1444

IN THE

INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

QUESTIONS RELATING TO THE PROTECTION OF SEA TURTLES

THE FEDERAL STATES OF ATTERAC

(APPLICANT)

V.

THE REPUBLIC OF REDONDA

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

2013

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STATEMENT OF JURISDICTION

Pursuant to the Joint Notification and the Record concluded on 14th June, 2013, including the Clarifications agreed to therein, between the Federal States of Atterac and the Republic of Redonda ["the Parties"], and in accordance with Article 40(1) of the Statute of the International Court of Justice, the Parties hereby submit to this Court, their dispute regarding the differences between the States concerning the Questions Relating to the Protection of Sea Turtles.

In accordance with Article 1 of the Special Agreement, notified to the Court on 14th June, 2013, the International Court of Justice is hereby requested to adjudge the dispute in accordance with the rules and principles of international law, including any applicable treaties.

The parties have agreed to respect the decision of this Court.

QUESTIONS PRESENTED

I. **WHETHER REDONDA HAS VIOLATED INTERNATIONAL LAW BY FACILITATING, ALLOWING OR FAILING TO PREVENT THE MAROONS FROM HUNTING THE KILPKONN SEA TURTLE AND THE COLLECTION OF ITS EGGS?**

II. **WHETHER THE HUNTING OF THE KILPKONN AND THE COLLECTION OF ITS EGGS BY THE MAROONS IS PROTECTED UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS?**

STATEMENT OF FACTS

The Federal States of Atterac ["Atterac"] and the Republic of Redonda ["Redonda"] are located in the Chelonia sea region, which is home to the endangered Kilpkonn sea turtle ["Kilpkonn"]. Atterac is a developed nation with a population of approximately 35 million. The tourism industry, with an emphasis on ecotourism, accounts for approximately 5% of its gross domestic product. **(R.¶2)** Redonda is a developing island nation with a population of approximately 2 million. The Maroons in Redonda are descendants of slaves who escaped from plantations in the region, and they are dependent on subsistence harvesting from the Chelonia sea. **(R.¶3)**

Along with a 200-mile exclusive-economic zone ["EEZ"], Redonda also asserts a claim to the "presential sea", an area between 200 and 250 nautical miles from its territorial sea baseline. Through the Redonda Presential Sea Act ["RPSA"], Redonda has expressed its continuing and significant national interest in the activities that occur in proximity to its EEZ. **(R.¶16)**

One Maroon community, with about 2000 members, hunt the Kilpkonn and collect its eggs pursuant to their unique rite to adulthood**. (R.¶3)** Redonda's law that prohibits the killing or capturing of sea turtles and the collection of its eggs exempts the Maroons. **(Clarifications.A10)**

Before 2002, the Maroons hunted in Redonda's territorial sea and its EEZ; however since 2003, Maroons have tagged certain Kilpkonn with tracking devices with the support of Redondan Ministry of Cultural Affairs, allowing them to hunt in the presential sea **(R.¶19)**and allowing Redonda to share the Kilpkonn' migration related data with other States in the region. **(Clarifications.A33)**

Redonda has signed but not ratified the 1995 Chelonia Sea Agreement [“CSA”] regarding the protection and conservation of sea turtles due to concerns regarding the Maroons. **(R.¶13)**

Subsequently, in a series of diplomatic exchanges, Atterac alleged violation of international law by Redonda in allowing the Maroons' activities in relation to the Kilpkonn, **(R.¶17)** whereas, Redonda asserted its sovereign right to exploit its own natural resources. **(R.¶25)**

Failing to resolve the disputes, the Parties have agreed to submit the matter to the International Court of Justice.

SUMMARY OF ARGUMENTS

Redonda has not violated international law by allowing the Maroons to hunt the Kilpkonn within its EEZ, and to collect its eggs on its territory, as it has lawfully exercised its sovereign right to exploit its natural resources. It has acted in accordance with its obligations under the United Nations Convention on the Law of the Sea ["UNCLOS"] and the Convention on Biological Diversity ["CBD"], by undertaking proper conservation measures through its domestic law to avoid "over-exploitation" of the Kilpkonn. Further, Redonda has not violated its interim obligations by not defeating the object and purpose of the Chelonia Sea Agreement for the Protection and Conservation of Sea Turtles ["CSA"], the provisions of which, in any case, do not constitute regional customary law.

Convention on International Trade in Endangered Species of Wild Fauna and Flora ["CITES"] is not applicable to the Maroons' activities in the presential sea as Redonda lawfully exercises sovereign rights therein by virtue of its lawful interest within the area closely related to its national jurisdiction. Therefore, the hunting of the Kilpkonn in the presential sea constitutes 'domestic use' and does not amount to an "introduction from the sea".

Further, Redonda has not violated its international obligations as it is protecting the rights of the Maroons under Article 1(2) and 15 of the International Covenant of Economic, Social and Cultural Rights ["ICESCR"]. The Maroons are "people" and alternatively, a protected minority, and thus cannot be deprived of their means of subsistence. Further, the tagging and tracking of the Kilpkonn is protected as it is a modernized part of the Maroons' culture.

Redonda's obligation to protect the Maroons' cultural-subsistence rights under the ICESCR prevail over restrictions on the hunting of the Kilpkonn as international law provides

exemptions to traditional users. Further, CITES and CBD give deference to Redonda's obligations to protect the Maroons.

