

INTERNATIONAL COURT OF JUSTICE



THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE 2018 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

**THE CASE CONCERNING
THE EGART AND THE IBRA**

**PEOPLE'S DEMOCRATIC REPUBLIC
OF ANDUCHENCA**
(APPLICANT)

v.

FEDERAL REPUBLIC OF RUKARUKU
(RESPONDENT)

MEMORIAL FOR THE APPLICANT

TABLE OF CONTENTS

TABLE OF CONTENTS	i
INDEX OF AUTHORITIES	vi
STATEMENT OF JURISDICTION	xviii
QUESTIONS PRESENTED	xix
STATEMENT OF FACTS	xx
SUMMARY OF PLEADINGS	xxv
PLEADINGS	1
I. ANDUCHENCA IS NOT BOUND BY THE ARBITRAL AWARD OF 2 MARCH 2017 AS IT IS INVALID.	1
A. THE TRIBUNAL HAD NO JURISDICTION BECAUSE RUKARUKU HAD NO AUTHORITY TO INITIATE ARBITRATION PROCEEDINGS UNDER ARTICLE 10(A) OF THE FCN TREATY.	1
1. There was no legal dispute between the parties under the “awareness” test.	1
2. The dispute prior to arbitration, if any, does not call for the application of Articles 1 to 9 of the FCN Treaty.	2
<i>a. The freedom of commerce and navigation clause under the FCN Treaty only covers commercial vessels.</i>	3
<i>i. It should be presumed that the parties never intended to give “freedom of commerce and navigation” an evolving meaning.</i>	3
<i>ii. In any case, the Egart cannot be construed as a commercial vessel even using evolutionary interpretation.</i>	4
<i>iii. The Egart is not a commercial vessel under restrictive treaty interpretation.</i>	5
<i>b. La compétence de la competence doctrine cannot apply due to improper constitution of the tribunal.</i>	5
B. IN ANY CASE, THE AWARD IS VOID AS THE PROCEEDINGS WERE TAINTED BY IRREGULARITIES NEGATING IMPARTIALITY, INTEGRITY, DUE DILIGENCE AND NON-DELEGATION.	6
1. The tribunal was neither independent nor impartial under the “appearance of bias” test.	6
<i>a. Brasht Moyet’s continuing relationship with Rukaruku gave the tribunal an appearance of bias.</i>	7
<i>b. The tribunal’s impartiality was compromised because of the ex parte communication between Brasht Moyet and Buoc Chivo.</i>	7

2. The tribunal violated the rule on <i>delegatus non potest delegare</i> by having Orvindari write the award.	8
II. RUKARUKU VIOLATED ARTICLE 6 OF THE FCN TREATY WHEN THE EGART OPERATED IN ANDUCHENCA’S TERRITORIAL SEA, BUT ANDUCHENCA DID NOT VIOLATE ARTICLE 7 OF THE FCN TREATY WHEN IT CAPTURED THE EGART.	8
A. RUKARUKU VIOLATED ARTICLE 6 OF THE FCN TREATY BY OPERATING THE EGART WITHIN ANDUCHENCA’S TERRITORIAL SEA.	9
1. The Egart, as an autonomous unmanned vehicle, is not a ship, hence, cannot exercise the right to innocent passage.	9
a. <i>Unmanned vehicles are not ships that are entitled to right of innocent passage.</i>	9
b. <i>In any case, the Egart failed to comply with the conditions of innocent passage.</i>	10
2. In any event, the Egart’s underwater espionage operation constituted a violation of Anduchenca’s territorial and maritime sovereignty.	11
a. <i>The Egart is engaged in maritime espionage.</i>	11
b. <i>Peacetime espionage is a violation of territorial and maritime sovereignty of Anduchenca.</i>	11
B. ANDUCHENCA DID NOT VIOLATE ARTICLE 7 OF THE FCN TREATY WHEN IT CAPTURED THE EGART.	12
1. Anduchenca’s capture of the Egart is within its sovereignty and jurisdiction.	12
a. <i>Anduchenca has the sovereign right to prevent non-innocent passage in its territorial sea.</i>	12
b. <i>The operation of the Egart is not protected by Article 7 of the FCN Treaty.</i>	13
2. Capturing the Egart is a valid response under international law.	13
a. <i>The Egart may be validly captured as it does not enjoy immunity.</i>	13
b. <i>Moreover, Anduchenca’s capture of the Egart qualifies as retorsion and its hacking was proportionate and necessary.</i>	14
III. ANDUCHENCA DID NOT VIOLATE ARTICLE 16 OF THE FCN TREATY BY COMMISSIONING AND OPERATING THE IBRA.	15
A. ANDUCHENCA CAN POSSESS AND ACQUIRE NUCLEAR WEAPONS UNDER CONVENTIONAL INTERNATIONAL LAW.	15
1. The prohibition under Article 16 of the FCN Treaty only pertains to the export and import of small arms and light	16

weapons (“SALWs”).	
a. “Weapons and ammunition” only refers to SALWs pursuant to the teleological approach.	16
b. “Weapons and ammunition” only refers to SALWs based on the parties’ subsequent practice.	17
c. In any event, the Ibra and its nuclear weapons were neither exported nor imported.	18
2. The Geneva Conventions and their Additional Protocols do not impose a disarmament obligation.	19
B. ANDUCHENCA HAS NO DISARMAMENT OBLIGATION UNDER CUSTOMARY INTERNATIONAL LAW.	19
1. There is no generally recognized and universal obligation to disarm as disarmament obligations are essentially treaty-based.	19
2. Article II of the NPT has not attained the status of a customary norm.	20
3. Mere possession of nuclear weapons is not inconsistent with international humanitarian law.	21
C. IN ANY CASE, ANDUCHENCA HAS ATTAINED A PERSISTENT OBJECTOR STATUS TO ANY NUCLEAR DISARMAMENT RULE OF CUSTOM.	21
1. The requirements for invoking the rule have been met.	22
a. Anduchenca complied with the objection criterion.	23
b. Anduchenca complied with the persistence criterion.	23
c. Anduchenca complied with the consistency criterion.	23
d. Anduchenca complied with the timeliness criterion.	24
2. The rule requiring nuclear disarmament is not a <i>jus cogens</i> norm.	24
IV. RUKARUKU VIOLATED ARTICLE 17 OF THE FCN TREATY WHEN IT ATTACKED THE COVFEFE AND WHEN IT CAPTURED THE IBRA.	25
A. THE ATTACK AGAINST THE COVFEFE WAS AN IMPERMISSIBLE THREAT OR USE OF FORCE.	25
1. The attack against the Covfefe was directed against Anduchenca’s political independence by forcefully limiting its possession of weapons.	26
2. In any case, “political independence” and “territorial integrity” do not qualify the prohibition against threat or use of force as appearing in the FCN Treaty using treaty interpretation.	26

a.	<i>Under the teleological approach, it is not the object and purpose of the FCN Treaty to limit threat or use of force only in cases which affect political independence or territorial integrity of parties.</i>	26
b.	<i>Article 17 of the FCN Treaty must be interpreted in relation to Article 2(4) of the UN Charter using systemic integration and supplementary means of treaty interpretation.</i>	27
3.	The attack against the Covfefe was not consistent with Article 51 of the UN Charter, contrary to Rukaruku’s claim.	28
a.	<i>There was no armed attack against Rukaruku either in its traditional notion or in the more liberal “accumulation of events” test.</i>	28
b.	<i>The firing of 12 cruise missiles violated the requirement of necessity and proportionality under jus ad bellum framework.</i>	29
c.	<i>Rukaruku cannot invoke anticipatory, pre-emptive or preventive self-defense.</i>	30
4.	Even assuming Anduchenca is guilty of armed attack, Rukaruku’s use of force violated the rules of jus in bello.	30
a.	<i>The Covfefe was not a legitimate military objective as it neither lost its civilian character nor effectively contributed to Anduchenca’s military capacity.</i>	31
b.	<i>The attack against the Covfefe violated the principle of proportionality under jus in bello.</i>	31
5.	Rukaruku cannot justify the use of force against the Covfefe under United Nations Security Council (“UNSC”) Resolution 3790.	32
a.	<i>Resolution 3790 failed to conform to Articles 40, 41 and 42 of the UN Charter.</i>	32
b.	<i>Resolution 3790 cannot be interpreted in a manner that violates fundamental human rights.</i>	32
B.	RUKARUKU’S CAPTURE OF THE IBRA VIOLATED ARTICLE 17 OF THE FCN TREATY.	32
1.	Article 17 of the FCN Treaty does not authorize the capture of the Ibra.	33
2.	International law does not permit the capture of the Ibra.	33
a.	<i>Possession of a nuclear-armed submarine per se does not amount to an armed attack which triggers the right of Rukaruku to invoke Article 51 of the UN Charter.</i>	33
b.	<i>The capture of Ibra cannot be justified under UNSC Resolution</i>	33

PRELIMINARY PAGES

3790.

- c. *UNCLOS and Customary International Law grant Anduchenca the exclusive jurisdiction over Ibra in the high seas under the flag state rule and freedom of navigation.* 34

PRAYER 34

INDEX OF AUTHORITIES

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<i>Additional Protocol II to the Geneva Conventions of 12 August 1949</i> , 1125 U.N.T.S. 609 (8 June 1977)	31
<i>European Convention for the Protection of Human Rights and Fundamental Freedoms</i> , as amended by Protocols Nos. 11 and 14, E.T.S. 5 (1950)	7
<i>Treaty on the Non-proliferation of Nuclear Weapons</i> , 729 UNTS 161 (1968)	15, 18, 20, 21, 23, 24
<i>Treaty on the Prohibition of Nuclear Weapons</i> , U.N.T.S. Ch XXVI-9 (2017)	15
<i>United Nations Convention on the Law of the Sea</i> , 1833 U.N.T.S. 397 (10 December 1982)	9, 10, 12, 13, 14, 34
<i>Vienna Convention on the Law of Treaties</i> , 1155 U.N.T.S. 331 (1969)	9, 13, 15, 24, 26, 27

JUDICIAL DECISIONS

International Cases and Arbitral Decisions

<i>Aegean Sea Continental Shelf (Greece v Turkey)</i> , 1978 I.C.J. Rep. 3 (19 December)	4
<i>Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)</i> , Merits, Judgment, 2010 I.C.J. Rep. 582 (30 November)	18
<i>Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)</i> , Preliminary Objections, Judgment, 2016 I.C.J. Rep. 3 (17 March)	2
<i>Anglo-Norwegian Fisheries Case (U.K. v Norway)</i> , 1951 I.C.J. Rep. 116 (18 December).	22
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<i>Arbitration Between the Republic of Croatia and the Republic of Slovenia, Partial Award</i> , P.C.A. Case No 2012-04 (30 June 2016)	6
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<i>Asylum Case (Colombia v Peru)</i> , 1950 I.C.J. 266 (13 June)	22
<i>Blue Bank International & Trust (Barbados) Ltd.</i> , I.C.S.I.D. Case No. ARB/12/20 (26 April 2017)	6

