
THE 2000 ASIA CUP INTERNATIONAL LAW
MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE,
THE HAGUE, THE NETHERLANDS

CASE CONCERNING THE EXTRADITION OF TERRORISTS

THE STATE OF VERD
APPLICANT

v.

THE STATE OF ORDINA
RESPONDENT

2000

On Submission to the International Court of Justice

COUNTER-MEMORIAL FOR THE RESPONDENT,
THE STATE OF ORDINA

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STATEMENT OF JURISDICTION

THIS DISPUTE HAS BEEN SUBMITTED TO THE HONORABLE COURT IN ACCORDANCE WITH ARTICLE 40, PARAGRAPH 1, OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. ORDINA PRESENTS THE QUESTIONS CONTAINED IN THE COMPROMIS AND REQUESTS THIS COURT TO DETERMINE THE RIGHTS AND OBLIGATIONS OF THE PARTIES TO THIS DISPUTE.

SUMMARY OF FACTS

Espel is a country with an unstable economic and political situation (Compromis [hereinafter, C.], Supplementary Explanation, E. 3). It has been criticized as being "totalitarian," and has been accused of not providing adequate protection for human rights (C., Supplementary Explanation, B. 1 and B. 2). The death penalty is in force in Espel, especially for the crime of treason against the State (C. 4). In one instance, a person who was accused of attempting to wreck a train was sentenced to death (C., Supplementary Explanation, B. 3). In recent years, there have been large-scale anti-government demonstrations and terrorist acts in Espel (C., Supplementary Explanation, E. 3).

In the morning of January 20, 2000, three persons, members of a political group that had been involved in anti-government protests, seized control of an Espel aircraft on a domestic flight (C. 1). They asked that members of their political group who had been imprisoned by the Espel authorities be released (C. 1). They also asked that the plane be diverted to Ordina (C. 1). Ordina, unlike Espel, is a country with a relatively stable political condition (C., Supplementary Explanation, E. 3). It is free from criticism as regards human rights violations, and its government has never been accused of being totalitarian (C., Supplementary Explanation, B. 1 and B. 3). The three persons had no guns or explosives with them, and did not do any acts of violence apart from holding the pilot of the plane at knifepoint (C., Supplementary Explanation, C.2).

The pilot of the plane transmitted the political demand of the three persons to the authorities of Espel (C. 1). However, instead of flying to Ordina, he landed the plane in Verd (C. 2). When the plane landed in the airport at Verd, Verd authorities negotiated with the three persons on board the plane (C. 2). The three agreed to release all the passengers on the plane, while Verd authorities agreed to allow the crew to fly the aircraft to Ordina (C. 2). When all the passengers had disembarked, Verd policemen immediately boarded the plane

(C. 2-3). During this incident, the pilot of the plane was wounded, although the wound was not inflicted by any of the three persons (C. 2, Supplementary Explanation C. 2). Instead of allowing the three persons to fly to Ordina, as agreed, they were arrested by the Verd police (C. 2-3). Upon hearing reports that the Verd police had arrested the three persons, the government of Ordina expressed its concern over the incident.

Meanwhile, Espel requested the immediate extradition of the three individuals (C. 4). Although Espel and Verd have concluded an Extradition Treaty (C. 3), the terms of the treaty expressly exclude political offenders from any obligation to extradite (C. 3). The government of Verd began extradition proceedings in a district court, which decided in favor of extradition, with the concurrence of the Foreign Minister of Verd (C. 4). However, the regularity of this procedure was questioned by some sympathizers of the three arrested persons, who claimed that this was contrary to the Extradition Law of Verd (C. 4). According to them, the three persons could not be extradited until the case had been reviewed by the higher courts (C. 4). Despite these procedural objections, Verd planned to proceed with the extradition (C. 4 *et seq.*).

When the government of Ordina received word of the extradition proceedings, it immediately became alarmed (C. 5). Ordina protested that the extradition would result in subjecting the three to excessively cruel punishment in Espel (C. 5), especially since there was a case in which a person belonging to the same political group as the three had already been sentenced to death (C. 5). Verd admitted that humanitarian conditions in Espel needed improvement (C. 8). Verd also admitted that it had jurisdiction to try the three persons in criminal proceedings (C. 5). However, it persisted in its decision to extradite the three instead of proceeding with a criminal trial (C. 5 *et seq.*).

