CASE CONCERNING THE ELYSIAN FIELDS

MEMORIALS FOR THE APPLICANT AND THE RESPONDENT

THE 2006 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

EDITORS' NOTE:

The University of the Philippines ("UP") College of Law Jessup Team represented the Philippines during the Philip C. Jessup International Law Moot Court Competition sponsored by Shearman and Sterling LLP held in Washington, D.C., from March 26 to April 2, 2006. Team Philippines ranked number 1 in the Final Rankings during the Preliminary rounds after winning over India, U.S.A. (University of Washington), Moscow, and Lithuania. Team Philippines won the octafinal match against Hong Kong, before bowing out in the quarterfinals to India.

The memorials submitted by Team Philippines earned the Alona Evans Award for Best Memorial (sixth place) in a tie with Columbia University, the eventual Jessup Cup Champion.

UP earned the right to represent the Philippines after sweeping the National Round matches against Ateneo Law School and De La Salle - Far Eastern University MBA-JD Program. Silliman University College of Law and Arellano Law School served as venues for the National Round, with Dean Myles Bejar of Silliman serving as National Administrator.

For the purposes of this publication, the Editorial Board has taken the liberty of revising the layout of the memorials. The only changes made to the actual text of the memorials is the omission of the table of contents and the index of authorities. The manner of citation and heading format remains the same.

The members of the UP Team are: Abraham Rey M. Acosta (LL.B. UP College of Law, 2006) served as Team Captain of the 2006 UP Jessup Team. He ranked 13th overall among close to 200 individual oralists during the International Rounds. Mr. Acosta also served as member of the student editorial board of the PHILIPPINE LAW JOURNAL during his sophomore year. Mark Pepito J. Rabe (LL.B. UP College of Law, 2006) ranked 17th overall among close to 200 individual oralists during the International

Rounds. Mark Perete (LL.B. UP College of Law, 2006) ranked 37th overall among close to 200 individual oralists during the International Rounds. Maricel Seno (LL.B. UP College of Law, 2007 expected) served as *of counsel* and *scribe* in all the UP matches against other law schools. Alain Charles J. Veloso (LL.B. UP College of Law, *cum laude* and *class valedictorian*, 2006) ranked 25th overall among close to 200 individual oralists during the International Rounds. He served as member of the student editorial board of the PHILIPPINE LAW JOURNAL during his sophomore year. Prof. Herminio Harry L. Roque, Jr. served as coach of the 2006 UP Jessup Team

MEMORIAL FOR APPLICANT

REPUBLIC OF ACASTUS
(APPLICANT)
V
STATE OF RUBRIA
(RESPONDENT)

STATEMENT OF JURISDICTION

The Court has jurisdiction over the claims in the case by virtue of the compromissory provision contained in Article 62 of the Rubria-Acastus Binding Bilateral Investment Treaty (RABBIT) and in accordance with Article 36(1) of the ICJ Statute.

The Court also has jurisdiction by virtue of the compulsory declaration by both parties accepting *ipso facto* and without need of special agreement the jurisdiction of the ICJ in accordance with Article 36(2) of the ICJ Statute.

QUESTIONS PRESENTED

(A) WHETHER OR NOT THE COURT HAS JURISDICTION OVER ALL CLAIMS IN THIS CASE, SINCE ACASTUS HAS SUCCEEDED TO NESSUS'S STATUS AS A PARTY TO THE STATUTE OF THE COURT;

(B) WHETHER OR NOT BY PERMITTING THE CONSTRUCTION OF THE PIPELINE AS PROPOSED, RUBRIA WOULD VIOLATE THE RIGHTS OF ACASTUS'S CITIZENS OF ELYSIAN HERITAGE;

(C) WHETHER OR NOT THE ACTIVITIES OF PROF IN THE ELYSIUM, INCLUDING THE FORCED LABOR OF CIVILIANS, ARE ATTRIBUTABLE TO RUBRIA AND ARE VIOLATIONS OF INTERNATIONAL LAW; AND

(D) WHETHER OR NOT THE OUTCOME OF THE BORIUS LITIGATION DOES NOT PLACE ACASTUS IN BREACH OF ARTICLE 52 OF THE RABBIT.

STATEMENT OF FACTS

Acastus and Rubria are two independent states formed from the dissolution of Nessus. Acastus occupied the bustling and successful industrial and trading region of the Northern portion of Nessus former territory. Rubria meanwhile occupied the mountainous, undeveloped and land-locked portion of the southern territory. Acastus's capital city is the same as Nessus's.

Acastus continued with the trading and industrial activities previously and traditionally undertaken by Nessus. Rubria, in order to boost its economy, invited multinational corporations to invest in the region.

In April 2001, Acastus sent a note to the UN Secretary General and informed the U.N. that Acastus will continue the personality of Nessus in the UN and in all the organs and organizations of the UN System, including the ICJ. The Under Secretary-General for Legal Affairs issued a memorandum which allowed Acastus to temporarily continue the membership of Nessus. In contrast, Rubria applied for membership in the UN.

Since 2002, Acastus's delegation has been seated behind nameplates reading "Acastus" in the General Assembly and various other UN bodies. The flag of Acastus has also been flown in place of the flag of Nessus at all UN buildings, and the government of Acastus has assumed the annual obligations under Nessus's multi-year plan to repay its 1999 UN dues.

Acastus entered into a bilateral investment treaty – the Rubria Acastus Binding Bilateral Investment Treaty – with Rubria. Under the treaty, Acastus bound itself to ensure that Acastian corporations conduct themselves according to international standards. Upon Rubria's insistence, Acastus undertook to enforce all aspects of its domestic law in carrying out Acastus's treaty obligations. Thus, incorporated in the RABBIT were:

(1) the Multinational Corporate Responsibility Act under which Acastus was empowered to obtain jurisdiction over cases against Acastian corporations whose acts proximately cause the suffering of individuals; and

(2) the Acastian International Rights Enforcement Statute which gave Acastus subject matter jurisdiction over cases involving violations of international law by defendants who are present or who can be found in Acastus.

The RABBIT also contained a provision whereby both Acastus and Rubria recognized the jurisdiction of the International Court of Justice (ICJ) on cases arising from matters contained in the treaty.

With Rubria's authorization, the Trans-National Corporation (TNC), an Acastian corporation, explored and discovered rich oil deposits in the mountains of Rubria. Rubria and TNC formed a joint venture, the Corporation for Oil and Gas (COG), to develop and export Rubria's petroleum resources. TNC owns 51% of COG and Rubria owns the remaining 49%. The COG was incorporated and is headquartered in Rubria. Rubria's president granted COG exclusive rights to operate within the region.

The region where COG operates includes the Elysium, a piece of land the northern portion of which lies within Acastus and the southern portion, in Rubria. The Elysium is home to the Elysians, a community of approximately 5,000 indigenous inhabitants. The Elysians have a unique and ancient cultural heritage. They use a language and profess a religion unrelated to those of their neighbors. Their economy is insular, wholly agricultural, and unchanged since well before the industrial revolution. The Elysians were granted citizenship by Acastus and are represented in the Acastian parliament.

The Elysians live in the part of the Elysium located in Acastus. But since prehistory, the Elysians have farmed in and derive food and sustenance from the Rubrian portion of the Elysium. In these rich agricultural lands completely depend the Elysians' for their survival, continued existence, and the preservation of their way of life.

The agricultural lands of the Elysium are threatened by the proposed construction of an oil pipeline that will deliver the gas obtained by COG to Creon, a neighboring country of Rubria. The proposed pipeline would pass through the portion of the Elysium located within Rubria and would entail the absolute destruction of the rich agricultural land. The construction would also totally block off the spring that irrigates the entire land.

An independent study conducted by the Institute of Local Studies and Appraisals (ILSA), a highly-respected and credible non-government organization, found that the resulting destruction of the agricultural land would make it impossible for the Elysians to continue their traditional way of life. The report concluded, "If the pipeline is built according to plan, each and every Elysian will have a very simple choice: leave their ancestral homeland for the inhospitable cities of Acastus and Rubria, or starve."

In order to prevent hostilities from arising due to the construction of the oil pipeline, COG authorized the formation of the Protection and Retention Operations Force (PROF). PROF consists largely of former members of the Rubrian armed forces, and its commanders are recently retired senior Rubrian army officers. Pursuant to a contract between COG and PROF, COG provides PROF with vehicles and communication equipment and pays a fee, which includes PROF's personnel, costs, other operating costs, and profit. COG finances the PROF but allows the latter to determine what weapons or ammunition to procure and use in its operations. Both TNC and Rubria approved the contract between the PROF and COG in July 2004.

The ILSA reported that PROF had been seizing young Elysian men and had been forcing them to work on the pipeline project. The report noted that the Elysians were repeatedly rounded up from their fields by armed PROF personnel, brought forcibly in truckloads to the site of the pipeline project, and there made to carry heavy loads and break hard rocks under the supervision of COG personnel. The Elysians are brought back to their fields long after sunset and are left only with small bags of sorghum.

In September 2004, an action was instituted in an Acastian civil court that sought to hold PROF, TNC, COG and Rubria for the forced and compulsory labor of Elysians. The case – later known as the Borious litigation – was commenced by Mr. Borious, an Elysian forced to work in the pipeline project.

The Acastian court dismissed the case against TNC and PROF. The court ruled that as a mere shareholder, TNC cannot be held liable for acts of the COG if there are no exceptional circumstances involved justifying the piercing of the corporate veil. The court also dismissed the case against PROF on the grounds that PROF had no business and assets in Acastus.

The Acastian civil court however proceeded with the case against Rubria and COG. It rejected Rubria's invocation of sovereign immunity on the ground that Rubria waived such immunity when undertook actions of a commercial character. The court adjudged both Rubria and COG liable.

SUMMARY OF PLEADINGS

The International Court of Justice (ICJ) has jurisdiction over all claims in the case. By continuing Nessus's identity, Acastus is a member of the UN and is *ipso facto* a party to the ICJ Statute.

Acastus may also be considered a party to the ICJ Statute by virtue of Article 93(2) of the UN Charter. Since Security Council Resolution 2386 did not prevent Acastus from continuing Nessus' membership in the UN and merely encouraged Acastus to apply for membership, the GA has determined Acastus compliant with the conditions of membership and allowed it to continue the personality of Nessus.

Acastus has also declared its compulsory acceptance of ICJ jurisdiction in all cases pursuant to Article 36(2) of the ICJ Statute. As a continuing state, Acastus is bound by Nessus's declaration accepting ICJ jurisdiction.

Acastus's claim concerning the violations of the individual and collective rights of Elysians arising from Rubria's construction of the pipeline are admissible since the Elysians are Acastian citizens, and because the Elysians have exhausted local remedies. The claim is also admissible since it involves breaches of *erga omnes* obligations.

Rubria violated the inherent right to life of the Elysians when Rubria destroyed the Elysians' means of livelihood. Rubria also violated the right of Elysians to enjoy their culture, practice and profess their religion, and use their own language. By destroying the Elysian agricultural lands and pushing the Elysians out of their ancestral lands, Rubria effectively forced the Elysians to be assimilated to the majority groups within Acastus and Rubria. Rubria's acts seriously threaten to extinguish the Elysians' distinctiveness and cultural identity as a group.

Aside from individual rights, Rubria also violated the collective rights of Elysians as an indigenous people. The Elysians' possession since time immemorial of the Elysium has ripened into native titles and vested rights protected by international law. Furthermore, before undertaking any major development project in these lands, such as the oil pipeline, Rubria is required under international law to obtain the free, prior, and informed consent of the Elysians. Rubria proceeded to construct the pipeline without the knowledge and consent of the Elysians.

Moreover, Rubria violated the proscription against forced and compulsory labor since the acts of PROF, as an agent of Rubria, are deemed to be that of Rubria's. These acts include the seizure by PROF of Elysian men and the threats and the dangerous work to which such men, without their consent, were subjected.

In addition, by its failure to adequately regulate the activities of PROF, Rubria breached its obligation to ensure that activities within its territory will not violate human rights. Rubria knew the activities of the PROF, having approved the contract between the COG and the PROF, but did not use its substantial influence in the COG or its regulatory powers over the PROF, an entity incorporated under its laws, to ensure that these activities conform to human rights norms.

In contrast, the outcome of the Borious litigation does not place Acastus in breach of its obligation under Article 52 of the Rubria-Acastus Binding Bilateral Investment Treaty (RABBIT).

Acastus cannot obtain jurisdiction over TNC since no act of TNC has been alleged to have proximately caused the suffering of the Elysians. TNC's investment in the COG is not the proximate cause of the damage to the Elysians. Neither can Acastus attribute the acts of the PROF to TNC to provide the jurisdictional basis over the case against TNC. The separate identity of a corporate entity from its shareholders is well entrenched in international law. The absence of any valid ground for piercing COG's corporate veil prevents Acastus from holding otherwise.

TNC is also not a subject of international law and cannot be held in breach thereof.

In contrast, Acastus was duty-bound to exercise jurisdiction over the cases against Rubria and the PROF since states and state-agents are recognized subjects of

international law. Their acts give rise to liability whenever they constitute breaches of obligations.

Finally, Rubria is precluded from invoking any immunity from suit, having waived such immunity by its insistence on the inclusion of the provision in Article 52 of the RABBIT and because the agreement to construct the pipeline is commercial in nature.

PLEADINGS

I. THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION OVER ALL CLAIMS IN THIS CASE, SINCE ACASTUS HAS SUCCEEDED TO NESSUS'S STATUS AS A PARTY TO THE STATUTE

The ICJ has jurisdiction[1] over cases brought before it by states parties to its Statute.[2] Jurisdiction may also be laid on states not parties to the Statute subject to conditions laid down by the UN Security Council.[3] The existence of jurisdiction of the Court is a question of law to be resolved in the light of the relevant facts.[4]

A. The ICJ has jurisdiction *ratione personae* over Acastus

1. Acastus is a state party to the Statute of the ICJ by virtue of its membership in the UN.

The ICJ is open to Acastus since Acastus is a party to the ICJ Statute[5] by virtue of its membership in the UN.[6]

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[1] Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, Chapter 2 [*hereinafter* ICJ Statute]; *Legality of Use of Force* (Serbia and Montenegro v. Canada), Judgement of 15 December 2004; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Judgement of 15 December 2004; *Legality of Use of Force* (Serbia and Montenegro v. France), Judgement of 15 December 2004; *Legality of Use of Force* (Serbia and Montenegro v. Germany), Judgement of 15 December 2004; *Legality of Use of Force* (Serbia and Montenegro v. Italy), Judgement of 15 December 2004; *Legality of Use of Force* (Serbia and Montenegro v. Netherlands), Judgement of 15 December 2004; *Legality of Use of Force* (Serbia and Montenegro v. Portugal), Judgement of 15 December 2004; *Legality of Use of Force* (Serbia and Montenegro v. United Kingdom), Judgement of 15 December 2004 [*hereinafter* SFRY Cases]; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Jurisdiction and Admissibility, Judgment, 1984 ICJ 392; ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT (1965) [*hereinafter* Rosenne]; Hambro, *The Jurisdiction of the International Court of Justice*, 76 Recueil des Cours 125 (1950) [*hereinafter* Hambro]; DAMROSCH, ED., THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS (1987) [*hereinafter* Damrosch]; SOHN, CASES AND MATERIALS ON UNITED NATIONS LAW (1956) [*hereinafter* Sohn].

[2] ICJ Statute, *id.*, §35(1).

[3] *Id.*, §35(2); Rosenne, supra note 1.

[4] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, 1988 ICJ 76, ¶16.

[5] ICJ Statute, supra note 1, §35(1).

[6] Charter of the United Nations, 59 Stat. 1031, T.S. 993, §93(1) [*hereinafter* UN Charter]; Sohn, supra note 1.

a) Acastus continued the membership of Nessus in the UN.

Acastus is a party to the ICJ statute since it is a member of the UN. Members of the UN are *ipso facto* parties to the ICJ Statute.[7]

Acastus continued Nessus' membership in the UN because Acastus satisfied both objective and subjective factors for continuity.[8] The practice within the UN recognizes these factors as evidence of the continuity of a state's membership.[9]

(i) Acastus has met the objective factors determinative of continuity.

Objective factors of continuity include variants of the basic criteria for statehood, such as retention of "a substantial amount of territory or a majority of the state's population, resources, armed forces or seat of government."[10]

Acastus satisfied these objective requirements. Its seat of government is the same seat of government as that of Nessus.[11] Acastus also retained the financial resources of Nessus as shown by the fact that Acastus occupied the portion of Nessus territory that is home to bustling and successful industry and trade.[12]

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[7] UN Charter, *id.*, §93.

