MEMORADUM OF CARIBU

Part A: The republic of Caribou submits that the international court of justice has jurisdiction, under article 36(2) of the statute of the court, and that Arcadia's reservation set out in its declaration is without effec in these proceedings.

1. Jurisdiction of the court

The Republic of Caribou and The Federated States of Arcadia[1] are members of the United Nations. According to Article 93(1) of the United Nations Charter "all Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice". States do not submit to the jurisdiction of the Court as a result of becoming parties to the Statute but a further expression of consent is required[2]. Acceptance of the compulsory jurisdiction of the Court is possible by way of Declarations accepting such jurisdiction according to Article 36(2) of the Statute of the Court, or under the terms of paragraph 1 of Articles 36 and 37 of the Statute.[3]

Caribou made a Declaration accepting as "compulsory, *ipso facto* and without special agreement" the jurisdiction of the International Court of Justice under Article 36(2) in 1980. Arcadia, also in 1993, accepted as compulsory, the jurisdiction of the Court, in conformity with Article 36[2] of the Statute of the Court. These two Declarations of acceptance, have established the jurisdiction of the Court in the present dispute .

2. The reservation in Arcadia's declaration without effect in the present case

2.1. Admissibility of reservations to the acceptance of the jurisdiction of the Court under Article 36(2) of the Statute of the Court.

The term 'reservation' in the domain of the compulsory jurisdiction of the Court is used in a broader sense that purports to include reservations, conditions, exclusions, exceptions or limitations to the jurisdiction accepted in the declaration of a state. In this sense, a state expresses in its declaration certain conditions or exclusions by which it aims at limiting the jurisdiction accepted, even though these conditions or exclusions might arise from relevant provisions of the Statute, independently of the declaration of acceptance. Thus, the

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[1] Hereinafter referred to as "Caribou" and "Arcadia".

[2] Brownlie I.: *Principles of Public International Law, 4th ed., Clarendon Press, Oxford, 1990,* p.720.

[3] Briggs H.: Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice, *93 R.C.A.D.I. 229 (1958-I),* p.229-232.

condition of reciprocity and the questions relative to the date of entry into force and termination of declarations may additionally be considered as particular exclusions which declarant states seek to exclude from the jurisdiction accepted.[4]

Therefore, it is admissible that states have the right to limit the extent of their acceptance by excluding some categories of disputes from the jurisdiction of the Court[5]. Accordingly, Arcadia, has accepted the jurisdiction of the Court subject to a reservation excluding disputes which concern the obligations in relation to any person who is a prisoner under sentence of death and any matter the facts of which have been brought before another procedure of international investigation or settlement.

Nevertheless, the admissibility or validity of any specific reservation under the Statute of the Court is a matter to be decided in each particular case by the Court itself, taking into account all relevant circumstances.

2.2. The present dispute concerns the violation of the Bilateral Treaty by Arcadia and does not fall within the scope of section 1 of its reservation.

Although the dispute submitted to the Court concerns a person ultimately under sentence of death, it consists of certain facts that go beyond this situation due to the fact of the violation by Arcadia of its obligations under Article 65(2) of the 1990 Bilateral Treaty between Caribou and Arcadia.

The violation of the Bilateral Treaty took place prior to Mr. Gask being sentenced to death. At the time the breach of Arcadia's international obligation occurred, Mr. Gask was detained pending his trial. It is important to note that the dispute arose in 1992. In particular, it was in 1992 when Arcadia violated Article 65(2) of the Bilateral Treaty. This violation consisted of Arcadia's failure to notify Mr. Gask of his rights under this treaty. More specifically, the prison authorities were continuously intercepting Mr. Gask's mail, all correspondence to the Embassy of Caribou was stopped and letters sent to him by the Embassy never reached him. Therefore, it is concluded that as long as the present dispute crystallized before Mr. Gask was sentenced to death, Arcadia's reservation is without effect in the present case.

2.3. The present dispute is governed by international law.

Arcadia's reservation concerns in principle a matter of domestic jurisdiction, as it excludes from the jurisdiction of the Court issues that lie within its national jurisdiction, in pursuance with the Arcadian Constitution and Penal Code. However, this Court, in its Advisory Opinion on the *Treatment of Polish Nationals and Other Persons of Polish Origin or*

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[4] *Id.*, p.230.

[5] Ioannou K.: *Introduction au Phenomene Juridictionel International, FASC. A': Aspects Theoriques et Institutionnels, 1984*, p.174 (in Greek).

Speech in the Danzig Territory ruled that 'a state cannot adduce as against another state its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force'.[6] Accordingly, in the *Free Zones* case, the Court observed that: "...it is certain that France cannot rely on her own legislation to limit the scope of her international obligations..."[7]. In the present case Arcadia cannot disregard its legal obligations under the Bilateral Treaty by invoking its Constitution and criminal justice system.

Moreover, the Court in the *Nationality Decrees Issued in Tunis and Morocco case* ruled that 'even in cases where a matter is not "in principle regulated by international law, the right of a State to use its discretion (within its reserved domain) is nevertheless restricted by obligations which it may have undertaken toward other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law."[8]

Furthermore, in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) the Court accepted the argument that 'when the matter involved is a question of treaty observance... then that 'matter' is the treaty itself and cannot... be a 'matter'... essentially within the domestic jurisdiction of any State. Such questions are, on the contrary, essentially and inherently matters of international jurisdiction, because of the very nature of a treaty, which is an international instrument.'[9]

Finally, the Court in the *Nottebohm* case held that even when in principle a topic (as in the present case the sentence to death) comes within the domestic jurisdiction, the exception of domestic jurisdiction is likely to be excluded if the consequences of the act complained of produce effects on the international plane and impinge on the rights of a State under international law.[10]

All the above indicate that Arcadia's reservation should be interpreted in the light of its obligations under Article 65(2) of the Bilateral Treaty. As long as the death sentence was imposed on Mr. Gask as a result of a series of acts or omissions constituting the violation of its obligations under the Bilateral Treaty, the dispute has an international character and hence the Court has jurisdiction to entertain the dispute.

