MEMORIAL OF ARCADIA

Part I. Preliminary objections in relation to the jurisdiction of the court

A. Admissibility of reservations to declarations accepting the compulsory jurisdiction of the court under Article 36 (2) of the statute of the court

In 1993 the Federated States of Arcadia[1] accepted as compulsory *ipso facto* and without special agreement, on condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with Art. 36(2) of the Statute of the Court, subject to one reservation.

Paragraph (3) of Art. 36 of the Statute provides that "reservations may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time." These words have sometimes been broadly regarded as authorizing states to make any reservation not incompatible with the provisions of the Statute.[2]

The right to append reservations to declarations accepting the compulsory jurisdiction of the Court has been acknowledged by the Court on numerous occasions. In the *Phosphates in Morocco* case, for instance the Court held that its compulsory jurisdiction "only exists within the limits within which it has been accepted."[3] In the *Norwegian Loans* case[4] the court reached the same conclusion, pointing out that jurisdiction is conferred upon it only to the extent to which the declarations of both parties coincide in conferring it, since the basis of the Court's jurisdiction is the common will of the parties.[5]

It is evident that the admissibility of reservations is clearly established in practice and accepted by the Court. Yet as Judge Lauterpacht observed in his separate opinion in the Norwegian Loans case, "while the Statute as interpreted in practice permits reservations to its jurisdiction it does not permit reservations as to the functioning and the organization of the Court".[6] This indicates that reservations, in order to be valid, have to be consistent with the Statute of the Court, as "the declaration of acceptance does not legally exist except by virtue of the Statute. It does not legally exist unless it is in accordance with it."[7]

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[1] Hereinafter referred to as Arcadia

[2] Herbert Briggs, Reservations to the Acceptance of the Compulsory Jurisdiction of the International Court of Justice, *vol. 93 RCADI, p. 229, (1958),* pp. 232.

[3] *Phosphates in Morocco (Italy v. France),* (1938) PCIJ, Series A/B No. 74, p.10 at 23

[4] *Case Concerning Certain Norwegian loans (France v. Norway),* 9 ICJ Reports 1957, 45-46

[5] This has been confirmed by the Court's practice in numerous cases. See the *Case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), (jurisdiction-admissibility)* 1984 ICJ Report 392, 418; *Anglo-Iranian Oil Co. Case (UK v. IRAN),* ICJ Reports 1957, p.23; *Interhandel case (Switzerland v. USA),* ICJ Reports 1959, p.23; *The Case Concerning Right of Passage over Indian Territory (Portugal v. India)*, ICJ Reports 1957, p. 125, 145;

[6] Separate opinion of Judge Lauterpacht in the *Norwegian Loans case,* Supra note 3, p. 45-46

[7] Id., at 46.

Accordingly, the reservation made by Arcadia is consistent with the Statute, as it employs very precise wording, excluding a specific category of disputes. In this way it does not infringe upon the competence of the Court to determine its own jurisdiction according to Art. 36(6) of the Statute. Therefore it is valid and can be applied in the present case. It is Arcadia's submission that the present dispute falls under both parts of the reservation.

B. The court does not have jurisdiction to entertain this dispute in the light of part one of Arcadia's reservation

The first paragraph of the Federated States of Arcadia's reservation provides that "the International Court shall not have jurisdiction in relation to any dispute concerning the obligations in relation to any person who is a prisoner under sentence of death."

Arcadia shall proceed to prove that the facts that gave rise to the present dispute fall in substance under section 1 of Arcadia's reservation.

(a) The time the dispute crystallized

According to the *Mavromatis Palestine Concessions* case "a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two parties".[8] Furthermore, in the *Interhandel case* the Court ruled that the facts and the situation which have led to a dispute must not be confused with the dispute itself.[9]

Therefore it must be shown that the claim of one party is actually opposed by the other.[10] In the *Right of Passage over Indian Territory case* the Court ruled hat a legal dispute crystallises when through preliminary diplomatic negotiations the parties present claims and determine their grounds.[11] In conclusion, a dispute has not crystallised merely when an exchange of views has taken place unless and until there are clearly defined opposing claims.[12]

In the present case, there has been no disagreement of any kind between Arcadia and the Republic of Caribou until May 1993, that is approximately one month after Mr. Gask's conviction to death in April 1993. At that time Ms Baggi, the Caribou ambassador in Arcadia, delivered a diplomatic note to the Foreign Ministry of Arcadia and received a reply. Before that time there had been no expression of any opposing claim or even attitude or conduct on behalf of Caribou. Thus it is evident that at the time that the dispute arose Mr. Gask was already a prisoner under a sentence of death.

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[8] *Mavromatis Palestine Concessions Case (Greece v. United Kingdom),* (1924) PCIJ, Series A/B, No 2, p. 6, at 11.

[9] Supra note 5, p. 22.

