminal Court* (CUP, 2012), 161.

## III. THE APPLICANT VIOLATED ARTICLE 16 OF THE FCN TREATY BY COMMISSIONING THE IBRA.

The Applicant commissioned and operated the Ibra in clear violation of its disarmament obligations. These obligations are imposed by CIL [A], its obligation to preserve peace and security [B] and Resolution 3790 [C].

### A. The Applicant has violated its customary obligation to negotiate nuclear disarmament in good faith.

Commissioning the Ibra violated the CIL[91] obligation to negotiate nuclear disarmament in good faith, crystallised in Article VI of the Non-Proliferation Treaty ("NPT").[92] This obligation arose from widespread State practice [a], pursued out of a legal obligation [b],[93] amid no persistent objection from the Applicant [c]. The Ibra's acquisition breaches this obligation [d].

#### *a. Nuclear non-proliferation is settled State practice.*

A majority of States irrespective of their subscription to the NPT is taking active steps to reduce the number of nuclear weapons.[94] This practice includes establishing nuclear weapon free

[91] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226 (Declaration of Judge Bedjaoui), [23], where President Bedjaoui recognised the "customary character" of the obligation.

[92] The Treaty on the Non-Proliferation of Nuclear Weapons 729 UNTS 161 ("NPT").

[93] *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark and Federal Republic of Germany v The Netherlands) (1969) ICJ Rep 3, [77]. See also 1986 *Nicaragua* [207]; *Jurisdictional Immunities of the State* (Germany v Italy: Greece intervening) (Judgment) (2012) ICJ Rep 99, [55].

[94] Rachel A. Wiese, 'How Nuclear Weapons Change the Doctrine of Self-Defence' (2012) 44 NYUJIntlL&Pol 1332 ("Wiese (2012)"), 1346.

zones in Antarctica,[95] Africa,[96] Latin America,[97] and Central[98] and Southeast Asia.[99] India, a non-NPT-State has tabled resolutions on nuclear disarmament before the UN General Assembly every year since 1998, and has joined Nuclear Weapons States (NWS) the United Kingdom and Pakistan in negotiations at multi-party disarmament conferences.[100] South Africa, before acceding to the NPT, ended its nuclear weapons program and negotiated a path to disarmament,[101] while Ukraine, once possessing the world's third largest nuclear weapons stockpile concluded bilateral treaties that achieved the same aim.[102] Similarly, the United States and Russia agreed in 1993 to reduce their nuclear arsenals by half.[103]

Additionally, a majority of States attended the Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons ("TPNW Conference")[104] and continue to participate in

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[95] Antarctic Treaty 402 UNTS 71.

[96] Treaty on the Nuclear Weapon Free Zone in Africa 35 ILM 698, Article 1.

[97] Treaty for the Prohibition of Nuclear Weapons in Latin America 634 UNTS 326, Article 3(1).

[98] Treaty on a Nuclear-Weapon-Free Zone in Central Asia 2970 UNTS 485, Article 3.

[99] Treaty on the Southeast Asia Nuclear-Weapon-Free Zone 1743 UNTS 316, Article 3(1).

[100] Heather Williams et al, *The Humanitarian Impacts of Nuclear Weapons Initiative: The 'Big Tent' in Disarmament* (Chatham House 2015), 7.

[101] Tariq Rauf, 'The Non-Proliferation Regime: Successes in Curbing the Spread of Nuclear Weapons' (1999) ("Rauf (1999)"), 14.

[102] Rauf (1999), 16.

[103] Strategic Arms Limitation Reduction Treaty 27 ILM 90.

[104] UN General Assembly 'UN Conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination (List of Participants)' UN Doc A/CONF.229/2017/INF/4 stating that 124 States engaged in negotiations at the second substantive session of the Conference.

the UN's Conference on Disarmament.[105] These negotiations, coupled with the NPT,[106] the Partial Test Ban Treaty ("PTBT"),[107] and the Comprehensive Test Ban Treaty's[108] extensive ratification, demonstrate a widespread practice of negotiating non-proliferation.