ARGUMENT

I. REDONDA HAS NOT VIOLATED INTERNATIONAL LAW BY FACILITATING, ALLOWING OR FAILING TO PREVENT THE MAROONS FROM HUNTING THE KILPKONN AND COLLECTING ITS EGGS.

Redonda has not violated international law by facilitating and allowing the collection of eggs of the Kilpkonn on its territory, the hunting of the Kilpkonn within its EEZ**[A]**and in its "presential sea"**[B]**.

A. REDONDA HAS NOT VIOLATED INTERNATIONAL LAW BY FACILITATING AND ALLOWING THE HUNTING OF THE KILPKONN WITHIN ITS EEZ AND THE COLLECTION OF ITS EGGS ON ITS TERRITORY.

Redonda has not violated international law in allowing Kilpkonn as it has not violated its obligations under the UNCLOS,[1] the CBD[2]**[i]** and the CSA**[ii]**.

[1] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S 397 [hereinafter UNCLOS].

[2] Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S 79 [hereinafter CBD].

i. REDONDA HAS NOT VIOLATED THE UNCLOS AND THE CBD IN EXPLOITING THE KILPKONN.

a. *Redonda has the sovereign right to exploit its own resources pursuant to its own environmental policies.*

The UNCLOS[3] and the CBD[4] give States Parties the sovereign right to control the exploitation and use of its natural resources, including biological resources,[5] despite being a 'shared resource'.[6] Thus, the Kilpkonn constitute a natural resource which Redonda and its people may exploit.

Further, all States have the sovereign right to exploit their natural resources pursuant to their own environmental policies,[7] such that the well-being of their people is not adversely affected.[8] Since, maintaining the cultural use of natural resources is related to *well-being*,[9]

[3] UNCLOS, *supra* note 1, art.193, 56.

[4] CBD, *supra* note 2, art.3.

[5] CBD, *supra* note 2, Preamble ¶4; NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES 19 (2008).

[6] Chris Wold, *The Status of Sea Turtles under International Environmental Law and International Environmental Agreements*, J. INT'L WILDLIFE & POL.11, 23 (2002) [hereinafter Wold].

[7] Stockholm Declaration, 11 I.L.M. 1416, Principle 21.

[8] *Id.* Principles 2,11.

[9] S. Colquhoun & A. M. Dockery, *The link between Indigenous culture and wellbeing: Qualitative evidence for Australian Aboriginal peoples*, (Curtin Business School, Centre for

Redonda has lawfully exercised its sovereign right by providing an exception to the Maroons in its environmental policy by allowing them to hunt the Kilpkonn and collect its eggs pursuant to their cultural practices.

b. *Redonda has not violated its obligations under the UNCLOS.*

Article 61 of the UNCLOS obligates States Parties to undertake "proper conservation and management measures" by ensuring that the living resources in the EEZ are not over-exploited. According to the International Union for Conservation of Nature ["IUCN"] which has listed the Kilpkonn as a critically endangered species under the Red List,[10] conservation measures for critically endangered species have to take into consideration the socio-cultural value of the human requirements for the endangered species.[11]

Accordingly, Redonda prohibits any capture, killing of, and the collection of eggs of sea turtles, only exempting the Maroons on account of their cultural-subsistence practices.[12] *Further,* utilization has in fact been acknowledged as a valid conservation technique, where socio-economic and cultural conditions warrant it.[13] The tagging of the Kilpkonn with Redonda's

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Labour Market Research Discussion Paper Series 2012/1, 2012); P. B. Richardson, et. al., *Marine Turtle Fisheries in the UK Overseas Territories of the Caribbean: Domestic Legislation and the Requirements of Multilateral Agreements,* J. INT'L WILDLIFE & POL.223, 224 (2006).

[10] Clarifications.A31.

[11] John N. Kittinger et al., *Sociocultural significance of the endangered Hawaiian monk seal and the human dimensions of conservation planning,* 17 ENDAN SPECIES RES 139 (2012).

[12] Clarifications.A26.

[13] Lisa M. Campbell, *Contemporary Culture, Use, and Conservation of Sea Turtles*, 2 THE BIOLOGY OF SEA TURTLES 301, 321 (2002) [hereinafter Campbell].

support[14] admittedly provides for its 'use', however, it also allows for monitoring the Maroons' activities. Therefore, by considering the "vital role of indigenous peoples" in environmental management,[15] Redonda has instituted a "proper conservation and management measure" pursuant to its obligation under Article 61 to ensure that the Kilpkonn are not over-exploited in the EEZ.

c. *Redonda has not violated its obligations under the CBD.*

Article 3 of the CBD obligates Redonda to ensure that the activities within its own jurisdiction do not harm the environment of other States. The ILC[16] recognizes that the threshold for such transboundary harm, under customary international law, only prohibits *"significant"* environmental harm. Accordingly, not all transboundary effects due to the use of natural resources are prohibited.[17] Such a limitation is also implicit under Principle 21 of the Stockholm

[14] R.¶19.

[15] Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874, Principle 22 [hereinafter Rio]; World Summit on Sustainable Development, Plan of Implementation, A/CONF.199/L1 ¶6(e) [hereinafter World Summit].

[16] Report of the International Law Commission (ILC), U.N. GAOR, 56th Sess., Supp. No. 10, 151, UN Doc.A/56/10 (2001).

[17] Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. Int'l Affairs 457, 463-64 (1991).