[10] Accordingly, in the *South West Africa cases (Jurisdiction-Admissibility)* the Court ruled that it was not sufficient for one of the parties to affirm of deny the existence of a dispute. ICJ Reports 1962, p. 319, at 328

[11] *Right of Passage over Indian Territory Case,* supra note 5, at 146

(b) The time the reservation becomes legally active.

As the Court declared in the *Nottebohm Case* the filing of the application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the application.[13] Therefore, a reservation becomes operative when the proceedings commence before the Court, namely after the filing of the application.

In the present case, Arcadia's reservation became operative at the time that Caribou instituted proceedings before the Court, namely, on 22 July 1998. At that time Mr. Gask had already been sentenced to death. Therefore it is obvious that Mr. Gask's conviction to death falls in substance under section 1 of Arcadia's reservation. Consequently the Court has no jurisdiction to entertain the case.

C. The court does not have jurisdiction to entertain this dispute in the light of part two of Arcadia's reservation

Section two of Arcadia's reservation in its declaration of acceptance of the Court's compulsory jurisdiction reads that "the International Court of Justice shall not have jurisdiction in relation to any matter the facts of which have been submitted to another procedure of international investigation of settlement."

First of all, it is to be noted that what is to be understood by the term "procedure of international investigation or settlement" is any other method of pacific settlement including, any international court or arbitral tribunal. A judicial forum of this kind is the Inter-American Court of Human Rights, as well as any other process including any international investigative or quasi-judicial body such as the Inter-American Commission of Human Rights.

Arcadia is a party to the American Convention of Human Rights[14] as of 15 January 1990, and it has accepted the jurisdiction of the Inter-American Court under Art. 62 of the Convention, subject to one reservation.[15] In April 1998 Mr. Gask petitioned the Inter-American Commission alleging violations of the 1969 American Convention on Human Rights, seeking an expedited procedure. At present his case is still pending, as the Inter-American Court has issued an order for a compulsory report on behalf of Arcadia to the Commission.

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[12] Alexandrov Staminir A., *Reservations in unilateral declaration accepting the compulsory jurisdiction of the International Court of Justice, Martinus Nijhoff Publishers, Dordrecht/Boston/London 1995*, p. 46.

[13] *Nottebohm Case (Liechtenstein v. Guatemala),* Judgement of November 18, (preliminary objections), ICJ Reports 1953, p.111, at 112.

[14] 9 ILM 673 (1970). Caribou is not a party to the Convention.

[15] The reservation, made under Art. 75 of the Convention, reads: "The Inter-American Court of Human Rights shall not be competent to address submissions relating to the situation of any person who is a prisoner under sentence of death".

Secondly, it is Arcadia's submission that the term "fact" in the reservation to the ICJ's jurisdiction must be interpreted in accordance with the ordinary meaning of the word as provided by Art. 31 of the Vienna Convention on the Law of Treaties. It refers to any actual event, which has taken place in relation to the present dispute, and not to any legal argument or claim submitted by either party of the dispute. In the light of this, Mr. Gask's petition to the Inter-American Commission is grounded upon the same facts that serve as the actual basis of the case brought by Caribou before the Court.

The facts common to both proceedings are Mr. Gask's crime committed in the "Caribou Clinger" in June 1992, his arrest by the police of Berkam, his trial before the Maranna Criminal Court on 15 February 1993, when he was sentenced to death, his appeal before the Court of Criminal Appeals in April 1994, his appeal before the State Supreme Court in the spring of 1996 and his final appeal on 1 December 1996 to the Supreme Court of Arcadia, all of which upheld the death sentence of Mr. Gask.

In conclusion, it becomes clear that the second section of Arcadia's reservation is effective and applicable in the present case. Therefore, Arcadia submits that the Court has no jurisdiction to entertain the merits of the case.

D. The principle of lis alibi pendens is applicable in the present case

The general principle of law known as *lis alibi pendens*, objective of which is to prevent the possibility of conflicting judgments, provides that a case cannot be judged *bis in idem* by two different tribunals of the same character at the same time.

The doctrine of litispendence was confirmed by the Court in the *Certain German Interests in Upper Silesia Case.*[16] The criteria for litispendence as laid down by the Court are the existence of two identical actions, the existence of the same parties to both disputes, and the same character of the two tribunals. It is Arcadia's contention that all these essential elements are met in the present case.

(a) Identical actions

The claims that Caribou has submitted to the ICJ and those that Mr. Gask has submitted to the Inter-American Commission of Human Rights are identical in substance.