2.4. The principle lis alibi pendens is inapplicable in the present dispute.

The second part of Arcadia's reservation excludes "any matter the facts of which have been submitted to another procedure of international investigation or settlement'. The present dispute, however, arose as a result of Arcadia's breach of the Bilateral Treaty and it concerns the disregard of an individual's rights, the observance of which has been

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[6] (1932) PCIJ, Series A/B, No 44, p.4, at 24.

[7] (1932) PCIJ, Series A/B, No 46, p.92 , at 167.

[8] (1923) PCIJ, Series B, No. 4,p. 7, at 24.

[9] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Pleadings 1950, p.314. A similar argument was made by Mr. Cohen on behalf of the United States, *id.*, at 278.

[10] *Nottebohm case*, ICJ Reports, 1955, p.21.

undertaken by Arcadia towards Caribou under Article 65(2) of the Bilateral Treaty. However, Mr. Gask does not have a *locus standi* in this Court, because according to Article 34(1) of the Statute of the Court, "only States may be parties in cases before the Court".

In the *Certain German Interests in Polish Upper Silesia* case,[11] the Court held that the essential conditions which constitute *lis alibi pendens* were not present, because the actions of the parties were not identical, (one referred to the Germano-Polish Mixed Arbitral Tribunal, the other to the Permanent Court of International Justice), the parties were not the same, and the courts were not of the same character.

In the present dispute Caribou submits that, initially, the petition of Mr. Gask to the Inter-American Commission of Human Rights, and Caribou's application to the ICJ, are not identical actions. The proceedings before the Inter-American Commission of Human Rights, where Mr. Gask had recourse to asserting that the 1969 American Convention of Human Rights had been violated by Arcadia, may be instituted by an individual. Therefore, they consist of a totally different kind of application, in the sense that the individual is recognized this right, under the specific system of protection of human rights.

Moreover, Caribou states that the parties involved are not the same, because the present dispute is one between two states as it concerns the violation of a treaty obligation of one state towards the other. Furthermore, Caribou appears before the Court exercising diplomatic protection on behalf of Mr. Gask. The exercise of diplomatic protection constitutes a right of the state that exercises it. As the Court ruled in the *Mavrommatis Palestine Concessions Case* (Jurisdiction) : "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State...By taking up the case of one of its subjects and by resorting to...international judicial proceedings on his behalf, a State is in reality asserting its own rights-its right to ensure, in the person of its subjects, respect for the rules of international law."[12] Therefore, Caribou by exercising diplomatic protection on behalf of Mr. Gask is exercising its own right.

Finally, it is submitted that the Inter-American Court of Human Rights and the ICJ are not courts of the same character, therefore the existence of two parallel proceedings does not prejudice the consideration of the present dispute by the Court. As this Court has in many occasions stated[13] the same dispute is possible to be considered simultaneously by the Court, and the Security Council.[14] In the present dispute two parallel proceedings take place; on

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[11] (1927) PCIJ, Series A, No 7, p.19.

[12] *Mavrommatis Palestine Concessions Case*, (1924) PCIJ, Series A, No. 2, p.6, at 35. See also *ELSI Case* (USA v. Italy), 28 ILM 1111 (1989).

[13] *Anglo-Iranian Oil Co.*, (Interim Protection), I.C.J. Reports 1951, pp. 89-98; *United States Diplomatic and Consular Staff in Teheran*, (Provisional measures), I.C.J Reports 1979, pp. 7-21; *Military and Paramilitary Activities in and against Nicaragua*, (Provisional Measures), I.C.J. Reports 1984, pp. 169-207; *Aegean Sea Continental Shelf*, (Interim Protection), I.C.J. Reports 1976, pp.3-40.

[14] Gunawardana A. de Z.: The Security Council and the International Court of Justice: are they in

the one hand there is a dispute between two states, therefore the International Court has jurisdiction; on the other hand there is a person who petitioned the Inter-American Commission of Human Rights on his own personal account.

Therefore, it is submitted that the principle of *lis alibi pendens* is inapplicable in the present case for both of the above proceedings are separate, distinct from each other, and have equal value as means for the peaceful settlement of disputes.[15]

Part B: The obligations set forth in Article 65(2) of the 1990 bilateral treaty confer on Mr. Gask individual rights and Arcadia's violation of these rights renders the judgment of the state and federal courts of Arcadia without legal effect.

1. The obligations set forth in Article 65(2) of the bilateral treaty confer on Mr. Gask individual rights.

1.1. Article 65(2) of the Bilateral Treaty is a self-executing treaty provision.

It is established in international law that states may agree to grant special rights to individuals.[16] It is accepted that individuals, as such, may be accorded rights under international agreements and that they are entitled to invoke these rights directly before national courts. In the *Danzig Railway Officials* Advisory Opinion, the Court ruled: "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable in the national courts."[17]

In the present dispute, Article 65(2) of the Bilateral Treaty clearly sets duties for the administrative authorities of the contracting parties (Caribou and Arcadia), and specifies the manner in which these should be performed. Moreover, Article 65(2) if read together with Article 65(3) of the Bilateral Treaty, which requires the consistent application of the provisions of Article 65(2) with the provisions of Article 36(1)(b) of the Vienna Convention on Consular Relations, clearly speaks of rights of the national arrested.

