2003 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

THE REPUBLIC OF ANNOLAY V. THE REPUBLIC OF RESTON

THE CASE CONCERNING THE WOMEN AND CHILDREN OF THE CIVIL WAR

BENCH MEMORANDUM

*****CONFIDENTIAL*****

FOR JUDGES EYES ONLY

FOR USE BY <u>ORAL ROUND JUDGES</u> IN THE

PRELIMINARY ROUNDS AND ADVANCED ROUNDS OF THE

SHEARMAN & STERLING INTERNATIONAL ROUNDS

OF THE

2003 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

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BENCH MEMORANDUM

PART I: GENERAL INFORMATION

I. INTRODUCTION

The purpose of this bench memorandum is to provide judges in the Philip C. Jessup International Law Moot Court Competition with a basic outline of the factual and legal issues relevant to the 2003 Jessup Problem (the "Compromis"). This Bench Memorandum should be read in conjunction with the Compromis and the Corrections and Clarifications to the Compromis. The Compromis is intended to present the competitors with a balanced problem, such that each side has strengths and weaknesses in its case. The Compromis contains a number of legal issues that are relevant to more than one claim for relief, and competitors will be placed in the difficult situation of arguing in favor of a rule of law in support of one claim, which rule they will then be forced to distinguish with respect to another claim. In light of this, judges should note and question internal inconsistencies that may arise in a competitor's or team's argument.

This memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis, but rather an outline of the most relevant arguments and authorities the competitors may present. As such, judges should not be surprised when, in evaluating either a memorial or an oral argument, they encounter arguments and authorities that are not discussed in this memorandum. The omission of such arguments or authorities from this memorandum does not suggest that they are not relevant or credible.

While there are a number of sub-issues which might be raised on these facts, the following questions must be addressed by the teams:

(1) Whether Reston bears state responsibility for the rapes of the women from Cascadia and

(2) Whether Annolay has standing to bring a claim on behalf of the Cascadian women.

(3) Whether Reston has violated any international legal obligation with respect to the extra-legal payments to Restonian border guards.

(4) Whether the treatment of the Cascadian women in Annolay violates international law, and, if it does, whether Annolay bears state responsibility for such treatment.

(5) Whether international law permits Reston to exercise "universal jurisdiction" over Mr. Schmandefare.

The problem includes tangential issues, some of which are discussed in this memorandum. The teams should not be penalized for missing such issues or credited unduly for noticing them.

The Jessup Competition is an international competition. As such, competitors come from many different countries with a wide variety of available legal resources. Regrettably, some teams are inevitably at a disadvantage in this respect. The issues in this Compromis are addressable with generally available materials and careful reading of the facts. That being said, teams should be candid about the existence of apparently adverse, significant authority.

II. JUDGING THE JESSUP – ORAL ROUNDS

A. Decorum and the Role of the Jessup Bench

The ultimate role of the Jessup bench is to evaluate the students' oral presentations. This evaluation takes into account not only the student's grasp of the facts of the case and the law applicable to those facts, but also such factors as poise, organization, and ability to effectively interact with – and not be completely at the mercy of – the Bench.

That being said, it is important for the judges to display an appropriate level of respect for the student competitors. It is true that many experienced and highly respected Jessup judges have quite effectively used a very active, give-and-take style with the competitors. But it is important – especially for new or inexperienced judges – to recognize the difference between "putting a competitor through his paces," on the one hand, and bullying him, on the other. It is appropriate to press a competitor – sometimes taking a tone of offense or opposition – to clarify a point or call a competitor on a stretch of the facts or law. But competitors are not "hostile witnesses" in an adversarial courtroom: ridiculing a competitor, openly ignoring a competitor, and similar conduct accomplishes nothing, and only serves to make the Jessup experience less enjoyable for our students.

B. "Hot Benches" versus "Cold Benches"

There are differing opinions as to the role of a judge in a moot court competition. On the one hand, there are those who believe that a judge should do whatever necessary to ensure that the competitors complete their entire presentation. At the other end of the spectrum are those who believe that competitors are tested only when they spend their entire allocation of time responding to questions from the judges. It is left to each judge to find a balance between these two extremes.

There is no "correct" position on this issue. However, most observers agree that judges should at least ask questions of a sufficient difficulty and in a sufficient quantity to prevent the competitors from merely reading a rehearsed speech. In any event, a rehearsed presentation is not particularly interesting from the judges' standpoint, and, when asked, competitors have indicated that they do not enjoy extremely passive benches.

Judges in the Jessup Competition play a different role than those in the real world. Jessup Judges do not decide a case on the merits; they must assess the validity of the participants' arguments, the persuasiveness of their presentation and the thoroughness of their preparation. Judges are expected to judge the performance of the participants as outlined by the criteria noted on the judging forms for the written and oral aspects of the competition.

Once submitted, participants may not revise their written Memorials. As they advance through the competition, however, participants are sure to revise the substance, style and structure of their arguments. It is important that judges in the oral rounds keep this fact in mind, as their questions and responses to the participants should be formulated so as to encourage that learning process. **MOST IMPORTANTLY, JUDGES MUST NOT ANNOUNCE THE WINNER OF A ROUND UNLESS THE ROUND IS AN ADVANCED ROUND.**

There are certain tactics oral-round judges can employ to test a competitor's flexibility without unduly interfering with the competitor's performance. These include asking a competitor to resolve apparent internal contradictions between her position and that of her partner; or asking about the particular remedy sought for a particular international delict. A judge should refrain from insisting upon an answer to a question when it appears as if a competitor has already made a good-faith effort to respond. In the final analysis, a moot court competition should, as much as possible, emulate a real courtroom to maximize the learning experience for the competitors.

It is important to keep in mind that the competitors choose neither the problem nor the side of the issue that they argue. As such, a competitor may be forced into making a weak legal argument. This by itself should not be held against the competitor. On the other hand, if the competitor incorrectly states the law, incorrectly cites a holding, or is unaware of an obvious source of relevant international law, a judge should bring it to the attention of the competitor through questioning and scoring.

Judges should feel free to ask "basic" questions of competitors, for example about the nature and sources of international law.. Such questions ensure that the competitors have an understanding of international law, and are not merely regurgitating memorized details.

The following are some specific suggestions for questioning:

- Frequently utilize questions that call for a "yes" or "no" answer. Such questions test a competitor's ability to answer directly, and the questions themselves tend to be shorter and more concise.

- Customary law is a key source of law in this Compromis. Students should not be permitted simply to assert that a particular rule or practice is a matter of customary international law, but should know and be prepared to present examples of the two elements of customary law: state practice and *opinio juris*. That is, if a student asserts that a given rule is a tenet of customary international law, ask the student to provide examples of state practice and *opinio juris*. (For a description of customary international law, state practice, and *opinio juris*, *see generally* Section IV.C of this Bench Memorandum.)

- Avoid asking rhetorical questions or making statements.

- Avoid lengthy debates with the competitors. As much as possible, the interaction between the competitors and the bench should be in question and answer format.

- Do not focus all of your questioning on one competitor or team. Try as much as possible to interject evenly throughout the round.

- Avoid detailed questioning about a co-counsel's argument. Each competitor should, at the beginning of their presentation, outline the points he or she will cover. Although it is sometimes difficult to avoid questioning on a co-counsel's argument, such questioning should be general in nature when necessary.

- Be mindful of how much time remains for the student's argument, and avoid extensive questioning after the competitor's allotted time has expired.

- Word your questions carefully and clearly, especially when facing a competitor who is not a native English speaker. It is especially helpful in such instances to avoid asking questions with overly complex sentence structures.

III. SYNOPSIS

This year's Jessup problem addresses some of the most significant and divisive issues in international law. At first blush, the issues are simply whether rape as a war tactic, sexual slavery, and corruption are unlawful at international law and what obligations or rights States have to prevent, discourage or punish such acts. On closer examination, the issues go to the core of the development of international law, state sovereignty and the need for more flexible rules in times of national upheavals. The development of customary international law is particularly important to the issues present in this Compromis.

The parties to the case are Reston, a developing country that has only recently come into being, and its neighbor, Annolay. Annolay is a developed country with a free-market economy.

The problem itself deals with the aftermath of a brutal civil war that resulted in the founding of two new States, Reston and Cascadia. During the civil war, members of the ethnic Restonian militia engaged in the systematic and widespread rape of women of ethnic Cascadian women. After the civil war, Reston's President declared an amnesty for all accused of wrongdoing during the civil war. Ostensibly, this is done to help the country heal and move forward, but it has the effect of foreclosing any civil or criminal penalties against the rapists. Annolay now brings a claim on behalf of the rape victims.

After the war, a private Annolaysian company recruited many of the Cascadian women to work in Annolay. When the women arrived in Annolay, they were put to work in the company's brothels. Although the women were paid a salary, the company garnished their wages to cover so-called loans the company made to the women when it brought them to Annolay. Reston seeks to characterize this relationship as one of sexual slavery, and asks the Court to find Annolay in violation of international law forbidding such practices. In addition, Reston wishes to bring the head of the Company to justice, and seeks a judgment from the court that it may exercise "universal jurisdiction" over him.

The civil war also left thousands of Restonian children orphaned. Large numbers of Annolaysian citizens travel to Reston to adopt the children and brought them to Annolay. Unfortunately, Restonian border guards routinely stopped them at the border and refused to let them leave the country with the children unless they paid large, extra-legal bribes Annolay brings a claim against Reston, alleging it has breached its obligations to prevent and discourage official corruption.

The echoes to recent real events are intentional. The authors want the students to grapple with the tension between what appears fair and just and the limitations of international law and sovereignty. Everyone can agree that rape, sexual enslavement and large scale bribery are "wrong," but the inquiry becomes more complex when students must determine what States are required, under law to do. Given the parallels to real-world situations, there should be plenty of examples of state practice to support and refute most customary law arguments competitors might make. Judges should not hesitate to request the student cite particular examples of state practice.

In a world where "might makes right" still holds a great deal of sway, and where countries are armed to the teeth with history's most destructive weapons, it is important not to allow States to say one thing and do another. This year's Compromis seeks to encourage students and practitioners of public international law not to lose sight of the goals of the international community after World War II: increased international cooperation and understanding and pacific resolution of disputes.

