THE REPUBLIC OF ACASTUS v. THE STATE OF RUBRIA: THE CASE CONCERNING THE ELYSIAN FIELDS

*Cora Charly von der Heide, Jessica Henopp, Söre Jötten, Felix Machts, and Torben Spliedt**

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* Memorial for the Respondent, University of Kiel, German: Philip C. Jessup International Law Moot Court Competition.

I. STATEMENT OF JURISDICTION

The differences between the Republic of Acastus and the State of Rubria concerning the Elysian Fields have been brought before the International Court of Justice in accordance with Article 40(1) of its statute by notification of the *Compromis* for Submission to the International Court of Justice of the Differences between the Republic of Acastus (Applicant) and the State of Rubria (Respondent) Concerning the Elysian Fields. This special agreement

was concluded by the parties in Chicago, Illinois, USA, on September 1, 2005 and was notified to the Court on September 15, 2005. The *Compromis* constitutes a statement of agreed facts but not an agreement to the Court's *ad hoc* jurisdiction. Rubria has no objection to the admissibility of the matters concerning the RABBIT. However, with respect to all other matters, including Rubria's direct responsibility for alleged human rights violations, admissibility is contested.

The Court is respectfully requested to decide the case on the basis of the rules and principles of general international law, as well as any applicable treaties.

The Court is also requested to determine the legal consequences, including the rights and obligations of the parties, arising from its judgment on the questions presented in the case.

II. QUESTIONS PRESENTED

The State of Rubria respectfully asks this Court to decide:

I. Whether the Court lacks jurisdiction over all claims other than those under the RABBIT, since Acastus is not in continuation of Nessus and has not accepted the compulsory jurisdiction of the Court in its own right;

II. Whether Rubria exercises rights attendant to its sovereignty over territory and natural resources and does not violate international law by permitting the construction of the pipeline as proposed;

III. Whether the actions of PROF are not imputable to Rubria under international law, or in the alternative, did not violate any international legal obligation owed by Rubria to Acastus;

IV. Whether Acastus is in breach of Article 52 of the RABBIT by virtue of the Acastian civil court's decision.

III. STATEMENT OF FACTS

In 2000 the Republic of Nessus dissolved to form two new democratic States: the Republic of Acastus (Applicant in this case), incorporating the rich coastal plains north of the thirty-sixth parallel, and the State of Rubria (Respondent in this case), incorporating the mountainous and largely undeveloped southern half of Nessus's territory.

Rubria became a member of the United Nations [hereinafter UN] in 2001 and accepted the compulsory jurisdiction of the International Court of Justice [hereinafter ICJ], making one reservation that the Court lacks jurisdiction over any case in which the opposing state has not been a party to the Statute of the Court [hereinafter ICJ Statute] for at least twelve months at the time of the application to the Court. Rubria is, and Nessus was, a party to the Vienna

Convention on the Law of Treaties [hereinafter VCLT], the International Covenant on Civil and Political Rights [hereinafter ICCPR], the International Covenant on Economic, Social and Cultural Rights [hereinafter ICESCR], and the Vienna Convention on Succession of States in Respect of Treaties [hereinafter VCST]. Acastus has not signed any of these treaties in its own capacity. Rubria is also a member of the International Labour Organization [hereinafter ILO] and Acastus is a member of the Organization for Economic Cooperation and Development [hereinafter OECD]. Although Acastus claims to continue the international legal personality of Nessus in both, membership in the UN and in all treaties, the Security Council [hereinafter SC] states in its Resolution 2386 that Nessus has ceased to exist and that Acastus shall also apply for membership. This resolution was subsequently interpreted by the Under-Secretary-General for Legal Affairs in a memorandum to conclude that Acastus can temporarily continue the membership of Nessus in the UN until it has been admitted as a new member state. Several third states including Rubria have protested against this interpretation because no devolution agreement has been signed, Acastus does not encompass a majority of the land mass or population of the former Nessus, and Nessus's armed forces were divided evenly between Acastus and Nessus. Irrespective of these facts, Acastus has not applied for membership.

Nonetheless, relations between Acastus and Rubria have largely been friendly. In February 2002, both countries signed the Rubria-Acastus-Binding-Bilateral-Investment-Treaty [hereinafter RABBIT], which *inter alia* guarantees that Acastus will enforce all aspects of its domestic law in carrying out its obligations under the treaty, including the Multinational Corporations Responsibility Act [hereinafter MCRA], and that any disputes regarding the RABBIT shall be referred to this honorable Court. The MCRA guarantees that in the case of a violation of international law by an Acastian company in its conduct abroad compensation will be provided to those harmed.

In May 2003, the Trans-National Corporation [hereinafter TNC], a limited liability company incorporated in Acastus, and the government of Rubria announced the formation of the Corporation for Oil & Gas [hereinafter COG] in Rubria for the purpose of developing and exporting petroleum resources discovered in northern Rubria. Exclusive rights to operate within the region were promptly granted. TNC holds fifty-one per cent and Rubria forty-nine per cent of shares in COG. Under the corporate charter of COG, all shareholder decisions are made by simple majority vote, on a one-share, one-vote basis.

For the extraction and exportation of the oil, experts have recommended the construction of a pipeline running through a territory used by the Elysians for agriculture. The Elysians are an indigenous group with Acastian citizenship, resident in Acastus and present only temporarily for the purpose of agricultural activities. Although the construction through the Elysium would

destroy half of the agricultural lands used by the Elysians and would reduce the yields of the remainder, this is the only financially feasible route.

As the Elysians were likely to be hostile to this construction, COG authorized and financed the creation of the Protection & Retention Operations Force [hereinafter PROF] for the sole purpose of accompanying and guarding their personnel.

A study ordered by the Acastian government and performed by the Institute of Local Studies and Appraisals [hereinafter ILSA] delivered a report, stating that the construction would make it impossible for the Elysians to continue their way of life and accusing PROF of seizing young men from among the Elysians and forcing them to work on the COG project.

On September 30, 2004 a number of local NGOs concerned with minority rights, Mr. Borius and an unincorporated group calling itself "Elysians for Justice" brought an action for damages in an Acastian civil court against COG, Rubria, PROF, and TNC. The action alleged that Elysians were forced to perform dangerous work without compensation. Jurisdiction over the case against Rubria, COG, and PROF was based on the Acastian International Rights Enforcement Statute [hereinafter AIRES], which grants Acastian courts jurisdiction in cases where international law has been violated outside of Acastus, as long as the defendant is present in Acastus. In the case against TNC jurisdiction was based on the MCRA and alternatively on AIRES.

Whereas TNC and PROF were dismissed as defendants, Rubria and COG were found jointly and severally liable to the plaintiffs for compensatory damages in an amount equivalent to 200 million Euros. TNC was dismissed on the grounds that the MCRA only imposes legal obligations on corporations which directly operate abroad, the Act does not repeal the limited liability principle, and that AIRES is not applicable because corporations cannot be subjects of international law. PROF did not fulfil the requirement of presence in Acastus. Rubria has vigorously protested against this illegal and extraterritorial judgement and does not accept it.

IV. SUMMARY OF PLEADINGS

Claim I: This honorable Court lacks jurisdiction over all claims other than those under the RABBIT, since Acastus is not the continuation of Nessus and has not accepted the compulsory jurisdiction of the Court in its own right.

I. The Court lacks jurisdiction because the Court shall only be open to State Parties according to Article 35 of the Statute of the International Court of Justice. Acastus is not the continuation of Nessus because it does not meet the necessary criteria under international law to legal identity. Therefore, Acastus cannot claim

Nessus's status as party to the statute and therefore does not have access to the Court.

II. Furthermore, the Court lacks jurisdiction because Acastus does not continue Nessus's membership or its inherent rights *sui generis* and thereby neither enjoys access to the Court, nor falls under its jurisdiction. First, access to the Court cannot be granted on the basis of *sui generis* status because no such right *sui generis* exists and second, Acastus did not declare submission to the ICJ as required under Article 36(2) of the ICJ Statue.

Claim II: By permitting the construction of the pipeline as proposed, Rubria exercises rights attendant to its sovereignty over territory and natural resources and does not violate international law.

I. Rubria has not violated international treaty law. Acastus cannot claim rights under the International Covenant on Civil and Political Rights because Acastus has not automatically succeeded Nessus as party to the ICCPR. In the alternative, Rubria has not violated the ICCPR because first, the Elysians are not "peoples" in the sense of ICCPR Article 1. Second, the Elysians are not Rubrian nationals and have not demonstrated the required element of stability on Rubrian territory. Third, Rubria has not violated Article 27 because agricultural activities are not included in its scope of protection. Fourth, in the alternative, Rubria's fundamental right to economic development supersedes Elysian claims.

