

INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE 2003 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

**CASE CONCERNING THE WOMEN AND
CHILDREN OF THE CIVIL WAR**

**REPUBLIC OF ANNOLAY
(APPLICANT)**

v.

**REPUBLIC OF RESTON
(RESPONDENT)**

MEMORIAL FOR THE APPLICANT

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Statement of Facts

This dispute arises from the Dysfuntian civil war between Restonian and Cascadian militias, resulting in the creation of Reston (Respondent) –a developing State- and Cascadia (not party to the case). Annolay (Applicant) -a neighboring State- remained neutral during the war and offered its services for a peace conference.

In April 1997, WRI reported that Restonian militiamen were systematically raping Cascadian women. This was confirmed by a UNCHR mission, which found that Raskolnikov, the Restonian militia leader, and his deputies took no steps to stop the rapes. In 1998, Raskolnikov admitted his knowledge of the rapes and that he was powerless to stop them.

In 1999, the militias agreed to a cease-fire. On 14 September, Dysfunctia partitioned, and on November 1st, Reston held its first elections. Raskolnikov, President elect, granted a comprehensive amnesty to everyone in Reston accused of wartime crimes as part of his “National Healing Campaign”.

The WRI Executive Director campaigned for the adoption by Annolaysian parents of children left orphaned by the war. ARAS arranged for parents to attend interviews in Reston to qualify for and receive foreign adoption certificates, and nearly 2000 children were adopted.

In January 2001, the ITP revealed that Restonian border officials were exacting bribes from adoptive parents. The officials kept these amounts. On February 2, Annolaysian President Contrary urged Raskolnikov to address the corruption. Raskolnikov replied that it was a small issue, and that Annolay was complicit in the children’s illegal removal. Upon further pressure, Reston reassigned 10 border officials accused of corruption –10% of those implicated. None were prosecuted or disciplined.

On March 21, 2001, Contrary expressed concern about the wartime rapes of Cascadian women, and urged Cascadia and Reston to punish the perpetrators and pay reparations to victims. On March 31, 2001, Raskolnikov reminded Annolay of the amnesty, denying that his government owed any reparations. On

April 20, 2001, given its neighbors' failure to pursue the matter, Contrary stated that Annolay would take up the cause and seek reparations for the women.

On December 1999, the UNCHR estimated that thousands of raped women lived without families or means of support. Reports indicate that in September of that year agents of the Schmandefare Co. -an Annolaysian private company founded by Fred Schmandefare (Annolaysian, and company CEO)- traveled to Cascadia to recruit hundreds of these women to find new lives in Annolay. They were promised jobs and education, and were assisted in filing work and travel documentation. Once in Annolay, nearly all began working in the Company's brothels. By December 2000, over 2,500 Cascadian women had been relocated to Annolay, which granted them resident status. According to the ITP, Schmandefare organized their recruitment and transportation to Annolay.

On 1 May 2001, ILSA published a report focusing on Cascadian women working in Schmandefare's brothels, alleging that many were abused and deprived of their liberty, and that Annolaysian agencies had dismissed women's complaints. The Report provided a detailed account of a Cascadian rape victim living in the brothels, who was subject to harsh living and working conditions. On May 17, 2001, Contrary expressed shock and horror at this, and announced the creation of a blue-ribbon panel to examine the problem. She denied Annolay's responsibility for the brothels' operation, and her government's independent knowledge of the facts in the report. She expressed her concern for the Cascadian women, yet affirmed that the Report was insufficient basis for criminal charges. She recognized that although complaints had been filed, the government was not involved in the abuse of Cascadian women.

On 19 May, 2001, Raskolnikov ordered his Justice Minister to perform an investigation on human rights violations in Annolay. Later that day, the Justice Ministry announced that it would prosecute Schmandefare for trafficking in women for sexual slavery based on the universal jurisdiction principle applicable to crimes against humanity. It is the first time that Reston invokes universal jurisdiction. Reston announced that it

would try him *in absentia* if jurisdiction was not obtained, and requested Schmandefare through diplomatic channels. There is no extradition treaty between Annolay and Reston.

The following day Contrary accused Raskolnikov of trying to distract attention from his country's problems, denying the commission of a crime against humanity and Reston's right to exercise universal jurisdiction. She requested that Reston respect Annolay's sovereignty.

On 21 May 2001, Raskolnikov released copies of the ILSA Report's unpublished background research, which indicated that the Schmandefare Co. operated dozens of brothels. Raskolnikov reiterated Reston's intention to try Schmandefare under the universality principle.

Following unsuccessful mediation by the UNSG, the parties agreed to submit their differences to the ICJ.

Contrary has ordered Schmandefare not to leave the country, pending the judgment of the Court.

Statement of Jurisdiction

Annolay and Reston have submitted by Special Agreement their differences concerning the women and children of the Dysfunctionian civil war and related matters, and transmitted a copy thereof to the Registrar of the Court pursuant to article 40(1) of the Statute. Therefore, both parties have accepted the jurisdiction of the ICJ pursuant to Article 36(1) of the Statute.