State conduct contrary to this practice has been met with international objection.[109] These few instances[110] are properly treated as breaches of the customary rule and do indicate that the rule does not exist. [111]

*b. The practice of negotiation arises from opinio juris.*

*Opinio juris* can be deduced from the attitudes of States expressed in General Assembly resolutions.[112] The General Assembly has passed numerous resolutions calling on 'all States' to

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[105] UN Conference on Disarmament 'List of Participants' (3 February 2017) UN Doc CD/INF.73. 65 States attended the 2017 Conference including India, Pakistan, Israel, China, the United Kingdom, the United States, Russia, and France.

[106] UN Office for Disarmament Affairs, 'Treaty on the Non-Proliferation of Nuclear Weapons' http://disarmament.un.org/treaties/t/npt, 191 State parties.

[107] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water 480 UNTS 43; 'PTBT: Status of the Treaty' http://disarmament.un.org/treaties/t/test_ban 125 States.

[108] Comprehensive Test Ban Treaty (10 September 1996, not yet into force) 35 ILM 1439.

[109] For example, UNSC/RES/687(1991), authorising the coercive disarmament of Iraq; UNSC/RES/1172 (1998) condemning nuclear weapons tests conducted by India and Pakistan; UNSC/RES/1718 (2006), UNSC/RES/2094 (2013), and UNSC/RES/2270 (2016) imposed several non-military enforcement measures against North Korea.

[110] See George Bunn, 'The Nuclear Non-Proliferation Treaty: History and Current Problems' (2003) 33(10) Arms Control Today 4, discussing the illegality of DPRK's withdrawal the six-party-talks.

[111] 1986 *Nicaragua*, [207].

[112] 1986 *Nicaragua*, [188], [202]-[203]; *Prosecutor v Dusko Tadic (Appeal Judgement) ICTY-94-1-Ar72 (2 October 1995)* ("*Tadic* Appeal"), [111]-[112].

fulfil their obligation to negotiate nuclear disarmament in good faith, regardless of their membership to the NPT.[113] While these resolutions are not binding, this Court has recognised their norm-creating value.[114] These resolutions were adopted in a "stream"[115] and by representative majorities which indicate their expression of a widespread legal conviction.[116]

The UN Security Council has also contributed to the relevant *opinio juris.*[117] In *Tadic*, it was held that Security Council Resolutions are of great relevance when evaluating the formation of opinio juris.[118] In Resolution 1540 the Security Council created obligations for all UN member States to set up measures to limit the proliferation of nuclear weapons.[119] The Council has also affirmed the need for all States to pursue negotiations in good faith.[120]

These contributions to *opinio juris*, supported by the aforementioned State practice, shows the existence of a CIL obligation that corresponds to Article VI of the NPT.

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[113] UNGA/RES/63/33 (2012); UNGA/RES/68/43 (2012); UNGA/RES/70/56 (2012).

[114] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226 ("*Nuclear Weapons*"), [254]-[255].

[115] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226 (Dissenting Opinion of Judge Weeramantry), 531-532.

[116] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) (1971) ICJ Rep 16 (Separate Opinion of Vice-President Ammoun), 79; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 136 (Separate Opinion of Judge Al-Khasawneh) ("*Occupied Wall*, Judge Al-Khasawneh"), [235]-[236].

[117] UNSC/RES/1810 (2008); UNSC/RES/1887 (2009); UNSC/RES/1997 (2011).

[118] *Tadic* Appeal, [133].

[119] UNSC/RES/1540 (2004).

[120] UNSC/RES/984 (1995).

### *c. The Applicant has not persistently objected to the obligation to negotiate.*

Persistent objection is an often-invoked exit door from CIL obligations.[121] This escape route is closed to the Applicant whose objections do not relate to the negotiation of nuclear non-proliferation [i] and are, in any event, inconsistent [ii].

#### *i. The Applicant's objections do not relate to negotiation of nuclear disarmament.*

The Applicant has never objected to the obligation to negotiate nuclear non-proliferation. While it may have opposed the distinction "between nuclear-weapon States and non-nuclear-weapon States" in Articles I and II of the NPT,[122] it has never expressed any opposition to the non-discriminatory obligation contained in Article VI. As silence does not qualify as objection,[123] the Applicant is bound by this obligation.