[8] Buhler, *State Succession, Identity/Continuity and Membership in the United Nations*, in EISEMANN AND KOSKENNIEMI, STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 200 (2000) [*hereinafter* Buhler]; *see also Admission of the Czech Republic to membership in the United Nations*, G.A. res. 47/221, 47 U.N. GAOR Supp. (No. 49) at 5-6, U.N. Doc. A/47/49 (1992); *Admission of the Slovak Republic to membership in the United Nations*, G.A. res. 47/222, 47 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/47/49 (1992); *Admission of The Former Yugoslav Republic of Macedonia to membership in the United Nations*, A/RES/47/225 (1993).

[9] *Succession of States and Governments, The Succession of States in Relation to Membership in the United Nations, Memorandum Prepared by the Secretariat*, UN Doc. A/CN.4/149 and Add.1, 2 YBILC 101 (1962); Buhler, supra note 8, at 187; Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L. L. J. 29 (1995); Lloyd, *Succession, Secession, and State Membership in the United Nations*, 26 NYU J. Int'l. L. & Pol. 763 (1994); *See also* Zemanek, *State Succession after Decolonization*, 116 RECUEIL DES COURS 253 (1965); O'CONNELL, 2 STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW 183 (1967); Jenks, *State Succession in Respect of Law-Making Treaties*, 39 BYIL 105 (1952); GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS (1969); Liang, *Notes on Legal Questions Concerning the United Nations*, 43 AJIL 134, 144 (1949); Misra, *Succession of States: Pakistan's Membership in the United Nations*, 3 Can. YIL 281 (1965); Schacter, *The Development of International Law Through the Legal Opinions of the United Nations Secretariat*, 25 BYIL 91, 101 (1948) [*hereinafter* Schacter].

[10] Williamson, *State Succession and Relations with Federal States, Panellist's Remarks*, 86 PROC. AMER. SOC. OF INT'L L. 1, 14 (1992).

[11] C ¶2 [*hereinafter* C].

[12] C ¶1.

(ii) Acastus has met the subjective factors determinative of continuity

Subjective factors of continuity include Acastus's claim to continuity and, most importantly, the international recognition of, or acquiescence in, this claim by third States.[13]

Acastus has always asserted its status as the continuation of Nessus. This is evidenced by the notice sent to the UN Secretary-General expressing the intention of Acastus to continue Nessus' membership in the UN, its organs and organizations, and the ICJ, including Nessus's acceptance of compulsory jurisdiction.[14]

Acastus's claim of continuity has not been contradicted by the international community. UN-member states, by general tacit agreement or acquiescence, may treat particular cases in a special way.[15] The ICJ has noted that in certain instances, the status of a state may even be *sui generis* as what happened to the Federal Republic of Yugoslavia prior to 2000.[16]

The UNGA has acquiesced in Acastus's claim of continuity. With respect to membership, it is the UNGA that decides and determine status.[17] Its decision cannot be reversed by a judgment of the Court[18] since in the structure of the UN the Court does not possess the ultimate authority to interpret the Charter.[19]

The UNGA recognized the claim of Acastus to continuing the membership of Nessus in the UN when the GA allowed (a) the flying of the Acastian flag in place of the flag of Nessus at all UN buildings;[20] (b) the assumption by Acastus of Nessus' annual obligations to the UN;[21] and, (c) the seating of Acastian representatives behind nameplates reading "Acastus".[22] This recognition has been further bolstered by the opinion of the UN Under-Secretary-General for Legal Affairs[23] who acknowledged that Acastus may continue the membership of Nessus.[24]

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[13] Mullerson, *The continuity and succession of states, by reference to the former USSR and Yugoslavia*, 42 ICLQ 473, 476 (1993).

[14] C ¶8.

[15] Blum, *Kaleidoscope: Russia Takes over the Soviet Union's Seat at the United Nations*, 3 EJIL 354 (1992); Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 VIRGINIA J. INT'L L. 299 (1993); Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EJIL 36 (1993); BROWNLIE, PUBLIC INTERNATIONAL LAW 672 (1998) [*hereinafter* Brownlie].

[16] SFRY Cases, supra note 1.

[17] *Certain Expenses of the United Nations*, Advisory Opinion, 1962 ICJ 163 [*hereinafter* Expenses Case].

[18] *Northern Cameroons*, Preliminary Objections, Judgment, 1963 ICJ 33.

[19] Expenses Case, supra note 17, at 168.

[20] C ¶12.

[21] C ¶12.

[22] C ¶12.

[23] *See* Schachter, supra note 9, at 91.

[24] C ¶10.

b) Even if Acastus is not a member of the UN, Acastus is still a party to the ICJ statute by virtue of Article 93(2) of the UN Charter

Article 93(2) of the UN Charter lays down the condition for Acastus to become a party to the ICJ Statute without being a member of the UN.[25] The provision requires that Acastus deposit with the UN Secretary-General a duly ratified instrument accepting three particular conditions, namely: (a) general acceptance of the provisions of the Statute; (b) acceptance of all the obligations of a member of the UN under Article 94 of the Charter, including the complementary obligations under Articles 25 and 103 in so far as relates to Article 94; and (c) an undertaking to contribute to the expenses of the Court in such equitable amount as the General Assembly might assess from time to time.[26]

Acastus has complied with these requirements. The note sent by the Foreign Minister of Acastus to the Secretary-General declaring that it was continuing the status of Nessus as a party to the ICJ[27] is considered a duly ratified instrument deposited with the UN. Acastus has also assumed the annual obligations under Nessus's multi-year plan to repay its dues,[28] indicating that it can contribute to the expenses of the Court.

2. <u>In any case, Acastus has satisfied the requirements necessary for a non-state party to invoke the jurisdiction of the ICJ</u>

The ICJ also has jurisdiction *rationae personae* over other states not parties to the Statute by virtue of Article 35(2) of the Statute.

The ICJ, in its Order of 8 April 1993 said that proceedings may validly be instituted by a State against a State which is a party to a special provision of a treaty in force, but is not a party to the Statute.[29] In the *Wimbledon Case*, the PCIJ affirmed its jurisdiction against Germany, although Germany was not yet a party to the Statute.[30]

Security Council Resolution 9 (1946)[31] enumerates the requirements in order for the ICJ to be open to non-state parties. It requires states like Acastus to deposit with

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[25] *See also Conditions On Which Switzerland May Become a Party to the International Court of Justice*, GA Res. 91 (I) of 11 December 1946, 1st Sess. 56th Plenary Meeting; *Application of Liechtenstein to Become a Party to the Statute of the International Court of Justice*, Resolution 363 (IV) of 1 December 1949, 4th Sess. 262nd Plenary Meeting; *Application of Japan to Become a Party to the International Court of Justice*, GA Res. 805 (VIII) of 9 December 1953, 8th Sess., 471st Plenary Meeting; *Application of San Marino to Become A Party to the International Court of Justice*, GA Res. 806 (VIII) of 9 December 1953, 8th Sess., 471st Plenary Meeting.

[26] *Id.*

[27] C ¶8.

[28] C ¶12.

[29] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)): Request for the Indication of Provisional Measures, 1993 ICJ Rep. 14.

[30] *The Wimbledon*, Judgement of 17 August 1923, PCIJ, Series A, no. 1, p. 20.

[31] Security Council Resolution 9 dated 15 October 1946.

the Registrar of the Court a declaration accepting the jurisdiction of the Court. The declaration must be in accordance with the Charter of the UN and must be consistent with the terms, and subject to the conditions, of the Statute and the Rules of Court. Such declaration must also include an undertaking by the state to comply in good faith with the decisions of the Court and to accept all the obligations of a Member of the UN under Article 94 of the Charter.[32]

The note sent by Acastus to the UN Secretary-General[33] satisfies the requirement of depositing with the Registrar of the Court of a declaration accepting ICJ jurisdiction. In the *Corfu Channel* case, the President of this Court ruled that a note of the Albanian Government in which Albania stated its preparedness to appear before the Court, was considered as constituting the document mentioned in Article 36.[34] There is therefore no need to deposit any special declaration.[35] The PCIJ had also decided that it was not necessary to deposit a special declaration for any state that was not a party to the Statute if the provision which conferred jurisdiction on the Court was contained in treaties and conventions in force, as provided for in Article 36 of the Statute.[36]

Furthermore, Acastus is able and willing to comply with the obligations under the UN Charter as shown by Acastus's willingness to pay Nessus's membership dues as its own.[37] Acastus is also a peace-loving state and has not been involved in any dispute with other states. The relationship of Acastus with Rubria has in fact been largely friendly.[38] These facts show the capacity of Acastus to act in accordance with the UN Charter.

B. The ICJ has jurisdiction *ratione materiae* for all claims in this case since Acastus has accepted the ICJ's compulsory jurisdiction.

Jurisdiction *ratione materiae* may be laid in three ways: via a *compromissory* provision in a treaty or convention in force,[39] by special agreement,[40] or by acceptance of compulsory jurisdiction by the ICJ.[41]

Article 36(2) of the ICJ Statute provides that states parties to the Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement the jurisdiction of the Court. Such jurisdiction includes all legal disputes concerning the interpretation of a treaty, any question of international law, the existence

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[32] *Id.*
[33] C ¶8.
[34] Hambro, supra note 1, at 148.
[35] *Id.*
[36] Publications of the PCIJ, Series E, No. 1, p. 261.
[37] C ¶12.
[38] C ¶6.
[39] ICJ Statute, supra note 1, §36(1).
[40] *Id.*, §36(1).
[41] *Id.*, §36(2); Hambro, *Some Observations on the Compulsory Jurisdiction of the International Court of Justice*, 25 BYBIL 133 (1948).

of any fact which, if established, would constitute a breach of an international obligation and the nature or extent of the reparation to be made for the breach of an international obligation.[42] Pursuant to the policy of peaceful settlement of disputes,[43] the UN urges all states to accept the compulsory jurisdiction of the Court.[44]

Acastus has accepted the compulsory jurisdiction of the ICJ through the note sent by the Acastian Foreign Minister to the UN Secretary-General. No particular form of declaration is contemplated by Article 36(2).[45] It is enough that the intention of Acastus is clearly conveyed by the declaration.[46] Moreover, an extensive interpretation of compulsory declarations should be given, pursuant to the spirit of the Charter.[47] According to Judge Alvarez in the *Anglo-Iranian Oil Case*:

> It is impossible to suppose that a State not a Member of the United Nations, or one which has not accepted jurisdiction of the Court, should be able to violate the rights of other States and that it should not be possible to bring it before the Court; or, conversely, that a State which is a Member of the United Nations should be able so to act with regard to a non-member State.[48]

The precise form and language in which Acastus declares acceptance is left to Acastus, and there is no suggestion that any particular form is required, or that any declaration not in such form will be invalid.[49] Thus, the note sent by the foreign minister of Acastus to the UN Secretary-General[50] clearly conveys the intention of Acastus to accept the compulsory jurisdiction of the ICJ.

II. RUBRIA VIOLATED THE RIGHTS OF ACASTIAN CITIZENS WHEN RUBRIA PERMITTED THE CONSTRUCTION OF THE PIPELINE

A. Acastus's claims in relation to the Elysians are admissible.

Acastus is entitled to exercise its right to diplomatic protection of its Elysian subjects who were injured by acts contrary to international law committed by Rubria.[51] The exercise of such right is valid since the Elysians have exhausted local remedies.[52]

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[42] ICJ Statute, supra note 1, §36(2).

[43] *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), 24 October 1970; *Review of the Role of the International Court of Justice*, GA Res. 2818 (XXVI), 15 December 1971; *Review of the Role of the International Court of Justice*, GA Res. 3232 (XXIX), 12 November 1974.

[44] *Need for Greater Use by the United Nations and Its Organs of the International Court of Justice*, GA Res. 171 (II), November 14, 1947.

[45] *Temple of Preah Vihear* (Cambodia v. Thailand), 1961 ICJ 17, 31 [*hereinafter* Preah Vihear]; Rosenne, supra note 1, at 379-380.

[46] Rosenne, supra note 1, at 379.

[47] *Anglo-Iranian Oil* (United Kingdom v. Iran), 1952 ICJ 93.

[48] *Id.*, at 133.

[49] *Preah Vihear*, supra note 45.

[50] C ¶8.

[51] *Nottebohm Case* (Liechtenstein v. Guatemala), 1955 ICJ 4 [*hereinafter* Nottebohm]; *Panevezys-Saldutiskis Case* (Estonia v. Lithuania), PCIJ Reports, Series A/B, No. 76 (1939) [*hereinafter* Panevezys-Saldutiskis].

1. The Elysians are Acastian citizens.

Acastus validly exercised its right under international law to protect its citizens.[53] Diplomatic protection rests primarily on the existence of the nationality of Acastus attaching to Elysians both at the time of the alleged breach of duty and at the time when the claim is presented.[54] To determine nationality, the genuine and effective link of the Elysians with Acastus must be established.[55]

Acastus has conferred citizenship on the Elysians.[56] The genuine and effective link[57] of the Elysians to Acastus is shown by the fact that the Elysians are residents of Acastus. The Elysians only go to work in fields located in Rubria. At the end of the day they return to Acastus where their villages and families are located.[58] The Elysians also participate in the Acastian parliament through their representative Mrs. Doris Galatea.[59] These indicators confirm that Elysians are Acastian citizens.

2. The espousal by Acastus of the claims of the Elysians is admissible since the Elysians have exhausted all local remedies.

Acastus can invoke the responsibility of Rubria since prior to espousing the Elysians' claim, the requirement of exhaustion of local remedies has been satisfied.[60]

3. Alternatively, the claims of the Elysians arising from the construction of the pipeline is admissible since Rubria breached *erga omnes* obligations.

Human rights obligations have 'the purpose of guaranteeing the enjoyment of individual human beings of those rights and freedoms, rather than the establishment of reciprocal relations between states.'[61] They are obligations *erga omnes,* in the fulfillment of which every state has a legal interest.[62] Acastus may therefore bring such claim before this court.

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[52] Clarifications ¶11 [*hereinafter* Cl]. *See also Case Concerning Elettronica Sicula S.p.A (ELSI)* (United States v. Italy), 1989 ICJ 15 [*hereinafter* ELSI]; *Interhandel Case* (Switzerland v. United States), 1959 ICJ 6 [*hereinafter* Interhandel]; *Ambatielos Arbitration* (Greece v. UK), 12 RIAA 83.

[53] Nottebohm, supra note 51; Panevezys-Saldutiskis, supra note 51.

[54] Brownlie, supra note 15 at 403.

[55] Nottebohm, supra note 51.

[56] C ¶4.

[57] Nottebohm, supra note 51.

[58] C ¶3.

[59] C ¶4.

[60] Cl ¶11; *See* Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1, §44(b) [*hereinafter* State Responsibility]; Brownlie, supra note 15 at 496-497; *See also* ELSI, supra note 52; Interhandel, supra note 52, at 27.

[61] Other Treaties subject to the Advisory Jurisdiction of the Court (§64 ACHR), (1982) 1 Inter-Am.Ct.Hum.Rts. (ser. A), 1982 3 H.R.L.J. 140 *cited in* Shelton, infra note 162, at 47.

[62] Barcelona Traction, infra note 121, at 32; State Responsibility, supra note 60, Art.42; The Effect of

B. Rubria violated international obligations owed to the Elysians

Rubria's exercise of the right to permanent sovereignty over its natural resources[63] is not absolute. It is subject to, *inter alia,* a concomitant duty to respect and observe human rights norms relating to individuals, minorities and indigenous peoples.[64]

1. Rubria violated rights of individual Acastian citizens.

a) Rubria failed to protect the Elysian's inherent right to life by destroying the Elysians' means of livelihood.

Rubria is required under Article 6(1) of the ICCPR[65] to protect every human being's inherent right to life. Rubria, as a party to the ICCPR, is bound to comply with the treaty provision in good faith under the rule of *pacta sunt servanda.*[66] Acastus is a party to the ICCPR, having succeeded to Nessus' treaty obligations.[67] It can demand the fulfillment of the obligations by Rubria.[68] In any case, the norms embodied in the ICCPR have attained customary status.[69]

The right to life is the supreme right of every human being.[70] It is the right from which all other rights flow, and is therefore basic to[71] and forms part of the irreducible core of all human rights.[72]

Rubria violated the inherent right to life of Elysians when it destroyed the Elysians' means of livelihood. Rubria's destruction of the agricultural lands in Elysium will prevent the Elysians from pursuing the only means of livelihood known to them

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Reservations on the Entry into Force of the ACHR (Articles 74 and 75), (1982)2 Inter-Am. Ct.Hum.Rts. (ser. A) (1982) 3 H.R.L.J. 153.

[63] Permanent Sovereignty over Natural Resources, G.A. res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962); Brownlie, *Legal Status of Natural Resources,* 162 RECUEIL DES COURS 245, 271 (1979); Indigenous peoples permanent sovereignty over natural resources, Preliminary report of the Special Rapporteur, 21 July 2003, E/CN.4/Sub.2/2003/20, ¶9; De Arechaga, *International Law in the Past Third of a Century: General Course in Public International Law,* 159 RECUEIL DES COURS 1, 297 (1978).