IV. SOURCES OF INTERNATIONAL LAW

This section is intended as an introduction to public international law for the judge who might not have professional experience or training in the field. There are important distinctions between international law and domestic law systems. The most significant, in the context of the international law moot court environment, is the rigid definition of what sources of law are acceptable before the Court.

A. General

The conduct and rules of the International Court of Justice (the "ICJ") are governed by the Statute of the International Court of Justice (the "ICJ Statute"). Under Article 38(a) of its Statute, the International Court of Justice may consider the following sources of international law in order to decide disputes before it:

> (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> (2) international custom, as evidence of a general practice accepted as law;
>
> (3) the general principles of law recognized by civilized nations;
>
> (4) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There is some dispute among commentators as to whether these four sources of international law are listed in order of importance.

Judges hailing from common-law systems should take note of the status of precedent before the International Court of Justice. With respect to decisions of the ICJ itself,, Article 59 of the ICJ Statute seems to deny outright the existence of precedent, stating, "the decision of the Court has no binding force except between the parties and in respect of that particular case." However, the ICJ often cites its previous case law, and that of its predecessor, the Permanent Court of International Justice, as persuasive authority, as an Article 38(a)(4) judicial decision. Furthermore, in reaching a judgment, the Court frequently evaluates putative tenets of customary international law. Previous determinations of the existence or non-existence of a rule of customary law are often used by the Court in its judgments.

Decisions by other tribunals are dealt with in the discussion in Section E ("Decisions and Publicists") below.

Practitioners familiar only with domestic law should note that resolutions of the United Nations General Assembly are not, of themselves, binding before the Court. Although such resolutions may be evidence of customary international law, the General Assembly's

position in international law is not analogous to that of a domestic legislature, and resolutions of the General Assembly do not create international law.

B. Treaties

Treaties are affirmative agreements between and among sovereign States, by which they voluntarily bind themselves to act or refrain from acting according to the terms of the treaty. The rules regarding treaty procedure and interpretation are spelled out in the 1959 Vienna Convention on the Law of Treaties[1] (the "VCLT") (itself, a treaty).

The fundamental principle relating to treaties, reiterated in Article 26 of the VCLT, is that of *pacta sunt servanda:* "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." In other words, once a State becomes a party to a treaty, it is bound by that treaty.

A corollary to this rule is contained in Article 34 of the VCLT: a treaty is generally not binding on States which are not parties to the treaty, and does not create rights or obligations for such third-party States. Article 18 tempers this general rule with respect to States that have signed – but not yet ratified – a treaty: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty...." pending ratification, unless it has "made its intention clear not to become a party to the treaty." For example, a State which has signed but not ratified a treaty forbidding testing of nuclear weapons would not be held to the minute procedural details of the treaty; however, actual nuclear-weapons testing by the State would probably be seen as a violation of international law, constituting a breach of the "object and purpose" of the treaty.

The "object and purpose" issue is significant this year in the context of the border-guard corruption issue. Reston has signed, but not ratified, a regional anti-corruption treaty. Students should be prepared – or prompted by a judge – to identify the object and purpose of the anti-corruption treaty, and also to explain whether Reston's conduct defeats said object and purpose.

Even if a State is not party to a treaty, a treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this "back-door" means by which a treaty may become binding on non-parties. Judges should be aware, however, that situations arise where some provisions of a treaty – for example, many provisions of the International Covenant on Civil and Political Rights ("ICCPR")[2] -- may reflect or codify customary international law, while other parts do not.

C. Customary International Law

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[1] 1155 U.N.T.S. 331 (1969).

[2] 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.

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has the binding force of law simply because the community of States treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a State whether or not it has affirmatively assented to that rule.

In order to prove that a given rule has become a rule of customary international law, one must prove two elements: widespread state practice and *opinio juris sive necessitas* -- the "mutual conviction that the recurrence (of state practice) . . . is the result of a compulsory rule."

"State practice" is the material element of customary international law, and simply means that a sufficient number of states behave in a regular and repeated manner that establishes a customary norm. As alluded to in the section on treaties, State practice also may be evidenced when a sufficient number of States sign, ratify, and accede to a convention. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create "regional customary international law" or whether the practice of particularly affected states, e.g. in the area of space law, Internet law, or antitrust law, can create custom that binds states which later become affected by these issues, although the ICJ, in its decision in the *North Sea Continental Shelf Cases, (F.R.G. v. Den.), 1969 I.C.J. 1 (1969)*, appears to have acknowledged either possibility.

O*pinio juris* is the psychological element of customary international law. It requires that the subject State action be taken out of a sense of legal obligation, as opposed to domestic expediency. Put another way, *opinio juris*, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it." MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

Evidence of customary international law may be in the form of treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and practice of international organizations. Depending upon the context and content of such statements and documents, each of these items may serve as evidence of State practice, *opinio juris*, or both.

With respect to the burden of proof, in *The North Sea Continental Shelf Cases*, the ICJ stated that the party asserting the existence of a rule of customary international law bears the burden of proving its existence of such a rule.

D. General Principles of Law

The third source of international law recognized by the Court consists of "general principles of law." Such principles are gap-filler provisions: on occasion, the ICJ must have recourse to domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature, for example, the laws regarding burden of proof and admissibility of circumstantial evidence. Many others, for example estoppel, waiver, unclean hands, necessity, and *force majeure,* may sound to an American practitioner like appeals to equity. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited "general principles" of international law. The ICJ has upheld the application of equitable principles generally in, among other cases, the *North Sea Continental Shelf Cases* (1969); its predecessor, the Permanent Court of International Justice, recognized equitable principles as part and parcel of international law in *The Diversion of Water from the Meuse* (Neth. v. Belg.), P.C.I.J. Ser. A/B, No. 70, 76-78 (1937).

It is important to note, however, that "equity" in this sense is a source of international law, brought before the court under Article 38(1)(c) of the Statute of the ICJ. It is an *inter legem* application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono*, a separate matter treated under Article 38(2) of the Statute.

E. Decisions and Publicists

The final source of international law recognized by the ICJ is judicial decisions and teachings of scholars. This category is explicitly mentioned only as "a subsidiary means of finding the law." That is, judicial decisions and scholarly writings are, in essence, research aids for the Court, used for example to support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they cognize international law directly or when used to demonstrate a general principle.

"Teachings" refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published law-review article constitutes an Article 38(1)(d) "teaching." However, the provision is expressly limited to teachings of "the most highly qualified publicists." For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. However, within the context of a specific field of international law – for example, environmental law, children's rights, or law of the sea – there are additional experts who would be regarded, within the field of their expertise, as "highly qualified publicists."

PART II: LEGAL ANALYSIS

This legal analysis is divided into sections which correpsond to the claims for relief sought by the parties. The first section, however, covers the general issue of "standing," which both parties will be required to argue as a preliminary matter before proceeding to the substantive claims.

I. DOES ANNOLAY OR RESTON HAVE STANDING TO BRING ITS CLAIM

Each party has one claim for relief which poses an immediate question of standing. Namely, before reaching the substantive issues with respect to Annolay's claim against Reston for the war-time rapes, the Court must be satisfied that Annolay has a legal interest in taking up the claim. Likewise, Reston must satisfy the Court that it has standing to raise its claim against Annolay for the treatment of the Cascadian sex workers.

A. Nationality Rules for Standing (also "Diplomatic Protection" or "Espousal")

The first basis of standing is the notion of "diplomatic protection," namely, the right of a State to seek redress for harms caused to its nationals. The traditional and firmest basis for establishing standing under this doctrine is the nationality of the harmed individuals. That is, States are accorded legal standing to seek redress for harms suffered to its nationals, wherever they might be found. Notions of State sovereignty dictate that a State is free to designate as its "national" any person it sees fit, so a formal analysis of this principle simply requires the Court to determine whether the State has so designated the victim of the harm it seeks to redress.

In the key case dealing with the issue, the *Nottebohm Case (Liechtenstein v. Guatemala)* 1955 ICJ 4, the Court diverged from this strictly formal interpretation of the nationality principle. In *Nottebohm*, the Court focused on a "genuine link," rather than formal notions of citizenship or nationality. In that case, the ICJ decided not to recognize the claim of Liechtenstein against Nicaragua on behalf of a naturalized Liechtenstein citizen. The citizen had lived in Guatemala for many years and had very few ties to Liechtenstein. Liechtenstein based its standing argument solely upon the formal citizenship of its naturalized citizen, and could not provide sufficient other ties. The standard the Court adopted was

> "whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter."[3]

The rule in *Nottebohm* is therefore that a State must demonstrate a sufficiently close nexus between the claiming state and the individual. Several commentators have limited *Nottebohm*'s rule to its facts, observing that the nexus between Liechtenstein and Mr. Nottebohm was extremely attenuated, and that in most circumstances, the formal

[3] 1955 I.C.J. Reports, p.23.

nationality (whether by birth, descent or naturalization) of the harmed individual will be sufficient to satisfy the requirements of diplomatic protection.[4]

The students may also cite one of two more recent cases concerning diplomatic protection. In the *Barcelona Traction Case*,[5] the ICJ held that only the state of incorporation, and not the state of the nationality of shareholders, is permitted to espouse a claim on behalf of a corporation before the ICJ. The Court reached this conclusion by analogizing to standing issues in the case of individuals. In the *Elettronica Sicula Case*,[6] the World Court permitted the United States to pursue a claim of damage to an Italian corporation (ELSI), which was wholly owned by two U.S. corporations (Raytheon and Machlett). However, the facts in that case (which included a bilateral treaty which explicitly allowed claims to be brought on behalf of shareholders) are easily distinguished from the present case.

B. Standing Pursuant to *Erga Omnes* Principles

If standing cannot be established on the "genuine link" basis of *Nottebohm*, the claiming State may attempt to establish standing based upon the doctrine of "obligations *erga omnes*, or obligations which are owed to the international community as a whole. In dicta in the *Barcelona Traction Case*, the ICJ stated,

> "By their very nature [obligations *erga omnes*] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection."