#### *ii. The Applicant's objections are inconsistent.*

In any event, the Applicant did not object "consistently and uninterruptedly".[124] Its attendance of the TPNW Conference[125] is inconsistent with a rejection of a legal obligation to

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[121] *Anglo-Norwegian Fisheries Case* (United Kingdom v Norway) (1951) ICJ Rep 116 ("*Fisheries*"), 131; David Armstrong et al, *International Law and International Relations* (2nd edn CUP 2012), 180.

[122] F[9].

[123] Jan B. McClane, 'How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?' (1989) 13 ILSAJIntl&CompL 1, 4; Mark E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Martinus Nijhoff Publishers 1985) ("Villiger (1985)") 16; Jonathan Charney, 'Universal International Law' (1993) 87 AJIL 529, 532, 539.

[124] *Fisheries*, 138.

[125] F[39].

negotiate.[126] The contradiction between the Applicant's alleged objection and positive conduct precludes it from claiming persistent objector status.[127]

*d. By acquiring the Ibra, the Applicant acted in bad faith.*

The Applicant's duty to negotiate goes beyond conduct[128] and is not discharged by its brief attendance of the TPNW Conference.[129] It must show that it has adopted, in good faith, a course of action that will achieve the "precise result" of general nuclear disarmament.[130] The Applicant's development of nuclear weapons reverses rather than advances the objective of nuclear disarmament. It has acted in bad faith and has therefore violated Article 16 of the FCN Treaty.

## B. The Applicant has violated its obligation to maintain peace and security.

The Applicant has an obligation to maintain international peace and security [a]. The proliferation of nuclear weapons violates this obligation [b]. Thus, the maintenance of peace and security creates a disarmament obligation violated by the acquisition of the Ibra [c].

[126] *Domingues v United States of America* (Merits) (2002) IACmHR Rep 62/02, Case No. 12.285 [85].

[127] Villiger (1985), 16.

[128] *Nuclear Weapons*, [99].

[129] F[39].

[130] *Nuclear Weapons*, [99].

*c. The Applicant has an obligation to maintain peace and security.*

As a UN member,[131] the Applicant has a positive obligation to preserve international peace.[132] It must pursue this obligation in good faith[133] in accordance with the fundamental principles of the UN Charter.[134] Acts that threaten international peace are prohibited by CIL[135] and will attract censure from the UN General Assembly[136] and corrective measures from the UN Security Council,[137] as has been the case with the Ibra.[138]

*d. The commissioning of the Ibra threatens international peace and security.*

The acquisition and possession of nuclear weapons represent a distinct threat to international peace and security.[139] This threat is recognised by overwhelming majorities of the General Assembly, which affirms that lasting international peace is only guaranteed by the

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[131] F[48].

[132] Charter of the United Nations 1 UNTS XVI (The Charter), Articles 1(1) & 2(5); Rüdiger Wolfrum, 'Article 1' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn OUP 2012) ("Wolfrum (2012)") 108.

[133] The Charter, Article 2(2); Vienna Convention on the Law of Treaties 1155 UNTS 331 ("VCLT"), Article 26.

[134] The Charter, Article 2.

[135] Wolfrum (2012), 108.

[136] The Charter, Article 11.

[137] The Charter, Articles 39, 41 & 42.

[138] UNSC/RES/3790 (2017).

[139] As determined by the UN Security Council in UNSC/RES/687 (1991), UNSC/RES/1172 (1998), UNSC/RES/1718 (2006), UNSC/RES/1874 (2009), UNSC/RES/2094 (2013), UNSC/RES/2270 (2016).

nuclear disarmament of all States.[140] It has declared nuclear weapons inconsistent "with the spirit, letter and aims of the UN"[141] and has considered their use a "crime against humanity and mankind."[142]

Equally, the UN Security Council has either imposed sanctions,[143] weapons embargoes,[144] or condemned "in the strongest terms"[145] attempts by States to develop or expand nuclear capabilities. The Applicant is no exception to the Council's consistent practice in this regard.[146] Hence, the acquisition and deployment of the Ibra, in the Kumatqesh Ocean and elsewhere,[147] is an unmistakable threat to international peace.

*e. The obligation to maintain peace and security creates a disarmament obligation breached by the Ibra's acquisition.*

A clear link exists between nuclear disarmament and the maintenance of peace and security.[148] The obligation to maintain international peace requires the Applicant to supress

[140] UNGA/RES/43/75 (1988); UNGA/RES/14/1378 (1959).

