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Mednarodno tekmovanje iz mednarodnega prava telders-roundsian rescue dispute Memorandum on behalf of the respondent[1] (Achtagonia *v* Roundsia)

1. Statement of relevant facts[2]

Roundsia is a developed state with a unitary central government. In contrast, Achtagonia is a developing state composed of four provinces governed in a loose federal system. The parties to the present dispute are members of the UN and have both accepted the jurisdiction of the International Court of Justice pursuant to the optional clause. Furthermore, both parties have signed and ratified the Vienna Convention. Moreover, Roundsia has adopted the Hague Convention, while Achtagonia has not.

The parties are neighbouring states which share a 100 km border entirely along the territory of the Achtagonian province of Quad. In recent years, there have been intermittent skirmishes between the Roundsian government's special forces and militant groups from Achtagonia's Quad province, although in the past, Achtagonia and Roundsia have enjoyed friendly relations. Roundsia's military actions along the border were necessary due to Achtagonia's failure to take action to control the militant groups in Quad. It was assured by Roundsia's Minister of Defence that the purpose of the interventions is to disarm the militants and that the special forces have strict orders to only use force in self-defence.

In 2010, a Roundsian family of four was held hostage for several days during border skirmishes. Although the incident was

[1] Memorandum so pripravili člani ekipe Evropske pravne fakultete v Novi Gorici : Aleksandra Andrejević, Matjaž Kačič, Anja Soderžnik in Špela Zagorc pod mentorstvom doc. dr. Jerneja Letnarja Černiča. Zanj so na tekmovanju Telders iz mednarodnega javnega prava na Univerzi v Leidnu na Nizozemskem prejeli nagrado »The Carnegie Foundation Award for Best Memorial for the Respondent« za najboljši pisni memorandum za toženo stranko.

[2] Based on the Telders case 2014.

resolved peacefully through negotiation and the family was not harmed, Roundsia considers the incident a vigorous violation of the right of Roundsian nationals and consequently Roundsia itself. The Circular Times reported that the militant group involved in the incident had routinely received assistance from the government of Achtagonia's Quad province and that the militants spoke with a dialect unique to that province. Roundsia requested Achtagonia to pursue the militants involved in the 2010 incident. While no arrests have been made, the matter continues to be a priority of Roundsia.

In December 2013, a Roundsian commercial aircraft with 90 Roundsian nationals (passengers and crew) on board and 10 passengers of other nationalities was hijacked by five heavily-armed, unidentified individuals. Due to inclement weather, the hijackers were forced to make an emergency landing in Achtagonia on 31 December 2013. The aircraft landed at a rural airport near the border between Achtagonia and Roundsia and the hijackers took the passengers and crew to an abandoned building in the airport complex.

After the 31 December 2013 hijacking and during the first week of January 2014, the Roundsian authorities made significant efforts to bring the situation to an end and safeguard the hostages and were for that reason in continuous contact with the highest political and diplomatic levels of Achtagonia.

On 1 January 2014, the Foreign Minister of Roundsia wrote to the SC of the UN expressing Roundsia's grave concern for the safety of the hostages. In the first week after the hijacking, Achtagonia took no action in response to Roundsia's demands. While no formal statements were made, Achtagonia appeared content to leave the matter to Roundsia. Furthermore, 15 individuals with serious health problems (seven of whom were Roundsians) were released. They reported that the hijackers appeared to be sharing the aircraft's food supplies with local Quad residents.

Roundsia's Foreign Minister expressed concern over the limited food supplies on the aircraft and recalled the 2010 hostage incident involving militant forces operating in Achtagonia. The situation sharpened when Achtagonia's President declined the hijackers' request for a meeting and refused the hijackers' demands to refuel and safety service the aircraft. From 4 January 2014 the hijackers publicly threatened to kill the hostages at random if Achtagonia refused to facilitate the onward flight.

At 2.00 am on 7 January 2014, under heavy cloud, the Special Forces of Roundsia undertook a rescue mission. All of the hostages were saved and all of the hijackers were killed. All members of the special forces returned to Roundsia except Captain Jack Squarejaw. He was left at the airport in a seriously injured state and is now recovering in a military hospital in Achtagonia. The Achtagonian government charged him with the murder of the five hijackers. Roundsia argues that Captain Squarejaw is entitled to state immunity and cannot be prosecuted in Achtagonia. Furthermore, Roundsia stressed that Captain Squarejaw is not only a captain in its special forces, but also the Deputy Minister of Defence. In an official statement, Roundsia's Prime Minister calls Captain Squarejaw a national hero and commends him for his years of service to Roundsia, particularly his peaceful resolution of the 2010 hostage incident involving the Roundsian family.

Roundsia and Achtagonia concluded a Treaty on Mutual Assistance in Criminal Matters in 1985. It requires each Party to provide information it holds is relevant to an inquiry into alleged criminal offences over which the other has jurisdiction. On the basis of the aforementioned Treaty, Achtagonia requested Roundsia to supply information about the general training provided to its special forces and the particular instructions and rules of engagement applicable to the January exercise. Roundsia refused to disclose such information as is its right on the basis of Article VI of the TMACM.

Achtagonia commences proceedings in the International Court of Justice, founding the jurisdiction of the Court on the declarations which each has made under Article 36 (2) of the Court's Statute. Roundsia's has no relevant reservation but Achtagonia's, as of 2011, excludes *"disputes relating to the national defence of Achtagonia, as determined by Achtagonia".*

Achtagonia seeks declarations:

(1) that the mission undertaken by Roundsia on 7 January was unlawful;

(2) that it may exercise criminal jurisdiction over Captain Squarejaw notwithstanding Roundsia's claim that Captain Squarejaw has immunity; and

(3) that Roundsia is in breach of its obligations under the Mutual Assistance treaty.