PRELIMINARY PAGES

<i>Burlington Resources, Inc. v Republic of Ecuador, Decision on the Proposal for Disqualification of Professor Vicuña</i> , I.C.S.I.D. Case No. ARB/08/5 (13 December 2013)	6
<i>Caratube International Oil Co. LLP v Republic of Kazakhstan, Decision on the Proposal for Disqualification of Bruno Boesch</i> , I.C.S.I.D. Case No. ARB/13/13 (20 March 2014)	7
<i>Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)</i> , Judgment, 1999 I.C.J. Rep. 1045 (13 December)	4, 17
<i>Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)</i> Judgment, 2007 I.C.J. Rep. 43	18
<i>Case Concerning the Pulp Mills on the River Uruguay (Argentina v Uruguay)</i> , Judgment, 2010 I.C.J. Rep. 425 (20 April)	18
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<i>Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)</i> , Merits, Judgment 1962 I.C.J. Rep. 6 (15 June)	17
<i>Case of Al-Jedda v United Kingdom</i> , Application no. 27021/08 (7 July 2011)	32
<i>Corfu Channel Case (United Kingdom v Albania)</i> , 1949 I.C.J. Rep. (9 April)	18
<i>Di Curzio Case</i> , 1959 R.I.A.A. Vol XIV	2
<i>Dispute between Argentina and Chile concerning the Beagle Channel XXI (Pt II)</i> , Award, 1977 R.I.A.A. 53 (18 February)	18
<i>Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)</i> , Judgment, 2009 I.C.J. Rep. 213 (13 July)	3, 4, 27
<i>Domingues v United States of America</i> , Merits, IACmHR, Report No. 62/02, Case No. 12.285 (2002)	23
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<i>Gabčíkovo-Nagymaros Project (Hungary v Slovenia)</i> , Judgment, 1997 I.C.J. Rep. 3 (5 February)	4
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Rep. 303 (10 October)	
<i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory</i> , Advisory Opinion, 2004 I.C.J. Rep 136 (30 January)	28
<i>Legality of the Threat or Use of Nuclear Weapons</i> , Advisory Opinion, 1996 I.C.J. Rep 226 (8 July)	20, 21, 33
<i>Mavrommatis Palestine Concessions Case (Greece v Britain)</i> , Judgment, 1924 P.C.I.J. Series A, No. 2	1
<i>Military and Paramilitary Activities In and against Nicaragua (Nicaragua v United States of America)</i> , Judgment, Merits, 1986 I.C.J. Rep. 14 (27 June)	17, 20
<i>National Grid P.L.C. v Argentine Republic</i> , Decision on the Challenge to Mr. Judd L. Kessler, Case No. UN 7949 (3 December 2007)	7
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<i>Nottebohm (Liechtenstein v Guatemala)</i> , Preliminary Objection, 1955 I.C.J. Rep. 4 (18 November)	6
<i>Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v UK)</i> , Judgment, General List No. 158 (5 October 2016)	1
<i>Oil Platforms (Islamic Republic of Iran v United States of America)</i> , Merits, Judgment, 2003 I.C.J. Rep. 161 (6 November)	27
<i>Prosecutor v Duško Tadić</i> , Judgment, Case No. IT-94-1-T (7 May 1997)	31, 34
<i>Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)</i> , Merits, Judgment, 2012 I.C.J. Rep. 422 (20 July)	2, 24
<i>Roach and Pinkerton v United States of America</i> , Merits, IACmHR, Resolution No. 3/87, Case 9647 (1987)	23
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<i>Territorial Dispute (Libyan Arab Jamahiriya v Chad)</i> , Judgment, 1994 I.C.J. Rep. 7 (3 Feb)	17
<i>The Case of S.S. Lotus (France v Turkey)</i> , Judgment, 1927 P.C.I.J. (ser. A) No. 10 (7 Sep)	15, 20, 26
<i>The S.S. 'Wimbledon', United Kingdom and Poland (intervening) v Germany</i> , Judgments, 1923 P.C.I.J. Ser. A, No. 1	5
<i>The Walfish Bay Boundary Case (Germany/Great Britain)</i> , Award, R.I.A.A.	6

Vol. XI 23 (May 1911)	
<i>United States — Import Prohibition of Certain Shrimp and Shrimp Products</i> (“US-Shrimp”), Appellate Body Report, WT/DS58/AB/R (12 October 1998)	13
<i>Vito G. Gallo v Government of Canada, Decision on the Challenge to Mr. J.</i> <i>Christopher Thomas, QC</i> , PCA Case No. 55798 (14 October 2009)	7
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<i>Yukos Universal Ltd (Isle of Man) v The Russian Federation, Final Award</i> , PCA Case No 2005-04/AA227 (18 July 2014)	8
National Case Law	
<i>Fetherstone v Cooper</i> , 9 Ves 67 (1803)	8
<i>Giacamo Costa Fu Andrea v British Italian Trading Ltd.</i> , 1 QB 201 (1963)	8
BOOKS AND TREATISES	
ABASS, ADEMOLA, <i>COMPLETE INTERNATIONAL LAW: TEXT, CASES,</i> <i>AND MATERIALS</i> (2014)	21
BOWETT, DEREK, <i>SELF-DEFENCE IN INTERNATIONAL LAW</i> (1958)	28
BROWNLIE, IAN, <i>INTERNATIONAL LAW AND THE USE OF FORCE BY</i> <i>STATES</i> (1963)	26, 28
BROWNLIE, IAN, <i>PRINCIPLES OF PUBLIC INTERNATIONAL LAW</i> (1990)	15
BROWNLIE, IAN, <i>PRINCIPLES OF PUBLIC INTERNATIONAL LAW</i> (2003)	21
CHESTERMAN, SIMON, DAVID MALONE, IAN JOHNSTONE, <i>LAW</i> <i>AND PRACTICE OF THE UNITED NATIONS: DOCUMENTARY AND</i> <i>COMMENTARY</i> (2008)	32
CORTEN, OLIVIER, <i>LE DROIT CONTRE LA GUERRE</i> (2014)	25
CRAWFORD, JAMES, <i>BROWNLIE’S PRINCIPLES OF PUBLIC</i> <i>INTERNATIONAL LAW</i> (2012)	12
DINSTEIN, YORAM, <i>WAR, AGGRESSION AND SELF-DEFENCE</i> (1988)	25
DÖRR, OLIVER & KIRSTEN SCHMALENBACH, <i>VIENNA</i> <i>CONVENTION ON THE LAW OF TREATIES: A COMMENTARY</i> (2012)	16
DOSWALD-BECK, LOUISE (ED.), <i>SAN REMO MANUAL ON</i> <i>INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT</i> <i>SEA</i> (1995)	31, 32
ERICKSON, RICHARD, <i>LEGITIMATE USE OF MILITARY FORCE</i>	30

PRELIMINARY PAGES

<i>AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM</i> (1989)	
GARDAM, JUDITH, <i>NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES</i> (2004)	29
GARDINER, RICHARD, <i>TREATY INTERPRETATION</i> (2015)	17, 26, 27
GILLIS, MELISSA, <i>DISARMAMENT: A BASIC GUIDE</i> (2017)	
GREEN, JAMES A., <i>THE PERSISTENT OBJECTOR RULE INTERNATIONAL LAW</i> (2016)	23, 24
GREY, CHRISTINE, <i>INTERNATIONAL LAW AND THE USE OF FORCE</i> (2000)	28
HARRIS, DAVID, <i>CASES AND MATERIALS ON INTERNATIONAL LAW</i> (2010)	28
HIGGINS, ROSALYN, <i>THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS</i> (1963)	29
JENNINGS, ROBERT AND ARTHUR. WATTS, <i>OPPENHEIM'S INTERNATIONAL LAW, VOL. I: PEACE</i> (1996)	20
JESSUP, PHILIP, <i>THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION</i> (1927)	10
JOYNER, DANIEL, <i>INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION</i> (2009)	21
JUDGE SHIGERU ODA, <i>LIBER AMICORUM</i> , NISUKE ANDO, EDWARD MCWHINNEY, RUDIGER WOLFRUM, EDS. (2012)	27
KLABBERS, JAN, <i>INTERNATIONAL LAW</i> (2013)	22
KOSKENNIEMI, MARTTI, <i>STUDY ON THE FUNCTIONS AND SCOPE OF THE LEX SPECIALIS RULE AND THE QUESTION OF "SELF-CONTAINED REGIMES"</i> (2004)	27
LAUTERPACHT, HERSCH. (ED.), <i>DISPUTES, WAR AND NEUTRALITY</i> (1952)	26
LEPARD, BRIAN, <i>CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS</i> (2010)	23
LO, CHANG-FA, <i>TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES: A NEW ROUND OF CODIFICATION</i> (2017)	13
MALANCZUK, PETER, <i>AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW</i> (1997)	22
MCMAHAN, JEFF, <i>KILLING IN WAR</i> (2009)	31
MCNAIR, ARNOLD DUNCAN, <i>THE LAW OF TREATIES</i> (1961)	19

PRELIMINARY PAGES

NOLTE, GEORG, <i>TREATIES AND SUBSEQUENT PRACTICE</i> (2013)	16
OFFICE FOR DISARMAMENT AFFAIRS, <i>THE UNITED NATIONS DISARMAMENT YEARBOOK: DISARMAMENT RESOLUTIONS AND DECISIONS OF THE SEVENTY-FIRST SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY</i> , Volume 41 Part I (2017)	16
OPPENHEIM, LASSA, <i>I INTERNATIONAL LAW: A TREATISE</i> , HERSCH LAUTERPACHT ED. (1955)	12
QUINCE, CHARLES, <i>THE PERSISTENT OBJECTOR AND CUSTOMARY INTERNATIONAL LAW</i> (2010)	25
RAJOO, SUNDRA, <i>LAW, PRACTICE AND PROCEDURE OF ARBITRATION</i> (2017)	8
RATNABALI, KONGBRAILATPAM, <i>THE LAW OF ARMED CONFLICT: AN INTRODUCTION</i> (2017)	31
REDFERN, ALAN & MARTIN HUNTER, <i>INTERNATIONAL COMMERCIAL ARBITRATION</i> (2004)	7
ROZAKIS, C.L., <i>THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES</i> (1976)	25
SINCLAIR, IAN, <i>THE VIENNA CONVENTION ON THE LAW OF TREATIES</i> (1984).	16
ST. HIN SUTTON, DAVID, JUDITH GILL AND MATTHEW GEARING, <i>RUSSELL ON ARBITRATION</i> (2007)	8
STRAW, JACK, <i>LAST MAN STANDING: MEMOIRS OF A POLITICAL SURVIVOR</i> (2012)	32
SVERRISSON, HJORTUR B., <i>COUNTERMEASURES, THE INTERNATIONAL LEGAL SYSTEM, AND ENVIRONMENTAL VIOLATIONS</i> (2008)	14
TACKABERRY, JOHN, ARTHUR MARRIOTT AND RONALD BERNSTEIN, <i>BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE</i> (2003)	8
TRINDADE, ANTÔNIO AUGUSTO CANÇADO, <i>THE UNIVERSAL OBLIGATION OF NUCLEAR DISARMAMENT</i> (2017)	20
UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS (UNODA), <i>SMALL ARMS AND LIGHT WEAPONS: SELECTED UNITED NATIONS DOCUMENTS</i> (2008).	16
VATTEL, EMMERICH DE, <i>THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS</i> (1797)	5
WILMSHURTS, ELIZABETH, <i>PRINCIPLES OF INTERNATIONAL LAW ON THE USE OF FORCE BY STATES IN SELF-DEFENSE</i> (2005)	29

WOOD, DONALD, <i>INTERNATIONAL LOGISTICS</i> (1995)	31
ZABALZA, GABRIEL ORELLANA, <i>THE PRINCIPLE OF SYSTEMIC INTEGRATION: TOWARDS A COHERENT INTERNATIONAL LEGAL ORDER</i> (2012)	
ESSAYS, ARTICLES, AND JOURNALS	
Akehurst, Michael, <i>Custom as a Source of International Law</i> , 47 <i>British Yearbook of International Law</i> 1 (1974–5)	22
Anderson, Troy, <i>Itting a Virtual Peg into a Round Hole: Why Existing International Law Fails to Govern Cyber Reprisals</i> , 34 <i>Ariz. J. International & Comp. Law</i> 135 (2017)	14
Arato, Julian, <i>Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences</i> , 9 <i>L and Practice of Intl Courts and Tribunals</i> (2010)	4
Berman, Frank, <i>Treaty “Interpretation” in a Judicial Context</i> , 29 <i>Yale J. International L.</i> 318 (2004)	17
Bosch, Miguel, <i>The Non-Proliferation Treaty and its Future</i> in Philippe Sands and Laurence Boisson De Chazournes (eds.), <i>INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS</i> (1999)	20
Bunn, George and Roland Timerbaev, <i>Security Assurances to Non-Nuclear-Weapon State</i> , <i>The Non Proliferation Review</i> (Fall 1993)	33
Byers, Michael, <i>Terrorism, the Use of Force and International Law after 11 September</i> , 51 <i>International and Comparative Law Quarterly</i> 401 (2002)	29
Cannizzaro, Enzo, <i>Contextualizing Proportionality: Jus ad bellum and jus in bello in the Lebanese War</i> , 88 <i>International Review of the Red Cross</i> , no. 864 (2006)	32
Caron, David D., <i>The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution</i> , 84 <i>A.J.I.L.</i> 104 (1990)	1
Champonovo, Christopher, <i>Dispute Settlement and the OECD Multilateral Agreement Investment</i> , 1 <i>UCLA J. International L. & For. Aff.</i> 181 (1996)	14
Charlesworth, Hillary and Christine Chinkin, <i>The Gender of Jus Cogens</i> , 15 <i>Human Rights Quarterly</i> (1993)	24
Charney, Jonathan, <i>The Persistent Objector Rule and the Development of Customary International Law</i> , 56 <i>Brit. Y.B. International L.</i> 1 (1985)	22
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PRELIMINARY PAGES

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STATEMENT OF JURISDICTION

The People’s Republic of Anduchenca (“Anduchenca”) instituted proceedings against the Federal Republic of Rukaruku (“Rukaruku”) before the International Court of Justice pursuant to Article 40(1) of the Statute of the Court regarding the dispute concerning alleged violations by Rukaruku of the Treaty of Friendship, Commerce and Navigation between Anduchenca and Rukaruku on 12 March 1947 (“FCN Treaty”).

