

37th Edition of the Telders Moot Court Competition 2014

THE ROUNDSIAN RESCUE DISPUTE

Achtagonia v. Roundsia

MEMORIAL SUBMITTED BY

ACHTAGONIA

(APPLICANT)

REGISTRATION NUMBER:

14 A

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(b) List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AM	<i>Ante meridiem</i>
App	Application
Art./Arts.	Article/Articles
ASR	Draft articles on Responsibility of States for internationally wrongful acts
Cpt	Captain
Decl.	Declaration
Diss. Op.	Dissenting opinion
Doc.	Document
ECHR	European Convention on Human Rights
<i>Et al.</i>	<i>Et alii</i>
Fn./Fns.	Footnote/Footnotes
GA	General Assembly
Ibid	Ibidem
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
MAT	Treaty on Mutual Assistance in Criminal Matters
No.	Number
P./PP.	Page/pages
Para./Paras.	Paragraph/Paragraphs
PCIJ	Permanent Court of International Justice
Res.	Resolution
SC	Security Council
Sep. Op.	Separate opinion

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	Charter of the United Nations
V.	<i>Versus</i>
VCLT	Vienna Convention on the Law of Treaties (1969)
Vol.	Volume

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(d) Statement of Relevant Facts

Achtagonia and Roundsia are neighbouring states that share a border along the territory of the Achtagonian province of Quad. Historically, Achtagonia and Roundsia have had peaceful relations, although some tensions have arisen in recent years due to intermittent skirmishes between the Roundsian government's special forces and militant groups located in Achtagonia's Quad province. Achtagonia's government has protested Roundsia's military actions along the border to no avail. Both Achtagonia and Roundsia are members of the UN and have signed and ratified the VCLT (1969).

On 31 December 2013, a Roundsian commercial aircraft carrying 90 Roundsian nationals and 10 passengers of other nationalities, including Achtagonians, was hijacked by five heavily-armed unidentified individuals. Due to inclement weather, the aircraft made an emergency landing in Achtagonia's rural airport, near the border between Achtagonia and Roundsia.. The passengers and crew were taken to an abandoned building in the airport complex.

After the hijacking and through the first week of January 2014, the authorities of Achtagonia were in continuous contact with those of Roundsia at the highest political and diplomatic levels. In the course of 1-3 January, 15 individuals with severe health problems (seven of whom were Roundsians) were released.

On 1 January 2014, the Foreign Minister of Roundsia wrote to the Secretary-General of the UN to express Roundsia's concern for the safety of the passengers and crew, inter alia noting limited food ration on-board the aircraft. Roundsian commercial airliner reported that the aircraft of the type hijacked generally carry food and water rations sufficient for passenger and crew to survive up to ten days. Despite addressing the UN, Roundsia's Foreign Minister did not call for any action by any UN body, and neither the GA nor the SC considered the matter formally. Roundsia also failed to raise the matter with a regional organisation with broad competence, including political and security matters, of which both Roundsia and Achtagonia are members.

In the first week after the hijacking, Achtagonia made no formal statements concerning the situation. Although hijackers made requests for a meeting, demanded for refuelling and safety servicing of the aircraft, Achtagonia refused to co-operate and aid the terrorists. From 4 January 2014 the hijackers threatened publicly to kill the hostages at random.

On 7 January 2014, without making any attempts to negotiate with the hijackers and without any notice to Achtagonia, the special forces of Roundsia entered the sovereign territory of Achtagonia and carried out an armed military operation which resulted in killing all five of the hijackers and returning the hostages to Roundsia or to their home states. All of the members of the special forces unit also returned to Roundsia with one exception. Cpt Squarejaw was left at the airport with serious injuries sustained to his arms, chest and back. He was taken to a military hospital in Achtagonia. Cpt Squarejaw is, in addition to being a captain in its special forces, the Deputy Minister of Defence of Roundsia since 2011. His duties as a deputy minister of defence include overseeing the nation's ground troops stationed domestically and abroad, and meeting with his counterparts in other states.

Cpt Squarejaw has been charged with the murder of the five hijackers. Several weapons of the Roundsian special forces were left at the site of the mission and the only discharged weapon bore Cpt Squarejaw's fingerprints. Roundsia has claimed that Cpt Squarejaw is entitled to State immunity and cannot be prosecuted in Achtagonia unless that immunity is waived, a step which Roundsia has refused to take.

As Achtagonia has commenced criminal proceedings, it requested information from Roundsia about the general training provided to its special forces and the particular instructions and rules of engagement applicable to the January exercise. Roundsia and Achtagonia have a MAT concluded in 1985 that requires each Party to provide information which it holds relevant to an inquiry into alleged criminal offences over which the other has jurisdiction. Art. VI of the MAT states that "[a]ssistance may be refused when execution of the request would seriously impair [a State's] sovereignty, national security, or other essential public interest or for any reason provided by its

domestic law.” Roundsia refused to disclose any information referring generally to concerns about "national sovereignty, national security and the requirements of national law relating to the secrecy of defence operations.” Achtagonia sought a more specific reasons, but Roundsia refused, vaguely citing national security concerns and its on-going intelligence-sharing relationship with a third country.

Achtagonia commenced proceedings in the ICJ, founding the jurisdiction of the Court on the declarations which each has made under Art. 36(2) of the Court’s Statute. Achtagonia has made a reservation that, as of 2011, excludes disputes relating to the national defence of Achtagonia, as determined by Achtagonia. There was no formal withdrawal or termination of the initial declaration. Achtagonia seeks declarations that the mission undertaken by Roundsia on 7 January was unlawful, that it may exercise criminal jurisdiction over Cpt Squarejaw notwithstanding Roundsia’s claim that Cpt Squarejaw has immunity and that Roundsia is in breach of its obligations under the MAT.

(e) Issues

In the *Roundsian Rescue Dispute*, Achatagonia requests this honourable to adjudge and declare whether:

I. THE COURT HAS CONTENTIUS JURISDICTION TO ADJUDGE THE CURRENT DISPUTE

1. Is Achatagonia's reservation (c) to the declaration accepting the compulsory jurisdiction of the Court valid?
2. Can Roundsia rely on Achatagonia's reservation (c) to exclude the Court's jurisdiction?
3. Does the invalidity of the reservation of 2011 entail the nullification of the entire declaration accepting the compulsory jurisdiction of the Court?
4. If Roundsia's armed operation falls within the scope of Achatagonia's reservation, can the court judge over the questions of fulfilment of MAT and criminal jurisdiction?

II. ROUNDSIA CARRIED OUT AN UNLAWFUL ATTACK AGAINST ACHATAGONIA

1. Did the Roundsian operation constitute a use of force within the meaning of Art. 2(4) of the Charter of the UN?
2. Did the use of force by Roundsia meet the requirements of self-defence?
3. Did Roundsia follow the principles of necessity and proportionality in exercising self-defence?
4. Can the use of force be justified by the doctrine of protecting nationals abroad?
5. Were the conditions of the doctrine of protecting nationals satisfied?

