

MEMORIAL FOR THE RESPONDENT*

STATE OF ALSTAAT
(APPLICANT)

v.

STATE OF RODMANIA
(RESPONDENT)

*Maricel R. Seno***
*Anna Loren R. Ramos***
*Janice C. Lee***
*Anyra M. Palileo***

STATEMENT OF THE PROBLEM***

The State of Alstaat shares a border with Xian on the same continent, while Rodmania, a developed country, is found on another continent. The peculiar geographic circumstances of Alstaat and Xian had led to hostilities between the two states – in January 2005, Xian troops launched an armed attack against Xian rebels (who have taken up arms against Xian since 2004) believed to have been planning to launch terrorist activities using Alstaat as a launching pad. While hostilities between the two states were in full swing, Rodmania chose to adopt a neutral position, even while it was largely believed to lean more towards Xian.

* The Asia Cup International Law Moot Court Competition is organized annually by the Ministry of Foreign Affairs of Japan. For 2007, the competition was held in August 20-21, 2007 at Tokyo. The Philippines was represented by a team from the University of the Philippines College of Law which bested other teams from Thailand, Singapore, China, Indonesia, Bangladesh, and Japan. The Philippine Team emerged victorious against Thailand's Chulalongkorn University in the Final Match with a panel of judges composed of Dr. Jean-Marie Henckaerts of the International Committee of the Red Cross (ICRC), Ambassador Chusei Yamada of the United Nations International Law Commission, Ambassador Tetsuyo Endo of the Japanese Ministry of Foreign Affairs and Dr. Umesh Kadam of the ICRC.

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A ceasefire agreement was entered into in March 2005, the terms of which include the withdrawal of Xian troops from Alstaat, undertaking of efforts on Alstaat's part to prevent Xian rebels from using it as a launching pad for terrorism, and the prosecution and punishment of international humanitarian law violations committed in Alstaat in accord with international law.

During the period after the ceasefire, investigations regarding the conduct of the hostilities were undertaken. In one such investigation, an Alstaat soldier during the conflict revealed that he was treated inhumanely in a Xian Medical Unit Camp by one Mr. Hattin. Alstaat made overtures that it would seek to enforce the prosecution and punishment clause of the Ceasefire Agreement against Hattin. Hattin, it was found, was a Xian-licensed doctor who graduated from Rodmania and was in fact presently in Rodmania on a six-month visa for advanced studies. He, along with other health professionals, participated in the rendition of medical aid during the conflict under a supervising doctor appointed by Xian.

In response to Alstaat's representations, the Xian government required Hattin to return to the country and explain his position. Hattin, however, refused to do so, and instead applied for asylum in Rodmania. He claimed that his being summoned to his country was politically motivated. According to him, Xian merely wanted to highlight how Alstaat has, for its part, failed to live up to its commitment of controlling the activities of radicals within its territory. Also, Xian only wanted to avert possible adverse public opinion if Alstaat's request is not granted. This negative public sentiment in fact attended a prior instance where Xian refused to give up a General accused by Alstaat of causing damage to historical monuments. Such request was denied, amid public outcry, because Xian claimed that the accusation was groundless. Hattin is therefore claiming that Xian, in turning over a high-profile person to Alstaat, is doing so only for political expediency and abandoning its obligation to protect its citizens in the process. Hattin believed that he would never be accorded a fair and competent trial in Xian.

Upon knowing of Hattin's asylum application, Alstaat immediately requested Rodmania to extradite Hattin, pursuant to an extradition treaty in force between the two states, and also in accordance with Protocol I of the Geneva Conventions to which the parties are signatories. Rodmania rejected the extradition request, saying that it was looking into the asylum application first. Alstaat, in retaliation, froze Rodmania's assets, which the latter protested. When the matter was brought to negotiation, Alstaat and Rodmania came up with an agreement to submit the extradition case of Hattin to the International Court of Justice for resolution.