[64] *See Case of the Mayagna (Sumo) Community of Awas Tingni v. Nicaragua,* Inter-American Court of Human Rights, judgement of 31 August 2000 (Series C, No. 79), ¶149 [*hereinafter* Awas Tingni].

[65] *International Covenant on Civil and Political Rights,* G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [*hereinafter* ICCPR].

[66] Vienna Convention on the Law of Treaties, 1155 UNTS 331, §26 [hereinafter VCLOT].

[67] C ¶8.

[68] VCLOT, supra note 66, §26.

[69] Jayawickrama, infra note 71.

[70] CCPR General Comment No. 6. (General Comments), General Comment No. 06: The right to life (§6): 30/04/82.

[71] *Camargo v. Colombia,* Human Rights Committee, Communication No. 45/1979, HRC 1982 Report, Annex XI; JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 243 (2002) [*hereinafter* Jayawickrama].

[72] *Advisory Opinion on the Legality of the Use or Threat of Use of Nuclear Weapons,* 1996 ICJ 226, 506 (Separate Opinion, Judge Weeramantry).

since time immemorial.[73] In *Ominayak and the Lubicon Lake Band v. Canada*,[74] the oil and gas explorations in territory occupied by the Lubicon Lake Band were deemed by the Band as infringements on their right to life since the explorations prevented them from continuing with their traditional way of life and means of livelihood. In *Tellis v. Bombay Municipal Corporation*,[75] a group of slum dwellers sued an Indian municipality for destroying the sidewalks where they hawked their wares. The Indian Supreme Court held that a violation of their right to life occurred since the sidewalks serve as a venue for the slum dwellers' livelihood.[76]

Elysians have farmed on the Elysium and depended completely on the food produced by its fertile lands.[77] By destroying the lands, Rubria left the Elysians without any source of subsistence, forcing them into the inhospitable cities of Acastus and Rubria where their life and security is greatly put at risk.[78] If the right of the Elysians to their livelihood is not treated as a part of the right to life, the easiest way of derogating the Elysians right to life would be to deprive them of their means of livelihood.[79]

b) Rubria denied each Elysian the right to enjoy their culture, profess their religion and use their own language in violation of Article 27 of the ICCPR.

Rubria denied each Elysian the right to enjoy his culture, profess his religion and use his own language. This obligation is contained in Article 27 of the ICCPR, which provides:

> In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 27 establishes and recognizes a right which is conferred on individuals belonging to minority groups,[80] such as the Elysians. This right is distinct from, and is in addition to, all the other rights which the Elysians are entitled to enjoy.[81] The objective of the provision is the survival and continued development of the cultural, religious and

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[73] C ¶24.

[74] Human Rights Committee, Communication No. 167/1984 : Canada. 10/05/90. CCPR/C/38/D/167/1984.

[75] *Tellis et al. v. Bombay Municipal Corp.*, 1987 LRC 351 [*hereinafter* Tellis].

[76] *Id.*; *See also X v. Y Corp. and Another*, 1 LRC 688 (1999).

[77] C ¶5.

[78] C ¶24.

[79] Tellis, supra note 75.

[80] Human Rights Committee, General Comment No. 23: The rights of minorities (§27): 08/04/94. CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments) ¶1 [*hereinafter* GC23]; *See also Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981); *Ivan Kitok v. Sweden*, Human Rights Committee, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988).

[81] GC23, supra note 80, at ¶1.

social identity of the minorities concerned, and thereby the enrichment of the fabric of society as a whole.[82]

The Elysians' rural and subsistence economy and traditional activities are essential to the maintenance of their culture and to their economic self-reliance and development.[83] Rubria is under an obligation to respect the culture of the Elysians, particularly the special importance they accord to, and their relationship with, the lands which they occupy or otherwise use.[84]

Rubria denied the Elysians their right granted by Article 27 of the ICCPR when Rubria destroyed the agricultural lands. As held in the *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua* case:

> The close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[85]

The Elysians would inevitably have to scatter all over Acastus and Rubria in order to survive.[86] By absolutely depriving them of the use of their agricultural lands, Rubria has destroyed the Elysians' unique culture, language and religion.[87] The Elysians would be forcibly assimilated to the majority groups in Acastus and Rubria, and lose their distinctiveness as a group.[88]

2. Rubria violated the rights of indigenous peoples under international law.

a) Rubria did not respect the Elysians' native title to the Elysium lands.

The native title of the Elysians to the Elysium is recognized under international law.[89] Specially affected states have recognized possession by indigenous peoples of land since time immemorial as a mode of acquiring title.[90] The Elysians have the right to

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[82] *Id.*, at ¶9.

[83] Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, entry into force 5 September 1991, §23 [*hereinafter* ILO 169].

[84] ILO 169, supra note 83, §13.

[85] Awas Tingni, supra note 64, at ¶149.

[86] C ¶24.

[87] Awas Tingni, supra note 64.

[88] C ¶24.

[89] Draft United Nations declaration on the rights of indigenous peoples, §26 [*hereinafter* IP Rights]; ILO 169, supra note 83, §14.

[90] *Mabo v. Queensland*, [No 2] (1992) 175 CLR 1; *Carino v. Insular Government*, 212 US 449 (1909); *Calder v. Attorney General for British Columbia*, 1973 SCR 313; Constitution of the Federal Republic of Brazil, §231; Constitution of the Republic of Colombia, §329; Ley Indigena (Chile); Lamenxay and Riachito indigenous communities, of the

own, develop, control and use the lands and territories and other resources which they have traditionally owned or otherwise occupied or used.[91]

In allowing the construction of the pipeline and in depriving the Elysians of the use of the Elysium, Rubria totally disregarded the native title of the Elysians to their ancestral lands.[92]

b) Rubria violated customary international law when it did not obtain the free, prior, and informed consent of the Elysians in constructing the oil pipeline.

The Elysians cannot be removed from their lands without first obtaining their free and informed consent.[93] The principle of free, prior and informed consent recognizes the right of Elysians to participate in deciding matters related to the use of their ancestral lands.[94] It protects the human rights of indigenous peoples placed at risk by major development projects.[95] The principle is recognized as a general principle of law accepted by civilized nations[96] and stems from the right of Elysians' to freely dispose of their wealth and natural resources.[97]

Rubria did not obtain the free, prior and informed consent of the Elysians. The construction of the oil pipeline has commenced and the Elysians were denied the opportunity to voice their concerns about the project. They only knew about the project when they were already abducted and forced to work on the pipeline construction.[98] Despite the review by COG experts that the proposed pipeline construction would destroy half of the Elysians' agricultural lands and block the spring which irrigates the

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of the Republic of Colombia, §329; Ley Indigena (Chile); Lamenxay and Riachito indigenous communities, of the Enxet-Sanapana People v. Paraguay, Inter-American Human Rights Commission Case No. 11,713; Political Constitution of the Republic of Nicaragua, §89; Nicaragua Law 445; Constitution of Guatemala; Constitution of the Independent State of Papua New Guinea, Sec. 9; Johnson v. M'Intosh, 21 US 543 (1832); Cherokee Nation v. Georgia, 30 US 1 (1831); Worcester v. Georgia, 31 US 515 (1832).

[91] IP Rights, supra note 89, §26.

[92] C ¶3.

[93] IP Rights, supra note 89, §30; ILO 169, supra note 83, §16(2); Republic of the Philippines Act 8371, Indigenous Peoples Rights Act, Sec. 7; Australia's Aboriginal Land Rights (Northern Territory) Act 1976; American Declaration on the Rights of Indigenous Peoples, §21(2).

[94] Indigenous Issues: Human Rights and Indigenous Issues, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, UN Doc. E/CN.4/2003/90 [*hereinafter* Stavenhagen]; IP Rights, supra note 89, §30; *See also* Indigenous peoples permanent sovereignty over natural resources, Preliminary report of the Special Rapporteur, 21 July 2003, E/CN.4/Sub.2/2003/20.

[95] Stavenhagen, supra note 94, at 23; IP Rights, supra note 89, §30.; *See also The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and People's Rights, Communication 155/96 [*hereinafter* Wiwa].

[96] ICJ Statute, supra note 1, §38(1)(c).

[97] Stavenhagen, supra note 94, at ¶73.

[98] C ¶26.

Elysium,[99] no attempt was made by the Rubrian government to inform, and obtain the consent of, the Elysians regarding the plan.

C. Rubria must permanently cease from the construction of the pipeline, provide restitution and compensation to the Elysians.

Since the construction of the pipeline is the cause of the enumerated violations of human rights, Rubria must permanently cease from implementing such project.[100] It must also return the lands to the Elysians[101] and compensate the latter for the period under which they were denied the use of such lands.[102]

III. THE ACTIVITIES OF THE PROF IN THE ELYSIUM, INCLUDING THE FORCED LABOR OF CIVILIANS, ARE ATTRIBUTABLE TO RUBRIA AND ARE VIOLATIONS OF INTERNATIONAL LAW.

Rubria's international responsibility arises from acts which are (1) attributable to it, and (2) constitutes a breach of its international law obligations.[103]

A. The acts of PROF are attributable to Rubria.

The conduct of PROF which exercises the state's machinery of power and authority are attributable to Rubria.[104] Conduct attributable to Rubria include, *inter alia,* those of *de facto* agents acting under the instructions of, or direction or control of the state,[105] or state organs,[106] or persons or entities exercising elements of governmental authority.[107]

1. The PROF is an agent of Rubria empowered to exercise elements of governmental authority

States such as Rubria can only act through agents and representatives.[108] The conduct of persons empowered to exercise elements of governmental authority acting in such capacity is attributable to the State even if the persons acted in excess of authority or contrary to instructions.[109]

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[99] C ¶21.

[100] State Responsibility, supra note 60, §30.

[101] Velasquez Rodriquez Case (Compensatory Damages) (1987) 7 Inter-Am.CT.H.R. (ser. C).

[102] Sporrong and Lonnroth v. Sweden, (1982) 52 Eur.Ct.H.R. (ser.A).

[103] State Responsibility, supra note 60, §2; *United States Diplomatic and Consular Staff in Tehran case*, 1979 ICJ 56 [*hereinafter* Hostages Case]; *Phosphates in Morocco case* (Preliminary Objections), 1938 PCIJ 28.

[104] Bove, *Attribution Issues in State Responsibility*, 84 AM. SOC'Y. INT'L. L. PROC. 52 (1990).

[105] State Responsibility, supra note 60, §8.

[106] *Id.*, §4.

[107] *Id.*, §5.

[108] *Questions relating to settlers of German Origin in Poland*, 1923 PCIJ 22; OPPENHEIM, INTERNATIONAL LAW 540 (1996).

[109] State Responsibility, supra note 60, §7; Finkelstein, *Changing Notions of State Agency in International Law: The Case of Paul Touvier*, 30 TEX. INT'L. L. J. 278 (1995).

International law recognizes that a State may act through persons not part of its formal structure.[110] The conduct of the PROF is considered as an act of Rubria since the essential requisites[111] concur to qualify it as such.

First, the PROF performs functions normally exercised by Rubria's state organs.[112] The PROF functions generally to facilitate the exploitation and development of Rubria's natural resources and specifically to provide security to the persons and property of COG.[113] These two functions are both traditionally exercised by state organs: the exploitation and development of natural resources is recognized as a sovereign prerogative,[114] while the provision of security is integral to the police powers of a state.[115]

Second, Rubria granted these functions to the PROF.[116] The conferral of authority can be made expressly through the internal law of a state.[117] But:

> the attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law. It is generally accepted in international law that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State.[118]

The Rubrian government conferred such functions to the PROF when, acting through its instrumentality, the COG, it contracted with the PROF. That the Rubrian government can act through the COG cannot be denied. A state-owned enterprise is "considered part of the executive branch of the government."[119] Rubria also conferred such authority upon the PROF when it approved the latter's contract with the COG.[120] The approval by shareholders of corporate contracts is not deemed an act of a corporation but an act of a shareholder per se, in furtherance of its own interest.[121]

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[110] Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chp.IV.E.2)(2001).

[111] *Id.*

[112] Villapando, *Attribution of Conduct to the State: How the Rules of State Responsibility May be Applied Within the WTO Dispute Settlement System*, 5 J. INT'L ECON. L. 403 (2002) [*hereinafter* Villapando].

[113] C ¶23.

[114] *See* note 63.

[115] *See* Gerry Cleaver, *Subcontracting military power: The privatisation of security in contemporary Sub-Saharan Africa.* 33 CRIME, LAW AND SOCIAL CHANGE, 131-149, (Mar. 2000).

[116] Dolzer, *The Settlement of War-related claims does International Law Recognize a victims's Private Right of Action? Lessons after 1945*, 20 BERKELEY J. INT'L L. 296 (2002); BROWNLIE, I SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 136 (1983).

[117] MALCOLM SHAW, INTERNATIONAL LAW 702 (2003) [*hereinafter* Shaw].

[118] *Yeager v. The Islamic Republic of Iran*, (Partial Award) Award No. 324-10199-1, 17 IRAN-U.S.C.T.R. 92 (1987), ¶42 [*hereinafter* Yeager].

[119] McLean, *Government to State: Globalization, Regulation and Governments as Legal Persons*, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 187 (2003).

[120] C ¶23.

[121] *See Case Concerning the Barcelona Traction, Light and Power Company, Ltd.* (Belgium v. Spain), 1970 ICJ 3 [*hereinafter* Barcelona Traction].

Third, the PROF is accountable to Rubria[122] in two ways: Rubria is able to hold it accountable indirectly through the COG, and directly by monitoring and regulating its conduct as an incorporated entity under its laws.[123]

Fourth, PROF undertook the acts complained of in the capacity granted to it.[124] The forced and compulsory labor imposed upon Elysian men is intimately linked to the PROF's general mandate of facilitating the construction of the pipeline.[125] The PROF as its name suggests acts as a retention-operations unit, and as such is engaged in the day to day operations for the construction of the pipeline. Moreover, Rubria's failure to immediately put an end to this practice by PROF indicates a knowing approval of its activities,[126] confirming the broad mandate the government granted to such entity.

2. The PROF is a de facto agent that has acted under the over-all control and supervision of the state

Under international law, the acts of organized and hierarchically structured groups are attributable to the state which exercises over-all control over them.[127]

In order to attribute the acts of PROF to Rubria, it must be proved that Rubria wields overall control over the PROF.[128] Overall control may be shown, not only by equipping and financing the PROF but also by coordinating or helping in the general planning of the activity.[129] It is not necessary that Rubria issue specific instructions for the commission of specific acts that are contrary to international law.[130]

The PROF, as a security force, is an organized armed group.[131] Rubria equips and finances the PROF's operations through the COG, providing it with vehicles as well as resources for the purchase of its arms.[132] Moreover, Rubria is able to coordinate the operations of the PROF through the COG in whose board Rubria's representatives from the Ministry of Natural Resources sit as directors.[133]

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[122] CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 101 (2002); Villapando, supra. note 112, at 404.

[123] *SALW and Private Security Companies in South Eastern Europe: A Cause or Effect of Insecurity?* SEESAC 2005 [*hereinafter* SALW]; Prenzler and Sarre. Regulating Private Security in Australia, Australian Institute of Criminology: Trends and Issues (1998); *see also* Australian Private Security Act of 1995.

[124] *Phillips Petroleum Co. Iran v. Islamic Republic of Iran* (1989), Award No. 425-39-2, ¶89; *Petrolane Inc., et. al. v. The Government of the Islamic Republic of Iran et. al.*, 27 Iran-USCTR. 64.

[125] C ¶23.

[126] Yeager, supra. note 118, ¶¶43-44.

[127] *Prosecutor v. Tadic*, ICTY Appeals Chamber, July 1999, ¶120 [*hereinafter* Tadic]; Yeager, supra note 118, at 92; *US v. Mexico (Stephens Case)*, 4 RIAA 266-7; *Loizidou v. Turkey*, Eur. Court of Human Rights, Judgment of 18 December 1996 (40/1993/435/514).

[128] *Id.*

[129] *Id.*

[130] *Id.*, at ¶131.

[131] Sklansky, *The Private Police*, 46 UCLA L. REV. 1165; SALW, supra note 123; *See also* Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004).

[132] C ¶23.

[133] C ¶19.

Furthermore, Rubria in fact ratified the activities of the PROF when it did not immediately put an end to the latter's illegal practices.[134] It knew, or should have known,[135] the activities of the PROF within its territory. It has earlier approved the contract of the COG with the PROF.[136] The pipeline project was also of such nature and scale that it should have been known to Rubria[137] considering that it was the first and only major development project in the country.[138] Finally, the Elysian men were brought by the PROF to the fields and were made to work under the supervision of the COG,[139] an enterprise under the control of the state.