The concept of an obligation *erga omnes* is obviously a very powerful tool for showing standing. Taken at face value, if a State breaches an obligation *erga omnes*, then any State in the world would have standing to seek a judicial determination prohibiting the breach. As a result, the scope and effect of the doctrine – and the list of obligations which have *erga omnes* application – is a source of great controvery. As a starting point, the ICJ in *Barcelona Traction*, for example, listed as examples of sources of obligations *erga omnes* the prohibitions against genocide and acts of agression, and "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."

Drawing upon the paramount importance attributed to obligations *erga omnes* by the *Barcelona Traction* Court, many authors have drawn a link between the obligations *erga omnes* and the notion of *jus cogens* norms of international law. Article 53 of the VCLT defines a *jus cogens* norm as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the

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[4] See, for example, the text and accompanying footnotes of *Report of the International Law Commission on the work of its fifty-fourth session*, (A/57/10) (2002), at p.176..

[5] *Barcelona Traction,Light and Power Company, Limited (Belg. v. Sp.)*, Second Phase, Judgment, 1970 I.C.J. Rep. 32 (1970).

[6] *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. Rep. 3 (1989).

same character." These concepts were recognized by Grotius in *De Jure Belli ac Pacis* in 1758 and subsequently by Vattel in the 19th century and Oppenheim in the early 20th century. The idea that such norms do exist is also enshrined in the *Vienna Convention on the Law of Treaties*, Article 53.

The proceedings of the negotiations of Article 53 indicate that the authors had a very short list of obligations in mind. These include aggressive war, slavery, slave trade, piracy and genocide. The same source states "[violations of] human rights, the equality of States or the principle of self-determination were mentioned as other possible examples."[7]

A number of ICJ cases, usually dissents and concurrences, have addressed not just the question of *erga omnes* obligations but also the factors that would allow an obligation to rise to this level.[8] Depending on which Judge's opinion is consulted members of the Court have been both extraordinarily hostile and welcoming to the concept. This should give the competitors plenty to talk about and should be a rich source for questions from the bench.

The list of *erga omnes* obligations enumerated by the ICJ in *Barcelona Traction* is quite short, limited to acts of aggression, genocide, slavery and racial discrimination. The Court also recognized the obligation to respect the right of a people to self-determination as *erga omnes* in the *East Timor Case*[9]. Finally, the Court recognized the theoretical existence of such a right in the context of large-scale environmental injury in the *Gabcikovo-Nagymaros Case*[10]. The right to be free from torture was recognized as universal by U.S. courts in *Filartiga v. Pena-Irala*, 77 I.L.R. 185 (1984) and by British courts in *Regina v. Bow Street Magistrates Stipendiary Magistrate. Ex parte Pinochet Ugarte (Amnesty International Intervening)* (No.3), 2 All ER 97 (1999).

In the United States, at least one court has held that even a campaign of widespread and systematic rape, conducted on facts very similar to the Restonian civil war, does not rise to the level of an international crime. In *Doe v. Karadzic*,[11] the U.S. district court found that it had no jurisdiction to hear a civil suit based upon an alleged campaign of rape and torture by Bosnian Serbs under the U.S. Alien Tort Claims Act (ATCA). The court ruled that the ATCA only covered international crimes, and equated these to crimes carried out under State authority (to distinguish them from common crimes); to wit, "Acts committed by non-state actors do not violate the law of nations." Since the campaign was carried out

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[7] Yearbook... 1966, vol. II, p. 248, document A/6309/Rev.1, part II, chap. II, "Draft articles on the law of treaties with commentaries", para. (3) of the commentary to article 50.

[8] *South West Africa,* 1962 ICJ Reports 319 (Preliminary Objections) and 1966 ICJ Reports 6 (Second Phase), *Nuclear Test Cases,* 1974 ICJ Reports 253 (Aust. v. Fr.) and 1974 ICJ Reports 456 (New Zealand v. Fr.), *Military and Paramilitary Activities in and against Nicargua,*1996 ICJ Reports 226, *Reservations to the Genocide Conventions,* 1951 ICJ Reports 15 (Advisory Opinion stating prohibition against genocide is *jus cogens*), *Legality of the Threat or Use of Nuclear Weapons,* 8 July 1996, 35 ILM 809 (1996)(Advisory Opinion stating certain fundamental human rights applicable in armed conflict are "intransgressible").

[9] *East Timor Case* (Port. v. Aust.), 1995 ICJ Rep. 4

[10] *Gabcikovo-Nagymaros Case* (Hung. v. Slov.), 1997 ICJ 7

[11] Doe v. Karadzic, 866 F.Supp. 734 (U.S. S.D.N.Y., 1994).

by militiamen who did not act on behalf of a recognized State (there being no Bosnian Serb State), the crime did not fall under the ambit of the ATCA. The decision was overturned on appeal; the appellate court specifically rejected an overly formalist approach which requires a recognized and extant "State" as a prerequisite for an international crime.[12]

Once an obligation has been established as applying *erga omnes*, a State trying to enforce the obligation in a court must establish that its claim is an *actio popularis*, or a legal claim which is brought by one State on behalf of the community of States.[13] Because the obligation the State seeks to enforce is not owed directly to it (or to its national), the State must demonstrate that the action to enfroce is actionable and is brought on behalf of the international community

A careful competitor should be able to point out that while the ICJ has shown a willingness, in a number of its decisions, to recognize *erga omnes* obligations, it has flatly refused to grant a right of action based upon such obligations in practice. At the root of this reluctance is a concern regarding unwarranted and excessive interference with state sovereignty. Competitors should also recognize that the *erga omnes* doctrine is generally regarded as applying to the prohibition of a given contravening practice, rather than giving rise to a cause of action for redress.

Perhaps the most starkly illustrative example of the problem presented by this dichotomy between the recognition of obligations *erga omnes* and the reluctance to utilize the *actio popularis* is what happened in the international community with respect to the actions of the Khmer Rouge in Cambodia. While there was significant discussion of bringing a claim against Cambodia before the ICJ, when, in 1986, the Cambodian Documentation Commission and Cambodian Genocide Project prepared a draft Memorial for use in such a case, not one member of the international community came forward to bring the claim. See Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law*, 324 (Oxford, 2001).

Article 42 of the Articles on State Responsibility[14] acknowledges that it is possible to bring an *actio popularis* based upon an *erga omnes* obligation, and sets one standard for showing an *actio popularis*:

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[12] Kadic v. Karadzic, 70 F.3d 232 (U.S. 2nd Cir., 1995).

[13] See, e.g., Dissenting Opinion of Judges Onyeama, Dillard, Jiminez de Arachaga, and Waldock, in the Nuclear Test Cases (N.Z. v. Fr.), 1974 I.C.J. Rep. 457 (1974). ("Although we recognize that the existence of a so-called actio popularis in international law is a matter of controversy, the observations of this Court in the Barcelona Traction, Light and Power Company, Limited case suffice to show that the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court.")

[14] The final draft Articles on State Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility") is the work of the International Law Commission, and reflect years of work by the ILC. Although the Articles do not have the force of law, the General Assembly in December 2001 "commend[ed] them to the attention of Governments without prejudice to the question of their future adoption. . . ." U.N.G.A. 56/83 (56th Session), A/RES/56/83 (2001). The Articles on State Responsibility

> "A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to" *inter alia* a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specifically affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation."[15]

Annolay and Reston should argue that endorsement of this portion of the Articles by the General Assembly strengthens the argument for allowing *actio popularis*, in at least some circumstances.

C. Annolay's Standing With Respect to Cascadian Rape Victims

Annolay must establish that it has standing to bring a claim against Reston for the widespread and systematic war-time rapes. It will likely attempt to run both a "nationality" (*Nottebohm*) argument and an *erga omnes* argument.

Annolay will first base its argument on the *Nottebohm* standard, reasoning that it can establish a close connection to the Cascadian rape victims. The Cascadian women are physically resident in Annolay, they were not welcome in Cascadia, the Cascadian government has made it very clear they are not interested in pursuing any remedies for the women, and the Annolaysian government has granted them "permanent resident" status. Annolay will argue that this establishes a sufficiently close link to meet the *Nottebohm* standard.

Reston may argue that even if the *Nottebohm* test applies, the nexus is not sufficiently close and standing should be denied. Reston may also counter that the concept of "genuine link" must be analyzed within the context of general standing rules and cannot be created simply through a pronouncement by the claiming state even when *Nottebohm* is applied. The decision leaves the issue sufficiently open for both sides to make a credible argument.

Annolay may argue that notions of State sovereignty dictate that it is Annolay's sovereign right to determine whether a particular individual is a national. Annolay must then demonstrate that it rendered the women "nationals" for this purpose when it granted them permanent resident status.[16] Reston will reply that Annolay did not issue a formal decree, and that permanent resident status is not naturalization.[17]

Reston may also counter that the international community has not completely abandoned the formal "nationality" principle that predates *Nottebohm*, and that Annolay's conduct has fallen short of naturalizing the women. Reston may rely on *Mavrommatis Palestine*

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are contained as an annex to the Resolution. For a discussion of how competitors may (and may not) use the Articles of State Responsibility, see Section II.A(2) of this Bench Memorandum, *infra*.

[15] Articles on State Responsibility, art. 42.

[16] See *Tunis and Morocco Nationality Decrees Case* P.C.I.J., Ser. B, No.4.

[17] *Ibid.*

Concessions,[18] which upholds the formal principle. In *Mavrommatis*, the Court limited diplomatic-protection standing to the state of nationality. Under this principle, the Cascadian women are merely permanent residents, not citizens.

Annolay's second major basis is that the obligation to prevent widespread and systematic rape is an obligation *erga omnes*. Annolay will argue that the obligation to protect human beings from wholesale human rights abuses, including rape, is a right owed by a State to the international community as a whole under the principle of obligations *erga omnes*.

Annolay must first explain the *erga omnes* standard, and establish that the prohibition on such rapes rises to the level of an obligation *erga omnes*. In this respect, Annolay will rely on international conventions,[19] decisions of international tribunals, and decisions of municipal (domestic) courts.[20]

While the facts of *Barcelona Traction* and *Elettronica Sicula* are not particularly helpful to Annolay, Annolay may look at the Court's reasoning in *Elettronica Sicula* and argue that the Court's concern that a remedy be provided for a cognizable injury should be even more true in the human rights context than in the corporate context. To the contrary, Reston should cite both cases for their ultimate conclusion that a State may not bring a claim before the Court for any person other than its own national and that nationality cannot be arbitrarily conferred.