Summary of Pleadings

I. The Court should declare that Reston has breached its international obligations and must pay damages to Annolay to be distributed to victims of systematic rape during the Dysfunctional civil war now resident in Annolay. Annolay has standing since it can exercise diplomatic protection on behalf of the victims based on the effective link doctrine. In any case, since the rapes constitute war crimes in violation of Common Article 3 of the 1949 Geneva Conventions or, at least acts of torture, Annolay has standing because Reston breached these *erga omnes* obligations. Reston's responsibility arises from the attribution of the acts of the Restonian militia to the new State of Reston because of the continuity of the organization of the militia and that of the new State, as well as from Reston's subsequent ultimate default to prosecute and punish the perpetrators of such criminal acts through the granting of a comprehensive amnesty. Indeed, the granting of amnesty for gross violations of human rights is rejected under customary law.

II. Reston is in breach of its international obligations with respect to the bribes exacted by its border officials from Annolaysian citizens, and is obligated to pay restitution in the amount of the bribes. Annolay's claim is not barred by the clean-hands doctrine, since the damage was not due to the sole fault of the parents, nor were the parents required to exhaust local remedies as such remedies would be futile. Reston is responsible for the bribes due to its failure to enact anti-bribery legislation -which defeats the object and purpose of the RACC- and as a result of not prosecuting and punishing the corrupt border officials. Furthermore, by not preventing the improper financial gain of those officials involved, Reston breached customary obligations set out in the CRC regarding adoption, which directly relate to the Best Interest of the Child Principle.

III. Reston is not entitled to exercise universal jurisdiction over Schmandefare, as it intends, since the only available evidence of a crime against humanity subject to universal jurisdiction are press articles and NGO reports, which are insufficient to establish a *prima facie* case of Schmandefare's guilt. Moreover, the contextual elements required of crimes against humanity are not met because Schmandefare was acting in

his private capacity without instigation from any State or organization, and the attack was not directed against a specific civilian population. Reston is also barred from exercising universal jurisdiction, as the universality principle has not gained customary status. Additionally, trials *in absentia* are forbidden under international law, as evidenced by State practice. Moreover, trying Schmandefare *in absentia* without proper notice clearly breaches his right to due process, specifically to be present at trial. Finally, since Reston's assertion of universal jurisdiction over Schmandefare is retaliatory to Annolay's purpose of seeking reparation for the war victims, it is in bad faith.

IV. Annolay has not breached any international legal obligations deriving from the alleged treatment of Cascadian women working in brothels in Annolay, and in any event, Reston has no standing to enforce such obligations. Indeed, the obligations relating to trafficking have not acquired *erga omnes* status, hence Reston, as it is not an injured State, cannot invoke Annolay's responsibility. Alternatively, Annolay is not responsible for the treatment of the Cascadian women since customary law does not provide Reston any grounds for enforcing the obligation to prevent and punish trafficking upon Annolay, due to the lack of consistent State practice. Also, the creation of the investigatory panel evidences Annolay's diligence in the matter.

Questions Presented

1. Whether Reston has breached its international obligations and must pay damages to be distributed as reparations to those victims of systematic rape during the Dysfunctionian civil war now resident in Annolay;
2. Whether Reston is in breach of its international obligations with respect to the bribes exacted by its border officials from Annolaysian citizens and is obligated to pay restitution in the amount of the bribes to Annolay on behalf of the Annolaysian adoptive parents;
3. Whether Reston is entitled to exercise universal jurisdiction over Mr. Fred Schmandefare; and
4. Whether Annolay has breached any international legal obligations deriving from the alleged treatment of Cascadian women working in brothels in Annolay, and whether Reston has standing to enforce such obligations.

I. RESTON HAS BREACHED ITS INTERNATIONAL OBLIGATIONS AND MUST PAY DAMAGES TO ANNOLAY TO BE DISTRIBUTED AS REPARATIONS TO THOSE VICTIMS OF SYSTEMATIC RAPE DURING THE DYSFUNCTIONAL CIVIL WAR WHO ARE NOW RESIDENT IN ANNOLAY.

A. Annolay Has Standing To Bring This Claim Before the Court.

Although in principle States can exercise diplomatic protection only on behalf of nationals,¹ a progressive reading of *Nottebohm* can extend such protection to residents. In resolving which State could exercise diplomatic protection on Nottebohm's behalf, residence was used as a link between Nottebohm and the State to determine his nationality.² Although the women are not Annolaysians, they came into Annolay as Dysfunctionalians, a State that ceased to exist; Cascadia declined its right to exercise this claim; and they were victims of gross human rights violations deserving reparation. Hence, their State of residence, the only one with which they have an effective link, should be allowed to step forward. Thus, Annolay requests this Court to innovate towards a more reasonable approach and allow Annolay to bring this claim on behalf of its Cascadian residents. Alternatively, States other than the injured State may invoke the responsibility of another for breaches of obligations *erga omnes*.³ As proven below, Reston's conduct breaches two *erga omnes* rules: the prohibition against war crimes⁴ and the prohibition against torture,⁵ hence Annolay has

¹ *Barcelona Traction*, ICJR, 1970, para. 36; *Panevezys-Saldutiskis*, PCIJ, 1939, 16; Draft Articles on Diplomatic Protection, ILC Rep., 53rd Sess., UNGAOR A/53/10, 2001, art. 4; Brownlie, Principles of Public International Law, 1998, 406.

² *Nottebohm Case*, ICJR, 1955, para. 22-3.

³ Responsibility of States for Internationally Wrongful Acts, (ARS) UNGAR 56/83, 2001, art. 48(1)(b); Schachter, International Law in Theory and Practice, 1995, 208; Cassese, International Law, 2001, 202; Meron, Human Rights and Humanitarian Norms as Customary Law, 1991, 191.