II. By permitting the construction of the pipeline, Rubria has not violated customary international law.

Claim III: The actions of PROF are not imputable to Rubria under international law, or in the alternative, did not violate any international legal obligation owed by Rubria to Acastus.

I. The actions of PROF are not imputable to Rubria under international law because first, PROF acted as a private legal entity and not as a state organ of Rubria, and second, no *de facto* relationship exists between PROF and Rubria which entails state responsibility under international law. Neither did PROF exercise elements of Rubrian governmental authority, act under Rubrian instruction or under the direction or control of Rubria, nor can the alleged conduct be attributed to Rubria due to a "failure to control." Third, Rubria bears no responsibility due to so-called "supporting and harboring."

II. In the alternative PROF's actions did not violate any international obligation owed by Rubria to Acastus, because they do not constitute internationally wrongful acts. In the alternative, Acastus is estopped from holding Rubria legally responsible for conduct that it already

guaranteed to Rubria in the RABBIT would not be committed by Acastian companies.

Claim IV: Acastus has violated RABBIT Article 52 by failing to enforce all aspects of its domestic law.

I. TNC's influence and control over COG and PROF constitutes "conduct abroad," requiring the attribution of the alleged human rights violation under RABBIT Article 52. First, the term "conduct abroad" under MCRA Section Four must be interpreted according to international law due to its incorporation into the RABBIT and the accompanying declaration by the Acastian prime minister, and second, TNC is liable for human rights violation committed by COG and PROF under international customary law.

II. Acastus violated the RABBIT Article 52(2) by failing to enforce AIRES provisions. leadings

I. THE COURT LACKS JURISDICTION OVER ALL CLAIMS OTHER THAN THOSE UNDER THE RABBIT

The court lacks jurisdiction over all claims other than those under the RABBIT because Acastus is not in continuation of Nessus and therefore does not have access to the court, and has not accepted the compulsory jurisdiction of the Court in its own right.

A. Acastus is not in continuation of Nessus and therefore does not have access to the Court.

According to Article 35 of the Statute of the ICJ,[1] the Court shall be open to States Parties. Article 93(1) of the UN Charter[2] stipulates that only UN members can become parties to the Statute. Acastus is neither member of the UN nor party to the Statute because UN membership was not automatically transferred to Acastus as successor to Nessus, and furthermore, Acastus does not continue Nessus's membership or its inherent rights *sui generis* and thereby neither enjoys access to the Court, nor falls under its jurisdiction.

1. Acastus is not a UN member because Nessus's membership cannot automatically be transferred to its successor and Acastus does not fulfill the requirements of state identity.

Under customary international law continuation of membership in international organizations can only be established when the emergent and

1. Statute of the International Court of Justice art. 35.
2. U. N. Charter art. 93.

former states are identical.[3] A mere successor state does not assume the rights and obligations of the predecessor.[4] Legal identity is required,[5] which must be derived from certain objective and subjective criteria according to the merits and circumstances of each case.[6] Acastus has fulfilled neither the objective nor the subjective criteria for state identity which have emerged in customary international law:

a) Acastus has not assumed the majority of Nessus's territory;
b) Acastus has not incorporated the dominant share of Nessus's population and military infrastructure;
c) Third States have not accepted Acastus's claim;
d) A devolution agreement has not been signed by Rubria and Acastus.

a. Acastus has not assumed the majority of Nessus's former territory.

Under customary international law a clear majority of the former state's territory is necessary to establish state identity.[7] Continuation claims involving the incorporation of seventy-five per cent of the former territory have been accepted (e.g. India and Russia),[8] while claims of states incorporating forty per cent have been denied (e.g. Pakistan).[9] Furthermore, both the Czech Republic

3. U.N. GAOR, 2d Sess., 1st Comm., Annex 14g, at 582, U.N. Doc. A/C.1/212 (1947); *The Succession of States in relation to Membership in the United Nations*, U.N.Doc.A/CN.4/14 (1962), *reprinted in* [1962] 2 Y.B. INT'L L. COMM'N 101, [hereinafter *Succession of States Memorandum*]; Legality of Use of Force (Serb. & Mont. v. Can.), 2004 I.C.J. 1, 10–11 (Dec. 15) (separate opinion of Judge Kreæa) [hereinafter Opinion of Judge Kreca]. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 80 (6th ed. 2003).

4. *See* Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 1992 I.C.J. 351, 598 (Sept. 11); BROWNLIE, *supra* note 3, at 620–21.

5. *See* KONRAD G. BÜHLER, STATE SUCCESSION AND MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS 5 (2001); Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29, 41 (1995).

6. *See* U.N. GAOR, 2d Sess., 42nd mtg., Annex 6b, at 38, U.N. Doc. A/C.6/162 (1947).

7. *See* OLIVER DORR, DIE INKORPORATION ALS TATBESTAND DER STAATENSUKZESSION 131–40 (1995); *See also* RALF WITTKOWSKI, DIE STAATENSUKZESSION IN VÖLKERRECHTLICHE VERTRÄGE UNTER BESONDERER BERÜCKSICHTIGUNG DER HERSTELLUNG DER STAATLICHEN EINHEIT DEUTSCHLANDS 58 (1992); ANDREAS ZIMMERMANN, STAATENNACHFOLGE IN VÖLKERRECHTLICHE VERTRÄGE 70 (2000).

8. Kashi Parasod Mirsa, *Succession of States: Pakistan's membership in the United Nations*, 3 CAN. Y.B. INT'L L. 281, 283 (1965); Yehuda Z. Blum, *U.N. Membership of the "New" Yugoslavia: Continuity or Break*, 86 AM. J. INT'L L. 830, 832 (1992); *See* Indian Independence Order, U.N. GAOR, 2d Sess., 6th Comm., Annex 6c, at 3b U.N. Doc. A/C.6/161 (1947); Scharf, *supra* note 5, at 50, 59.

9. G.A. Res. 108 (II), at 1451, U.N. Doc. A/399 (Sept. 30, 1947); *Succession of States Memorandum*, *supra* note 3, at ¶ 8.

and the Slovak Republic, incorporating sixty per cent and forty per cent respectively,[10] were obliged to apply for new membership in the UN.[11]
After the dissolution of the Former Socialist Republic of Yugoslavia (hereinafter SFRY), the Federal Republic of Yugoslavia (hereinafter FRY) contained only forty per cent of the territory;[12] therefore the UN rejected its claim of continuation.[13] Therefore, because Acastus and Rubria both assumed fifty per cent of Nessus's former territory, Acastus has no clear majority and is not identical with Nessus.

b. Acastus has not incorporated the majority of Nessus 's population or the dominant share of its military infrastructure.

Only when a new state incorporates the majority of the former state's population and the dominant share of its military infrastructure the state can be considered identical to the former state.[14] India's claim was accepted because it incorporated eighty per cent of British India's population,[15] while Russia's claim was accepted because it incorporated more than half of the Soviet Union's population[16] and assumed the dominant share of its enormous military infrastructure.[17] In contrast the FRY contained less than half of the SFRY's population and was not accepted as identical to the SFRY.[18] As Acastus incorporated only fifty per cent of Nessus's population and military apparatus it cannot claim to be identical to Nessus.

c. Acastus cannot claim to be identical because third states have not accepted this claim.

Third states' acceptance or non-acceptance of continuation claims is an important subjective element.[19] Although the FRY claimed to continue the

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10. *See* Mary Battiata, *Czechs, Slovaks Set "Velvet Divorce"*, WASHINGTON POST, Aug. 28, 1992, at A25.

11. G.A. Res. 47/221, U.N. Doc. A/RES/47/221 (Jan. 19, 1993); G.A. Res. 47/222, U.N. Doc. A/RES/47/222 (Jan. 19, 1993).

12. Blum, *supra* note 8, at 833.

13. G.A. Res. 47/1, ¶ 1, U.N. Doc. A/RES/47/1 (Sept. 22, 1992); S.C. Res. 777, U.N. Doc. S/RES/777 (Sept. 19, 1992).

14. *See* DORR, *supra* note 7, at 131,140; ZIMMERMANN, *supra* note 7, at 70, 71.