III. ACHTAGONIA HAS A RIGHT TO EXERCISE CRIMINAL JURISDICTION OVER CPT SQUAREJAW

1. Has Cpt Squarejaw committed acts that must entail a criminal investigation by Achtagonia?
2. Does Achtagonia have an obligation to exercise criminal jurisdiction over Cpt Squarejaw due to the territorial principle?
3. Does Achtagonia's jurisdiction prevail in a case of concurrent jurisdictions?
4. Can Cpt Squarejaw enjoy any immunities protecting him from criminal proceedings?

IV. ROUNDSIA HAS AN OBLIGATION TO PROVIDE ACHTAGONIA WITH RELEVANT INFORMATION

1. Is Roundsia in breach of Art. V of the MAT and Arts. 26 and 27 of the VCLT?
2. Does Roundsia have an obligation to fulfil the MAT in good faith?
3. Is the breach of the MAT justifiable through an exclusion clause or a circumstance precluding wrongfulness?

(f) Summary of Arguments

1. Achtagonia submits that the Court has jurisdiction under Art. 36(2) of the Statute of the Court because both parties to the dispute have submitted valid declarations of acceptance of the Court's compulsory jurisdiction.
2. Achtagonia submits that the reservation (c) that was amended in 2011 is valid and therefore Court has jurisdiction in the dispute between Achtagonia and Roundsia.
3. Achtagonia submits that Roundsia may not rely on Achtagonia's reservation (c) of 2011 to preclude Court's jurisdiction because current dispute does not constitute matter of "national defence" when interpreted in natural and reasonable way.
4. Achtagonia submits that even if the Court should find that Achtagonia's reservation of 2011 is invalid, then this does not invalidate Achtagonia's previous declaration of acceptance.
5. Achtagonia submits that even if the Court should find that it lacks jurisdiction to judge the matter of legality of Roundsia's armed operation, then the Court retains jurisdiction on matters of treaty obligations and criminal jurisdiction.
6. Achtagonia submits that the armed operation carried out by Roundsia constituted a use of force within the meaning of Art. 2(4) of the Charter of the UN.
7. Achtagonia submits that the use of force against Achtagonia was not justifiable under Art. 51 of the Charter of the UN as the hijacking was not attributable to Achtagonia.
8. Achtagonia submits that the use of force against Achtagonia was not justifiable under Art. 51 of the Charter of the UN as the hijacking did not constitute an armed attack.
9. Achtagonia submits that, even if the use of force by Roundsia was justifiable under Art. 51, the customary international law principles of necessity and proportionality were not followed.

10. Achtagonia submits that the use of force against Achtagonia cannot be justified under the principle of protecting abroad as States do not wish to see the doctrine as an extension to the right of self-defence in fear of it being abused by powerful States.
11. Achtagonia submits that the use of force against Achtagonia cannot be justified under the principle of protecting nationals abroad as Art. 51 of the Charter of the UN cannot be interpreted as incorporating attacks against the nationals of a State as a valid basis to invoke the right to self-defence.
12. Achtagonia submits that, even if the Court should assert the existence of the protection of nationals abroad doctrine, the conditions of imminent threat of injury to nationals and a failure or inability on the part of the territorial sovereign to protect them were not satisfied.
13. Achtagonia submits that Cpt Squarejaw's actions must entail a criminal investigation by Achtagonia as it is a State's duty to investigate suspicious deaths within their jurisdiction.
14. Achtagonia submits that Achtagonia has an obligation to exercise criminal jurisdiction over Cpt Squarejaw as it has jurisdiction under the territorial principle and it has to fulfil its international obligation to investigate suspicious deaths within a State's jurisdiction.
15. Achtagonia submits that in a case of concurrent jurisdictions, Achtagonia's territorial principle prevails through the test of reasonableness that concludes Achtagonia's link to the alleged crime is the strongest.
16. Achtagonia submits that Cpt Squarejaw does not enjoy personal immunity as neither the position of the Deputy Minister of Defence of Roundsia nor the captain of special forces grants personal immunity.

17. Achtagonia submits that Cpt Squarejaw does not enjoy immunity *ratione materiae* as he entered Achtagonia and committed the alleged crimes as the captain of its special forces, not as the Deputy Minister of Defence of Roundsia.
18. Achtagonia submits that Roundsia is bound by the MAT and must fulfil its obligations in good faith.
19. Achtagonia submits that considering the object and purpose of the MAT, Roundsia has breached several of its obligations stipulated therein by refusing to provide relevant information requested by Achtagonia.
20. Achtagonia submits that Roundsia's breach of obligations arising from MAT is not justifiable, because Roundsia can not rely any stipulation provided in ASR to preclude responsibility.
21. Achtagonia submits that Roundsia may not rely on its internal law, whether legislative, regulatory, or administrative, to justify non-performance of conventional obligations binding upon it.

(g) Jurisdiction of the Court

The Court has jurisdiction under Art. 36(2). Achtagonia and Roundsia are both members of the United Nations and parties to the Statute of the Court. In 2011, Achtagonia made a reservation under Art. 36(3) in which Achtagonia excluded disputes relating to the national defence of Achtagonia, as determined by Achtagonia. Government of Achtagonia, in filing this application with the Court, submits to the Court's jurisdiction for the purposes of this case. Therefore, Achtagonia has made a declaration accepting the jurisdiction of the Court.

The Roundsian Government accepted the compulsory jurisdiction of this Court unconditionally under Article 36(2) of the Statute of the Court.

(h) Arguments**1. THE COURT HAS CONTENTIOUS JURISDICTION TO ADJUDGE THE CURRENT DISPUTE**

Achtagonia submits that Achtagonia's reservation (c), made in 2011 to the declaration accepting the compulsory jurisdiction of the Court, is valid under Art. 36(3) of the Statute of the International Court of Justice (1.1). Roundsia cannot preclude the Court's jurisdiction relying on Achtagonia's reservation (1.2). Should the Court find that Achtagonia's reservation is not valid, it will not invalidate Achtagonia's pre-2011 declaration of acceptance (1.3). Should the Court find Achtagonia's entire declaration valid, the Court has jurisdiction to judge on the issues of criminal jurisdiction and the breach of the MAT (1.4).