Ordina continued to protest against the extradition of the three persons (C. 5 *et seq.*). It pointed out that an agreement had been made with the three persons for safe conduct to Ordina, which agreement was broken (C. 6). It also pointed out that states are prohibited from extraditing persons to states where their life or freedom would be seriously threatened (C. 6). It claimed that Verd would violate both the International Convention on Civil and Political Rights, the Convention Relating to the Status of Refugees, and the generally accepted principle of international law that prohibits states from extraditing persons whose extradition was demanded for political offenses (C. 6-7). Heedless of these concerns, Verd claimed that it would not be violating any of its international

obligations if it continued with the proposed extradition, even if there were serious problems in the humanitarian conditions in Espel (C. 7-8).

Ordina informed Verd that the extradition of the three persons to Espel could affect future economic relations between Ordina and Verd (C. 8). Verd then submitted the dispute with Ordina to the International Court of Justice for a ruling (C. 8-9).

Ordina, Verd and Espel are members of the United Nations, and are parties to the Chicago Convention of Civil Aviation, the Convention on Offenses and Certain Other Acts Committed On Board Aircraft, the Convention for the Suppression of Unlawful Seizure of Aircraft, and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (C. 3). Ordina and Verd are also parties to the International Covenant on Civil and Political Rights and the Convention Relating to the Status of Refugees, but Espel is not (C. 5-6).

CLAIMS

I

VERD IS OBLIGATED NOT TO EXTRADITE THE THREE PERSONS TO ESPEL, SINCE THEY ARE POLITICAL OFFENDERS WHOSE EXTRADITION IS BARRED UNDER THE EXTRADITION TREATY AND GENERAL PRINCIPLES OF INTERNATIONAL LAW.

II

THE CONVENTION RELATING TO THE STATUS OF REFUGEES PROHIBITS VERD FROM EXTRADITING THE THREE PERSONS TO ESPEL, SINCE THEY ARE *DE FACTO* REFUGEES WITH A WELL-FOUNDED FEAR OF PERSECUTION SHOULD THEY BE RETURNED TO ESPEL.

III

AS A PARTY TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, VERD IS OBLIGATED NOT TO EXTRADITE THE THREE PERSONS TO ESPEL, SINCE VERD'S RIGHT TO EXTRADITE IS LIMITED BY THE *ERGA OMNES*, *JUS COGENS* PROHIBITION ON TORTURE.

SUMMARY OF PLEADINGS

Verd is under no specific international obligation to extradite the three offenders back to Espel. First, the Extradition Treaty between Espel and Verd does not apply to political offenders. Under customary international law and general principles of international law, the three persons may be considered political offenders, who are thus exempt from extradition. Further, the Hague and Montreal Conventions give Verd the option to either extradite or prosecute offenders found within its territory. However, this alternative obligation must be exercised in accordance with Verd's other international obligations. As a party to the Convention Relating to the Status of Refugees, Verd is obligated to refrain from returning refugees to their country of origin if there is a well-founded belief that such persons will be subject to persecution solely as a result of their political beliefs. Under the circumstances of this case, there is a well-founded belief that the three offenders will be subjected to persecution, especially as Espel has a history of humanitarian violations and imposing disproportionate penalties on other political offenders. Should Verd proceed with the extradition, it would be in breach of its obligations under the Refugee Convention.

Further, there are additional human rights concerns that warrant the non-extradition of the three offenders. Verd is a party to the International Covenant on Civil and Political Rights, which contains a specific prohibition against torture and other cruel, inhuman and degrading treatment. Should Verd proceed with its decision to extradite the three, it would be subjecting them to torture, and would be in breach of its *jus cogens*, *erga omnes* obligations. Finally, international law prohibits states from exercising extradition that would in effect deprive the extradited persons of legal recourse to international human rights conventions. Espel, the state of nationality of the three offenders, is not a party to such basic human rights conventions as the International Covenant on Civil and Political Rights or the Convention Relating to the Status of Refugees; additionally, it has had a history of human rights violations, and has been accused by the international community of being a country in which human rights are violated wholesale. By extraditing the hijackers to Espel, Verd would be subjecting them to the real possibility of human rights violations. For these reasons, Verd has the international obligation to refrain from extraditing the three hijackers to Espel.