PLEADINGS AND AUTHORITIES

I. THE REFUSAL OF RODMANIA TO EXTRADITE MR. HATTIN TO ALSTAAT IS A VALID EXERCISE OF ITS SOVEREIGNTY.

Under the principle of equality of states,¹ Rodmania and Alstaat possess the same juridical capacities and functions.² No State may therefore, impose its will on and violate another's territorial integrity and political independence.³ By virtue of this sovereign equality, States bind themselves to adhere to certain obligations only upon their consent. International law therefore, is founded upon the consent of states.⁴

Current international law provides that Rodmania is under no legal obligation to extradite without an explicit declaration in the form of a treaty.⁵ Since Rodmania and Alstaat have not entered into any such extradition treaty,⁶ Rodmania is therefore not obligated to turn Mr. Hattin over to Alstaat.

Furthermore, Rodmania cannot be compelled by Alstaat to extradite Mr. Hattin under customary international law.⁷ The common practice among States is to extradite only with a treaty.⁸ The exceptions only involve instances where States do so merely on the basis of reciprocity or comity.⁹ Since neither establishes the opinio

¹ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. res. 2625 (XXV), 25 UN GAOR Supp. (No. 28) at 12, UN Doc. A/5217 (1970) [*hereinafter* Declaration on Principles of International Law]; Malcolm N. Shaw, *International Law* 152 4th Edition 1997 [*hereinafter* Shaw].

² *Ibid.*; Charter of the United Nations, 59 Stat. 1031, T.S. 993, § 1(2) [*hereinafter* UN Charter].

³ *Ibid.*

⁴ Shaw supra note 1; D.P. O'Connell, *International Law* 323 [*hereinafter* O'Connell].

⁵ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States of America) Provisional Measures, 1992 ICJ Reports 27 (April 14) [*hereinafter* Lockerbie]; Barbara M. Yarnold, *International Fugitives: A New Role for the International Court of Justice* 11, 1991 [*hereinafter* Yarnold]; M. Cherif Bassiouni, *International Extradition*, 1983 [*hereinafter* Bassiouni Extradition]; Ivan Anthony Shearer, *Extradition in International Law* 22, 1971 [*hereinafter* Shearer]; Shaw, supra note 1 at 482; *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Valentine v. United States*, 299 U.S. 5 (1936)

⁶ Statement of Facts, par. 2.

⁷ Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, § 38 (1B) [*hereinafter* ICJ Statute]; *North Sea Continental Shelf Case* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 1969 I.C.J. 3, (20 Feb. 1969), par 74-79 [*hereinafter* North Sea];

⁸ Yarnold, supra note 5, at 12; Shearer, supra note 5, at 35; Bruce Broomhall, *International Justice and the International Criminal Court* 122, 2003 [*hereinafter* Broomhall]; Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* 116, 1992 [*hereinafter* Sunga]; Shaw, supra note 1, at 483;

⁹ Yarnold, supra note 5, at 11; Shearer, supra note 5, at 23-27;

juris¹⁰ necessary for a customary norm to exist, customary law¹¹ cannot govern cases concerning extradition.

A multilateral convention may also serve as a basis for extradition.¹² It must, however, explicitly contain an obligation to extradite.¹³ This is demonstrated when an obligation *aut dedere aut judicare*¹⁴ or the duty to extradite or prosecute is included in such a convention.

II. UNDER INTERNATIONAL HUMANITARIAN LAW, RODMANIA IS JUSTIFIED IN REFUSING TO EXTRADITE MR. HATTIN.

A. The Geneva Conventions, as well as its Additional Protocols do not provide a sufficient legal basis for extradition.

Rodmania, Alstaat and Xian are parties to the Geneva Conventions and its two Additional Protocols.¹⁵ As such, the Conventions and the First Additional Protocol are applicable laws. These find full application when there is an international armed conflict; which exists when there is resort to armed force or violence between States, or when there is a partial or total occupation of one state over another state regardless of whether or not it is met with armed resistance¹⁶.

When Xian sent its troops to Alstaat in January 2005, and engaged in battle with the latter's forces, such situation constitutes an international armed conflict which calls for the application of the Geneva Conventions as well as Additional Protocol I¹⁷.