An international treaty is self-executing or directly applicable[18] if national courts and national authorities can directly apply it, if subjective rights and duties are established for the

conflict or in concourse?, *in Thesaurus Acroasium, Vol. XXVI, "International Justice", published by the Institute of International Public Law and International Relations of Thessaloniki, 1997*, pp. 155-168, at p. 159.

[15] In any case, the requirement of the exhaustion of local remedies is fulfilled and is permissible for Caribou in the present case to exercise its right of diplomatic protection on behalf of Mr. Gask.

[16] Brownlie, *supra* note 2, p. 455.

[17] (1928) PCIJ, Series B, No 15, p. 3, at 17-18

[18] The concept of self-executing treaties was first developed by the US Supreme Court. However in Europe the term " direct applicability of treaties" is used instead of self-executing treaties. See Bleckmann A.: Self-executing treaty provisions, *in Encyclopedia of Public International Law, vol. 7*, p. 414.

individual and if the individual can rely on it before national courts and authorities.[19] In the present case Caribou submits that it is necessary to establish that Article 65(2) of the Bilateral Treaty is a self-executing treaty provision, in order to demonstrate the violation of Mr. Gask's individual rights and that it may be invoked directly by Mr. Gask before the municipal courts of Arcadia.

1.1.2. Criteria of self-executing treaty provisions.

Courts and commentators seem to agree that a treaty's self-executing character is largely, if not entirely, a matter of precision of its provisions and intent of the contracting parties.

A) Intent of the contracting parties.

The intention of the contracting parties is the most important prerequisite for the self-executing character of treaty provisions. In the *Van Gend en Loose* case, The European Court of Justice[20], in interpreting Article 12 of the EEC Treaty, stated that the intention was to be clarified by examining the spirit, content and wording of the treaty provision and, in the light of the object and purpose of the treaty as a whole.[21] Furthermore, according to the ECJ, the intention of the parties amounts to establishing some special regime designed to ascertain that individuals are the beneficiaries of certain rights. Moreover, the Supreme Court of California in the *Sei Fujii v. State of California* ruled that in determining whether a treaty is self-executing, Courts look into the intent of the signatory parties as manifested by the language of the instrument.[22]

The established view in literature and jurisprudence holds that the intention of the parties as a determining factor of the self-executing character of a treaty provision, is a matter of treaty interpretation. According to Article 31 of the Vienna Convention on the Law of Treaties, which codifies customary international law[23], the wording of Article 65(2) of the Bilateral Treaty manifests the intention of the parties (Caribou and Arcadia) to create rights which individuals may have a legal interest to enforce and indicates the capacity of national courts to give effect to those rights without further legislative measures.[24] The word "shall"

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[19] Bleckmann, *loc. cit. supra* n.16, p.416.

[20] Hereinafter referred to as the ECJ.

[21] Buergenthal T.: Self-executing and Non Self-executing Treaties in National and International Law, *235 R.C.A.D.I. 303 (1992-IV), pp.322-335.*

[22] 19 I.L.R. 312 (1952), pp.313-319.

[23] Article 31(1) of the Vienna Convention on the Law of Treaties provides that: *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context..."*. The Vienna Convention on the Law of Treaties rules, on treaty interpretation, are now considered by the ICJ to codify customary law. See, e.g. the *Maritime Delimitation and Territorial Questions case (Qatar v. Balnrain),* ICJ Rep. 1995, p.6 at 18.

[24] In *Foster vs. Neilson,* the US Supreme Court stated that: " only treaties that operate for

which is referred twice in the wording of the Article 65(2), ("...the competent authorities *shall* without delay...*shall* also be forwarded by the said authorities without delay..."), clearly shows that the intention of Caribou and Arcadia was to impose legal obligations, which must be carried out by the administrative authorities.

Moreover, Caribou submits that Article 65(3) of the Bilateral Treaty states that the provisions of paragraph 2 of Article 65 shall be applied consistently with the requirements of Article 36(1)(b) of the 1963 Vienna Convention on Consular Relations. The requirements of the latter Article are that "the said [i.e. national] authorities shall inform the person concerned without delay of his *rights* [25] under this subparagraph". It is beyond doubt that the parties to the Bilateral Treaty had the intention of establishing individual rights in Article 65(2).

B) Precision of the treaty provisions

In *Sei Fujii v. State of California* the California District Court of Appeals noted that when the parties intended the reaty to be self-executing, "they employed language which is clear and definite and manifests that intention"(emphasis added). In the same case the Court found that articles 55 and 56 of the UN Charter "lacked the mandatory quality and deffinitiveness which would indicate an intent to create justiciable rights in private persons".[26] Moreover, it is generally accepted that where a treaty is full and complete and uses precise statutory language, is considered to be self-executing.[27] Furthermore, a treaty must specify the organs or procedures necessary for its execution.[28] More specifically, a treaty provision in order to be self-executing has to adequately determine the procedures and powers of national authorities and courts.[29] In this sense a self-executing treaty provision must not allow a state or legislature excessively wide discretion or decision-making powers,[30] with respect to its implementation in the domestic legal order of a state.