Rukaruku made known its intention to file counter-claims under Article 80 of the Rules of Court on 10 July 2017.

On 4 August 2017, the Agents of the Parties agreed to have all the claims and counter-claims heard together in a single set of proceedings, and after negotiations, the Agents of the Parties jointly communicated to the Court the Statement of Agreed Facts on 23 August 2017.

The Agents of the Parties have agreed that a “dispute” between the Parties exists with respect to each of the aforementioned claims and counter-claims within the meaning of Articles 10 and 20 of the FCN Treaty, and that all of the counter-claims are “directly connected with the subject matter” of at least one of the claims within the meaning of Article 80 of the Rules of Court.

Both States are party to the Court’s compromissory and compulsory jurisdiction under Article 36(1) and Article 36(2) of the Court’s Statute respectively.

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 violated Article 7 of the FCN Treaty when it captured the Egart;
- III.** Whether Anduchenca violated Article 16 of the FCN Treaty by commissioning and operating the Ibra; and
- IV.** Whether Rukaruku violated Article 17 of the FCN Treaty when it attacked the Covfefe and captured the Ibra.

STATEMENT OF FACTS

ODASARRAN NEIGHBORS AND THE INCONGRUENCE OF POWER

Anduchenca and Rukaruku are neighboring States in the Odasarra Region, with the latter as the dominant military, diplomatic and economic power in the region. Except for Rukaruku, the region was left with decimated civil infrastructures and shattered economies post World War II, and there was a proliferation of small arms and light weapons among civilians. For decades, Odasarra became a hub for illicit international arms trafficking.

To stimulate growth and promote stability in the region, Rukaruku concluded bilateral treaties of Friendship, Commerce and Navigation (“FCN Treaty”) with all Odasarran States, including Anduchenca in 1947. Rukaruku also provided economic aid packages, expanded its Navy and helped the other States implement large-scale disarmament programs. Beginning 1995, Rukarukan Navy implemented an aggressive interdiction strategy to end illicit small-arms trade in Odasarra.

In 1968, all Odasarran States, except Anduchenca, signed the Treaty on the Non-Proliferation of Nuclear Weapons (“NPT Treaty”). On numerous occasions in the last half decade, Anduchenca has consistently maintained that the NPT Treaty “establishes and aggravates an inherent inequality between nuclear-weapon and non-nuclear-weapon States”.

In December 1982, all Odasarran States, again with the exception of Anduchenca, signed and ratified the United Nations Convention on the Law of the Sea (“UNCLOS”). Anduchenca cited the compulsory dispute settlement mechanism under UNCLOS to be “unnecessary”.

EGART, THE RUKARUKAN SPY DRONE

In August 2015, the Rukarukan Navy began deploying autonomous underwater vehicles (“AUVs”) in its naval operations outside Odasarra. The AUVs are programmed to navigate

autonomously for a week and return to their deploying ships. They are equipped with sophisticated optical, acoustic and sonar systems. Anduchencan press labelled them as “spy drones” conducting surveillance of Anduchenca’s naval activities.

On his speech before the General Assembly on 25 September 2015, the Anduchencan Head of State, General Tovarish, gave notice to all States that should Anduchenca find any spy drone within its territorial sea, it shall be captured and not returned.

A month thereafter, the Anduchencan Navy announced the capture of a Rukarukan AUV found less than 11 nautical miles from the Anduchencan coast. Hours later, Rukaruku released a statement confirming the capture of its AUV, called the Egart. It insisted the Egart’s immediate return, without necessarily invoking the FCN Treaty as having been violated by Anduchenca.

The dispute of the Egart’s return was the subject of diplomatic conversations between the States throughout November 2015. Failing to come to an agreement, Rukaruku initiated arbitration proceedings against Anduchenca under Article 10(a) of their FCN Treaty. Anduchenca did not respond to the request for arbitration. It later argued that the FCN Treaty does not apply to the dispute involving the Egart.

A TRIBUNAL WITHOUT JURISDICTION AND THE RUKA RUSE

The arbitral tribunal was composed of (1) Bhrasht Moyet, a Rukarukan elected into the International Court of Justice (“ICJ”) and arbitrator for Rukaruku in 4 arbitrations in the last decade, (2) Alice Bacal, ICJ President and presiding arbitrator, and (3) Mou Tong, member of the International Tribunal for the Law of the Sea, appointed by Bacal on behalf of Anduchenca.

Upon its constitution, Anduchenca sent a *Note Verbale* to Rukaruku and the tribunal declaring that it will neither participate in the arbitration nor recognize the validity of the award.

Anduchenca believes that the dispute is not arbitrable and the tribunal is not seized of jurisdiction.

The tribunal decided to continue with the proceedings and treated Anduchenca's *Note Verbale* as an objection. On 2 March 2017, the tribunal rendered an award in favor of Rukaruku. It concluded that it was seized of jurisdiction, and ordered the Egart's immediate return.

On 21 March 2017, an international non-governmental organization that reports on high-profile arbitrations, the Institute for Legal Studies of Arbitration ("ILSA"), published a report called "The Ruka Ruse".

The report reproduced transcripts of three telephone conversations between Moyet and Rukarukan counsel and lawyer for the Rukarukan Ministry of External Relations, Buoc Chivo, before and during the tribunal's deliberations. In the *ex parte* communication, Chivo requested Moyet to emphasize to the tribunal certain arguments. Moyet agreed and interposed no objection to the communication made to him.

The report also revealed the hiring of Mikkell Orvindari as assistant to the tribunal without the knowledge and consent of either party. Orvindari billed 522 hours, ten times more than the judges of the tribunal. ILSA also discovered and published Orvindari's draft of the award which was identical to the final version. Chivo resigned from his post in the Rukarukan Ministry.

On 27 March 2017, Rukaruku addressed the ILSA Report and downplayed the irregularities as not having any significant influence over the tribunal's decision.

THE IBRA AND THE ATTACK ON THE COVFEFE

In April 2017, General Tovarish called a special conference to confirm reports that Anduchenca had commissioned a nuclear-armed submarine, called the Ibra. In the same

conference, Tovarish declared that Anduchenca would not be attending the second substantive session to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, and would consequently not sign any treaty that might emerge from those meetings.

On 8 May 2017, the Security Council adopted Resolution 3790 which called on Member States to take such actions as may be appropriate to support the implementation of the NPT, and to restrict the proliferation of nuclear weapons and nuclear-armed vessels, whose very existence constitutes a threat to peace.

Nothing in the said resolution explicitly authorizes use of force. However, during the Council's discussions, Rukaruku declared that it would do "what is necessary to promote peace and stability in the region".

The Covfefe, an unarmed vessel owned and operated by a privately held company, the High Seas Supplies, was en route to deliver to the Ibra 10 Anduchencan sailors, bedding, medical supplies, communications equipment, food and water on 6 June 2017.

Rukarukan warships fired 12 cruise missiles at the Covfefe, on the high seas. Four of the 12 missiles hit the Covfefe which caused it to sink within the hour from the attack, resulting to the death of 10 Anduchencan sailors and 7 civilians employed by High Seas Supply.

On 14 June 2017, Rukaruku located the Ibra, approximately 20 nautical miles from the Anduchencan coast. Rukarukan warships began enclosing the submarine and fired torpedoes that forced the Ibra to surface. After its deck was hit by machine gun-fire, the Ibra was boarded and Rukaruku seized operational control of the submarine. The personnel on board were escorted to the Rukarukan naval base, with the Ibra's crew detained for questioning. They were then delivered to the Anduchencan Embassy in Rukaruku for repatriation.

On 19 June 2017, the Security Council adopted a Resolution affirming Rukaruku's agreement with the International Atomic Energy Agency ("IAEA") and two NPT nuclear weapon States. The agreement provided for the Ibra's complete dismantling. The IAEA certified that the agreement had been carried out six weeks later, with initial findings that the weapons found on the Ibra, including its nuclear weapons, had been manufactured in Anduchenca.

SUMMARY OF PLEADINGS

I

The arbitral award of 2 March 2017 is invalid because the tribunal had no jurisdiction. There was no legal dispute cognizable by the tribunal based on the requirements of Article 10(a) of the 1947 Treaty of Friendship, Commerce and Navigation (“FCN”).

The Egart does not enjoy freedom of commerce and navigation as Article 7 of the FCN only covers commercial vessels, using the principle of contemporaneity. The parties did not intend to give the treaty an evolving meaning as reflected by their subsequent acts. In any case, there is no existing norm under international law which supports the classification of autonomous underwater vehicles as commercial vessels.

Assuming the tribunal had jurisdiction, the award is still invalid due to serious breach of arbitral integrity. Using the “appearance of bias” test, the tribunal’s impartiality and independence were compromised. Further, the tribunal violated the rule on *delegatus non potest delegare*.

II

Rukaruku violated Article 6 of the FCN Treaty by operating the Egart within Anduchencan waters. The Egart is not entitled to the right of innocent passage, and also failed to comply with the conditions to enjoy such right. The Egart also violated Anduchenca’s maritime sovereignty for engaging in espionage during peacetime.

The Egart’s capture does not violate Article 7 of the FCN Treaty as it is within Anduchenca’s sovereignty and jurisdiction. Anduchenca has the right to prevent non-innocent passage within its territory. The Egart’s capture is a valid response under international law

because it is not protected by sovereign immunity. In any case, it qualifies as retorsion, and is proportionate and necessary under the circumstances.

III

Commissioning and operating the Ibra does not violate Article 16 of the FCN Treaty as the prohibition only pertains to the export and import of small arms and light weapons. This is supported by a teleological approach of treaty interpretation, and by the parties' subsequent practice. In any event, the Ibra and its nuclear weapons were neither exported nor imported.

Anduchenca has no disarmament obligation under conventional or customary international law. The Geneva Conventions and their Additional Protocols do not impose disarmament obligations. Mere possession of nuclear weapons is not inconsistent with international humanitarian law.

In any case, Anduchenca is a persistent objector to any nuclear disarmament custom as it met the criteria of objection, persistence, consistency and timeliness. The rule requiring disarmament is not a *jus cogens* norm.

IV

The attack against the Covfefe was an impermissible threat or use of force as it was directed against Anduchenca's political independence to forcefully limit its possession of weapons. In any case, under the teleological approach of treaty interpretation, it is not the object and purpose of the FCN Treaty to limit threat or use of force only in cases which affect political independence or territorial integrity. Article 17 of the FCN must be interpreted in relation to Article 2(4) of the United Nations ("UN") Charter using systemic and supplementary means of treaty interpretation.

The attack on the Covfefe was inconsistent with Article 51 of the UN Charter as there was no armed attack against Rukaruku under its traditional notion or under the “accumulation of events” test. The firing of 12 cruise missiles was unnecessary and disproportionate under *jus ad bellum*, and Rukaruku cannot invoke anticipatory, pre-emptive or preventive self-defense.

In any case, Rukaruku violated the rules of *jus in bello*. There was no military necessity which made the Covfefe a legitimate military objective as it retained its civilian character and did not effectively contribute to Anduchenca’s military capacity. UN Security Council (“SC”) Resolution 3790 cannot justify Rukaruku’s use of force as it failed to conform to Articles 40, 41 and 42 of the United Nations Charter, and it cannot be interpreted in a manner that violates fundamental human rights.

Rukaruku’s capture of the Ibra violated Article 17 of the FCN Treaty and international law. Possession of nuclear-armed submarine *per se* does not amount to armed attack which triggers invocation of UN Charter Article 51. UNSC Resolution 3790 does not justify the capture of the Ibra. The United Nations Convention on the Law of the Sea and customary international law grants Anduchenca exclusive jurisdiction over the Ibra in the high seas.

PLEADINGS

I. ANDUCHENCA IS NOT BOUND BY THE ARBITRAL AWARD OF 2 MARCH 2017 AS IT IS INVALID.

Interstate arbitration is created and defined by treaty,¹ and the arbitration clause becomes the foundation of a tribunal’s jurisdiction.² Anduchenca submits that [A] the tribunal did not have jurisdiction, and [B] in any case, the award is invalid because of the irregularities in the proceedings.

A. THE TRIBUNAL HAD NO JURISDICTION BECAUSE RUKARUKU HAD NO AUTHORITY TO INITIATE ARBITRATION PROCEEDINGS UNDER ARTICLE 10(A) OF THE FCN TREATY.