Roundsia, in a letter to the Court, states that the Court does not have jurisdiction because of the terms of reservation of Achtagonia's declaration which it invokes on the basis of reciprocity. Finally, Roundsia states that Achtagonia's claims are, in any event, without foundation.

2. Written memorial on behalf of roundsia (respondent)

I. THE INTERNATIONAL COURT OF JUSTICE LACKS THE JURISDICTION TO ADJUDICATE THE PRESENT DISPUTE

Both States parties are members of the United Nations and parties to the Statute of the International Court of Justice. The Applicant commenced proceedings before the International Court of Justice, recognising as compulsory *ipso facto* the Court's jurisdiction with the declarations submitted by both parties to the present dispute pursuant to Art. 36 (2) of the ICJ Statute. Roundsia stipulated no relevant reservation, while Achtagonia has formed a reservation which excludes from the ICJ's jurisdiction "disputes relating to the national defence of Achtagonia, as determined by Achtagonia".[3] Roundsia has in accordance with Art. 36 (3) of the ICJ Statute made its declaration on the condition of reciprocity. Roundsia argues that the International Court of Justice lacks jurisdiction to adjudicate the present dispute.

A. The ICJ lacks jurisdiction over the claims brought against Roundsia

1. On the basis of reciprocity Roundsia invokes Achtagonia's reservation

Roundsia formed its declaration on the basis of reciprocity pursuant to Art. 36 (3) of the ICJ Statute.

The notion of reciprocity is well established since in several cases[4] the ICJ has reaffirmed the adequate meaning of reciprocity in the implementation of Art. 36 (2) of the ICJ Statute.[5] Reciprocity serves the purpose of maintaining equality between all States parties which have submitted their declarations on the basis of Art.

[3] The case, para. 11.
[4] *Anglo-Iranian Oil Co.*, ICJ Reports 1952, p. 103, *Certain Norwegian Loans*, ICJ Reports 1957, pp. 23-4; *Interhandel case*, ICJ Reports 1959, p. 23; *Nicaragua case*, ICJ Reports 1984, p. 419, para. 62, pp. 420-421, para. 64.
[5] Land and maritime boundary, Preliminary objections, Judgment (1998), p. 298.

36 (2).[6] The condition of reciprocity is not abstract as it must be in conjunction with a provision of the declaration or of the ICJ Statute.[7] Furthermore, the aforementioned condition of reciprocity is "concerned with the scope and substance of the commitments entered into, including reservations..."[8], as it requires the Court to determine if a consensus has been achieved by the parties to the present dispute.[9] This was reaffirmed by the ICJ in the *Fisheries Jurisdiction case*[10] where the ICJ recalled that the Court must determine by interpreting the declarations of acceptance and of any reservations they include if a consensus has been reached to establish the Court's jurisdiction on the grounds of mutual consent.[11] Moreover, the ICJ emphasised that every state may formulate its declaration as it pleases; consequently, the ICJ's jurisdiction only exists where the declarations of States parties overlap in conferring it.[12] Regarding this, Shaw stated that "the doctrine of the lowest common denominator thus operates since the acceptance, by means of the optional clause, by one state of the jurisdiction of the Court is in relation to any other state accepting the same obligation".[13] Thus, reciprocity enables a state party to invoke a reservation which originated from the declaration of the other party.[14] Consequently, the party which more widely accepts the Court's jurisdiction may rely upon the narrower acceptance made by the other party. This was reaffirmed by the ICJ in the *Anglo-Iranian oil company case*[15], *Interhandel case*[16], and the *Norwegian Loans case*[17].

Achtagonia made its declaration under Art. 36 (2) of the ICJ Statute with a reservation on "disputes relating to the national defence of Achtagonia, as determined by Achtagonia".[18] In this respect, Roundsia stresses that the consensus between the States parties accord-

[6] Zimmermann (2006), p. 607.
[7] Right of Passage over Indian Territory, Preliminary objections, Judgment (1957), p. 24.
[8] Land and maritime boundary, Preliminary objections, Judgment (1998), p. 299; also see *Nicaragua case*, ICJ Reports 1984, p. 419, para. 62, also pp. 420-21, para. 64.
[9] *Nicaragua case*, ICJ Reports 1984, pp. 420-421, para. 64.
[10] *Fisheries Jurisdiction*, Summary of Judgment (1998), paras. 39-56.
[11] Ibid.
[12] This was reaffirmed by the ICJ in the: *Fisheries Jurisdiction*, Summary of Judgment (1998), paras. 39-56.; also in *Certain Norwegian Loans*, Judgment (1957), p. 18.
[13] Shaw (2003), pp. 979-80.
[14] Zimmermann (2006), p. 608.
[15] *Anglo-Iranian Oil Co*., Preliminary objections, Judgment (1952), p. 14.
[16] *Interhandel case*, Preliminary objections, Judgment (1959), p. 21.
[17] *Certain Norwegian Loans*, Judgment (1957), p. 19.
[18] The case, para. 11.

ing to their declarations exists in the narrower limits indicated by Achtagonia's reservation. Therefore, Roundsia is entitled by virtue of the condition of reciprocity to invoke the reservation relating to national defence pursuant to the reservation made by Achtagonia. Therefore, Roundsia's declaration does not confer jurisdiction of the Court regarding disputes which relate to the national defence of Roundsia, as determined by Roundsia. By invoking the reservation of Achtagonia on the basis of reciprocity, Roundsia determines that the present dispute falls within the category of Roundsia's national defence. The notion of national defence reflects a state's obligation to protect its essential values and interests from any external interferences which might compromise the state's sovereignty. In the present dispute, Roundsia's nationals who were held hostage represent the threatened essential value of Roundsia which must be protected. Roundsia condemns the actions of the hijackers which pose a grave threat to the national defence of Roundsia as well as a threat to international peace and security.