Conference,[18] which must be read into Article 3 of the CBD, as soft law informs the treaty obligations, to the extent that it articulates general principles of law agreed by consensus.[19]

"Significant harm" has not been caused to Atterac as the loss of revenue is an indicator for *severity of environment damage* for States involved in eco-tourism.[20] Atterac has not incurred *any* economic harm pursuant to the activities of the Maroons,[21] even though eco-tourism accounts for approximately 5% of its gross domestic product.[22]

In any case, the duty to not cause transboundary harm is an obligation of conduct.[23] Since Redonda's conduct demonstrates due-diligence and undertaking feasible measures[24] of prohibiting all other hunting of the Kilpkonn through its laws[25] and sharing data regarding their migration patterns with other States in the region,[26] it has not violated its duty under Article 3 of the CBD.

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[18] Georg Dahm et al., PUBLIC INTERNATIONAL LAW 446 (2d ed. 1989) *in* Franz Xaver Perrez, *"The relationship between permanent sovereignty and the obligation not to cause Transboundary Environmental Damage"* 26 ENVIRONMENTAL LAW 1190, 1200 (1996).

[19] Alan Boyle, *Soft Law in International Law-Makin*g, *in* MALCOLM D. EVANS, INTERNATIONAL LAW 133 (3ded., 2010).

[20] Wold, *supra* note 6, at 16.

[21] Clarifications.A17.

[22] R.¶2.

[23] Report of the ILC, U.N. GAOR 48th Sess., Supp. No. 10, 110 U.N. Doc. A/51/10 (1996).

[24] XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 164 (2003).

[25] Clarifications.A26.

[26] R.¶33.

ii. REDONDA IS NOT BOUND BY THE CSA.

Article 18 of the Vienna Convention on Law of the Treaties[27] ["VCLT"] cannot be invoked to bind Redonda as it has made its intention clear not to become a party through its conduct.**[a]** *In the alternative,* even as a signatory, Redonda has not violated its interim obligation, to not defeat the object and purpose of the CSA pursuant to Article 18 of the VCLT.**[b]** *In any case,* Redonda is not bound by the provisions of the CSA as it does not constitute regional customary law.**[c]**

a. *Article 18 of the VCLT cannot be invoked as Redonda made its intention clear not to become a party.*

A State may make its intention clear to not ratify a treaty, and hence withdraw from its obligations under Article 18 of the VCLT. Since, Article 18 does not set up any formal requirement for "making the intention clear", the expression of that intention through *implied conduct* cannot be excluded.[28] Such conclusion is also supported by the inaction on part of the Drafting Committee regarding an amendment proposed by Malaysia to Draft Article 15, suggesting "expression of intention in the *clearest* terms".[29]

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[27] Vienna Convention on the Law of Treaties, art.18, May 23, 1969, 1155 U.N.T.S 331 [hereinafter VCLT].

[28] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 228,251(2009) [hereinafter Villiger]; T. Hassan, *Good Faith in Treaty Formation* (1981) 21 Va. J. Int'l. L. 443, 456-457.

[29] Malaysia: U.N.Doc. A/CONF.39/C.1/L.122, *in* United Nations Conference on the Law of Treaties, 1st.Sess., U.N. Doc. A/CONF.39/C.1/SR.18 (1968).

Redonda has clearly signified its concern regarding the potential impact of the CSA on Maroons.[30] *Moreover*, an unreasonable postponement of ratification may also offer an indication as to the signatory's intention.[31] Accordingly, the lapse of 15 years since Redonda signed the CSA[32] must be interpreted as an expression of Redonda's intention to not ratify the treaty. Therefore, Article 18 cannot be invoked since Redonda has made its intention clear, to not ratify the CSA through implied conduct.

b. *In the alternative, Redonda has not violated its interim obligation to not defeat the object and purpose of the CSA under Article 18 of the VCLT.*

1. Redonda is does not have an interim obligation under the CSA to restrict the Maroons' activities.

Article 18 of the VCLT does not require specific observance of a treaty,[33] but to "refrain" from certain acts, thus requiring a passive conduct on part of the States.[34] Enforcement of the measures provided for under the CSA[35] to restrict Maroons' activities, would constitute specific

[30] R.¶14.

[31] Vertrauensschutz Müller, 163, *in* Villiger, *supra* note 28 at, 251.

[32] R.¶13.

[33] M.A. Rogoff, *The Interim Legal Obligations of Signatories to an Unratified Treaty*, 32 MAINE LR 263, 297 (1980).

[34] Villiger, *supra* note 28, at 249.

[35] R. Annex B, Article III (a), (c), CSA.

observance of the CSA itself, which is not required as per the obligation under Article 18 of the VCLT, as then the act of ratification would have no purpose.[36]

2. *In any case*, the deference given to the Maroons is consistent with the objectives of the CSA.

Acts which are not prohibited by a treaty cannot constitute a violation of the interim obligation.[37] Since the *object clause* of the CSA provides that a State may take into account its cultural characteristics while implementing the measures under the CSA,[38] Redonda has not violated its interim obligation under the CSA in allowing hunting pursuant to the Maroons' cultural practices.

3. Facilitation of the hunting of the Kilpkonn does not amount to a "defeating act".

Not every departure from the provisions of a treaty, pending its ratification or entry into force, will automatically defeat its object and purpose – otherwise the treaty would *de fact*o enter into force upon signature.[39] "*Defeating*" the object and purpose connotes actions of a much more

[36] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE, 107 (3rd ed., 2013)

[37] Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.I.C.J. 29 (ser. A), No. 7, at 39.