¹⁰North Sea, *supra* note 7, at 74; Asylum Case (Columbia v. Peru), 1950 I.C.J. 266, par. 276 [*hereinafter* Asylum Case];

¹¹*Ibid.*; ICJ Statute, *supra* note 7, § 38 (1B);

¹²Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, May 23, 1988, S.Treaty Doc. No. 100-20 (2d Sess. 1988), § 5 (1 and 2);

¹³Broomhall, *supra* note 8, at 122-123.

¹⁴*Id.*

¹⁵Statement of Facts, par.2.

¹⁶Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, art. 2 [*hereinafter* Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, art. 2 [*hereinafter* Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 2 [*hereinafter* Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 2 [*hereinafter* Geneva Convention IV]; Common Article 2; Tadic Appeals Judgment (October 1995) para 70; Dinstein

¹⁷*Id.*, Common Article 2; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [*hereinafter* Additional Protocol I] Art 1(3), Art 3.

1. Article 49 of Geneva Convention 1 imposes only a duty to prosecute, but not a duty to extradite.

While the Geneva Conventions impose an obligation on States to enact legislation to punish grave breaches, to search for persons who have allegedly committed such crimes, and to bring them before their own courts, extradition is only permissive according to the preference of the State.¹⁸ During the deliberations on the Geneva Conventions, the Diplomatic Conference of Geneva was not able to agree on a text establishing the GCs or AP I as constituting the legal basis for extradition in cases where no extradition treaty exists between the State Parties concerned.¹⁹ At best, assenting to a request for extradition is only discretionary upon the requested State, as the right to choose between prosecuting the person and extraditing him is recognized as absolute²⁰. In this case, whether or not Rodmania will extradite Mr. Hattin to Alstaat is discretionary, as neither the Geneva Conventions nor Additional Protocol I obligates it to do so.

2. Article 88 of Additional Protocol 1 on mutual assistance on criminal matters is not a basis for an obligation to extradite

Mutual assistance in criminal matters mandates States to cooperate in the prosecution of grave breaches²¹. This may include the compilation and exchange of information, notification of documents, conducting of searches, and other modes of assistance with respect to the tracing, arrest and trial of suspected offenders²².

Even though mutual assistance stems from the principle that grave breaches are subject to universal jurisdiction, such does not constitute a basis for an obligation to extradite because its conditions and modalities are determined by the law of the requested State²³.

B. Assuming arguendo that Article 49 is sufficient basis for extradition under the aut dedere aut judicare rule, this does not apply in the case of Rodmania.

¹⁸ Geneva Convention I Art 49; Geneva Convention II Art 50; Geneva Convention III Art 129; Geneva Convention IV Art 146; How Does Law Protect in War (1999) pp. 247.

¹⁹ Commentary to Additional Protocol I Art 88, International Committee of the Red Cross

²⁰ *Ibid.*

²¹ Additional Protocol I Art 88

²² Commentary to Additional Protocol I Art 88, International Committee of the Red Cross

²³ *Ibid.*

The *aut dedere aut judicare* rule imposes upon a State the choice to either extradite or investigate and prosecute.²⁴ A State may be considered in breach of this obligation only when it is clearly shown that it failed to accomplish both options.²⁵

1. Rodmania did not fail in its duty to prosecute.

Article 49 imposes the obligation on state parties to search for the persons accused of grave breaches and to prosecute them. It is an active duty on the part of the state concerned, and must be undertaken automatically²⁶. Here, Rodmania began examining Mr. Hattin's case within a month after Alstaat informed Xian of Mr. Gayload's allegations.²⁷ Such investigation was in view of the formal determination of his eligibility to apply for refugee status. More importantly, it would also necessarily include a finding of any *prima facie* case as to the commission of Mr. Hattin of any violation of international humanitarian law, as this would be a bar to his being considered as a refugee²⁸. The investigation conducted by the Rodmanian government was sufficient compliance therefore with its duty to prosecute.

C. Rodmania cannot extradite Mr. Hattin to Alstaat when there is no *prima facie* case showing he violated international humanitarian law.

The Geneva Conventions mandate that extradition is restricted by the national legislation of the requested State and may be pursued as an option only if the requesting State has made out a *prima facie* case.²⁹ This means that the acts alleged to have been committed involves prosecution before the courts³⁰.

1. The actions of Mr. Hattin do not constitute grave breaches of the Geneva Conventions or serious violations of the laws or customs of war.