B. The declaration of Achtagonia is invalid

1. Achtagonia's declaration is incapable of giving rise to a legal obligation

Art. 36 (2) of the ICJ Statute serves the purpose of accepting the Court's jurisdiction by submitting a unilateral declaration "in relation to any other State accepting the same obligation".[19] It is well established that states enjoy liberty in deciding to accept the Court's jurisdiction and also in formulating its declarations.[20] However, this liberty should not be mistaken for arbitrariness to the point that "the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases".[21] The intention of both States parties in submitting the declaration of acceptance was to become legally bound by it.[22] This point was recalled by the ICJ in the *Nuclear test case*[23].

In conclusion, when a state accepts the Court's jurisdiction the declaration must be formed pursuant to the principle of effectiveness, meaning that if a declaration is made with reservations such reservations "must be interpreted by reference to the object and

[19] ICJ Statute, Art. 36 (2).
[20] This was reaffirmed by the ICJ in: *Fisheries Jurisdiction*, Summary of Judgment (1998), paras. 39-56.; and also *Nicaragua case*, Jurisdiction and Admissibility Judgment (1984), para. 59.
[21] *Nicaragua case*, Jurisdiction and Admissibility Judgment (1984), para. 59.
[22] *Nuclear test*, Judgment (1974), para. 46.
[23] Ibid.

purpose of the declaration, which was the acceptance of the compulsory jurisdiction of the Court".[24] Therefore, Roundsia argues that Achtagonia's declaration is unable to create legal obligations, while it is in conflict with the declaration's object and purpose which is to accept the Court's jurisdiction. By conferring the jurisdiction of the ICJ on the basis of unilateral declarations, both parties to the present dispute concluded a type of contract which gives rise to mutual rights and obligations. However, Achtagonia's declaration cannot be treated as a legal instrument due to Achtagonia's 'automatic reservation' which states "...as determined by Achtagonia"[25] by which it can unilaterally determine whether its obligation exists or not.[26]

2. Achtagonia's declaration is not in accordance with the principle of good faith

Roundsia emphasises that one of the general principles of international law is the obligation to act in good faith.[27] As regards to the present dispute, Roundsia stresses that the automatic reservation enables Achtagonia to unilaterally preclude the Court's competence to determine whether Achtagonia is invoking its automatic reservation legally and in good faith. In conclusion, Roundsia emphasises that Achtagonia's automatic reservation is not in accordance with the principle of good faith. With this type of reservation Achtagonia has encroached upon the Court's jurisdiction.

3. The automatic reservation is not consistent with the Court's Statute

Achtagonia's reservation is not in line with the object and purpose of the ICJ Statute. Art. 36 (6) of the ICJ Statute states "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by a decision of the Court".[28] With respect to the aforementioned article, it must be pointed out that when a state's declaration includes an 'automatic reservation' it deprives the Court of the power bestowed upon it pursuant to Art. 36 (6) of the ICJ Statute.[29] Roundsia argues that such conduct is inadmissible and therefore such an automatic reservation must be recognised as invalid by the Court.

[24] *Fisheries Jurisdiction*, Summary of Judgment (1998), paras. 39-56.
[25] The case, para. 11.
[26] *Certain Norwegian Loans*, Separate opinion of Judge Lauterpacht (1957), p. 44.
[27] Ibid, p. 48.
[28] ICJ Statute, Art. 36 (6).
[29] *Certain Norwegian Loans*, Separate opinion of Judge Lauterpacht (1957), p. 39.

It is well established that an automatic reservation is not in compliance with the provisions of Art. 36 (6) which declare the principle of *compétence de la compétence* (the Kompetenz Kompetenz doctrine), consequently it is also in contradiction with the ICJ Statute.[30] Further, Roundsia points out that the adoption of such a reservation by the ICJ as valid; it would be acting against both its Statute and the general Art. 92 of the Charter which requires the Court to act in accordance with the Statute.

4. The automatic reservation invalidates the whole declaration

Roundsia argues that Achtagonia's declaration cannot be treated as a valid legal instrument due to the 'automatic reservation' being a vital element of the declaration. An invalid declaration is therefore incapable of giving rise to legal effects; consequently, Achtagonia may not found the Court's jurisdiction on this ground[31]. Judge Lauerpacht argues that "it is not the case that the Declaration is valid until an occasion arises in which that particular reservation is relied upon by one party and challenged by the other with the result that its inconsistency with the Statute is thus brought to light. The Declaration is invalid ab initio".[32]

II. The mission by roundsia on 7 january was a lawful rescue mission of its nationals abroad

A. Roundsia's rescue mission was in accordance with international law

1. The use of necessary force to protect nationals abroad does not infringe Art. 2(4) of the UN Charter

In order to fully and clearly understand the meaning of specific provisions of the UN Charter we must pursue the fundamental purpose[33] for which it was written.[34] By taking a closer look at the Preamble, Art. 1, 55 and 56 of the UN Charter, a powerful argument is revealed, namely that the UN Charter's fundamental purpose is the protection of human rights.[35] With Art. 2 (4) being an essential principle[36] of the UN Charter, it must be interpreted

[30] Evans (2006), p. 572.
[31] *Certain Norwegian Loans*, Separate opinion of Judge Lauterpacht (1957), p. 56.
[32] Ibid.
[33] As Kofi Annan stated: "when we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings...", see Gareth (2008), p. 37.
[34] Brady (1999), p. 66.
[35] Ibid, p. 66.
[36] The prohibition on the threat of the use of force with the status of a *jus cogens* norm and a norm of customary law.

in accordance with the fundamental purposes of that Charter.[37] "Therefore, when viewed against the purposes of the Charter as a whole, Art. 2 (4) does not prohibit forcible self-help to protect humanitarian concerns."[38]

Notwithstanding the importance and general acceptance of Art. 2 (4) of the UN Charter as a jus cogens norm[39] and a norm of customary international law[40], it must be recognised that the wording of Art. 2 (4) does not cover all dimensions of the use of force, with one of the dimensions being the inherent right of states to use self-defence that is embodied in Art. 51 of the UN Charter and which has also gained the status of a rule of customary law. This view was reaffirmed by the ICJ in the *Nicaragua case*.[41] In this respect, Roundsia argues that a customary rule has formed over the years with widespread state practice[42] which recognises the right of a state to rescue its nationals when certain conditions are met.