[141] UN General Assembly Res. 1653 (XVI) (24 November 1961) Declaration on the prohibition of the Use of Nuclear Weapons UN Doc A/Res/1653 ("PNW Declaration"), [1(a)].

[142] PNW Declaration, [1(d)].

[143] SC/RES/1929 (2010), imposing economic sanctions on Iran.

[144] SC/RES/1172 (1998).

[145] SC/RES/1874 (2009); SC/RES/2270 (2016).

[146]SC/RES/3790 (2017).

[147] F[43].

[148]UN SC/RES/1887 (2009); UNGA/RES/68/32 (2014); UNGA/RES/67/39 (2013).

nuclear activity that threatens international peace. This represents a nuclear disarmament obligation.

The Applicant, by commissioning and operating the Ibra in defiance of the Security Council,[149] the General Assembly,[150] and amid condemnation from the international community,[151] has violated its obligation to maintain peace and security, and the resultant disarmament obligation binding on it.

## C. Operating the Ibra violates the nuclear disarmament obligation imposed by Resolution 3790.

Resolution 3790 is both sufficient [a] and intended [b] to create a binding nuclear disarmament obligation on the Applicant.

### *a. The language of Resolution 3790 is sufficient to create a legal obligation.*

It is unquestionable that Resolution 3790[152] creates a nuclear disarmament obligation for the Applicant. In *Namibia,* South Africa alleged that Resolution 276[153] was not mandatory, claiming that the resolution's language lacked instructive provisions.[154] This Court rejected this

[149] UNSC/RES/3790 (2017).

[150] UNGA/RES/3078 (1973).

[151] F[37].

[152] UNSC/RES/3790 (2017).

[153] UNSC/RES/287 (1970) where the Council "calls upon all States … to refrain from any dealings with the Government of South Africa…".

[154] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1970* (Advisory Opinion) (1971) ICJ Rep 16 ("*Namibia*"), [113]; Rosalyn Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?' (1972) 2 ICLQ 270, 272.

view and held the operative verb "[c]alls" created a legal obligation binding on all Member States.[155] Thus, when the Security Council "call[ed]" on the Applicant and all UN member States to "restrict the proliferation"[156] of nuclear-armed vessels, it created a binding obligation that was violated by the Ibra's continued operation.

*b. Resolution 3790 was intended to create a legal obligation.*

The Security Council intended to create a disarmament obligation for Anduchenca. In its *Kosovo* Advisory Opinion, this Court, relying on the Vienna Convention on the Law of Treaties (VCLT),[157] found that the terms of UN Security Council resolutions must be considered in their ordinary meaning together with the resolution's context. [158]

In Resolution 3790, the Council uses the terms "neutralise"[159] and "restrict"[160] and recognises the risk of a "serious and uncontrollable conflict".[161] Previously, the term "neutralise" was used to authorise the destruction of armed groups in the Democratic Republic of the Congo.[162] It follows that the language of Resolution 3790, interpreted in its ordinary meaning in

[155] *Namibia*, [114].

[156] UNSC/RES/3790 (2017), [1].

[157] VCLT, Article 31(2).

[158] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) (2010) ICJ Rep 403 ("*Kosovo*"), [94], [96]–[98]. See also *Prosecutor v Tadic* (Protective Measures for Victims and Witnesses) 105 ILR 599, 607-608.

[159] UNSC/RES/3790 (2017), [4].

[160] UNSC/RES/3790 (2017), [1].

[161] UNSC/RES/3790 (2017), [2].

[162] UNSC/RES/2098 (2013), [12(b)].

the context of the Council's commitment to nuclear non-proliferation[163] demonstrate an intention to eliminate the Applicant's nuclear capabilities. Such elimination could only be guaranteed by the imposition of a binding disarmament obligation.

[163] UNSC/RES/3790 (2017), preamble.

## 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 the Ibra are consistent with the recognised exceptions to the prohibition of the use of force under *jus ad bellum* [A]. In disabling the Covfefe [B] and capturing the Ibra, [C] Rukaruku complied with the customary international humanitarian law ("IHL") applicable to international armed conflict at sea.