B. Rubria violated its obligation to protect Elysians from forced labor

Rubria's imposition of forced and compulsory labor through the PROF violates customary international law.[140] Rubria is obligated to afford all individuals under its jurisdiction and irrespective of nationality the protection against forced or compulsory labor.[141]

There is forced or compulsory labor in this case since the Elysians were rounded up by PROF and made to work against their will in the pipeline project.[142] They were compelled to work by armed PROF members who, by waving their weapons upon the Elysians,[143] have created an environment of threat against the personal security and liberty of the Elysians. The work conditions of the Elysians were also oppressive: the Elysians were made to carry "impossible heavy loads" and to break "large rocks with heavy hammers" without or with insufficient compensation.[144]

C. Rubria failed to adequately regulate the activities of the PROF in breach of its obligation under international law.

Irrespective of whether the acts of PROF are attributable to Rubria, Rubria's failure to regulate[145] the activities of the PROF constitutes a breach[146] of its obligations under international law.

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[134] Hostages Case, supra note 103; Yeager, supra note 118.

[135] *The Corfu Channel Case (Merits)*, (UK v. Albania), 1949 ICJ 4 [*hereinafter* Corfu].

[136] C ¶23.

[137] Yeager, supra note 118.

[138] C ¶19-23.

[139] Cl. ¶7.

[140] ICCPR, supra. note 65, §8(3)(a); UNGA Resolution 2200A (XXI), 16 December 1996; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, §4(2); American Convention on Human Rights, 22 November 1969, §6(2); *Iwanowa v. Ford Motor, Co.*, 67 F. Supp. 2d 424,441 (1999); *US v. Krauch, et. al (the I.G. Farben Case)*, VIII TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS III-IV (1952).

[141] Jayawickrama, supra note 71, at 153.

[142] C ¶26; *See* Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 UNTS 55, entered into force May 1, 1932, §2(1); *Van der Mussle v. Belgium* 6 EHRR 163 (1983).

[143] C ¶26.

[144] C ¶26.

[145] Wiwa, supra note 95.

[146] State Responsibility, supra note 60, §2.

Rubria failed in its duty to protect other States and their nationals against injurious acts by individuals within their jurisdiction,[147] and its correlative duty to (i) prevent injury,[148] and (ii) punish wrongdoers.[149] This obligation entails the protection by government of individuals not only through appropriate legislation and effective enforcement[150] but also by protecting them from damaging acts that may be perpetrated by private parties.[151] To this end, states like Rubria are made primarily responsible[152] for ensuring that transnational corporations and other business enterprises within their territory respect human rights.[153] This obligation is customary law.[154]

In ***Velàsquez Rodríguez v. Honduras***[155] the IACHR held that "when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens."[156] To the same effect is the ECHR ruling in ***X and Y v. Netherlands.***[157]

Rubria is responsible for the violation of the fundamental rights of Elysians to *inter alia,* life, cultural property, and way of life. It has given the green light to private actors, such as the PROF, to devastatingly affect the well-being of the Elysians.[158]

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[147] *Trail Smelter Arbitration,* 3 RIAA 1963; *Island of Palmas,* 2 RIAA 829, 831; ELSI, supra note 52, at 15; Lillich and Paxmann, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Attacks,* 26 AM. U. L. REV. 225-30 (1997).

[148] *Zafiro Claim,* 6 RIAA 160.

[149] Christenson, *Attributing Acts of Omission to the State,* 12 MICH. J. INT'L L. 324 (1991); EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 87-89 (1928).

[150] *International Covenant on Economic, Social and Cultural Rights,* GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, Article 2 [*hereinafter* ICESCR].

[151] ICESCR, *id.,* Preamble and Article 1; *see Union des Jeunes Avocats / Chad.* Communication 74/92; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Jan. 22-26, 1997 paras. 6, 7 18 at http://www1.umn,edu/humanrts/instree/Maastrchtguidelines_.html.

[152] Norms, infra note 153, ¶3, Preamble; Report of the Sessional Working Group on Working Methods and Activities of Transnational Corporations, U.N. ESCOR Hum. RTs. Comm., Sub-COmm'n on the Promotion and Protection of Hum. Rts., 54th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2002/13 (2002) at 5, ¶12; Aguirre, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights,* CALIFORNIA WESTERN INT'L L. J. (2004).

[153] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003) ¶1 and §12 [*hereinafter* Norms]; *see also* Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* 111 YALE L. J. 443, 466 (2001); Wiwa, supra note 95, ¶44; Sanchez-Moreno and Higgins *No Recourse: Transnational Corporations and The Protection of Economic, Social, And Cultural Rights In Bolivia,* 27 FORDHAM INT'L L.J. 1663 [*hereinafter* Sanchez-Moreno]; Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, Maastricht, The Netherlands, Jan. 22-26, 1997, ¶18.

[154] *Morissette v. US,* US Supreme Court, No. 12, 1952; *US v. Arjona,* 120 US 479 (1888); Restatement (Third) of Foreign Relations Law of the United States, American Law Institute, §711, 184 (1987); COHEN, CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 268-320 (1972); COHEN AND CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW 828 (1974); Note from the Secretary of State of the US in the Negrete Affair, *as cited in* MOORE, HISTORY AND DIGEST OF INTERNATIONAL LAW 962 (1906); Soviet News, London, 1 Apr. 1963, 31 Aug., 1964, 20 Apr. 1961, 6 Jan. 1981, *as cited in* Brownlie, *supra* note 15, 135; Diplomatic Note from the Italian Minister of Foreign Affairs to the US, dated 28 January 1927, *as cited in* HACKWORTH, DIGEST OF INTERNATIONAL LAW 659-60 (1943); Sorensen, *Drug Trafficking on The High Seas: A Move Toward Universal Jurisdiction Under International Law,* 4 EMORY INT'L L. REV. 530 (1990).

[155] *See Velàsquez Rodríguez Case,* Judgment of July 19, 1988, Inter-American Court of Human Rights, Series C, No. 4.

[156] *Id.*

[157] *X and Y v. Netherlands,* 91 ECHR (1985) (Ser. A) at 32.

[158] Wiwa, supra note 95.

Despite the ample mechanisms[159] extant by which it can regulate these entities,[160] Rubria did not use its powers to prevent the PROF from pursuing the latter's illegal activities. Its practice falls short of the minimum conduct expected of states[161] in the protection of human rights.

D. Rubria must compensate the Elysians for the acts of the PROF.

Rubria must compensate each Elysians for the harm they suffered,[162] restitution in *integrum* not being an available remedy.[163] Rubria is liable for non-pecuniary damages,[164] such as moral damages, since the forced and compulsory labor impaired the way of life[165] of the Elysians.

IV. THE OUTCOME OF THE BORIUS LITIGATION DOES NOT PLACE ACASTUS IN BREACH OF ARTICLE 52 OF THE RUBRIA-ACASTUS BINDING BILATERAL INVESTMENT TREATY (RABBIT)

Pursuant to Sec. 52 of the RABBIT in relation to the AIRES and Sec. 2(1) of the MCRA, Acastus obligated itself to exercise jurisdiction over: (a) any suit for damages brought by persons who suffered actual damages proximately caused by the acts of any Acastian corporation or (b) cases relating to violations of international law against a defendant present or found in Acastus,[166] respectively.

A. TNC was not the proximate cause of the damage to the Elysians.

TNC has not acted, nor was it complicit in any act, which proximately caused[167] the suffering of the Elysians. Neither can the acts of the COG or the PROF be imputed on TNC since no justification exists to pierce COG's or PROF's separate corporate existence.

TNC held shares in the COG which did not, directly or proximately, cause damage to the Elysians. Mere investment by a parent in a subsidiary does not suffice to hold the parent liable for the acts of the latter.[168] The TNC cannot be faulted for the

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[159] *See* Corfu, supra note 135.

[160] C ¶19,22,23; Cl. ¶7.

[161] Wiwa, supra note 95, at ¶58.

[162] *Aloeboetoe case (Reparations)*, 15 Inter-American. Ct. H.R. (ser. C); SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 214-79 (1999) [*hereinafter* Shelton].

[163] *Chorzow Factory Case*, Judgment No. 8, 1937, PCIJ Series A, No. 17, p. 29; *Reparations for the Injuries Suffered in the Service of the United Nations, Advisory Opinion*, 1949 ICJ 184; Velasquez-Rodriguez case (Compensatory Damages) (1987) 7 Inter-Am. Ct.H.R. (ser.C).

[164] Pasqualucci, *Victim Reparation in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure*, 18 MICH. J. INT'L L. 1, 30-7 (1997).

[165] *Case of Young, James and Webster*, (1981) 44 Eur.Ct.H.R. (ser. A) at 7, ¶¶12-13.

[166] C ¶27.

[167] Shelton, supra note 162.

[168] *See Doe v. Unocal*, 248 F. 3d. at 926.

activities of COG because the latter maintains its existence and operations separate from and independent of TNC.[169] The COG has its own executive manager as well as full-time employees who perform their tasks independent of the TNC.

1. COG's corporate entity cannot be pierced to hold TNC liable

It is a general principle of law that corporations have a personality separate and distinct from its shareholders. COG's corporate veil may not be pierced unless necessary to prevent the misuse of privileges of legal personality, to protect third persons, or to prevent the evasion of legal requirements or obligations,[170] none of which is applicable herein. Neither is there any ground specifically alleged in the case at bar.[171] No acts constituting any of the grounds for piercing the corporate veil have been alleged in the Borious litigation.[172] The Acastian court could never therefore obtain subject matter jurisdiction over the case against the TNC pursuant to the terms of the MCRA as incorporated in the RABBIT.[173]

2. TNC did not control the COG or the PROF.

The OECD Guidelines, which forms part of the treaty by reference,[174] recognize the autonomy of a joint-venture enterprise from its constituent companies[175] and distribute responsibility among them in complying with these obligations. TNC was not responsible for the operations of COG[176] and cannot be held liable therefore. The COG has its own charter, board of directors and employees separate from the TNC and is responsible for its own operations.[177]

To hold TNC responsible, proof of its control over the COG must be shown.[178] Mere monitoring by the TNC over the COG, supervision over its capital and budget,[179] and in the articulation of general policies and procedures is insufficient to attribute the acts of the COG to the TNC.[180] What is required is proof of control over the day to day operations of the COG.[181]

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[169] Cl ¶5; Barcelona Traction, supra note 121; Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. 573, 577-99 (1986).

[170] Barcelona Traction, *id.*, at paras. 56-8.

[171] Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493 at 500 [*hereinafter* Blumberg]; *United States v. Bestfoods*, 524 US 51 (1998).

[172] C ¶27.

[173] C ¶15,17.

[174] C ¶15, Annex A, §2.

[175] OECD Guidelines For Multinational Enterprises, ¶3, Concepts and Principles.

[176] C ¶19; Cl. ¶5.

[177] C ¶19; Cl. ¶5.

[178] Blumberg, supra note 171, at 498.

[179] *Id.*

[180] *United States v. Bestfoods*, 524 US 51 (1998).

[181] *Id.*

TNC did not control the day to day operations of the COG to constitute the latter as its mere alter ego. The approval by the TNC representatives of the creation of the PROF never amounted to control over the day to day operations of the COG. Simply put, TNC did not take part in the management of the COG.

B. Acastus did not violate its duty to exercise jurisdiction over cases of violations of international law by defendants present or found in its territory.

1. The dismissal of the case against the TNC does not place Acastus in breach of its treaty obligation since TNC is not a subject of international law.

The case filed against the TNC is not one involving a violation of international law. The TNC is not a subject of international law[182] and does not assume liability for violating the prohibition against forced and compulsory labor which is the issue involved in the *Borious* litigation.[183]

International law does not invest rights upon corporations nor impose upon them responsibilities.[184] States have not as yet recognized the international legal personality of corporations,[185] and have explicitly refused to impose upon corporations liability for international criminal acts.[186] *Societes delinquere non potest*: corporate crimes is a fiction.[187]

The characterization of groups as "criminal organizations" in cases of grave breaches of peremptory norms[188] does not suggest imposition of corporate liability but merely facilitated the prosecution of individuals for membership therein.[189] It is the individual perpetrator, e.g. the corporate director, and not the corporate entity who is susceptible of liability for violations of peremptory norms, such as the proscription against forced and compulsory labor.

Acastus could not obtain jurisdiction over the TNC pursuant to the RABBIT which incorporated the AIRES[190] since its obligation pursuant thereto is to prosecute only international persons alleged to have breached international law.[191]

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[182] Brownlie, supra note 15.

[183] C ¶27.

[184] Brownlie, supra note 15; Shaw, supra note 117.

[185] Shaw, supra note 117, at 224-5.

[186] *See* JORGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 59-79 (2000).

[187] FISSE AND BRAITHWAITE. CORPORATIONS, CRIME AND ACCOUNTABILITY 17-18.

[188] Charter of the International Military Tribunal, Aug. 8, 1945, §6, 82 UNTS 279, Arts. 9-11 [*hereinafter* Nuremberg]; FAFO and International Peace Academy, BUSINESS AND INTERNATIONAL CRIMES: ASSESSING THE LIABILITY OF BUSINESS ENTITIES FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW (2004).

[189] Nuremberg, *id.* §10.

[190] C ¶27.

[191] C ¶28.

2. **In contrast, Acastus fulfilled its duty to obtain jurisdiction over the cases against Rubria and the COG**

a) **Rubria and the COG are subjects of international law**

Rubria, as a state, is a subject of international law[192] and as such may be held liable for any breach therein.[193] The acts and omissions of Rubria caused violations of rights which every state is duty bound to protect.

Similarly, the COG, as a state instrumentality or agent, can commit violations of international human rights law which consequent responsibility is imputed to the state. Individuals and entities who have acted under official authority or under color of such authority are internationally accountable for violations of international law.[194]

b) **Neither Rubria nor COG can invoke the doctrine of sovereign immunity to evade liability.**

Rubria has waived any claim to immunity[195] in cases involving violations of international law and cannot now invoke it to impugn the outcome of the Borious litigation. It has, through an international agreement, expressly consented to the exercise of jurisdiction by the court of another state with regard to a matter or case. It cannot, thus, invoke immunity from jurisdiction in a proceeding before such court.[196]

Rubria not only consented to but in fact insisted on the incorporation of the MCRA and other pertinent Acastian legislation, such as the AIRES, into the RABBIT.[197] It is precisely because of Rubria's insistence that Acastian courts, through the treaty, have been empowered to obtain jurisdiction over the case against the former.[198] Because the RABBIT provisions create international obligations, Rubria is bound to recognize the jurisdiction of Acastian courts over cases arising from its violations of international law.[199] It cannot now be permitted to impugn the acts of the Acastian courts pursuant to the general principle of *allegans contraria non est audiendus.*[200]

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[192] LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS 489 (1975).

[193] Brownlie, supra note 15.

[194] *Trajano*, 630 F.2d. 501-2; *Tel-Oren*, 726 F.2d 791-95 (Edwards, J., concurring). *See also Hilao*, 25 F.3d 1470-71.

[195] SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 6 (1988).

[196] Draft Articles on Jurisdictional Immunities of States and Their Properties, §7(1) [*hereinafter* State Immunities].

[197] C ¶15.

[198] C ¶15,27,30.

[199] Cheng, *Power, Authority and International Investment Law*, AM. U. INT'L L. REV. 473, 487 (2005).

[200] *Schufeldt Case*, 2 UNRIAA 1079, 1094; European Danube Commission (1927) B. 14, at 23; CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141-9 (1993).

Moreover, Rubria is not immune from liability[201] for its transactions that are by nature commercial.[202] Rubria contracted commercially with the TNC to develop and export its petroleum resources.[203] Since the violations of the rights of the Elysians arose out of this transaction, Rubria is further precluded from invoking state immunity in the Borius litigation.

Neither can COG invoke immunity. Corporations with a separate legal personality from the state cannot claim immunity from prosecution for its own acts.[204]

PRAYER FOR RELIEF

Based on the foregoing, Acastus respectfully requests that the Court adjudge and declare that:

> (a) the Court has jurisdiction over all claims in this case, since Acastus has succeeded to Nessus's status as a party to the Statute of the Court;
>
> (b) by permitting the construction of the pipeline as proposed, Rubria would violate the rights of Acastian citizens of Elysian heritage;
>
> (c) the activities of PROF in Elysium, including the forced labor of civilians, are attributable to Rubria and are violations of international law; and,
>
> (d) the outcome of the *Borious* litigation does not place Acastus in breach of Article 52 of the RABBIT.

Respectfully submitted,

Counsel for the Republic of Acastus

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[201] State Immunities, supra note 196, §10(1); *McDonnel Douglas Corp. v. Islamic Rep. of Iran*, 758 F.2d 341 at 349 (8th Cir. 1985); *Central Bank of Nigeria, Court of Appeal*, (1977) Q.B. 529, 64 ILR 11 (1983); *National Iranian Oil Company Pipeline Contracts, F.R. Germany, Oberlandes-gerich Frankfurt*, 65 ILR 212 (1984); *see* Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in US Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255; ILC Draft Convention on Foreign Sovereign Immunity, §1C.