The bench should be mindful that the theory is controversial. Furthermore, if Annolay argues too broadly or forcefully in defending its *erga omnes* position, it may provide support for Reston's (later) standing argument. In this situation, Annolay will need to explain why the principle may be relied on by Annolay but not by Reston. (Likewise, if Reston relies on *erga omnes* principles, it must be able to distinguish its argument from any such position that Annolay might establish.)

1. Is Rape a Violation of Customary International Law?

No matter which basis Annolay uses for establishing standing, Annolay must prove that a prohibition against rape is part of international law. If nationality standing is established,

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[18] *Mavrommatis Palestine Concessions (Jurisdiction)(Greece v. Great Britain)* P.C.I.J. Ser. A., No. 2 (1924) p.1

[19] *See* Common Article 3 to the Geneva Conventions of 1949, U.N.T.S. No. 970, vol. 75, p. 31 (1950) (prohibiting "outrages upon personal dignity, in particular humiliating and degrading treatment" and "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), U.N.T.S. No. 17513, vol. 1125, p. 609 (1978) (prohibiting "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault").

[20] *See, e.g,, Doe v. Unocal*, 963 F. Supp. 880 (U.S. C.D.Calif. 1994) (holding that rape is an international crime under the U.S. Alien Tort Claims Act, which does not require a State action); and Kadic v. Karadzic, 70 F.3d 232 (U.S. 2nd Cir., 1995).

Annolay must merely prove it is customary international law. If the principle of obligations *erga omnes* is invoked, Annolay faces a greater challenge (discussed briefly above), because it must show that the prohibition against rape has risen to the level of an obligation *erga omnes*. To make this point, Annolay may try to place the rapes in the context of other recognized areas of *erga omnes* obligations such as torture or other cruel and degrading treatment.

Rape and gender based crimes are conspicuously absent from the Genocide Convention[21]and the Torture Convention.[22] However, a given act or acts of rape might be deemed as "genocide"[23] or "torture,"[24] under the Conventions, depending on the circumstances.

The genocide analogy should always be rejected by the Bench. The authors have been careful to present the facts in such a manner that they do not fit into the limited category of rapes recognized as a form of genocide in the Yugoslav tribunal. The facts are structured such that there was no policy of forced pregnancy or other government objective to destroy the Cascadian national or ethnic group, as required under the Genocide Convention. While the warring factions comprised different ethnic groups with different values and objectives, there is no evidence that the rapes occurred as the result of any agenda of ethnic cleansing through rape or forced impregnation. Rather the rapes were what some scholars describe as "opportunistic rapes," which have been a historical part of warfare. If Annolay argues the rapes constituted genocide, Reston should, in its response, cite the Genocide Convention definition and the case-law of the International Criminal Tribunal for the Former Yugoslavia, and demonstrate that genocide is not implicated in this case.

Annolay will have a better argument if it relies on the Torture Convention, particularly its general prohibition against subjecting persons so cruel, inhuman and degrading treatment. Certainly forced sexual intercourse fits within this broad definition. As already stated above, there are several municipal court decisions that acknowledge the right to be free from torture as a *jus cogens* norm but the Bench should keep in mind that if standing is based on nationality, all that is required is that Annolay establish a violation of customary law.

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[21] Convention on the Prevention and Punishment of All Forms of Genocide, U.N.T.S. No. 1021, vol. 78 (1951) (hereinafter, "Genocide Convention").

[22] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. Res. 39/46, Annex (10 December 1984).

[23] Article 2 of the Genocide Convention states "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: . . . (b) Causing serious bodily or mental harm to members of the group. . ."

[24] Article 1(1) of the Torture Convention defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The Convention on the Elimination of All Forms of Discrimination Against Women[25] does not help Annolay because it does not even address acts of violence against women. The *traveaux preparatoires* of the Convention adopted in 1979 make it clear that the drafters did not even contemplate the issue of violence against women despite the fact that it was globally commonplace.[26] The committee established to implement and monitor the provisions of the Convention; however, stated unequivocally in 1992 that "gender-based violence is a form of discrimination" and made recommendations respecting the treatment of women in times of war.[27] These recommendations do not, however, carry formal legal authority. Annolay may also cite in support of its position the later United Nations Declaration on Elimination of Violence Against Women[28] and the 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict.[29]

Reston may respond that the rapists were militia/guerilla fighters – not a State army – and that the conflict was an internal armed conflict and not an international armed conflict. Under this line of reasoning, the the Hague Conventions on armed conflict is NOT generally applicable, except for Protocol II, mentioned above, which deals with the protection of victims of internal conflicts and prohibits rape. Otherwise, Common Article 2 of the 1949 Geneva Conventions limits applicability to armed conflict that" may arise between two or more of the High Contracting Parties." Reston might argue that the Geneva Conventions are inapplicable and, given their specific aim of dealing with international armed conflict, cannot be imported into a case of internal armed conflict. The Bench may also wish to raise this "internal versus international conflict," in order to force Annolay to respond.

That being said, the "internal versus international" dichotomy is not a very strong argument. Common Article 3 of the 1949 Geneva Conventions contains provisions for "armed conflict not of an international character," and prohibits "violence to life and person" and "outrages upon personal dignity."[30]

Furthermore, international tribunals have indicated that some civil war situations can take on an international character. In *Prosecutor v. Tadic*,[31] the International Criminal Tribunal for the Former Yugoslavia ("ICTY") addressed the question of whether the conflict in Bosnia-Herzegovina between the Bosnian Serb army and the local Bosnian army was international, in order to determine whether Dusko Tadic's crimes fell within the ambit of the "grave breaches" regime of the ICTY. Drawing upon treaty provisions[32] and case

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[25] U.N.T.S. No. 20378, vol. 1249 (1981).
[26] *See* Askin, *War Crimes Against Women* (Martinus Nijhoff 1977).
[27] *Id* at 233-234.
[28] UNGA Res. 48/104, 23 Feb. 1994.
[29] UNGA Res. 3318 (December 14, 1974).
[30] Common Article 3(1)(a) and 3(1)(b) of the Geneva Conventions of 1949.
[31] Prosecutor v. Dusko Tadic (Case No. IT-94-1-A), Judgment of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (July 15, 1999).
[32] The Court relied upon Article 4A of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, and upon Articles 43(1) and 44(3) of the First Protocol Additional to the Geneva

law,[33] concerning treatment of paramilitary groups as legitimate combatants, the court eventually determined that in some situations, a traditionally internal war might be regarded as an international conflict, for example where one side in the conflict may be regarded as under the control of a foreign power.[34]

The specific reasoning of the *Tadic* appellate court may easily be distinguished on the ground that here, no foreign power exercised control over the Restonian militia. Howver, Annolay may cite the *Tadic* appeals decision for the limited notion that modern developments in international law are undermining the internal/international distinction.

If Annolay pursues the *erga omnes* approach, it should focus on the similarities between the act of rape as a method or policy of waging war and the other conduct that *Barcelona Traction* identifies as *erga omnes* obligations. Annolay may also use the reasoning of the ICJ and apply it to the act of large-scale rapes. The ILC has stated that "it is not the form of a general rule of international law but the particular nature of the subject matter with which it dealt" that determines whether it is *jus cogens.*[35] The *Barcelona Traction* case focused on those principles so essential that by their very nature they are " a concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection."

Reston, on the other hand, should focus on actual state practice and argue that there is no evidence that the international community views rape in the same manner as it does prohibitions against slavery, genocide, and murder, unless those rapes are carried out as part of a state policy to perpetrate a genocide. There is no evidence that this has occurred in the instant case.

2. If Rape is a Violation of an Obligation *Erga Omnes*, is there a Right of Action

If Annolay prevails on establishing nationality as a basis for standing and proves the prohibition against rape is a principle of customary law, a right of action is presumed. If Annolay, however, relies on *erga omnes* principles, the inquiry does not end. Annolay must also prove that such a violation carries a concomitant right of action otherwise known as *actio popularis.* Given that such a right of action is highly controversial, a

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Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 1977. *Id.* at para. 92.

[33] The Court drew the following language from the Israeli military court sitting in Ramallah in *Military Prosecutor v. Omar Mahmud Kassem et al* (April 13, 1969)., 42 *International Law Reports* 1971, p. 470, at p. 477: "In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war." *Id.* at para. 93.

[34] *Id.* at para. 94. "In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars *vis-à-vis* that Party to the conflict."

[35] Jorgenson, *The Responsibility of States for International Crimes*, p.90 (Oxford Press, 2000).

cautious Annolaysian side will try, as much as possible, to base its standing on direct standing by virtue of the grant of permanent residence using the *Nottebohm* analysis.

Reston may cite *Reparation for Injuries Suffered in the Service of the UN*,[36] for the proposition that "only a party to whom an international obligation is due can bring a claim in respect of its breach." This is a conservative position that has been challenged by scholars;[37] however, it reflects the actual practice of courts and is thus sustainable.[38] However, Reston will need to be careful in undermining *actio popularis*, because it will later seek to invoke the principle. A cautious Restonian representative will focus on the difference between the rapes upon which Annolay's claim is based and the acts alleged against Schmandefare upon which Reston's claim is based. Reston's argument is, essentially, that it is not inconceivable that an *actio popularis* would ever be granted, it is simply inappropriate in the context of the rapes.

Annolay is in a better position to lay claim to it *vis-a-vis* the rape victims than Reston is *vis-a-vis* the women forced into prostitution. The ICJ has never recognized the *actio popularis*, and States that have sought to invoke the concept before the Court have done so as a supplemental and not an independent basis for standing.[39] Ragazzi cites the *Nuclear Test Cases* as particularly instructive examples because both New Zealand and Australia first focused on their own territorial interests, given their proximity to the nuclear testing, and then looked to the universal interests affected. Here Annolay, by virtue of conferring nationality upon the women can cite a special interest while Reston cannot.