[38] R.Annex-B, Article II.

[39] J Klabbers, *Strange Bedfellows: The 'Interim Obligation' and the 1993 Chemical Weapons Convention, in* ISSUES OF ARMS CONTROL LAW AND THE CHEMICAL WEAPONS CONVENTION: OBLIGATIONS INTER SE AND SUPERVISORY MECHANISMS, E Myjer (ed.) 18 (2001).

severe nature than those that are merely "*incompatible*" with the object and purpose.[40] The obligation is to do nothing which might impair the operation of its clauses.[41] Therefore, facilitation of hunting of the Kilpkonn only by the Maroons, does not impair the performance of the CSA as a whole and merely constitutes a departure.

c. *In any case, Redonda is not bound by the CSA as it does not constitute regional customary law.*

The substance of the provisions of a treaty as regional customary law must be found "primarily in the actual practice and *opinio juris* of States."[42] The provisions of the CSA, invoked as regional custom, neither satisfy the state practice element nor the *opinio juris* element.**[1]***Alternatively*, being a 'persistent objector', Redonda has contracted out of the alleged custom.**[2]**

1. <u>The provisions of the CSA do not constitute regional customary law as they don't satisfy the state practice element nor the *opinio juris* element.</u>

Admittedly, a treaty provision can pass into customary law,[43] however, there is a wide consensus among tribunals[44] and scholars[45] that the State purporting the existence of a *regional*

[40] OLIVER DORR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES 233 (2012).

[41] *Megalidis* v. *Turkey,* 8 Recueil des decisions Tribinaux Mixtes 386, 395 (Tukish-Greek Mixed Arb.Trib. 1928).

[42] Continental Shelf Case (Libya v. Malta), 1985 I.C.J. 13 (Mar. 21).

[43] North Sea Continental Shelf(Ger. v. Den., Ger. v. Neth.), 1969 I.C.J. 3, ¶ 72 (Feb. 20).

custom must prove a "constant and virtually uniform" state practice and hence, requires "unanimous consent". Redonda's non-ratification of the CSA clearly shows insufficient uniformity in state practice, essential for the formation of regional customary law.

Further, when a regional custom is alleged, the proponent "must prove that this custom has become binding on the other party".[46] Thus, a regional custom, requires a higher standard of proof than in cases where general customary law is alleged, thereby making the positive acceptance of an obligation indispensable.[47] Redonda's domestic law on prohibition of the killing of sea turtles specifically provides for the exception to Maroons, thus, Redonda does not display a positive acceptance of the obligations under the CSA.

2. Redonda has contracted out of the alleged custom by being a 'persistent objector'

The principle of persistent objector is well recognized by international tribunals, and in the practice of the States.[48] Hence, a State may contract out of a custom in the process of its formation.[49]

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[44] *Id.* at ¶74; Columbian-Peru Asylum (Colum. v. Peru) 1950 I.C.J. 277 (Nov. 20) [hereinafter Asylum].

[45] D'Amato, Anthony, *The Concept of Special Custom in International Law*63 Am. J. Int'l. L. 211 (2010).

[46] Asylum, *supra* note 44, at 276.

[47] MALCOLM N. SHAW, INTERNATIONAL LAW 92 (6th ed. 2008).

[48] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 11 (2008).

[49] Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131.

The non-ratification of the CSA and maintenance of the exception for Maroons in its domestic law evinces persistent objection by Redonda against the provisions of the CSA. Accordingly, a presumption of acceptance of the CSA is rebutted.

B. REDONDA HAS NOT VIOLATED INTERNATIONAL LAW BY FACILITATING, ALLOWING AND OTHERWISE FAILING TO PREVENT THE HUNTING OF THE KILPKONN IN ITS "PRESENTIAL SEA".

The "presential sea" is lawfully subject to the sovereign right of Redonda.**[i]***Accordingly*, the CITES[50] is not applicable to the Maroons' activities in its presential sea since there is no "introduction from the sea".**[ii]**

i. THE PRESENTIAL SEA IS LAWFULLY SUBJECT TO THE SOVEREIGN RIGHTS OF REDONDA.

Redonda's exercise of sovereign rights in the presential sea does not violate the UNCLOS.**[a]** Further, such exercise is consistent with the recognized principles of jurisdiction under international law.**[b]**

a. *The exercise of sovereign rights does not violate the UNCLOS.*

1. The exercise of sovereign rights by Redonda is in accordance with Article 89 of the UNCLOS.

Admittedly, Article 89 provides for invalidity of claims of sovereignty over the high seas. However, the exercise of jurisdiction over high seas, which is a consequence of sovereignty,[51] does not always denote a sovereign claim but can be an exercise of sovereign right.

[50] The Convention on International trade in Endangered Species of Wild Fauna and Flora,Mar.3, 1973, 993 UNTS 243 [hereinafter CITES].

'Sovereignty' entails the requirement for independence to the exclusion of any other State,[52] as opposed to exercise of sovereign right which denotes "something less than full sovereignty".[53] Since the RPSA does not limit the sovereign right of other States from regulating its nationals and vessels therein,[54] it does not purport to exercise sovereignty over the presential sea.