The rescue of nationals abroad is in compliance with Art. 2 (4) of the UN Charter when three conditions are met cumulatively. According to Simma, "firstly, the life of nationals must be endangered in the territory of other state. Secondly, the other state is not able or unwilling to ensure the safety of the persons concerned. Thirdly, the scale and effect of military force used are adequate to achieve the purpose and goal of the operation, thus the impact on the other state's territory is kept to the absolutely necessary minimum".[43] As a member of the UN, Roundsia recognises and respects its obligation under the UN Charter, but stresses that every state has a commitment to protect its nationals as they represent the core of every state. The rescue mission was in accordance with the required conditions described by Simma[44]. In this respect, Roundsia stresses that the rescue mission's sole purpose was to rescue its nationals from imminent danger.[45] The necessity

[37] Brady (1999), p. 66.
[38] Ibid.
[39] is a universally recognised norm of which derogation is not permitted.
[40] defined in Art. 38 (1)(b) of the ICJ Statute as: "evidence of a general practice accepted as law."
[41] *Nicaragua case*, Merits, Judgment (1986), para. 176.
[42] Operations by: the UK in the Suez Canal in 1956; the USA from 1958 until 1989 in Lebanon and Panama; Belgium in Congo in 1960 and 1964; Israel in Uganda (Entebbe) in 1976; France in Mauritania in 1977; Russia in Georgia in 2008; the USA in Teheran in 1980, the USA in Grenada in 1984 and in Panama in 1989, also the USA in Liberia in 1990, France and the USA in the Central African Republic in 1996 and 2003; Belgium and France in Rwanda in 1990, 1993 and 1997; France in Chad in 1992 and 2006; Germany in Albania in 1997; France in the Ivory Coast in 2002/3.
[43] Simma (2002), p. 228.
[44] Ibid.
[45] Ibid.

requirement was given due to Achtagonia's inaction in response to its duty to protect the lives within its territory.[46] Consequently, Roundsia's right to protect its own nationals arose. Moreover, the rescue mission was proportionate whereas the military force was only directed at the armed hijackers and was terminated immediately after the purpose had been achieved.[47] Further, the rescue mission was not in any way directed at breaching the territorial integrity and sovereignty of Achtagonia. Roundsia thus concludes that the rescue mission was legal and justified.

1.1. The institute of self-defence under international customary law allows interventions to protect one's nationals abroad

Roundsia was acting pursuant to its inherent right to self-defence under customary international law when carrying out the rescue mission. The legal exercise of self-defence requires that the conditions of necessity and proportionality are satisfied. The latter was reaffirmed in the following cases: the *Nuclear Weapons Advisory Opinion*[48], the *Oil Platforms case*[49] and the *Nicaragua case*[50]. Moreover, the ICJ ruled in the *Nicaragua case* that "...the Charter, having itself recognized the existence of right to self-defence, does not go on to regulate directly all aspects of its content. Moreover, a definition of the 'armed attack' which, if found to exist, authorizes the exercise of the 'inherent right' of self-defence, is not provided in the Charter, and is not part of treaty law".[51] Roundsia emphasises that customary international law continues to exist alongside treaty law, meaning that the international treaty law does not prevail over international customary law.[52]

In the era before the UN Charter was adopted, a right existed to forcibly protect nationals abroad under customary international law.[53]

In addition, Roundsia stresses that since 1945 when the UN Charter was accepted "there has been no treaty, no UN Security Council Resolution, nor any judgment[54] from the ICJ condoning

[46] Ibid.
[47] Ibid.
[48] Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, p. 226, para. 141.
[49] *Oil Platforms case*, ICJ Reports 2003, p. 161.
[50] *Nicaragua case*, ICJ Reports 1986, para. 194.
[51] *Nicaragua case*, Merits, Judgment (1986), para. 176.
[52] Ibid.
[53] Thomson (2012), p. 644.
[54] US Diplomatic Staff in Teheran Case, Judgment (1980), p. 227.

or condemning the legality[55] of protection of nationals abroad".[56] Many states have carried out rescue operations[57] in order to rescue their nationals abroad at least since 1960.[58] Roundsia emphasises that a positive *opinio juris* has been established. Further, the inaction of the international community and the fact many third states have refrained from condemning the aforementioned rescue operations only acts as confirmation. In this respect, a strong argument may be made that a customary international rule has crystallised which confirms the legality of Roundsia's rescue mission.[59] This view is confirmed by many international legal experts such as Bowett, Kewenig, Paasche, Schröder, Dinstein, Schachter and many others.