15. Scharf, *supra* note 5, at 50.

16. Blum, *supra* note 8.

17. Scharf, *supra* note 5, at 51.

18. G.A. Res. 47/1, *supra* note 13; S.C. Res. 777, *supra* note 13; Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

19. *See* BROWNLIE, *supra* note 3, at 639; DORR, *supra* note 7, at 142; ZIMMERMANN, *supra* note 7, at 77.

SFRY's UN seat,[20] the claim was not accepted by the USA, Canada, Japan, Australia, and members of the European Community.[21] Rubria and several other states have vigorously and consistently protested against Acastus's claim to continue Nessus's membership, thereby demonstrating that Acastus's claim must also be rejected.

d. Nessus's dissolution was not concluded with a devolution agreement.

A major subjective requirement for continuation is the existence of a devolution agreement.[22] Even though Russia fulfilled all objective criteria illustrated above, the UN nonetheless made clear that it was only possible for Russia to continue the USSR's membership in the UN because of the Alma Ata devolution agreement between the USSR, Belarus, the Ukraine, and the Commonwealth of Independent States. [23] India was also able to continue British India's membership in the UN because of the existence of a devolution agreement.[24] Until today, the two successor states of Nessus have failed to sign a devolution agreement, indicating that the consent of the states immediately concerned and necessary for the continuation of the former state to be accepted, has not been established.

2. Acastus does not enjoy Nessus's membership or membership rights, including access to the Court *sui generis*.

Until Acastus has applied for new membership in the UN, it would be incompatible with international law to temporarily continue Nessus's membership or certain membership rights *sui generis* because the Charter does not provide for rights derived from a *sui generis* position, and the 2004 judgments of this Court in *Legality of Use of Force*[25] make clear that *sui generis* status does not grant access to the Court.

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20. Scharf, *supra* note 5, at 59.

21. *See* G.A. Res. 47/201, U.N. Doc. A/RES/47/201 (Dec. 22, 1992).

22. Paul R. Williams, *State Succession and the International Financial Institutions: Political Criteria v. Protection of Outstanding Financial Obligations*, 43 INT'L & COMP. L. Q. 776, 783 (1994); *See* BROWNLIE, *supra* note 3, at 623.

23. Agreement Establishing the Commonwealth of Independent States, Dec. 21, 1991, 31 I.L.M. 151 (1991); *See* Scharf, *supra* note 5, at 68.

24. *See* Indian Independence Order, U.N. GAOR, 2d Sess., 6th Comm., Annex 6c, at 308–10, U.N. Doc. A/C.6/161 (1947).

25. Legality of Use of Force (Serb. & Mont. v. Can.), 2004 I.C.J. 1 (Dec. 15) (Preliminary Objections) [hereinafter Legality of Use of Force].

a. The Charter does not provide for rights derived from a sui generis position.

The provisions of the Charter, as far as the relationship of the UN *vis-à-vis* states is concerned, have been formulated in exclusive terms of a member state/non-member state dichotomy.[26] Because Acastus is not a member to the UN, it therefore does not enjoy any rights attendant upon UN membership

b. Sui generis status does not grant access to the Court.

The position taken by the UN by accepting the FRY as a new member state in 2000 and this Court's judgments in the *Legality of Use of Force* document the legal irrelevance of a state's *sui generis* position. Although the FRY's continuation claim was rejected by the UN, the FRY was *de facto* allowed to participate in particular work of the UN. In *Application for Revision*[27] this Court examined the issue of a *sui generis* position for the FRY and stated that it was unable to deny *locus standi* to the FRY in the *Genocide Case*[28] due to the unclear and unprecedented situation before it and therefore developed the ambiguous term of *sui generis* status.[29] In its 2004 judgments in *Legality of Use of Force* however, this Court clarified that a *sui generis* position is generally not legally relevant and ruled that "*sui generis,* " is not a prescriptive term from which certain defined legal consequences "accrue" and "no final and definitive conclusion was drawn . . . from this descriptive term on the amorphous status of the [FRI] *vis-à-vis* or within the United Nations."[30] It further stated that "the *sui generis* position of the Applicant could not have amounted to its membership in the Organization"[31] and came to the conclusion that the FRY was not a member of the UN, and in that capacity a state party to the statute of the ICJ.[32] As emphasized in Judge Kreca's dissenting opinion in *Genocide Case (Application for Revision)*, the FRY's so-called *sui generis* position was considered insufficient for establishing access to the Court.[33] In light of the final clarifications in the above cases, the fact that Acastus enjoys certain *de*

26. Opinion of Judge Kreca, 2004 I.C.J. 1, at ¶ 20.

27. Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Yugo. v. Bosn. & Herz.), 2003 I.C.J. 7 (Feb. 3) (Preliminary Objections) [hereinafter Genocide Case (Application for Revision)].

28. *See generally* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595 (July 11) (Preliminary Objections) [hereinafter Genocide Case].

29. *See* Genocide Case (Application for Revision), 2003 I.C.J. 7, at ¶ 70.

30. Legality of Use of Force, 2004 I.C.J. 1, at ¶ 73.

31. *Id.* at ¶ 77.

32. *Id.*; Opinion of Judge Kreca, 2004 I.C.J. 1, at ¶ 20.

33. *See* Genocide Case (Application for Revision), 2003 I.C.J. 7, at ¶ 30 (dissenting opinion of Judge Kreca); Legality of Use of Force, 2004 I.C.J. 1, at ¶ 89.

facto participation rights despite its unresolved identity does not create legal circumstances amounting to access to this Court.

B. Alternatively, Acastus's sui generis position does not imply that it automatically continues Nessus's declaration of submission to the ICJ's compulsory jurisdiction.

The submission of a former state generally does not have binding effect on successor states.[34] The judgment in the *Genocide Case (Application for Revision)* supports this position, as the Court stated that it explicitly based its jurisdiction on ICJ Statute Article 35(2)[35] in connection with Article 9 of the Genocide Convention[36] and not on the FRY's *sui generis* status.[37] Acastus did not declare its submission to the ICJ as required under Article 36(2) of the ICJ statute.[38] Acastus did not apply for membership, evidently seeking to circumvent Rubria's reservation to the statute, under which it only accepts the compulsory jurisdiction of this Court when the opposing state has been a party to the ICJ statute for at least twelve months. If Acastus had applied for membership as requested, jurisdiction could not be granted in the present case due to the Rubrian reservation. For these reasons, the Court does not enjoy jurisdiction in this case.

II. BY PERMITTING THE CONSTRUCTION OF THE PIPELINE AS PROPOSED, RUBRIA EXERCISES RIGHTS ATTENDANT TO ITS SOVEREIGNTY OVER TERRITORY AND NATURAL RESOURCES AND DOES NOT VIOLATE INTERNATIONAL LAW.

Rubria does not violate the ICCPR or customary international law.

A. Rubria has not violated international treaty law.

Acastus cannot claim rights under the ICCPR[39] and alternatively, Rubria has not violated the ICCPR.

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34. *See* ZIMMERMANN, *supra* note 7, at 672.

35. . Statute of the International Court of Justice art. 35.

36. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

37. *See* Genocide Case, 1996 I.C.J. 595, at ¶ 41; Legality of Use of Force, 2004 I.C.J. 1, at ¶ 87.

38. Statute of the International Court of Justice art. 36.

39. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

1. Acastus cannot claim rights under the ICCPR because Acastus's claim of automatic succession to the Convention must be denied.

According to the rules of customary international law codified in Articles 34 and 36 of the Vienna Convention on the Law of Treaties[40], a treaty generally only creates rights and obligations for the contracting parties. [41] Acastus never became party to the ICCPR in its own capacity and can therefore not invoke articles thereof, as it neither signed nor ratified this treaty as required in ICCPR Articles 48(1) and (2).[42] According to the clean slate principle, Acastus does not enjoy rights under the ICCPR because it is not in continuation of Nessus; successor States do not automatically succeed in party status because VCST Article 34[43] does not represent customary international law. [44] Israel explicitly stated in its 1948 Declaration of Independence that it was not bound by any treaties "on the basis of generally recognized principles of international law;"[45] additional state practice confirms this principle.[46] E.g. Israel emphasized that a singular declaration of succession cannot have constitutive effect.[47] Just as UN membership is strictly personal in character,[48] party status to human rights treaties is directly connected to the legal personality of the state. Acastus is therefore not a party to the ICCPR and thus not entitled to invoke articles thereof.

2. Alternatively, Rubria has not violated the ICCPR.

Alternatively, Rubria has not violated the ICCPR because the Elysians, as an indigenous group, are not "peoples" in the sense of ICCPR Article 1, and do not constitute a minority entitled to protection under ICCPR Article 27[49] in Rubria.