More specifically, Caribou claims that Mr. Gask, according to Art. 65(2) of the Bilateral Treaty of Friendship, Commerce and Cultural and Consular Relations[17] between Caribou and Arcadia, had the right of access to a consular official of his country. Subsequently, Caribou claims that Arcadia violated its obligation to inform Mr. Gask of his right, that interfered with his efforts to make contact with his states consular authorities and prevented

[16] *Certain German Interests in upper Silesia Case (Germany v. Poland),* (1924) PCIJ Reports, Series A, No 7, p.19 -21

[17] Hereinafter referred to as the Bilateral Treaty.

access to them. Respectively, Mr. Gask asks that the Inter-American Commission declare that he has been denied his right of access to a consular official.

Secondly, Caribou claims that the aforementioned alleged violations render the judgement of the Arcadian courts without legal effect. Mr. Gask, on his turn, makes the same request by attacking the same judicial decision on the same grounds, namely that he has not been given a fair trial.

Finally, Caribou has asked the Court to adjudge that the fact that Mr. Gask has been on death row for five years as well as his imminent execution constitute inhuman and degrading treatment. Mr. Gask on his part, in order to achieve a favorable verdict concerning his death penalty, claims that his five-year detention on death row has violated his right to humane treatment.

(b) Both disputes are between the same parties

It is true that Mr. Gask is not granted *locus standi* before the Court, according to Art. 34(1) of the Statute of the Court. However, it is evident that in essence both proceedings aim at the protection of the same person's rights, as diplomatic protection ensures respect of international law as well as a state's interests in the person of a state's national. Thus, in the present case the actual party, the one seeking protection, is Mr. Gask.

In the same line of argument, it is to be pointed out that there is no hierarchical relationship between the two protection systems, namely that of the ICJ and the one of the Inter-American Court of Human Rights. Therefore the one decision cannot overrule the other. Consequently, it is obvious that there is the danger of two conflicting judgments concerning the future of Mr. Gask. All the above indicate that the fact that Mr. Gask is not formally a party to the proceedings before the Court is in itself not sufficient for the Court to uphold its jurisdiction in regard of the principle of *lis alibi pendens.*

(c) Both organs before which the cases are pending are of the same character

In relation to the character of the two tribunals it has to be stated that both the ICJ and the Inter-American System for protection of Human Rights (that is the Inter-American Court and Commission co-operating as in this case) constitute international judicial proceedings, to which disputes concerning issues of international law are submitted on the basis of a previous acceptance of the tribunal's compulsory jurisdiction. To this effect the Inter-American Commission exercises quasi-judicial functions, similar to those of the European Commission of Human Rights[18], while the Inter-American Court has both a contentious and an advisory jurisdiction in the same way with the ICJ. What is more, the Inter-American Commission of Human Rights has already decided to seize the Inter-

[18] Buergenthal Thomas, Norris Robert, Shelton Dinah, *Protecting Human Rights in the Americas, Cases and Materials, 4th revised edition, N.P. Engel Publishers, Kehl/Strasbourg/Arlington, 1995*, p. 52.

American Court on the merits of Mr. Gask's petition. Therefore, compulsory proceedings have already begun. Consequently, Arcadia asks the Court to declare that the criteria for applying the principle of *lis alibi pendens* are met and therefore to dismiss the case.

In respect to the aforementioned it is obvious that the government of Caribou is trying to interfere with Arcadia's judicial system because of the latter's decision to sentence Mr. Gask to death for his crime. The Court in the *Case concerning the Vienna Convention on Consular Relations (Provisional Measures)*[19] stated that the function of this Court is to resolve international disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal. The ICJ, as a principal organ of the UN, is precluded by virtue of Art. 2(7) of the UN Charter from dealing with matters that are essentially within the domestic jurisdiction of Members states.

Part II. Questions concerning the observance of the bilateral treaty of 1990.

A. The obligations set forth in Article 65(2) of the 1990 bilateral treaty do no confer individual rights and are not intended to create such rights which can be exercised by Mr. Gask in Arcadia.

(a) Self executing treaties

An international treaty that can be directly applied by national courts and national authorities, that also establishes subjective rights and duties for an individual, and that an individual can rely on before national courts and national authorities, is called self-executing or directly applicable.[20]

Arcadia submits that Art. 65(2) of the 1990 Bilateral Treaty is not of self-executing character and therefore does not confer to Mr. Gask any individual rights which can be exercised before the Arcadian courts.

The Court dealt with the doctrine of self-executing treaties in the *Advisory Opinion on the Jurisdiction of the Courts of Danzig.*[21] In that case the Court declared that "it is a principle

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[19] *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. USA), Order of 9 April 1998 (Provisional Measures),* ICJ General List No 99, p.5.

[20] The notion of self-executing treaties was first developed by the American Supreme Court. In Europe however the term "direct applicability of treaties" is used instead of "self-executing treaties". See Albert Bleckman, *Self-executing treaty provisions,* Encyclopedia of public international law, vol. 7, Max Planc Institute For Comparative Public Law and International Law.