1.1 ACHTAGONIA'S RESERVATION (C) TO THE DECLARATION ACCEPTING THE COMPULSORY JURISDICTION OF THE COURT IS VALID

Achtagonia made a declaration accepting the compulsory jurisdiction of the Court with a reservation to exclude Court's jurisdiction in matters of national defence. In 2011, Achtagonia made an amendment to its previous reservation and excluded matters of national defence as determined by Achtagonia. This type of reservation is known as an automatic reservation.¹ Achtagonia contests that both the initial declaration and the 2011 amendment are valid, relying on the *Norwegian Loans* and on the *Interhandel* where the Court assumed the validity

¹ *Norwegian Loans*, Sep. Op. of Sir Hersch Lauterpacht p. 29. See also Larson; Briggs; Jennings (1958).

of this type of reservation.² The Court has kept in mind consistency with previous case-law in order to provide predictability as „consistency is the essence of judicial reasoning“.³

1.2 ROUNDSIA CANNOT RELY ON ACHTAGONIA’S RESERVATION (C) TO EXCLUDE THE COURT’S JURISDICTION

According to the rule of reciprocity, Roundsia is entitled to rely on any of the reservations contained in Achatagonia’s declaration accepting the Court’s compulsory jurisdiction.⁴ Nevertheless, Roundsia cannot exceed the proper scope of the reservations in making its defence⁵ and arbitrarily exercise its discretionary powers.⁶ In order to apply the reservation it is necessary to interpret the term „national defence“. The ICJ has stated that the relevant words of a declaration, including a reservation contained therein, must be interpreted in a natural and reasonable way, having due regard to the intentions of the State concerned at the time when it accepted the compulsory jurisdiction of the Court.⁷ National defence interpreted in a reasonable way would, based on grounding principles of international law, constitute questions relating to territorial integrity or political independence⁸ of the State – e.g. defending itself against an armed attack or acting in self-defence; maintaining effective armed forces, intelligence services and counterintelligence. This is also the interpretation, which is of

² Judge Badawi in the *Norwegian Loans* seems to assume the validity of the reservation, Judge Basdevant expressly left the point open, as did Judge Spiropoulos in the *Interhandel Case*.

³ Shaw, p. 1065; *Legality of Use of Force*, Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, p. 1353.

⁴ *Norwegian Loans; Interhandel Case; Anglo-Iranian Oil Co.*; Jennings (1958), p. 362.

⁵ *Aerial Incident* (1957), p. 308.

⁶ I.C.J. Pleadings, *Interhandel Case*, p. 579.

⁷ *Anglo-Iranian Oil Co.*, p. 104, *Fisheries Jurisdiction*, para. 49.

⁸ Charter of UN, Art. 2(4).

essential importance⁹ that Ahtagonia had in mind when adopting the 2011 amendment to the reservation.

Roundsia has interpreted Ahtagonia's reservation in bad faith and not in a natural nor in a reasonable way.¹⁰ Denying the jurisdiction of the Court in a case which manifestly does not relate to 'disputes relating to national defence' constitutes an abuse of right¹¹ which the Court has the power to reject.¹²

1.3 INVALIDITY OF THE RESERVATION OF 2011 DOES NOT ENTAIL THE NULLIFICATION OF THE ENTIRE DECLARATION ACCEPTING THE COMPULSORY JURISDICTION OF THE COURT

If the Court should find that Ahtagonia's automatic reservation of 2011 under Article 36(3) is invalid, Ahtagonia asserts that this does not invalidate Ahtagonia's pre-2011 declaration of acceptance. The good faith of Ahtagonia in accepting the Court's jurisdiction in all legal disputes, except national defence disputes, should not be questioned.¹³ If the invalidity of the automatic reservation clause would entail nullity of the entire declaration, the consequence would be that Ahtagonia would find itself in the same legal situation as States which have not submitted to the compulsory jurisdiction of the Court.¹⁴ This situation would not be in conformity with the true intentions of Ahtagonia.

⁹ *Fisheries Jurisdiction*, Sep. Op. Oda, para. 10.

¹⁰ *Competence of Assembly*, p. 8; *Ambatielos*, Diss. Op, p. 30; Hambro (1948), p. 150.

¹¹ I.C.J. Pleadings, *Norwegian Loans*, p. 131.

¹² Gross, p. 376.

¹³ Briggs, p. 361.

¹⁴ *Interhandel Case*, Diss. Op. Of Pres. Klaestad, p. 77.

It was the wish of Achtagonia to have the right to determine what constitutes a dispute relating to national defence. There was apprehension that unless it was Achtagonia, rather than the Court, in charge of this determination, the Court could readily extend its jurisdiction to various national defence issues¹⁵ and Achtagonia's aim was to avoid that. Nevertheless, it was the true intention of Achtagonia to issue a real and effective declaration accepting the compulsory jurisdiction of the Court. Achtagonia agrees with the view expressed by Judge Armand-Ugon, who in the *Interhandel* found that: "The declaration consists of two parts, acceptance of the Court's jurisdiction and reservations to that acceptance. Those two elements of a single juridical act are separable. Nothing justifies us, when reading the text, in considering them as an indivisible whole."¹⁶ Therefore even if Achtagonia's amendment to its earlier reservation is void, claiming Achtagonia's entire declaration is void would run counter to the clear intention of Achtagonia, which has submitted the case to the Court.¹⁷ Achtagonia has shown the Court reasons behind the amendment of 2011 but it is clear that the amendment is not essential in its nature¹⁸ because it does not exclude matters previously not excluded. Therefore, it is possible to sever the amendment of 2011 from the initial declaration and maintain the validity of declaration as a whole.

Moreover, Achtagonia has not officially withdrawn or terminated its first declaration of accepting the compulsory jurisdiction. The Court has stated that reservations do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction.¹⁹ The same could be said

¹⁵ Rogers, p. 760.

¹⁶ *Interhandel Case*, Diss. Op. of Judge Armand-Ugon, p. 89.

¹⁷ *Ibid.* p. 91.

¹⁸ *Fisheries Jurisdiction*, Sep. Op. Judge Schwebel, p.45.

¹⁹ *Fisheries Jurisdiction*, para. 44.

about amendments to the reservations. There exists a valid declaration of acceptance of compulsory jurisdiction and this dispute does not fall within the scope of the reservation of Achtagonia's initial acceptance. Therefore, it can be concluded that the Court has jurisdiction to adjudge on the merits.

1.4 THE COURT HAS JURISDICTION TO DECIDE QUESTIONS OF CRIMINAL JURISDICTION AND INTERPRETATION OF THE MAT

If the Court should find that Roundsia's armed operation to Achtagonia falls within the scope of Achtagonia's reservation and therefore finds a lack of jurisdiction, Achtagonia requests that the Court would judge whether Achtagonia has criminal jurisdiction over Cpt Squarejaw and whether Roundsia is in breach of its obligations under the MAT.

The Court has found that no provisions of the Statute or Rules contemplate that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects.²⁰ The Court should consider a dispute even if the same principles and rules govern another aspect of the same dispute which is, allegedly, exempted from the jurisdiction of the Court.²¹ The Immunities of officials, the criminal jurisdiction of a State and the interpretation of the MAT are questions closely linked with Roundsia's armed operation but can be judged without passing a judgement on the lawfulness of this mission.

2. ROUNDSIA CARRIED OUT AN UNLAWFUL ATTACK AGAINST ACHTAGONIA

Achtagonia submits that the armed operation carried out by Roundsia constituted a use of force within the meaning of Art. 2(4) of the Charter of the UN (2.1). The use of force against Achtagonia was not in conformity with Art. 51 of the Charter of the UN and cannot be justified as self-defence (2.2). Should the court find the use of force was in conformity with

²⁰ *Tehran*, para. 36.