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40. Vienna Convention on the Law of Treaties, arts. 34, 36, May 23, 1969, 1155 U.N.T.S. 331.

41. Aerial Incident of 27 July 1955 (Isr. v. Bulg.), 1959 I.C.J. 127 (May 26) (Preliminary Objections); *See generally* Certain German Interests in Polish Upper Silesia (F.R.G. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 29 (May 25).

42. International Covenant on Civil and Political Rights, art. 48, Mar. 23, 1976, 999 U.N.T.S. 171.

43. Vienna Convention on Succession of States in Respect of Treaties, art. 34, Aug. 22, 1978, 17 I.L.M. 1488 (1978).

44. Genocide Case, 1996 I.C.J. 595, at ¶¶ 109–111(dissenting opinion judge Kreca); Shigejiro Tabata, *Interim Report by the Committee on State Succession, in* 9 THE JAPANESE ANNUAL OF INTERNATIONAL LAW 167, 173 (1965); *See* Anthony A. Lester, *State Succession and Localized Treaties*, 4 HARV. INT'L L. CLUB J. 145, 153 (1962); 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 86 (1992).

45. Lester, *supra* note 44, at 145, 153; *See* YILMA MAKONNEN, INTERNATIONAL LAW AND THE NEW STATES OF AFRICA 158 (1983).

46. Tabata, *supra* note 44; *See* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 44.

47. *See* ZIMMERMANN, *supra* note 7, at 562; MAKONNEN, *supra* note 45.

48. U.N. GAOR, 2d Sess., 1st Comm., Annex 14g, at 582, U.N. Doc. A/C.1/212 (1947); Scharf, *supra* note 5.

49. International Covenant on Civil and Political Rights, *supra* note 42, at art. 27.

a. The Elysians are not "peoples" in the sense of ICCPR Article 1.

The ICCPR must be interpreted according to the rules of the VCLT.[50] According to VCLT Articles 31 and 32, a treaty's terms must be interpreted according to their ordinary meaning; if terms remain ambiguous, the *travaux préparatoires* may be consulted.[51] Diverse opinions can be found on the interpretation of the term "peoples" in Article 1[52], because the wording leaves the meaning obscure.[53] The *travaux préparatoires* document that minorities were not included in the term "peoples" nor accorded the right of self-determination at the time of drafting.[54] In multinational states, such groups must be of comparable size to other groups and be constitutionally recognized as a people.[55] The term "peoples" implies all people—the *demos*—and not separate *ethnoses* or religious groups.[56] Even if the Elysians partially possess these characteristics, they are not constitutionally recognized as a people by Acastus or Rubria and are not comparable in size to other groups, as they consist of only approximately 5,000 people. The Elysians have instead demonstrated that they are part of the Acastian people by accepting Acastian citizenship and actively participating in the Acastian government. The ILO's 1957 Indigenous and Tribal Populations Convention categorized indigenous populations solely as members of the national population.[57] When the ILO

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50. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS CPPR COMMENTARY 952–53, 994 (2d ed. 2005).

51. Vienna Convention on the Law of Treaties, arts. 31, 32, May 23, 1969, 1155 U.N.T.S. 331; *See* Lighthouses Case (Fr. v. Greece), 1934 P.C.I.J. (ser. A/B) No.62, at 4, 13; Conditions of Admission of a State to Membership in the United Nations (Charter, Art. 4), 1948 I.C.J. 57, at 63 (May 28); Competence of the General Assembly for Admission of a State to the United Nations, 1950 I.C.J. 4, 8 (Mar. 3). *See generally* Polish Postal Service in Danzig, 1925 P.C.I.J. (ser. B) No.11 (May 16) (Advisory Opinion).

52. International Covenant on Civil and Political Rights, *supra* note 42, at art. 1.

53. KNUT IPSEN & EBERHARD MENZEL, VÖLKERRECHT 407 (5th ed. 2004); MALCOLM N. SHAW, INTERNATIONAL LAW 230–31 (5th ed. 2003).

54. U.N. GAOR, 10th Sess., at14–15, U.N. Doc. A/2929, (July 1, 1955); Sub-Comm. on Prevention of Discrimination & Prot. Of Minorities, *Study: The Right to Self-Determination, Implementation of the United Nations Resolutions*, at 9, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (Mar. 1981) (*prepared by* Hector Gros Espiell); Sub-Comm. on Prevention of Discrimination & Prot. Of Minorities, *Study: The right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, at 41, U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (1981) (*prepared by* Aureliu Cristescu); Antonio Cassese, *Self-Determination of People*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92, 96 (Louis Henkin ed., 1981); IPSEN, *supra* note 53, at 413.

55. CASSESE, *supra* note 54, at 92, 94–96; IPSEN, *supra* note 53, at 409.

56. ANNA MEIJKNECHT, TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW 72 (2001); *See generally* U.N. GAOR, 45th Sess., at 18, ¶ 82, U.N. Doc.E/CN.4/Sub.2/1993/34 (July 19, 1993).

57. INTERNATIONAL LABOUR ORGANIZATION, CONVENTION ON INDIGENOUS AND TRIBAL POPULATIONS, ILO No. 107, art. 1 (June 2, 1959), *available at* http://www.ilo.org/ilolex/english/convdispl.htm (last visited Sep. 28, 2006) [hereinafter ILO 107].

recognized indigenous groups as peoples in ILO Convention 169, it clarified in Article 1(3) that no legal consequences can be derived from this term. [58] States have not supported documents like the Draft Declaration on the Rights of Indigenous Peoples, which attempted to grant indigenous groups *inter alia* the right to self-determination.[59] For these reasons, the Elysians do not enjoy the right of self-determination as an indigenous group, and Rubria, therefore, did not violate ICCPR Article 1.

b. Rubria has not violated ICCPR Article 27 because the Elysians are not a protected minority on Rubrian territory.

Rubria has not violated ICCPR Article 27 because the Elysians are not Rubrian citizens and have not demonstrated the required element of stability on Rubrian territory, and Article 27 does not include agricultural activities in its scope of protection. Even if the Elysians and their farming practices are protected under Article 27, Rubria's fundamental right to economic development and other vital State interests supersedes Elysian claims.

i. The Elysians are not Rubrian nationals and have not demonstrated the required element of stability on Rubrian territory.

Article 27 is not applicable to aliens because the drafting process confirms that the term minority only implies groups of nationals.[60] Being nationals of Acastus and not of Rubria, the Elysians do not fall under the protection of Article 27 in Rubria. Alternatively, a minority must additionally fulfill the requirement of "existence" in the relevant state to be protected under Article 27. As can be derived from the *travaux préparatoires*, stability was emphasized in the definition of minorities in order to prevent recognition of immigrants, migrant workers and other forms of "new minorities."[61] During the drafting, the GA emphasized the necessity of distinguishing between long-established, well-defined minorities, and temporary visitors, who, on account of their transient

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58. Convention on Indigenous and Tribal Peoples in Independent Countries, No. 169, June 27, 1989, 28 I.L.M. 1382 (1989).

59. *See* Draft Declaration on the rights of indigenous peoples, U.N. Doc. E/CN.4/Sub2/1992/28 (June 23, 1992); *See also* IPSEN, *supra* note 53, at 412; *See generally* 2005 World Summit Outcome, GA Res. 60/1, U.N. Doc. A/Res/60/1 (Oct. 24, 2005).

60. PARTICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 171 (1991); *See generally* Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Study of the Rights Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/384 (1977) (*prepared by* Francesco Capotorti).

61. The Right of Peoples and Nations to Self-Determination, U.N. GAOR, 10th Sess., at 63 ¶ 186, U.N. Doc. A/2929 (1955); MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 495 (1987); NOWAK, *supra* note 50, at 646.

relationship to the host state, should not be entitled to enjoy the same rights.[62] In order to fulfill these criteria, an ethnic group must have inhabited a traditional settlement area within the state for a significant period of time.[63] The Elysians are not a long-established group with a settlement inside Rubria because they enter and leave Rubria daily for work. Therefore they fail to satisfy the element of stability required for the attribution of minority status in Rubria.

ii. Rubria has not violated Article 27 because agricultural activities are not included in its scope of protection.