[21] *Advisory opinion on the jurisdiction of the Courts of Danzig,* (1928) PCIJ Reports, Series B, No 15, at 3.

of international law, that an international agreement cannot as such create direct rights and obligations for private individuals". It went on though to state 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 by the national courts".[22] The Court eventually reached the conclusion that a finding regarding the self-executing character of a treaty should be founded on its wording and general tenor and its object as manifested in its contents.

While the Court itself did not have the opportunity to seize itself of such a matter ever since, similar criteria were iterated by leading authors in literature as well as by jurisprudence. There have been also used in numerous cases, by international tribunals, of which one is the European Court of Justice. Namely, in the *Van Gend en Loos* case, while interpreting Art. 12 of the EEC Treaty, the European Court stated that the intention of the parties is defined by the spirit, content and wording of a provision, in the light of the treaty as a whole.[23] It appears that, according to the European Court, this intention must be there to establish a special regime, designed to ascertain that individuals be the beneficiaries of certain rights.[24]

There have also been a great number of national judicial decisions concerning the doctrine of self-executing treaties. In *Sei Fujii v. California,* for instance, it was ruled that in order to determine whether a treaty is self-executing, courts must look to "the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution". The same judgement also provided that "for a treaty provision to be operative without further implementing legislation and have statutory effect and force, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts".[25]

In *Foster v. Neilson,* the USA Supreme Court stated that "only treaties that operate for 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".[26]

Furthermore, such an approach is reinforced by Art. 31(1) of the Vienna Convention on the Law of Treaties, which reads that: "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose". In conclusion, the issue of self-executing treaties

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[22] id, at 3

[23] *Van Gend en Loos v. Netherlands Inland Revenue Admin.,* 1963 E. Comm. Ct. J. Rep. 1.; [1963] CML rep. 129-130

[24] T. Buergenthal, Self-executing and non Self-executing Treaties in National and International Law, 235 RCADI 303(1992-IV), p. 328.

[25] *Sei Fujii v. State of California,* 19 ILR 312.

[26] *Foster v. Neilson, 27 US (2. Pet.) 1829.*

is primarily an issue of interpretation. This interpretation is to be based on the contents of a treaty, its wording and more specifically on the intent and the purpose of the contracting parties as manifested in it. In the light of the above, Arcadia will proceed to prove that the 1990 Bilateral Treaty is by no means a self-executing treaty.

(b) The intention of the parties to the Bilateral Treaty

Art. 65(2) of the 1990 Bilateral Treaty between Caribou and Arcadia reads: "in order to facilitate the exercise of consular functions, if a national of the sending state so requests, the competent authorities shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or if detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay".

It should be observed that the very first words of the aforementioned provision define its purpose. It is expressly provided into the treaty that this provision has been incorporated "in order to facilitate the exercise of consular functions". Consular relations between Caribou and Arcadia are mainly regulated by the 1963 Vienna Convention on Consular Relations[27]. After a difficult period in the relationship between the two countries though, it was deemed appropriate that certain elements of the 1963 Convention be reiterated in the 1990 Bilateral Treaty, so as to further emphasize the new era in the relations between the two states. As a matter of fact Art. 65(2) of the treaty, is an almost identical repetition of the first lines of Art. 36(1)(b) of the 1963 Convention. At this point it should be observed that Arcadia is not accused of violating any of its obligations deriving from the Convention, but only those deriving from the Bilateral Treaty.

Nonetheless, the Bilateral Treaty should be interpreted under the scope of the 1963 Vienna Convention, which sets the general framework within which consular relations between states are to be reviewed. As important bilateral or supplementary agreements may be, the Convention remains the main document regulating consular relations between signatory states[28], and provides the basic principles of understanding them. This is clearly expressed in Art. 65(3) of the Bilateral Treaty, which provides that "the provisions of paragraph (2) of this Article shall be applied consistently with the requirements of Article 36(1)(b) of the 1963 Vienna Convention on Consular Relations". Notwithstanding the fact that Art. 65 of the Bilateral Treaty is nearly a restatement of certain elements of the 1963 Convention, it is of the outmost significance that this express reference indices beyond any doubt that this specific provision should be interpreted and applied in the same manner.

According to the preamble of the 1963 Vienna Convention it was the explicit

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[27] 596 UNTS 261. Hereinafter referred to as the 1963 Vienna Convention.

[28] William J. Aceves, The Vienna Convention on Consular Relations. A study of rights, wrongs and remedies, *31 Va.. Journal of Transnat'l L. 257 (1998)*, p. 267.

understanding of the parties that its purpose was not to benefit individuals, but to ensure the efficient performance by consular posts of their functions on behalf of their respective states. The same conclusion can be reached through the interpretation of article 14 of the Convention. This provides that the receiving state "shall also ensure that the necessary measures are taken to enable the head of a consular post to carry out the duties of his office and to have the benefit of the provisions of the present Convention".