[202] US Foreign Sovereign Immunities Act of 1976, 28 USCA S.1603(d); *Trendex Trading Corp. v. Central Bank of Nigeria*, (1977) 1 QB 529; *see also* HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 83 (1994).

[203] C ¶19.

[204] *Krajina v. The Tass Agency*, 2 ALL ENG. REP. 274 (CA 1949) *as cited in* Maniruzzaman, *State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends*, 60-Oct DISP. RESOL. J. 77; *see also* State Immunities, supra note 196, §10(3).

MEMORIAL FOR RESPONDENT

REPUBLIC OF ACASTUS
(APPLICANT)
V
STATE OF RUBRIA
(RESPONDENT)

STATEMENT OF JURISDICTION

The Court only has jurisdiction over questions raised relative to the interpretation of the Rubria-Acastus Binding Bilateral Investment Treaty and in accordance with Article 36(1) of the Statute of the Court on compromissory jurisdiction.

The Court does not have jurisdiction over all the other claims not contained in the RABBIT under the reservation contained in the compulsory declaration made by Rubria and in accordance with Article 36(2) of the Statute of the Court.

QUESTIONS PRESENTED

(A) WHETHER THE 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;

(B) WHETHER BY PERMITTING THE CONSTRUCTION OF THE PIPELINE AS PROPOSED, RUBRIA WOULD EXERCISE RIGHTS ATTENDANT TO ITS SOVEREIGNTY OVER TERRITORY AND NATURAL RESOURCES, AND WOULD NOT VIOLATE INTERNATIONAL LAW;

(C) 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; AND

(D) WHETHER ACASTUS IS IN BREACH OF ART. 52 OF THE RABBIT BY VIRTUE OF THE ACASTIAN CIVIL COURT'S DECISION.

STATEMENT OF FACTS

Acastus and Rubria are new independent States that emerged from the dissolution of Nessus in 2000. Acastus occupies the northern plains of the former State of Nessus while Rubria occupies the underdeveloped, yet oil and mineral-rich, mountainous southern region.

In April 2001, Rubria applied for membership in the UN and was admitted in October of that year. When it accepted the ICJ's compulsory jurisdiction, it made an express reservation that it will not accept jurisdiction over any case in which the opposing state has not been a party to the Statute for at least twelve months at the time of the application to the Court.

Acastus did not apply for membership in the UN and all its organs, including the ICJ. Instead, it claims to have continued Nessus's membership in the UN and its organs as well as in other treaties. The UN Security Council, however, unanimously adopted Resolution 2386, which underscored the fact that Nessus has ceased to exist, and categorically required Acastus to apply for UN membership.

Rubria, as well as other states protest Acastus's claim that it is entitled to continue Nessus. Their protests were based, *inter alia*, on the fact that (1) there was no devolution agreement between Acastus and Rubria, or between Nessus and Acastus before dissolution, assigning Nessus' UN membership to Acastus; (2) Acastus does not encompass a majority of the land mass and population of the former Nessus; and (3) Nessus' armed forces were divided evenly between Acastus and Rubria. Despite these protests and UN Security Council Resolution 2386, Acastus still has not submitted an application for new membership in the UN.

The border between Acastus and Rubria has been clearly delineated along the 36th latitudinal parallel. This parallel also divides the former Elysium. The Elysian residential villages are located in the north within Acastian territory while the Elysian agricultural fields are in Rubria, in the south. Incidentally, the former capital of Nessus fell within Acastian territory, which the latter adopted as its own capital.

The Elysians, an indigenous group formerly inhabiting the Elysium, now reside in Acastus and have been conferred citizenship by it. Rubria on the other hand has permitted the Elysians to continue farming in the Elysian Fields which is within Rubria's territory. Rubria's ownership of the agricultural lands in these Fields is not disputed, and Rubria has since classified these lands as a public park and wildlife area.

Acastus, a trade and industry oriented state, aggressively encourages its private corporations to invest in foreign lands through bilateral investment treaties with other

states. On December 10, 2002, Acastus passed the MCRA, the promulgation of which was made with an assurance to the international community by the Acastian Prime Minister that entities incorporated in Acastus would be held accountable for violations of international law.

Rubria, largely underdeveloped but rich in oil and mineral resources, aims to boost its economy by encouraging investment in its territory by multinational companies, especially those involved in extracting such mineral and oil resources.

On February 2003, Rubria and Acastus signed the RABBIT, which established a most-favored relationship with respect to investment and dispute resolutions between the two states. Considering the scale and magnitude of the projects that would eventually be undertaken by Acastian companies within its territory, and its potential impact upon the human rights of its inhabitants, Rubria insisted on the inclusion of Article 52 in the RABBIT.

Article 52 of the RABBIT contains an undertaking by Acastus in favor of Rubria that it will carry out its obligations therein in accordance with the terms of the MCRA, which is incorporated by reference into the treaty. The MCRA aims to ensure that Acastian corporations operating abroad, such as the TNC, conduct themselves by the same high standards to which they are held in their domestic affairs. It vests the Acastian civil courts with jurisdiction over any suit for compensatory damages brought by any person suffering actual losses proximately caused by an alleged violation of governing norms of international law.

The TNC, a private corporation incorporated in Acastus and whose principal business is extraction and refining of petroleum resources, invested in exploring the petroleum resources of Rubria. In 2002, TNC discovered a rich deposit in the Elysium.

Considering its lack of technological capabilities to undertake the development this petroleum resource, Rubria entered into a joint venture agreement with the TNC. Rubria also gave the TNC exclusive rights to operate within the region.

Pursuant to a joint venture agreement between the TNC and Rubria, the COG was formed. The TNC owns 51% of COG shares and occupies 5 out of the 9 seats in COG's Board of Directors. All decisions in the COG are made by a majority vote.

To facilitate the extraction and exportation of the petroleum, COG initiated the construction of a pipeline that would traverse the Elysian Fields en route to the Kingdom of Creon. The decision to construct the pipeline was reached after 10 months of extensive study by experts. The best route determined was through a portion of the fields. Alternative routes had to be dismissed because they were prohibitively expensive.

After the pipeline proposal was announced publicly, the Institute of Local Studies and Appraisals, on commission by Acastus, issued a report which concluded that the pipeline would affect the Elysium from where the Elysians' source their food.

In the meantime, to secure its personnel from hostilities, COG created and financed the PROF composed entirely of private individuals. The COG provides the vehicles, communications equipment, personnel fee, and all other operating costs of the PROF.

The PROF was accused by an Acastian Parliament representative, Mrs. Doris Galatea, of allegedly forcing, on ten occasions, scores of young Elysian men to work in the Pipeline Project. It was noted that COG forcibly took these men from the remote villages in Rubria. Mrs. Galatea's accusation was based on an unverified letter received by the ILSA team from a young Elysian. As soon as Rubria learned about these occurrences, it immediately conducted an investigation, with a view to holding accountable those responsible.

A number of individuals branding themselves as the "Elysians for Justice" filed a civil suit in an Acastus court under the MCRA, praying for damages against COG, Rubria, PROF, and TNC for purported human rights violations consisting of forced and unpaid labor committed by the PROF. The claim against TNC was however dismissed by the Acastian Court on the grounds that the TNC, as a private company, is not a subject of international law and that it cannot be held liable for the acts of the COG, a distinct corporate entity. The claim against the PROF was likewise dismissed for lack of personal jurisdiction. In its final judgment, the Court held COG and Rubria solidarily liable for the human rights violations committed by PROF.

SUMMARY OF PLEADINGS

The International Court of Justice has no jurisdiction over all the claims of Acastus since the requirements for the acquisition of jurisdiction *ratione personae* and *ratione materiae* are not satisfied.

Acastus is not a party to the ICJ Statute because it did not continue Nessus' UN membership. Membership by continuation is not recognized in the UN. Alterntatively, the determinative criteria for continuity are absent: the UN did not recognize Acastus' claim of continuity. Neither has Acastus met the requirements under Art. 35(2) of the ICJ Statute to participate as a non-party state.

The ICJ did not also acquire jurisdiction *ratione materiae* over the claims of Acastus. Acastus cannot be deemed to have accepted the compulsory jurisdiction of the Court since the diplomatic note it submitted to the UN is not the declaration of acceptance required for this purpose.

Acastus cannot espouse the claims of the Elysians. Acastus' grant of citizenship to the Elysians does not establish the genuine and effective link of nationality required for Acastus to exercise the right of diplomatic protection.

In any case, Rubria did not violate international law when it permitted the construction of the pipeline. The Elysians do not have any vested rights in the Elysium superior to Rubria's sovereignty over territory and natural resources.

Moreover, Rubria did not breach fundamental human rights norms. Elysian access to the agricultural lands is an economic right, not guaranteed by the right to life, subject to lawful interference for the development of Rubria's national economy. Neither was the right to culture impaired: the lands were not intimately linked to the cultural identity of the Elysians.

The forced labor committed by the PROF is not attributable to Rubria. The PROF is a private entity, not Rubria's state organ, as it does not form part of the organization of the State. Neither is it a *para-statal* entity since Rubria did not, *inter alia,* by internal law empower PROF to exercise elements of governmental authority.

The PROF is also not a *de facto* agent of Rubria. It is a private corporation responsible for its own conduct and operations. Rubria did not issue specific instructions, nor provide direction, nor exercise effective control over the PROF. Rubria also did not participate in the planning and supervision of the forced labor committed by the PROF.

Rubria did not breach any obligations owed to Acastus. Rubria did not participate, nor was it complicit in the forced labor. The element of *mens rea* is absent since Rubria was not aware of the acts of the PROF. Moreover, the forced labor was not of such size and nature that Rubria ought to have known its occurrence.

In fact, Rubria provided reasonable measures to protect the rights of the Elysians by insisting that Acastus incorporate Art.52 in the RABBIT so as to ensure that the investing Acastian corporations comply with international law.

In contrast, Acastus violated its obligation under Art.52 of the Rubria-Acastus Binding Bilateral Investment Treaty. Acastus failed to enforce its domestic law to ensure that its corporations observe international law and to hold violators thereof accountable.

Acastus' bases for the dismissal of the complaint against the TNC, i.e. that a stockholder cannot be held liable for acts of a subsidiary, and that TNC is not a subject of international law and cannot be held liable for breaches thereof, is erroneous. Non-State actors like the TNC can commit the crime of forced-labor. Moreover, the MCRA imposes an obligation upon domestic corporations to comply with international law. Pursuant to its treaty obligation, it was incumbent upon Acastus to resolve the genuine issue of material fact of TNC's involvement in the commission of forced labor.

Furthermore, there was no need to pierce COG's corporate veil to hold the TNC liable. TNC failed to observe the due diligence required within its sphere of influence to respect and protect the rights of the Elysians. TNC was also complicit with the COG in the acts of forced-labor.

In any case, the piercing COG's corporate veil is permissible, otherwise TNC will continuously use COG's separate personality to evade liability for a wrong. Finally, the relationship between TNC and COG is so close and intimate that their separation is imperceptible.

PLEADINGS

I. THE COURT LACKS JURISDICITON 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.

In order for the Court to acquire jurisdiction[1] over Acastus, the ICJ must satisfy itself[2] that it has jurisdiction *ratione personae*[3] over Acastus and *ratione materiae*[4] and *ratione temporis*[5] over Acastian claims outside the RABBIT.

A. The Court did not acquire jurisdiction *ratione personae* over Acastus

Acastus cannot bring before the ICJ claims outside the RABBIT since it is not a party to the statute.[6] A state may become a party to the Statute if it is a UN member.[7] States that are not UN members may also bring a claim in the ICJ if they comply with the requirements provided by the Statute.[8]

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[1] Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, §36 [*hereinafter* ICJ Statute]; *Fisheries Jurisdiction Case* (UK v. Iceland) Preliminary Objections, 1973 ICJ; *Corfu Channel Case* (UK v. Albania) Preliminary Objections, 1948 ICJ 18 [*hereinafter* Corfu]; *Jurisdiction of the Courts of Danzig Advisory Opinion*, 1928 PCIJ 2; *See also* ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT (1965) [*hereinafter* Rosenne]; ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS (1973) [*hereinafter* World Court]; FITZMAURICE, 2 THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE (1986) [*hereinafter* Fitzmaurice].

[2] *Mavrommatis Palestine Concessions Case*, (PCIJ) Series A, No. 2, p. 10 [*hereinafter* Mavrommatis].

[3] ICJ Statute, supra note 1, Art 35; *See also* Fitzmaurice, supra note 1, at 434-5; Rosenne, supra note 1, at 267.

[4] ICJ Statute, supra note 1; Corfu, supra note 1; *The Electricity Company of Sofia and Bulgaria* (Preliminary Objection) 1939 PCIJ 2 [*hereinafter* Electricity Co.]; *See also* Fitzmaurice, supra note 1, at 434-5; Rosenne, supra note 1, at 327-8.

[5] Electricity Co., supra note 4; *See also* Fitzmaurice, supra note 1, at 434-5; Rosenne, supra note 1, at 329-31; ROSENNE, TIME FACTOR IN THE JURISDICTION OF THE COURT (1960) [*hereinafter* Time Factor].

[6] ICJ Statute, supra note 1, §35(1); *Case Concerning Legality of Use of Force* (Serbia and Montenegro v. France), ICJ Judgement of 15 December 2004 [*hereinafter* SFRY Case]; *See also* DAMROSCH, THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS (1987); Rosenne, supra note 1; Hambro, *The Jurisdiction of the International Court of Justice*, 76 RECUEIL DES COURS 125 (1950).

[7] Charter of the United Nations, 59 Stat. 1031, T.S. 993, §93(1) [*hereinafter* UN Charter].

[8] ICJ Statute, supra note 1, §35(2); UN Security Council Resolution 9 dated 15 October 1946; *Aerial Incident of 10 March 1953*, 1956 ICJ 6; *Treatment in Hungary of Aircraft and Crew of USA* (USA v. Hungary) 1954 ICJ 99.

1. Acastus is not a party to the Statute since it is not a UN member by continuation.

The satisfaction of both objective and subjective factors is a prerequisite to continuity of a state's UN membership.[9]

a) Acastus did not satisfy the objective factors required for continuation.

A claim to continuity must meet the determinative criteria[10] established by the UN to qualify as a continuing state. The claim must also be in conformity with the assertions made by the parties directly concerned and the attitudes adopted by third states and international organizations.[11]

In order for Acastus to qualify as a continuing state, it must encompass a substantial amount of Nessus' territory, retain a majority of Nessus' population, resources, and armed forces, and possess Nessus' former seat of government.[12]

Acastus does not occupy a substantial majority of the former territory of Nessus, nor possess a majority of the latter's population and armed forces.[13] The retention by Acastus of Nessus' former seat of government is merely incidental since it acquired the territory where the capital was located.[14] This fact is not determinative of continuation; a majority of the criteria must be present.[15]

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[9] *Succession of States and Governments, The Succession of States in Relation to Membership in the United Nations*, Memorandum Prepared by the Secretariat, UN Doc. A/CN.4/149 and Add.1, 2 YBILC 101 (1962); Buhler, *State Succession, Identity/Continuity and Membership in the United Nations, as cited in* EISEMANN AND KOSKENNIEMI, STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 187 (2000) [*hereinafter* Buhler]; Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L. J. 29 (1995); Lloyd, *Succession, Secession, and State Membership in the United Nations*, 26 NYU J. INT'L L. & POL 763 (1994); *See also* Zemanek, *State Succession after Decolonization*, 116 RECUEIL DES COURS 253 (1965) [*hereinafter* Zemanek]; O'CONNELL, 2 STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW 183 (1967) [*hereinafter* O'Connell]; Jenks, *State Succession in Respect of Law-Making Treaties*, 39 BYIL 105 (1952) [*hereinafter* Jenks]; GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS (1969); Liang, *Notes on Legal Questions Concerning the United Nations*, 43 AJIL 134, 144 (1949); Misra, *Succession of States: Pakistan's Membership in the United Nations*, 3 CAN. YIL 281 (1965); Schachter, *The Development of International Law Through the Legal Opinions of the United Nations Secretariat*, 25 BYIL 91, 101 (1948).

[10] *Id.*; Montevideo Convention on Rights and Duties of States, §1.

[11] SHAW, INTERNATIONAL LAW 863 (2003) [*hereinafter* Shaw]; BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 663 (1998) [*hereinafter* Brownlie].

[12] Buhler, supra note 9; Williamson, *State Succession and Relations with Federal States, Panellist's Remarks*, 86 PROC. AMER. SOC. INT'L L. 1, 14 (1992).

[13] Compromis ¶11 [*hereinafter* C].

[14] C ¶11.

[15] *See* Buhler, supra note 9.

b) Acastus did not meet the subjective factors for continuation.