### A. Rukaruku's use of force is justified by the existing exceptions under international law.

The prohibition against the use of force is not absolute.[164] International law permits States to use force in the exceptional circumstance of UN Security Council authorisation,[165] or through the exercise of their right to self-defence in Article 51 of the UN Charter.[166] Accordingly, Rukaruku's use of force is justified by UN Security Council authorisation [a]. Alternatively, it is justified by its right to self-defence [b].

#### *a. Rukaruku was authorised to use force by the UN Security Council.*

Exercising its authority to restore international peace and security,[167] the UN Security Council authorised Rukaruku to use armed force to neutralise the Ibra [i]. The Applicant cannot ask this Court to review the Council's discretion [ii].

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[164] The Charter, Article 2(4); James A Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 MichJIntlL 215, 229.

[165] The Charter, Article 42

[166] The Charter, Article 51; *Wall*, [131].

[167] The Charter, Article 24; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) (1962) ICJ Rep 151 ("*Expenses*"), 163.

*i. The Security Council authorised Rukaruku to use armed force.*

The UN Security Council, in terms of Article 42 of the Charter and its established practice,[168] can authorise States to use force. Rukaruku was authorised by Resolution 3790[169] to use armed force to neutralise the Ibra. Resolution 3790[170] was passed by a requisite majority of Security Council members[171] and satisfies the three preconditions typical of authorisation under Article 42. First, the Security Council acted "under Chapter VII of the UN Charter."[172] Second, it determined a threat to international peace and security.[173] Third, it clearly outlined the extent, nature and objective of the intended military action[174] which was to use "measures commensurate" to neutralise the Ibra's threat to international security.

This Court,[175] the International Criminal Tribunal for the Former Yugoslavia (ICTY)[176] and the International Criminal Tribunal for Rwanda (ICTR)[177] have relied on the Council's previous practice to interpret whether Security Council resolutions are obligatory, and the scope

[168] See for example, UNSC/RES/83 (1950).

[169] UNSC/RES/3790 (2017).

[170] UNSC/RES/3790 (2017).

[171] F[41]; The Charter, Article 27(3).

[172] Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) ("De Wet (2004)") 143.

[173] The Charter, Article 39; UNSC/RES/3790 (2017).

[174] De Wet (2004), 268-269.

[175] *Namibia*, [22]; *Kosovo*, [94].

[176] *Prosecutor v Tadic* (Jurisdiction) ICTY-94-1 (10 August 1995) ("*Tadic* Jurisdiction"), [28], [39].

[177] *Prosecutor v Rutaganda* (Judgment) *ICTR–96–3–T* (6 December 1999), [67]-[68].

of measures authorised. These tribunals have held that the Council's consistent use of similar terms can be determinative of a resolution's content.

The phrase "measures commensurate" has been used together with "specific circumstances" in resolutions addressing events in Haiti[178] Iraq,[179] Libya,[180] Somalia[181] and the former Yugoslavia.[182] Invoking these Article 42 resolutions as justification, UN Member States used military force to restore international peace and security in each of those instances.[183] Resolution 3790, which employs almost identical phrasing to the aforementioned resolutions, is therefore an unambiguous authorisation of armed measures.

Although the words "all means necessary" generally indicate military authorisation,[184] there is no binding rule governing the drafting of Security Council resolutions that make the phrase mandatory.[185] In fact, substantially weaker language, including the phrases "recommend[s]" and "furnish assistance", have previously been used to authorise States to use

[178] UNSC/RES/875 (1993).

[179] UNSC/RES/665 (1990).

[180] UNSC/RES/1973 (2011); UNSC RES/2292 (2016).

[181] UNSC RES/2181 (2014).

[182] UNSC/RES/787 (1992).

[183] Martin Fink, 'Maritime Embargo Operations: Naval Implementation of UN Sanctions at Sea Under Articles 41 and 42 of the UN Charter' (2011) 60 NILR 73; Yoram Dinstein, *War, Aggression and Self-Defence* (3rd edn, CUP 2001) ("Dinstein (2001)") 303; Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (OUP: 2000), 201.

[184] John Quigley, 'The "Privatization" of Security Council Enforcement Action: A Threat to Multilateralism' (1996) 17 MichJIntlL 249, 262.