Under the FCN Treaty³ arbitration clause, a tribunal shall arbitrate only when (1) there exists a dispute between the parties and (2) the dispute concerns interpretation or application of Articles 1 to 9 of the FCN Treaty.

1. There was no legal dispute between the parties under the “awareness” test.

Under international law, a dispute is a clash of legal views, or a disagreement on a point of fact or law between two parties.⁴ In the *2016 Marshall Islands Case*⁵, the International Court of Justice (“ICJ”) laid down the “awareness” test, under which there must be an assessment

¹ David Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 A.J.I.L. 104 (1990).

² Doyin Rhodes-Vivour, *The Agreement to Arbitrate – A Primary Tool for the Resolution of Maritime Disputes*, Practical Maritime Arbitration Conference, Dubai, (5-7 April 2008).

³ *Treaty of Friendship, Commerce and Navigation between the People’s Democratic Republic of Anduchenca and the Federal Republic of Rukaruku*, Statement of Agreed Facts [hereinafter *Agreed Facts*], Annex I. [hereinafter *FCN Treaty*]

⁴ *Mavrommatis Palestine Concessions Case (Greece v Britain)*, Judgment, 1924 P.C.I.J. Series A, No. 2, 11.

⁵ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v UK)*, Judgment, General List No. 158 (5 October 2016).

whether the respondent is aware of the existence of a dispute⁶, to place it on notice⁷ and give it an opportunity to recognize or deny an international obligation.⁸

Here, Anduchenca could not be seen as being aware of the dispute cognizable by the tribunal. The subject of the communication between itself and Rukaruku prior to the initiation for arbitration was limited to the return of the Egart.⁹ There is no clear showing that Rukaruku ever specifically alleged¹⁰ any FCN Treaty violation on the part of Anduchenca, which is the threshold set by the ICJ in its recent decisions.¹¹

2. The dispute prior to arbitration, if any, does not call for the application of Articles 1 to 9 of the FCN Treaty.

The arbitration tribunal under the FCN Treaty can only be legally constituted when Articles 1 to 9 of the FCN Treaty apply to the dispute. Here, the only disagreement existing at the time of Rukaruku's initiation for arbitration had been about the Egart¹² – a matter falling outside the FCN Treaty as discussed below.¹³

⁶ Meenakshi Ramkumar and Aishwarya Singh, *The Nuclear Disarmament Cases: Is Formalistic Rigour in Establishing Jurisdiction Impeding Access to Justice?*, 33 *Utrecht Journal of International European Law* 85 (2017), 128-134.

⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, Judgment, 2011 I.C.J. Rep. 70 (1 April), ¶30. [hereinafter *Georgia v Russian Federation*]

⁸ *Di Curzio Case*, 1959 R.I.A.A. Vol XIV, 391-393.

⁹ *Agreed Facts*, ¶16-19.

¹⁰ Phoebe Okowa, *The International Court of Justice and the Georgia/Russia Dispute*, 11 *Human Rights Law Review* (2011), 739-757.

¹¹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Merits, Judgment, 2012 ICJ Rep. 422 (20 July), 444-5, 462; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, Preliminary Objections, Judgment, 2016 I.C.J. Rep. 3 (17 March), ¶78.

¹² *Agreed Facts*, ¶19.

¹³ *Id.*, ¶23.

- a. *The freedom of commerce and navigation clause under the FCN Treaty only covers commercial vessels.*

Under the principle of contemporaneity, the terms of the treaty must be interpreted according to the meaning attributed to them at the time when it was originally concluded¹⁴ to ascertain the original intent of the parties.¹⁵

The FCN Treaty was concluded after World War II as part of the rehabilitation of the region.¹⁶ The freedom of commerce and navigation was intended to stimulate financial growth after the war shattered Odasarran economies.¹⁷ Thus, Article 7¹⁸ must be construed to only cover vessels which facilitate trade between both parties.¹⁹

For this provision to cover Egart, the parties must have intended to give “freedom of commerce and navigation” an evolving meaning²⁰ such that commercial vessels cover autonomous underwater vehicles (“AUVs”).²¹ Such intent is lacking in this case.

- i. *It should be presumed that the parties never intended to give “freedom of commerce and navigation” an evolving meaning.*

¹⁴ Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, B.Y.I.L., Vol. 33 (1957), 212.

¹⁵ Bruno Simma and Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in Binder, et al (eds.), *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CRISTOPH SCHREUR* (2009), 694.

¹⁶ *Agreed Facts*, ¶5.

¹⁷ *Id.*, ¶4.

¹⁸ *FCN Treaty*.

¹⁹ *Agreed Facts*, ¶23.

²⁰ *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, 2009 I.C.J. Rep. 213 (13 July), ¶64-67. [hereinafter *Costa Rica v Nicaragua*]

²¹ *Agreed Facts*, ¶13.

Without clear subsequent practice,²² it must not be presumed that the parties intended to give the terms of a treaty an evolving meaning.²³

Here, Anduchenca manifested to the world that it would not permit any foreign government vessel proposing to enter its territorial sea without obtaining prior authorization.²⁴ The subsequent practice of Rukaruku also supports this interpretation since it piloted the AUVs outside the region despite having freedom of navigation throughout the entire Odasarra.²⁵

ii. *In any case, the Egart cannot be construed as a commercial vessel even using evolutionary interpretation.*

Evolutionary treaty interpretation dictates the understanding of the treaty in light of emerging norms of international law.²⁶ Current state practice show that AUVs used for commerce are deployed by private entities for specific commercial endeavors²⁷ such as deep sea exploration for offshore oil and mineral deposits.²⁸

²² *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 1999 I.C.J. Rep. 1045 (13 December), 1076. [hereinafter *Kasikili/Sedudu Island*]

²³ Report of the ILC, U.N.G.A.O.R. 66th Sess Supp 10, U.N. Doc A/66/10/Add.1 (2011), 33; Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 *Law and Practice of International Courts and Tribunals* (2010), 443; *Costa Rica v Nicaragua*, ¶66.

²⁴ *Agreed Facts*, ¶12.

²⁵ *Agreed Facts*, ¶5, ¶12-13.

²⁶ *Aegean Sea Continental Shelf (Greece v Turkey)*, 1978 I.C.J. Rep. 3 (19 December), ¶77-78; *Gabčikovo-Nagymaros Project (Hungary v Slovenia)*, Judgment, 1997 I.C.J. Rep. 3 (5 February); *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, 1923 P.C.I.J. Series B No 4 (7 February).

²⁷ Stephanie Showalter, *The Legal Status of Autonomous Underwater Vehicles*, 38 *Marine Tech. Society J.* 38 (2004), 80.

²⁸ *Ibid.*

Here, the Egart is controlled by the Rukarukan Navy for naval operations.²⁹ Rukarukan AUVs routinely collect optical and acoustic data,³⁰ hence, considered engaged in undersea peacetime espionage.³¹

iii. *The Egart is not a commercial vessel under restrictive treaty interpretation.*

Restrictive interpretation is applied when the intention of the parties to restrict their sovereign rights is doubtful.³² Here, when the FCN Treaty was concluded,³³ it was unlikely for Anduchenca to act against its own interest by granting Rukaruku navigational rights outside the contemporaneous understanding³⁴ of “freedom of commerce and navigation” in order to accommodate spy drones.³⁵

In any event, the Egart’s characterization³⁶ is a matter falling outside the tribunal’s competence.

b. *La compétence de la compétence doctrine cannot apply due to improper constitution of the tribunal.*

The general principle of international law³⁷ doctrine of *la compétence de la compétence* provides that a tribunal has jurisdiction to determine its own jurisdiction. Nevertheless, such

²⁹ *Agreed Facts*, ¶14, ¶17.

³⁰ *Id.*, ¶14.

³¹ EMMERICH DE Vattel, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (1797), 374-76.

³² *The S.S. ‘Wimbledon’, United Kingdom and Poland (intervening) v Germany*, Judgments, 1923 P.C.I.J. Ser. A, No. 1, 24-25.

³³ *Agreed Facts*, ¶6.

³⁴ *Case Concerning the Rights of Nationals of the United States of America in Morocco (France v United States of America)*, Judgment, 1952 I.C.J. Rep. 176 (27 August).

³⁵ *Agreed Facts*, ¶15.

³⁶ Andrew Henderson, *Murky Waters: The Legal Status of Unmanned Undersea Vehicles*, 53 *Naval L. Rev.* 55 (2006).

tribunal must have been validly constituted under the arbitration agreement which is not the case here.

B. IN ANY CASE, THE AWARD IS VOID AS THE PROCEEDINGS WERE TAINTED BY IRREGULARITIES NEGATING IMPARTIALITY, INTEGRITY, DUE DILIGENCE AND NON-DELEGATION.

A tribunal has the duty to safeguard the integrity of the arbitral process, the core of which are the principles of independence and integrity.³⁸ Anduchenca submits that the award of 2 March 2017 is invalid because (1) the tribunal's independence and impartiality were compromised and (2) the tribunal delegated its decision-making power.

1. The tribunal was neither independent nor impartial under the “appearance of bias” test.

A tribunal is obligated to protect the procedural rights of the parties which includes the right to an impartial and independent arbitrator.³⁹

The point of inquiry is not whether there is actual bias or dependence, but whether there is an *appearance* of lack of independence or impartiality⁴⁰ from the viewpoint of a *reasonable and informed third party*.⁴¹ This “appearance of bias” test is reflected in the corpus of

³⁷ *Nottebohm (Liechtenstein v Guatemala), Preliminary Objection*, 1955 I.C.J. Rep. 4 (18 November), 111, 119; *The Walfish Bay Boundary Case (Germany/Great Britain)*, Award, R.I.A.A. Vol. XI (23 May 1911), 263.

³⁸ *Arbitration Between the Republic of Croatia and the Republic of Slovenia, Partial Award*, P.C.A. Case No 2012-04 (30 June 2016), ¶183.

³⁹ *Id.*, ¶227.

⁴⁰ *Blue Bank International & Trust (Barbados) Ltd.*, I.C.S.I.D. Case No. ARB/12/20 (26 April 2017), 59; *Burlington Resources, Inc. v Republic of Ecuador, Decision on the Proposal for Disqualification of Professor Vicuña*, I.C.S.I.D. Case No. ARB/08/5 (13 December 2013), 66.

⁴¹ *Caratube International Oil Co. LLP v Republic of Kazakhstan, Decision on the Proposal for Disqualification of Bruno Boesch*, I.C.S.I.D. Case No. ARB/13/13 (20 March 2014), 1-2.

international law through convention,⁴² jurisprudence,⁴³ and writings of scholars including non-government organizations like the International Bar Association.⁴⁴

- a. *Brasht Moyet's continuing relationship with Rukaruku gave the tribunal an appearance of bias.*

Independence requires that there be no actual or past dependent relationship between the parties that may, or at least appear, to affect the arbitrator's freedom of judgment.⁴⁵

Here, even while Moyet was sitting as a judge in the ICJ, he was also appointed by Rukaruku as arbitrator in four arbitrations.⁴⁶ Moyet, therefore, has a standing and continuing relationship with Rukaruku which may appear to a reasonable third party as a factor which compromises his impartiality.

- b. *The tribunal's impartiality was compromised because of the ex parte communication between Brasht Moyet and Buoc Chivo.*

Impartiality is a definitive feature of every dispute resolution system.⁴⁷ As enshrined in Rule 5.3 of the IBA's Rules of Ethics for International Arbitrators⁴⁸, arbitrators must not discuss

⁴² *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, E.T.S. 5 (1950), Article 6.

⁴³ *Vito G. Gallo v Government of Canada, Decision on the Challenge to Mr. J. Christopher Thomas, QC*, PCA Case No. 55798 (14 October 2009), ¶19; *National Grid P.L.C. v Argentine Republic*, Decision on the Challenge to Mr. Judd L. Kessler, Case No. UN 7949 (3 December 2007), ¶80.

⁴⁴ International Bar Association Guidelines on Conflicts of Interest in International Arbitration (23 October 2014), General Standard 2(b).

⁴⁵ ALAN REDFERN & MARTIN HUNTER, *INTERNATIONAL COMMERCIAL ARBITRATION* (2004), 4-51.

⁴⁶ *Agreed Facts*, ¶21.

⁴⁷ Georgios Dimitropoulos, *Constructing the Independence of International Investment Arbitrators: Past, Present and Future*, 36 NW J. International L. & Bus. 371 (2016).