Article 27 prohibits State parties to "deny to minorities the right to enjoy their own culture, profess their own religions, or use their own language."[64] If the enjoyment of culture includes protection of a particular way of life associated with the use of land, this solely addresses a relationship with the land that would give rise to a distinct culture.[65] The Human Rights Committee accepted the 1976 expropriation of the one hundred and twenty-five year old Rehbooth community in Namibia because cattle raising cannot create such a relationship to the land "that would have given rise to distinctive culture."[66] Because it cannot be assumed that Elysian agricultural practices create a relevant cultural link to the occupied territory, Rubria has not violated Article 27 by allowing the construction of the pipeline.

iii. Alternatively, even if the Elysians and their agricultural practices are protected, Rubria's fundamental right to economic development supersedes Elysian claims.

Even if states are required to uphold minority rights under the ICCPR, these rights are not absolute.[67] The Human Rights Committee stated in *Lovelace* that state parties may restrict minority rights to residential areas of the minority when such measures "have both a reasonable and objective

62. *See* The Right of Peoples and Nations to Self-Determination, U.N. GAOR, 10th Sess., at 181, ¶ 184, U.N. Doc. A/2929 (1955); NOWAK, *supra* note 50, at 646; CHRISTIAN TOMUSCHAT, Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights, *in* VÖLKERRECHT ALS RECHTSORDNUNG—INTERNATIONALE GERICHTSBARKEIT—MENSCHENRECHTE: FESTSCHRIFT FÜR HERMANN MOSLER 949, 961 (1983).

63. Fourth periodic reports of States parties due in 1993: Ger. 22/02/96, at ¶ 244, U.N. Doc. CCPR/C/84/Add.5 (Feb. 22, 1996).

64. International Covenant on Civil and Political Rights, *supra* note 42, at art. 27.

65. International Covenant on Civil and Political Rights, July 10–28, 2000, J.G.A. Diergaardt v. Namibia, ¶ 10.6, U.N. GAOR, 55th Sess., H.R.C., Communication No.760/1997, U.N.Doc.CCPR/C/69/D/760/1997 (Sept. 6, 2000).

66. *Id.*

67. NOWAK, *supra* note 50, at 658.

justification."[68] Others claim that Article 27 rights are limited by other rights guaranteed under the ICCPR or general limitation clauses such as ICCPR Article 18(3).[69] Under Article 18(3), States may limit ICCPR rights in order to protect fundamental rights and freedoms under their own legal systems.[70] The Rubrian people enjoy the right to self-determination under ICCPR Article 1, including the right to development and the right to exploit their natural resources. Development is recognized as an inherent right,[71] inseparable from self-determination and fundamental to human rights.[72] Even assumed that agricultural activities in Rubria establish similar ties as habitation, e.g. Article 11 of ILO Convention No.107 explicitly allows for the removal of indigenous people for reasons of national economic development.[73] As Rubria's economic development depends on the exploitation of oil resources and the construction of the pipeline through the Elysium, Rubria's right to development provides a reasonable and objective justification for the restriction of any Elysian rights connected to the Elysium and must prevail over rights protected in ICCPR Article 27.

B. Rubria has not violated rights of the Elysians under customary international law.

Under customary international law, minority protection is limited to the general rights of equality and non-discrimination.[74] Several governments, including France, consistently interpret Article 27 as applying only to countries which have adopted the ICCPR without reservation.[75] In the alternative, even if the scope were expanded to include the rights contained in Article 27, attempts to grant additional rights to indigenous peoples have failed due to lack

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68. International Covenant on Civil and Political Rights, Sandra Lovelace v. Canada, ¶¶ 15–16, U.N. GAOR, 13th Sess., H.R.C. Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 (July 30,1981); *See* NOWAK, *supra* note 50, at 655 and accompanying text.

69. NOWAK, *supra* note 50, at 667; *See* Tomuschat, *supra* note 62, at 976 and accompanying text; *See also* Louis B. Sohn, *A Short History of United Nations Documents on Human Rights*, *in* THE UNITED NATIONS AND HUMAN RIGHTS, EIGHTEENTH REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE 38 (1968).

70. International Covenant on Civil and Political Rights, *supra* note 42, at art. 18(3); NOWAK, *supra* note 50, at 430.

71. Declaration on the Right to Development, GA Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986); IPSEN, *supra* note 53, at 440.

72. *See generally* U.N. GAOR, 48th Sess., Supp. No. 49, at 261, U.N. Doc. A/48/141 (1993).

73. ILO 107, *supra* note 57, at art. 11.

74. Individual opinion of Rosalyn Higgins, T.K. v. France, U.N. GAOR, 45th Sess., Supp. No.40, H.R.C. Communication No. 220/1987, *in* Report of the Human Rights Committee, Volume II, Appendix II, at 125, U.N. Doc. A/45/40 (Oct. 4, 1990).

75. *Id.*; *See also* NOWAK, *supra* note 50, at 641.

of acceptance on the international plane.[76] Because customary international law does not exceed the protection standards for minorities established in the ICCPR, the construction of the pipeline would not violate rights enjoyed by the Elysians.

III. THE ACTIONS OF PROF ARE NOT IMPUTABLE TO RUBRIA UNDER INTERNATIONAL LAW, OR ALTERNATIVELY, DID NOT VIOLATE ANY INTERNATIONAL LEGAL OBLIGATION OWED BY RUBRIA TO ACASTUS.

As this honorable Court stated in *Elettronica Sicula*, an allegation of state responsibility should not be made lightly.[77] Hence, the criteria for invoking state responsibility must clearly be satisfied before raising an allegation.

A. PROF's actions cannot be imputed to Rubria.

1) PROF acted as a private legal entity and not as a state organ of Rubria, 2) no *de facto* relationship exists between PROF and Rubria which entails state responsibility under international law, and 3) Rubria bears no responsibility due to so-called "supporting and harboring" PROF.

1. PROF did not act as a State organ of Rubria.

The status of an organ must be determined by the state's internal law.[78] Because PROF does not have this status under Rubrian domestic law, it did not act as an organ of Rubria. Although it is argued that the status of organ should additionally be examined under international law in exceptional cases,[79] this position has not gained international acceptance, as evidenced by objections raised in the drafting process of the ILC Draft Articles on State Responsibility.[80] Also, while it is claimed that "all officers and men in authority" represent the state and act on its behalf,[81] retired and former military personnel are nowhere classified as organs of state. Therefore, PROF clearly did not act as an organ of Rubria.

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76. Draft Declaration on the rights of indigenous peoples, *supra* note 59; IPSEN, *supra* note 53, at 412; *See* 2005 World Summit Outcome, *supra* note 59.

77. *See* Elettronica Sicula S.P.A. (U.S. v. Italy), 1989 I.C.J. 15 (July 20).

78. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* United Nations International Law Commission Report on the work of its fifty-third session, U.N.GAOR, 56th Sess., Supp. No. 10, at 43, U.N.Doc.A/56/10 (2001) [hereinafter ILC Draft]; *See* THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 91 (James Crawford ed., 2002) [hereinafter Crawford].

79. Crawford, *supra* note 78, at 98, Art.4 ¶ 11.

80. International Law Commission, State responsibility: Comments and observations received from Governments (Poland), U.N. GAOR, 53rd Sess., at 6, U.N. Doc. A/CN.4/515/Add.2 (May 1, 2001).

81. Crawford, *supra* note 78, at 94, Art.4 ¶ 3 and accompanying text.

2. No de facto relationship exists between PROF and Rubria which entails State responsibility under international law.

As a general principle of international law, "the conduct of private persons or entities is not attributable to the State."[82] As held by this honorable Court in *Nicaragua*, only the actions of private persons or entities acting as *de facto* organs or agents under the instruction, direction or *effective control* of a state can be imputed under customary international law.[83] This was confirmed in the ILC Draft.[84] PROF has not acted a) as a *de facto* organ of Rubria, b) on instructions given by Rubria, or c) under its direction or control. Furthermore, d) the actions of PROF cannot be imputed to Rubria due to a "failure to control."

a. PROF did not act as a de facto organ of Rubria exercising elements of governmental authority.

"The fact that a state initially establishes a corporate entity, whether by special law or otherwise, is not a sufficient basis for attribution to the state of the subsequent conduct of that entity."[85] According to ILC Article 5, solely the conduct of entities empowered by the law of that State to exercise elements of governmental authority shall be considered an act of state.[86] The internal law in question must specifically authorize the conduct as involving the exercise of public authority.[87] It is not sufficient that internal law permits activities as part of the general regulation of the affairs of the community.[88] Proposals to delete the phrase empowered "by the law of that State" in the ILC Draft, referring only to the vague term "elements of governmental authority" without further clarification[89] are incompatible with customary international law and are therefore not

82. Crawford, *supra* note 78, at 110, Art.8 ¶ 1; *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 29 (May 24); BROWNLIE, *supra* note 3, at 437 and accompanying text.

83. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at ¶¶ 109, 115 (June 27) [hereinafter Nicaragua]; Armed Activities on the territory of the Congo (Dem. Rep. Congo v. Uganda), I.C.J. General List No. 116, at ¶ 301 (Dec. 19, 2005) *available at* http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_20051219.pdf (last visited Oct. 4, 2006) [hereinafter Armed Activities].

84. Crawford, *supra* note 78, at 110–11, Art.8 ¶ 4.

85. Crawford, *supra* note 78, at 112–13, Art.8 ¶ 6; *See* Schering Corp. v. Iran, 5 Iran-U.S. Cl. Trib. Rep. 361 (1984); Otis Elevator Co. v. Iran, Iran Award 304-284-2, 1987 WL 503815 (1987); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997).

86. Crawford, *supra* note 78, at 112–13, Art.8 ¶ 6.

87. *See* Hyatt Int'l Corp. v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 72 (1985); Crawford, *supra* note 78, at 113, Art.8 ¶ 7.

88. Crawford, *supra* note 78, at 113, Art.8 ¶ 7.

89. International Law Commission, State responsibility: Comments and observations received from Governments (Japan), U.N. GAOR, 53rd Sess., at 22, U.N. Doc. A/CN.4/515 (Mar. 19, 2001).

reflected in the final version.[90] No Rubrian law authorized PROF or COG to engage in any specific conduct, in particular the exercise of any governmental authority. The Rubrian Ministry of Natural Resources approved COG's contract with PROF as a shareholder and not on the basis of an internal law. PROF therefore did not act as a *de facto* organ of Rubria.

b. PROF did not act under Rubrian instruction.

PROF did not act under Rubrian instruction in perpetrating the alleged actions because Rubria did not exercise the necessary decisive influence over COG to qualify its approval of the contract between COG and PROF as giving instructions. Alternatively, the alleged actions of PROF were not committed under specific instructions from Rubria and can therefore not be imputed.

i. The Rubrian Ministry of Natural Resources did not issue instructions to PROF when it approved the contract between COG and PROF.

The conduct of private entities has only been attributed to the state in exceptional cases where evidence showed that "the State was using its ownership interest in or control of a corporation specifically to achieve a particular result."[91] In Iran-U.S. Claims Tribunal cases, even the actions of a fully state-owned oil company were not attributed to the state as there was no proof that the state used its ownership interest as a vehicle for directing a company to seize property.[92] As documented in these cases and specifically addressed in European Competition law concerning shareholder responsibility, shareholders must have decisive influence over a corporation's actions in order for these actions to be attributed to the shareholder.[93] Necessary decisive influence can only be established when the shareholder fully owns the subsidiary or possesses more than fifty per cent of the subsidiary's shares, enabling it to effectively

90. Crawford, *supra* note 78, at 113, Art.8 ¶ 7.

91. Crawford, *supra* note 78, at 112–13, Art.8 ¶ 6 and accompanying text; *See* Foremost Tehran, Inc. v. Iran, 10 Iran-U.S. Cl. Trib. Rep. 228 (1986); American Bell Int'l Inc. v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 170 (1986).

92. *See* Sedco, Inc. v. Nat'l Iranian Oil Co., 15 Iran-U.S. Cl. Trib. Rep. 23 (1987); Int'l Technical Products Corp. v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 206 (1985); Flexi-Van Leasing, Inc. v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 335 (1986).

93. *See* Case C-286/98, Stora Kopparbergs Bergslags AB v. Comm'n, 2000 E.C.R. I-09925, 61; Case 48/69, Imperial Chemical Indus. Ltd. v. Comn'n, 1972 E.C.R. 619, 692 (Advocate General Mayras); Case 6/72, Europemballage Corp. and Continental Can Co. Inc. v. Comm'n, 1973 E.C.R. 215, ¶¶ 14–16; Joined Cases 6/73, Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corp. v. Comm'n, 1974 E.C.R. 223, ¶¶ 26–31; *See also* Peter Jan Kuyper, *European Community Law and Extraterritoriality: Some Trends and New Developments*, 33 INT'L & COMP. L.Q. 1013, 1016–21 (1984).

control the company's activities.[94] COG enacted simple majority voting procedures for shareholder decisions in its corporate charter. Rubria, holding forty-nine per cent of shares, was not able to overrule TNC or otherwise control COG's policies. Therefore, Rubria, as its minority shareholder, did not have the decisive influence over COG necessary for it to be in a position to issue instructions to PROF.

ii. Alternatively, the alleged Human Rights violations by PROF were not committed according to specific instructions by Rubria.

"A State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally wrongful manner."[95] Human rights violations committed by the Nicaraguan *Contras* were not imputable to the U.S. because they were not carried out under specific instructions of the CIA.[96] In the present case, Rubria did not issue specific instructions to PROF. Rubria merely approved a contract between COG and PROF, authorizing PROF to guard COG personnel. This contract did not authorize or instruct PROF to force Elysians to perform dangerous work without compensation. Rubria therefore clearly did not specifically instruct PROF to commit the alleged actions.

c. PROF did not act under the direction or control of Rubria.

Rubria did not i) exercise *effective control* over the actions of PROF, ii) *Overall control* would not be sufficient to impute actions of private individuals or entities to a state, and iii) even if *overall control* were sufficient to entail responsibility, Rubria did not exercise this level of control over PROF.

i. Rubria did not exercise effective control over the actions of PROF.

This Court previously examined the degree of control necessary for attribution of private actions to a state in *Nicaragua,* where it established that responsibility is based on *effective control*—actual participation and direction—by a state.[97] "A general situation of dependence and support would be insufficient to justify attribution of the conduct to the state."[98] As shown above, Rubria did not give specific instructions or directions to PROF.

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94. *Id.*; *See* Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, *in* NON STATE ACTORS AND HUMAN RIGHTS 227, 276 (Philip Alston et al. eds., 2005) [hereinafter De Schutter].

95. Crawford, *supra* note 78, at 113, Art.8 ¶ 8.

96. Nicaragua, 1986 I.C.J. 14, at ¶¶ 109, 115.

97. Nicaragua, 1986 I.C.J. 14, at ¶¶ 62, 64–65, 86, 109, 115.

98. Crawford, *supra* note 78, at 110–11, Art.8 ¶ 4; Nicaragua, 1986 I.C.J. 14, at ¶¶ 109–115.

Furthermore, Rubrian officials did not participate in the actions at issue. Therefore, Rubria did not exercise effective control over PROF.

ii. Overall control is not sufficient to impute actions of private individuals or entities to a State.

No argument to the contrary can be drawn from *Prosecutor v. Tadic (Appeal)*; *Tadic* did not examine the issue of state responsibility, [99] but solely determined the existence of an international conflict and the application of international humanitarian law on the basis that the FRY exercised *overall control*[100] over the Bosnian Serb Army. Additionally, the inapplicability of the overall control doctrine does not conflict with *Tadic* because, as rightfully held by ICTY Judge Shahabuddeen, a violation of international human rights or humanitarian law requires a higher degree of control than an illegal use of force.[101] In contrast, it would contravene rules of customary international law referenced in *Nicaragua* and confirmed in the ILC Draft if the broader *Tadic* criteria were applied in the present case of state responsibility.[102] Overall control is therefore not sufficient to impute the actions of PROF to Rubria.

iii. Even if overall control is sufficient for invoking responsibility, Rubria did not exercise this degree of control over PROF.

As held in *Tadic*, overall control is established when the state not only finances and equips forces, but also plans, participates in and supervises military activities.[103] In *Tadic*, "forces were almost completely dependent on the supplies [of the state] to carry out offensive operations."[104] In this case, Rubria did not equip PROF, because PROF independently determined its equipment needs and procured those items on the open market. Rubria did not participate in the planning and supervision of the alleged activities, as it had no decisive influence or control over COG or PROF. As held in *Jorgic* and cited in *Tadic*,[105] State organs or officials must actively participate in the conduct beyond financing and providing technical equipment in order to establish

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99. Prosecutor v. Tadic, Case No. IT-94-1-I, Appeals Chamber, Opinion of Judge Shahabuddeen, ¶¶ 14, 18, 38 I.L.M. 1518, 1611 (July 15, 1999) [hereinafter Tadic]; Crawford, *supra* note 78, at 111–12, Art.8 ¶ 5.