⁴ Bassiouni, International Crimes: Jus Cogens and Obligations Erga Omnes, Law and Contemp. Probs., 1996, 68; Moir, The Law of Internal Armed Conflict, 2002, 245; Meron, Human Rights and Humanitarian Norms as Customary Law, *supra* note 3, 227.

⁵ *Prosecutor v. Delalic*, (Trial), ICTY, 1998, 454; *Prosecutor v. Kunarac*, ICTY, 2001, 466; *Siderman de Blake v. Argentina*, US 9th Cir. Ct. App., 965 F.2d 699, 1992; Restatement the Third, Third Restatement of

standing to bring this claim.

B. The Rapes Of The Cascadian Women Breached *Erga Omnes* Obligations.

Although the widespread and presumably systematic nature of the rapes may qualify them as crimes against humanity, Reston's responsibility arises more clearly from the commission of war crimes and/or torture. Thus, Annolay will base this claim on said arguments.

1. The Rapes of the Cascadian Women were War Crimes.

An act is a war crime when: (i) it breaches a customary rule of international humanitarian law that protects important values, involving grave consequences for the victims; and (ii) said rule entails individual criminal responsibility under customary law.⁶ The rapes of Cascadian women constitute war crimes.

a. The rapes breached a customary rule of humanitarian law protecting important values.

Common Article 3, which applies to all armed conflicts⁷ (including internal wars between groups without government involvement or where the State ceases to exist)⁸ is custom,⁹ as evidenced from State practice deriving from the creation of international criminal tribunals, whose case-law has applied this rule as custom.¹⁰ *Opinio juris* follows from the widespread acceptance of the 1949 Geneva Conventions—regarded

the Law of the United States, §702; Griffin, Ending the Impunity of Perpetrators of Human Rights Atrocities, Int'l Rev. Red Cross No. 838, 2000, 369-389.

⁶ *Prosecutor v. Kvočka*, ICTY, 2001, para. 123; *Prosecutor v. Tadic*, (Defense Motion-Jurisdiction), ICTY, 1995, para. 94; *Prosecutor v. Aleksovski*, ICTY, 2000, para. 20.

⁷ *Nicaragua Case*, ICJR, 1986, para. 218.

⁸ *Abella v. Argentina*, IACtHR, 1997, para. 152; Fleck, The Handbook of Humanitarian Law in Armed Conflicts, 1999, 48; Thürer, The "Failed State" and International Law, Int'l Rev. Red Cross, No. 836, 1999, 731-761.

⁹ Meron, Human Rights and Humanitarian Norms as Customary Law, *supra* note 3, 227-28; Askin, Women and International Humanitarian Law, In: Women and International Human Rights Law, Vol. 1, 1998, 55; Pratt & Fletcher, Time for Justice: The Case for International Prosecutions of Rapes and Gender-Based Violence in the Former Yugoslavia, Berkeley Women's L.J., 1994, note 85.

as customary law -,¹¹ and UN Resolutions calling for respect of human rights and humanitarian law – including Common Article 3- in all armed conflicts.¹² Additionally, a breach of Common Article 3 requires (i) that the victims be “protected persons” (*i. e.* not taking part in the hostilities); and (ii) that a nexus exist between the offence and the armed conflict.¹³ In this case, (i) no evidence points to the victims’ taking part in the hostilities, thus they were protected persons; and (ii) according to UNCHR and WRI reports, which are admissible evidence,¹⁴ the rapes were systematic and intended to coerce the Cascadian population, which proves their nexus to the war. Thus, the rapes breached Common Article 3.

Second, Common Article 3 implicitly prohibits rape,¹⁵ as rape constitutes cruel treatment under general principles of law,¹⁶ and can also take the form of torture,¹⁷ as did the rapes of the Cascadian women (as

¹⁰ *Prosecutor v. Blaskic*, ICTY, 2000, para. 166; *Prosecutor v. Akayesu*, ICTR, 1998, para. 608; *Prosecutor v. Tadic*, (Trial), ICTY, 1997, para. 557; *Prosecutor v. Tadic*, (Appeals), ICTY, 1999, para. 613.

¹¹ *Legality of the Threat or Use of Nuclear Weapons*, ICJR, 1996, para. 81; Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law*, 2001, 82.

¹² SC Res: 788, 1992; 794, 1992; 814, 1993; 911, 1994; 972, 1995; 1001, 1995; UN Declaration on Respect of Human Rights in Armed Conflicts, UNGAR 2444, 1968; UN Basic Principles for the Protection of Civilians in Armed Conflicts, UNGAR 2675, 1970.

¹³ *Prosecutor v. Bagilishema*, ICTR, 2001, 103; *Prosecutor v. Tadic*, (Trial), *supra* note 10, para. 614-15; *Prosecutor v. Kvočka*, *supra* note 6, para. 123-24; *Prosecutor v. Kunarac*, *supra* note 5, para. 407.

¹⁴ *Corfu Channel Case*, ICJR, 1949, para. 18; *Velazquez Rodriguez Case*, I/ACtHR, 1987, para. 176; Final Draft Text of the ICC Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1, 2000, Rule 63.

¹⁵ Askin, *Women and International Humanitarian Law*, *supra* note 9, 56; Carrillo, *Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, Am. U. Int’l. L. Rev., 1999, 116.

¹⁶ Bassiouni & Manikas, *The Law of the International Criminal Tribunals for the Former Yugoslavia*, Transnational Publishers, 1996, 574-75.