Physical mutilation and biological experiments, when committed against a protected person such as a wounded prisoner of war, is considered a grave breach of the Geneva Conventions³¹. However, when the amputation or experiment is

²⁴ ILC, Preliminary Report on the Obligation to Extradite or Prosecute, 7 June 2006, UN Doc. A/CN.4/ 571.

²⁵ *Id.*

²⁶ Commentary to Article 49 of the Geneva Convention I, International Committee of the Red Cross

²⁷ Statement of Facts, par. 9.

²⁸ 1951 Convention Relating to the Status of Refugees, Article 33(2)

²⁹ Geneva Convention I Art 49; Geneva Convention II Art 50; Geneva Convention III Art 129; Geneva Convention IV Art 146.

³⁰ Commentary to Geneva Convention III Art 129, International Committee of the Red Cross

³¹ Geneva Convention I Art 50; Geneva Convention II Art 51; Geneva Convention III Arts 13 and 130; Geneva Convention IV Art 147; Additional Protocol I Art 85 (1).

performed with the sole object of improving the patient's condition or saving his very life, such cannot be considered a grave breach, as the action is justified by the medical treatment of the prisoner concerned and is carried out in his interest³².

When Mr. Hattin amputated the limbs of the wounded and practiced skin implantation in the Medical Unit camp, he carried them out as part of his duty as medical staff under the supervision of a chief doctor and as necessary treatments to preserve the lives of those wounded in battle³³.

In Mr. Gayload's case, his gunshot wound which resulted in a state of comatose only shows the acuteness of his medical condition. Amputation is a medically-recognized treatment especially when the limb has attained a gangrenous status. Since the act of amputating his limb was only for therapeutic purposes, it cannot be considered as a grave breach of the Geneva Conventions.

Even Mr. Gayload's allegation³⁴ that he witnessed a colleague die in fear and unrest after an unsuccessful removal of burned tissue for transplantation performed by Mr Hattin is not a grave breach. The removal was part of the prisoner's medical treatment, and even if it were unsuccessful, such was still performed with the sole objective of improving his condition. No proof is shown or even an allegation made that Mr. Hattin directly caused the death or seriously endangered the health of this particular prisoner.

Mr. Hattin performed such actions to save the lives of those who were in the Medical Unit camp, regardless of whether they be part of the Xian army, the enemy forces or the civilian population.³⁵ Hence, his medical treatments cannot be considered as mutilations and medical experiments prohibited by IHL.

2. The actions of Mr. Hattin do not constitute crimes against humanity

The crimes against humanity of torture and of other inhumane acts require that the perpetrator inflicted severe physical or mental pain or suffering³⁶, or serious injury to body or to mental or physical health by means of an inhumane act³⁷. The crime must constitute a widespread or a systematic attack³⁸ directed against a civilian population³⁹ with knowledge of such target.⁴⁰

³² Geneva Convention III Art 13

³³ Statement of Facts, par. 8 in relation to par. 14 (a)

³⁴ Statement of Facts, par. 14

³⁵ Statement of Facts, par. 8.

³⁶ International Criminal Court, Elements of Crimes and its Rules of Procedure and Evidence, Art 7(1)(f)

³⁷ *Ibid.*, Art 7(1)(k)

³⁸ ICTY (Trial) *Prosecutor v. Naletilic and Martinovic*, IT-98-34, para.236.

³⁹ Statute, Article 3.

⁴⁰ *Naletilic and Martinovic*, supra note 38; Dormann, *Elements of War Crimes*, (2003).

Mr. Hattin's actions do not constitute a crime against humanity, either of torture or of other inhumane acts. The physical mutilation, tissue transplantation and skin implantation were all part of legitimate medical treatments carried out in the interest of the patients⁴¹ in the Medical Unit camp. The acts were not to inflict pain or suffering, but were for therapeutic purposes. They were not done by means of an inhumane act, but were performed using the dictates of medical necessity in the context of constraints existing in the battlefield. All of Mr. Hattin's acts followed the established standards of evaluation schemes on medical care⁴².