Moreover, the US Supreme Court, in its judgment in *Head Money Cases*, stated that "a treaty may be judicially invoked by private individuals when it prescribes a rule by which the rights of the private citizen or subject may be determined."[31] Additionally, in *People of Saipan*[32], the US 9th Circuit Court of Appeals listed the following requirements as relevant to

themselves are applicable by the courts without legislative implementation. The question whether the treaty operates of itself is a matter of treaty construction; it depends on the words of the treaty", cited in Harris, D.J., *Cases and Materials on International Law, 5th ed., London, 1998*, p.96.

[25] Emphasis added.

[26] Iwasawa Y.: The doctrine of self-executing treaties in the United States: A critical analysis, *26 Va. J. Int'L. 627 (1986)*, at 671-672.

[27] *Id.*

[28] *Ibid.*, at 671-673.

[29] Bleckmann, *loc. cit. supra* note 16, p. 416.

[30] *Id.*

[31] Vasquez C.M.: The Four Doctrines of Self-executing Treaties, *89 AJIL 695 (1995)*, p. 714.

[32] *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90 (9th Cir.), Cert. denied, 420 US 1003 (1974).

determining whether a treaty "establishes affirmative and judicially enforceable obligations without implementing legislation": these are the purposes of the treaty and the objectives of its drafters, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self or non- self execution.[33]

In the present dispute, Article 65(2) of the Bilateral Treaty clearly determines the procedures and duties of the administrative authorities. In particular, the administrative authorities have the obligation to inform at once the consular officials of the sending state, if a national of that state is arrested or detained. Moreover, they have the duty to allow the arrested person to communicate with the consular authorities of his state. Therefore, it is a complete[34] and legally perfect[35] provision , and as a result, capable of producing individual rights which national courts are bound to safeguard[36] without the need of implementing additional legislation.

1.2 Arcadia by its actions has violated article 65(2) of the 1990 bilateral theaty

In June of 1992, the authorities of Berkam, one of the states comprising the Federated States of Arcadia, arrested a citizen of Caribou, Mr. Eric Gask, on murder charges. Although aware of Mr. Gask's nationality the competent authorities of Berkam did not inform Mr. Gask of his rights to access to the consular authorities of his country and did not notify the consular officials of Caribou about Mr. Gask's arrest, as required by Article 65(2) of the Bilateral Treaty.

More specifically, Arcadia failed to ensure that Mr. Gask was informed of his right to have access to a consular official as Article 65(2) of the Bilateral Treaty stipulates. Instead, he was appointed a local attorney, Mr. Bebe , who proved too busy to deal in a satisfactory manner with Mr. Gask's case. Moreover, Arcadia failed to comply with its obligations under Article 65(2) of the Bilateral Treaty because of its continuous interference and obstruction with Mr. Gask's efforts to contact a consular official of Caribou. It is established that Mr. Gask repeatedly attempted to write to the Embassy of Caribou from the state penitentiary where he was being held. However, the contact was impossible as the prison authorities were routinely intercepting his mail.

Furthermore, Arcadia violated Article 65(2) of the Bilateral Treaty as it prevented access on the part of consular officials of Caribou. When Ms. Baggi, Caribou's ambassador, attempted to see Mr. Gask, the prison authorities refused permission to her. The

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[33] *Ibid.*, p.715.

[34] Iwasawa, *supra* note 26, p.673.

[35] Buergenthal, *supra* note 21, p.333.

[36] Treaties of Friendship, (as the Bilateral Treaty) are considered to be self-executing. See Vasquez, *supra* note 31, pp.718-719; Buergenthal, *supra* note 21, p.381.

justification given by the Foreign Ministry of Arcadia, was that Arcadia was a federation and the rules of criminal procedure in the State of Berkam were not a matter in respect of which the Federation had any responsibility.

However, Arcadia, by preventing access to Caribou's consular officials on these grounds, disregarded a basic principle of international law according to which a federal state *is* the state internationally responsible for the activities of its federal units and hence has the duty to comply with its treaty obligations undertaken by the federal government.[37] The responsibility for the violation by a federal unit of treaties that have been concluded by a federal state, is imputed to the federal government.[38] Moreover, arbitral awards contain examples of the responsibility of federal states for acts of authorities of units of the federation.[39] In the present dispute, the treaty partner of Caribou is Arcadia, not Berkam. As a corollary Arcadia is under the express obligation to ensure within its national territory the particular rules and requirements that are stipulated in Article 65(2) of the Bilateral Treaty.

1.2.1. Consequences of Arcadia's violation of Article 65(2) of the Bilateral Treaty.

a) Consequences with respect to Mr. Gask's individual rights.

If Mr. Gask had been properly informed of his rights under Article 65(2), he would have communicated with the Embassy of Caribou, which would have immediately offered him the assistance provided for in this Article. However, the competent authorities intentionally and effectively deprived Mr. Gask of appropriate legal representation. They appointed a local lawyer who was incompetent to provide Mr. Gask with proper legal advice. As it is reasonably expected, treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national[40]; nonetheless, Mr. Bebe not only failed to contact the Embassy of Caribou, but also failed to inform Mr. Gask of his rights under Article 65(2) of the Bilateral Treaty. As a consequence, Mr. Gask was not able to raise the claims of his individual rights before the courts of Arcadia.