D. Reston's Standing With Respect to the Cascadian Women Forced into Prostitution

Reston has fewer arguments to support standing on behalf of the women forced into prostitution by Schmandefare. It cannot establish any nexus to the Cascadian women in Annolay, and is limited to arguing that the treatment of the women breaches Annolay's obligations *erga omnes*, and thus Reston may bring an *actio popularis* on the women's behalf before the ICJ.

1. Is the Treatment of the Cascadian Women in Annolay a Breach of an Obligation *Erga Omnes*.

Given the restrictions placed on the *erga omnes* principle as discussed above, this argument will focus on showing that the women are essentially sexual slaves of the Schmandefare Company. Thus it is not the forced prostitution, but the enslavement of the

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[36] 1949 ICJ Reports 174 (Advisory Opinion 1949).

[37] *See, e.g.*, Judge Weeramantry's Separate Opinion in the *Gabcikovo-Nagymaros* case, *supra* note 9. (Where there is an environmental harm that has global effects, a global right of action should follow.) *See also* Judge Schwebel's Dissenting Opinion in *Military and Paramilitary Affairs In and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. Rep. 1 (1984)

[38] *See, e.g.*, Judge Gross's Separate Opinion in *Nuclear Tests Case, (Aust. v. Fr.)*, 1974 ICJ 53 (1974).

[39] See Ragazzi, *The Concept of International Obligations Erga Omnes* 210-214.

women that forms the violation of the obligation *erga omnes*. Reston may still try to argue that forced prostitution itself is a prohibition *jus cogens*, but this argument is difficult to support given existing state practice and court decisions. Reston, unlike Annolay, will not prevail if it merely establishes that the treatment of the women violates customary law because its only basis for standing is the *erga omnes* principle.

Slavery is generally defined as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[40] Similar language was used in the 1956 supplementary convention to the Slavery Convention[41]put forth by the UN. As of 1997, 114 States were parties to the 1956 supplementary Convention.[42] The 1956 Convention includes prohibitions on slavery-like practices such as debt bondage and calls upon State parties to abolish these concepts.

Neither Annolay nor Reston is a party to these Conventions. Therefore, these Conventions – and any other evidence the competitors might bring in support of an *erga omnes* prohibition on slavery-like conditions – are applicable only as evidence of customary international law. As seen in the ICJ's pronouncements regarding *jus cogens* norms and discussion of them in other contexts such as the U.S. *Restatement on the Law of Foreign Relations*, it is undisputed that the prohibition against slavery is a *jus cogens* norm, and its prevention an *erga omnes* obligation; however, the applicability to and definition of "slavery-like" conditions is more ambiguous and disputed. The facts as presented in the Compromis allow for an interpretation either way.

Annolay should therefore respond by first characterizing the women's employment in Annolay as voluntary. Although driven by economic need, these women voluntarily followed Schmandefare's agents to Annolay. Second, Annolay should dispute the above evidence of a customary norm. Forced prostitution, so the argument goes, is not tantamount to slavery, and there is no state practice or *opinio juris* in existence that establishes that forced prostitution is contrary to customary international law, let alone a *jus cogens* norm. Annolay should be able to cite numerous examples in contemporary state practice throughout the globe to prove this point.

In responding to the allegation that this is enslavement, Annolay should focus on the definition of slavery. It should point out that the women are compensated for their services, have a significantly better standard of living than that which they left behind in Cascadia and remain with Schmandefare solely because of a contractual obligation which they are required to fulfill. Again, existing state practice and an almost complete absence of *opinio juris* should help Annolay with this argument. The issue squarely presents the

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[40] International Convention to Suppress Slave Trade and Slavery, LNTS 253 (1926), at Art. 1(1) (hereinafter, the "Slavery Convention").

[41] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (7 Sep 1956). (Requiring States Parties to eliminate "debt bondage," serfdom, and other practices.

[42]Ragazzi, *The Concept of International Obligations Erga Omnes* 106 (Oxford 1997).

quandary of what to do when conduct is clearly morally reprehensible but not clearly illegal.

2. Is There A Right of Action for Reston on Behalf of the Victims of Schmandefare

Reston needs to display a complete understanding not of the individual holdings of the ICJ with respect to the *actio popularis*, but with the reasoning put forth by the various judges for the theoretical existence of such a right. There are a number of concurrences and dissents, as well as a couple of majority opinions, including the *Nuclear Test Cases*,[43] *Military and Paramilitary Affairs in and against Nicaragua*,[44] *Barcelona Traction*[45] and the *Gabcikovo-Magymaros Project Case*,[46] where jurists have laid out the reasons why the Court might allow an *actio popularis*. If Reston successfully shows that the conduct involved is slavery, it is the type of pernicious abuse of human beings that the Court has said should be eliminated, and has acknowledged that all states have a right to enforce this obligation.

Unless Annolay has succeeded in pressing its own *actio popularis* case, Annolay will reply that there is no such thing as an *actio popularis*, as shown by the ICJ's repeated refusal to recognize the concept in anything but theory. If Annolay did rely on the principle, then it needs to focus on the qualitative nature of the acts of which Schmandefare is accused and the elements of slavery, torture or whatever *erga omnes* obligation Reston has established, and argue that its conduct does not meet the definition of the principal obligation in question.

II. STATE RESPONSIBILITY

Once standing has been established and the wrongfulness of the conduct proven both Annolay and Reston must show that the other has incurred State responsibility. The doctrine of State responsibility means, simply, that the State itself is culpable for the wrongful conduct alleged.

Annolay must show that the current government of Reston has State responsibility either for the actions of the Restonian militia, or for its subsequent failure to prosecute them. Reston will have to demonstrate that Annolay has incurred State responsibility with respect to the treatment of the Cascadian women working for the Schmandefare Company. Both issues involve careful analysis of the law of State responsibility for the actions of private persons. In the first instance, Annolay is faced with the difficult task of linking the actions of the militiamen which occurred prior to the existence of the Republic of Reston. In the second instance, Reston must find a basis for culpability for the conditions to which the Cascadian women were subjected in Annolay. The latter argument

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[43] *See* footnotes 12 and 33.
[44] *See* footnote 32.
[45] *See* footnote 4 and discussion in the opinions cited in footnote 32.
[46] *See* footnote 32.

is made more difficult by the fact that the Schmandefare Company is undeniably a private company.

A. The Legal Standard for State Responsibility

The competitors must first establish the appropriate general standards for State responsibility. Competitors must be cognizant of the fact that responsibility can be incurred in two ways: (1) directly by State action or inaction, or (2) indirectly, by becoming responsible for the actions of private actors. The primary sources respecting rules of state responsibility are prior case law of the ICJ and the Articles of State Responsibility, promulgated by the International Law Commission (ILC) to the United Nations General Assembly. Competitors may also argue by analogy from the realms of international environmental, human rights and criminal law.

1. Direct Responsibility for State Action or Inaction

It is axiomatic in international law that a state becomes directly responsible when it breaches a duty or responsibility owed to another state. Here both Reston and Annolay have arguably directly violated obligations owed to one another, which will be examined in detail below. Because the Schmandefare Company is a private company with no links to the government of Annolay, direct responsibility will likely be the only basis upon which Reston can allege State responsibility.

2. Indirect Responsibility for the Actions of Private Persons

State responsibility may be incurred indirectly. The ICJ addressed indirect responsibility in two leading cases. In 1986's *Military and Paramilitary Activities in and against Nicaragua*, the ICJ focused on the liability of the United States for actions against the government of Nicaragua by the rebel Contra forces. In that case, the Court established a legal standard for attributing the acts of private actors to a state. For private conduct to be attributed to the State "it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." This is known today as the "effective control" test. The inquiry focuses on what the government did with respect to prospective conduct.

The second ICJ case was 1981's *United States Diplomatic and Consular Staff in Tehran*[47]. In this case, the ICJ considered whether Iran was liable for actions of Iranian students against the United States in connection with the seizure of the U.S. embassy. Even though Iran had no control of the initial take over, the ICJ determined that Iran did incur responsibility when it adopted the conduct of the students as its own and allowed the occupation of the embassy and the hostage taking to continue.

The second major source of law in this area are the Articles on State Responsibility, a longtime project of the International Law Commission (ILC), an expert committee charged by the United Nations with development of principles of international law. The

[47] *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (Judgment of May 24)

Articles are intended to codify the international law principles of state responsibility. The Articles have never been presented in a form susceptible of state signature or ratification; they were approved by the General Assembly by Resolution in 2001. A competitor seeking to base an argument on the Articles must argue either that the specific provision cited is a codification of existing customary law, or that the work of the ILC, a commission of experts on the topic of state responsibility, is deserving of consideration as a "most highly qualified publicist" under Article 38(1)(d) of the Statute of the ICJ. If the student chooses the latter route, the bench should be mindful that Article 38(1)(d) is merely "supplemental" to the other sources of international law.

If the competitor successfully introduces the Articles as a source of international law, the panel should force the competitor to choose which Article or Articles (s)he is relying upon. The panel should not allow the competitor to conflate evidence which demonstrates that one Article is a codification of custom with those that support another.

Article 1 of the Articles provides that the "every internationally wrongful act of a State entails the international responsibility of that State." Article 2 provides that a State commits an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to it and constitutes a breach of its international obligations. Article 3 states that how a state characterizes an act under its domestic law is immaterial if international law provides that it is unlawful.

B. Reston's Responsibility for the Rapes

Annolay, under developing principles of customary law, has a very strong argument that Reston is actually directly responsible for the actions of the guerrillas if they are viewed as an insurrectionist movement. Article 10 of the Articles provides that the conduct of a insurrectional or other movement, which prevails in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

Reston will argue that Annolay cannot establish responsibility based on Article 10, because the facts in the Compromis do not prove that there was an insurrectionist movement that became the new government. The mere fact that Raskolnikov, the leader of the militia, was elected President does not present the scenario contemplated by Article 10. In support, they may cite the Commentary to the Articles respecting Article 10 which arguably envisions a different scenario from the one presented in the Compromis.