A crime may be widespread by the cumulative effect of a series of inhumane acts.⁴³ The acts of Mr. Hattin are not to be considered as inhumane, as they were legitimate medical treatments performed only for therapeutic purposes.

The systematic character of a crime against humanity requires that it be carried out in furtherance of a larger plan or policy, which entails repetition of similar conduct.⁴⁴ There was no showing or even an allegation that the acts of Mr. Hattin are products of intensive planning, showing an organized nature of the acts⁴⁵. His actions do not form part of any calculated plan or policy to inflict injury or suffering on the wounded in the Medical Unit camp, but were treatments to address whatever medical needs the patients may have.

Mr. Hattin did not direct any attack on the civilian people with knowledge of such target. The acts performed on the people in the Medical Unit camp were medical treatments required to preserve the lives of those wounded in battle regardless of their status as Xian army, enemy or civilian. They were not considered as military targets, but as patients requiring the best kind of medical situation given the circumstances in field.

III. FURTHERMORE, RODMANIA IS BOUND UNDER INTERNATIONAL REFUGEE AND HUMAN RIGHTS LAW TO PROTECT THE PERSON OF MR. HATTIN, AND SO MUST ACCORDINGLY REFUSE EXTRADITION.

A. Under the principle of non-refoulement, Rodmania is prohibited from extraditing Mr. Hattin.

The principle of non-refoulement prohibits states from expelling or returning a refugee or asylum seeker to territories where there is a risk that his life or freedom

⁴¹ Geneva Convention III, Art 13.

⁴² Statement of Facts, para 8

⁴³ ICTY (Trial) *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, para. 179.

⁴⁴ ICTY (Judgment), *Prosecutor v. Kunarac*, IT-96-23.

⁴⁵ *Nalentic and Martinovic*, *supra* note 38.

would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion⁴⁶.

1. Rodmania is bound under the 1951 Convention Relating to the Status of Refugees to respect the rights of refugees and asylum seekers.

The concept of non-*refoulement* was codified in Article 33 of the 1951 Convention and its subsequent Protocol, to which Rodmania and Alstaat are parties. Non-*refoulement* under the 1951 Convention is a non-derogable obligation⁴⁷. Rodmania is responsible for any act with respect to refugees and asylum seekers that occurs within its territory or is committed by its organs or agencies acting on its behalf⁴⁸. Any extradition to be made by Rodmania must necessarily conform to its other treaty obligations, and any obligation to extradite, if found to exist, must take into account the principle of non-*refoulement*⁴⁹.

2. Mr. Hattin is a protected person under the 1951 Convention.

Mr. Hattin is a refugee under the 1951 Convention. A refugee is one who, 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country...' ⁵⁰. The Convention does not require that a person must be formally recognized as a refugee to be treated as such, only that he fulfills the criteria set forth in it⁵¹. Thus, the fact that Mr. Hattin's refugee status is still under consideration by the Rodmanian Refugee Examination Committee is of no moment, as such formal determination is merely declaratory in nature⁵².

⁴⁶ Article 33(1), 1951 Convention Relating to the Status of Refugees [hereinafter, '1951 Convention']; 1967 Protocol to the Convention [hereinafter, '1967 Protocol']; 1967 Declaration on Territorial Asylum adopted by the United Nations General Assembly [hereinafter, 'Declaration on Territorial Asylum']; Article III(3), 1966 Principles Concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee; Article 22(8), 1969 American Convention on Human Rights; Article II(3), 1969 Organization of Africa Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.

⁴⁷ Article 42(1), 1951 Convention.

⁴⁸ Articles 4 and 5, Articles on State Responsibility adopted by the International Law Commission on May 31, 2001.

⁴⁹ Article 3(2), 1957 European Convention on Extradition; 1981 Inter-American Convention on Extradition; E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', in E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003), pp. 112-113.

⁵⁰ Article 1(A)(2), 1951 Convention, as amended by the 1967 Protocol.

⁵¹ Article 31, 1951 Convention; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979); UNGA Resolution 52/103 of February 9, 1998.

⁵² Note on Non-Refoulement (Submitted by the High Commissioner) (EC/SCP/2), from the Executive Committee of the High Commissioner's Programme, Twenty-eighth session, para. 19.