1.2. Roundsia's rescue mission was necessary

For the use of force in self-defence for the purpose of protecting one's own nationals abroad to be legal, it must be necessary. The necessity requirement has two parts. The first requires certainty of the imminent threat to the hostages, and the second demands that peaceful means to prevent harm to the hostages be exhausted.[60]

The need for the rescue mission was established by clear indicators. Roundsia's nationals were not only being detained by heavily armed hijackers, but the hijackers had publicly threatened to kill the hostages at random if Achtagonia refused to facilitate the flight. At this point, there is no doubt that the hostages were in imminent danger and that the necessity requirement was fulfilled. The second part of the 'necessity' requirement demands that non-forceful means be exhausted prior to the use of force. However, non-forceful means were not adequate in this situation or, as Schachter pointed out, "when the 'remedies' are likely to be futile".[61] The armed intervention was urgent since the hostages faced certain death. Moreover, Roundsia stresses that without the element of surprise it is highly probable that the rescue mission would have failed, allowing the hijackers to secure themselves. Consequently, the hijackers may have felt threatened which may

[55] Also confirmed by Gray (2008), p. 159.
[56] Thomson (2012), p. 645.
[57] See p. 8 of the memorandum, reference No. 41.
[58] Simma (2012), p. 226.
[59] Ibid, pp. 227-8.
[60] Eichensehr (2008), p. 470.
[61] Schachter (1984), p. 334.

have led to the lives of the hostages being put at even greater risk.[62]

1.3. Roundsia's rescue mission was proportionate

The main purpose of Roundsia's rescue mission was to safeguard the hostages; it harboured no intentions with regard to Achtagonia. The rescue mission was on a small scale and only temporarily breached Achtagonia's territory. On that note, Roundsia emphasises that the rescue mission was a so-called in-and-out operation. Achtagonia's territorial sovereignty was breached for a short period of time, long enough to "overfly the territory, land, retrieve the hostages, take off and overfly out of the territory"[63]. Therefore, Roundsia concludes that its action was undertaken in complete harmony with the principle of proportionality.

1.4. An attack on a state's nationals abroad constitutes an attack on the state itself

According to Eichensehr, "the harm to a state's citizens could reach the level of armed attack".[64] This would occur when the scale of imminent danger to nationals reaches such intensity that it would be classified as an assault on the state itself.[65] Roundsia recognises the kidnapping of its nationals by the armed hijackers and the imminent threat they were subjected to as an armed attack on itself.

Under the Montevideo Convention, the permanent population constitutes an essential element for the existence of a state.[66] In this regard, by carrying out the rescue mission to protect its nationals in Achtagonia, Roundsia was acting in line with its self-preservation. Roundsia points out that the number of hostages involved, namely 82 Roundsian nationals, in the hijacking reveals the large magnitude of the attack. According to Eichensehr, "indeed, even in the traditional self-defence context, number of deaths is not the measure of an armed attack".[67]

B. The actions of Roundsia's special forces were necessary due to Achtagonia's inaction

1. Achtagonia failed to exercise the customary obligation to protect foreigners within its territory as part of its sovereignty

[62] Ibid, p. 473.
[63] Sheehan (1977), p. 151.
[64] Eichensehr (2008), p. 468.
[65] Ibid.
[66] Montevideo convention, Art. 1.
[67] Eichensehr (2008), p. 468.

Sheehan notes that "a cardinal rule of municipal as well as international law is the maxim *sic utere tuo ut alienum non laedas*, or use your own property in such a manner as not to injure that of another".[68] ICJ reaffirmed the latter rule in the *Corfu Channel case*[69]. In this regard, Achtagonia clearly breached its customary international obligation which implies that a state should not allow its territory to be used in a manner whereby the legally protected interests of other states would be endangered.[70] In the present case, Roundsia's nationals represent its legally protected interest as Achtagonia did not take any action whatsoever to protect them. Achtagonia must thus be held accountable for its inaction.[71] It could be implied that Achtagonia "appeared content to leave the matter to Roundsia"[72]. Roundsia argues that it on several occasions urged Achtagonia's authorities to take appropriate measures to safeguard the hostages and bring the situation to an end.

"In the course of 1-3 January, 15 individuals with severe health problems (seven of whom are Roundsians) are released. Those released from the aircraft report that the ... hijackers appear to be sharing the aircraft's food supplies with local Quad residents".[73] This alarming fact implied that the hijackers were collaborating with Achtagonia or, more precisely, with residents of the Quad province in Achtagonia. Here we should recall the hostage taking of a Roundsian family in 2010 by a militant group which "spoke with a dialect unique to that province."[74] Even more disturbing was an article in the Circular Times which "reported that the militant group routinely received assistance from the government of Achtagonia's Quad province".[75] Roundsia argues that in cases where it is presumed that the authorities are collaborating with the hijackers or when the authorities do not take any action against the hijackers in order to protect the nationals of a foreign state, actions in self-defence are justified.[76]

[68] Sheehan (1977), p. 148.
[69] *Corfu Channel*, ICJ Reports 1949, p. 22.
[70] Sheehan (1977), pp. 148-49.
[71] Ibid, p. 150.
[72] The case, para. 6.
[73] Ibid, para. 4.
[74] Ibid, para. 3.
[75] Ibid.
[76] Dinstein (2005), p. 233.

2. Achtagonia breached the Hague Convention

2. 1. The Hague Convention is binding upon Achtagonia

Both States parties to the present dispute have signed and ratified the VCLT. Unlike Achtagonia, Roundsia is a party to the Hague Convention and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention).

Art. 38 of the VCLT provides an exception to the general rule implemented in Art. 34 of VCLT, whereby it declares that the rules in a treaty can become binding on third states through international custom. Customary international law can be established by showing state practice and *opinio juris*. For this purpose, it has to be emphasised that the Hague Convention has 185 States parties. Roundsia therefore concludes that the Hague Convention can be treated as part of international customary law and consequently binding on non-State parties to the Convention, such as Achtagonia.