Appropriate consular assistance would have involved contacting Mr. Gask's family in Caribou and informing them of his situation. Family members would have provided assistance and moral support to Mr. Gask, who was then only sixteen years old. Moreover,

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[37] Oliver C.T.: The enforcement of Treaties by a Federal State, *141 R.C.A.D.I. 331 (1974-I)*, p. 354.

[38] Di Marco L.: Component Units of Federated States and International Agreements, *Sijthoff and Noordhoff, 1980, at 169.* See also art. 7 of the I.L.C. Draft Articles on State Responsibility (I.L.C.'s 1996 Report, G.A.O.R., 51st Sess., Supp. 10, p. 125), and comments made therein in Harris, D.J., *supra* note 24, p.p. 500-501.

[39] See for e.g. *Youmans* claim, 4 RIAA 110 (1926); *Mallen* claim, 4 RIAA 173 (1927); *Pellat* claim, 5 RIAA 534 (1929).

[40] Opinion of the Supreme Court of the State of Virginia in the *Murphy v. Netherlands* case,(116 F.3d 97, 4th Cir. 1997), reprinted in *31 Vand. J. Trans'l L 257 (1998).*

consular assistance would have included the presence of consular officers at court or other proceedings; collecting and presenting mitigating evidence at the sentencing phase; and other forms of aid both legal and moral. Such consular assistance could have had a bearing on the outcome of the criminal proceedings in favour of Mr. Gask, including the sentence imposed. In any case, the fact that the jury deliberated for less than one hour clearly indicates the lack of appropriate legal aid for Mr. Gask which was largely due to the lack of consular assistance.

b) Arcadia violated the Vienna Convention on Consular Relations

Both Caribou and Arcadia are parties to the Vienna Convention on Consular Relations (1963). As a result they are under the duty to carry out in good faith the obligations they have undertaken with respect to this treaty, according to the fundamental principle of international law *pacta sunt servanda.*[41]

However, Arcadia by its acts, namely by failing to inform Mr. Gask of his rights under Article 36(1)(b) of the VCCR violated its obligations *vis-a-vis* Caribou under this treaty. Consequently, Arcadia disregarded Article 26 of the 1969 Vienna Convention on the Law of Treaties[42]. Moreover, Arcadia's failure to provide the notification required by Article 36(1)(b) of the Vienna Convention on Consular Relations precluded Caribou from protecting its interests in Arcadia. Caribou's consular authorities, having being completely unaware of Mr. Gask's arrest, could not contact him, assist in his defense and ensure that international legal norms were respected. In this sense, Caribou was deprived of its right under the Bilateral Treaty to assist its citizen.

2. The violation of Mr. Gask's rights under article 65(2) of the bilateral treaty, renders the judgments of the state and federal courts of Arcadia without legal effect.

A state in the application of its domestic law may act contrary to international law, in a manner involving a breach of its international obligations.[43] The Court in the *Certain German Interests in Polish Upper Silesia* case ruled that " ...municipal laws are merely facts which express the will and constitute the activities of states...The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not , in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."[44] This

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[41] Thrilway, H., The Law and Procedure of the International Court of Justice 1960-1989, (Part Four), *63 BYIL 1 (1992),* p.48.

[42] 8 I.L.M. 679 (1969).

[43] See, *inter alia* Fitzmaurice G.: The General Principles of International Law Considered from the Standpoint of the Rule of Law, *92 R.C.A.D.I. 1 (1957-II)*; Brownlie I.: General Course on Public International Law, *255 R.C.A.D.I. 9 (1995)*, pp. 93-96.

[44] (1928) PCIJ, Series B, No 15, p. 3.

statement is evidence that a decision of a municipal court may constitute a breach of a treaty obligation. Furthermore, in this sense, McNair states that : "...a state has a right to delegate to its judicial department the application and interpretation of treaties. If, however, the courts commit errors in that task or decline to give effect to the treaty or are unable to do so because the necessary change in, or addition to, the national law has not been made, their judgments involve the state in a breach of a treaty".[45]

In the present dispute Arcadia's state and federal courts failed to give effect to the individual rights that Article 65(2) of the Bilateral Treaty confers to Mr. Gask, when applied and interpreted. In this sense, their decisions involve a breach of this treaty which is imputable to Arcadia. As a result, because of the violation of Mr. Gask's individual rights their judgment should be rendered by the Court without legal effect in the sense that they are not opposable to Caribou in the course of the present proceedings.

Caribou therefore asks the Court to declare that Arcadia's courts judgments should have no legal effect, as their decisions constitute denial of justice. It is accepted in international law that denial of justice exists when an international agreement is violated by the machinery of the administration of justice of a state.[46]

Moreover, in the *Barcelona Traction* case, the Belgian Government included in its submissions a section of complaints under the head "denials of justice *lato sensu*". It read that "considering that a large number of decisions of the Spanish Courts are vitiated by gross and manifest error in the application of Spanish law, by arbitrariness or discrimination, constituting in international law denials of justice *lato sensu*"[47]. Notwithstanding the fact that the Court did not examine the above submission in the merits of the case, Judge Tanaka in his Separate Opinion observed *inter alia,* that in cases where grave circumstances exist, the state bears the responsibility for the acts and omissions of judicial organs. In addition, the distinguished judge took the view that: "the concept of denial of justice, understood in the proper sense, is that of an injury committed by a court of justice involving the responsibility of the state"[48]

As a result, the judgments of Arcadia's municipal courts are not opposable to Caribou. Accordingly, Caribou submits that it is entitled to *restitutio in integrum* (namely, legal restitution). It is accepted in international law that tribunals, in order to achieve the object of reparation, may give "legal restitution" in the form of a declaration that the relevant acts of the state are null under international law.[49] Nullity is the necessary outcome of illegality.[50]

In the *Chorzow Factory* case, the Court stated that, as the purpose of the Geneva Convention

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[45] McNair, A., *Law of Treaties, Clarendon Press, Oxford, 1961,* p.346.