[185] Michael Wood, 'The Interpretation of Security Council Resolutions, Revisited' in 2017 20(1) *MaxPlanckYrbkUNL* 1, 13.

armed force.[186] Therefore an authorisation of "measures commensurate" is sufficient to trigger Article 42 of the UN Charter.

Rukaruku's "specific circumstances"[187] warrant its resort to armed force. These include its geographic vulnerability to the Ibra's range of attack,[188] the devastating effects such an attack would have, the Applicant's repeated antagonism towards Rukaruku,[189] the size and sophistication of Rukaruku's navy[190] and its well-developed co-operation strategies in the region.[191] Cumulatively, these specific circumstances warrant its resort to armed force.

### *ii. The Applicant cannot ask this Court to review the legality of the Security Council's decision.*

The Security Council is the only body capable of determining when its Chapter VII powers come into operation and which measures to take under Article 42 of the Charter.[192] Accordingly, the Applicant is precluded from asking this Court "to overrule or undercut"[193] the

[186] UNSC/RES/83 (1950).

[187] UNSC/RES/3790 (2017), [4].

[188] Clarifications, [5].

[189] F[8], [15], [19], [40], [42].

[190] F[8].

[191] F[5].

[192] The Charter, Article 31.

[193] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom) (Dissenting Opinion of Judge Schwabel) ("*Lockerbie* (Dissenting Opinion of Judge Schwabel)") 73, 76.

Council's decision.[194] The only recognised limits on the Council's powers are norms of jus *cogens*[195] which in any event are not relevant to the present dispute.

The Security Council's recognition of events in Odassara as "threat[ening] to the peace"[196] is a political appreciation,[197] not subject to any review by this Court.[198] Not only is there no judicial yardstick for determining threats to peace and security,[199] but in performing such review this Court would usurp the Council's primary function. Respectfully, this Court is requested to exercise discretion and recognise that the scope of Resolution 3790 can only be determined by the body that passed it.[200]

*b. Alternatively, the attacks were a lawful exercise of Rukaruku's right to self-defence.*

Rukaruku's right to self-defence involves anticipatory measures [i]. Its actions were both necessary and proportionate [ii].

*i. Rukaruku's right to self-defence involves anticipatory measures.*

The UN Charter is not a suicide pact – State Parties are not required to remain passive in the face of threats to their existence.[201] Accordingly, Rukaruku has a right to anticipatory self-

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[194] *Namibia*, [89].

[195] De Wet (2000), 188.

[196] UNSC/RES/3790.

[197] *Tadic* Appeal, [39, 40].

[198] *Expenses*, 151, 168.

[199] *Expenses*, 168.

[200] *Expenses*, 168; *Namibia*, [45]; *Lockerbie* (Dissenting Opinion of Judge Schwabel), 76.

[201] Report of the Secretary General, 'Relationship between Disarmament and International Security' (1982) UN Doc A/36/597, [124].

defence when an attack is believed to be imminent.[202]To read Article 51 otherwise, especially in an age of nuclear weapons,[203] guarantees the aggressor's right to the first strike. Anticipatory measures have always been an intrinsic part of the right to self-defence, evidenced in judicial authority[204] and in State practice.[205] This right, according to the drafting history of the UN Charter, is upheld and not extinguished by Article 51.[206]

The temporal dimension of anticipatory self-defence is changed by nuclear weapons. What it considered "imminent" for a conventional weapon cannot apply to a nuclear weapon, which has effects that are instant, widespread and generational.[207] These differences mean that the requirements outlined in *Caroline*[208] - drafted decades before the advent of the nuclear age - are an inappropriate lens to review Rukaruku's actions.

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[202] Shaw (2008), 693-694; Antonio Cassese, *International Law in a Divided World* (Clarendon Press: 1986), 230-233; Thomas Franck, 'Who Killed Article 2(4)?: Changing Norms Governing the Use of Force by States' (1970) 64 AJIL 809, 821.

[203] Stephen Schwebel, 'Aggression, Intervention and Self-Defense' (1972) 136 RdC 481, 483.

[204] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v United States of America) (Merits) (Dissenting Opinion of Judge Schwebel) (1986) ICJ Rep 14, [173]; Humphry Waldock, 'Use of Force in International Law' (1951) 81 RdC 498, 503.