The “well-founded fear of persecution” contains both the subjective element of “fear” and the objective criterion of whether this fear is “well-founded”.⁵³ With regard to the element of fear, the state may take into account the asylum seeker’s frame of mind, his personal background, and his own interpretation of the situation and personal experience. On the other hand, to determine whether the fear is well-founded, States parties must consider the personal background of the applicant, influence, wealth, or outspokenness. States may also take into account the general situation in the country of origin⁵⁴. If a reasonable person in the applicant’s situation would fear persecution, then that fear is well-founded, and so long as an objective situation is established, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility⁵⁵.

The persecution contemplated by the 1951 Convention are not exclusively those caused by reasons of ‘race, religion, nationality, membership of a particular social group or political opinion’⁵⁶. Rather, the provisions of the Convention are to be construed broadly in light of its humanitarian objectives⁵⁷, and it is not the reason for the persecution which is controlling, but rather the fact of the persecution itself⁵⁸.

Neither does Mr. Hattin fall under the exceptions to the Convention⁵⁹ nor under the exceptions to the application of non-*refoulement*⁶⁰. Mr. Hattin has not committed any war crimes, or crimes against humanity. Neither has he committed any serious non-political crime nor any act contrary to the purposes of the United Nations. Mr. Hattin is also not any danger to the security of Rodmania, nor has he been convicted by final judgment of a particularly serious crime. Instead, Mr. Hattin is a productive and vital member of Rodmanian society. He had earlier graduated from a medical college in Rodmania and is currently employed as a medical doctor in a Rodmanian hospital.

Even assuming the possibility that Mr. Hattin falls under any exception, such determination is to be made by Rodmania, and may not be unilaterally

⁵³ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees para. 38, U.N. Doc. HCR/1P/4/Eng/REV.2 (1992)

⁵⁴ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees para. 41-43, U.N. Doc. HCR/1P/4/Eng/REV.2 (1992)

⁵⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

⁵⁶ Article 33(1), 1951 Convention.

⁵⁷ Preamble, 1951 Convention. E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement’, in E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003), p. 126.

⁵⁸ Declaration on Territorial Asylum; Conclusion No. 6 (XXVIII) 1977 and Conclusion No. 15 (XXV) 1979, of the Executive Committee of the High Commissioner’s Programme.

⁵⁹ Article 1(F), 1951 Convention.

⁶⁰ Article 33(2), 1951 Convention.

imposed by Alstaat, as it is the state granting asylum which has the right to evaluate the grounds for the grant of asylum⁶¹.

3. Mr. Hattin's life and freedom will be threatened by his return to Alstaat.

The concept of "threat to life and freedom" under Article 33 of the 1951 Convention has been construed to be broader in scope than the "well-founded fear of persecution" in the definition of refugees in Article 1. It encompasses circumstances where a refugee or asylum seeker (a) has a well-founded fear of persecution, (b) faces a real risk of torture or cruel or inhuman treatment, or (c) faces other threats to life, physical integrity, or liberty⁶².

There is an ongoing political tension between Xian and Alstaat. Being a Xian national, and having been involved in the recent clash between the Xian troops and Alstaat forces, Mr. Hattin clearly has a reasonable basis for expecting a real risk of threats to his life, physical integrity, and his liberty, which is beyond mere conjecture. He is accused of crimes he did not commit, and is being used by the government of Alstaat as a political pawn for its refusal to execute any of the provision of the Cease-Fire Agreement⁶³. Mr. Hattin is also unable to return to Xian for his well-founded fear of being unjustly punished in a court pandered to politics, and his inability to seek assistance from his own government⁶⁴.

Non-refoulement prohibits not only a return to the refugee's country of origin or nationality, but in fact prohibits a return to *any* territory where the refugee's life and freedom would be at risk⁶⁵. It also prohibits a removal of the refugee to a third state where there is a danger that the refugee might be sent from that third state to a territory where he would be at risk⁶⁶. Thus, the prohibited territories in this case would necessarily include Alstaat.