The claim of Acastus to continuity must be recognized by third states and by the UN.[16] This recognition, which constitutes the subjective factor in cases of continuation, is ultimately decisive in cases where the objective factors are absent.[17]

No state expressly recognized Acastus' claim of continuity to Nessus' identity.[18] In fact, Rubria and other states objected to such claim.[19] Furthermore, the UN itself did not recognize such claim. The Secretary General treated the diplomatic note of Acastus claiming continuity as an application for membership under Art. 4.[20] The SC, furthermore, issued Resolution No. 2386 requiring Acastus to make an application for UN membership.[21]

2. Acastus is not a party to the Statute since it is not a UN member by succession.

a) Succession is not a recognized mode of admission into the UN.

As an international organization, the UN has plenary authority to decide which states to admit as members, and which to refuse.[22]

The current rule and practice[23] in the UN is that when a predecessor state is dissolved and new states are created, such states will have to apply anew for membership.[24] New states are regarded as entitled to UN membership only by admission.[25] Membership by succession is not allowed in the UN[26] where admission is

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[16] Brownlie, supra note 11.

[17] Buhler, supra note 9, at 199.

[18] Cl ¶8.

[19] C ¶11.

[20] C ¶10.

[21] C ¶9.

[22] Aquaviva, *Subjects of International Law: A Power-based Analysis,* 38 VAND. J. TRANSNAT'L L. 345, 373-4 (2005).

[23] *See Admission of the Czech Republic to membership in the United Nations,* G.A. res. 47/221, 47 UN GAOR Supp. (No. 49) at 5-6, UN Doc. A/47/49 (1992); *Admission of the Slovak Republic to membership in the United Nations,* G.A. re: 47/222, 47 UN GAOR Supp. (No. 49) at 5, UN Doc. A/47/49 (1992); *Admission of The Former Yugoslav Republic of Macedonia to membership in the United Nations,* A/RES/47/225 (1993).

[24] Shaw, supra note 11, 889; *See also* note 9.

[25] UN Charter, supra note 7, §4; SFRY Case, supra note 6; *See also* Buhler, supra note 9.

[26] Sixth Legal Committee of the UN, A/CN.4/149, p. 8. [*hereinafter* Sixth Legal]; *See also* Zemanek, supra note 9, at 253; Schermers, *International Organizations, Membership,* 8 EPIL 147, 148 (1983); Brownlie, supra note 11, at 672; O'Connell, supra note 9; Jenks, supra note 9, at 133; see Vienna Convention on Succession of States in Respect of Treaties, §4 [*hereinafter* Succession Convention]; Report of the ILC on work of 26th Session, Draft Articles on Succession of States in Respect of Treaties, UN doc. A/9610/Rev.1,2 YBILC (1974), Part I, p. 174, Commentary to Article 4, at p. 177, ¶2; Buhler, supra note 9, at 189-90.

based on consent by member-states,[27] and rests on the decision of the GA upon the recommendation of the SC.[28]

Acastus situation is governed by the principle enunciated by the Sixth Legal Committee of the UN General Assembly (UNGA), applicable in situations where new states emerge from the division of a member state.[29] The principle provides that:

> When a new state is created, whatever may be the territory and the population it comprises and whether or not they formed part of a state member of the UN, it cannot under the system of the Charter claim the status of a member of the UN unless it has been formally admitted as such in conformity with the provisions of the Charter.[30]

b) In any case, Acastus did not satisfy the requisites for membership by succession.

Assuming *arguendo* that membership by succession is recognized, Acastus still did not succeed to Nessus's membership in the UN since succession to multilateral treaties, such as the UN Charter, is not unilateral and automatic.[31]

Membership by succession depends upon the consent of the parties to a multilateral treaty.[32] Consent is determined based on the provisions of the treaty itself.[33] Under the UN Charter, consent is shown by an express recognition and decision of the GA, upon the recommendation of the Security Council.[34]

By Resolution 2386, the SC refused to recommend Acastus' admission into the UN by succession.[35] Neither did the UNGA approve of Acastus' claim of succession to Nessus' membership.[36]

That the UNGA and other UN bodies allowed the participation of Acastian delegates in their proceedings, the flying of the flag of Acastus in place of Nessus' in all UN buildings, and the assumption by Acastus of Nessus' annual obligations to the UN do not support Acastus claim of UN membership in light of Resolution 2386 requiring Acastus to apply for membership. No claims of membership by acquiescence can prosper since the UN Charter is clear and unequivocal: membership requires a decision by the UNGA upon recommendation by the UNSC.[37] The ICJ resolved that,

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[27] Succession Convention, *id.*, §4(a) and 17; *See also* Buhler, supra note 9, at 322-33.
[28] UN Charter, supra note 7, §4; Succession Convention, *id.*, §4 and 17; *See* note 23.
[29] Sixth Legal, supra note 26.
[30] *Id.*
[31] Succession Convention, supra note 26, §4(a) and 17; Brownlie, supra note 11.
[32] *Id.*, §17(3).
[33] *Id.*
[34] UN Charter, supra note 7, §4(2).
[35] C ¶9.
[36] C ¶8.
[37] UN Charter, supra note 7, §4 (2).

> "The admission of a State to membership in the UN, pursuant to paragraph 2, Article 4 of the Charter, cannot be effected by a decision of the UNGA when the UNSC has made no recommendation for admission, by reason of the candidate failing to obtain the requisite majority..."[38]

The SC has the "primary responsibility for the maintenance of international peace and security" under the Charter.[39] Its recommendation for admission is indispensable since admissions to UN membership is an issue that involves considerations of peace and security.[40]

3. Acastus does not have access to the Court as a non-party State.

The ICJ is open to those States not parties to the Statute.[41] Acastus, however, has not complied with the conditions[42] necessary for the participation of non-party States in the ICJ.

The Republic of Acastus did not deposit with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court. Acastus' diplomatic note does not constitute as such a declaration as it was deposited with the UN Secretary General[43] and not with the Registrar of the Court. It also did not expressly accept the jurisdiction of the ICJ. A sufficient declaration is one which expresses intent to appear before the Court and to confer jurisdiction on the Court[44].

B. The Court did not acquire jurisdiction *ratione materiae* over Acastus' claims since Acastus has not accepted the compulsory jurisdiction of the Court.

The fact that a State – whether or not a member of the UN - is a party to the Statute only means that it is qualified to be party in litigation.[45] It does not mean that it has agreed to confer jurisdiction on the Court upon every claim brought against it.[46] A state cannot be a party to litigation when the state did not consent to the subject matter involved in the case.[47]

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[38] *Competence of the UNGA for the Admission of a State to the UN, Advisory Opinion of the ICJ*, 1950 ICJ 4.
[39] UN Charter, supra note 7, §24.
[40] *See* SOHN, CASES AND MATERIALS ON UNITED NATIONS LAW 12 (1956).
[41] ICJ Statute, supra note 1 §35(2).
[42] Security Council Resolution 9 dated 15 October 1946.
[43] C ¶8.
[44] Corfu, supra note 1, at 15-16; *Lotus Case*, PCIJ, Ser.A, No.10 (1927); *See* Hambro, supra note 6, at 148.
[45] World Court, supra note 1, at 68.
[46] *Id.*
[47] *Anglo-Iranian Oil* (United Kingdom v. Iran), 1952 ICJ 93; Fitzmaurice, supra note 1, at 493.

Jurisdiction *ratione materiae* of the Court[48] may be compromissory[49] or by agreement or the parties, or compulsory.[50] The Court does not have compromissory jurisdiction over the Acastain claims since such claims do not originate from the RABBIT.[51]

The acceptance of compulsory jurisdiction entails a declaration by the parties.[52] Jurisdiction is conferred upon the court only to the extent to which the parties' declarations coincide in conferring it.[53] While there is no required form for a declaration, it must however evince the intent of the state to recognize the compulsory jurisdiction of the Court.[54]

The language employed by the diplomatic note sent by the foreign minister of Acastus to the UN Secretary General does not evince the required intent.[55] It merely stated that Acastus is succeeding to the membership of Nessus' to all UN organizations and to the treaties of Nessus.[56] The acceptance of compulsory jurisdiction cannot be implied from this statement. Thus, even if Acastus is deemed a party to the Statute of the Court, it did not make the necessary declaration for the Court to acquire jurisdiction over the claims it currently puts forth.[57]

II. RUBRIA DID NOT VIOLATE INTERNATIONAL LAW WHEN IT PERMITTED THE CONSTRUCTION OF THE OIL PIPELINE.

Acastus suffered no injury from the construction of the pipeline. Its claims in this respect are therefore inadmissible.[58] Moreover, Rubria not only validly exercised its sovereign right to exploit and develop its natural resources;[59] it did so without violating the rights of the Elysians.

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[48] ICJ Statute, supra note 1, §36; *See also* World Court, supra note 1 (1962); Rosenne, supra note 1.

[49] ICJ Statute, *id.*, §36(1).

[50] *Id.*, §36(2).

[51] *Id.*, §36(1).

[52] *Id.*, §36(2).

[53] *Certain Norwegian Loans* (France v. Norway) 1957 ICJ 9, 23-4; SANDS, MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 10 (1999).

[54] *Temple of Preah Vihear*, 1961 ICJ 17, 31; Corfu, supra note 1; *See also Minority Schools Case*, PCIJ A 15 p. 23; Rosenne, supra note 1, at 319.

[55] C ¶8.

[56] C ¶8.

[57] ICJ Statute, supra note 1, §36(2); Time Factor, supra note 5.

[58] Brownlie, supra note 11, at 481; Fitzmaurice, supra note 1, at 438-40; *Cameroon Case*, 1963 ICJ 132.

[59] Permanent Sovereignty over Natural Resources, G.A. res. 1803 (XVII), 17 UN GAOR Supp. (No.17) at 15, UN Doc. A/5217 (1962) [*hereinafter* GA Res. 1803]; Brownlie, *Legal Status of Natural Resources*, 162 RECUEIL DES COURS 245, 271 (1979); Indigenous peoples permanent sovereignty over natural resources, Preliminary report of the Special Rapporteur, 21 July 2003, E/CN.4/Sub.2/2003/20, par. 9; De Arechaga, *International Law in the Past Third of a Century: General Course in Public International Law*, 159 RECUEIL DES COURS 1, 297 (1978).

A. The claim is inadmissible since Acastus cannot espouse the claims of the Elysians who are not its nationals.

In the construction of the pipeline, Rubria did not breach any obligation owed to Acastus. Acastus was therefore not directly injured thereby.[60] Neither may Acastus invoke its right of diplomatic protection[61] in order to espouse the cause of the Elysians.[62] Acastus can only exercise diplomatic protection in favor of individuals who are its own nationals at the time of the prejudicial event and at the time that the claim is made.[63]

Acastus' grant of citizenship to all Elysians[64] does not provide the basis for the former's exercise of diplomatic protection. While Acastus is free to confer nationality to Elysians under its domestic law,[65] such conferral cannot be recognized under international law since no genuine and effective link of nationality[66] exists between Acastus and the Elysians.

The lack of such link is shown by the fact that the center of economic interests[67] of the Elysians is not in Acastus but in the part of Elysium within Rubria's territory. Neither have the Elysians participated in the public life[68] of Acastus. The alleged Elysian representative in parliament was chosen by Acastus, not by the Elysians, and is not even shown to be an Elysian herself.[69] The Elysians have a culture totally removed from and unrelated to that of Acastus.[70] They are not in any way connected with the Acastian population.[71]

B. Rubria legitimately exercised rights attendant to its sovereignty over territory and natural resources.

Rubria has the power to freely exercise full sovereignty, including possession, use and disposal, over all its territory, wealth, natural resources and economic

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[60] Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1, §42 [*hereinafter* ASR]; ILC, Commentary on the Draft Articles on State Responsibility [*hereinafter* ILC Report].

[61] *Panevezys-Saldutiskis Case* (Estonia v. Lithuania), PCIJ Reports, Series A/B, No. 76 (1939);

[62] Mavrommatis, supra note 2; *Polish Upper Silesia Case*, (PCIJ) Series A, No. 6, p. 19; *Case Concerning Elettronica Sicula S.p.A (ELSI)* (United States v. Italy), 1989 ICJ 15; *Case Concerning the Barcelona Traction, Light and Power Company, Ltd.* (Belgium v. Spain), 1970 ICJ 3 [*hereinafter* Barcelona Traction].

[63] *Nottebohm Case* (Liechtenstein v. Guatemala), 1955 ICJ 4 [*hereinafter* Nottebohm].

[64] C ¶4.

[65] Hague Convention on Conflict of National Laws. League of Nations Treaty Series, vol. 179, p. 89, §1; *Tunis and Morocco Nationality Decrees*, PCIJ, Ser. B, no. 4 (1923), 24.

[66] Nottebohm, supra note 63.

[67] *Id.*

[68] *Id.*

[69] C ¶4.

[70] C ¶3.

[71] Nottebohm, supra note 63.

activities.[72] Customary international law also recognizes that states have the sovereign right to exploit their own resources on the basis of their own policies.[73]

1. The Elysians do not have any vested rights in the agricultural lands.

The State of Rubria possesses sovereign rights over the agricultural fields of the Elysium which form part of Rubria's territory.[74] Rubria's tolerance of the Elysians cannot defeat the state's title over these agricultural fields.[75] The Elysians do not have any vested rights over these lands under international law.[76] States in fact do not recognize in indigenous peoples any inherent right over lands except through express conferral by municipal law.[77]

Rubria did not confer upon Elysians any right over these agricultural lands. In fact, Rubria's grant of authority to COG for the construction of the pipeline — a valid exercise of sovereignty over its territory and natural resources[78] -- expressly declares Rubria's intent to use these lands for the benefit of its nationals and deny any claim of right contrary to that of its own.

2. Rubria is not obligated to obtain the Elysians' free and prior informed consent as a precondition to the use of these lands.

Rubria has no obligation to obtain the Elysians' free and informed consent[79] prior to the use of the agricultural lands. International law does not recognize the right

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[72] *Island of Palmas*, 2 RIAA 829; Charter on Economic Rights and Duties of States; GA Res. 1803, supra note 59.

[73] UN Framework Convention for Climate Change; Rio Declaration on Environment and Development; 1972 Stockholm Declaration.

[74] C ¶5.

[75] *See* UN Conference on Environment and Development, Convention on Biological Diversity, concluded June 5, 1992, 1760 UNTS 79, reprinted in 31 I.L.M. 818 (entered into force Dec. 29, 1993) available at http://www.biodiv.org/convention/articles.asp, §15, p. 1; Peña-Neira et al., *Equitably Sharing Benefits from the Utilization of Natural Genetic Resources: The Brazilian Interpretation of the Convention on Biological Diversity*, 6(3) ELECTRONIC J. COMP. L., AT 17 (2002); Firestone, *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L L. REV. 219, 268 [*hereinafter* Firestone].

[76] *See* Firestone, supra note 75; Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1, 8 (1991).

[77] *Mabo v. Queensland*, [No 2] (1992) 175 CLR 1; *Carino v. Insular Government*, 212 US 449 (1909); *Calder v. Attorney General for British Columbia*, 1973 SCR 313; Constitution of the Federal Republic of Brazil, §231; Constitution of the Republic of Colombia, §329; Ley Indigena (Chile); Lamenxay and Riachito indigenous communities, of the Enxet-Sanapana People v. Paraguay, Inter-American Human Rights Commission Case No. 11,713; Political Constitution of the Republic of Nicaragua, §89; Nicaragua Law 445; Johnson v. M'Intosh, 21 US 543 (1832); Cherokee Nation v. Georgia, 30 US 1 (1831); Worcester v. Georgia, 31 US 515 (1832); GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 854-59 (1998).

[78] *See* note 59.

[79] Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, entry into force 5 September 1991.

of indigenous groups to cultural land,[80] much less does it obligate states to obtain the free and informed consent of indigenous groups prior to the use of state property.[81]

C. Rubria did not violate any Elysian rights.

1. Acastus cannot validly claim any violation of the Elysians' inherent right to life under the ICCPR

Not being a party to the ICCPR,[82] Acastus cannot invoke any violation by Rubria of its obligations under that treaty. The general principle of *pacta tertiis nec nocent nec prosunct*[83] does not grant third states like Acastus the right to invoke obligations of parties to a treaty, except when the norm constitutes a stipulation pour atrui[84] or is otherwise customary.[85]

Article 27 of the ICCPR is not a stipulation *pour atrui*, not having been made specifically in favor of Acastus.[86] Assuming that the right to life is recognized as customary law, it is strictly construed as the right not to be arbitrarily deprived of life.[87] The guarantee requires states to safeguard individuals within its territory against arbitrary killing or the extinguishment of life.[88] It does not include the right to subsistence or livelihood[89] which is recognized separately in the ESCR.[90]

In permitting the construction of the pipeline, Rubria did not violate the Elysians' right to life under customary law. Rubria did not in any way engage in the extinguishment of the life of any Elysian. Assuming *arguendo* that the right to life includes the right to livelihood, Rubria has never arbitrarily deprived the Elysians of this right. A deprivation is arbitrary when it is unjust or illegal.[91]

The deprivation by Rubria of the Elysian's right to livelihood is justified on grounds of economic necessity. Moreover, in the exercise thereof, Rubria did not violate any Elysian rights.