²¹ *Fisheries Jurisdiction*, Diss. Op. Vereshchetin, para. 6; Diss. Op. Bedjaoui, para. 25.

Art. 51 of the Charter of the UN, it failed to meet the conditions of necessity and proportionality (2.3). The use of force cannot be justified through the doctrine of protecting nationals abroad. In any case, Roundsia failed to follow the doctrine's conditions²² (2.4).

2.1. THE ROUNDSIAN OPERATION CONSTITUTED A USE OF FORCE WITHIN THE MEANING OF ART. 2(4) OF THE CHARTER OF THE UN

Art. 2(4) of the Charter of the UN, the prohibition to use force or threat of force, is declared a cornerstone of the Charter of the UN and regarded as *ius cogens* by the ICJ and the ILC.²³ The relevance of the principles of non-use of force and non-intervention have been emphasised thoroughly in ICJ judgements²⁴ and GA Resolutions.²⁵ Art. 2(4) is a strict prohibition; an incursion into the territory of another State constitutes an infringement of Art. 2(4), even if it is not intended to deprive that State of part of its territory and if the invading troops are meant to withdraw immediately after completing a temporary and limited operation.²⁶ In order for the force used against a State to be illegitimate, force has to be aimed towards the territorial integrity or political independence of said State. The standard of using forcible measures

²² Waldock, p. 235.

²³ *Nicaragua*, para. 183; *Armed Activities*, para. 148; *Construction of a Wall* (Sep. op. Elaraby), p. 254; *Oil Platforms* (Dis. op. Elaraby), p. 291; *Oil Platforms* (Sep. op. Kooijmans), para. 46; *Oil Platforms* (Sep. op. Simma), para. 6; Yearbook of ILC (1996-II), p. 247.

²⁴ *Nicaragua*, paras. 184-185; *Corfu Channel*, p. 35.

²⁵ *Friendly Relations Declaration*; UN Doc. A/RES/42/22; UN Doc. A/RES/2160(XXI); UN Doc. A/RES/32/150; UN Doc. A/RES/2936(XXVII); UN Doc. A/RES/107(S-1).

²⁶ „The ICJ construes the prohibition to use force as a strict prohibition and there is no sign in its jurisprudence of any support for the argument that the prohibition of the use of force in Article 2(4) should be construed to allow exceptions going beyond self-defence, such as limited military operations which do not aim to overthrow the government or to seize the territory of a foreign State and which further the purposes of the UN“ Commentary of the Charter of the UN, p. 123; Gray (2013) p 9-10.

encompass sending undercover agents to kill an individual, therefore a covert military mission into another State satisfies the conditions of a forcible measure.²⁷

Roundsian highly trained armed special forces covertly, forcefully and without Achtagonia's explicit consent entered the sovereign territory of Achtagonia on 7 January 2014 at 2 AM using military equipment and displayed a great level of violence by opening fire. During the limited short-term operation, the territorial integrity and national security of Roundsia was severely harmed. An armed unit of potentially hostile foreign soldiers forcefully crossed the internationally recognised borders of a sovereign State and carried out a military operation using forcible measures without any prior notifications. Therefore, the conditions of an illegitimate use of force have been satisfied.

2.2. THE USE OF FORCE BY ROUNDSIA DID NOT MEET THE REQUIREMENTS OF SELF-DEFENCE

The right to self-defence is contained in Art. 51 of the Charter of the UN. The main condition for invoking the right to self-defence is the existence of an armed attack against a State.²⁸ The practice of the ICJ and the teachings of the most highly qualified publicists have widely and repeatedly supported the position that an attack has to be attributable to a State for it to be considered an armed attack in the meaning of Art. 51 of the Charter of the UN.²⁹ In the present case, an act or omission is attributable to the State when the attributing conduct is directed or controlled by State, or when the conduct is acknowledged and adopted by a State as its own.³⁰

²⁷ Lubell, p. 14.

²⁸ Art. 51, Charter of the UN.

²⁹ *Construction of a Wall*, para. 139; *Nicaragua*, paras. 131, 195, 229, 230; *Oil Platforms*, para. 51; *Armed Activities*, para. 146; Zanardi, p. 112; Yee, p. 291; Becker, p. 159.

³⁰ Arts. 8 and 11, ASR.

In order to attribute conduct to a State through Art. 8 of the ASR, the person or group of persons has to either be acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. This is most commonly achieved through recruiting or instigating private persons or groups of private individuals who remain outside the official structure of the State.³¹ In the present case, a link between the hijackers and Achtagonia cannot be established as their only affiliation with Achtagonia is making an emergency landing due to inclement weather in an airport situated within Achtagonia. Moreover, denying the hijackers' demands means Achtagonian officials do not support the actions of the hijackers. Therefore, the hijackers were not acting on the instructions of, or under the direction or control of Achtagonia as the tests of effective control and overall control would fail to demonstrate a sufficient link between the hijackers and Achtagonia.³²

Under Art. 11 of the ASR, conduct is attributable to a State if it has been acknowledged and adopted by the State as its own.³³ In *Tehran*, this was proved by showing that Iranian authorities endorsed the occupation of the Embassy and the detention of its inmates as hostages by making statements in various contexts.³⁴ In the present case, Achtagonian authorities have made no statements nor expressed any acceptance regarding the actions of the hijackers. Therefore, the conditions of attributability in Art. 11 of the ASR have not been satisfied and the actions of the hijackers cannot be attributed to Achtagonia. Conclusively, as the actions of the hijackers cannot be attributed to Achtagonia, the use of force prohibited in Art. 2(4) of the Charter of the UN cannot be justified as legitimate self-defence under Art. 51 of the Charter of the UN.

³¹ ASR Commentaries, p. 47.

³² *Nicaragua*, para. 115; *Tadic*, para. 131.

³³ ASR Commentaries, p. 52.

³⁴ *Tehran*, para. 74.

If the Court should find that the attack does not have to be attributable to a State, the Applicant submits that in the present case the hijacking of a commercial airplane does not constitute an armed attack for the purpose of Art. 51 of the Charter of the UN and does not justify the use of force in self-defence.³⁵ The ICJ has emphasised the need to distinguish the most grave forms of the use of force that constitute an armed attack from less grave forms of the use of force³⁶ In *Oil Platforms*, the ICJ hesitated whether an attack on a single military vessel would amount to an armed attack.³⁷ In order for a use of force to amount to an armed attack, a massive armed aggression against the territorial integrity and political independence of a State that imperils its life or government; or at least a use of force that results in casualties.³⁸ In the Definition of Aggression, an act is considered an aggression if the target is an air *fleet*³⁹. In the present case, the hijacking of a commercial airplane cannot be viewed as a direct attack against the territorial integrity of Achtagonia as its target was a single aircraft and the terrorists have made no statements regarding the hijacking, meaning their intentions are unclear, nor have there been any casualties. Therefore, the hijacking cannot amount to an armed attack and Roundsia cannot justify its use of force through exercising its right to self-defence.

³⁵ Constantinou, p. 82.

³⁶ *Nicaragua*, para. 191; *Oil Platforms*, para. 51.