[205] For Example: (1) Israel's strike on Egyptian forces massing on the West Bank June 5, 1967; (2) Israel's strike of the Iraqi Osirak Nuclear Research Reactor June 7, 1981; (3) United States-South Vietnamese action in Cambodia April 30, 1970; (4) The sinking of Argentine warship, General Belgrano, by British Submarines in the Falkland Islands May 2, 1982; (5) America's invasion of Iraq 20 March to 1 May 2003.

[206] United Nations, *UN Charter Travaux Préparatoires*, vol 3 (United Nations: 1945), 483; Kinga Tibori Szabó, *Anticipatory Action in Self-Defence* (Springer 2014), 94.

[207] *Nuclear Weapons*, [35].

[208] Daniel Webster, 'Caroline incident, Remarks by American Secretary Of State Webster' 29 British and Foreign State Papers 1129 ("Caroline"), 1138.

*ii. Rukaruku's use of force was necessary and proportionate to the threat posed by the Ibra.*

The Ibra's instant, overwhelming threat necessitated the attacks. [209] Possession of nuclear weapons infers a readiness to use them.[210] Waiting for the Ibra to strike first or even for the Applicant to express such an intention is untenable.[211] Such delay exposes the region to the disastrous effects of nuclear fallout. Action was taken only after the Security Council was seized of the matter, declared it a threat to international peace and security and authorised armed force.[212] Even then, the Applicant was unwavering and continued to affirm its intention to possess its weapons.[213] Rukaruku was left with no other choice but to employ armed force, thereby establishing necessity.

The armed force used was proportionate as it was limited to targets related to the purpose of neutralising the Ibra.[214] Rukaruku must only show that its measures did not exceed[215] the goal

[209] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) (Merits) (2005) ICJ Rep 168, 231 (Separate Opinion of Judge Simma), [12]; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) (Merits) (2005) ICJ Rep 168 (Separate Opinion of Judge Kooijmans), [30]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2014) ICJ Rep 136 (Declaration of Judge Buergenthal), [30]; Caroline, 1138; *Nuclear Weapons*, [41]; Dinstein (2001), 209.

[210] *Nuclear Weapons*, [45].

[211] Wiese (2012), 1342.

[212] F[43].

[213] F[42].

[214] *Case concerning Oil Platforms* (Islamic Republic of Iran v United States of America) (Merits) (2003) ICJ Rep 161, [51].

[215] Okimoto (2011) 74.

of neutralising the Ibra. When balanced against the vessel's destructive power, the risk of inaction, the attacks on the Ibra and Covfefe[216] fall within the bounds of proportionality.[217]

## B. Rukaruku's use of force was IHL compliant.

Rukaruku's use of force satisfies the *jus in bello* which was triggered by an international armed conflict arising from the resort to force against another State [a]. The separate attacks on the Covfefe and the Ibra are IHL compliant [b].

### *a. An international armed conflict was triggered by the attack on the Covfefe.*

The attack on the Covfefe brought an international armed conflict into existence.[218] The attack did not have to meet a minimum level of intensity,[219] and Rukaruku did not have to make a formal declaration of war.[220] While the Applicant has not responded with its own use of force, an international armed conflict, governed by IHL,[221] nonetheless came into existence.[222]

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[216] Christine Gray, *International Law and the Use of Force* (2nd edn, OUP 2004), 121.

[217] Clarifications [8].

[218] *Tadic* Jurisdiction, [70]; *Prosecutor v Thomas Lubanga Dyilo* (Decision) ICC-01/04-01/06-803, [209].

[219] *Prosecutor v Delalić* (Trial Judgment) IT-96-21 (16 November 1998), [184].

[220] ICRC, *Commentary on Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949)* (ICRC: 2nd ed 2017) (online version) ("ICRC Commentary on GC II"), [233].

[221] *Nuclear Weapons*, [25].

[222] Wolff Heintschel von Heinegg, 'The Difficulties of Conflict Classification at Sea: Distinguishing Incidents at Sea from Hostilities' (2016) 98(2) IRRC 449, 452; ICRC Commentary on GC II, [259]; Jean Pictet (ed), *Commentary on Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949)* (ICRC 1958) ("Pictet (1958)") 20 ; Sylvain Vité, 'Typology Of Armed Conflicts In International Humanitarian Law: Legal Concepts And Actual Situations' (2009) 91 IRRC 69, 72.