100. Tadic, 38 I.L.M. at ¶ 141.

101. *Id.*

102. Armed Activities, I.C.J. General List No. 116, at ¶ 301, (Separate Opinion of Judge Simma), at ¶ 29, (Separate Opinion Kooijmans), at ¶ 25; Crawford, *supra* note 78, at 111–12, Art.8 ¶ 5.

103. Tadic, 38 I.L.M. at ¶¶ 145, 160.

104. Tadic, 38 I.L.M. at ¶ 155.

105. *See* Tadic, 38 I.L.M. at ¶ 130 and accompanying text.

overall control, specifically using the term "Verpflechtung."[106] In the present case, only PROF personnel participated in the alleged actions. As former members of the Rubrian armed forces were completely discharged from service before joining PROF, PROF personnel cannot be considered State organs or officials of Rubria. Therefore, Rubrian organs and officials clearly did not participate in PROF's activities. Attribution of *ultra vires* acts beyond acts of state organs as stated in ILC Draft Article 9, is not compatible with customary international law as enshrined in *Nicaragua*.[107] In any case, this claim is only brought forward concerning acts committed under a state's effective control,[108] which, as demonstrated above, Rubria did not exercise over PROF at any time. Alternatively, PROF's activities clearly went beyond instructions. As PROF was mandated by COG only to guard COG personnel, the conduct in question was clearly incidental. Therefore, PROF's actions do not give rise to *ultra vires* attribution to Rubria under international law.

d. The alleged conduct cannot be attributed to Rubria due to a "failure to control."

As this Court held in *Armed Activities on the Territory of the Congo*, the "mere failure to control the activities of armed . . . bands in itself cannot be attributed to the territorial State as an unlawful act."[109] Therefore, Rubria cannot be held responsible for the alleged acts because it was merely the *situs*. According to Article 9 ILC Draft, conduct may be attributed to a state "in the absence or default of the official authorities" when the conduct effectively relates to the exercise of governmental authority and occurred in situations where a state has lost control or collapsed.[110] The conduct here cannot be attributed to Rubria for "failure to control" because PROF did not exercise elements of governmental authority nor had Rubria lost control over its territory, including the Elysian Fields.

3. PROF's actions are not imputable to Rubria due to "supporting and harboring."

Attempts to legally justify military action in Afghanistan and Iraq following September 11th have not changed the general rules of state responsibility for the attribution of private acts to the state relevant in this case.

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106. *Id.*

107. Nicaragua, 1986 I.C.J. 14, at ¶¶ 109, 115; *Cf.* Armed Activities, I.C.J. General List No. 116, at ¶ 301.

108. Crawford, *supra* note 78, at 113, Art.8 ¶ 8.

109. Armed Activities, I.C.J. General List No. 116, at ¶ 301, (Separate Opinion of Koojimans), at ¶ 24.

110. Crawford, *supra* note 78, at 114–15, Art.9 ¶¶ 3, 5.

Some scholars claim that the principle of "supporting and harboring" contains a special standard of imputability between terrorist groups and host states,[111] while others claim that Article 51 also applies to armed attacks of non-state origin.[112] As the factual and legal situation surrounding September 11th is not comparable to the present case and PROF's actions cannot be considered terrorist acts, they would certainly not be imputed to Rubria under such standards.

B. Alternatively, PROF's actions did not violate any international obligation owed by Rubria to Acastus.

The alleged actions did not violate an international obligation owed by Rubria to Acastus because Acastus is not party to the ICCPR and the actions did not violate customary international law. They do not amount to prohibited forced labor because the Elysians were adequately compensated for their efforts. Alternatively, Acastus cannot make such a complaint *venire contra factum proprium* as the actions are attributable to the Acastian domestic corporation TNC and furthermore imputable to Acastus itself. Acastus is estopped from holding Rubria legally responsible for conduct which it guaranteed to Rubria in the RABBIT would not be committed by Acastian companies.

IV. ACASTUS HAS VIOLATED RABBIT ARTICLE 52 BY FAILING TO ENFORCE ALL ASPECTS OF ITS DOMESTIC LAW.

If COG and PROF have in fact violated the human rights of the Elysians, Acastus has violated obligations toward Rubria contained in RABBIT Article 52 by dismissing TNC as a defendant in the *Borius* litigation on the basis of a too narrow interpretation of "conduct abroad," because TNC's influence and control over COG constitutes "conduct abroad" under MCRA Section Four, therefore requiring the attribution of COG's and PROF's conduct to TNC, or alternatively, Acastus failed to enforce provisions contained in AIRES, constituting a violation of Article 52 RABBIT.

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111. Albrecht Randelzhofer, *The Charter of the United Nations, in* TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VS. LIBERTY? 34 (Christian Walker et al. eds., 2004); *See generally* Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1 (2002).

112. Armed Activities, I.C.J. General List No. 116, at ¶ 301, (Separate Opinion of Simma), at ¶ 13, (Separate Opinion of Kooijmans), at ¶ 23; Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion – An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62 (2005); *See generally* Markus Krajewski, *Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen*, 40 ARCHIV DES VÖLKERRECHTS 183 (2002).

A. TNC's influence and control over COG and PROF constitutes "conduct abroad" requiring the attribution of the alleged human rights violations to TNC under RABBIT Article 52.

RABBIT Article 52 in connection with MCRA Section Four obliges Acastus to grant jurisdiction in all cases where a violation of Section Four by an Acastian domestic company is alleged. Acastus violated this obligation by dismissing TNC from the Borius litigation because the term "conduct abroad" must be interpreted according to international law and thus, human rights violations of COG and PROF must be attributed to TNC because TNC exercised sufficient influence and control over COG and PROF to cause a duty of care to arise under international law.

1. The term "conduct abroad" in MCRA Section Four must be interpreted according to international law.

Although the MCRA was originally passed as domestic law, its incorporation into the RABBIT and the December 15, 2002 declaration by the Acastian prime minister evidence that MCRA provisions have taken effect between Rubria and Acastus and must be interpreted according to international law. Due to the incorporation by reference, the MCRA becomes a rule of international law in effect between Rubria and Acastus. Because investment treaties are instruments of international law, arbitrators "should have recourse to the rules of general international law to supplement those of the treaty."[113] ICSID Convention Article 42(1) reflects the generally accepted principle of customary international law that the domestic law of the host state and the applicable rules of international law govern the interpretation of investment treaty provisions if no explicit choice of law is made.[114] The RABBIT does not provide for an explicit choice of law for the interpretation of its treaty provisions. Therefore, the application of the principle of limited liability as under Acastian domestic law by the Acastian civil court is incorrect. Instead, the interpretation must be governed by Rubrian law as law of the host state and the rules of customary international law.

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113. Antonio Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties*, 16 ICSID Review—Foreign Investment Law Journal 21 (2001); Luke Eric Peterson & Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, at 10 (2.2.2), (Apr. 2003), *available at* http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf (last visited Sept. 28, 2006).

114. Convention on the Settlements of Disputes Between States and Nationals of other States, Art. 42, Mar. 18, 1965, 17 U.S.T. 1270.

2. TNC is liable for human rights violations committed by COG and PROF under international law.

TNC is liable for human rights violations committed by COG and PROF under international law because customary international law establishes parent company liability for human rights violations, and TNC exercised sufficient influence and control over COG and PROF to establish liability for their human rights violations.

a. The customary international law principle of parent company liability applies in cases of human rights violations, particularly in cases of forced labor.

According to ICJ Statute Article 38(1), a *general practice accepted as law* is required for customary international law to emerge.[115] State practice encompasses all legally relevant acts, including those within international organizations and between states.[116] State practice and *opinio juris* affirm that the parent company of a multi-national corporation owes a legal duty of care to those affected by its subsidiary operations, provided there is sufficient involvement in and control over the subsidiary operations by the parent. [117] This notion, i) reflected in the decisions of supra- and international courts, is derived from State practice of ii) national courts *inter alia* in the European Union, USA, United Kingdom, Netherlands, and Australia, and iii) manifested in the recently created guidelines and declarations of major international organizations.

i. Supranational and international Courts' decisions confirm the legal responsibility of parent companies.

This Court already confirmed in *Barcelona Traction* that the principle of limited liability has no unrestricted validity under international law when it stated that "lifting the corporate veil" or "disregarding the legal entity" can be

115. Statute of the International Court of Justice art. 38(1); North Sea Continental Shelf Case (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20).