¹⁷ Coan, *Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia*, N.C. J. Int’l L. & Com. Reg., 2000, 205-10; Capelon, *Women and War Crimes*, St. John’s L. Rev., 1995; Koenig & Askin, *International Criminal Law and the ICC Statute*, In: *Women and International Human Rights Law*, (Vol. 2), 2000, 15.

proven *infra*). Accordingly, Common article 3 protects important values, since it reflects elementary considerations of humanity,¹⁸ and protects rights recognized in major human rights instruments. Moreover, the rapes entailed grave consequences for victims, as rape inflicts severe physical and psychological suffering,¹⁹ and the Cascadian women endured ostracism, unemployment, and loss of family and friends.

b. The breach of Common Article 3 entails individual criminal responsibility.

International criminal courts prosecute breaches of Common Article 3 under the idea that they entail individual criminal responsibility,²⁰ a notion supported by States.²¹ Moreover, international law has developed towards the criminalization of breaches of Common Article 3, as acts perpetrated in internal conflicts cannot be treated more leniently than those committed in international conflicts.²² Thus, since both elements required for acts to constitute war crimes are met, the rapes constitute war crimes.

2. Alternatively, The Rapes Constitute Acts of Torture.

International criminal tribunals have relied on human rights instruments to define torture,²³ which can be

¹⁸ *Nicaragua Case*, *supra* note 7, para. 218.

¹⁹ Aswald, *Torture by Means of Rape*, Geo. L. J., 1996, 1932-39; Chinkin, *Rape and Sexual Abuse of Women in International Law*, Eur. J. Int'l L., 1994; *Prosecutor v. Tadic*, (Trial), *supra* note 10, para. 612.

²⁰ *Prosecutor v. Delalic*, (Appeal), ICTY, 2001, 153-74; *Prosecutor v. Kunarac*, *supra* note 5, para. 408; *Prosecutor v. Kordic*, ICTY, 26 Feb. 2001, para. 168.

²¹ Statement by French Representative, SC 3217th Meeting, UN Doc. S/PV.3217, 1993, 15; US Gov't Submission Concerning Certain Arguments by the Council for the Accused in *Prosecutor v. Tadic*, 1995, 35-36; EU Joint Statement No. 11, 1992, 102; ICC Statute, UN Doc. A/Conf.183/9, 2002, art. 8.2(c).

²² *Prosecutor v. Delalic*, (Trial), *supra* note 5, para. 300; Degni-Séqui, *Report on the Situation of Human Rights in Rwanda*, UN Doc. E/CN.4/1995/7, 1994, para. 54; Meron, *International Criminalization of Internal Atrocities*, AJIL, 1995, 561.

²³ *Prosecutor v. Furundzija*, ICTY, 1998, para. 160; *Prosecutor v. Delalic*, (Trial), *supra* note 5, para. 459; *Prosecutor v. Akayesu*, *supra* note 10, para. 459; Moir, *supra* note 4, 201.

committed by non-state actors in some circumstances²⁴ The elements of torture are: (i) the intentional infliction of severe pain; (ii) for the purpose of, *inter alia*, intimidating or coercing the victim or a third person, or for any reason based on discrimination; (iii) with the consent or acquiescence of a public official or someone acting in official capacity. As stated *supra*, rape is a form of torture, specially when committed systematically and for political purposes.²⁵ In armed conflict, rape inherently entails coercive or discriminatory purposes.²⁶ This case was no exception: UNCHR and WRI reports characterized the rapes as systematic and deliberately used to spread terror among the Cascadian population. Moreover, rape victims endure a high degree of suffering, as stated *supra*. Therefore, the first two elements of torture are met. The third element is also present, since officials of non-state organizations or groups seeking political control over a territory, and non-state parties to an internal conflict, such as Restonian militia, act in official capacity.²⁷ Thus, the rapes constituted torture.

The prohibition against torture in Common Article 3 constitutes an elementary consideration of humanity which must be respected in all armed conflicts,²⁸ due to the need to ensure respect for certain human rights and humanitarian norms –minimum humanitarian standards- in all circumstances²⁹ Elementary

²⁴ *HLR v. France*, EurCtHR, 1997, para. 40; *Prosecutor v. Kvočka*, *supra* note 6, para 139; *Prosecutor v. Kunarac*, *supra* note 5, para. 496.

²⁵ I/A Comm. Hum. Rts., Report of the Human Rights Situation in Haiti, OEA/Ser.L/V/II.88 Doc. 10 rev., 1995, para. 134; Bymes, The Convention Against Torture, In: Women and International Human Rights Law, Vol. 2, 2000, 198.

²⁶ *Prosecutor v. Delalic*, (Trial), *supra* note 5, para. 495-96.

²⁷ Ratner & Abrams, *supra* note 11, 119; Alexander, Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims, Am. U. Int'l L. Rev., 2000, 920; *Prosecutor v. Delalic*, (Trial), *supra* note 5, para. 473.

²⁸ *Nicaragua Case*, *supra* note 7, para. 218; Meron, The Martens Clause, Principles of Humanity, and Dictates of Public Conscience, AJIL, 2000, 82; Legality of the Threat or Use of Nuclear Weapons, Shahabuddeen Diss.Op., ICJR, 1996.

considerations of humanity bind all States as principles of law.³⁰ thus, the prohibition against torture should have been respected during the Dysfuctionian war.