The absence of any restriction on exercising 'sovereign rights' under Article 89, as opposed to Article 137(1) of the UNCLOS indicates that a blanket-ban on exercising jurisdiction in the high sea does not exist, applying the principle, *expressio unius est exclusio alterius* [the expression of one thing means exclusion of all others].[55] This interpretation is supported by the *travaux préparatoires* of the UNCLOS for Draft Article 27, wherein the proposals to include restriction in the high seas for "any authority whatsoever" were not adopted.[56]

Therefore, the prescriptive jurisdiction under the RPSA for the limited purpose of regulating activities therein implies the exercise of *sovereign rights*, and therefore does not violate Article 89 of the UNCLOS.

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[51] F.A. MANN, THE DOCTRINE OF INTERNATIONAL JURISDICTION REVISITED AFTER TWENTY YEARS, 20 (1984).

[52] Island of Palmas Case (1928) 2 R.I.A.A 829, 838.

[53] Aegean Sea Continental Shelf Case, (Greece v. Turk.) 1977 I.C.J. 3,¶81 (Dec. 19).

[54] R.¶16.

[55] LORD MCNAIR, THE LAW OF TREATIES, 402 (1961).

[56] Portugal: A/CONF.13/C.2/L.7; Yugoslavia: A/CONF.13/C.2/L.15 *in* United Nations Conference on Law of the Sea, Vol.II, U.N.Doc.A/CONF.13/40 (1958).

2. The exercise of sovereign rights by Redonda does not violate Article 87 of the UNCLOS

The right to exercise freedom of the high seas under Article 87 of the UNCLOS is not absolute in nature.[57] The UNCLOS qualifies this right by obligating States Parties to recognize the coastal States' interests and to cooperate in regulating activities beyond the EEZ. Redonda has not violated the right of the States to exercise freedom of the high seas as Redonda's exercise of sovereign right is an expression of lawful interest in the presential sea **[(i)]** and such interest is lawfully enforced.**[(ii)]**

(i) Redonda's exercise of sovereign rights is an expression of its lawful interest in the presential sea.

The coastal State interest in areas of the high seas closely related to the areas under national jurisdiction is extensively recognized in the law of the sea regime.[58]Article 116 of the UNCLOS obligates States Parties not to undercut the coastal States' interests. Such interest is based on the biological fact that high sea fishing may have adverse consequences on the stocks within the EEZ.[59] Therefore, Redonda, with dependence on the fish stocks,[60] has a lawful interest to regulate activities in the presential sea, as stocks in the *adjacent* high seas are inseparable from the EEZ in terms of management.

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[57] UNCLOS, *supra* note 1, art.87¶2

[58] LAWRENCE JUDA, INTERNATIONAL LAW AND OCEAN USE MANAGEMENT 258-61,278 (1996).

[59] Division for Ocean Affairs and Law for the Sea, UN Office of Legal Affairs, *The Regime for High Sea Fisheries: Status and Prospects* 21, ¶62(1992).

[60] R.¶3.

(ii) Redonda's interest in the presential sea is enforced in accordance with UNCLOS.

The UNCLOS provides a duty to seek agreement with the coastal States regarding the management of stocks that appear both within and beyond its EEZ ["straddling stocks"].[61] This duty requires that the measures in the EEZ and adjacent high seas are to be compatible.[62] Therefore, coastal State policy within its EEZ acts as a prevailing element, for the regulation of high sea fisheries beyond the EEZ.[63] Thus, Article 116 must be interpreted to mean that high seas' fishing for a straddling stock is subject to the reasonable exercise of sovereign rights of the coastal State.[64]

Thus, Redonda's jurisdiction under the RPSA to regulate the activities in accordance with its laws through a mechanism for cooperation is lawful under the UNCLOS, and is a consequence of the reasonable exercise of its sovereign rights under Article 116.

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[61] UNCLOS, *supra* note 1, art. 63(2).

[62] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art.7(2)(a), Aug.4, 1995, 2167 U.N.T.S. 3 [hereinafter Fish Stocks Agreement].

[63] FRANCISCO ORREGO VICUÑA, THE CHANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES 190 (1999).

[64] WILLIAM T. BURKE, THE NEW INTERNATIONAL LAW OF FISHERIES, UNCLOS 1982 AND BEYOND 133 (1994).

b. *The exercise of sovereign rights is in consonance with the recognized principles of jurisdiction.*

The 'territorial principle' supports a country's jurisdiction on resources, which though located outside its territory; are conceded by international law to be within its control.[65] The RPSA finds its lawful basis in this principle as it provides jurisdiction to Redonda to protect its coastal State interests in the "straddling stocks" though actually located beyond its EEZ but which are subject to the reasonable exercise of Redonda's sovereign rights in the *adjacent* high seas under the UNCLOS.

Additionally, the allocation of jurisdiction to States under the UNCLOS regime is in terms of the State's functions. This forms the basis for the principle of "functional jurisdiction" in the "law of the sea" regime.[66] Redonda's jurisdiction under the RPSA is pursuant to the coastal States' duty to seek cooperation with other States in the management of the high sea fisheries and to demand negotiation towards that end. Therefore, the exercise of such jurisdiction in furtherance of the coastal state's function incumbent upon Redonda under UNCLOS, is lawful.

ii. THE HUNTING OF THE KILPKONN IN THE PRESENTIAL SEA DOES NOT AMOUNT TO AN "INTRODUCTION FROM THE SEA".

"Introduction from the sea" ["IFS"] as per Article 1(e) of the CITES requires transportation from the "marine environment not under the jurisdiction of any State", which according to Resolution Conference 14.6 (Rev.COP16) adopted in 2007, means areas beyond the

[65] D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 BYIL 1, 5 (1982).