³⁷ „The Court does not exclude the possibility that the mining of a single military vessel *might be sufficient* to bring into play the "inherent right of self-defence.““ *Oil Platforms*, para. 72.

³⁸ Cassese, p. 354, 469; Lubell, p. 50; Singh and McWhinney, p. 191.

³⁹ Art. 3(d), Definition of Aggression.

2.3. IN ANY EVENT, ROUNDSIA DID NOT FOLLOW THE PRINCIPLES OF NECESSITY AND PROPORTIONALITY IN EXERCISING SELF-DEFENCE UNDER ART. 51 OF THE CHARTER OF THE UN

If the court should find that Roundsia exercised legitimate self-defence, the principles of necessity and proportionality were not followed. As part of customary international law, self-defence has to satisfy the conditions of necessity and proportionality.⁴⁰ Necessity is interpreted as self-defence being the last resort after all peaceful measures have failed.⁴¹ Proportionality relates to the size, duration and target of the response.⁴² The questions of necessity and proportionality are dependent on the facts of the particular case.⁴³

2.3.1. THE NECESSITY PRINCIPLE

Art. 33(1) of the Charter of the UN stipulates a duty to seek for peaceful means to settle a dispute, e.g. by a negotiation or by resorting to a regional agency.⁴⁴ If a State were able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravenes the general prohibition against the use of armed force.⁴⁵

Achtagonia argues that resorting to a unilateral unauthorized armed operation was not necessary as the actual threat arising from the statement of the hijackers to publicly kill the hostages left room for deliberation and was overestimated by Roundsia. Firstly, the hijackers

⁴⁰ Shaw, p. 1131; Jennings, p. 82; Kirgis; *Nuclear Weapons*, para. 41; *Nicaragua*, para. 176; *Armed Activities*, para. 147; *Oil Platforms*, para. 43.

⁴¹ Gardam, p. 5.

⁴² Gray (2008), p. 150.

⁴³ Gray (2008), p. 151; Shaw, p. 1141.

⁴⁴ Art. 33(1), Charter of the UN.

⁴⁵ Addendum to Report, p. 69.

were willingly sharing food with the hostages. Secondly, there were no previous reports on any violence towards the hostages. Thirdly, during the three days between making the public threat and the attack by Roundsian special forces, no hostages were harmed. Lastly and most importantly, during the course of 1-3 January, 15 individuals with severe health problems were released. As the released unhealthy passengers had to be taken care of by proper instances, it demonstrates that Achtagonia had taken steps to assume control of the situation.

Moreover, Roundsia had not satisfied every peaceful option in its disposal. Despite writing to the Secretary-General of the UN, Roundsia's Foreign Minister did not call for any action by any UN body. Roundsia did not address the issue with the regional organisation with competence of security matters. It was not necessary for Roundsia to carry out an armed operation without the consent of Achtagonia. If Roundsia believed that further action could be taken by Achtagonia, it could have been dealt with through cooperative arrangements.⁴⁶ A prior notification or a co-ordinated operation would have yielded same results. Although a co-ordinated operation would have still involved using armed force, the severity of the operation would have been greatly decreased as Achtagonia's sovereignty and territorial integrity would not have been impaired. Even a limited use of force not targeted at the State's apparatus amounts to a violation of that State's territorial integrity.⁴⁷ Therefore, the requirement of necessity is not satisfied.

2.3.2. THE PROPORTIONALITY PRINCIPLE

Should the Court find that Roundsia's use of force was necessary, Achtagonia submits that the proportionality principle was not followed. In self-defence, the proportionality requirement is cognisant of there being an on-going danger which the self-defence is aimed at ending, and the proportionality and limitation placed upon actions taken in self-defence must therefore be

⁴⁶ Trapp, p. 147.

⁴⁷ Trapp, p. 145.

measured in relation to the achievement of this legitimate aim.⁴⁸ The intensity of the force used should be about the same as the intensity defended against.⁴⁹

The military attack by Roundsia on 7 January 2014 was unilateral, unauthorized, violent and impaired Achtagonia's sovereignty. In addition, it was carried out under heavy cloud cover and at night. 15 passengers had already been released from the airport complex and despite the terrorists' threats to kill the hostages, there were neither casualties nor injuries up until 7 January 2014. Taking all of the above into account, it becomes evident that Roundsia overestimated the gravity of the situation. The attack endangered both the national security of Achtagonia and the hostages. Opening fire in the vicinity of unprotected civilians creates a massive risk of civilian casualties.⁵⁰

Comparing the casualties of the armed operation, the one-sided outcome poses the question whether Roundsian special forces enjoyed a serious advantage over the hijackers.⁵¹ Employing lethal force in a situation where only one member of the Roundsian special forces has sustained injuries cannot amount to a proportionate use of force. Moreover, as Cpt Squarejaw also sustained injuries to his back, they may have been inflicted by another member of the special forces, *i.e.* by friendly fire. Additionally, the resort to lethal force has to be the final possibility, preceded by granting a possibility to surrender, capturing the hijackers or injuring them non-lethally. As the on-going danger was the potential risk of death of the hostages, the aim of the rescue operation was to neutralise this risk. Means less endangering

⁴⁸ Lubell, p. 65; Schmitt, p. 20.

⁴⁹ „[This] might be particularly applicable to skirmishes or relatively small-scale conflicts“ Kirgis.

⁵⁰ Brownlie (1963), p. 300.

⁵¹ „[...]objection to the US's incursion into both Grenada nad Panama stemmed largely from the disproportionate amount of troops involved in order to secure the safety of the threatened nationals.“ Grimal and Melling, p. 550.

to the hostages, to the sovereignty of Achtagonia and one's causing less casualties were at the disposal of the special forces. The legitimate aim of the armed operation was achievable through these means. Therefore, the use of force was not proportionate.

2.4. THE USE OF FORCE CANNOT BE JUSTIFIED UNDER THE PRINCIPLE OF PROTECTING NATIONALS ABROAD

As the law stands at present, no rule of international law allows covert military operations for the protection of a State's own nationals.⁵² It cannot be justified as a case of lawful self-defence pursuant to Art. 51 of the Charter of the UN nor can it be seen as part of customary international law.⁵³ When States make a legal claim based on the protection of national abroad, they do so within the scope of self-defence.⁵⁴ Therefore, Achtagonia will demonstrate that the doctrine of protection of nationals abroad is not an extension of the right to self-defence.

Firstly, the use of force to rescue nationals in a foreign State without the consent of that State is uncommon and has been practised by only a few States since the Second World War.⁵⁵ The legal arguments of Belgium, the USA, Israel, and the UK in favour of such a wide right to self-defence have attracted few adherents.⁵⁶ Moreover, many States have explicitly protested against such a right, most notably Sweden.⁵⁷ It can be concluded that States do not wish to see

⁵² *E.g.* UN Doc. A/RES/2131 (XX). Notes that no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State; Convention Against the Taking of Hostages, Art. 14; Schachter, pp. 138, 139.