PLEADINGS AND AUTHORITIES

I. VERD IS UNDER NO SPECIFIC OBLIGATION TO EXTRADITE THE THREE OFFENDERS BACK TO ESPEL.

A. UNDER THE VARIOUS AVIATION CONVENTIONS, VERD HAS THE OPTION TO EITHER EXTRADITE OR PROSECUTE THE OFFENDERS UNDER THE PRINCIPLE *AUT DEDERE AUT JUDICARE*

Under the Convention for the Suppression of the Unlawful Seizure of Aircraft of 1970 (hereinafter, the Hague Convention) and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 (hereinafter, the Montreal Convention), the state of registration of the aircraft and the state where the aircraft lands with the hijacker on board, among others, have concurrent criminal jurisdiction over the offense of aerial hijacking.¹ Thus both Espel and Verd are permitted to assert jurisdiction over the offense. This fact has been admitted by the Foreign Minister of Verd (C. 5).

Nothing in either of these Conventions imposes upon Verd the definite obligation to extradite the three offenders. Rather, the Conventions impose the *alternative* obligation either to extradite the offenders, or to assume criminal jurisdiction over the offense. Under the principle of *aut dedere aut judicare* enshrined in article 7 of the Hague Convention² and the Montreal Convention,³ Verd, being the state where the offenders are located, has the prerogative to

¹ Hague Convention, December 16, 1970, art. 4, 22 U.S.T. 1641 (entered into force October 14, 1977); Montreal Convention, September 23, 1971, art. 5, 24 U.S.T. 564 (entered into force January 26, 1973); See, also, S.K. AGRAWALA, AERIAL HIJACKING IN INTERNATIONAL LAW 42 (1973).

² The provision reads: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

³ The provision reads: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

decide whether to extradite the offenders to Espel, or to prosecute them in its domestic courts should it decide not to extradite.⁴ While it is true that extradition is a sovereign decision of the requested state,⁵ such right is not without limitations. The fact that the principle of *aut dedere aut judicare* has been included in the Hague and Montreal Conventions, both of which are aimed at suppressing the crime of aerial hijacking, is an acknowledgment that even the serious criminal may deserve protection against persecution or prejudice.⁶ The subsidiary right to institute criminal proceedings must be exercised, in particular, where the extradition of an offender might violate the internationally recognized rights of refugees.⁷

**B. THE TREATY ON EXTRADITION BETWEEN VERD AND
ESPEL DOES NOT EXTEND TO POLITICAL OFFENDERS.**

Whereas a Treaty on Extradition (hereinafter, the Extradition Treaty) has been concluded between Verd and Espel, the obligation to extradite does not extend to political offenders. Under article 3 of the Extradition Treaty, “[e]xtradition shall not be granted ... when the offense for which extradition is requested is a political offense or when it appears that the request for extradition is made with a view to prosecuting, trying or punishing the person sought for a political offense (C. 3).” In the present case, the special situation of the Espel hijackers merits their non-extradition to Espel, and instead their prosecution in Verd domestic courts.

**II. GIVEN THE CIRCUMSTANCES, VERD WOULD BE
VIOLATING ITS INTERNATIONAL OBLIGATIONS IF IT
WOULD PROCEED WITH THE EXTRADITION.**

⁴ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 38 (1988).

⁵ Lockerbie Case (Libya v. U.S.), April 14, 1992, 1992 I.C.J. 114 (Provisional Measures); Asylum Case (Colom. v. Per.), Nov. 27, 1950, 1950 I.C.J. 116.

⁶ G. S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 149 (2d ed. 1996) (hereinafter I GOODWIN-GILL).

⁷ Universal Jurisdiction Case (1958), OGH, Serie Strafsachen XXIX, No. 32, translated and summarized in 28 INT’L L. REP. 341, 343 (Austria).

A. SHOULD VERD PROCEED WITH THE EXTRADITION, IT
WOULD BE VIOLATING THE GENERALLY ACCEPTED
PRINCIPLE OF INTERNATIONAL LAW THAT PROHIBITS THE
EXTRADITION OF POLITICAL OFFENDERS.

The non-extradition of political offenders is an established principle of international law, being a general principle of law recognized by civilized nations.⁸ It has been adopted as a principle of domestic law, and has become a familiar provision in extradition treaties,⁹ national constitutions,¹⁰ and domestic laws.¹¹ This doctrine is based on the belief that political offenders are vulnerable to a retaliatory trial colored with political bias if returned to the requesting state.¹²

The principle of non-extradition of political offenders applies not only to offenses directed against the State, which are described as purely political offenses,

⁸ H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 28, 88 (1844), cited in M. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962) at 1236-7.