[66] MARIA GABUNELĒ, FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA 39 (2007).

sovereignty or the area beyond which States exercise sovereign rights consistent with international law, as reflected in the UNCLOS.

Since the presential sea is subject to exercise of Redonda's sovereign rights, which are consistent with international law, it does not constitute 'marine environment not within the jurisdiction of any State.

Moreover, in order to determine IFS, resolutions adopted by the other conferences of the parties must be taken into account, which as per Article 31(3) of the VCLT provide a valid tool to determine IFS.[67]

In particular, Resolution Conference 11.4,[68] recognizes that the jurisdiction of the Parties with respect to marine resources in their adjacent seas is not uniform in extent and varies in nature. Also, it was noted that to determine IFS, state practice and *any possible evolution* of the UNCLOS should be considered,[69] thus, signifying the intention of the parties to provide an *evolutionary interpretation*,[70] to the term 'jurisdiction' under CITES. The jurisdiction provided

[67] Eric Franck, *Applications of the Term "Introduction from the Sea",* http://www.cites.org/eng/news/meetings/ifs-05/term_IFS.pdf (last visited Oct. 30, 2013).

[68] CITES, Res. Conf. 11.4(Rev.COP12), Recital 7, 2000.

[69] CITES Standing Committee, *Rep. on its 54th Meeting*, SC54 Doc.19, at 4 (Oct. 2-6, 2006).

[70] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (Jun. 21).

under the RPSA is based on evolution in the law of the sea regime relating to regulation of the high seas[71] and coastal State's role in ocean governance.

Therefore, since the Maroons' activities in Redonda's presential sea do not amount to an IFS; accordingly, CITES is not applicable.

II. REDONDA HAS NOT VIOLATED ITS INTERNATIONAL OBLIGATIONS AS IT IS PROTECTING THE RIGHTS OF THE MAROONS GUARANTEED UNDER THE ICESCR.

Redonda has an obligation under the ICESCR[72] to protect the Maroons' activities**[A]** and the ICESCR prevails over any restrictions imposed by other treaties on the Maroons' activities **[B]**.

A. REDONDA HAS AN OBLIGATION UNDER THE ICESCR TO PROTECT THE MAROONS' ACTIVITIES.

The Maroons cannot be deprived of their *own means of subsistence* under Article 1(2) of ICESCR**[i]** and have the right to take part in cultural life pursuant to Article 15 of the ICESCR [**ii**].

[71] High Seas Task Force: Closing the net: Stopping illegal fishing on the high seas (Mar. 2006) *available at* http://www.thew2o.net/events/highseas/reports.htm; Food and Agriculture Organisation, Code of Conduct for Responsible Fishing (1995) *available at* http://www.fao.org/docrep/005/v9878e/v9878e00.htm.

[72] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 993 U.N.T.S 3 [hereinafter ICESCR].

i. THE MAROONS CANNOT BE DEPRIVED OF THEIR OWN MEANS OF SUBSISTENCE.

The Maroons cannot be deprived of their own means of subsistence as they are a "people" under Article 1(2) of the ICESCR.**[a]** *Alternatively*, the Maroons are an ethnic minority which cannot be deprived of its own means of subsistence.[**b]**

a. *The Maroons are a "people" and cannot be deprived of their own means of subsistence.*

To claim the *internal right to self-determination*[73], embodying the right not to be deprived of one's own means of subsistence under Article 1(2) of the ICESCR, the Maroons must qualify as a "people". As per Anaya and Higgins, common history, close cultural ties to the territory, cultural difference from the rest of the population[74] must therefore be considered in classifying a group as a "people".[75] Further, being "indigenous to a State" is not a requirement for a group to qualify as a "people" to be entitled to the protection from being deprived of their means of subsistence; the Inter-American Court of Human Rights ["IACtHR"] has observed in the *Saramaka* and *Moiwana* cases that even though the community was not "indigenous" to *Suriname,* it could not be deprived of its own means of subsistence. The cases pointed out that a

[73] United Nations Human Rights Committee (HRC), Article 1, The Right to Self-determination of Peoples, General Comment No. 12, U.N. Doc. HRI/GEN/1/Rev.1 (Mar. 13, 1984).

[74] Int'l Comm'n of Jurists, *The Events of East Pakistan 1971: A Legal Study* 8 INT'L. COMM'N. JURISTS REV. 23, 47 (1972).

[75] JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3 (2004); R. HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 124 (1994).

community's cultural relationship with their lands and their historic struggle against slavery were sufficient factors in protecting their means of subsistence.[76]

Similar to the situation of *Gibraltar,* the Maroons, though "imported", have established themselves as a unique entity,[77] living in their own communities, practicing their unique cultural traditions and managing their own subsistence.[78] Further, the Maroons represent a common historical struggle as they are descendants of slaves of the Chelonia sea region.[79] Therefore, the Maroons are a "people" and thus cannot be deprived of their own means of subsistence.

b. *Alternatively, the Maroons constitute an ethnic minority which cannot be deprived of its own means of subsistence.*

Rights under common Article 1(2) of the ICESCR and International Covenant on Civil and Political Rights[80] ["ICCPR"] are similarly enshrined under Article 27 of the ICCPR which protects traditional subsistence activities of ethnic minorities.[81] In determining a group as a

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[76] Saramaka People v. Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶26-27 (28 Nov. 2007) [hereinafter Samaraka]; Moiwana Community v. Suriname, Judgment, Inter-Am. Ct. H. R. (ser. C.) No. 124, ¶130-131(June 15, 2005).