⁵³ Commentary of the Charter of the UN, p. 133, Verdross and Simma, § 1338.

⁵⁴ Grimal and Melling, p 543.

⁵⁵ Gray (2008), p. 156. Quigley, p. 305.

⁵⁶ Gray (2008), p. 157.

⁵⁷ „The Charter does not authorize any exception to this rule except for the right of self-defence and enforcement measures undertaken by the Council under Chapter VII of the Charter. This is no coincidence or oversight. Any formal exceptions permitting the use of

the protection of nationals abroad doctrine as an extension to the right to self-defence in fear of it being abused by powerful States.

Secondly, Art. 51 of the Charter of the UN sets forth the requirement of an armed attack in order to exercise the right to self-defence. In Chapter 2.2, Achtagonia argued that there had not been an armed attack against the *State* of Roundsia. The protection of nationals abroad doctrine would require there to be an armed attack against the *nationals* of Roundsia. Yet, Art. 51 of the Charter of the UN cannot be interpreted in a way to incorporate attacks against the nationals of a State as a valid basis to invoke the right to self-defence.⁵⁸ Therefore, as there has not been an armed attack, the right to use self-defence to justify Roundsia's use of force cannot be invoked.

If the court should assert the existence of the protection of nationals abroad doctrine, certain conditions have to be met in order for it to be legitimately exercised: (1) there must be an imminent threat of injury to nationals; (2) a failure or inability on the part of the territorial sovereign to protect them, and; (3) the action of the intervening State must be strictly confined to the object of protecting its nationals against injury.⁵⁹ Achtagonia contests the satisfaction of conditions 1 and 2. Firstly, the imminence of threat of injury to Roundsian nationals had immensely subsided due to the fact that the three days between the public threats to kill the hostages and the armed operation resulted in no casualties or injuries. A quicker response by Roundsia would have satisfied the condition of imminent threat. Secondly, as discussed in

force or of military intervention in order to achieve certain aims, however laudable, would be bound to be abused, especially by the big and strong, and to pose a threat, especially to the small and weak." (Sweden) UN Doc. S/PV.1140, para. 121; see also UN Doc. A/PV.742, para. 75 (Ethiopia); UN Doc. S/PV.120, paras. 79-83; (Cuba). UN Doc. S/PV.1942, para. 45 (Romania). S/PV.1939, para. 226 (China). S/PV.1941, para. 168 (Soviet Union).

⁵⁸ Ronzitti, p 11. Iqbal and Hassan.

⁵⁹ Waldock, p. 235.

Chapter 2.3.1, Achtagonian officials had to have taken steps to protect and ensure the well-being of the released hostages with severe health problems. Therefore, Achtagonia was both willing and able to protect the hostages. Achtagonia does not contest satisfying the third condition of exercising the right to protect nationals abroad. Nevertheless, as all three conditions have to be satisfied simultaneously, the present situation failed to fulfil the requirements for Roundsia to exercise such a right. Therefore, Roundsia cannot justify its use of force through the protection of nationals doctrine.

3. ACHTAGONIA HAS A RIGHT TO EXERCISE CRIMINAL JURISDICTION OVER CPT SQUAREJAW

Achtagonia submits that it has a right to exercise criminal jurisdiction over Cpt Squarejaw. Cpt Squarejaw's actions must entail a criminal investigation by Achtagonia (3.1). Achtagonia has jurisdiction over Cpt Squarejaw under the territorial principle (3.2). Should the court find that Roundsia has a concurrent jurisdiction, Achtagonia's territorial principle prevails (3.3). Cpt Squarejaw does not enjoy immunities. In any case, immunity *ratione materiae* will not apply in the current case (3.4).

3.1. CPT SQUAREJAW'S ACTIONS MUST ENTAIL A CRIMINAL INVESTIGATION BY ACHTAGONIA

On 7 January 2014, Cpt Squarejaw was found at the airport in Achtagonia near five dead bodies with bullet wounds and a discharged weapon carrying Cpt Squarejaw's fingerprints. The right to life is a fundamental right that is widely recognized as part of customary international law.⁶⁰ The right to life entails a State's duty to investigate suspicious deaths within their jurisdiction.⁶¹ The evidence in the present case clearly excludes the possibility of

⁶⁰ Lubell, p. 169; Art. 3, UDHR; Art. 6, ICCPR; Art 4. ACHPR; Art.2. ECHR.

⁶¹ "Among these positive duties, it is worth mentioning the duty to investigate killings and the duty to punish offenders" Sepúlveda, p. 219. Communication No. 321/1988, para. 11; Communication No. 161/1983, para. 12. See also Communication No. 138/1983, para. 10. In

the hijackers dying from natural causes. Therefore, to secure every subject of human rights their rights and freedoms, a criminal investigation has to be initiated by Achatagonia.⁶²

3.2. ACHATAGONIA HAS AN OBLIGATION TO EXERCISE CRIMINAL JURISDICTION OVER CPT SQUAREJAW DUE TO THE TERRITORIAL PRINCIPLE

The territorial basis for the exercise of jurisdiction reflects the sovereignty exercisable by a State in its territorial home and is the starting point and indispensable foundation of several rights that a State possesses.⁶³ All alleged crimes committed within the territorial jurisdiction of a State may come before the municipal courts, this is so even where the alleged offenders are foreign citizens.⁶⁴ Events taking place within the territorial jurisdiction of a State should not be generally subject to another State's legislation⁶⁵ and not interfere with the sovereign authority of another State.⁶⁶ The aim of criminal law is to enable punishment for crimes committed within the territory of a State.⁶⁷ The State a crime was committed in is where the evidence is, where the offence produced its effects and where a punishment serves as an

its Comments on Argentina the Committee urged the State party to fully investigate and "to take action on the findings." CCPR/C/79/Add.46, para. 16.

⁶² *McCann and Others*, para 161: „The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (Art. 2), read in conjunction with the State's general duty under Article 1 (Art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.”

⁶³ Shaw, pp. 652-653; Ryngaert, p. 42; Brownlie, pp. 301, 303; *Lotus*, p. 20.

⁶⁴ Shaw, p. 653. Akande and Shah, p. 816, 826.

⁶⁵ *Kaunda*, para. 38;

⁶⁶ *Cook*, para. 46

⁶⁷ *Armed Activities* (Sep. op. of Pres. Guillaume), para 4.

example.⁶⁸ The alleged crime was committed in Achtagonia which provides jurisdiction to Achtagonia under the territorial principle. Commencing proceedings means fulfilling Achtagonia's international obligation to investigate suspicious deaths within a State's jurisdiction.⁶⁹ Therefore, Achtagonia has an obligation to investigate Cpt Squarejaw's actions during the military operation in Achtagonia.