[46] *Affaire Martini,* R.I.A.A. ii, p. 975.

[47] ICJ Reports, 1970, p.4 at pp. 18-22.

[48] ICJ Reports, 1970, pp.150-160, at p.156 in particular.

[49] Brownlie I., *System of the Law of Nations State Responsibility, Part I, Oxford, 1983,* p.210

[50] See Guggenheim P.: *Traité de Droit International Public,* vol. II, Lib. de l'Université, Génève, 1954, p.68; Jennings, *Cambridge Essays,* 1965, p.64; Mann, 48 *B.Y.I.L.*(1976-1977), pp.5,8,65; Brownlie, *supra* note 2, pp.509-512.

of 1922 was to maintain the economic *status quo* in Polish Upper Silesia, restitution was the "natural redress" for violation of or failure to obscure the treaty provisions.[51] Moreover, in the *Martini* case the arbitral tribunal ruled that the obligations imposed on Maison Martini & Cie., by a judicial decision of a striking injustice, "must be annulled under the heading of reparation", the award stating that " in pronouncing their annulment, the Arbitral Tribunal emphasizes that an illegal act has been committed and applies the principle that the consequences of the illegal act must be effaced". It is beyond doubt that when an unlawful act has been performed, the first remedy to be envisaged is the restoration of the situation in conformity with law by the annulment of the unlawful act itself.[52]

Furthermore, it must be noted that the Court cannot declare the invalidity of the decisions of Arcadia's municipal courts, qua Court of Appeals, since the international legal order must respect the reserved domain of domestic jurisdiction. However, in the present dispute Arcadia may not invoke its domestic law, which is premised on the powers of its judicial system, in order to disregard its obligations under the Bilateral Treaty. In this sense, in the *Applicability to the Obligation to Arbitrate under Section 21 of the UN Headquarters Agreement of 26 June 1947* (Advisory Opinion) the Court stated the fundamental principle of international law that international obligations prevail over domestic law.[53]

Part C: The individual rights that article 65(2) of the bilateral traty confers on Mr. Gask must be read in accordance with the customary norm of international law to the effect that the carrying out of an execution after a five year delay consitutes inhuman and degrading treatment, as a result the death penalty against Mr. Gask must be commuted.

1. The prohibition of inhuman and degrading treatment is recognized as a norm of costomary law

The prohibition of inhuman and degrading treatment is enshrined in all the basic international instruments concerning the protection of Human Rights, namely Article 5 of the Universal Declaration of Human Rights[54], Article 7 of the International Covenant on

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[51] (1927), PCIJ, Ser. A, no.9, p.28.

[52] see *supra* note 49, p. 215, see also *inter alia*, O'Connell, D.P., *International Law, Vol. II, second ed., Stevens, London, 1970, p.1116*.

[53] ICJ Reports, 1988, (Advisory Opinion), pp. 34-35. This principle was first introduced by the arbitral award of 14 September 1872 in the *Alabama Claims Arbitration* and has frequently been recalled since, for example in the *Greco-Bulgarian Communities Case*, in which the PCIJ ruled that: " it is a generally accepted principle of international law that in the relations between Powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of a treaty." see PCIJ, Series B, 1930, No 17, p32.

[54] G.A Resolution 217A(III), G.A.O.R., 3rd sess, Part I, Resus, p.71. The General Assembly adopted the Universal Declaration of Human Rights by 48 votes to none, with eight abstentions. Many

Civil and Political Rights (1966)[55], Article 3 of the European Convention on Human Rights[56], in Article 5 of the American Convention on Human Rights[57], Article 5 of the African Charter of Human and Peoples Rights[58], Article 37(a) of the Convention on the Rights of Child (1989)[59], and in Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)[60]. The repetition of the norm concerning the prohibition of inhuman and degrading treatment in all the above human rights treaties is evidence of *opinio iuris*, while the wide participation in the above mentioned international instruments[61] constitutes evidence of state practice. Furthermore, the Third Restatement of US Foreign Relations clearly adopts the view that the prohibition of inhuman and degrading treatment is part of customary law[62]. Consequently, it has acquired customary law status.

1.2. Arcadia disregarded the norm of customary international law to the effect that an execution after a five year delay constitutes inhuman and degrading treatment.[63]

Mr. Gask, shortly after being sentenced to death on March 1, 1993, was moved to death row. By March 1998 he had been on death row for five years. During that period, he had been held incommunicado suffering considerable abuse by his other inmates as well as prison officers. Moreover, notwithstanding the fact that his execution had been postponed twice, after the outcome of his appeals of October 1, 1995, and December 1, 1996, the prison

years later, in 1980, the *Filartiga v. Pena-Irala* Case considered the Declaration as a source of rules of customary international law (cited in 19 I.L.M. 966 (1980)). See also Harris, *supra* note 24, p.610.

[55] 999 U.N.T.S. 171.

[56] 213 U.N.T.S. 221.

[57] O.A.S. Treaty Series No.36, at 1, O.A.S. Off Rec. O.E.A./ Ser. L/ V/ II 23 doc.rev.2.