Another possible basis of direct responsibility is Reston's failure to prosecute the rapists once they were in its territory and granting them amnesty instead. This basis of responsibility is that Reston owes an obligation to the international community to prosecute grave violations of human rights that violate obligations *erga omnes*. This argument will of course only be reached if the competitor is successful in establishing the *erga omnes* character of the prohibition against rape. Otherwise, given that the women are

Cascadian and Cascadia is not appearing in this case, there is no party in this proceeding to whom Reston owes a duty to act.

As for indirect responsibility, Annolay will have a difficult time establishing that the current government in any way controlled the guerrillas as set forth in the ICJ's *Nicaragua* case. The statements made by Raskolnikov make it clear that, while he was aware of the activities of the guerrilla bands, he did not order them to engage in the rapes or even necessarily command them in any other meaningful fashion. There may be an argument, that the pardon operates as an adoption of the conduct by the government of Reston. This is particularly true when combined with the stipulated fact that the rapes did occur as a means to instill fear and intimidation into the populace of Cascadia, arguably a military objective from which the rebels that eventually formed Reston benefited.

Reston may also argue necessity with respect to the amnesty. Many States which have granted similar amnesties have argued that it was the only means of safeguarding and ensuring the continued viability of the State. States where prosecutions proceeded, (for example, Argentina), were in fact faced with military rebellions and other challenges to the government.[48] Another fact to consider in favor of Reston is that once control was established and Reston was created it provided counseling and assistance to rape victims, therefore this is not the kind of blanket amnesty that pretends that nothing has happened. Scholars writing on the topic of amnesties unanimously agree that one factor suggesting an amnesty is appropriate is if the State acknowledges the wrong and tries to provide some sort of redress. Annolay should point out that there are no apparent threats here to the Restonian government and that the preconditions for invoking necessity have not been met.

C. Annolay's Responsibility for the Women from Cascadia Working for Schmandefare

Annolay has potential direct responsibility if it is established that Annolay's actions in not enforcing its own domestic law to prevent the brothels from operating violated international law. Annolay also has direct responsibility if it had a duty to stop Schmandefare's conduct.

There is no indirect responsibility in this case as there are no facts to suggest that Mr. Schmandefare acted under the direction and control of Annolay or that Annolay adopted his conduct as its own. The two principal ICJ cases, *Nicaragua* and the *Hostages Case* are inapplicable to this fact scenario

To establish direct responsibility, Reston must show that allowing Schmandefare's conduct breached an obligation of Annolay not to allow its citizens to force others into prostitution or sexual slavery and a to prevent trafficking in women. It is important to note that the acts of Schmandefare continue as his operations have not been halted, thus if the actions are unlawful, Article 14 of the Articles comes into play. It provides that "the

[48] See generally Diane Orentlicher, *Settling Accounts*, 100 Yale Law Journal 2539 (1991).

breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."

The international community has long decried the trafficking in women as unlawful; however, bans against forced prostitution have met with less universal support. Here, the facts are relatively thin as far as a claim for trafficking is concerned since the women relocated apparently voluntarily and no money changed hands; however, some scholars argue that the possible false pretenses and the restrictive conditions under which the women are kept do place their treatment under the rubric of trafficking. Given the story of Heidi F. and the international reporting on the Cascadian women, Reston does have a strong argument that forced prostitution is occurring.

The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others dates back to 1950,[49] yet it is weak evidence of custom, because today less than a quarter of United Nations members are parties. While the Convention provides that states are to punish traffickers and owners of brothels and are to ensure that women cannot be lured into these types of situations, its specific terms apply only to its members and neither Annolay nor Reston is a party to the Convention. Therefore, Reston must establish that Annolay's direct responsibility was engaged by virtue of a customary rule of law respecting forced prostitution. The small number of signatories and the even smaller percentage of those that have actually ratified the treaty make it impossible to cite the treaty as a codification of custom; therefore, Reston must give other examples of state practice and *opinio juris* that supports a customary rule.

In 1974, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights formed a Working Group on Slavery which called trafficking in women and children a form of slavery as did the U.N. Commission on the Status of Women. The Nairobi Forward-Looking Strategies ("Strategies") that were drafted at the 1985 International Women's Conference also called forced prostitution as "a form of slavery imposed on women by procurers." In 1989, the European Parliament called the traffic in persons for the purpose of prostitution "one of the most degrading forms of slavery to which individuals can be subjected." It urged EC member states to repress procurement, change the attitude of society and prevent prostitution through "the provision of employment, education, vocational training and equal opportunities for women."[50] These findings of international bodies when combined with the writings of scholars and holdings in the Yugoslav tribunal give Reston an argument that it is a rule of customary international law that trafficking in persons and forced prostitution are violations of customary international law.

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[49] Convention for the Suppression of the Traffic in Persons and of the Exploitiation of the Prostitution of Others (21 March 1950, entered into force 25 July 1951).

[50] Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, Fordham International Law Journal 163 (Nov. 1994).

In response, Annolay has both factual and legal arguments. Factually, the women, as noted before, came voluntarily and are being compensated, other than the fact that they are closely watched to keep them from running away, there is no indication that they are not free to leave provided they can meet their contractual obligation to Schmandefare. Just reading the previous sentence, however, makes clear that this line of argument is quite unpalatable given the reality of the lives of the women in Schmandefare's brothels even if it is a technically correct inference from the facts. Therefore, a simpler and more effective approach would be for Annolay to concentrate on the legal arguments.

First, as noted above in the discussion regarding standing, Annolay needs to dispel any notion that the treatment of the women constitutes slavery at least as that concept is understood in the *erga omnes* context. Then Annolay must show that there is no customary rule obligating states to punish persons such as Schmandefare. Here both state practice and opinio juris seem to weigh heavily in favor of Annolay. Trafficking occurs in virtually every country in the world and most do nothing to combat it.[51] Those few states that do prosecute offenders do so only rarely and sentences imposed are relatively minimal. *Id.*

Annolay also has a defense available to it as a result of the manner in which the information about Schmandefare became known. Although Heidi F. complained to the police – and several other Annolaysian government agencies had received written complaints – no formal investigation was ever initiated. Annolay may therefore attempt to characterize these complaints as isolated occurrences, and nothing that rises to the level of actual knowledge on the part of the State. In fact, after the ILSA Report alleged that the practices were widespread, Annolay began investigating the matter. Annolay can assert its right of sovereignty over its people to preclude Reston from interfering with its internal affairs. Until it is established that Annolay is acting in bad faith in its investigation of Schmandefare, Reston has no right to interfere in Annolay's domestic affairs. This would also aid Annolay later in opposing Reston's claim to universal jurisdiction to prosecute Mr. Schmandefare.[52]

III. Is Reston in Breach of Its Obligations With Respect to Bribes Exacted by Its Officials?

A. The General State of Customary Law Respecting Corruption

There are a variety of multilateral, regional and bilateral conventions or treaties that attempt to deal with the global problem of corruption. Most focus both on the bribe giver and the bribe taker. The Conventions dealing with corruption do not, unlike a number of human rights conventions, oblige states to promise not to be corrupt or to stop corruption

[51] *Ibid.*

[52] *See, for example,* United Nations General Assembly Resolution 2131(XX). Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.

in other countries, rather, they encourage countries to pass domestic legislation to prevent corruption and, by implication, to enforce these provisions of domestic law. Therefore, any customary law derived from these conventions, for example the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions[53] and the Council of Europe Criminal Law Convention on Corruption (the "COE Convention"),[54] is limited to an obligation to enact end enforce domestic law. For example, the COE Convention calls for effective, proportionate, and dissuasive sanctions and measures and requires adoption of all kinds of measures to promote enforcement, such as witness and whistleblower protection.

Even before the corruption conventions, just about every country had a law on the books prohibiting domestic active bribery (that is, bribe paying within a country's borders and Annolay should be prepared to give examples of such domestic legislation. As far as multilateral agreements are concerned, there is the 1996 Interamerican Convention against Corruption (OAS Convention) required parties to criminalize active and passive (solicitation or reception) bribery; the 1997 OECD Recommendation calling for domestic action and the negotiation of a treaty on transnational active bribery in connection with business; the 1997 European Union Convention on Corruption of EU or Member Officials, and the Council of Europe Criminal Law Convention. These cover approximately 60 countries to varying degrees. In February, 1999, officials of 100 countries met at Global Forum and drafted Guiding Principles which are non-legally binding recommendations endorsing the effectiveness of laws against active and passive bribery. In February of 2000, the participating countries of the Stability Pact Anticorruption Initiative agreed to ratify and implement the Council of Europe Convention and the principles of the OECD Convention. The UN Transnational Organized Crime Convention, which has active and passive bribery prohibitions, is not yet in effect but to date has 141 signatories and 18 parties (40 are needed). Finally, the OECD-Asia Development Bank Anti-Corruption Action Plan for Asia and the Pacific, a nonbinding document endorsed by about 17 countries at the end of 2001, includes a call to take effective measures to actively combat bribery by ensuring the existence of legislation with dissuasive sanctions which effectively and actively combat the offence of bribery of public officials. Taken in total these measures suggest at least an emerging customary norm.

B. Application of the General Standard to Reston's Actions

On the merits, Annolay will argue that the actions of the Restonian border officials violate the Regional Anti-Corruption Convention ("RACC") to which Annolay is a party and to which Reston is a signatory.[55] Reston will respond, in the first place, that although it has

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[53] The text of the OECD Convention is available online at http://www.oecd.org/EN/document/0,,EN-document-88-3-no-6-7198-0,00.html

[54] STE No. 173. Available online at http://conventions.coe.int/treaty/en/Treaties/Html/173.htm.

[55] According to the *Compromis*, the text of the RACC is identical to the text of the COE Convention, *supra* note 49. Therefore, this Bench Memorandum will refer to the provisions of the COE Convention. Judges should be aware that students may – improperly – refer interchangeably to the COE Convention and the RACC.

signed the Anti Corruption Conventions, it has not ratified it and therefore under Article 18 of the VCLT, it is not bound by the letter of the signed treaty, but merely prohibited from taking any action which defeats the object and purpose of the treaty. Whether arguing for or against the treaty's application, the competitor should be prepared to explain the object and purpose of the RACC.