Accordingly, the IHL standards of necessity, proportionality and distinction govern Rukaruku's attack on the Covfefe and capture of the Ibra.[223]

*b. The attack on the Covfefe was IHL compliant.*

The use of force against the Covfefe complied with IHL. The attack was targeted at a military objective [i] and was proportionate [ii].

*i. The Covfefe was a military objective.*

By intending to replenish an enemy warship with troops and supplies,[224] the purpose of the Covfefe would be to make an "effective contribution" to enemy action, thereby becoming a military objective.[225] It remained a military objective even though civilians were on board.[226] Its cargo, including communications equipment and able-bodied combatants,[227] means it was not a medical transport and had no exemption from attack.[228]

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[223] *Wall*, [199].

[224] F[43]; Clarifications [8].

[225] Protocol Additional I to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflict (Adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ("AP I"), Article 52(2); San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Institute for Humanitarian Law: 12 June 1994), Rule 40; *Prosecutor v Boškoski and Tarčulovskii* IT-04-82-T (10 July 2008), [353], [354].

[226] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law: Rules* Volume 1 (Cambridge 2005) ("Humanitarian Law Rules"), Rule 8; Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces* (ICRC 1987), [56].

[227] Clarifications [8].

[228] AP I, Article 8(f).

*ii. The attack on the Covfefe was proportionate.*

Proportionate attacks strike a balance between the expected incidental loss of civilian life and the concrete and direct military advantage anticipated.[229] The short-term advantage was the capture of an enemy auxiliary vessel and the long-term advantage was the neutralisation of the Ibra.[230] The attacks were proportionate as the contractors ignored repeated calls to stop or change course.[231] Even if they were not directly participating in hostilities,[232] their proximity to a military objective "expose[d] them to an increased risk of incidental death or injury."[233] Measured against the overall concrete advantage anticipated, the twelve civilian casualties were comparatively low.

## C. Rukaruku's use of force against the Ibra complied with IHL.

The Ibra is a warship, and thus a military object [a] Rukaruku was entitled to capture the Ibra [b].

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[229] AP I, Article 51(5)(B); *Prosecutor v Perišic´* (Judgement) IT-04-81-T (6 September 2011), [96]; *Prosecutor v Galić* IT-98–29-A (30 November 2006), [190]; Humanitarian Law Rules, Rule 14.

[230] F[38].

[231] Clarifications, [8].

[232] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998), [629]; see also ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC: 2009) ("DPH Study") 43, stating that direct participation in hostilities is limited to acts that meet a threshold of harm, direct causation, and have a belligerent nexus.

[233] DPH Study, 37.

*a. The Ibra is a warship and thus a military objective.*

The Ibra is a warship and will, by its nature, always constitute a military objective.[234] The term "warship" defines all military floating platforms, whether surface vessels or submarines.[235] By virtue of its incorporation into the Applicant's naval forces,[236]and the military purpose it was commissioned for, the Ibra enjoyed belligerent rights and could be attacked on sight and sunk without any prior warning.[237]

*b. Rukaruku was entitled to capture the Ibra.*

Under CIL, Rukaruku is entitled to claim enemy warships as war booty.[238] Ownership of such vessels passes to the captor automatically, without any decision by a prize court. [239] The vessel's capture was lawful.

[234] Yoram Dinstein, *The Conduct of Hostilities Under International Law* (Cambridge University Press: 2004) ("Dinstein (2004)"), 102.

[235] Dinstein (2004), 102.

[236] F[38].

[237] Dinstein (2004), 102.

[238] Humanitarian Law Rules, Rule 49; The Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (Adopted 17 October 1907, entered into force 26 January 1910) 36 Stat. 2277, Article 4; Geneva Convention Relative to the Treatment of Prisoners of War (Adopted 12 August 1949, entered into force 21 October 1950) UNTS 75 135, Article 18(1); *Al Nawar v Minister of Defence, et al*, H.C. (High Court) 574/82, [39].

[239] Humanitarian Law Rules, Rule 49.

## PRAYERS FOR RELIEF

For the foregoing reasons, the Respondent respectfully requests this Honourable Court to find, 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

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

Respectfully Submitted on behalf of the Respondent,

Agents for the Respondent.