An important indication of the non self-executing character of article 36(1)(b) of the 1963 Convention in specific, is article 36(2), which provides that the rights referred to in its first paragraph shall be exercised in conformity with the laws and regulations of the receiving state. This indices that the contracting parties did not intend that the aforementioned provisions of article 36(1), therefore by inference also the identical provisions of Art. 65(2) as well, be of self-executing nature. To the contrary, they deemed it appropriate to provide in the text of the Convention for the need of further legislation for the implementation of these provisions.

It is thereupon established that legislative or administrative action is required for the implementation of Art. 65(2), as it is deduced through the reference to the 1963 Convention in the text of the Treaty. Such measures are analogous to the Regulations adopted by Arcadia in 1991, pursuant to the agreement. These regulations, that implemented the agreed upon changes to the regime governing the right of Caribou's citizens to travel in Arcadia, are yet another indication of the non self-executing character of the Bilateral Treaty.

Therefore, it is established that since article 65(1) of the Bilateral Treaty derives its content from the Vienna Convention, it is not intended to confer individual rights that can be exercised by Mr. Gask in Arcadia.

(c) Observance of Art. 65(2) of the Bilateral Treaty

It is submitted that some observations are due concerning the application of the provisions of the Bilateral Treaty. First of all, Art. 65(2) does not specify the identity of the "competent authorities" it refers to.[29] In this sense it cannot be directly applicable, as the necessity for implementing legislation or regulations is obvious, since the treaty demands of the parties to specify, or even possibly create the authorities competent to carry out the provisions of article 65(2).

Besides, the treaty does not specify a time limit or deadline set for complying with its provisions. A "delay" may range from a period of twenty-four hours to a few weeks, even a month. Any effort to specify the term "delay" by the means of interpreting the treaty in

[29] According to authority a treaty, in order to be self-executing, must adequately specify the organs or procedures necessary for its execution. See: Y. Iwasawa, The doctrine of self-executing treaties in the United States: A critical analysis, *Va. J. Int'l L (1985)*, at 671-673.; Albert Bleckman, supra note 19, p. 416.

connection to any objective factor of national judicial procedure is very difficult, since the obligation is not set for a specific manner of detention. It is, therefore, established that this term stands to be specified through national regulations, possibly after relevant consultations between the two states. Thereupon Arcadia submits that the provisions of article 65(2) lack precision as a prerequisite for direct application. Consequently, in the absence of implementing legislation, Mr. Gask could not make any relevant request.

Furthermore, Arcadia submits that article 65(2) does not introduce a procedural prerequisite. Therefore, even if the aforementioned provisions were self-executing, and subsequently were violated in any way, Mr. Gask could not invoke them before the national courts. There is a clear distinction between a treaty that is of self-executing character and one that creates a private right of action to seek judicial remedies. The Supreme Court of the USA in the *Breard v. Commonwealth* Case[30] held the position that "a treaty through its text or history must provide a clear and express statement in order for a particular right or obligation to be recognised by the federal courts". As a result the Supreme Court of Virginia refused to recognise the claim that the rules of procedural defaults did not apply to treaty obligations. Such a statement is not expressed in the treaty. Anyhow, even if that was the case further legislative implementation would still be required.

B. Arcadiahas not violated Article 65(2) of the bilateral theaty.

Arcadia submits that it has not violated article 65(2) of the 1990 Bilateral Treaty. Firstly, the one alleged violation is that Arcadia failed to ensure that Mr. Gask be informed of his right to have access to a consular official. An obligation to inform is provided for in the Vienna Convention, in Art. 36(1)(b). Although Art. 65(2) of the Bilateral Treaty is consistent with Art. 36(1)(b) of the Vienna Convention, it does not include in its contents this specific obligation. Consequently, Arcadia did not have a positive obligation under the Bilateral Treaty, which is the applicable law in this case to inform Mr. Gask of a pertinent right of his.

Nevertheless, Arcadia, as a well-organised democracy which respects its institutions that provide equality of law towards everyone, immediately after Mr. Gask's arrest, appointed a lawyer for him paid out of public funds. It is clear that Arcadia demonstrated due diligence to ensure that Mr. Gask would have legal advice and representation from the very first moment of his arrest.

Furthermore, Arcadia, had no right to interfere in the way Mr. Gask's lawyer conducted his defence and certainly could not and should not have knowledge of any information exchanged between an attorney and his client. A lawyer is expected to be aware of the law and his client's rights. What is more, the one provided to Mr. Gask had access to all the information necessary for his client's defence. Accordingly treaties should be one of the first law sources that should be reviewed by a reasonably diligent counsel representing a foreign

[30] Breard v. Commonwealth, 248 Va. 68 (1994)

national. In any case, it should be noted that consular notification and assistance at trial is a "complementary and subsidiary intervention which does not replace the accused's right to provide for himself a trusted legal representative for his defense".[31]

Secondly, and in consequence to the above, Arcadia submits that it did not interfere with Mr. Gask's efforts to contact a consular official of Caribou. Mr. Gask could contact a consular official through his attorney who was at all times in the position to help, and who should have acted in this direction if requested so. Eventually, it was his attorney's mistakes that deprived him of this possibility.