2. 2. Achtagonia breached the Hague Convention by its inaction towards the hijackers

The Hague Convention imposes an obligation on Achtagonia to take action. Art. 6 (1) of the Convention determines that a state in whose territory a perpetrator is found shall take him into custody or take other measures to ensure his presence. In addition, Art. 6 (2) prescribes a duty on the state in whose territory the offender is found to start a preliminary enquiry into the facts. Further, according to Art. 7 of the Convention the state in whose territory the offender is found shall submit the case to its competent authorities for the purpose of prosecution or extradite him to another state. "This is a well-known international principle known as *aut dedere aut judicare*[77]."[78] In conclusion, none of these obligations were satisfied by Achtagonia. It did not take any steps with regard to the hijackers even though Roundsia had clearly demanded Achtagonia to take all necessary actions to bring the situation to an end.

[77] Meaning to extradite or prosecute.
[78] Diederiks-Verschoor, Philepina (1997), p. 213.

III. Achtagonia violated international law concerning immunity in exercising criminal jurisdiction over captain squarejaw

A. Achtagonia is not competent to prosecute Captain Squarejaw

1. Captain Squarejaw enjoys immunity ratione personae[79]

Immunity *ratione personae* is enjoyed by heads of state, heads of government, the minister of foreign affairs and certain other high-ranking state officials "who play a prominent role in that State and who by virtue of its functions represent it in international relations automatically under the rules of international law"[80]. This was reaffirmed by the ICJ in the *Arrest warrant case*[81] where it used the words "such as", implying that the list of senior officials entitled to this immunity is not closed.[82] A wider definition[83] which would allow high-ranking state officials other than the so-called troika[84] to enjoy personal immunity was also addressed by the ILC's Special Rapporteur Hernández.[85] She considered that such a wider definition would "strengthen the secure and sustainable nature of international relations and the sovereign equality of States in light of new models of diplomacy and international relations".[86] Further, she pointed out that it should be taken into consideration "that there are examples of State judicial practice in which certain domestic courts have granted immunity ratione personae to senior State officials other than the troika".[87] This wider definition is supported by many states[88] which believe it could benefit their international relations. In conclusion, it must be considered that nowadays international relations are far more intense, and the needs of international relations dictate that other high-ranking

[79] Also known as personal immunity.
[80] Special Rapporteur Hernández (2013), p. 18.
[81] *Arrest Warrant*, Judgment (2002), para. 51.
[82] Akande, Shah (2011), p. 821.
[83] "could take on greater importance if it is decided to follow a broader interpretation whereby immunity might also be enjoyed by other senior State officials, including, as often suggested, other members of the Government such as ministers of defence, ministers of trade and other ministers whose office requires them to play some role in international relations, either generally or in specific international forums, and who must therefore travel outside the borders of their own country in order to perform their functions." See: Special Rapporteur Hernández (2013), p. 18.
[84] Head of State, Head of Government, Minister of Foreign Affairs.
[85] Special Rapporteur Hernández (2013), pp. 20-21.
[86] Ibid.
[87] Ibid, p. 21.
[88] In this connection, the following States have indicated, to varying degrees, their willingness to explore a non-restrictive interpretation: Algeria, Belarus, Chile, China, France, Israel, Norway, Peru, Portugal, the Russian Federation, Switzerland, the United Kingdom of Great Britain and Northern Ireland and Vietnam; See: Special Rapporteur Hernández (2013), p. 21, reference No. 42.

state officials would benefit from personal immunity to effectively represent their respective states[89]. Captain Jack Squarejaw as a serving deputy minister enjoys immunity *ratione personae*, which covers his private acts as well as official acts while in office.[90] His "duties as deputy minister of defence include overseeing the nation's ground troops stationed domestically and abroad, and meeting with his counterparts in other states".[91] To determine whether one should be granted immunity ratione personae it is crucial to examine the nature of his functions.[92] Captain Squarejaw's personal immunity derives from his office. Roundsia contends that the requirements which imply that Captain Squarejaw is rightfully deserving of personal immunity are linked to his function which requires him to travel frequently as part of his role in Roundsia's national defence which requires his functioning in international relations.[93] Thus, Roundsia stresses that Captain Squarejaw must enjoy full protection under the immunity ratione personae which demands inviolability and immunity from criminal jurisdiction.[94] Further, it is clear "that immunity *ratione personae* extends even to cases involving allegations of international crimes must be taken as applying to all those serving state officials ... possessing this type of immunity".[95] In *Arrest Warrant case* ICJ determined "that under customary international law no exception to that immunity exists in respect of war crimes and crimes against humanity."[96] ICJ based this latter view on the following cases: *Ghaddafi case*[97], *Pinochet case*[98] also *Tachiona v. Mugabe*[99] and *Wei Ye v. Jiang Zemin*[100]. Roundsia therefore demands that Achtagonia respects the personal immunity of Captain Squarejaw and refrains from prosecuting him.

[89] *Congo case*, Judgement (2006), para. 47.
[90] Foakes (2011), p. 4.
[91] Case Clarifications, answer on question 6.
[92] *Arrest Warrant*, Judgment (2002), para. 53.
[93] Ibid.
[94] Foakes (2011), p. 4.
[95] Akande, Shah (2011), p. 819.
[96] Evans (2006), p. 413.
[97] Zappal (2001), p. 596.
[98] See the speeches of Lord Browne-Wilkinson at 844E-G; Lord Hope at 886G-H; Lord Saville at 903F-G; Lord Millett 913E-G; and Lord Phillips at 924C-D, cited in Evans (2006), p. 414, reference No. 64.
[99] *Tachiona v. Mugabe* (2001), cited in Evans p. 414, reference No. 62.
[100] *Wei Ye v. Jiang Zemin* (2004), cited in Evans p. 414, reference No. 62.