C. Reston is Responsible for Breaching Obligations in Connection with the Rapes.

Internationally wrongful acts of States, which occur when conduct is attributable to the State and constitutes a breach of its international obligations,³¹ entail their responsibility.³² A State's international responsibility can arise from an ultimate default to prosecute and punish internationally injurious acts of its nationals.³³ Such default results from the pardon of an offence, for this causes a State to deprive itself of the possibility to punish a crime under international law.³⁴ Particularly, granting amnesties for war crimes breaches international human rights law and undermines principles enshrined in UN Resolutions.³⁵ Indeed, States have an obligation to prosecute and punish gross violations of human rights, which include acts of torture.³⁶

²⁹ UNCHR Res. on Minimum Humanitarian Standards, 1997/21, 1997; UNSG Rep. pursuant to Comm. Hum. Rts. Decision 2001/112, Promotion and Protection of Human Rights: Fundamental Standards of Humanity, 2001, E/CN.4/2002/103, para. 3.

³⁰ *Corfu Channel Case*, *supra* note 14, p 158; *Legality of the Threat of Nuclear Weapons*, *supra* note 11, para. 79.

³¹ ARS, *supra* note 3, art. 2; *Case Concerning Phosphates in Morocco*, PCIJ, 1938, 10; *Hostages Case*, ICJR, 1980, para. 56; *Gabcikovo-Nagymaros*, ICJR, 1997, para. 78.

³² ARS, *supra* note 3, art. 1; *SS Wimbledon*, PCIJ, 1923, 30; *Chorzow Factory Case*, (Jurisdiction), PCIJ, 1927, 21; *Chorzow Factory Case*, (Merits), PCIJ, 1928, 29.

³³ *Short v. Iran*, Iran-US Cl. Trib., 1987; *Montijo Case*, In: Moore Arb., 1874; *Janes Claim*, US-Mex Gral.Cl.Comm., 4 RIAA 82, 1926, 82; *Parker Massey Case*, US-Mex Gral.Cl.Comm., No. C166, 1927.

³⁴ *West Case*, US-Mex. Gral.Cl.Comm., 1927.

³⁵ *Prosecutor v. Furundzija*, *supra* note 23, para. 155; UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGAR 40/34, 1985; UNGAR 2840, 1971; Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, UNGAR 3074, 1973.

³⁶ Convention Against Torture, UN Doc. A/39/51, 1987, art. 12, 13; ICCPR, UN Doc. A/6316, 1976, art. 7; Inter-American Convention to Prevent and Punish Torture, OASTS 67, 1987, art. 1; *Case 10.150*, OAS

Moreover, despite UN reluctance to reject general amnesties, as in the case concerning Haiti,³⁷ the state of the law evolves towards the contrary. Indeed, in the more recent case of Sierra Leone, the UN affirmed that it did not recognize amnesty for war crimes and other serious violations of international law.³⁸ Thus, Reston's granting of amnesty breaches its obligation to prosecute and punish the perpetrators of the crime, giving rise to its responsibility.

D. Reston Must Pay Damages.

States entitled to invoke another State's responsibility for breaches of *erga omnes* obligations may claim reparation in the interest of the beneficiaries of said obligation.³⁹ Hence, Annolay can claim reparations for the Cascadian women, specifically compensation -due when a wronged situation cannot be reestablished to the conditions that existed before the wrongful act was committed.⁴⁰ Here, the situation cannot be reestablished, since the women's physical and psychological suffering cannot be undone. Thus, considering that compensation has been awarded before, both for physical and moral damage,⁴¹ Annolay requests that the Court order Reston payment to be distributed among the rape victims now resident in Annolay.

II. RESTON IS IN BREACH OF ITS INTERNATIONAL OBLIGATIONS WITH RESPECT TO

Ann. Rep. on Suriname, OAS/ser.L./V/II.77, Doc. 23, 1990, 14; Burke-White, Reframing Impunity, Harv. Int'l L. J., 2001, 479.

³⁷ Scharf, Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?, Tex. Int'l L. J., 1996.

³⁸ UN Daily Press Briefing, July 5-7, 1999; Africa Recovery, Vol. 13, No. 2-3 Sep. 1999, 8.

³⁹ ARS, *supra* note 3, art. 48(2)(b).

⁴⁰ Gray, Judicial Remedies in International Law, 1990, 14; Shelton, Remedies in International Human Rights Law, 1999, 44; Brownlie, Remedies in the ICJ, In: Fifty Years of the International Court of Justice, 1996, 565.

⁴¹ I'm Alone Case, 3 RIAA 1609, 1935, 44; Spanish Zones of Morocco Claims, 2 RIAA 615, 1925; Rainbow Warrior Incident, Ruling of the UNSG, 1986; Norwegian Shipowners Claim, 1 RIAA, 1922, 309; Maal Case, 10 RIAA 731, 1903.

THE BRIBES EXACTED BY ITS BORDER OFFICIALS FROM ANNOLAYSIAN CITIZENS, AND IS OBLIGATED TO PAY RESTITUTION IN THE AMOUNT OF THE BRIBES TO ANNOLAY ON BEHALF OF THE ANNOLAYSIAN ADOPTIVE PARENTS.