[77] Simon J. Lincoln, *Note, The Legal Status of Gibraltar: Whose Rock is it Anyway?* 18 FORDHAM INT'L L.J. 285, 328 (1994).

[78] R.¶3.

[79] R.¶3,18.

[80] International Covenant on Civil and Political Rights, Dec.16, 1996, 999 U.N.T.S. 171.

[81] HRC, The Rights of Minorities, General Comment No. 23, CCPR/C/21/Rev.1/Add.5, at ¶7 (Apr.8, 1994); Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, Rep. of

"minority", the criteria considered is - numerical inferiority, distinct ethnic characteristic, preservation of culture and tradition.[82] The Maroons constitute a minority of the population of Redonda; have distinct cultural characteristics as they have maintained their cultural traditions and unique rites while living in their own communities.[83]

Application of Article 27 can be invoked to protect the Maroons despite Redonda not being a party to the ICCPR as the Inter-American Commission on Human Rights has applied Article 27 to non-parties, delineating the principles of international law aimed at the protection of cultural identity of ethnic groups.[84] *Similarly,* in determining a complaint under common Article 1(2) of the ICESCR, the Human Rights Committee has not considered whether the ethnic group constituted a "people", instead it has granted protection of not being *deprived of one's own means of subsistence* under Article 27, ICCPR.[85]

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the United Nations Human Rights Committee, UN Doc. A/56/40 (Vol. II), ¶11–29 (Oct.27, 2000) [hereinafter Apirana Mahuika];

[82] Sub-Commission on the Promotion and Protection of Human Rights, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, U.N. Doc.E/CN.4/Sub.2/384/Rev.1 (1979) (Report by Francesco Capotori).

[83] R.¶3.

[84] Yanomami Indians v. Brazil, Case No. 7615 Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser. L/V/II.66, doc. 10 rev. 1 (1985).

[85] Lubicon Lake Band v. Canada, Communication No. 167/1984, Rep. of the HRC, U.N. Doc. CCPR/C/38/D/167/1984 (Mar.26, 1990).

Further, "Subsistence activities" includes hunting activities done both for physical and *cultural survival*.[86] The hunting of the Kilpkonn and the collection of its eggs is an intrinsic part of the Maroons' culture and hence, a "subsistence activity" essential to the Maroons' cultural survival.

ii. THE MAROONS' ACTIVITIES ARE PURSUANT TO THEIR RIGHT TO TAKE PART IN CULTURAL LIFE UNDER ARTICLE 15 OF THE ICESCR.

The right to take part in native cultural activities is manifested in a particular "way of life" associated with the use of natural resources, and includes traditional hunting activities.[87] The Kilpkonn and its eggs are a natural resource intrinsic to the Maroons' cultural life.[88] Thus, depriving the Maroons of hunting the Kilpkonn and collection of its eggs would be a violation of Article 15 of ICESCR.

[86] Saramaka, *supra* note 76 at, ¶37; Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, (June 27, 2012); Garifuna Community of Cayos Cochinos and its Members v. Honduras, Inter-Am. Ct. H.R. Case No. 12.548, at ¶216, (Feb. 21, 2013).

[87] Kitok v. Sweden, Communication No. 197/1985, Rep. of the HRC, UN. Doc. CCPR/C/33/D/197/1985 at 221, ¶4.1 (July 27, 1988); Lansman v. Finland, Communication No. 511/1992, Rep. of the HRC, U.N. Doc CCPR/C/52/D/511/1992 (Oct. 26, 1994).

[88] R.¶25.

Further, state practice indicates that cultural rights are not limited to customary uses that prevailed in ancient times and can be adapted or modernized.[89] Accordingly, modern equipment may be used to carry out the traditional activities.[90] *Furthermore*, in determining whether an activity is traditional, the purpose of hunting prevails over the method used, and thus any change to the method of hunting does not make the hunting less traditional.[91] Accordingly, the "tagging of the Kilpkonn" is a modernized hunting practice which is pursuant to the Maroons' traditional rites and customary requirements of hunting Kilpkonn far from the shore.[92] Therefore, the tagging and tracking does not exclude the hunting from the scope of the cultural practices protected under Article 15 of the ICESCR.

B. THE PROVISIONS OF THE ICESCR PREVAIL OVER ANY RESTRICTIONS IMPOSED ON THE ACTIVITIES OF THE MAROONS.

Redonda's obligations to protect the Maroons' cultural-subsistence rights prevail over its obligation to protect the environment.[**i**] *In any case,* the CITES and the CBD give deference to Redonda to protect the Maroons pursuant to its obligations under the ICESCR.[**ii**]

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[89] *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2001)110 FCR 244 (Austl.); Garifuna, *supra* note 86; Apriana Mahuika, *supra* note 81.

[90] *Regina v Sparrow*, [1990] 1 S.C.R. 1075(Can.); *Campbell v Arnold* [1985] 565 FLR 382 (NTSC); *Yanner v Eaton* (1999) 201 CLR 351 (Austl.).

[91] Dominique Thiriet, *Tradition and Change- Avenues for Improving Animal Welfare in Indigenous Hunting*, 11 JAMES COOK U. L. REV. 159.

[92] R.¶19.

i. REDONDA'S OBLIGATION TO PROTECT THE MAROONS' CULTURAL-SUBSISTENCE RIGHTS PREVAIL OVER ITS OBLIGATIONS TO PROTECT THE ENVIRONMENT.