⁹ Convention on Extradition between France and Belgium, November 22, 1834, Billot, TRAITE DE L'EXTRADITION 109 (1874) note 4, at 111, cited in M. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962), note 8, at 373; Extradition Convention Between the Kingdom of Iraq and the Republic of Turkey, March 29, 1946, art. 4, par. (a), 37 U.N.T.S. 388; Convention Between the Governments of Denmark, Norway, and Sweden Regarding the Recognition and Enforcement of Judgments in Criminal Matters, March 8, 1948, art. 4, 27 UNTS. 128; Convention between the Republic of Poland and the Czechoslovak Republic concerning their Mutual Legal Relation in Civil and Criminal Law, January 21, 1949, art. 60, paragraph (b), 31 U.N.T.S. 262; Extradition Treaty between Brazil and Bolivia, February 25, 1938, art. 3, 54 UNTS 346.

¹⁰ CUBA CONST., art. 31; COSTA RICA CONST., art. 31; EL SAL. CONST., art. 11; GUAT. CONST., art. 26; HAITI CONST., art. 31; MEX. CONST., art. 15; NICAR. CONST., art. 27; PAN. CONST., art. 23; BRAZ. CONST., art. 141, par. (33); HOND. CONST., art. 20; ITALY CONST., art. 10.

¹¹ British Extradition Act of 1870, art. 3, par. (1), 22 & 34 Vict., c. 52 (Eng.), cited in M. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962), note 10 at 373; Argentine Extradition Law of August 25, 1885, art. 3, paragraph (2), printed in U.S. Foreign Relations 1886 at 4 (Department of State 1887), cited in M. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962), note 10 at 373; French Extradition Law of March 10, 1927, art. 5, par. (2), translated in Harvard Research in International Law, *Extradition*, 29 AM. J. INT'L L. 280, 38^c and Swiss Extradition Law of January 22, 1892, art. 10, *id* at 420.

¹² S. Fuller, *Extradition of Terrorists: An Executive Solution to the Limitations of the P Offense Exception in the Context of Contemporary Judicial Interpretations of American Ex Law*, 11 SUFFOLK TRANSNAT'L L. REV. 351, 363 (1987).

but also to so-called "relative political offenses."¹³ Relative political offenses are those acts "which have the character of an ordinary crime appearing on the list of extraditable offenses but which, because of the attendant circumstances, in particular because of the motive and the object, are of a predominantly political complexion."¹⁴

Whereas hijacking, in normal circumstances, is a common crime, the political terrorist hijacking offense must be distinguished from the common crime of hijacking.¹⁵ Circumstances peculiar to each case may merit the characterization of the offense as political, thus demanding non-extradition.

While the characterization of an offense as political is usually left to the authorities of the State from which extradition is requested,¹⁶ special regard should be paid to the practice of international organizations such as the United Nations High Commissioner for Refugees. According to the UNHCR, to determine whether an offense is political or non-political, the primary consideration should be the *nature and purpose* of the crime, i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct *causal link* between the crime committed and its alleged political purpose or object. The political element of the offense should also *outweigh* its common-law character.¹⁷

To be considered as non-extraditable, the offense must be predominantly political in character, and "the damage caused be proportionate to the result

¹³ *In re Kavic, Bjelanovic and Arsenijevic*, ATF 78 I 39, *translated and summarized in* 19 INT'L L. REP. 371 (1952) at 372 (Swit.). See, e.g., *In re Ockert*, Bundesgericht, Oct. 20, 1933, 59 (I.) Entscheidungen des Schweizerischen Bundesgerichtes 136, *translated and summarized in* [1933-34] ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 369 (Swit.); *In re Peruzzo*, ATF 77 (1951) 50, *translated and summarized in* [1952] INT'L L. REP. 369 (1951) (Swit.); *In re Ragni*, [1923-24] ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 286 (1923) (Swit.); *In re Nappi*, ATF 78 (1952) 123, *translated and summarized in* [1952] INT'L L. REP. 375 (No. 81) (Swit.).

¹⁴ *In re Ockert*, [1933-34] ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 369, 370 (Swit.); *Folkerts v. Public Prosecutor*, 10 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 465 (1979), *summarized in* 74 INT'L L. REP. 498.