3.3 IN A CASE OF CONCURRENT JURISDICTIONS, ACHTAGONIA'S TERRITORIAL PRINCIPLE PREVAILS

Roundsia might claim concurrent jurisdiction under the nationality principle, yet a large number of the most highly qualified publicists and courts support the view that the territorial principle prevails.⁷⁰ This is justified as generally the State a crime is committed in is in the best position to commence proceedings. Nevertheless, a case of concurring jurisdictions has to be resolved through the test of reasonableness, which requires weighing the different interests involved in the situation.⁷¹ Every State has to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another State.⁷² A test of interest-balancing has to be applied to

⁶⁸ *Armed Activities* (Sep. op. of Pres. Guillaume), para 4, Ryngaert, p 13.

⁶⁹ See fn. 61.

⁷⁰ „In a large number of cases the local law will have to be allowed to prevail, for every other solution would be destructive of justice and international intercourse“ Mann, p 90; „The supreme principle of penal jurisdiction is territorial“ Beale, p 216; „The host State's interest in preserving order at home [under the territoriality principle] outweighs the interests of either the victim's or offender's home State in regulating conduct abroad“ Watson, p 17. „[A] State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence“ *Bankovic and others*, para. 60.

⁷¹ Ryngaert, p. 143; Restatement (Third) of Foreign Relations Law, para. 403.

⁷² *Barcelona Traction* (Sep. Op. Fitzmaurice), para. 70.

assess whether a State's interests outweigh the interest of another State to justify violating the principle of non-intervention.⁷³

In the present case, the alleged crime was committed on the sovereign territory of Achatagonia. Firstly, the evidence, including the scene of the crime, five dead bodies, the alleged murder weapon and a number of witnesses are in Achatagonia. Moreover, it is among Achatagonia's crucial interests to investigate violations of its domestic penal code to ascertain the effectiveness of its legislative and judicial system. Secondly, Roundisia has declared Cpt Squarejaw a national hero which indicates a lack of will to commence proper and just proceedings. Lastly, Achatagonia has already commenced proceedings against Cpt Squarejaw, which can be seen as a solution to concurrent jurisdictions if it does not produce unjust results.⁷⁴ Conclusively, Achatagonia's territorial principle has to prevail over Roundisia's nationality principle as Achatagonia's link to the alleged crime is the strongest.

3.4 CPT SQUAREJAW DOES NOT ENJOY PERSONAL IMMUNITY

Personal immunity can manifest in two different forms: immunity of high-ranking State officials and special missions immunity.⁷⁵ In the present case, the latter is excluded since the definition requires a diplomatic mission and the receiving State's consent which are absent.⁷⁶

Immunity of high-ranking State officials is traditionally reserved to only the highest civil servants, such as heads of State, heads of government and diplomats accredited to the receiving State.⁷⁷ Personal immunity also covers private acts.⁷⁸ The people enjoying immunity

⁷³ Ryngaert, p. 145; Meessen, p. 199.

⁷⁴ Ryngaert, p. 183.

⁷⁵ Sanger, pp. 196, 198.

⁷⁶ Art. 1, Convention on Special Missions.

⁷⁷ Sanger, p. 198; Akande and Shah, p. 820.

⁷⁸ Fox, p. 694.

ratione personae need to undertake international travel and often represent their State at the international level⁷⁹, although this condition alone is not enough to grant immunity.⁸⁰ The ICJ has extended this immunity to serving Foreign Ministers.⁸¹ English District Judges have recognized the immunity of Ministers of Defence.⁸² In *Mutual Assistance in Criminal Matters*, the Court refused to extend immunity to the *Procureur de la République* and the Head of National Security of Djibouti.⁸³ This can be seen as unwillingness to infinitely extend the category of „high ranking officials“ and is a reasonable approach as immunity from prosecution is an exception to the general rule of prosecuting offenders⁸⁴. A great number of exceptions to a rule devalue its importance and impact.

Cpt Squarejaw is a captain in its special forces and serves as the Deputy Minister of Defence. Neither of these positions are granted personal immunity, a military captain is not a civil servant and courts have not extended personal immunity to Deputy Ministers.⁸⁵ Cpt Squarejaw’s duties include traveling, yet in moderns times it is difficult to envisage a ministerial position not including a duty to travel. Extending personal immunity to a Deputy Minister would be unprecedented, irrational, and, as demonstrated, against current State practice as it may, *inter alia* lead to a false sense of impunity. Therefore, personal immunity cannot be extended to the position of Deputy Minister of Defence.

⁷⁹ Akande and Shah, p. 821.

⁸⁰ Akande and Shah, p. 821; *Mofaz*, paras. 13-14.

⁸¹ *Arrest Warrant*, paras. 51, 53.

⁸² *Mofaz*.

⁸³ *Mutual Assistance in Criminal Matters*, para. 194.

⁸⁴ See fn. 61.

⁸⁵ See fns. 81, 82, 83.

State officials may benefit from the immunity of their State for acts committed on its behalf.⁸⁶ Immunity *ratione materiae* only covers acts by State officials undertaken in their official capacity during their term in office.⁸⁷ The functions of the Deputy Minister of Defence of Roundsia do not include participating in military operations, therefore Cpt Squarejaw entered Ahtagonia as a captain of its special forces, *i.e.* part of armed forces. This is reassured by the fact that Cpt Squarejaw was wearing a military uniform. As immunity *ratione materiae* is reserved to State officials, a member of the armed forces cannot be granted protection. Members of armed forces might receive immunity from Status of Forces Agreements.⁸⁸ There is no such agreement between Roundsia and Ahtagonia. Therefore, Cpt Squarejaw does not enjoy functional immunity.

4. ROUNDSIA HAS AN OBLIGATION TO PROVIDE AHTAGONIA WITH RELEVANT INFORMATION

Ahtagonia submits that Roundsia has breached the MAT when it refused to share the information requested by Ahtagonia about the general training provided to Roundsia's special forces and the particular instructions and rules of engagement applicable to the January exercise (4.1). Roundsia has breached its obligation to act in good faith and there are no mitigating circumstances (4.2). The breach of the MAT is not justifiable through an exclusion clause or a circumstance precluding wrongfulness (4.3).

⁸⁶ Sanger, p. 200.

⁸⁷ Report of the ILC (A/66/10), para 135.

⁸⁸ Fleck, p 656.

4.1 ROUNDSIA IS IN BREACH OF ART. V OF THE MAT AND ARTS. 26 AND 27 OF THE VCLT

Roundsia's refusal to share information is in breach of Art. V of the MAT and Arts. 26 and 27 of the. The MAT, concluded in 1985, establishes that Roundsia has an obligation to provide information which it holds relevant to an inquiry into alleged criminal offences over which Achtagonia has jurisdiction.

The 1985 MAT is binding upon the State parties under the customary rule of *pacta sunt servanda*.⁸⁹ From 1985 to 2013 neither Achtagonia nor Roundsia have ever repudiated the MAT and there is no applicable treaty or customary rule to suspend or withdraw from the treaty.