⁴⁸ International Bar Association Rules of Ethics for International Arbitrators (9 July 2008).

with one party in the absence of the other⁴⁹, so as not to give rise to suspicions of bias⁵⁰ and to guard against interference from the parties to the relevant issues.⁵¹ The *ex parte* communication between Judge Moyet and Chivo casts doubt in the impartiality of the tribunal. Chivo was acting as counsel for Rukaruku when he colluded with Moyet. Pursuant to the “state organ doctrine,” Rukaruku may not escape responsibility by Chivo’s resignation and the State’s denial.

2. The tribunal violated the rule on *delegatus non potest delegare* by having Orvindari write the award.

Decision-making of the tribunal is non-delegable.⁵² In fact in the *Isle of Man* Arbitration,⁵³ the award was set aside after expert evidence showed that 79% of the award was written by the tribunal secretary. Here, the entire award was written by Orvindari, as buttressed by the fact that Orvindari billed 522 hours for the case, almost ten times the average number of hours spent by the three arbitrators.⁵⁴

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

⁴⁹ JOHN TACKABERRY, ARTHUR MARRIOTT AND RONALD BERNSTEIN, *BERNSTEIN’S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE* (2003), ¶2-424.

⁵⁰ SUNDRA RAJOO, *LAW, PRACTICE AND PROCEDURE OF ARBITRATION, SECOND EDITION* (2017), 491.

⁵¹ U.N.G.A., *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. Doc No. A/Res/40/32 (29 November 1985); U.N.G.A., *Human Rights in the Administration of Justice*, U.N. Doc No. A/Res/40/146 (13 December 1985).

⁵² DAVID ST. HIN SUTTON, JUDITH GILL and MATTHEW GEARING, *RUSSELL ON ARBITRATION* (2007), ¶6-74; *Fetherstone v Cooper*, 9 Ves 67 (1803); *Giacamo Costa Fu Andrea v British Italian Trading Ltd.*, 1 QB 201 (1963).

⁵³ *Yukos Universal Ltd (Isle of Man) v The Russian Federation, Final Award*, PCA Case No 2005-04/AA227 (18 July 2014).

⁵⁴ *Agreed Facts*, ¶32.

A. RUKARUKU VIOLATED ARTICLE 6 OF THE FCN TREATY BY OPERATING THE EGART WITHIN ANDUCHENCA’S TERRITORIAL SEA.

States are required to comply with their treaty obligations in good faith.⁵⁵ Rukaruku violated Article 6 of the FCN Treaty because (1) the Egart, as an AUV, is not a ship, hence, cannot exercise the right to innocent passage. (2) In any case, the Egart’s underwater espionage operation constituted a violation of Anduchenca’s territorial and maritime sovereignty.

1. The Egart, as an autonomous unmanned vehicle, is not a ship, hence, cannot exercise the right to innocent passage.

a. Unmanned vehicles are not ships that are entitled to right of innocent passage.

The Egart, a Rukarukan AUV, is an independent, autonomous conveyance from the ship from which it was deployed, programmed to navigate autonomously for one week, and then return to the ship from which it was deployed.⁵⁶

Although United Nations Convention on the Law of the Sea (“UNCLOS”) does not define the term “ships”, a reading from its context pursuant to the *Vienna Convention on Law of Treaties* (VCLT)⁵⁷ shows that “ships” are considered manned.⁵⁸ Even several other instruments characterize ships or vessels as being controlled by a human.⁵⁹

⁵⁵ *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331 (1969), Article 26. [hereinafter *VCLT*]

⁵⁶ *Agreed Facts*, ¶14.

⁵⁷ *VCLT*, Article 31.

⁵⁸ Michael Schmitt and David Goddard, *International Law and the Military Use of Unmanned Maritime Systems*, *International Review of the Red Cross* 567 (2016), 576; *United Nations Convention on the Law of the Sea*, 1833 U.N.T.S. 397 (10 December 1982), Article 94. [hereinafter *UNCLOS*]

⁵⁹ Daniel A.G. Vallejo, *Electric Currents: Programming Legal Status into Autonomous Unmanned Maritime Vehicles*, 47 *Case W. Res. J. International L.* 405 (2015), 412.

Neither can the Egart be considered as a warship under UNCLOS or customary international law as “warships” are limited to those under the command of an officer and manned by a crew.⁶⁰

Indeed, there is absence of state practice and *opinio juris* that would support a custom granting unmanned vessels navigational rights.⁶¹

b. *In any case, the Egart failed to comply with the conditions of innocent passage.*

Assuming that the Egart is entitled to navigational rights, it should comply with the conditions associated with those rights,⁶² including the rules on innocent passage.⁶³ Submarines and other underwater vehicles must navigate on the surface and show their flag for their passage to be considered innocent under UNCLOS.⁶⁴

Here, the Egart failed to navigate on the surface and show its flag.⁶⁵ Its recurrent surfacing was only for the purpose of obtaining GPS signals and not to comply with the rules on innocent passage.⁶⁶ Moreover, it was only identified as of Rukarukan ownership when the Anduchencan authority captured and inspected it.⁶⁷

⁶⁰ UNCLOS, Article 29; Schmitt and Goddard, *supra* note 58, 579.

⁶¹ Schmitt and Goddard, *supra* note 58, 578.

⁶² *Ibid.*

⁶³ Thomas A. Clingan, Jr., *An Overview of Second Committee Negotiations in the Law of the Sea Conference*, 63 Or. L. Rev. 53 (1984), 63-64; Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 77 Am. J. International L. 616 (1983), 619; *see also* PHILIP JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* (1927).

⁶⁴ UNCLOS, Articles 18(2), 20.

⁶⁵ *Agreed Facts*, ¶16.

⁶⁶ *Clarifications*, ¶2.

⁶⁷ *Agreed Facts*, ¶16.

2. In any event, the Egart's underwater espionage operation constituted a violation of Anduchenca's territorial and maritime sovereignty.

a. The Egart is engaged in maritime espionage.

In its broad sense, espionage encompasses a wide range of clandestine government activities with the objective of acquiring in advance as much information as possible.⁶⁸

Egart's underwater operation within Anduchencan territorial sea was premised upon the false pretext of ensuring safe passage of all ships and to facilitate friendly trade and commerce in the Odasarra Region.⁶⁹ It can be inferred that it was cunningly obtaining information about Anduchenca's military and naval improvements aided by other socialist countries, and its Advance Electronic Warfare Division.⁷⁰ The Egart's sophisticated optical, acoustic and sonar systems⁷¹ are capable of collecting data including the position, specification and configuration of 20 Anduchencan surface ships and submarines.⁷²

b. Peacetime espionage is a violation of territorial and maritime sovereignty of Anduchenca.

The international legal norm against peacetime espionage is based on respect for the territorial boundaries of sovereign states, as these lines enclose the land territory extending to

⁶⁸ Tara Davenport, *Submarine Cables, Cybersecurity and International Law: An Intersectional Analysis*, 24 Cath. U. J. L. & Tech. 57 (2015), 92.

⁶⁹ *Agreed Facts*, ¶17.

⁷⁰ *Id.*, ¶2, ¶8.

⁷¹ *Id.*, ¶14.

⁷² *Id.*, ¶2.

internal waters and territorial seas.⁷³ Within the territorial sea, the flag state must respect the qualified sovereignty of the coastal state.⁷⁴ Operating the Egart militates against this duty.

B. ANDUCHENCA DID NOT VIOLATE ARTICLE 7 OF THE FCN TREATY WHEN IT CAPTURED THE EGART.

Anduchenca submits that it did not violate Article 7 of the FCN Treaty because: (1) Anduchenca's capture of the Egart is within its sovereignty and jurisdiction and (2) capturing the Egart is a valid response under international law.

1. Anduchenca's capture of the Egart is within its sovereignty and jurisdiction.

a. Anduchenca has the sovereign right to prevent non-innocent passage in its territorial sea.

The coastal state's sovereignty over its territorial sea is comparable to that which exists over the land territory,⁷⁵ including all the rights and duties inherent thereto.⁷⁶

Anduchenca is justified in taking necessary steps⁷⁷ to prevent the Egart's non-innocent and illegal passage.⁷⁸ An act aimed at collecting information in the territorial sea to the prejudice

⁷³ Myers McDougal, Harold Lasswell & Michael Reisman, *The Intelligence Function and World Public Order*, 46 Temple L.Q. 365 (1973), 367.

⁷⁴ OPPENHEIM, LASSA, *I INTERNATIONAL LAW: A TREATISE*, HERSCH. LAUTERPACHT ED. (1955), 460-61.

⁷⁵ Natalie Klein, *Legal Limitations on Ensuring Australia's Maritime Security*, 7 Melbourne J. Intl. L. (2006).

⁷⁶ JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (2012), 264.

⁷⁷ UNCLOS, Article 25(1); see also Brendan Gogarty and Meredith Hagger, *The Laws of Man over Vehicles Unmanned: The Legal Response to Robotic Revolution on Sea, Land and Air*, 19 J. Law Info. & Science 73 (2008), 117.

⁷⁸ James Kraska, *Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters*, 54 Colum. J. Transnat'l L. 164 (2015), 226.

of the defense or security of the coastal state is prejudicial to the peace, good order or security of the latter.⁷⁹

b. *The operation of the Egart is not protected by Article 7 of the FCN Treaty.*

In any case, Anduchenca's actions do not violate Article 7 of the FCN Treaty, which guarantees freedom of commerce and navigation. By the ordinary meaning of the text and its object and purpose,⁸⁰ the parties are bound to respect navigation that is commercial in nature.

In deciphering the ordinary meaning of the text, the object and purpose of the treaty must be taken into account.⁸¹ The preambular language, being a reflection of the intentions of the negotiators, must add color, texture and shading to the interpretation of the treaty⁸² and is a constant source to identify the object and purpose of a treaty.⁸³

Here, the preamble prominently speaks about “encouraging mutually beneficial trade and investment.”⁸⁴ Clearly, the object and purpose of the FCN Treaty is to guarantee navigation in order to promote commerce. It does not cover navigation that is military in nature, like the operation of the Egart.⁸⁵

2. Capturing the Egart is a valid response under international law.

a. *The Egart may be validly captured as it does not enjoy immunity.*

⁷⁹ *UNCLOS*, Article 19(c); Kraska, *supra* note 78, 219.

⁸⁰ *VCLT*, Article 31(1).

⁸¹ *Id.*

⁸² *United States — Import Prohibition of Certain Shrimp and Shrimp Products (“US-Shrimp”)*, Appellate Body Report, WT/DS58/AB/R (12 October 1998), ¶153.

⁸³ CHANG-FA LO, *TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES: A NEW ROUND OF CODIFICATION* (2017), 186.

⁸⁴ *FCN Treaty*, Preamble.

⁸⁵ *Agreed Facts*, ¶13.

Sovereign immunity attaches only when the vessel is a warship or a government ship operated for non-commercial purposes.⁸⁶ Since Egart is unmanned, it cannot be considered as a “warship” or a “ship” under applicable international law regimes.⁸⁷

It is neither an extension of a ship or warship because it is an autonomous machine⁸⁸ nor a naval auxiliary as auxiliaries are vessels other than warships.⁸⁹

b. Moreover, Anduchenca’s capture of the Egart qualifies as retorsion and its hacking was proportionate and necessary.

Retorsion is widely regarded as a freedom and largely unregulated by international law⁹⁰ because it involves no illegal action.⁹¹ It lives and breathes in the incompleteness of international law where no clear rules of international law prohibit the remedy.⁹² It must, however, be proportionate⁹³ and necessary.⁹⁴

Here, hacking the Egart was necessary and proportionate. As a machine, the Egart can only “understand” through codes and programs. Hacking the Egart was proportionate in order for it to cease its non-innocent passage. It is also necessary to neutralize the Egart as it is a threat to

⁸⁶ UNCLOS, Articles 32, 95-96.

⁸⁷ *Agreed Facts*, ¶14, ¶17.

⁸⁸ *Id.*, ¶14.

⁸⁹ U.S. Dept. of Navy, NWP 1-14M, *The Commander’s Handbook on the Law of Naval Operations - Annotated Supplement*, ¶2.1.3 (1997).

⁹⁰ Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in Larissa van den Herik (ed.), *RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW* (2016), 5.

⁹¹ Christopher Champonovo, *Dispute Settlement and the OECD Multilateral Agreement Investment*, 1 UCLA J. International L. & For. Aff. 181 (1996), 201.

⁹² HJORTUR SVERRISSON, *COUNTERMEASURES, THE INTERNATIONAL LEGAL SYSTEM, AND ENVIRONMENTAL VIOLATIONS* (2008), 72.

⁹³ Troy Anderson, *Itting a Virtual Peg into a Round Hole: Why Existing International Law Fails to Govern Cyber Reprisals*, 34 Ariz. J. International & Comp. Law 135 (2017), 144.