2. Captain Squarejaw is subject to immunity ratione materiae[101]

Immunity *ratione materiae* is granted to all state officials when carrying out official acts on behalf of their state.[102] To consider whether a state official should be granted functional immunity, it must first be determined that he acted in his official capacity. In this respect, the ILC held that "the conduct of ... a person ... empowered to exercise elements of the governmental authority shall be considered an act of the state under international law if the ... person ... acts in that capacity, even if it exceeds its authority or contravenes instructions".[103] In this regard, Roundsia stresses that Captain Squarejaw enjoys immunity *ratione materiae* as he is the serving Deputy Minister of Defence since 2011 and during the rescue operation was in Achtagonia acting in his official capacity on behalf of Roundsia.[104] The latter can be firmly established if we consider that Captain Squarejaw was carrying out the rescue mission to rescue the hostages who were mainly Roundsian nationals. This could never be treated as a private act because it was conducted for the benefit of Roundsia. Thus, it can only be treated as an official act of the state.[105] This is a well-known rule of customary international law[106] which was reaffirmed in the *Blaškić case*[107] and is also supported by the European court of human rights[108] and by national jurisprudence. UK recognized in *Propend Finance v. Sing*[109] that the protection afforded by the State Immunity Act of state officials acting on behalf of the state should not be undermined.[110] Similar view is also shared by the US courts in the case *Chuidian v. Philippine National Bank*[111] and in *Herbage v. Meese*[112], further by Canadian Courts in *Jaffe v. Miller*[113] and

[101] Also known as functional immunity.
[102] Special Rapporteur Hernández (2013), p. 16, para. 50.
[103] ILC Articles on State Responsibility (2001), Art. 7.
[104] Akande, Shah (2011), p. 825.
[105] Ibid, p. 826, see also *Jones case*, Lord Hoffmann, para. 74-8.
[106] which originates from "the eighteenth and nineteenth centuries, restated many times since", see *Prosecutor v. Blaškić* (1997), p. 607.
[107] *Prosecutor v. Blaškić* (1997), p. 607, para. 38.
[108] *Kalogeropoulou case*, Decision of 12 December 2002, p. 537.
[109] *Propend Finance v. Sing* (1997), cited in Evans (2006), p. 410.
[110] Evans (2006), p. 410.
[111] *Chuidian v. Philippine National Bank* (1990), cited in Evans (2006), p. 410, reference No. 54.
[112] *Herbage v. Meese* (1990), Ibid.
[113] *Jaffe v. Miller* (1993), Ibid.

in *Walker v. Baird*[114] and also by the special highest Court of Greece in *Margellos case*[115].

Roundsia emphasises that Captain Squarejaw is immune from the jurisdiction of Achtagonia with respect to the acts he performed on behalf of Roundsia.[116]

In addition, Roundsia has notified Achtagonia that Captain Squarejaw enjoys immunity. By doing so, it has accepted responsibility for the official act performed by Captain Squarejaw.[117] In conclusion, "the right of State officials to immunity does not accrue to the individuals acting on behalf of the State, but to the State itself".[118] Therefore, Achtagonia must immediately terminate all proceedings it has initiated against Captain Squarejaw and secure his return to Roundsia where any wrongdoing he may have caused in carrying out the rescue mission will be appropriately resolved.

3. Captain Squarejaw would not be given a fair trial in Achtagonia

Roundsia argues that Captain Squarejaw would not be given a fair trial in a national court of Achtagonia. First, the nature of the matter is politically highly sensitive. Second, as we can deduce from Achtagonia's application, it considers the rescue mission as an attack on its sovereignty which was clearly not the focus of the mission and therefore this trial will be directed to find a scapegoat. It is unacceptable to Roundsia that Achtagonia is bringing a discussion of the national policy of Roundsia into a national court, as this would be contrary to the sovereignty of Roundsia.

IV. Roundsia did not breach any of its obligations under the mutual assistance treaty in criminal matters

Roundsia and Achtagonia concluded the TMACM in 1985. That treaty "requires each Party to provide information which it holds relevant to an inquiry into alleged criminal offences over which the other has jurisdiction".[119] Roundsia stresses that it performed the obligations arising from the TMACM in accordance with the VCLT. Art. VI of the TMACM clearly states which conditions must

[114] *Walker v. Baird* (1994), Ibid.
[115] *Margellos case*, Decision of 17 September 2002, para. 14.
[116] Akande, Shah (2011), p. 825.
[117] *Mutual Assistance in Criminal Matters*, Merits, Judgment (2008), para. 196.
[118] Cassese (2005), p. 113.
[119] The case, para. 9.

be fulfilled for a party to legally refuse assistance. On that note, Roundsia acted pursuant to good practice and indicated sufficient grounds for refusal as required by Art. VI of the mentioned treaty. Roundsia thus emphasises that the allegations made by Achtagonia are without any legal foundations.

A. Roundsia acted lawfully pursuant to Art. VI of the TMACM

Roundsia emphasises that it has not violated the TMACM by refusing to disclose information. Roundsia notes that not only did it inform Achtagonia of its refusal of the request for mutual assistance concerned, but that it also gave explicit reasons in accordance with Art. VI of the TMACM. In addition, Roundsia argues that Art. VI of the treaty does not demand that the requested state must give a specific reason or precise explanation for its refusal to comply with the request. In *Mutual Assistance in Criminal Matters*[120] and in the *Nicaragua case*[121] the ICJ made a valid point which could apply to the present case. The TMACM is formulated in a manner which allows each party to refer to exceptions provided in Art. VI when it considers that fulfilment of the request "would seriously impair [a State's] sovereignty, national security or other essential public interests of for any reason provided by its domestic law"[122]. Roundsia has emphasized that the TMACM enables it to act pursuant to Art. VI of the TMACM. Thus, Achtagonia must acknowledge and respect the right of Roundsia to invoke Art. VI as this provision was unanimously adopted by both parties when implementing the TMACM.