[58] 21 I.L.M. 59 (1982).

[59] 28 I.L.M. 1448 (1989).

[60] 23 I.L.M.1027 (1984) and 24 I.L.M. 535 (1985).

[61] For example, the Convention on the Rights of Child has 191 ratifications; the International Covenant on Civil and Political Rights, 136 ratifications; the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment has 101 ratifications. See Harris, *supra* note 24, pp. 631, 636, 710.

[62] Steiner H.J. and Alston P.: *International Human Rights in Context, Clarendon Press, Oxford*, 1996, pp.145-146.

[63] None of these international instruments has included in its provisions a definition of the term "inhuman and degrading treatment". It was in 1969 when the European Commission on Human Rights in the *Greek Case* defined the notion of inhuman and degrading treatment as the kind of treatment which "covers at least such treatment as deliberately causes severe suffering, mental or physical which, in the particular situation is unjustifiable". Moreover, the Committee considered that the " treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others, or drives him to an act against his will or conscience". A more recent definition of

governor, who was already aware of the fact that Mr. Gask's execution would not be carried out, proceeded to weighing, measuring, and taking him on a "preparatory tour" of the gallows. Undoubtedly this treatment had a profound psychological effect on Mr. Gask.[64]

Furthermore, account is to be taken not only of the physical pain experienced (considerable abuse) but also of the convict's mental anguish of anticipating the execution of the sentence, when there is considerable delay before the execution. During the five years that Mr. Gask was on death row, he lived in a stressful and tense environment, which was exacerbated by humiliating conditions and constant uncertainty for his fate.

In the *Kirkwood v. United Kingdom* case [65], the applicant argued that the circumstances surrounding the execution of the death penalty with respect to him would constitute inhuman and degrading treatment. In particular, he referred to the "death row phenomenon", namely the excessive delay during a prolonged appeal procedure lasting several years, during which he would be gripped with agony as to the outcome of his appeal and therefore his fate. The European Commission of Human Rights upheld this argument. It noted that "it is established that the death row phenomenon is now an arguable basis for alleging cruel or unusual punishment in the United States, and it cannot ignore the similarity between this concept and that of inhuman and degrading treatment under article 3 of the Convention".[66]

The infliction of mental suffering was also considered in the *Pratt and Morgan v. Jamaica* case [67]. In this case, the UN Human Rights Committee found that the infliction of mental suffering while under the death penalty pending execution is sufficient to infringe the prohibition of inhuman and degrading treatment. In particular, the decision to grant a first stay of execution in the *Pratt and Morgan v. Jamaica* case, was taken at noon on February 23, 1987; nevertheless, the applicants were not notified until 45 minutes before the scheduled time of the execution on February 24, 1987. The Committee, considering that the issue of warrant for execution necessarily causes intense anguish to the individuals concerned, decided that a delay of approximately 20 hours from the time the stay of execution was granted to the time the applicants were removed from the death cell constituted cruel, inhuman and degrading treatment within the meaning of article 7 of the International Covenant on Civil and Political Rights.

inhuman and degrading treatment can be found in the 1989 *Vuolanne v. Finland* Case, where the UN Committee of Human Rights stated that the meaning of inhuman and degrading treatment depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim, cited in H.R.C. Report, G.A.O.R., 44th Sess., Supp. 40, p. 249 (1989).

[64] see *infra* notes 65, 67, 68.

[65] *E.M. Kirkwood v. United Kingdom*, Application no.10479/83, 27 YECHR 191 (1984).

[66] *Ibid.* p.196. Article 3 of the ECHR states that: "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[67] *Pratt and Morgan v. Jamaica*, H.R.C. Report, G.A.O.R., 44th Sess., Supp. 40 (1989), p.222 at 230.

Moreover, in *Pratt and Morgan v. The Attorney General for Jamaica* [68] the UK Privy Council relied upon decisions of international tribunals to support the view that the delay in the execution of the petitioners amounted to inhuman treatment. More specifically, the Privy Council proclaimed that "in any case in which the execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading punishment or other treatment". Caribou also wishes to draw attention to the fact that the Privy Council ordered the petitioners sentences to death to be commuted to life imprisonment. In addition, in the *Catholic Commission for Justice and Peace in Zimbabwe v. the Attorney General Case,*[69] the Supreme Court of Zimbabwe observed that it may be supported on strong grounds that death is as lingering if a person spends several years in a death cell awaiting execution. The pain of mental lingering, can be as intense as the agony of physical lingering.

Similar observations have been made in the case *Sher Singh and Others v. State of Punjab,* in which the court observed that "the prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman and degrading punishment in circumstances of a given case ".[70]

In the present dispute the fact that Mr. Gask has been on death row for five years must be considered in conjunction with the particular circumstances of his case. It is undeniable that Mr. Gask suffered considerable abuse both by the other inmates and the prison officers; that he suffered severe and unjustifiable psychological strain because of the "preparatory tours"; that he was held incommunicado for many years; and that he was only sixteen years old when sentenced to death. All these particular circumstances lead to the conclusion that his execution after a five year delay constitutes inhuman and degrading treatment.

Finally an important decision of the European Court of Human Rights, in which all the issues concerning the "death row phenomenon" were raised, is the *Soering Case.*[71] In this case the European Court of Human Rights had to decide whether to extradite a German national to the United States, where he would undergo the risk of facing capital punishment. The applicant claimed before the ECHR that if extradited he would be exposed to the "death row phenomenon", which constitutes such treatment that his

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[68] *Pratt and Morgan v. Attorney General for Jamaica,* Privy Council, Appeal no.10, Judgment of the Lords of the Judicial Committee of the Privy Council, November 1993, reprinted in 14 HRLJ 338 (1993).