⁹⁴ UNCLOS, Articles 22, 25, 212.

navigation and safety.

III. ANDUCHENCA DID NOT VIOLATE ARTICLE 16 OF THE FCN TREATY BY COMMISSIONING AND OPERATING THE IBRA.

The *in dubio mitius*⁹⁵ principle instructs that absent a clear international obligation, all doubts must be resolved against a finding of breach or violation⁹⁶ and in favor of upholding state sovereignty.⁹⁷ Restrictions upon the independence of states cannot be presumed.⁹⁸

Anduchenca submits that [A] it has every right under conventional international law to acquire and possess nuclear weapons and that [B] there is no disarmament obligation binding upon it under customary international law. [C] In any case, Anduchenca has attained a persistent objector status to any nuclear disarmament rule of custom and Anduchenca may invoke this status because nuclear disarmament is not a *jus cogens* norm.

A. ANDUCHENCA CAN POSSESS AND ACQUIRE NUCLEAR WEAPONS UNDER CONVENTIONAL INTERNATIONAL LAW.

Treaties do not directly bind non-parties.⁹⁹ Anduchenca is not a party either to the 1968 Treaty on the Nonproliferation of Nuclear Weapons (“NPT”)¹⁰⁰ or to the 2017 Treaty on the Prohibition of Nuclear Weapons.¹⁰¹ While Anduchenca is a party to the FCN Treaty, its act of

⁹⁵ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (1990), 631.

⁹⁶ *Free Zones of Upper Savoy and the District of Gex*, Judgment, 1932 P.C.I.J. Series A/B, No. 46, 167.

⁹⁷ *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, Advisory Opinion, 1925 P.C.I.J. Series B. No. 12, 25.

⁹⁸ *The Case of S.S. Lotus (France v Turkey)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10 (7 Sep), 18-20. [hereinafter *S.S. Lotus*].

⁹⁹ *VCLT*, Article 34.

¹⁰⁰ *Agreed Facts*, ¶9; *Treaty on the Non-proliferation of Nuclear Weapons*, 729 UNTS 161 (1968).

¹⁰¹ *Id.*, ¶48. *Treaty on the Prohibition of Nuclear Weapons*, U.N.T.S. Ch XXVI-9 (2017).

commissioning and operating the Ibra does not amount to a violation thereof as Article 16 only contemplates small arms and light weapons.

1. The prohibition under Article 16 of the FCN Treaty only pertains to the export and import of small arms and light weapons (“SALWs”).

Article 16 of the FCN Treaty prohibits the export and import of weapons and ammunitions without the express approval of appropriate government departments.¹⁰²

a. “Weapons and ammunition” only refers to SALWs pursuant to the teleological approach.

In *Whaling*,¹⁰³ the ICJ underscored that treaty terms are not to be determined in the abstract,¹⁰⁴ but in light of its context, object and purpose.¹⁰⁵ Apart from the preamble,¹⁰⁶ reference is made to the treaty’s historical,¹⁰⁷ political and social factors.¹⁰⁸

Post-conflict regions are normally characterized by excessive accumulation and uncontrolled spread of surplus SALWs¹⁰⁹ necessitating disarmament measures.¹¹⁰ Here, states in

¹⁰² *FCN Treaty*, Article 16.

¹⁰³ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment, 2014 I.C.J. Rep. 226 (31 March), ¶55-58.

¹⁰⁴ *ILC Commentaries on Draft Articles*, Y.I.L.C. Vol II, 221(1966), ¶12.

¹⁰⁵ GEORGE NOLTE (ED.), *TREATIES AND SUBSEQUENT PRACTICE* (2013), 5.

¹⁰⁶ IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (1984), 130.

¹⁰⁷ Special Rapporteur Humphrey Waldock, Third Report on the Law of Treaties, Y.I.L.C. Vol II (1964), 59; *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion, 1927 P.C.I.J., Series B, No. 14 (8 December), 28.

¹⁰⁸ OLIVER DÖRR AND KIRSTEN SCHMALENBACH, *VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* (2011), 578.

¹⁰⁹ Office for Disarmament Affairs, *THE UNITED NATIONS DISARMAMENT YEARBOOK: DISARMAMENT RESOLUTIONS AND DECISIONS OF THE SEVENTY-FIRST SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY*, Volume 41 Part I (2017), 174.

¹¹⁰ UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS (UNODA), *SMALL ARMS AND LIGHT WEAPONS: SELECTED UNITED NATIONS DOCUMENTS* (2008), 40.

the Odasarra Region concluded the FCN Treaty after World War II¹¹¹ to ensure perpetual “peace and stability in the region”¹¹² and address the “proliferation of small arms and weapons among the civilian populations” that made the Region a “hub for illicit international arms trafficking”.¹¹³

Thus, Anduchenca submits that “weapons and ammunition” in the FCN Treaty could only refer to SALWs and not nuclear arsenals, which was not the reality of the situation in the Odasarra Region.

b. “Weapons and ammunition” only refers to SALWs based on the parties’ subsequent practice.

In several cases¹¹⁴ the ICJ affirmed the role of subsequent practice in treaty interpretation as constituting objective evidence of the understanding of the parties as to the meaning of the treaty.¹¹⁵

Since 1947, the object of Article 16 of the FCN Treaty had always been the *surplus* SALWs left by World War II, based on Rukuruku’s aid programs and campaigns against illicit arms trade.¹¹⁶

Further, in *Temple of Preah Vihear*,¹¹⁷ the ICJ held that subsequent practice can also be gleaned from silence in circumstances calling for some reaction, thus allowing the inference that

¹¹¹ *Agreed Facts*, ¶4-6.

¹¹² *FCN Treaty*.

¹¹³ *Agreed Facts*, ¶4.

¹¹⁴ *Kasikili/Sedudu Island*, ¶49; Frank Berman, *Treaty “Interpretation” in a Judicial Context*, 29 *Yale J. International L.* 318 (2004), ¶82; *Military and Paramilitary Activities In and against Nicaragua (Nicaragua v United States of America)*, Judgment, Merits, 1986 I.C.J. Rep. 14 (27 June), ¶¶36-47 [*Nicaragua v US*]; *Territorial Dispute (Libyan Arab Jamahiriya v Chad)*, Judgment, 1994 I.C.J. Rep. 7 (3 Feb), ¶¶66-71.

¹¹⁵ RICHARD GARDINER, *TREATY INTERPRETATION* (2015), 253.

¹¹⁶ *Agreed Facts*, ¶6, ¶11.

¹¹⁷ *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment 1962 I.C.J. Rep. 6 (15 June), 23.

the acts confirm an interpretation of the meaning of the Treaty.¹¹⁸ Here, if Article 16 of the FCN Treaty covered nuclear weapons, Anduchenca's refusal to sign the NPT in 1968 would have called for reaction from Rukaruku and the rest of the Odasarran States.¹¹⁹

c. *In any event, the Ibra and its nuclear weapons were neither exported nor imported.*

A party that alleges a fact in support of its claims must prove the existence of such fact.¹²⁰ While "a more liberal recourse to inferences of fact and circumstantial evidence" has been recognized,¹²¹ direct evidence must be within the sole control of the opposing party.¹²² Indeed, charges of "exceptional gravity" require a higher degree of direct proof.¹²³

Here, initial findings of the International Atomic Energy Agency ("IAEA") indicate that the nuclear weapons in the Ibra were manufactured in Anduchenca.¹²⁴ Further, Anduchenca is rich in uranium, allocates a substantial portion of its budget to its military, and even maintains an Advanced Electronic Warfare Division in its Navy.¹²⁵ These facts, taken together, will

¹¹⁸ *Dispute between Argentina and Chile concerning the Beagle Channel XXI (Pt II)*, Award, 1977 R.I.A.A. 53 (18 February), 187.

¹¹⁹ *Agreed Facts*, ¶9.

¹²⁰ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits, Judgment, 2010 I.C.J. Rep. 582 (30 November), 660; *Case Concerning the Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, 2010 I.C.J. Rep. 425 (20 April), ¶162.

¹²¹ *Corfu Channel Case (United Kingdom v Albania)*, 1949 I.C.J. Rep. (9 April), 18.

¹²² *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, 1966 ICJ 6 (July 18, 1966); *Armed Activities on the Territory of the Congo (Dem Rep Congo v Uganda)*, 2005 I.C.J. 168 (Dec 19).

¹²³ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment, 2007 I.C.J. Rep. 43.

¹²⁴ *Clarifications*, ¶10.

¹²⁵ *Agreed Facts*, ¶2.

demonstrate that Anduchenca is capable of acquiring Ibra and its nuclear weapons without violating the export-import prohibition.

2. The Geneva Conventions and their Additional Protocols do not impose a disarmament obligation.

While Anduchenca is a party to the four (4) Geneva Conventions of 1949 and its Additional Protocols of 1977,¹²⁶ the *Martens Clause*¹²⁷ under Article 1(2) and Articles 35 and 36 of the Geneva Conventions all refer to the *use* of weapons in armed conflict, and not a prohibition on *mere* possession, which is what a disarmament obligation is.¹²⁸

B. ANDUCHENCA HAS NO DISARMAMENT OBLIGATION UNDER CUSTOMARY INTERNATIONAL LAW.

A disarmament obligation means physical destruction or elimination of particular types of armaments¹²⁹ and essentially remains treaty-based.¹³⁰ Hence, Anduchenca may only be bound by rules under customary international law pursuant to systemic integration.¹³¹ There is no generally recognized and universal obligation to disarm in contemporary international law.¹³²

1. There is no generally recognized and universal obligation to disarm as disarmament obligations are essentially treaty-based.

¹²⁶ International Committee of the Red Cross (ICRC), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 38–39 (1987).

¹²⁷ *Id.*, 389-420.

¹²⁸ *Id.* 424-425.

¹²⁹ *Relationship Between Disarmament and International Security*, Report of the Secretary General of the United Nations Centre for Disarmament, U.N. Doc. A/36/597 (1982), ¶46.

¹³⁰ Goran Lysen, *The Adequacy of the Law of Treaties Regarding Arms Control Agreements*, in Julie Dahlitz (ed.), *AVOIDANCE AND SETTLEMENT OF ARMS CONTROL DISPUTES* (1994), 123.

¹³¹ ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* (1961), 466.

¹³² Bakhtiyar Tuzmukhamedov, *Disarmament* in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia Of International Law* (May 2011), ¶5.

In international law, there are no rules limiting level of armaments other than that which may be accepted by the State concerned, by treaty or otherwise, and this principle is valid for all states.¹³³ With respect to nuclear weapons, the ICJ concluded that there is no “comprehensive and universal prohibition of the threat or *use* of nuclear weapons.”¹³⁴

Further, the “humanistic approach” as a general principle in support of nuclear disarmament¹³⁵ must be rejected in favor of sovereignty laid down in the *S.S. Lotus* case.

2. Article II of the NPT has not attained the status of a customary norm.

Anduchenca acknowledges that formal sources in the ICJ Statute “are not self-contained but interrelated so that any non-consensual element in one source of law may indirectly affect the rules deriving from other sources”¹³⁶ resulting to “crystallization” or codification by subsequent adoption.¹³⁷

Thus, while the NPT enjoys near-universal membership,¹³⁸ Anduchenca submits that the *opinio juris* for a customary prohibition on the possession of nuclear weapons by non-nuclear weapon states (“NNWS”) is less evident. Furthermore, the *quid pro quo* nature of the obligations under the NPT cannot form the basis of a general rule of law. Unlike other multilateral treaties

¹³³ *Nicaragua v US*, ¶269.

¹³⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep 226 (8 July), ¶64-73. [hereinafter *Nuclear Weapons*]

¹³⁵ ANTÔNIO AUGUSTO CANÇADO TRINDADE, *THE UNIVERSAL OBLIGATION OF NUCLEAR DISARMAMENT* (2017), 164.

¹³⁶ ROBERT JENNINGS AND ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW, VOL. I: PEACE* (1996), 25.