A. Annolay's Claim Is Not Barred By The Clean-Hands Doctrine.

A claimant's involvement in illegal activities may bar his claim, thus the clean-hands doctrine can be invoked as basis for rejecting a claim of diplomatic protection.⁴² Accordingly, Reston may argue that Annolaysian parents were –by paying the bribes- involved themselves in corruption and have “dirty hands”. However, said argument must be dismissed. Indeed, the value of “clean-hands” is highly questionable, since it has been rarely applied.⁴³ The doctrine succeeds only where the breach by the victim was the sole cause of her damage, that is, where the cause-and-effect relationship between the damage and the victim's conduct involved no wrongful act by the respondent State.⁴⁴ However, the corruption of the Restonian officials was a *quid pro quo*, involving no sole fault since, as with any case of corruption, someone paid and someone was paid.⁴⁵ Consequently, the clean-hands doctrine does not apply.

B. Furthermore, Annolaysian Parents Need Not Exhaust Local Remedies.

Reston may also argue that Annolaysian parents should have sought redress in Reston before Annolay could bring the case to the ICJ. Nevertheless, in this case exceptions to the exhaustion of local remedies rule

⁴² *Eastern Greenland Case*, Anzilotti Diss.Op., PCIJ, 1933, 95; *Meuse Case*, PCIJ, 1937, 50; *Clark Claim*, 1862, In: Moore Arb., 2738-39; Cheng, General Principles of Law as Applied by International Courts and Tribunals, 1994, 156.

⁴³ ARS, ILC Commentary, UN Doc. A/56/10, 2001, 173; ILC Rep. on the Work of its 51st Sess., UN Doc. A/54/10, 1999, Ch. V, para. 412; *Nicaragua Case*, Schwebel Diss.Op., ICJR, 1986, 392-94.

⁴⁴ Crawford, ILC 2nd Rep. on State Responsibility, A/CN.4/498/Add.2, 1999, para. 332; Salmon, Des 'mains propres' comme Condition de Recevabilité, AFDI, 1964, 249; Garcia Arias, La Doctrine des 'clean hands' en Droit International Public, Annuaire A.A.D.I., 1960, 18.

⁴⁵ Rose-Ackerman, Corruption and Government: Causes, Consequences and Reform, Cambridge, 1999, 93.

apply: first, the requirement is exonerated where local remedies do not exist;⁴⁶ second, local remedies need not be exhausted whenever they are futile.⁴⁷ In this case, (i) evidently there are no remedies available in Reston, since the non-existence of specific anti-bribery laws in that State makes it impossible for Annolaysians to charge the officials for bribery under Restonian criminal law; and (ii) remedies are obviously futile in a State that showed the most flagrant tolerance towards corruption, not only by its lack of anti-bribery laws, but by considering that the mere reassignment of officials, while none have been disciplined or prosecuted, was enough to solve the problem, and furthermore by its President's declaration regarding the corruption problem as a small issue undeserving his immediate attention; a stand that contradicts most States' view of corruption as an international crime that threatens democracy and human rights.⁴⁸ Thus, arguments claiming non-exhaustion of local remedies should be disregarded.

C. Reston's Conduct Entails A Breach Of Its International Obligations.

1. Reston Breached the Obligation to Enact Anti-Bribery Laws.

The customary character of the rule binding States to enact anti-bribery laws derives from its inclusion in international instruments,⁴⁹ suggesting a pattern of State practice. *Opinio juris* follows from the

⁴⁶ *Altesor v. Uruguay*, 70 ILR, 1982, 248; *Exception to the Exhaustion of Local Remedies*, I/ACTHR, (OC-11), 1990; Oppenheim, *International Law (Peace)* 1996, 525.

⁴⁷ Draft Articles on Diplomatic Protection, *supra* note 1, art. 14(a); *Finnish Shipowners Arbitration*, RIAA, 1934; *ELSI Case*, ICJR, 1989, 14; Amerasinghe, *Local Remedies in International Law*, Cambridge, 1990, 193-194.

⁴⁸ Explanatory Report CLCC, 1998, GMC(98)40, §II; Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, Case W. Res. J. Int'l L., 1983, 27; Henkin & Hargrove, *Enforcing Human Rights Through International Criminal Law and Through an International Criminal Court*, In: *Human Rights: An Agenda for the Next Century*, 1994, 347.

⁴⁹ RACC, 1999, art. 3; CLCC, 1999, art. 3; Inter-American Convention Against Corruption, 1996, art. II(1), VI and VIII; Southern African Development Community Protocol Against Corruption, 2001, art. 2(a), 3(1)(a); International Code of Conduct for Public Officials, UNGAR 51/59, 1996; UN Declaration on Crime and Public Security, UNGAR A/51/610, 1996, art. 10.

criminalization of bribery in most States' domestic law.⁵⁰ In this case, Reston has clearly failed to enact legislation against corruption. Furthermore, such failure entails a breach of the object and purpose of the RACC, which Reston is bound not to defeat,⁵¹ as a signatory of the RACC, and a party to the VCLT. According to legal experts, the object and purpose of the RACC (identical to that of the CLCC) derives from its Preamble,⁵² which states the need to pursue, as a matter of priority, a common criminal policy to protect society against corruption, including the adoption of appropriate legislation.⁵³ Accordingly, the duty of States to enact anti-corruption legislation (and forbid bribery) is part of the object and purpose of the RACC. Thus, Reston's failure to enact anti-bribery laws defeats the object and purpose of a signed treaty.