If Annolay loses the argument that the RACC itself binds Reston, which is probable, then Annolay should also argue that, even if the treaty does not apply directly, there is a body of customary law in existences that prohibits actions such as those taken by the Restonian Border officials. Since customary law has two key components, state practice and *opinio juris*, both teams should be able to give examples of how states have dealt with corruption, either by their officials or their citizens when those citizens are active abroad. There is likely to be a dichotomy between what States have stated officially, enacted in their domestic laws and agreed to by signing various multilateral or bilateral agreements and what is actually done when cases of corruption are discovered. This should be an area where a lot of questions may be asked of the competitors to resolve these real and apparent contradictions.

Arguments by Annolay against Reston should be generally confined to the fact that Reston does not have specific domestic laws against corruption or designed to prevent corruption and this violates the customary law in this area. Reston, under present customary rules respecting corruption is not liable for failure to stop corruption but would be liable, assuming the competitors are able to show state practice and *opinio juris* is sufficient to establish a customary rule, for failure to enact and enforce domestic laws.

Annolay can argue not only that Reston's laws are insufficient but also that Reston is not interested in effectively enforcing its relevant laws. Initially, President Raskolnikov refused to act and when he finally did act no one was prosecuted, and only a small percentage of the apparently guilty officials were even transferred or otherwise sanctioned. In trying to establish that the requirement to enact laws prohibiting or discouraging corruption is customary international law, Annolay can cite fairly significant state practice some examples of which are given above.

Reston on the other hand should point to the fact that there is rampant corruption in international business and other areas of international relations with relatively few prosecutions, and therefore the actual practice is contrary to the professed objectives of the international community. Reston may also argue that to the extent there is any obligation, Reston has met that obligation by punishing those border officials whose wrongful acts could be proven. This argument is supported by the rule, set out in the *North Sea Continental Shelf Cases*, that when a treaty establishes a general customary rule compliance with the general rule, rather than the specific enforcement measures under any of the conventions, is all that is required.

C. Reston's Affirmative Defenses

Reston may argue that Annolay is precluded from bringing the claim because Annolaysian citizens forced to pay the bribes made no effort to exhaust local remedies which is a prerequisite to the exercise of diplomatic protection.[56] The only exception to the exhaustion requirement is futility and Annolay may argue that given the lackadaisical treatment accorded to those few border officials who were disciplined, there is clear indication that resort to the Restonian courts would have been futile.[57] **This is the only issue in the Compromis where exhaustion of local remedies is implicated. The argument is not appropriate with respect to the rapes or the acts of Schmandefare.**

Finally, Reston has an argument of unclean hands against Annolay because the Annolaysian couples are clearly guilty of active bribery for the $2,500 payments, and are probably guilty of active bribery for the $500 payments. Competitors should differentiate between this and passive bribery as the Conventions make this distinction and place a higher penalty on active bribery. Annolay has not prosecuted any of the couples and thus may even be arguably complicit in the unlawful removal of the children from Reston given that the subject of some of the bribes was the fact that parents failed the required fitness interviews. For a payment to be a "grease" or "facilitating" payment (which are permissible under some of the treaties and domestic laws), the governmental action solicited must be legal, the action must be ministerial (ie, non-discretionary), and the payment should be minor.

Reston should argue that the guards are acting "without authority," and appear to be soliciting the payment to avoid the imposition of a barrier to crossing the border not provided for under the law; therefore, the payment is not to speed up or expedite a legal, ministerial task. This payment is arguably a small one, but the other tests are clearly not met. The second payment, of $2,500, is clearly in consideration of an illegal action, and can't be considered a grease payment. The dimension of the payment, perhaps reflecting the clear illegality, also makes it look more like a bribe.

Under Article 2 of the Council of Europe's Criminal Law Convention, active bribery of public officials is prohibited. It consists of intentional promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for him or her to act or refrain from acting in the exercise of his or her functions. Active bribery is a payer to recipient crime. Under the Council of Europe Convention (the analog to our fictional convention), no transborder activity or business transaction element is required. Reston should argue that while in each case the conduct appears to be initiated by the guards, the conduct of the Annolaysian couples satisfies the elements. Maybe the case is a bit harder in the case of the $500 payment, as the only "advantage" the bribe payer is obtaining is avoiding the application of an illegal barrier, not something within the border guards' official functions. Reston should still try to show that the Annolaysian wrongdoing precludes a finding of wrongful conduct on the part of Reston.

Likewise, Art. 3 of the Council of Europe Convention dealing with passive bribery has the

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[56] *Case Concerning Elletronica Sicula S.P.A.*, 1989 ICJ 15 (1989).
[57] *The Finnish Shipowners Case*, (Finland v. G.B.), 3 UN Rep. Int'l Arbitral Awards 1479 (1939).

same elements but focuses on "the request or receipt" by any public official of the bribe, so the conduct of the guards is also illicit. Annolay should focus on this provision.

Both Reston and Annolay should point out to the Court that neither case is illicit under the OECD Convention which requires transborder, business-related bribery, but that the OAS Convention does require criminalization of active and passive domestic bribery, as does Art. 8 of the UN Transnational Organized Crime Convention.

IV. IS RESTON ENTITLED TO EXERCISE UNIVERSAL JURISDICTION OVER FRED SCHMANDEFARE?

There are six bases upon which states have asserted extraterritorial jurisdiction over conduct occurring outside their borders: (1) the "objective territorial principle," where the act occurred abroad but its effect was felt within the prosecuting state's territory (e.g., narcotics trafficking, antitrust violations); (2) under the "nationality principle" where the perpetrator is a national of the prosecuting state; (3) under the "passive personality principle," where the victim is a national of the prosecuting state; (4) under the "protective principle," where the act affects the essential security interests of the prosecuting state (e.g., espionage, visa fraud, terrorism); and (5) under the "universality principle," where the act is universally condemned (e.g., war crimes, crimes against humanity, genocide).[58]

In this case, Reston cannot make – and does not seek to make -- any argument on the first four principles. The only option for asserting jurisdiction is the "universality principle." It is somewhat akin to the previously discussed *actio popularis* but deals with prosecution of foreign persons for conduct occurring outside a state's borders by that state's domestic courts. Much like the *actio popularis*, universal jurisdiction has not been advocated very frequently. For example, the United States' efforts to interest other States in prosecuting Pol Pot in 1997 met with complete disinterest.[59] Conversely, there is a practice among members of the European Community and the U.S. pursuant to its Alien Tort Claims Act to prosecute and/or allow civil suits against human rights violators, and both Reston and Annolay should give these differing examples in trying to establish the existence or non-existence of universal jurisdiction.

The concept of universal jurisdiction was introduced in the four Geneva Conventions of 1949.[60] The Geneva Conventions introduced the strong concept of "mandatory universal

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[58] *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

[59] Steven R. Ratner & Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy 141 (1997).

[60] *See, e.g.*, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, U.N.T.S No. 970, vol. 75, pp. 31-83 (1950), signed at Geneva, 12 August 1949, at Art. 49, para. 2. ("Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, arid shall bring such persons, regardless of their nationality, before its own courts."); Single Convention on Narcotics and Drugs (1961), at art. 36(2)(a)(iv); International Convention against the Taking of Hostages of 17 December 1979, at art. 8 (States parties shall try or extradite accused hostage-takers "without exception whatsoever and whether or not the offence was committed in its territory").

jurisdiction," whereby States parties are *required* to find and try persons guilty of "grave breaches" under the Conventions, regardless of their nationality, and wherever they might be found.

"Permissive universal jurisdiction," whereby States are permitted to exercise criminal jurisdiction over a violator of international humanitarian law, is embodied in several other treaties.[61] In addition, several States have implemented legislation enabling them to exercise limited forms of universal jurisdiction, usually based upon the grant of jurisdiction under treaties.[62] National courts have given a broader rein to extraterritorial grants of jurisdiction in cases of, for example, genocide[63] However, even in municipal courts, there is plenty of evidence that, without a treaty basis for universal jurisdiction, such jurisdiction is not to be exercised by a State.[64]

Because the concept has been known more for its theoretical discussion than its actual application it creates a significant problem for anyone attempting to argue it is customary law; however, there is some evidence that, in the right circumstances, it will be sustained. Universal jurisdiction depends on whether a treaty or custom recognizes it a jurisdictional ground for enforcing a particular international law obligation and whether jurisdiction should, given concerns of state sovereignty, be extended to give a right of enforcement to

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[61] *See, e.g.*, Torture Convention, *supra* note 21, at arts. 4 and 5.

[62] The broadest example is the Belgian Law of 16 June 1993, as modified 1999 (allowing exercise of universal jurisdiction by Belgian domestic prosecutors in cases of, *inter alia*, genocide and "grave violations of international humanitarian law). The Belgian law, and the exercise of universal jurisdiction thereunder, was the subject of the 2000 *Arrest Warrant Case* between the Democratic Republic of the Congo and Belgium. *See* discussion accompanying note 59 *et seq.* In addition, *see* United Kingdom War Crimes Act of 1991 (allowing prosecution for war crimes committed in Germany during World War II by persons who were at the time, or had subsequently become, citizens or residents of the United Kingdom); Australian War Crimes Act of 1945, as amended in 1988 (allowing prosecution for World War II-era war crimes committed by persons who, *at the time of being charged with the offense*, [emphasis added] were Australian citizens or residents); Criminal Code of Canada 1985, art. 7 (conferring jurisdiction, broadly, where the accused is (a) a Canadian citizen, (b) employed by Canada in a military or civilian capacity, or (c) when the person's presence in Canada at the time of the act or omission gives rise to jurisdiction.)

[63] *See* Mary Ellen O'Connell, *New International Legal Process*, 93 Am. J. Int'l L. 334, 341 (1999), citing the Danish case *Director of Public Prosecutions v. T.* (trial of a Croatian national accused of war crimes against ethnic Bosnians committed within the territory of Yugoslavia). *See also* Brigette Stern, *International Decisions*, 93 Am. J. Int'l L. 525, 528 at notes 20 & 21 (1999) (citing French laws allowing for the exercise of universal jurisdiction for crimes within the cognizance of the *ad hoc* international criminal tribunals for Rwanda and the former Yugoslavia).