¹³⁷ *North Sea Continental Shelf (Federal Republic of Germany v Netherlands, Federal Republic of Germany v Denmark)*, Merits, 1969 ICJ Rep. 3, ¶63. [“*North Sea Continental Shelf*”]

¹³⁸ Miguel Bosch, *The Non-Proliferation Treaty and its Future* in Laurence Boisson De Chazournes and Philippe Sands (eds), *THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* (1999), 388.

that have lawmaking character, the NPT is a contract treaty¹³⁹ intended to be a “grand bargain,”¹⁴⁰ involving differential reciprocal obligations that are not applied universally across the full spectrum of states parties.¹⁴¹ This *quid pro quo* arrangement precludes the provisions of the NPT from acquiring the character of a general rule of law”.¹⁴²

3. Mere possession of nuclear weapons is not inconsistent with international humanitarian law.

While the ICJ held that international humanitarian law rules out any possibility of a lawful use of nuclear weapons, it has not made the same conclusion with regard to its mere possession.¹⁴³ In fact, the ICJ was even equivocal as to the legality of the use of nuclear weapons in “an extreme circumstance of self-defense, in which the very survival of a state would be at stake”.¹⁴⁴

C. IN ANY CASE, ANDUCHENCA HAS ATTAINED A PERSISTENT OBJECTOR STATUS TO ANY NUCLEAR DISARMAMENT RULE OF CUSTOM.

A rule of custom will not be binding on persistent objectors¹⁴⁵ who demonstrated unwillingness to be bound by it before the rule becomes established.¹⁴⁶ Anduchenca is a

¹³⁹ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 12 (2003); Hugh Thirlway, *The Sources of International Law* in Malcolm Evans (ed), *INTERNATIONAL LAW* (2006), 119-120.

¹⁴⁰ Christopher Chyba, *Second-Tier Suppliers and Their Threat to the Nuclear Nonproliferation Regime* in J. PILAT (ED), *ATOMS FOR PEACE: A FUTURE AFTER FIFTY YEARS?* (2007), 120-122.

¹⁴¹ DANIEL JOYNER, *INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION* (2009), 10.

¹⁴² *Id.*, 68-69; *North Sea Continental Shelf*, ¶72.

¹⁴³ *Nuclear Weapons*, ¶74–86.

¹⁴⁴ *Id.*, ¶97.

¹⁴⁵ ADEMOLA ABASS, *COMPLETE INTERNATIONAL LAW: TEXT, CASES, AND MATERIALS* (2014), 46-9; M. DIXON, *TEXTBOOK ON INTERNATIONAL LAW* (2013), 34-5.

persistent objector because: (1) the requirements for invoking the rule have been met and (2) the rule requiring nuclear disarmament is not a *jus cogens* norm.

1. The requirements for invoking the rule have been met.

The criteria for the operation of the rule includes objection,¹⁴⁷ persistence,¹⁴⁸ consistency¹⁴⁹ and timeliness.¹⁵⁰ Anduchenca submits that all four (4) criteria have been met.

a. Anduchenca complied with the objection criterion.

Under this criterion, the objection “must be expressed, not entertained purely privately within the internal counsel of the state”.¹⁵¹ It may relate to the lack of consent to the formation of the rule or the applicability of the rule in question to the objecting state.¹⁵² In both the *Fisheries* and *Asylum* cases, the ICJ viewed failure to sign the relevant treaty as an acceptable instance of objection.¹⁵³

¹⁴⁶ JAN KLABBERS, *INTERNATIONAL LAW* (2013), 30-31; P. MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* (1997) 48.

¹⁴⁷ Cemile Guldahl, *The Role of Persistent Objection in International Humanitarian Law*, 77 *Nordic Journal of International Law* 51 (2008), 54.

¹⁴⁸ Dino Kritsiotis, *On the Possibilities Of and For Persistent Objection*, 21 *Duke Journal of Comparative and International Law* 121 (2010), 130.

¹⁴⁹ Michael Akehurst, *Custom as a Source of International Law*, 47 *British Yearbook of International Law* 1 (1974–5), 24.

¹⁵⁰ Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 *Brit. Y.B. International L.* 1, 4 (1985), 1.

¹⁵¹ See *Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee*, UN Doc. A/CN.4/L.869, 5, Draft Conclusion 15: Persistent Objector. [hereinafter *Persistent Objector*]

¹⁵² Olufemi Elias, *Persistent Objector*, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia Of International Law* (September 2006), ¶17.

¹⁵³ *Anglo-Norwegian Fisheries Case (U.K. v Norway)*, 1951 I.C.J. Rep. 116 (18 December); *Asylum Case (Colombia v Peru)*, 1950 I.C.J. 266 (13 June).

Here, Anduchenca consistently denied the existence of a rule prohibiting possession of nuclear weapons¹⁵⁴ and declined to sign, ratify, or accede to the NPT.¹⁵⁵

b. Anduchenca complied with the persistence criterion.

Under the persistence criterion, sporadic objections will not suffice.¹⁵⁶ The objection need not manifest a certain level of intensity in every case;¹⁵⁷ it must only be repeated as often as circumstances require.¹⁵⁸ Here, Anduchenca has expressed its objection to the NPT “on numerous occasions over the past 50 years.”¹⁵⁹

c. Anduchenca complied with the consistency criterion.

The consistency criterion allows isolated occasions of affirmation;¹⁶⁰ the state’s actions need not “be in absolute rigorous conformity”¹⁶¹ with its objector stance. Substantively, a *principled* position of disagreement is favored, requiring “fuller consideration of the general international interest”¹⁶² and discouraging “wholly self-interested objections”.¹⁶³

¹⁵⁴ *Agreed Facts*, ¶40.

¹⁵⁵ *Id.*, ¶9.

¹⁵⁶ I. MacGibbon, *Some Observations on the Part of Protest in International Law*, 30 *British Yearbook of International Law* (1953), 293.

¹⁵⁷ BRIAN LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* (2010), 235-8.

¹⁵⁸ *Persistent Objector*, Draft Conclusion 15.

¹⁵⁹ *Agreed Facts*, ¶9.

¹⁶⁰ JAMES A. GREEN, *THE PERSISTENT OBJECTOR RULE INTERNATIONAL LAW* (2016), 109; *Roach and Pinkerton v United States of America*, Merits, IACmHR, Resolution No. 3/87, Case 9647 (1987).

¹⁶¹ *Domingues v United States of America*, Merits, IACmHR, Report No. 62/02, Case No. 12.285 (2002), ¶83.

¹⁶² Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 *Harvard International L.J.* 459 (1985), 479.

¹⁶³ *Id.*, 479.

For five decades, Anduchenca has remained firm on its *principled* position that the NPT “establishes and aggravates an inherent inequality between nuclear-weapon States and non-nuclear-weapon States.”¹⁶⁴

d. Anduchenca complied with the timeliness criterion.

The objecting state must react to unwelcome developments prior to the norm’s “crystallization” as a binding customary norm. Norm-gestation begins when any practice by some states, potentially constituting the birth of a new norm, is followed by the others.¹⁶⁵ Anduchenca, which expressed its objections as early as 1968, has therefore clearly satisfied the timeliness criterion.

2. The rule requiring nuclear disarmament is not a *jus cogens* norm.

Peremptory norms trump the persistent objector rule.¹⁶⁶ As defined in Article 53 of the VCLT, reiterated in *Questions Relating to the Obligation to Prosecute or Extradite*,¹⁶⁷ *jus cogens* norms are “fundamental [international] legal norms from which no derogation is permitted”.¹⁶⁸

¹⁶⁴ *Agreed Facts*, ¶9.

¹⁶⁵ GREEN, *supra* note 160, 160.

¹⁶⁶ Report of the International Law Commission, Fifty-ninth session, 7 May–5 June and 9 July–10 August 2007, UN Doc. A/62/10, 101; *North Sea Continental Shelf*, Dissenting Opinion of Judge Lachs, 229.

¹⁶⁷ VCLT, Article 53; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, 2012 ICJ Rep. 422, ¶99.

¹⁶⁸ Hillary Charlesworth and Christine Chinkin, *The Gender of Jus Cogens*, 15 *Human Rights Quarterly* (1993), 15.

The legal criteria for establishing peremptory norms are onerous,¹⁶⁹ hence, they are only limited to a “handful of human rights norms”.¹⁷⁰ As one scholar notes, “the category of *jus cogens* is still largely an empty box”.¹⁷¹

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

Threat or use of force is characterized as coercive¹⁷² and aimed at compelling the state to adopt a certain conduct of action.¹⁷³ The prohibition against it is customary¹⁷⁴ and peremptory¹⁷⁵. Anduchenca submits that [A] the attack against the Covfefefe amounts to an invalid use of force and [B] the capture of the Ibra violated the FCN Treaty.

A. THE ATTACK AGAINST THE COVFEFE WAS AN IMPERMISSIBLE THREAT OR USE OF FORCE.

¹⁶⁹ Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 Chicago Journal of International Law 495 (2005–6), 498; C.L. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* (1976), 15.

¹⁷⁰ Bruno Simma and Phillip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Australian Yearbook of International Law 82 (1988–9), 103; CHARLES QUINCE, *THE PERSISTENT OBJECTOR AND CUSTOMARY INTERNATIONAL LAW* (2010), 62.

¹⁷¹ Olufemif Elias, *Some Remarks on the Persistent Objector Rule in Customary International Law*, 6 Denning Law Journal 40 (1991).

¹⁷² YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (1988), 89.

¹⁷³ OLIVIER CORTEN, *LE DROIT CONTRE LA GUERRE* (2014), 145-6.

¹⁷⁴ Krysztof Skubiszewski, *Use of Force by States, Collective Security, Law of War and Neutrality* in Max Sorensen (ed), *MANUAL OF PUBLIC INTERNATIONAL LAW* (1968), 745.

¹⁷⁵ International Law Commission, Yearbook of the International Law Commission, 1966, vol II, 270; See also William Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 Yale Journal of International Law (2004), 305.

Unless the threat or use of force is justified under Article 51 of the UN Charter or permitted under Chapter VII thereof, it shall be considered in contravention of international peace and security¹⁷⁶ and thus illegal¹⁷⁷.

1. The attack against the Covfefe was directed against Anduchenca's political independence by forcefully limiting its possession of weapons.

Political independence specifically relates to the right of the state to fully and freely exercise the range of powers possessed by it as a sovereign nation.¹⁷⁸

Here, the attack against the Covfefe was to deprive the Ibra of supplies and compel it to resurface to be captured.¹⁷⁹ Thus, the firing of missiles was to impair the legitimate exercise of Anduchenca's sovereignty¹⁸⁰ through military build-up, a right within its sovereign prerogative.¹⁸¹

2. In any case, "political independence" and "territorial integrity" do not qualify the prohibition against threat or use of force as appearing in the FCN Treaty using treaty interpretation.

a. Under the teleological approach, it is not the object and purpose of the FCN Treaty to limit threat or use of force only in cases which affect political independence or territorial integrity of parties.

The teleological element¹⁸² under Article 31(1) of the VCLT allows considerations of the principle of "effectiveness" or the "purposive approach".¹⁸³ Object and purpose may be

¹⁷⁶ *Charter of the United Nations*, 1 U.N.T.S. XVI (24 October 1945), Articles 1(1), 2(3). [hereinafter *UN Charter*]

¹⁷⁷ IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963).

¹⁷⁸ HERSCH LAUTERPACHT (ED.), *DISPUTES, WAR AND NEUTRALITY* (1952), 154.

¹⁷⁹ *Agreed Facts*, ¶43.

¹⁸⁰ *See S.S. Lotus*.

¹⁸¹ Marcelo Kohen, *The Notion of State Survival in International Law*, in Philippe Sands and Laurence Boisson De Chazournes (eds.), *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* (1999), 293.

¹⁸² GARDINER, *supra* note 115, 211.

determined from its preamble¹⁸⁴, circumstances of adoption¹⁸⁵ and other associated matter pursuant to Article 31(2) of the VCLT.

Here, the parties' desire to strengthen their friendly relations especially since Anduchenca was a war front during World War II¹⁸⁶ is defeated by any use of force by one against the other.

b. *Article 17 of the FCN Treaty must be interpreted in relation to Article 2(4) of the UN Charter using systemic integration and supplementary means of treaty interpretation.*

Systemic integration¹⁸⁷ contemplates that treaties are themselves creatures of international law¹⁸⁸ and must be deemed to refer to principles of international law¹⁸⁹ relevant to the relations between parties.¹⁹⁰

Article 17 of the FCN Treaty mirrors Article 2(4) of the UN Charter. The latter's *travaux préparatoires*¹⁹¹ and initial draft at Dumbarton Oaks show that the terms "territorial integrity or

¹⁸³ *Costa Rica v Nicaragua*.

¹⁸⁴ GARDINER, *supra* note 117, 212.

¹⁸⁵ Martin Ris, *Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, 14 B.C. International & Comp. L. Rev. 111 (1991), 115.

¹⁸⁶ *Agreed Facts*, ¶4.

¹⁸⁷ Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 I.L.Q. 279 (2005), 280.

¹⁸⁸ MARTTI KOSKENNIEMI, *STUDY ON THE FUNCTIONS AND SCOPE OF THE LEX SPECIALIS RULE AND THE QUESTION OF "SELF-CONTAINED REGIMES"* (2004).