2. Reston Breached its Obligation to Establish Jurisdiction over the Bribers.

States have a general duty to exercise due diligence in the prosecution and punishment of nationals when these have harmed nationals of other States.⁵⁴ As regards corruption, there is a duty to assert jurisdiction over offenses committed within their territories or by their nationals, which is a customary obligation, as derives from its inclusion in international instruments and UN Resolutions on corruption urging States to

⁵⁰ Bah: Criminal Code, §118-23; Can: Corruption of Foreign Public Officials Act; Colom: Anticorruption Statute, 1995; India: Penal Code 165, Prevention of Corruption Act; Indon: Criminal Code of Law Regarding Bribery, 1980; Kaz: Criminal Code, art. 147, Decree on Responsibility for Corruption, 22 Dec. 1995; Libya: Economic Crimes Law No. 2, 1979, art. 226; Nig: Criminal Code, 1990, Chapter 77, §98; Peru: Supreme Resolution No. 160, 11 Apr. 2001; PRC: Supplementary Regulations on Suppression of Corruption and Bribery, 21 Jan. 1988; US: Foreign Corrupt Practices Act.

⁵¹ VCLT, 1980, article 18(a).

⁵² Henning, Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law, *Ariz. J. Int'l & Comp. L.*, 2001, 793; Heimann, Should Foreign Bribery be a Crime?, 1994, 7; Hess & Dunfee, Fighting Corruption, *Cornell Int'l L. J.*, 595; Moore, Political Corruption, *Conn. J. Int'l L.*, 1999, 385.

⁵³ RACC, *supra* note 49, Preamble; CLCC, *supra* note 49, Preamble.

⁵⁴ Janes Claim, *supra* note 33; Neer Case, US-Mex Gral.Cl.Comm., 4 RIAA 60, 1926; Noyes Claim, 6 RIAA 308, 1933; Shaw, International Law, Cambridge, 513.

adopt legislation permitting prosecution of corruption,⁵⁵ and its continuous application by national tribunals.⁵⁶ Reston's breach of this obligation is evidenced by three facts: first, the Restonian officials committed passive bribery, defined as the request or receipt by any public official of an undue advantage in order to act or refrain from acting in the exercise of his functions;⁵⁷ second, the State's only reaction to the rampant corruption at its borders was to reassign a mere 10% of the individuals implicated; and third, although no border officials were ever prosecuted or disciplined, Reston considered that the problem had been "taken care of". Moreover, even if Reston has no criminal anti-bribery laws, at least civil and/or administrative liability remained possible. Therefore, Reston is responsible for the breach of the obligation to establish jurisdiction over acts of corruption.

3. Reston Breached its Obligation to Prevent Improper Financial Gain in Adoption.

The UN Convention on the Rights of the Child (CRC) binds all States under customary international law.⁵⁸ Said status derives from its ratification by all States, excepting Somalia and the US (which have nevertheless signed the CRC),⁵⁹ and Reston, the only State in the world which has not even signed the CRC. The CRC

⁵⁵ RACC, *supra* note 49, art. 17; CLCC, *supra* note 49, art. 17; OECD Convention on Combating Bribery of Foreign Public Officials, UNGAR 51/59, 1996, art. 4; Inter-American Convention Against Corruption, *supra* note 49, art. VI; UNGAR: 3514(XXX), 1975; 50/106, 1995; 55/25, 2000.

⁵⁶ *Berlusconi Case*, Italian Ct. Cass., 2001; *Montesinos Case*, Special Criminal Law Chamber, 2002; *Attn'y Gal. v. Hui Kin-hong*, 1HKCLR 227 (CA), 299, 1995; *Attn'y Gal. v. Reid*, 1 AC 324, 1994; *A.G. Ogun State v. A.G.*, Nig. Federal Court, 3 NCLR 166, 1982.

⁵⁷ RACC, *supra* note 49, art. 3, 5; CLCC, *supra* note 49, art. 3, 5; Inter-American Convention Against Corruption, *supra* note 49, art. VI(1)(a); Revised Draft UN Convention Against Corruption, A/AC.261/3/Rev.1, 2002, 24-5.

⁵⁸ Price, The United Nations Convention on the Rights of the Child, Wn. & Mary J. Women & L., 1997, 29; Bartner, Intercountry Adoption and the Convention on the Rights of the Child, Syr. J. Int'l L. and Comm., 2000, 412; Leblanc, The Convention on the Rights of the Child, 1995, 45.

⁵⁹ UN Human Rights Treaties Database, <http://www.unhchr.org>, Ratification Status, Somalia, CRC, 2002; UN Human Rights Treaties Database, <http://www.unhchr.org>, Ratification Status, United States of America, 1995; UNICEF, CRC, Ratification Status, <http://www.unicef.org/crc/crc.htm>.

requires States to take all appropriate measures to ensure that adoption does not result in improper financial gain for those involved,⁶⁰ a customary rule, as evidenced from the practice of States in accepting its inclusion in international instruments,⁶¹ and from the *opinio juris* revealed by its adoption in domestic legislation.⁶² Also, State practice in fighting corruption in adoption is shown by cases such as Romania's, where States have halted their international adoptions to stop related acts of corruption.⁶³

Moreover, this provision relates directly to the observance of the Best Interest of the Child Principle,⁶⁴ as the rule seeks to contribute in the fight against baby selling and child trafficking. One case where the world has most clearly regarded the best interest of children is where a State has suffered internal or international conflicts, resulting in the adoption of approximately 20,000 children per year,⁶⁵ most of which come from countries with serious difficulties (e.g. Paraguay, Colombia, Honduras, Sri Lanka, Romania and the Former

⁶⁰ CRC, UN Doc. A/44/736, 1990, art. 21(d).

⁶¹ UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, UNGAR 41/85, 1986, art. 20; Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 32(1); US: Uniform Adoption Act.