[64] *See, e.g., In re Javor*, 1996 Bull.crim., No. 132, at 379, French Cour de Cassation, Criminal Chamber, March 26, 1996 (where the Genocide Convention does not expressly provide for universal jurisdiction, French courts are without power to prosecute defendants who lack a territorial or personality nexus with France). The *Javor* court expressly rejected an argument that customary international law has developed to the point of allowing the exercise of universal jurisdiction over criminal defendants accused of genocide. Note, however, the the French criminal code was subsequently twice amended, in 1995 and 1996, to allow for universal jurisdiction over crimes within the cognizance of the international criminal tribunals for Rwanda and Yugoslavia.

a State not particularly connected to the wrong.[65] One frequently cited example of a wrongful act that justifies an exercise of universal jurisdiction is slavery.[66]

The International Court of Justice declined the opportunity to discuss universal jurisdiction in the 2002 *Arrest Warrant Case*.[67] In that case, Belgium issued an "international arrest warrant *in absentia*" against the foreign affairs minister of the Democratic Republic of the Congo, alleging crimes against humanity, including violations of the Geneva Conventions of 1949. In its judgment, the Court ruled that the minister enjoyed full and inviolable immunity from prosecution, deriving from his official position as foreign affairs minister.[68] Although Congo's original submissions argued that Belgium's exercise of universal jurisdiction was improper, it withdrew this claim in its final submissions, resting entirely upon the immunities argument. As such, the Court expressly declined to rule upon whether the exercise of universal jurisdiction – whether in the specific case, or in general – was proper.[69]

Although the Judgment in the *Arrest Warrant Case* did not reach the issue of universal jurisdiction, three Justices joined in a Separate Opinion, discussing the issue at length.[70] After reviewing existing treaty law, state practice and learned writings, the Justices were compelled to admit that there was precious little evidence in support of universal jurisdiction as a customary norm, stating, "[V]irtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction."[71]

However, the Separate Opinion Justices strained to legitimize Belgium's exercise of jurisdiction, relying upon a general trend in international law that persons accused of grave breaches of international humanitarian law not go unpunished.[72] After reviewing State practice, the Justices came to the conclusion that no rule of international law *prohibits* the exercise of universal jurisdiction *in absentia*, and proceeded to discuss certain safeguards which must be implemented in exercising such jurisdiction.[73] The Justices also limited the use of universal jurisdiction *in absentia* to "those crimes regarded as most heinous by the

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[65] *Ibid.*

[66] Steven R. Ratner & Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy 141 (1997).

[67] Case Concerning the Arrest Warrant of 11 April 2000 (D.R.Congo v. Belg.), 2002 I.C.J. Rep. ___ (2002).

[68] *Arrest Warrant Case*, at para. 54.

[69] *Arrest Warrant Case*, at para. 41.

[70] See *Arrest Warrant Case*, Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal. ("*Arrest Warrant* Case, Separate Opinion") The justices reasoned that the legitimacy of the exercise of jurisdiction was a necessary prior inquiry to the issue of the validity of Congo's immunity claim, stating, "If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise." *Arrest Warrant Case*, Separate Opinion at para. 3.

[71] *Arrest Warrant Case*, Separate Opinion, at para. 45.

[72] *Id. at para. 52.*

[73] Among the safeguards were included respect for immunities, exhaustion of local remedies, and independence of the court or prosecutor from the political machinery of the forum State. *Id.* at para. 59.

international community,"[74] and specifically enumerated piracy[75] and "crimes against humanity."[76]

Both Annolay and Reston should be questioned by the Bench, in order to determine that they understand the importance to their argument of the status of trials *in absentia*, and can defend their position with respect to such trials.

Annolay may distinguish the *Arrest Warrants Case* by pointing out that, in that case, the Court was addressing the question of whether the mere exercise of an international arrest warrant *in absentia*, based solely upon universal jurisdiction, is valid. In this case, there is an additional element: Reston also seeks to try Mr. Schmandefare *in absentia*, a practice which Annolay will argue violates international law. Reston will point out that the ICCPR, which has been ratified by Annolay, as well as the preponderant majority of States, prohibits criminal trials *in absentia*.[77]

However, since Reston is not a party to the ICCPR, that covenant creates no rights for Reston,[78] unless the prohibition against trials *in absentia* contained in the ICCPR is reflective of a rule of customary international law.[79] Annolay faces an uphill battle in proving a customary norm: while over 20 States prohibit trials in absentia, the practice of trying serious criminals *in absentia* dates at least to the post-WWII Nurenberg Trials, and continues to this day in countries including the United States, France, Italy, and Belgium.

Looking to the substantive claims against Schmandefare, Reston will try to make the case that his acts either constituted crimes against humanity or that they constituted slavery as envisioned by the definitions in the US Restatement, various Conventions and writings of scholars. Here the Compromis springs a bit of a trap for the unwary. Reston has stated that it seeks to prosecute Schmandefare for Crimes Against Humanity; however, slavery is a basis for universal jurisdiction that is actually easier to establish under the facts presented and less controversial than Crimes Against Humanity. Therefore both bases should be briefed.

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[74] *Id.* at para 60.
[75] *Id.* at para. 61.
[76] *Id.* at para. 62. The Justices cited with approval the list of crimes against humanity enumerated by the International Law Commission in its 1996 Draft Code of Crimes Against the Peace and Security of Mankind, to wit, (a) murder, (b) extermination, (c) torture, (d) enslavement, (e) persecution on political, racial, religious or ethnic grounds, (f) institutionalized discrimination on these grounds, involving the violation of fundamental human rights, (g) arbitrary deportation or forcible transfer, (h) arbitrary imprisonment, (i) forced disappearance, (j) rape, enforced prostitution and other forms of sexual abuse, and (k) other inhuman acts which severely damage physical or mental integrity, health or human dignity, such as mutilation or severe bodily harm.
[77] ICCPR, *supra* note 2, at art. 14(3)(d): "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . To be tried in his presence . . ."
[78] VCLT, *supra* note 1, at art. 34.
[79] In this respect, *see, e.g., id.* at art. 38.

In order for a misdeed to be considered a "crime against humanity," it must generally either be directed against a large number of civilian persons (an outgrowth of the fact that most crimes against humanity have been but are not necessarily linked to armed conflicts) or be committed, in a planned and systematic manner, against a specific population and not merely random individuals.[80] In this case, there is a somewhat attenuated nexus to armed conflict in that the women were put in the position where they could be recruited by Schmandefare as a result of the Civil War. However, Schmandefare had nothing to do with that war and his acts were not directed against a large number of civilian persons. Reston can, however, argue that they were committed in a planned and systematic manner against a specific population, namely the female rape victims resident in Cascadia.

Annolay should point out that one has to look at who commits the act, usually governments or persons acting in lieu of or on behalf of governments. *Id.* At 58-61. Schmandefare is a private individual acting for purely personal purposes and not on behalf of any government or governmental purpose. The Compromis does contain facts that suggest there was government acquiescence in Schmandefare's acts and some cooperation by various government agencies that facilitated Schmandefare's operations but this is probably not enough to create the required linkage.

The Statute of the International Criminal Court was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998. In Article 7, the Statute includes in the definition of crimes against humanity enslavement, severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. Using this definition, Reston could bring Schmandefare's conduct within the ambit of Crimes Against Humanity; however, since Annolay is not a party to the Treaty and Reston is not either, it would still require a showing that the language in the Treaty reflected customary international law a priori.

Conversely, if Reston is able to make the argument, addressed in detail above, that the treatment of the women does constitute slavery or a slavery-like condition then there is virtual unanimity among the courts and scholars that such a violation would justify an exercise of universal jurisdiction.

If Reston is unable to make a case for sexual slavery, it may attempt reliance upon the ILC's Draft Code of Crimes Against the Peace and Security of Mankind.[81] The Draft Code enumerated in its definition of crimes against humanity "rape, enforced prostitution and other forms of sexual abuse . . . when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group."[82] As noted above, the list of crimes against humanity contained in the Draft Code was specifically cited with approval by Justices Higgins, Kooijmans and Buergenthal in their

[80] *See* Ratner & Abrams, *supra* note 54.
[81] U.N. Doc. A/48/10 (1996).
[82] *Id.* at Art. 18(j).

Separate Opinion in the *Arrest Warrant Case*. Article 1(2) of the Draft Code includes such acts among "crimes under international law and punishable as such, whether or not they are punishable under national law."[83] Article 8 explicitly institutes mandatory universal jurisdiction, stating, "each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed."[84] However, the Draft Code is merely a draft, and the commentary thereto does not indicate particularly strong State practice in support thereof. Therefore, while Reston might be able to use the Draft Code to bolster an otherwise strong case, it is, standing alone, not strong support for Reston's position.

As a final note, Annolay may make the ill-advised opinion to attempt to sidestep the issue of universal jurisdiction. However, the Court is not able to avoid the issue of universal jurisdiction in this case, as it did in the *Arrest Warrant Case*. There is no issue of immunity here, and the question of the legal status of universal jurisdiction – and the legality of Reston's exercise thereof, is squarely before the Court in the present case.[85]

V. Damages

While the request for relief does not require the competitors or the Court to enter into a calculation of damages (which in any event is not done by the ICJ but is done by appointment of special master) there will often need to be a theoretical discussion of types of damage recoverable, If either Annolay prevails in its claims against Reston for the rapes or Reston prevails with respect to the forced prostitution, damages may be awarded. There may also be an award of damages with respect to the allegations of bribery.

Article 31 of the Articles states that the responsible State is under an obligation to make full reparation for the injury caused by its internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State. Article 34 provides that "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination." Article 35 enshrines the principle set forth in the PCIJ's *Chorzow Factory*.[86] "State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

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[83] *Id.* at Art. 1(2).
[84] *Id.* at Art. 8.
[85] In the *Arrest Warrant Case*, the Court relied upon the doctrine of *non ultra petita*. Since Congo did not rely upon an attack on the validity in its final amended submission, the Court was free to focus on the issue of immunity to resolve the case. Belgium expressly raised the *non ultra petita* doctrine in its reply.See *Arrest Warrant Case*, at para. 41.
[86] *Case of the Factory at Chorzow 1928 P.C.I.J. (Ser. A) No. 17.A*