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[80] Restatement (Third) of the Foreign Relations Law of the United States (1987) §702.

[81] See Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations – Emergent International Rights and Wrongs*, 38 VA. J. INT'L. L. 331 at 374-8.

[82] C ¶36.

[83] Vienna Convention on the Law of Treaties, 1155 UNTS 331, §34 [hereinafter VCLOT].

[84] *Id.*, §36.

[85] *Asylum case* (Colombia v. Peru, Merits, 1950 ICJ; *Case Concerning the Rights of the United States of America in Morocco* (Merits), 1952 ICJ.

[86] *Id.*, §36.

[87] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force Mar. 23, 1976, §6 [*hereinafter* ICCPR].

[88] Przetacznick, *The Right to Life as a Basic Human Right*, HUMAN RIGHTS JOURNAL 585, 585-7 (1976); *see also* Dinstein, *The Right to Life, Physical Integrity, and Liberty, in* HENKIN (ED.), THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 114 (1981).

[89] *Simon et. al. V. Commission on Human Rights* (Philippines) (1994), GR No. 100150; *Lawson v. Housing New Zealand* (1997) 4 LRC 369.

[90] *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, §11(2) [*hereinafter* ICESCR].

[91] Jayawickrama, infra note 95.

2. Rubria did not violate its obligation concerning the right to cultural integrity granted to minorities.

The right to cultural integrity granted to minorities merely limits state's interference in the culture and way of life of such minorities.[92] It does not guarantee the right of minorities to live on a specific piece of land.[93] Moreover, only those practices or activities which are integral or essential[94] to the group's identity are protected from any interference by the state that seriously threatens that identity.[95] The protection does not extend to the means of livelihood of minorities.

The agricultural practices of the Elysians are economic activities[96] the connection of which to the Elysian culture is tenuous. No intimate connection between the Elysian culture and the agricultural lands[97] has been established. The agricultural lands in no way had a spiritual and religious significance[98] to the Elysians. This being so, the use by Rubria of such lands is permissible[99] since it does not result in the eradication of the Elysian culture and cannot constitute a violation of international law.[100]

3. Rubria did not violate the Elysian's right to subsistence

The construction of the pipeline does not violate the right of Elysians to subsistence.[101] Rubria's obligation concerning the right to subsistence is progressive.[102] It consists of taking appropriate steps[103] to ensure the realization of this right[104] consistent with Rubria's capability and resources.[105] Moreover, the right extends only to

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[92] ICCPR, supra note 87, Art 27.

[93] *Sandra Lovelace v. Canada*, Communication No. R.6/24, UN Doc. Supp. No. 40 (A/36/40) at 166 (1981); *Ivan Kitok v. Sweden*, Human Rights Committee, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988) [*hereinafter* Kitok].

[94] Kitok, *id.*

[95] JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE (2002) [*hereinafter* Jayawickrama].

[96] Getches, *Indigenous Peoples' Rights to Water Under International Norms*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 259,281 [*hereinafter* Getches].

[97] *Rehoboth Baster Community v. Namibia*, Human Rights Committee, Communication No. 760/1997, HRC 2000 Report Annex IX.M, (individual concurring opinion of Elizabeth Evatt and Cecilia Medina Quiroga).

[98] *Kayano v. Hokkaido Expropriation Committee*, 1598 Hanrei jiho 33, 938 Hanrei Times 75 (Sapporo Dist. Ct., Mar. 27, 1997) (Japan), translated in 38 I.L.M. 394 (1999).

[99] *Lansman (Ilmiri) v. Finland* (No. 1) Human Rights Communication No. 511/1992, HRC Report 1995, Annex X.I.I, Para. 9.4.

[100] Getches, supra note 96.

[101] ICESCR, supra note 90, Art 11.

[102] General Comment No. 3 (1990), UN Doc. E/1991/23, Annex III, UN ESCOR, Supp. (No. 3) at 83, para. 2 [*hereinafter* GC3]; Alston and Quinn, *The Nature and Scope of State Parties Obligations under the International Covenant on Economic, Social and Cultural Rights*, 8 HUM. RTS. Q. 156, 165 (1987); Jayawickrama, supra note 95.

[103] ICESCR, supra note 90, Art 2(1).

[104] CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 114-120 (1995) [*hereinafter* Craven].

[105] Bussoyt, *La Distinction juridique entre les droits civils et politiques et les droits economiques, sociaux et culturels* (1975) 8 HRLJ 783, at 790, *cited in* Craven, supra note 104, at 119.; *see also* General Comment No. 1, UN Doc. E/1989/22, Annex III, UN ESCOR, Supp. (No. 4) at 89, para. 6 (1989).

the nationals of a state,[106] and developing countries such as Rubria are given the prerogative to determine to what extent they would guarantee this to non-nationals.[107]

The Elysians are not Rubrian nationals or citizens.[108] Rubria did not undertake to guarantee the right of the Elysians to subsistence, but did not object to allowing the Elysians to find alternative sources of livelihood even within its territory.[109] Rubria cannot therefore be held in breach of its obligation in this respect.

III. RUBRIA DID NOT BREACH ANY OBLIGATION UNDER INTERNATIONAL LAW.

Rubria's responsibility cannot be engaged:[110] the acts of the PROF are not attributable to it, and Rubria did not breach any international obligation.[111]

A. The forced-labor is not attributable to Rubria.

The forced-labor perpetrated by the PROF cannot be attributed to Rubria; no circumstances justify the imputation.[112]

Only government acts are imputable to the state.[113] An injury done by a private entity cannot be considered an act by the state[114] except when that entity is, *inter alia*: (1) an organ of the state,[115] (2) exercising elements of government authority,[116] or (3) acting under the State's instructions, direction, or control.[117]

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[106] *Decision of the Court of Arbitration of Belgium*, Judgment No. 51/94, 29 June 1994, 2 Bulletin on Constitutional Case-Law 111 (1994).

[107] ICESCR, supra note 90, Art 2(3).

[108] C ¶4.

[109] C ¶24.

[110] ASR, supra note 60, §1.

[111] ASR, supra note 60, §2; *United States Diplomatic and Consular Staff in Tehran case*, 1979 ICJ 56 [*hereinafter* Hostages Case]; *Phosphates in Morocco case* (Preliminary Objections), 1938 PCIJ 28 [*hereinafter* Phosphates].

[112] ASR, supra note 60, §2; Phosphates, supra note 111, at 10; Hostages Case, supra note 111, at 3; *Dickson Car Wheel Company* Case 4 RIAA 669, 678 (1931); CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 180-181 (1993) [*hereinafter* GPL].

[113] GPL, supra note 112, at 184; *British Guiana-Venezuela Boundary Arbitration* (1899) [*hereinafter* Guiana]; Senate of Hamburg: Yuilles, Shortridge & Co. Case, 2 Arb. Int. 96 (1861) [*hereinafter* Yuilles]; *Brazil-British Guiana Boundary Case* 99 B.F.S.P. 930 (1904) [*hereinafter* Brazil Guiana]; *Eastern Greenland Case* 1933 PCIJ A/B. 53, pp. 42-3 [*hereinafter* Eastern Greenland]; League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), pp. 25, 41, 52; Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America (Doc C.75(a)M.69(a).1929.V.), pp. 2-3, 6 [*hereinafter* League of Nations]. *Questions relating to settlers of German Origin in Poland*, (Ad.Op.), PCIJ, 1923, 22; OPPENHEIM, INTERNATIONAL LAW 540 (1996).

[114] *Lovett Case*, 3 *Int.Arb.* 2990, 2991 [*hereinafter* Lovett].

[115] ASR, supra note 60, §4.

[116] *Id.*, §5.

[117] *Id.*, §8.

1. PROF is not a state organ.

PROF does not "make up the organization of the State,"[118] act on its behalf, nor act as such for any of its territorial governmental entity.[119]

2. PROF is not a *para-statal* entity.

The PROF is not a *para-statal* entity[120] i.e. one authorized to exercise elements of governmental authority. The essential factors in attributing the acts of para-statal entities to a state[121] are not present.

a) Rubria did not, by its internal law, confer upon the PROF their functions.[122]

A specific conferment of authority under the internal law of the state sought to be responsible for the acts of the *para-statal* entity is required for attribution to prosper.[123] Rubria never empowered, through its internal law, the PROF to exercise elements of its governmental authority.[124]

Rubria's approval of the contract between COG and PROF[125] does not qualify as a conferment of governmental authority. Rubria acted as a stockholder in authorizing COG to engage the private security services of the PROF.[126]

b) PROF functions are not governmental in character.

The function of the PROF is limited to protecting and accompanying the COG personnel.[127] The security functions of PROF, which is private self-defense, cannot be stretched as involving an exercise of governmental authority.[128] Governmental authority relates to the exercise of police or military authority,[129] the power to make arrests, confiscate property, or take people to prison.[130] PROF's functions were only state-

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[118] ILC Report, supra note 60, at 84.

[119] *Id.*

[120] ASR, supra note 60, §5; ILC Report, supra note 60, at 92; See League of Nations, supra note 113, at 90; HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 501 (1998) [*hereinafter* Harris].

[121] *See Hyatt International Corporation v. Government of the Islamic Republic of Iran* (1985) 9 Iran-U.S.C.T.R. 72, at pp. 88-94 [*hereinafter* Hyatt].

[122] ILC Report, supra note 60, at 94. Villapando, *Attribution of Conduct to the State: How the Rules of State Responsibility May be Applied Within the WTO Dispute Settlement System*, 5 J. INT'L ECON. L. 403 (2002) [*hereinafter* Villapando].

[123] ILC Report, *id.*

[124] C ¶19, ¶23; ILC Report, supra note 60, at 94.

[125] C ¶23.

[126] C ¶23.

[127] C ¶23.

[128] ILC Report, supra note 60, at 94. Villapando, supra note 122.

[129] Harris, supra note 120; Commentary, Y.B.I.L.C., 1974, II, (Part One), p. 283.

[130] *See Kenneth P. Yeager*, Case 17 Iran-U.S.C.T.R. 102 ¶39 [*hereinafter* Yeager]; Hyatt, supra note 121; *SEDCO, Inc. v. National Iranian Oil Co.*, 15 Iran-U.S.C.T.R. 23 (1987) [*hereinafter* SEDCO]. *See also International Technical Products*

permitted activities under the general regulation of the state.[131] As explained by the ILC, the rule on attribution of acts of para-statal entities to the state,

> [D]oes not extend to cover situations where internal law authorizes or justifies certain conduct by way of self-help or self-defense; i.e. where it confers powers upon or authorizes conduct by residents generally. The internal law must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community.[132]

c) The PROF is not directly accountable to the State.

The essential element of accountability[133] of the perpetrators to Rubria is also glaringly absent: PROF is a private corporation not directly answerable to Rubria.[134] It is only subjected to general state regulation,[135] which does not justify attribution.[136]

d) The PROF did not act pursuant to its mandate nor under any apparent authority.

Finally, the PROF did not commit the forced-labor while acting in the governmental capacity conferred to it.[137] For the acts to be attributable to Rubria, they must have been undertaken pursuant to the authority granted to the PROF.[138]

The violations against forced-labor were committed by the PROF outside of its capacity to secure and accompany the COG personnel. They are therefore acts of a private individual and not attributable to Rubria.[139]

Alternatively, for these *ultra vires* acts to be deemed acts of Rubria, they must have been committed by the PROF under an apparent authority.[140] The PROF did not have any apparent authority to act in behalf of Rubria. They were not using symbols

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Corp. v. Islamic Republic of Iran, 9 Iran-U.S.C.T.R. 206 (1985) [*hereinafter* ITP]; *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran*, 12 Iran-U.S.C.T.R. 335, 349 (1986) [*hereinafter* Flexi-Van].

[131] ILC Report, supra note 60, §5.

[132] *Id.*, at 94-95.

[133] *Id.*, at 94. Villapando, supra note 122, at 404.

[134] Cl, ¶6; C ¶ 19.

[135] *SALW and Private Security Companies in South Eastern Europe: A Cause or Effect of Insecurity?* SEESAC 2005; Prenzler and Sarre. Regulating Private Security in Australia, Australian Institute of Criminology: Trends and Issues (1998); *see also* Australian Private Security Act of 1995.

[136] ILC Report, supra note 60, at 94-95.

[137] ASR, supra note 60, §5.

[138] Schueren, et. al., *WTO Jurisprudence on Non-Agricultural Subsidies: New Developments*, 11(6) INT. T.L.R. 197 at 198 (2005).

[139] *Caire Claim*, 5 UNRIAA 516, 531 (1929) [*hereinafter* Caire]; *Mallen Case*, 4 UNRIAA 173, 175 (1927). *See also Bensley Case* (1850), in MOORE, 3 INTERNATIONAL ARBITRATIONS 3018 (1880); *Castelains, in* Moore, 3 International Arbitrations at 2999; ILC Report, supra note 60, at 91-92, 4.

[140] ILC Report, supra note 60, at 91-92.

identified with Rubria nor employed government properties in the conscription of Elysian men.[141]

Yeager v. Iran[142] cannot be invoked as authority for attributing the acts of the PROF to the State. While in *Yeager*, the "Komitehs", in illegally expelling the US citizens, acted in behalf of the Iranian Government, the PROF in this case did so in behalf of the COG, at most, the TNC,[143] and not Rubria. It would be illogical and counterintuitive to suggest otherwise: Rubria cannot afford to tolerate any acts of forced-labor within its territory which would certainly have devastating consequences on its peace and order. In fact, Rubria, upon learning of the incident, lost no time in investigating the matter with the view to holding the perpetrators accountable.[144]

Furthermore, the Iranian Government in *Yeager* had knowledge of the operations of the "Komiteh" and did not specifically object thereto.[145] In contrast, Rubria could not have known the acts of forced-labor in the pipeline project. Forced-labor was not regular and systematic,[146] and was not of such size and nature that Rubria would have been expected to know of its occurrence.[147] It was committed surreptitiously in the remote villages of Rubria, far from the reach and notice of Rubrian authorities.[148]

3. Rubria did not instruct, nor exercise effective control over, the perpetrators.

International law requires a stringent basis for attributing acts of private entities to the State: in carrying out its conduct, the person or group of persons must in fact be acting on the instructions of, or under the direction or control of, the State.[149]

PROF's acts are not attributable to Rubria as the latter did not give any explicit or implied instructions to, nor directed or controlled[150] the former.

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[141] Caire, supra note 139, at 529-31.

[142] Yeager, supra note 130.

[143] *Id.*, at ¶43.

[144] Cl ¶1.

[145] Yeager, supra note 130, at ¶44.

[146] C ¶27.

[147] *See Zafiro Claim* (Great Britain v. US) (1925), 6 RIAA 160 [*hereinafter* Zafiro]; Yeager, supra note 130.

[148] C ¶¶1–2, ¶26; *See* Ratner, *Corporation and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443; Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations, UN ESCOR Hum. Rts. Co., Sub-Comm'n on the Promotion and Protection of Hum. Rts., 54th Sess., Agenda Item 4 at 5, UN Doc. E/CN.4/Sub.2/2002/13 (2002).

[149] ASR, supra note 60, §8; GPL, supra note 112, at 184; Guiana, supra note 113; Yuilles, supra note 113; Brazil Guiana, supra note 113; Eastern Greenland, supra note 113; League of Nations, supra note 113; Lovett, supra note 114, at 2991.

[150] *Id.*

a) Rubria did not effectively control the PROF.

For attributing the act of a private actor like the PROF to Rubria, effective control by the State over the "operations in the course of which the alleged violations were committed"[151] is essential. Participation by the state in the financing, organizing, training, supplying, equipping, and planning of the operations of a perpetrator is insufficient to justify attribution.[152] As declared by this Court in *Nicaragua*, specific instructions must have been issued by the state, and the private entity must have acted pursuant to such instructions.

The circumstances are bereft of any indication that Rubria had effective control over the PROF, or that it gave any specific instructions to the PROF to conscript the Elysian men.

b) Neither did Rubria exercise over-all control over the PROF.

Assuming *arguendo* that overall control, not effective control, is the applicable test for attribution, it still cannot be invoked against Rubria. There is overall control when the State "*has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group."[153]

The PROF is a distinct corporate entity whose sole purpose is to accompany and guard the COG personnel.[154] Rubria did not organize the PROF, and the latter is responsible for its own operations.[155] If at all, it was the COG or the TNC which had a role in the planning, supervision, and control of the PROF.

B. Rubria did not violate any obligation under international law owed to Acastus.

Rubria's responsibility is not entailed[156] since Rubria did not breach its obligation to respect, protect, promote, and fulfill human rights.[157]

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[151] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, 1986 ICJ 14, at 115 [*hereinafter* Nicaragua].