The *pacta sunt servanda* rule, stipulated in Arts. 26 and 27 of the VCLT, applies solely when the following conditions are fulfilled: 1) the treaty is in force; 2) the treaty is valid; 3) the provisions of the treaty apply to the particular case and 4) the rule applies between 'parties' to the treaty as defined in Art. 2(1)(b) of the VCLT.⁹⁰ All the conditions are currently satisfied. Firstly, the MAT is valid under Arts. 42-53 of the VCLT. Secondly, the MAT is in force under Art. 24 of the VCLT. Thirdly, the MAT was intended to facilitate "mutual assistance" in criminal matters and currently there exists an alleged criminal offence over which Achtagonia has jurisdiction.

Therefore, all the conditions for the *pacta sunt servanda* rule are fulfilled and Roundsia has the obligation to fulfil the obligations provided in the MAT.

⁸⁹ Art. 26, VCLT (1969) „Every treaty in force is binding upon the parties to it and must be performed by them in good faith.“ *Territorial Dispute*, para. 21; *Kasikili/Sedudu Island*, para. 18. Kelsen, p. 28.

⁹⁰ ASR Commentaries, p. 24.

4.2 ROUNDSIA HAS AN OBLIGATION FULFIL THE MAT IN GOOD FAITH

The good faith obligation reflected in Art. 26 of the VCLT “obliges the Parties [to a treaty] to apply it in a reasonable way and in such a manner that its purpose can be realized”.⁹¹ It is implicit in the requirement of applying good faith in treaty obligations that a party must abstain from acts calculated to frustrate the object and purpose of the treaty.⁹² The object and purpose of the MAT is to encourage and facilitate “mutual assistance” in criminal matters in order to improve the efficiency of cooperation⁹³ and to ensure thorough investigations into allegations of human rights violations.⁹⁴ Roundsia’s refusal to share relevant information with Achtagonia does frustrate object and purpose of the MAT and this refusal has clearly been calculated as to deny Achtagonia the possibility to carry out a thorough and efficient criminal investigation into the facts of Roundsia’s armed operation and Cpt Squarejaw’s alleged criminal offence. Thus Roundsia has indeed breached its obligation to act in good faith.

4.3 THE BREACH OF THE MAT IS NOT JUSTIFIABLE THROUGH AN EXCLUSION CLAUSE OR A CIRCUMSTANCE PRECLUDING WRONGFULNESS

Roundsia’s liability for the breach of the MAT might be excluded if the treaty provides an exclusion clause or circumstances precluding wrongfulness occur.⁹⁵ Art. VI of the MAT provides limits to the obligation to assist, stipulating that “[a]ssistance may be refused when execution of the request would seriously impair [a State’s] sovereignty, national security, or other essential public interest or for any reason provided by its domestic law.” The maxim of

⁹¹ *Gabcikovo-Nagymaros Project*, para. 142.

⁹² Yearbook of ILC (1966), p. 211.

⁹³ Convention on Mutual Assistance in Criminal Matters 2000/C 197/01.

⁹⁴ Seibert-Fohr, A., p. 307.

⁹⁵ Chapter V, ASR.

interpretation, *ut res magis valeat quam pereat*⁹⁶ should be applied when interpreting the scope of the limiting clauses. The ICJ has harnessed the idea of underlying the principle of effectiveness to the task of interpretation of treaties.⁹⁷ As mentioned earlier, the object and purpose of the MAT is to encourage and facilitate mutual assistance. Reservations to a treaty are, in the absence of any specific provisions, only permissible to the extent that they are not incompatible with a treaty's object and purpose.⁹⁸ Therefore, keeping in mind the principle of effectiveness, a restrictive interpretation of clauses that allow to decline giving information is needed, so that the rest of the treaty clauses would not be deprived of all practical effect.⁹⁹ This means that while the requested State retains for itself a wide discretion, it cannot indiscriminately invoke these derogation clauses¹⁰⁰. A refusal to comply with a request for assistance may only be exceptional, and must in any event be based on proper grounds.¹⁰¹ It is difficult for Achtagonia to evaluate whether Roundsia's refusal was based on proper grounds because no proper explanation was given. The decision of the Arbitral Tribunal in *Rainbow Warrior*¹⁰² postulated that the regimes of the law of treaties and State responsibility were applicable sequentially to the same situation and that the "circumstances precluding wrongfulness" contained in the draft articles could provide an excuse for the non-performance of a treaty obligation.¹⁰³ Chapter V of the draft articles of the ASR, provides circumstances

⁹⁶ "That the thing may rather have effect than be destroyed." Principle of Effectiveness, p. 85.

⁹⁷ Gardiner, p. 201.

⁹⁸ Klabbers, p. 138.

⁹⁹ *Construction of a Wall*, para 66.

¹⁰⁰ *Questions Of Mutual Assistance*, Oral Proceedings 29 January 2008, para. 16; *Questions Of Mutual Assistance*, Decl. Keith, para. 5.

¹⁰¹ *Questions Of Mutual Assistance*, Sep. Op. Yusuf, para 16.

¹⁰² *Rainbow Warrior* (1990).

¹⁰³ Crawford, p. 57.

when a breach of an obligation is justifiable. With the possible exception of necessity, contained in Art. 25 of the ASR, none of Arts. 20 – 27 apply in the current situation.

Necessity will only be rarely available to excuse non-performance of an obligation and is subject to strict limitations to safeguard against possible abuse.¹⁰⁴ It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other.¹⁰⁵ To successfully preclude wrongfulness through necessity, a State must objectively show that the act in question is (a) the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.¹⁰⁶ The Roundsian argument on the state of necessity is not convincing because no real, "grave" and "imminent" "peril" exists for Roundsia's national security by sharing relevant information and declining assistance. Roundsia's refusal to give any information requested is neither a proportional nor an adequate response, because Roundsia could have used various ways to protect the information that it deemed to be classified or sensitive – for example removing or blackening out some parts of relevant documents.¹⁰⁷ Therefore, Roundsia cannot justify its refusal to share information relying on a state of necessity.

Moreover, Roundsia has stated that one ground for the refusal of assistance was Roundsia's on-going intelligence-sharing relationship with a third country. A State cannot invoke provisions of its internal law, whether legislative, regulatory, or administrative, to justify non-

¹⁰⁴ ASR Commentaries, p. 80.

¹⁰⁵ ASR Commentaries, p. 80; *Gabcikovo-Nagymaros Project*, para. 51.

¹⁰⁶ Art. 25 ASR; Rose-Ackerman, p. 443.

¹⁰⁷ *Mutual Assistance in Criminal Matters*, para. 143.

performance of conventional obligations binding upon it.¹⁰⁸ Therefore, an obligation before a third State is not a sufficient ground to decline assistance.

i) Submissions

For the above reasons, Achtagonia respectfully requests the Court to adjudge and declare that:

- I. The Court does not lack jurisdiction over the present case;
- II. The mission undertaken by Roundsia on 7 January was unlawful;
- III. Achtagonia may exercise criminal jurisdiction over Cpt Squarejaw as he is not entitled to immunity;
- IV. Roundsia is in breach of its obligations under the Mutual Assistance Treaty and is obligated to provide Achtagonia with relevant information.

¹⁰⁸ *Greco-Bulgarian Communities*, p. 23; *Wimbledon*, p. 29; *Certain German Interest*, p. 19.