[69] *Catholic Commission for Justice and Peace in Zimbabwe v. the Attorney General,* 14 HRLJ 323 (1993) . Moreover, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture"(People v. Anderson, 6 Cal. 3d 628,649). See also, *inter alia,* 14 HRLJ 326 (1993). All these studies describe confinement under sentence of death as exquisite psychological torture.

[70] (1983) 2 S.C.R. 583 at 591.

[71] 11 HRLJ 335 (1990).

extradition would be contrary to article 3 of the European Convention on Human Rights.[72] In addition, he argued that the court had to reach judgment by taking into account the particular circumstances of his case (his youth and mental state). The European Court of Human Rights, after considering the arguments, concluded: "...in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offense, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by article 3 (of the European Convention on Human Rights)".[73]

The particular importance of this case is that the ECHR in deciding against the extradition of Mr. Soering considered as very important the fact that he was young at the time of the offense (Mr. Soering was eighteen years old when he committed the offence he was accused of) . It particularly held that Mr. Soering's youth has to be taken into consideration as a factor which could bring his remaining on death row within the terms of article 3 of the European Convention on Human Rights[74].

Accordingly, Caribou submits that the fact that Mr. Gask was only sixteen years old when he was sentenced to death is a ground that has to be taken into consideration by the Court[75]. In the present dispute, Mr. Gask's execution was postponed twice, after his appeals on October 1, 1995 and December 1, 1996.[76] At both times, the prison governor, before announcing the stay of execution to him, arranged for Mr. Gask to be weighed and measured and taken on a "preparatory tour" of the gallows. Not only did he not order

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[72] See *supra* note 66.

[73] *Soering* Case, *supra* note 71, p.366.

[74] *Ibid*, p.365.

[75] The imposition of death penalty to those individuals who have committed offenses whilst under eighteen years of age is illustrated in many international instruments and, at the very least, an international customary norm prohibiting the sentence to death of those under eighteen has now fully emerged. see, *inter alia*, Geraldine van Bueren, The International Law on the Rights of the Child, Martinus Nijhof Publishers, 1995, pp. 187-190. Moreover, the Inter-American Commission on Human Rights stated that in the OAS, to which both Caribou and Arcadia are members, there is a recognized norm of *jus cogens*, i.e. a peremptory norm of international law from which no derogation is permitted, which prohibits the state execution of children, *id.*, at 189.

[76]The fact that the delay may be due to Mr. Gask's insistence on exercising his appellate rights does not mitigate the severity of the impact of the death row phenomenon on him, and the right to pursue due process of law must not be set off against the right to be free from inhuman and degrading treatment. see *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General and Others,* in 14 HRLJ 330(1993), opinion of HENNESSEY CJ. in District Attorney for Suffolk District. See also the *Soering Case, supra* note 71, p. 364, where it was held that "it is equally part of the human nature that the [condemned] person will cling to life by exploiting those safeguards to the full".

immediately the stay of Mr. Gask's execution, but also subjected him to profound psychological torture. Moreover, it must be noted that there has been a considerable delay before the outcome of Mr. Gask's appeal in April 1994 (one and a half year). One may cast no doubt that this treatment is inhuman and degrading.[77]

Furthermore, it has been established by international jurisprudence that when the death penalty has been imposed in violation of customary or conventional international law, it can be commuted to life imprisonment, as the court held in the *Prat and Morgan v. the Attorney General for Jamaica Case*[78] and also in *Javed Ahmed v. State of Maharashtra Case.*[79]

In conclusion, Caribou submits that Arcadia, by allowing Mr. Gask to remain on death row for five years in such extreme conditions, which prejudiced his physical and psychological health, and, in addition, disregarded the fact that Mr. Gask was a minor when sentenced to death, violated the customary norm of international law to the effect that the carrying out of an execution of death penalty after a considerable delay constitutes inhuman and degrading treatment. Subsequently, the death penalty against Mr. Gask cannot be carried out by Arcadia and must be commuted to life imprisonment.

SUBMISSIONS

The Republic of Caribou respectfully requests that the Court adjudge and declare that:

1.The ICJ has jurisdiction to adjudge and declare upon the present dispute by virtue of Arcadia's Declaration under Article 36(2) of the Statute of the Court.

2.Arcadia's reservation under Article 36(2) of the Statute of the Court has no legal effect in the present dispute.

3.Article 65(2) of the 1990 Bilateral Treaty between Caribou and Arcadia confers on Mr. Gask individual rights which are enforceable in the national courts of Arcadia.

4.Arcadia by its actions and omissions has violated Article 65(2) of the 1990 Bilateral Treaty.

5.Caribou is entitled to *restitutio in integrum* (namely, legal restitution).

6.Arcadia violated the rule of customary international law which prohibits the execution after a five year delay for it constitutes inhuman and degrading treatment.

7.The death penalty against Mr Gask must be commuted to life imprisonment.

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[77] Over one hundred years ago Mr. JUSTICE MILLER in *Ex parte Medley* expressed the view that: "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole if it...as to the precise time when his execution shall take place" 14 HRLJ 326 (1993).

[78] See *supra* note 68.

[79] 14 HRLJ 329 (1993).