¹⁵ N. GAL-OR, INTERNATIONAL COOPERATION TO SUPPRESS TERRORISM 88 (1985).

¹⁶ G. S. GOODWIN-GILL, MOVEMENT OF PERSONS, 143ff, 226-228; J.M. COREY, *INS v. Doherty: The Politics of Extradition, Deportation and Asylum*, 16 MD. J. INT'L L. & TRADE 83 (1992); see, also, I GOODWIN-GILL, *supra* note 6, at 60.

¹⁷ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 36 (1988).

sought, in other words, that the interests at stake should be sufficiently important to excuse, if not justify, the infringement of private legal rights."¹⁸

The circumstances surrounding the hijacking of the Espel domestic aircraft indicate that the act constitutes a non-extraditable relative political offense. The hijacking was politically motivated: the primary purpose for its commission was to demand the release of the hijackers' political partymates who had been accused of treason by the Espel government (C. 1). The hijacking was a means to effectuate their escape to neutral territory, as can be seen from the fact that they hijacked not an international but a domestic flight, and asked to be permitted to continue their journey to Ordina (C. 2). Moreover, the damage caused was proportionate to the result sought. There was no real intent to harm either the passengers or the crew, and neither was there any intent to sabotage the aircraft, as indicated by the fact that the hijackers had no guns or explosives with them (C., Supplementary Explanation C. 2). The pilot's injury was a result of the struggle during the rescue attempt, and was not caused by any intentional harm inflicted by the hijackers (C. 2; C., Supplementary Explanation, C. 2). Moreover, other than the diversion of the aircraft, no illegal acts were committed.

Given these circumstances, it can be seen that the interests at stake (i.e., release of the imprisoned partymates, and the escape of the hijackers to neutral territory) were sufficiently important to excuse, if not justify, the infringement of private legal rights, which were very minimal. There is sufficient judicial precedent to deny extradition under these circumstances. For example, in the case of *In re Kavic, Bjelanovic and Arsenijevic*,¹⁹ whose circumstances are near identical to this case, the Swiss Federal Tribunal declined the request for extradition made by Yugoslavia. Verd must therefore decline the request for extradition made by Espel on these grounds.

**B. EVEN ASSUMING *ARGUENDO* THAT THE HIJACKING
CANNOT BE DEEMED A POLITICAL OFFENSE, VERD WOULD
BE VIOLATING ITS OBLIGATIONS UNDER THE**

¹⁸ *Ktir v. Ministere Public Federal*, ATF 1961 I 134, *translated and summarized in* 34 INT'L L. REP. 143 at 144 (Swit.). See, also, *Watin v. Ministere Public Federal*, ATF 90 I 298, *translated and summarized in* 72 INT'L L. REP. 614 (Swit.).

¹⁹ 19 INT'L L. REP. 371 (Swit.)

CONVENTION RELATING TO THE STATUS OF REFUGEES
SHOULD IT PROCEED WITH THE EXTRADITION.

The concept of political persecutee is not limited to so-called political offenders within the meaning of the Extradition Treaty; it must be extended to persons prosecuted for non-political offenses "where such persons, if extradited, would be liable in their home country to suffer measures of persecution involving danger to life and limb or restrictions of personal liberty for political reasons."²⁰ Even assuming *arguendo* that the hijacking does not constitute a non-extraditable relative political offense, the Espel nationals may still be deemed as political persecutees and even refugees who should not be extradited.

The principle of non-refoulement prohibits the return of a person to a territory where he has reason to fear persecution. This principle can apply with respect to extradition.²¹ In fact, statements of the principles of non-refoulement in various international instruments are wide enough to cover extradition.²² This principle forms part of general international law and is binding on all States, independently of specific assent.²³ Such a principle has been codified in article 33 of the Convention Relating to the Status of Refugees (hereinafter, the Refugee Convention).²⁴

²⁰ Decision of the German Federal Constitutional Court, First Division, Feb. 4, 1959, (1 BvR 193/57) 9 Entscheidungen des Bundesverfassungsgerichts 174; 12 Neus Juristische Wochenschrift 763 (No. 17, 1959), summarized and translated in 54 AM. J. INT'L L. 416 (1960) at 418-419.

²¹ United Nations High Commissioner for Refugees, Executive Committee of the High Commissioner's Programme, Note on Problems of Extradition Affecting Refugees, August 27, 1980, 31st session.