[152] *Id.*

[153] *Prosecutor v. Tadic*, ICTY Appeals Chamber, July 1999, at ¶137.

[154] C ¶23, Cl ¶5.

[155] C ¶23, Cl ¶5.

[156] *Noyes Claim* (US v. Panama) 6 RIAA 308 (1933).

[157] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and People's Rights, Communication 155/96 ¶44 [*hereinafter* Wiwa]; ICCPR, supra note 87, Preamble, §2; *See, e.g.* European Convention on Human Rights, §1.

1. Rubria did not participate, nor was it complicit in the acts committed by the PROF and the COG.

Rubria's duty to respect human rights consists in non-interference in their enjoyment.[158] Rubria did not interfere with the rights of the Elysians because the violations were not attributable to it and it was not complicit with the perpetrators.

To establish Rubria's complicity,[159] two elements must be shown: *actus reus* and *mens rea*.[160] *Mens rea*, or the state's actual or constructive "knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime"[161] is glaringly absent in this case.

Rubria's knowledge of the unlawful acts of the PROF cannot be concluded from the control exercised it exercised over its territory.[162] Moreover, the clandestine conscription of forced-laborers was not of such size and nature to be constructively known to Rubria.[163]

2. Rubria complied with its duty to protect, promote, and fulfill the rights of the Elysians within its territory.

a) Rubria took positive measures to protect the rights of the Elysians.

International law imposes upon States the duty to take positive measures in protecting the rights of, and preventing the injuries committed against, inhabitants within its territory.[164]

Rubria's insistence to include the section on corporate responsibility into its BITs[165] was a measure to protect human rights.[166] It was meant to ensure that corporations undertaking large-scale projects within Rubria would respect human rights.[167]

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[158] Wiwa, supra note 157, at ¶45.

[159] Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BYIL 77 (1986).

[160] Tadic, supra note 153, at ¶¶688-692.

[161] *Id.* at 245.

[162] Corfu, supra note 1, at 18.

[163] Cf. *Fariën Garbi and Solís Corrales Case*, Case 8097, Inter-Am. C.H.R. 130, para. c, ser. C, doc. 5 (1989).

[164] *See e.g. Youmans Claim* (US v. Mexico) 4 RIAA 110 (1926); *Asian Agricultural Products Case*, 30 ILM 577 (1991); *Velásquez-Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988) [*hereinafter* Velasquez-Rodríguez]; *British Property in Spanish Morocco Case*, 2 RIAA 616, 636 (1925); *Janes Case*, 4 RIAA 82, 86 (1925); SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT 36-43 (1988); GC3, supra note 102, at para. 10.

[165] C ¶17.

[166] C ¶¶15, 17, and ANNEX A.

[167] C ¶¶15, and ANNEX A.

b) Rubria exercised the proper degree of diligence in preventing injuries committed by individuals within its territory.

Rubria is not an absolute guarantor of the prevention of harm.[168] States cannot prevent all injurious acts.[169] State inaction entails responsibility only when it "amounts to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[170]

The standard for determining diligence[171] by a state in the treatment of persons is not fixed[172]: considerations of the effectiveness of territorial control, the territories available to the state, and the nature of specific activities may all be taken into account and justify differing degrees of diligence.[173]

To invoke liability, it must be proved that the state was aware or ought to be aware of the violations and yet did not prevent them.[174] Even a claim that the acts could have been averted if there was sufficient police regulation does not suffice to hold the state liable.[175]

In its treatment of the Elysians, Rubria satisfied the "international minimum standard"[176] of protection. The acts of PROF were committed without the knowledge, participation, or complicity of the state. Moreover, Rubria sought assurance from Acastus that the TNC will fully comply with governing norms of international human rights law.[177]

3. Rubria provided adequate remedies to the Elysians.

Rubria provided adequate remedy for the redress of violations of Elysian rights.[178] The Elysians had access to Rubrian courts.[179] Moreover, as soon as it was made aware of the acts of the PROF against the Elysians, Rubria investigated the matter for the purpose of prosecuting those responsible.[180]

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[168] OEC, LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 380.

[169] OPPENHEIM, 1 INTERNATIONAL LAW A TREATISE 365 (1958).

[170] *Neer Claim*, 4 RIAA 60, 61-62 (1926) [*hereinafter* Neer]; *see also Chattin Case*, 4 RIAA 282 (1927); see also *Certain British Claims in the Spanish Zone of Morocco*, 2 UN Rep. 615 (1925) [*hereinafter* British Claims]; Hostages Case, supra note 111; Corfu, supra note 1; Zafiro, supra note 147; *Union des Jeunes Avocats / Chad* Communication 74/92; Velasquez-Rodríguez, supra note 164; *X and Y v. Netherlands*, 91 ECHR (1985) (Ser. A) at 32 [*hereinafter* X and Y].

[171] *Id.*

[172] *Id.*

[173] See e.g. Alabama Claims Arbitration, *in* Moore, 1 Int. Arb. 495 (1872) [*hereinafter* Alabama]; Hostages Case, supra note 111; Corfu, supra note 1, and Zafiro, supra note 147.

[174] *Way v. United Mexican States*, 4 UN Rep. 391 (1928) [*hereinafter* Way]; *see also* Corfu, supra note 1;, Hostages Case, supra note 111, at 32-33, ¶68.

[175] *Sturtevant v. United Mexican States*, 4 UN Rep. 665 (1930); *Banks v. Panama*, 4 UN Rep. 349 (1933).

[176] Neer, supra note 170.

[177] C ¶18.

[178] O'Connell, International Law 942 [*hereinafter* O'Connell2].

[179] *Id.*

[180] Cl ¶1.

IV. ACASTUS IS IN BREACH OF ART. 52 OF THE RABBIT BY VIRTUE OF THE DECISION OF THE ACASTIAN CIVIL COURT DISMISSING THE CLAIMS AGAINST TNC.

Acastus breached its treaty obligation to hold those responsible for the injuries accountable under its domestic law.[181] A decision of a municipal court contrary to international law is a denial of justice.[182]

The RABBIT is a valid and binding bilateral treaty between Acastus and Rubria. Under the principle of *pacta sunt servanda*, both parties are bound to comply with their obligations therein in good faith.[183]

A treaty shall be interpreted in the light of its object and purpose.[184] The object of the RABBIT is unequivocal: Acastus being the home state of TNC, shall enforce all aspects of its domestic law, including the MCRA, to ensure that TNC observes conventional and customary international law in the conduct of its operations.[185]

A. Acastus breached its treaty obligation to prosecute violations of international law.

1. The TNC is a participant in international law capable of committing the crime of forced-labor.

Corporations can commit the crime of forced-labor.[186] TNCs are participants in international law,[187] not merely objects[188] thereof.

The TNC is bound to comply with specific international norms and may be held accountable for violations thereof.[189] It can commit crimes such as "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism"[190]

The work imposed by the PROF upon Elysians constitutes forced-labor, being a "work or service which is exacted from any person under the menace of any penalty

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[181] *See* Vasquez, *Direct v. Indirect Obligations of Corporations Under International Law*, COL. JOUR. OF TRANS. L. 927, 935 (2005) [*hereinafter* Vasquez].

[182] O'Connell2, supra note 178, at 949.

[183] VCLOT, supra note 83, §26.

[184] VCLOT, supra note 83, §31(1).

[185] C ¶¶14,15, and ANNEX A.

[186] *Doe v. Unocal*, 110 F. Supp. 2d at 1307-09 [*hereinafter* Unocal].

[187] HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT 50 (1994).

[188] *Id. at* 49.

[189] *See Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) at 239 [*hereinafter* Kadic]; Charter of the International Military Tribunal, Aug. 8, 1945, §6, 82 UNTS 279; Unocal, supra note 186; Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 76 (2002).

[190] Kadic, *id.* at 240, quoting Restatement (Third) of the Foreign Relations Law of the United States §404 (1986).

and for which the said person has not offered himself voluntarily."[191] Forced-labor has achieved the status of a *jus cogens* violation,[192] which can be committed by a private, non-state actor.[193]

2. Alternatively, Acastus obligated itself to penalize Acastian corporations violating international law regardless of their international personality.

As clearly set forth in §4 of the MCRA, the domestic corporations of Acastus "shall, in its conduct abroad, comply with all governing norms of conventional and customary international law." Section 2 thereof subjects a corporation that commits a knowing violation of §4 with civil penalty. It therefore becomes immaterial whether the corporation is a subject of international law since the treaty itself imposes upon Acastus the obligation to resolve disputes in accordance with the treaty's provisions which is to make TNC bound by international law.[194]

B. The Acastian Court should have found the TNC liable for violation of international law.

Under its treaty obligation, Acastus should not have dismissed the complaints against TNC because genuine issues of material facts exist that TNC knowingly committed violations of international law. [195]

1. TNC was complicit with COG in committing the forced-labor through the PROF.

The three elements of complicity are present: a crime against humanity, *actus reus*, and *mens rea*.[196] Forced-labor is a crime against humanity;[197] it is so widely condemned that it has achieved the status of a *jus cogens* violation.[198]

There is *actus reus*: TNC, by approving the contract between COG and PROF,[199] created and financed the latter, provided them with vehicles, communications equipment, and money. The practical assistance, encouragement, or moral support by

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[191] C ¶26; Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 UNTS 55, entered into force May 1, 1932, §2(1).

[192] *Citing* Universal Declaration of Human Rights, G.A. Res. 217(A)III (1948) [*hereinafter* UDHR]; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, §6, 82 UNTS 280.

[193] Unocal, supra note 186.

[194] Vasquez, supra note 181.

[195] *See* Londis, *The Corporate Face of the ATCA: How An Old Statute Mandates A New Understanding of Global Interdependence*, 57 ME. L. REV. 141 [*hereinafter* Londis]; Unocal, supra note 186; *Bowoto v. Chevron Texaco Corp.*, (N.D. Cal. Mar. 23, 2004) (No. C 99-25061 SI).

[196] Tadic, supra note 153, at ¶¶688-692.

[197] Statute of the International Criminal Court, §7; Statute of the International Criminal Tribunal for Yugoslavia, §5; Statute of the International Criminal Tribunal for Rwanda, §3.

[198] *See* note 192.

[199] C ¶22.

TNC to the PROF has substantially aided the perpetration of the crime.[200] TNC's degree of assistance was sufficient because it "need not constitute an indispensable element, that is, a *condition sine qua non* for the acts of the principal."[201] It suffices that "the acts of the accomplice make a significant difference to the commission of the criminal act by the principal."[202]

The requirement of *mens rea* is also satisfied. *Mens rea* exists when there is actual or constructive "knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime. . . it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime."[203] Actual knowledge of the precise crime that the principal intends to commit is not required; it is sufficient that it ought to have known the acts.[204]

Considering that TNC had control over COG, had five out of the nine seats in the board of directors, and was actually heavily involved in the management and operation of the company,[205] it should have reasonably known what PROF had or would have done. Moreover, since the COG managers were the ones who supervised the forced-laborers at the work sites,[206] TNC ought to have been aware of such activities since it is the board of directors, which TNC effectively controls, who appoints the managers of the corporation.[207]

2. Acastus should have held TNC liable.

a) The TNC committed the violations in its own capacity.

TNC itself violated its human rights obligations by failing to exercise due diligence in preventing the forced-labor committed by PROF. TNC had the duty to prevent any violation of human rights[208] within its sphere of control.[209] The OECD Guidelines, incorporated by reference in the RABBIT,[210] explicitly imposes the obligation upon enterprises to "respect human rights of those affected by their activities consistent with the host government's international obligations and commitments."[211]

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[200] *Prosecutor v. Furundzija*, IT-95-17/1-T (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999) at 235.
[201] *Id.* at 209.
[202] *Id.* at 233.
[203] *Id.* at 245.
[204] *Id.*
[205] *See* BUCHEL, ET. AL., INTERNATIONAL JOINT VENTURE MANAGEMENT 11 (1998) [*hereinafter* Buchel]; El Chiati, *Protection of Investment in the Context of Petroleum Agreements*, 4 RECUEIL DES COURS 68 (1987) [*hereinafter* Chiati].
[206] Cl par 7.
[207] See e.g. Corporation Code of the Philippines, BP 68 Sec. 23.
[208] Velasquez-Rodríguez, supra note 164, at para. 166.
[209] 2000 OECD Guidelines, Concepts and Principles No. 3.
[210] C ANNEX A.
[211] OECD Guidelines, General Policies No. 2.

TNC had a majority interest in the joint venture, held majority of the seats in the board, and had effective control in the management and actual day-to-day operation of the project. The prevention of the violation of the rights of the Elysian was clearly within TNC's sphere of control.[212]

It was, however, the TNC which approved the contract with the PROF, and facilitated the commission of the forced-labor.[213] TNC cannot feign ignorance of PROF's activities: it knew that the PROF were composed of ex military officers, and procured weapons in the open market.[214]

b) In any case, circumstances exist to justify the piercing of COG's corporate veil.

The court erred in ruling that the separate personality of the COG should be recognized.[215] This fiction is disregarded if it contravenes the policy for which it was created, *fictione juris subsistit aequitas*[216] as when: (1) the legal entity is used to evade liability for a wrong,[217] or (2) in cases of parent-subsidiary relations where its separate identity is hardly discernible, and the subsidiary is a mere instrumentality or alter ego of the former.[218] Both grounds are present in this case.

TNC established the COG to evade the application of the MCRA. As is commonly the case, transnational corporations like the TNC:

> [A]ttempt to shield themselves from liability by purposefully erecting foreign subsidiaries and international joint ventures that utilize complex legal arrangements to appear independent. These subsidiaries are not fully subject to the laws of the parent company's home state, and may be established in a second country with poor laws concerning governance, or may operate in a country in which the authorities are unwilling or are unable to apply the law. Often, international companies structure their subsidiary relationship to protect the bulk of an operation's capital from legal attack.[219]

The COG was a mere instrumentality of the TNC. TNC owns 51% of COG. Under the corporate charter of COG, "all shareholders decisions are made by simple majority vote, a one-share-one-vote basis."[220] TNC's control and domination over the COG is complete. Rubria could not have done anything contrary to the wishes of TNC.

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[212] C ¶19; Chiati, supra note 205, at 7; Buchel, supra note 205, at 16; *La Bugal-B'Laan Tribal Assn vs Ramos*, G.R. No. 127882, December 1, 2004 (Philippines).

[213] C ¶23.

[214] C ¶23.

[215] Londis, supra note 195.

[216] *State ex. rel. Attorney General v. Standard Oil Co.*, 49 Ohio, St., 137, NE 279,15.

[217] CAMPOS, ET. AL., 1 THE CORPORATION CODE 150 (1990); Barcelona Traction, supra note 62, §56-58.

[218] *Id.*, 199.

[219] FAFO, BUSINESS AND INTERNATIONAL CRIMES: ASSESSING THE LIABILITY OF BUSINESS ENTITIES FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW 33 (2004).

[220] C¶19.

COG is in fact an agent of TNC. As is true of joint liability principles, agency liability is well-established in international law.[221] Principal-agent liability is widely adopted by civil law and other common law systems.[222]

Through the COG, TNC violated international law and should have been held liable by Acastus: the COG participated in the acts of committing forced-labor as shown by the fact that its managers were the ones who instructed the Elysian men at the work sites.[223] COG is complicit with the PROF in perpetrating the forced-labor by virtue of the fact that it created, financed, and provided material assistance to, and supervised the forced-labor committed by the PROF,[224] of which it had knowledge. There is compelling ground for piercing the separate entity of the PROF, with respect to the COG, since the PROF exists solely to perform its services for the COG.[225] It is a mere instrumentality of the COG, created to evade accountability by the COG for the committed violations.

PRAYER FOR RELIEF

Rubria respectfully requests that the Court adjudge and declare that:

(a) the Court lacks jurisdiction over all claims, since Acastus is not the continuation of Nessus and has not accepted the compulsory jurisdiction of the Court in its own right;

(b) by permitting the construction of the pipeline as proposed, Rubria would exercise rights attendant to its sovereignty over territory and natural resources, and would not violate international law;

(c) the actions of PROF are not imputable to Rubria under international law, or did not violate any international legal obligation owed by Rubria to Acastus; and

(d) Acastus is in breach of Art.52 of the RABBIT by virtue of the Acastian civil court's decision.

Respectfully submitted,

Counsel for Rubria

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[221] *National Coalition Government of Burma v. Unocal Inc.*, 176 F.R.D. 329, 334 (C.D. Ca. 1997); *See* Barcelona Traction, supra note 62, at 215; *Application for Review of Judgment No. 333 of the UN Administrative Tribunal*, May 27, 1987.

[222] *See, Bazley v. Curry*, 2 S.C.R. LEXIS 134 (1999); Civil Code of France, §1384 (1994).

[223] C¶7.

[224] C¶23.

[225] C¶5.