¹⁸⁹ *Georges Pinson (France v United Mexican States)*, 1928 R.I.A.A. 327 (1927-8) AD Case No 292.

¹⁹⁰ *Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, Judgment, 2003 I.C.J. Rep. 161 (6 November).

¹⁹¹ JUDGE SHIGERU ODA, *LIBER AMICORUM*, NISUKE ANDO, EDWARD MCWHINNEY, RUDIGER WOLFRUM, EDS. (2012), 144.

political independence” were used to emphasize protection to smaller states¹⁹², not qualify Article 2(4) of the UN Charter¹⁹³. This broader approach¹⁹⁴ emphasizes the absolute nature against the prohibition while a restrictive interpretation¹⁹⁵ results to aggressors invoking absence of intent to violate territorial integrity or political independence¹⁹⁶.

3. The attack against the Covfefe was not consistent with Article 51 of the UN Charter, contrary to Rukaruku’s claim.

Self-defense¹⁹⁷ requires an armed attack against the state and that the response be necessary and proportional.¹⁹⁸

- a. *There was no armed attack against Rukaruku either in its traditional notion or in the more liberal “accumulation of events” test.*

While modern weapons¹⁹⁹ pose emerging threats, the ICJ’s standard of armed attack is sending by or on behalf of a state of groups which carry out acts of armed force against another state of such gravity as to amount to an actual armed attack has been consistently retained in its decisions.²⁰⁰

¹⁹² HARRIS, DAVID, *CASES AND MATERIALS ON INTERNATIONAL LAW* (2010), 726; *See also* David Gordon, *Use of Force for the Protection of Nationals Abroad: The Entebbe Incident*, 9 *Case Western Reserve Journal of International Law* 117 (1977).

¹⁹³ IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963), 265-266.

¹⁹⁴ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (2008).

¹⁹⁵ DEREK BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* (1958), 152.

¹⁹⁶ BROWNLIE (1963), *supra* note 193, 265-266.

¹⁹⁷ *UN Charter*, Article 51.

¹⁹⁸ Raphaël van Steenberghe, *Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent Practice: A Step Forward?*, 23 *Leiden Journal of International Law* 183 (2010), 186.

¹⁹⁹ CHRISTINE GREY, *INTERNATIONAL LAW AND THE USE OF FORCE* (2000), 128.

²⁰⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep 136 (30 January).

Thus, Anduchenca's possession of a nuclear-armed submarine does not amount to an armed attack, much less the act of supplying provisions by Covfefe.

Rukaruku cannot argue that the attack was necessary as it was justified under 'accumulation of events test'²⁰¹, allowing an otherwise disproportionate response.²⁰²

The commissioning of a submarine for lawful purpose cannot be considered sufficient to provoke an attack since military build-up to protect sovereignty is a legal act under international law.²⁰³

b. The firing of 12 cruise missiles violated the requirement of necessity and proportionality under jus ad bellum framework.

The Caroline incident sets out the requirements of necessity and proportionality²⁰⁴ in self-defense²⁰⁵. Necessity exists when the situation is instant, overwhelming, leaving no choice of means and no moment of deliberation²⁰⁶ while proportionality requires that the means employed must not be unreasonable or excessive.²⁰⁷

²⁰¹ Norman Menachem Feder, *Reading the UN Charter Connotatively; Toward a New Definition of Armed Attack*, 19 N.Y.U. J. International L. & Pol. 395 (1987), 395.

²⁰² ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963), 201.

²⁰³ Kohen, *supra note* 181, 38-39; See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon and Equatorial Guinea, intervening, v Nigeria)*, Judgment, 2002 I.C.J. Rep. 303 (10 October).

²⁰⁴ Caroline Case, 29 British and Foreign State Papers (1841), 1137-1138, available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp (last accessed 5 January 2018); Theodora Christodoulidou and Kalliopi Chainoglou, *The Principle of Proportionality in Self-Defence and Humanitarian Intervention*, 20 Journal of International Law of Peace and Armed Conflict 79 (2007).

²⁰⁵ Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 International and Comparative Law Quarterly 401 (2002), 159.

²⁰⁶ ELIZABETH WILMSHURTS, *PRINCIPLES OF INTERNATIONAL LAW AND THE USE OF FORCE BY STATES IN SELF-DEFENSE* (2005), 9.

²⁰⁷ JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* (2004), 158.

Here, the Covfefe itself did not present an overwhelming threat negating necessity. It could have been impaired by using less fatal means.

c. *Rukaruku cannot invoke anticipatory, pre-emptive, or preventive self-defense.*

Some scholars do not recognize substantial difference between anticipatory²⁰⁸, pre-emptive and preventive²⁰⁹ self-defense as they all presuppose an imminent attack that the state seeks to address.²¹⁰

There is no legal framework for anticipatory self-defense²¹¹ due to the extreme difficulty of determining the imminence of an armed attack.²¹² Indeed, leaders often give scathing comments against other states without any intention of attacking.²¹³

4. Even assuming Anduchenca is guilty of armed attack, Rukaruku's use of force violated the rules of *jus in bello*.

The fundamental principles of military necessity, distinction²¹⁴ and proportionality²¹⁵ under *jus in bello* must be observed independently of *jus ad bellum*²¹⁶ from the moment force is used.²¹⁷

²⁰⁸ Leo Van den hole, "Anticipatory Self-Defense Under International Law." American University International Law Review, Volume 19, Issue 1, 103.

²⁰⁹ Ashley Deeks, *Part III - The Prohibition Of The Use Of Force, Self- Defence, And Other Concepts, Ch. 29 Taming The Doctrine Of Pre-Emption*, in Marc Weller (ed) *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* (1 January 2015), 2.

²¹⁰ *US Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02 (2015).

²¹¹ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, U.N.G.A. Res. 2625(XXV) (1970); see also *Definition of Aggression*, U.N.G.A. Res 3314 (XXIX).

²¹² RICHARD ERICKSON, *LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM* (1989), 140-41.

²¹³ John Quigley, *A Weak Defense of Anticipatory Self-Defence*, 10 Temp. International & Comp. L.J. 255, 257 (1996).

- a. *The Covfefe was not a legitimate military objective as it neither lost its civilian character nor effectively contributed to Anduchenca's military capacity.*

A civilian vessel which makes effective military contribution to the enemy and whose neutralization offers a definite military advantage²¹⁸ loses its immunity from enemy attack.²¹⁹ It is not exceptional for commercial vessels to provide services for states' militaries.²²⁰ Further, it is a wise corporate judgment that the directors of a military supplier are former members of the military.²²¹ Since a nuclear submarine may remain submerged for months²²², attacking a supply ship could not compel it to resurface.

- b. *The attack against the Covfefe violated the principle of proportionality under jus in bello.*

Proportionality under *jus in bello* is concerned with moral appropriateness²²³ of force and the interplay between military advantage and protection to humanitarian values.²²⁴

²¹⁴ LOUISE DOSWALD-BECK (ED.), *SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA* (1995), Section 39. [hereinafter *San Remo Manual*]

²¹⁵ *San Remo Manual*, Section 38.

²¹⁶ Jasmine Moussa, , *Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law*, 90 *International Review of the Red Cross* no. 872 (2008).

²¹⁷ *Prosecutor v Duško Tadić*, Judgment, ICTY, IT-94-1-A (2 October 1995), ¶70.

²¹⁸ Additional Protocol II to the Geneva Conventions of 12 August 1949, 1125 U.N.T.S. 609 (8 June 1977), Article 52(2); Horace Robertson, *An International Manual for the Law of Armed Conflict at Sea*, *Duke L. Mag.*, Winter 1995, 14.

²¹⁹ J. Ashley Roach, *Legal Aspects of Modern Submarine Warfare*, 6 *Max Planck Yearbook of United Nations Law Online* (2002), 14.

²²⁰ DONALD WOOD, *INTERNATIONAL LOGISTICS* (1995), 14.

²²¹ *Clarifications*, ¶8.

²²² KONGBRAILATPAM RATNABALI, *THE LAW OF ARMED CONFLICT: AN INTRODUCTION* (2017).

²²³ Thomas Hurka, *Proportionality in the Morality of War*, 33 *Philosophy & Public Affairs* 34 (2005); JEFF MCMAHAN, *KILLING IN WAR* (2009).

Rukaruku could have chosen measures short of attack²²⁵ instead of firing 12 cruise missiles at an unarmed merchant ship if only to impair the Covfefe from delivering supplies to Ibra.²²⁶

5. Rukaruku cannot justify the use of force against the Covfefe under United Nations Security Council (“UNSC”) Resolution 3790.

a. Resolution 3790 failed to conform to Articles 40, 41 and 42 of the UN Charter.

In issuing Resolution 3790, the UNSC neither provided provisional measures nor did it employ non-military measures not involving force.²²⁷

b. Resolution 3790 cannot be interpreted in a manner that violates fundamental human rights.

Because of their political nature²²⁸, UNSC resolutions must be interpreted in good faith without intent to distort in order to achieve a predetermined result.²²⁹ This consideration is critical since Rukaruku has been a non-permanent member of the UNSC four times.²³⁰

In any case, an interpretation of a UNSC Resolution should not require violations of fundamental human rights or *jus cogens* norm²³¹ such as killing innocent civilians.

B. RUKARUKU’S CAPTURE OF THE IBRA VIOLATED ARTICLE 17 OF THE FCN TREATY.

²²⁴ Enzo Cannizzaro, *Contextualizing Proportionality: Jus ad bellum and jus in bello in the Lebanese War*, 88 *International Review of the Red Cross* no 864 (2006).

²²⁵ *San Remo Manual*, Part V.

²²⁶ *Agreed Facts*, ¶43-44.

²²⁷ *UN Charter*, Articles 40-42.

²²⁸ JACK STRAW, *LAST MAN STANDING: MEMOIRS OF A POLITICAL SURVIVOR* (2012), 377–381.

²²⁹ SIMON CHESTERMAN, DAVID MALONE, IAN JOHNSTONE, *LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTARY AND COMMENTARY* (2008), 7.

²³⁰ *Agreed Facts*, ¶48.

²³¹ *Case of Al-Jedda v United Kingdom*, Application no. 27021/08 (7 July 2011), ¶102.

Rukaruku is not justified in capturing the Ibra as (1) the FCN Treaty does not authorize the capture and (2) neither is it permitted under international law.

1. Article 17 of the FCN Treaty does not authorize the capture of the Ibra.

The capture using torpedoes and machine-gun fire was by means of use of force.²³² The capture was an undue limitation to Anduchenca's sovereign right by impairing its capacity to expand its military.²³³

2. International law does not permit the capture of the Ibra.

- a. *Possession of a nuclear-armed submarine per se does not amount to an armed attack which triggers the right of Rukaruku to invoke Article 51 of the UN Charter.*

While the ICJ has stated that possession of a nuclear weapon may infer preparedness to use them,²³⁴ only when the envisaged use is violative of the UN Charter may the possession of the nuclear weapon be considered illegal.²³⁵

Here, General Tovarish announced that the acquisition of the nuclear-armed submarine was in order to serve as firm deterrent against violations of Anduchenca's sovereignty.

- b. *The capture of Ibra cannot be justified under UNSC Resolution 3790.*

UNSC Resolutions should not be interpreted to adopt derogation from customary international law.²³⁶ State properties used for governmental non-commercial purposes enjoy

²³² *Agreed Facts*, ¶46.

²³³ Eugene Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 A.J.I.L. (1991), 510.

²³⁴ *Nuclear Weapons*, ¶48.

²³⁵ George Bunn and Roland Timerbaev, *Security Assurances to Non-Nuclear-Weapon State*, The Non Proliferation Review (Fall 1993).

sovereign immunity.²³⁷ Since UNSC Resolution 3790 did not express its intention to violate the immunity of Ibra, its capture is not justified under the said resolution.

- c. *UNCLOS and Customary International Law grant Anduchenca the exclusive jurisdiction over Ibra in the high seas under the flag state rule and freedom of navigation.*

Articles 30 of the UNCLOS gives the flag state the exclusive jurisdiction over a military vessel like a submarine. Further, Article 88 of UNCLOS allows all states to use the high seas peacefully while Article 90 recognizes every state's right of navigation.

PRAYER

Anduchenca respectfully requests the Court to adjudge and declare that:

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

Respectfully submitted,

AGENTS FOR THE APPLICANT

²³⁶ *Prosecutor v Duško Tadić*, Judgment, Case No. IT-94-1-T (7 May 1997).

²³⁷ *Jurisdictional Immunities of the States (Germany v Italy: Greece intervening)*, Judgment, 2012 I.C.J. Rep 99 (3 February).