²² See, e.g., Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 150, 176; Draft Convention on Territorial Asylum, art. 3, U.N. Doc. A/10/177, which reads: "Non-extradition. No person shall be extradited to a State to the territory of which he may not be returned by virtue of Article 2." (i.e., the article of the Draft Convention that states the principle of non-refoulement); European Convention on Extradition, 13 December 1957, art. 3, which provides: "Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence. The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that person's position may be prejudiced for any of these reasons."

²³ I GOODWIN-GILL, *supra* note 6, at 167.

²⁴ 189 U.N.T.S. 150, 176.

Under the said Convention, the following elements must concur for a person to qualify as a refugee:

1. The individual is outside his country of origin;
2. He is unable or unwilling to avail himself of the protection of that country, or to return there;
3. Such inability or unwillingness is attributable to a well-founded fear of being persecuted; and
4. The persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.²⁵

Under the Refugee Convention, the term "political" is susceptible of the broadest possible interpretation, a view that has been expressed in Germany and Switzerland.²⁶

Fear of persecution is deemed to be well founded where the evidence demonstrates that:

1. The alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;
2. The persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic;
3. The persecutor has the capability of punishing the alien; and

²⁵ *Id.* at 152.

²⁶ *Traité de Droit Criminel et de Législation Pénale Comparée* 985 (3d ed. 1947). See, also, Order of the German Federal Supreme Court, Jan. 11, 1961, BAusl. 4/60, 4 ARs 32/60, 15 *Neus Juristische Wochenschrift* 738, 56 AM. J. INT'L L. 221 at 222-223; Decision of the German Federal Constitutional Court, First Division, Feb. 4, 1959, (1 BvR 193/57) 9 *Entscheidungen des Bundesverfassungsgerichts* 174; 12 *Neus Juristische Wochenschrift* 763 (No. 17, 1959), translated and summarized in 54 AM. J. INT'L L. 416 (1960) at 418-419; *Re Wryobnik* (1952), ATF 78 I 235, translated and summarized in 1952 INT'L L. REP. 379 (Swit.); Decision of the Swiss Supreme Federal Court in the Matter of Ktir Against the Federal Prosecutor, May 17, 1961, 87 *Entscheidungen des Schweizerischen Bundesgerichts*, I, 134, 56 AM. J. INT'L L. 224.

4. The persecutor has the inclination to punish the alien.²⁷

Under the circumstances of this case, the Espel hijackers can properly be deemed refugees subject to the protection of the Refugee Convention. They are outside their country of origin; they refuse to return to Espel on the ground that they will be persecuted by virtue of their political affiliation. Such fear is well-founded, as borne out by the facts: an Espel national belonging to the same political group as the hijackers was previously sentenced to death for treason against the State (C. 5); the Espel government is likewise detaining several other partymates on charges of treason (C. 1); and the Espel government has been known to impose punishment grossly disproportionate to the offense committed (C., Supplementary Explanation, B. 3).²⁸ Where it is a near-absolute certainty that an unjust punishment and even death awaits the hijackers upon their extradition to Espel, article 33 of the Refugee Convention obligates Verd not to return them to Espel.²⁹

**C. SHOULD VERD PROCEED WITH THE EXTRADITION, IT
WOULD BE VIOLATING ARTICLE 7 OF THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS.**

Freedom from torture is a norm of customary international law,³⁰ an obligation *erga omnes*³¹ and a jus cogens norm³² “rooted in the international

²⁷ *Re Acosta-Solorzano*, Int. Dec. no. 2986, 1 March 1985, cited in I GOODWIN-GILL, *supra* note 6, at 37.

²⁸ An Espel national who attempted to wreck a train was convicted of treason against the state and sentenced to death, even though the maximum penalty for attempting to wreck a train is only life imprisonment.

²⁹ “No contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

³⁰ Universal Declaration on Human Rights, GA Res. 217A, U.N. GAOR, 3rd Sess. (1948), art. 5; International Covenant on Civil and Political Rights, GA Res. 39/46 Annex, U.N. GAOR, art. 7; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3; Convention Against Torture and Other Cruel, Inhuman, or degrading Treatment or Punishment, Feb. 4, 1985, art. 1.

³¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 702 (1987), cited in T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 94-95 (1989).

conscience.”³³ As such, all States have a legal interest in ensuring the fulfillment of such obligation.³⁴

Under article 2, paragraph (1) of the International Covenant on Civil and Political Rights (hereinafter, the ICCPR),³⁵ states that are parties to the Covenant are bound to undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, including “political or other opinion.” As a State party to the ICCPR, and as a member of the United Nations, Verd is bound to guarantee this right to all persons within its territory and jurisdiction, including the Espel hijackers who are in their custody.

Under international law, states are prohibited from extraditing alleged offenders to states where there are serious grounds to believe that the person will be subjected to torture or cruel, inhuman or degrading treatment or punishment.³⁶ In the case of *Cox v. Canada*,³⁷ it was held that if a State party to the ICCPR takes a decision relating to a person within its jurisdiction and the necessary and foreseeable consequence is that that person’s rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. In the case of *Soering v. United Kingdom*,³⁸ it was held that the decision

³² Art. 4, para. 2 of the ICCPR specifically provides that the right enshrined in article 7 thereof is non-derogable, even in times of public emergency. The non-derogability of this right is also mentioned in art. 2, par. (2) of the Convention Against Torture, and art. 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (GA Res. 3452, U.N. GAOR, 30th Sess., [1975]).

³³ Mustafa Yasseen, Member for Iraq of the International Law Commission, in International Law Commission, ‘683rd Meeting’ [1963] 1 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 63, cited in M. RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES 17 (1997).

³⁴ Barcelona Traction Light, and Power Company, Limited, 1970 I.C.J. 32 cited in International Law Commission, ‘Report of the International Law Commission to the General Assembly on the Work of its Twenty-Eighth Session’ [1976] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 99, U.N. Doc. A/31/10 (1976).

³⁵ Adopted and opened for signature, ratification and accession by GA Res. 2200 A, U.N. GAOR, 21st Sess., (1966), (entered into force 23 March 1976).

³⁶ Convention Against Torture and Other Cruel, Inhuman, or degrading Treatment or Punishment, Feb. 4, 1985, art. 3,

³⁷ *Cox v. Canada*, U.N. Human Rights Committee, Communication No. 539/1993, Oct. 31, 1994, Doc. CCPR/C/52/D/539/1993, printed in 114 INT’L L. REP. 347, at 366.

³⁸ *Soering v. United Kingdom*, Eur. Ct. H. R. (Ser. A), (1989), No. 161.

by a State to extradite a fugitive may constitute a violation of the European Convention on Human Rights where substantial grounds are shown for believing that the person concerned faces a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment in the requesting country.

Given Espel's inadequate protection of the human rights of its nationals, and its record of imposing punishment grossly disproportionate to the offense,³⁹ Verd's extradition of the Espel hijackers despite the presence of such conditions would constitute a violation of its obligations under the ICCPR.

**D. SHOULD VERD PROCEED WITH THE EXTRADITION, IT
WOULD BE DEPRIVING THE HIJACKERS OF LEGAL
RECOURSE TO THE HUMAN RIGHTS CONVENTIONS TO
WHICH IT IS A PARTY.**

International law prohibits states from extradition which would in effect deprive the extradited persons of legal recourse to international human rights conventions.⁴⁰ In the case of Communication No. 13/1993,⁴¹ the Committee Against Torture held that a State party to the European Convention on Human Rights has an obligation to refrain from expelling an individual to a country where he would not only run a real risk of being subjected to torture, but of also being deprived of the legal possibility of applying to the Committee for protection inasmuch as the requesting State was not a party to the Convention against Torture.

Similarly, Espel is not a party to either the International Covenant on Civil and Political Rights or the Convention Relating to the Status of Refugees. By extraditing the hijackers to Espel, not only will Verd be subjecting them to the danger of torture, it will also be depriving them of legal recourse under said Conventions.

³⁹ *Supra*, note 28.

⁴⁰ Communication No. 13, Committee against Torture, Decision of 27 April 1994.

⁴¹ Communication No. 13, Committee against Torture, Decision of 27 April 1994.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the State of Ordina respectfully requests that this Honorable Court, by way of judgment:

- (a) **Declare** that Verd is under an obligation not to extradite the hijackers of the flight of 20 January 2000 to Espel.
- (b) **Grant** such other and further relief as this Honorable Court may deem just and equitable under the premises.

Respectfully submitted,

Agents for Ordina

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