116. IPSEN, *supra* note 53, at 215; OTTO KIMMINICH & STEPHAN HOBE, EINFÜHRUNG IN DAS VÖLKERRECHT 184 (8th ed., 2004).

117. *See* Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter UN Norms on the Responsibility of Transnational Corporations]; *Cf.* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001); Daniel Aguirre, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*, 35 CAL. W. INT'L L.J. 53 (2004); *See also* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003); De Schutter, *supra* note 92, at 227.

justified at the international level under certain circumstances or for certain purposes.[118]

In its prevailing case law, the European Court of Justice applies rules accepted by Member States when it emphasizes that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company ... in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.[119]

In European Competition law, the so-called "single economic unity approach"[120] demands that piercing the corporate veil may be possible in some cases, for instance where the parent corporation fully owns the subsidiary or possesses more than 50% of the shares of the subsidiary company, so that it is in a position to control effectively its activities, or where the boards of directors of both companies are composed essentially or fully of the same individuals.[121]

ii. State practice evidences the legal responsibility of controlling companies in cases of human rights violations, in particular where forced labor occurred.

Recent U.S. court decisions based on the Alien Tort Claims Act[122] have ruled that a fictitious legal separation of activities to insulate the parent company from liability for subsidiaries' activities is not (generally) permitted under U.S. or international law.[123] Court decisions in the United Kingdom,[124] Australia,[125] and the Netherlands[126] have upheld the principle of parent company responsibility in a similar manner.

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118. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, at ¶ 56 (Feb. 5).

119. Imperial Chemical Indus. Ltd., 1972 E.C.R. 619, at ¶ 132–33; Case 107/82, AEG-Telefunken AG v. Comm'n of the European Cmty's, 1983 E.C.R. 3151, at ¶ 49; Europemballage and Continental Can, 1972 E.C.R. 215, at ¶ 15; De Schutter, *supra* note 94, at 279.

120. De Schutter, *supra* note 94, at 279.

121. De Schutter, *supra* note 94, at 276; AEG-Telefunken, 1983 E.C.R. 3151, at ¶ 50.

122. Alien Tort Claims Act, 28 U.S.C. §1350 (2006).

123. *See* Doe v. Unocal Corp., 395 F.3d 932 (Cal. App. 2002); Beanal v. Freeport-McMoran, 969 F. Supp. 362, 370–71 (D. La. 1997); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

124. Lubbe v. Cape Plc., [2001] 1 W.L.R 1545 (A.C.).

125. Dagi v. Broken Hill Proprietary Co. Ltd. & Anor (1997) 1 V.R. 428.

126. Gerrit Betlem, *Transnational Litigation Against Multinational Corporations in Dutch Courts, in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 283 (Kamminga & Zia-Zarifi eds., 2000).

iii. Recently created guidelines and declarations confirm parent company responsibility for human rights violations committed by subsidiaries and significantly influenced companies.

States' commitment to create a legal framework for multinationals is reflected in the OECD's Guidelines for Multi-National Enterprises—directly referenced in the MCRA—according to which "to the extent that parent companies actually exercise control over the activities of their subsidiaries, they have a responsibility for observance of the Guidelines by those subsidiaries."[127] The most recent reflection of state practice is the UN Norms on the Responsibilities of Transnational Corporations approved by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, which define a transnational corporation as an enterprise, whether of public, private or mixed ownership, comprising companies of two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making centers, in which the entities are so linked, by ownership or otherwise, that one or more of them exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others. [128]

A paramount concern in drafting the norms for exclusive application to transnational corporations was that an inadequate definition "would allow businesses to use financial and other devices to conceal the transnational nature" of their operations, and thus avoid responsibility.[129] As the leading expert in the drafting committee stated, the "Norms constitute a succinct, but comprehensive restatement of the international legal principles" derived from treaties and customary international law. [130] Forced labor is included as prohibited conduct in both the OECD and the UN guidelines, and furthermore in the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[131] which are all generally accepted by the international community.

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127. OECD Guidelines for Multinational Enterprises, Text, Commentary and Clarifications, at 9, (Oct. 31, 2001), *available at* http://www.olis.oecd.org/olis/2000doc.nsf/4f7adc214b91a685c12569fa005d0ee7/d1bada1e70ca5d90c1256af6005ddad5/$FILE/JT00115758.PDF (last visited Oct. 4, 2006).

128. UN Norms on the Responsibility of Transnational Corporations, *supra* note 117, at ¶ 1(a).

129. Weissbrodt et al., *supra* note 117, at 909.

130. Weissbrodt et al., *supra* note 117, at 913 and accompanying text.

131. International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 I.L.M. 422, para. 6 (Nov. 16, 1977).

b. TNC exercised sufficient influence and control over COG and PROF to establish liability for their human rights violations.

Although COG maintains a separate legal personality from TNC, TNC nonetheless exercises significant influence over COG because it effectively controls its activities, including those of its subcontractor PROF. In 2003 TNC's Chief Executive Officer Silvia Euterpe announced at a shareholders' meeting that TNC was actively exploring commercially viable strategies for exploiting the oil resources discovered in the southern Elysium. TNC then founded COG in 2004 solely for the purposes of developing and exporting these resources. TNC has not only exercised significant influence over COG since its creation, it also continues to exercise exclusive control over COG because it holds fifty-one per cent of COG's shares and appoints the majority of its board of directors following simple majority voting procedures. COG therefore cannot independently pursue its own policies and must instead carry out the instructions of its majority shareholder. Although the Elysians supposedly labored under PROF's supervision, TNC, as COG's majority shareholder, had the authority to direct and control PROF's activities. For these reasons, the conduct in question must be attributed to TNC.

B. Acastus violated RABBIT Article 52(2) by failing to enforce AIRES provisions.

Because TNC is situated in Acastus, it is clearly present in Acastus for the purposes of AIRES. The Rubrian claim cannot be rejected on the grounds that TNC lacked subjectivity under international law. First, subjectivity is conferred on Acastus under RABBIT Article 52 in connection with MCRA Section Four. It binds Acastus to grant jurisdictions in all cases where a violation of those rules is alleged, thus conferring legal personality on Acastian domestic corporations in regard to their compliance with all governing norms of international law. Secondly, it is grossly inconsistent to claim that TNC, a private company, cannot be subject to international law provisions on human rights, as the Acastian courts must have assumed subjectivity under international law for the private company COG when it was sentenced to compensation under the AIRES in the same lawsuit. Thirdly, corporations must be held individually liable for violations of international law committed in complicity with state actors.[132] Furthermore, because the plaintiffs in the Acastian civil court's case incorrectly claimed that the human rights violations were committed by Rubrian

132. *See* Hilao v. Estate of Marcos, 103 F.3d 767, 776 (9th Cir. 1996); Eastman Kodak Co., 978 F. Supp. at 1091–92; Kadic v. Karadzic, 70 F.3d 232, 245–46 (2d Cir. 1995); United States v. Price, 383 U.S. 787, 794 (1966); Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 6 YALE J. INT'L L. 487, 494–507 (2001).

officials, a state action requirement for subjectivity of TNC would have been met. At minimum transnational companies must be subjects of international law in cases of grave human rights violations such as forced labor.[133] Therefore, even if this honorable Court decides to interpret the term "conduct abroad" in MCRA Section Four according to Acastian domestic law, Rubria has violated its obligation *vis-à-vis* Acastus under RABBIT Article 52 in connection with the provisions of AIRES on the basis that TNC is responsible for the alleged conduct of COG and PROF under international law.

V. CONCLUSION AND SUBMISSIONS

The State of Rubria respectfully requests this honorable Court to adjudge and declare that:

I. The Court lacks jurisdiction over all claims other than those under the RABBIT;
II. By permitting the construction of the pipeline as proposed, Rubria exercises rights attendant to its sovereignty over territory and natural resources and does not violate international law;
III. The actions of PROF are not imputable to Rubria under international law, or alternatively did not violate any international legal obligation owned by Rubria to Acastus;
IV. Acastus has violated RABBIT Article 52 by failing to enforce all aspects of its domestic law.

Respectfully submitted,
Agents of the Respondent

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133. *See* Doe v. Unocal Corp., 963 F. Supp. 880, 891–92 (C.D. Cal. 1997); Andrew Clapham, *The Question over Jurisdiction under International Criminal Law over Legal Persons*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 166–171 (Kamminga & Zia-Zafiri eds., 2000).

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