B. Under international human rights law, Rodmania may validly refuse to extradite Mr. Hattin.

Laws protecting human rights apply in all situations. Even in times of armed conflict, the protection offered by human rights conventions does not

⁶¹ Article 1(3); Declaration on Territorial Asylum.

⁶² E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', in E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003), p. 125

⁶³ Statement of Facts, par. 14(c).

⁶⁴ Statement of Facts, par. 8.

⁶⁵ Article 33(1), 1951 Convention.

⁶⁶ E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', in E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003), p. 122

cease⁶⁷. One of the major sources of international human rights law is the International Convention on Civil and Political Rights.

A. Rodmania is obligated to refuse extradition under the terms of the ICCPR.

As a signatory to the United Nations International Covenant on Civil and Political Rights (ICCPR), Rodmania is bound to observe the provisions therein⁶⁸. Article 7 provides an absolute prohibition on the use of torture, cruel, inhuman or degrading treatment or punishment. Punishment through the death penalty that causes prolonged suffering is considered cruel and inhumane punishment.⁶⁹ Hanging as a form of execution causes prolonged suffering⁷⁰. Furthermore, Article 7 includes the obligation of States parties not to expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition⁷¹. In view of this, should Rodmania extradite Mr. Hattin with full knowledge that there is a risk that his rights under the ICCPR will be violated in Alstaat, Rodmania itself may be considered to be in violation of the ICCPR. It is therefore clear that in refusing to extradite Mr. Hattin, Rodmania is simply fulfilling its obligation under the ICCPR

B. Current customary law on extradition validly permits Rodmania's refusal to extradite on the ground that death penalty may be resorted to by the requesting state.

States have generally employed human rights considerations in the extradition process⁷². The customary law on extradition provides that the existence of the death penalty in the requesting state may be a valid ground for refusal to extradite if the requested state does not provide for the death penalty in the same case. Such custom among states is well evidenced by numerous cases⁷³, bilateral⁷⁴

⁶⁷ Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory. Advisory Opinion. 2004 I.C.J. 136. 178 (July 9)

⁶⁸ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Article 26

⁶⁹ Chitat Ng v. Canada, U.N. Human Rights Committee., 49th Sess., Comm. No. 469/1991, ¶¶ 16.3-4, U.N. Doc. CCPR/C/49/D/469/1991 (1994).

⁷⁰ Kelly, Michael. *Cheating Justice by Cheating Death: the Doctrinal Collision for Prosecuting Foreign Terrorists - Passage of aut delere aut iudicare into Customary Law & Refusal to Extradite Based on the Death Penalty* 20 ARIZ. J. INT'L & COMP. L. 491

⁷¹ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

⁷² Dugard, John and Van Den Wyngaert, Christine. *Reconciling Extradition with Human Rights*. 92 Am. JIL.

⁷³ United States v. Burns, Supreme Court of Canada, 2001, D.L.R. (4th), 1; Mohamed & Another v. President of the Republic of South Africa, Constitutional Court of South Africa, 2001 (7) BCLR 685 (CC).

Soering v. United Kingdom, 11 Eur. Ct. H.R. 439, 1989.

and multilateral treaties⁷⁵, and other legal documents evidencing widespread state practice⁷⁶.

PRAYER FOR RELIEF

For the foregoing reasons, the State of Rodmania requests this Honorable Court to declare that Rodmania has not breached its international obligations under international humanitarian law with respect to its refusal to extradite Mr. Hattin.

Respectfully submitted,

AGENTS FOR THE STATE OF RODMANIA

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⁷⁴ Extradition Treaty Between Canada and the United States of America, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983, 1976 . Can. T.S. No. 3. Great Britain-Israel , 1960, 377 U.N.T.S. . 331 Art. 3. United States-Mexico Extradition Treaty.

⁷⁵ 1981 Inter-American Convention on Extradition, Organization of American States, Feb. 25, 1981, 20 I.L.M. 723, art. 9. European Convention on Extradition, opened for signature Dec. 13, 1957, art. 11, 359 U.N.T.S. 273, 282.

⁷⁶ 1990 Model Treaty on Extradition, United Nations GAOR 3d Comm., 45th Sess., Agenda Item 100, at 6, U.N. Doc. A/RES/45/116, 1991.