1. Roundsia's refusal is in 'good faith'

The requirement of good faith derives from the customary law principle of *pacta sunt servanda* and is reflected not only in Art. 26 of the VCLT, but also in Art. 31 (1). It finds a further reflection in the Declaration on friendly relations. The ICJ recognised that good faith is one of the basic principles governing the creation and performance of legal obligations, whatever their source, in the *Nuclear Tests case*[123] and the *Nicaragua vs. United States case*[124].

In *Mutual Assistance in Criminal Matters,* the Court stated that "It also allows the requested State to substantiate its good faith

[120] *Mutual Assistance in Criminal Matters*, Summary of Judgment (2008), p. 7.
[121] *Nicaragua case*, ICJ Reports 1986; para. 222 and para. 282; also see *Oil Platforms case*, ICJ Reports 2003, para. 43.
[122] The case, para. 9.
[123] *Nuclear test*, Judgment (1974), paras. 457, 473, 253, 268.
[124] *Nicaragua case*, Jurisdiction and Admissibility Judgment (1984), para. 60.

in refusing the request".[125] In the same case, the ICJ held that it could review France's actions with respect to good faith and that France therefore needed to show that the reasons for its refusal to execute the rogatory letter fell within those allowed for in Art. 2.[126] Therefore, all that needs to be established by Roundsia is that one of the reasons for refusing to disclose the information fell within the ambit of Article VI of the TMACM. Roundsia again notes that matters concerning national security, its special forces and in particular its instructions and rules of engagement more than others affect the national sovereignty of Roundsia and its security, public order and other essential interests, as mentioned in Art. VI of the TMACM. Thus, national security in particular is a matter for which the government is the sole trustee. It is eminently a matter on which an international court can have no useful opinion.[127] Roundsia argues that the ultimate treatment of a request for mutual assistance in criminal matters clearly depends on the decision by its competent national authorities, which was also confirmed by the Court in *Mutual Assistance in Criminal Matters*.[128]

2. The ICJ has no jurisdiction over a self-judging clause

Self-judging clauses are clauses that allow states to reserve for themselves a right of non-compliance with international legal obligations in certain circumstances. These circumstances arise predominantly where the state in question considers that compliance would harm its sovereignty, security, public policy or, more generally, its vital interests.[129]

Self-judging clauses grant discretion to States to unilaterally determine certain elements that allow them to exit from or even avoid the coming into existence of an international obligation. Similarly, States parties to international treaties that contain self-judging clauses are aware of the potential for abuse.[130] In this regard, Roundsia considers that Art. VI is a self-judging clause and that each request for legal assistance is to be assessed on its own terms by each Party as stated by Art. VI of the TMACM. In the *Norwegian loans case*, the ICJ stated that with a self-judging clause a State has "undertaken an obligation to the extent to which it,

[125] *Mutual Assistance in Criminal Matters*, Summary of Judgment (2008), p. 9.
[126] *Mutual Assistance in Criminal Matters*, Merits, Judgment (2008); paras. 135, 145.
[127] Jennings (1958), pp. 349, 362.
[128] *Mutual Assistance in Criminal Matters*, Summary of Judgment (2008), p. 7.
[129] Ackerman, Billa (2008), p. 437.
[130] Briese, Schill (2009), p. 24.

and it alone, considers that it has done so".[131] While it must of course ensure that the procedure is put in motion, Roundsia is not thereby obliged to guarantee the outcome.[132] Furthermore, the ICJ appeared to favour the position put forward by Roundsia on self-judging clauses, namely that the Court would have no jurisdiction to review a state's exercise of discretion under a self-judging clause. This was confirmed by the Court in the *Oil Platforms case*[133]. Moreover, in the *Ireland v. United Kingdom case,* the ECtHR stated "the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it".[134]

B. Achtagonia's request for information under the TMACM is not in accordance with Art. V of the TMACM

Roundsia argues that the request for information made by Achtagonia in accordance with Art. V of the TMACM did not fulfil all the necessary conditions. The aforementioned request for information was related to the general training of Roundsia's special forces and the specific instructions and rules of engagement applicable to the January exercise. Furthermore, Roundsia points out that Achtagonia's request only included a description of the essential acts or omissions or matters alleged or sought to be ascertained. Roundsia points out that under Art. V (a) the request for information must also include a description of the nature of the investigation or proceedings in the State requesting the information. In addition, Art. V (c) requires the requesting state to reveal the purpose for which the request for information is made and the nature of the assistance sought. Roundsia notes that Achtagonia did not include a description of the investigation or proceedings which were going on in Achtagonia. Moreover, Achtagonia failed to reveal the purpose for which the request for information was made.

Therefore, Roundsia considers Achtagonia's request is not a valid legal instrument and not in accordance with the TMACM and consequently refuses to disclose any information.

[131] *Certain Norwegian Loans*, Separate opinion of Judge Lauterpacht (1957), paras. 34, 48.
[132] *Mutual Assistance in Criminal Matters*, Summary of Judgment (2008), p. 7.
[133] *Oil Platforms case*, ICJ Reports 2003, para. 43.
[134] *Ireland v. United Kingdom*, Judgment (1978), para. 207.

(i) Submissions

For the reasons advanced above, Roundsia respectfully requests this Honourable Court to **adjudge and declare** that:

I. Achtagonia cannot properly bring an application within the jurisdiction of the ICJ for Roundsia's actions with respect to the reservation in the declaration made by Achtagonia.

II. The mission carried out by Roundsia on 7 January does not constitute a breach of international law or of any other international legal obligation.

III. Achtagonia violated international law concerning the immunity of Captain Squarejaw and also by exercising criminal jurisdiction over him, notwithstanding Roundsia's claim that Captain Squarejaw has immunity.

IV. Roundsia did not breach any of its obligations under the TMACM.

V. Failing an agreement between the parties to this dispute, the form and amount of reparation will be settled by this Court.

Respectfully submitted,
Agents for the Respondent