Finally, Arcadia submits that there is no reference in article 65(2) providing for an obligation to allow consular officials of Caribou to have access. The right of access of consular officials to prisons is a separate and distinct right provided for in article 36(1)(c) of the Vienna Convention. Yet, a provision of the same or an equivalent content is not repeated in the Bilateral Treaty. Neither is it possible that article 65(2) be interpreted in such a way as to provide for it in similar terms to article 31 of the Vienna Convention.

Therefore, it is clear that since the obligation does not exist at all in the applicable law, the allegation of its violation is bereft of legal justification. In conclusion, it is evident that Arcadia did not violate any of the obligations set forth in article 65(2) of the 1990 Bilateral Treaty.

C. No practical or material consequences would have flowed if Mr. Gask had been given access to a consular official.

Art. 65(2) of the Bilateral Treaty provides for the obligation of the receiving state to allow communication between a detained foreign national and a consular post of his or her state.

While it is true that communication with one's home state authorities in such a situation can be an invaluable source of moral support, this right is not connected in any way whatsoever to the reasons that led to this detention, or the prosecution method and procedures. In other words, even if Mr. Gask had been given immediate access to a consular official of Caribou, the course and result of the judicial proceedings would not have been altered in any way whatsoever.

The first important point in that respect is that Mr. Gask was immediately provided with adequate legal representation. Since Arcadia is not responsible and has no obligation to be aware of an attorney's capabilities and knowledge, it is clear that Mr. Gask has been treated equally to any other accused person. In the light of this reality even if Caribou had been earlier notified of Mr. Gask's situation it could not provide him with any further, more effective assistance before independent judicial fora than that of his lawyer..

Secondly, Arcadia did not by any means prevent Gask's counsel from invoking Art. 65(2) of the Bilateral Treaty during proceedings. The only fact required to raise this claim was the knowledge of Mr. Gask's foreign nationality. Consequently, Mr. Gask was tried under valid criminal justice proceedings, in accordance to the Arcadian rules of criminal procedure.

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[31] This was the reasoning of the Italian Court of Cassation in "In Re Yater Case", 77 ILR 541.

Therefore, Arcadia submits that the procedures concerning Mr. Gask before its courts were not prejudiced in any manner against him. A crime such as the one Mr. Gask committed carries a mandatory sentence of death in the state of Berkam. Accordingly, even if he had been provided with the best possible legal representation, it is very doubtful whether a more favourable judgment for Mr. Gask could be reached.

Consequently, Arcadia submits that the decisions of the Arcadian courts were not in anyway affected by any of the alleged violations of Art. 65(2) of the Bilateral Treaty, and accordingly reject on this additional ground the respondent's argument that such an alleged violation renders these judgements without legal effect.

Part III: Issues concerning allegations of inhuman and degrading treatment

A. An execution after a five year delay does not constitute inhuman and degrading threatment

(a) Lack of definition for inhuman and degrading treatment

Arcadia submits that there exists no customary norm of international law to the effect that the carrying out of an execution after a five-year delay constitutes inhuman and degrading treatment, and that consequently there are no reasons why the death penalty against Mr. Gask should be commuted.

Insofar as it might be possible to derive from the observation of the content and application of several international legal instruments, the prohibition of inhuman and degrading treatment appears to be indeed a norm of international customary law. However, there is no uniform interpretation as to what constitutes such treatment.

There is no clear definition of the term "inhuman and degrading treatment" in any international instrument. Art. 5 of the Universal Declaration of Human Rights of 1948[32] provides a mere recognition of a person's right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This is repeated *verbatim* in Art. 3 of the subsequent European Convention on Human Rights.[33] Article 7 of the International Covenant on Civil and Political rights of 1966[34] duplicates these provisions with the addition of prohibiting medical or scientific experimentation without one's free consent. Art. 5(2) of the American Convention on Human Rights of 1969[35] reaffirms the same rule, simply to connect the issue to the "inherent dignity of the human person". Likewise, Art. 5

[32] G. A. Resolution 217A(III), GAOR, 3rd Ser., Part I, Resolutions, p.71

[33] 213 UNTS 221. Entered in force in 1953.

[34] 999, UNTS 171. Arcadia has not signed or ratified the Covenant.

[35] Supra note 14.

of the African Charter on Human Rights and Peoples Rights of 1981[36] provides *inter alia* that "inhuman or degrading punishment and treatment shall be prohibited".