Redonda' obligation under the ICESCR must be interpreted taking into consideration the relevant rules applicable between contracting parties as per Article 31 of the VCLT.

The necessity to support and facilitate the needs of *traditional users* is well recognized in international law.[93] This necessity finds its basis in the principle of sustainable development.[94] The IUCN[95] and a number of turtle protection agreements,[96] provide exemption to *traditional users* of sea turtles taking into account their cultural-subsistence needs in addressing concerns regarding the conservation of endangered species.[97] Therefore, Redonda's obligation to protect

[93] A. Gillespie, *Aboriginal Subsistence Whaling: A Critique of the Inter-Relationship Between International Law and the International Whaling Commission*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 79 (2001).

[94] Rio, *supra*, note 15, Principles 1, 22.

[95] IUCN Policy Statement on Sustainable Use of Wild Living Resources, Res. 2.29 (Oct. 2000).

[96] Convention on the Conservation of Migratory Species of Wild Animals art. III¶5(c), June 3, 1979 1651 U.N.T.S. 28395; Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region art.14, Jan. 18, 1990, 2180 U.N.T.S. 25974; Inter-American Convention for the Protection and Conservation of Sea Turtles art. 2, May 2, 2001, 2164 U.N.T.S. 29.

[97] Alexander Gillespie, *The Slow Swim From Extinction: Saving Turtles in the South Pacific* 21 INT'L J. MARINE & COASTAL L. 57, 69 (2006).

the Kilpkonn under international law must be interpreted taking into account the cultural-subsistence practices of the Maroons.

ii. IN ANY CASE, THE CITES AND THE CBD GIVE DEFERENCE TO REDONDA TO PROTECT THE MAROONS PURSUANT TO ITS OBLIGATIONS UNDER THE ICESCR.

In case of conflict, *deference provisions* in treaties allow preference to other agreements and thus resolve the conflict.[98] The CITES **[a]** and the CBD [**b**] contain deference provisions which allow for ICESCR to prevail.

a. *Deference under CITES.*

A combined reading of Article 2(1) and 3(5) of the CITES permits Parties to authorize trade of Appendix-I species in "exceptional circumstances" and if the species is not used for "primarily commercial purposes". States have an obligation to adopt 'specific measures'[99] to protect traditional lifestyle of communities, failure of which violates the "prohibition on discrimination" under international law.[100] Accordingly, Redonda's obligation to protect the Maroons' basic human values[101] is an "exceptional circumstance" and thus, CITES allows for such obligations to prevail.

[98] Continental Shelf (Tunis./Libyan Arab Jamahiriyah),1982 I.C.J. 18,¶38 (Feb. 24).

[99] Minority Schools in Albania case, 1935 P.C.I.J. (ser.A/B) No. 64, at 19.

[100] Thlimmenos v. Greece, App. No. 34369/97, 31 Eur. Comm'n H. R. Dec. & Rep. 15 (2001).

[101] Report of the ILC, U.N. GAOR, 59th Sess., Supp No. 10, U.N. Doc. A/59/10 (2004).

Further, The Maroons' use of the Kilpkonn for purely private and personal purposes,[102] and does not yield any economic benefit, thus, it cannot be categorized as "primarily commercial purposes".

Therefore, the Maroons' rights under the ICESCR are given deference to and hence apply over restrictions imposed by the CITES.

b. *Deference under the CBD.*

The CBD provides for "preserving and maintaining" of traditional practices[103] and permits *cultural-subsistence use* of biological resources, subject to sustainable use.[104] Further, the CBD allows the contracting States' obligations arising out of "other conventions" to prevail except on a serious threat to biological diversity.[105]

The Maroons' hunting is sustainable as the consumptive use of sea turtles is recognized as a part of "sustainable use projects".[106] Since little is known about breeding habits of the Kilpkonn (*Dermochelys coriacea)*, it is a common practice among States to adopt "sustainable use projects" in which they utilize the help of the *traditional users* to tag and track the sea turtles to determine migration patterns.[107] Therefore, allowing only the Maroons to consume the Kilpkonn

[102] CITES, Res. Conf.5.10 (Rev. CoP15), 1985.

[103] CBD, *supra* note 2, art. 8(j), 20(6), Preamble ¶1.

[104] CBD, *supra* note 2, art. 10(c); CBD, CoP 7, Decision VII/12, ¶6, 2004.

[105] CBD, *supra* note 2, art. 22.

[106] Campbell, *supra* note 13.

[107] World Summit, *supra* note 15; H.F. Hirth, *Some aspects of the nesting behavior and reproductive biology of sea turtles.* 20 AMER. ZOOL. 507 (1980).

while tagging and tracking them is in pursuance of Redonda's obligation to ensure sustainable use of the Kilpkonn. Accordingly, the Maroons' rights under the ICESCR are given deference to and hence apply over restrictions imposed by the CBD.

CONCLUSION AND PRAYER

For the foregoing reasons, Redonda respectfully requests this Court to adjudge and declare that:

The Republic of Redonda has not violated international law by facilitating, allowing and otherwise failing to prevent the Maroons from:

a. Hunting the Kilpkonn sea turtle in the Redondan EEZ and areas beyond the EEZ; and

b. Collecting the eggs of the Kilpkonn sea turtle.

Respectfully Submitted

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Agents for the Republic of Redonda