The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[37] was adopted in 1984. Despite the special character of this Convention with respect to the alleged treatment of Mr. Gask, it should be noted that it does not contain a definition of the term "inhuman or degrading treatment", while it does so in respect of torture in Art. 1(1).[38] This is due to the different views in regard to the desirability of dealing with such treatment and punishment in the Convention altogether. It was held that the concept of "cruel, inhuman or degrading treatment or punishment" was too vague to be included in a convention which was supposed to form the basis for the introduction of further criminal legislation in the contracting parties[39].

France considered for instance that cruel, inhuman or degrading treatment or punishment involved acts of physical or mental torture, from which no effective distinction could be drawn. Accordingly, it contended that torture should be defined in such a way as to encompass both torture and inhuman or degrading treatment or punishment Moreover, Switzerland proposed a specific provision in the Convention, according to which the term "torture" should include cruel, inhuman or degrading treatment or punishment.[40] In the end, Art. 16 was only formulated so as to indicate that the gravest form of inhuman and degrading treatment is torture. The same is indicated by the similar provision of Art. 6(3) of the Inter-American Convention to Prevent and Punish Torture.[41]

At this point, it will be of special significance to quote the definition that the European Commission of Human Rights gave for the concept of "inhuman or degrading treatment or punishment" as it appears in Art. 3 of the European Convention on Human rights, in the *Greek Case.*[42] The special gravity of this case lies in the fact that it provided guidelines to those who proposed the text of a definition for "inhuman and degrading treatment" to be

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[36] 21 ILM 59 (1982).

[37] 23 ILM 1027 (1984); 24 ILM 535. Entered in force in 1987.

[38] Art.1 defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in a official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

[39] J. Herman Burgers and Hans Danelius, *The UN Convention against Torture, A handbook on the Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, International studies of human rights, Martinus Nijhoff Publishers, 1988*, p.47.

[40] *Id.* p.47.

[41] 25 ILM 519 (1986)

[42] The Greek Case, 12 Yb. Eur. Conv. Hum. Rts., (1969).

included in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on 9th December 1975[43], that eventually served as the basis for the UN Convention of 1984.

According to the Commission "the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable". Furthermore, the Commission held, "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".[44] The terms used in the above definition lack precision and are vague by nature. In consequence, every case should be judged *in concreto.*

Severity, in particular, is a very relevant term that requires further analysis. While it could be accepted that there is a quite uniform understanding of physical suffering, a definition of mental suffering is by nature absolutely relevant to one's own perception and cultural background. Thus, since a case should always be judged *in concreto*, there is no way of defining the applicable objective rule. The European Court of Human Rights has stressed that ill treatment must attain a minimum level of severity if it is to be considered inhuman, and that "the assessment of this minimum is, in the nature of things relative".[45] Therefore, a considerable amount of pain , physical and/or mental will have to be tolerated in the light of special circumstances.[46]

In conclusion, Arcadia submits that customary international law in relation to Inhuman and Degrading Treatment does not provide an adequate definition of the term, but rather a number of subjective criteria. Arcadia shall proceed to prove that a five-year delay of execution does not meet this criteria.

(b) The so-called death row phenomenon

Arcadia submits that the death penalty itself does not constitute inhuman or degrading treatment. Although the opposite could be argued, it must be observed that for most international instruments death penalty is not prescribed to be a degrading treatment.[47] Furthermore, the UN Human Rights Committee has repeatedly deemed death penalty not

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[43] Art. 1(1) provides a definition of torture. Art. 1(2) states that "torture is an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." Supra note 7.

[44] Supra note 41, p.186

[45] *Ireland v. United Kingdom*, judgement of 18 January 1978, 1978 ECHR Series A, no 25, p. 65;

[46] There are many cases which were rejected on this ground. See: *Application no.4220/69 v. United Kingdom*, Yearbook on the European Convention of Human Rights vol.14, p.250; *Tyrer v. United Kingdom*, Application no.5356/72, Report of the Commission, p.14; *Ireland v. United Kingdom*, Application no.5310/71, Report of the Commission p.471.

[47] Namely, the 2nd optional protocol of the international covenant on civil and political rights, concerning the prohibition of the death penalty.

per se unlawful.[48] Of course it is clearly established that it should be carried out in accordance with international human rights standards.

Caribou alleges that the carrying out of an execution after a five-year delay constitutes inhuman and degrading treatment.[49] It is true that a long delay before an execution can create a certain amount of mental strain and anxiety. It is questionable, though, whether this can be considered severe mental suffering, since generally, every single day of life in detention could be considered in essence a fate preferable to death. In any case, during the time of his detention Mr. Gask had had adequate means of communication through his attorney. He also had continuous access to his family at the time of his as well as during the trial.

Moreover, Arcadia submits that prolonged periods of detention under a severe custodial regime on death row cannot be considered to constitute inhuman and degrading treatment, if the convicted person is merely availing himself of appellate remedies. Although prolonged judicial proceedings may be the source of mental strain and tension, they do not *per se* constitute inhuman and degrading treatment.

In the *Johnson v. Jamaica* case[50] the Human Rights Committee held that there was no breach of Art. 7 of the International Covenant of Civil and Political Rights, in the absence of compelling circumstances, although Mr. Johnson's detention on death row had already lasted for eleven years.

The machinery of justice of Arcadia respects the rule of law and affords considerable procedural safeguards to the defendant. In the present case, Mr. Gask spent five years in prison pursuing the exhaustion of all available local remedies. More specifically, he was convicted to death on 1 March 1993, and almost immediately appealed to the state of Berkam Court of Criminal Appeals, on 3 March 1993. After all grounds of appeal were rejected in September 1995, he appealed the judgement without any delay on 1 October 1995 to the Supreme Court of the state of Berkam. His appeal was unanimously rejected in October 1996 which resulted to his final appeal on 1 December 1996 to the Supreme Court of Arcadia. On 10 July 1998 the Supreme Court of Arcadia rejected the case.

All these remedies available under Arcadian law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed. An acceleration of such a prolonged appeal system, however, would only result in earlier executions, should the appeals be unsuccessful. Therefore, it is established that the alleged delay is justified because it protects Mr. Gask's interests.

Subsequently, it must be accepted that death row inmates contribute significantly to the so-called death row phenomenon through the exercise of the aforementioned State and

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[48] Cases Nos. 210/1986 (Earl Pratt v. Jamaica), and 225/1987 (Ivan Morgan v. Jamaica). CCPR/C/35/D/210/1986 and 225/1987, par. 15.

[49] The Court should take into account that according to the Agreement of July 1998 between Arcadia and Caribou the period during which the International Court's proceedings ran should not count in relation to any arguments which have been raised as to delay in execution.

[50] *Johnson v. Jamaica, (1997)* 4 I.H.R.R. 21, at 27.

Federal rights of appeal.[51] The responsibility of exercising remedies is to be born exclusively by the defendant, according to the principle of *iure suo uti nemo cogitur,* unless of course there is the possibility of an automatic appeal, which is not the case in the Arcadian judicial system. Therefore, Arcadia submits that it did not cause the alleged delay, which in fact cannot by any means be imputable to it. It is, therefore, evident that the applicant cannot essentially rely upon delays caused primarily by the exhaustion of the legal remedies by the defendant.

Consequently, it cannot be argued that the execution of a death penalty after a five-year delay is degrading. It is in no sense humiliating and obviously does not impose on the prisoner any action or behavior against his will or consciousness. Neither does it aim to humiliate the convicted person or force him to do anything contrary to his own will. The mere detention, no matter how long, does not in any manner degrade the prisoner nor does it entail any intent to do so. That is so because the purpose of his detention and of the alleged delay is to guard the prisoner and his rights until a final verdict is reached.

In conclusion, Arcadia asks the Court to adjudge and declare that there is no crystallized norm of customary international law to the effect that Mr. Gask's imminent execution after the lapse of five years is inhuman and degrading treatment, and, subsequently, to reject the relevant submission of the applicant that Mr. Gask's sentence should be commuted.

SUBMISSIONS

The federated States of Arcadia respectfully asks the court to adjudge and declare as follows that:.

1. Mr. Gask's conviction to death falls in substance under section 1 of Arcadia's reservation. Consequently the Court has no jurisdiction to entertain the present case.

2. The second paragraph of Arcadia's reservation is applicable in the present case. Therefore, Arcadia submits that the Court has no jurisdiction to entertain the merits of the case, and requests that the case be dismissed.

3. The criteria for applying the principle of *lis alibi pendens* are met and therefore the case should be dismissed.

4. Art. 65(1) of the Bilateral Treaty derives its content from the Vienna Convention, and therefore it is not intended to confer individual rights that can be exercised by Mr. Gask in Arcadia.

5. Arcadia has not violated any of the obligations set forth in article 65(2) of the 1990 Bilateral Treaty.

6. The decisions of the Arcadian courts are not in anyway affected by any of the alleged violations of Art. 65(2) of the Bilateral Treaty. Accordingly Arcadia asks the Court to reject the applicant's argument that such an alleged violation renders these judgments without legal effect.

7. There is no crystallized norm of customary international law to the effect that Mr. Gask's imminent execution after the lapse of five years is inhuman and degrading treatment. Therefore, the relevant submission of the applicant that Mr. Gask's sentence should be commuted, must be rejected.

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[51] This was the opinion of the European Human Rights Commission in the Soering case; *Soering v. United Kingdom,* Judgment of 7 July 1989, 1989 ECHR, Series A, No 161, p.62.