⁶² Alb: Family Law, 1992; Bel: Family & Marriage Law, 2002; Bol: Código del Menor, 1992; Braz: Estatuto del Menor y del Adolescente, 1990; Can: Adoption Act, 1993, Chile: Ley de Adopción; Peru: Civil Code; Phil: Republic Act No. 8043; PRC: Order of the President of the PRC No. 10, Adoption Law of 1999; Rom: Strategy Concerning the Protection of Children in Difficulty.

⁶³ Romanian Adoption Moratorium, 2002, http://travel.state.gov/adoption_romania.html; Romania Bans International Adoption, <http://www.cnn.com/2001/WORLD/europe/06/22/romania.adoption/>

⁶⁴ CRC, *supra* note 60, art. 21, 21(d); Bartner, *supra* note 58, 416.

⁶⁵ Jonet, Legal Measures to Eliminate Transnational Trading of Infants for Adoption, Loy. L. A. Int'l & Comp. L., 1990, 325; Liu, International Adoptions, Temp. Int'l & Comp. L. J., 1994, 210; Stein, A Call to End Baby Selling, Thomas Jefferson L. Rev., 2001, 72; Bartholet, International Adoption, J. Am. Acad. Matrim. Law., 1996, 201.

Yugoslavia).⁶⁶ In Romania, thousands came forward to adopt over 165,000 children living in inhumane conditions.⁶⁷ The case at hand is impressively similar to Romania's. However, Reston allowed its officials to obtain improper financial gain from the adoptions, even after knowing of the situation through the publication of the "Corruption in the Nursery" articles; which results in a breach of its international obligations.

D. Reston Is Bound To Pay Restitution.

In this case, the most adequate form of reparation is restitution of the amounts paid to the officials. Indeed, international tribunals have awarded restitution in a number of cases.⁶⁸ Consequently, the most adequate form of reparation for the Annolaysians' monetary losses is restitution in kind. However, since the parents paid the bribes, a question arises on the matter of comparative fault, recognized as grounds for the determination of damages.⁶⁹ Indeed, international tribunals have reduced the claimant's award in proportion to her culpability.⁷⁰ In this case, Annolay is prepared to accept that the parents "culpability" has an effect on the determination of damages, conceding to the following: (i) that parents who complied with all adoption requirements bear absolutely no fault in the corruption, hence the Court should award them restitution in the

⁶⁶ Carro, Regulation of Intercountry Adoption, *Hast. Int'l & Comp. L. Rev.*, 1994, 131-40; Bartholet, *supra* note 65, 183.

⁶⁷ Pollitt, Intercountry Adoption, 1992, 49-53; David, Romania, *Int'l Hum. Rts.*, 1991; Farrow, Romanian Orphans Suffer by New Rules, Supporters Say, 1991, B5.

⁶⁸ Macedonian Case, 1858, In: Moore Arb., 1449; Orinoco Company Case, 9 RIAA 297, 1903; Temple of Preah Vihear, ICJR 6, 1962, 37; Rights of Britons in Spanish Morocco, 2 RIAA 615, 1923, 722.

⁶⁹ Garcia-Amador, Recent Codification of the Law of State Responsibility for Injuries to Aliens, 1974, 35; De Beus, The Jurisprudence of the General Claims Commission, US and Mexico, 1938, 312; Bederman, Contributory Fault and State Responsibility, *Va. J. Int'l L.*, 1990, 359.

⁷⁰ Garcia & Garza Case, US-Mex Gral.Cl.Comm., 4 RIAA 119, 1926, 123; King Case, US-Mex Gral.Cl.Comm., 4 RIAA 575, 1930, 585; Delagoa Bay & East African RR Co. Case, 1900, In: Whiteman Arb., 1694.

full amount; and (ii) that parents who paid bribes after failing or without attending fitness interviews bear comparative fault, and thus Annolay accepts any reduction in recovery deemed appropriate.

III. RESTON IS NOT ENTITLED TO EXERCISE UNIVERSAL JURISDICTION OVER MR. FRED SCHMANDEFARE.

Under “universal jurisdiction”, any State can prosecute perpetrators of crimes that are considered heinous and harmful to mankind under the idea that every State has a legal interest to prosecute crimes that have been universally condemned.⁷¹ In this case, Reston has argued that it is entitled to exercise universal jurisdiction over Schmandefare based on the assumption that he committed a crime against humanity. However, the argument must be dismissed.

A. Evidence Does Not Support a *Prima Facie* Case Of Schmandefare’s Guilt.

For this Court to assert that Reston can exercise universal jurisdiction over Schmandefare, a *prima facie* case of his guilt for the crime against humanity of sexual slavery (as affirmed by Reston) must be established. A *prima facie* case is a credible case which would -if not contradicted- be sufficient legal basis to convict the accused.⁷² However, in this case, the evidence does not support the construction of a *prima facie* case against Schmandefare, since close analysis of the treatment of the Cascadian women is required, and the *Compromis* contains few facts on the matter, other than ILSA’s findings and ITP articles. This information does not suffice, as NGO findings and press information have little evidentiary value in the field of criminal law,⁷³ in light of the requirement of proof of guilt beyond reasonable doubt.⁷⁴ Moreover, press reports alone

⁷¹ Ratner & Abrams, *supra* note 11, 411; Cassese, *supra* note 3, 261; Randall, Universal Jurisdiction Under International Law, Tex. L. Rev., 1988, 788; Benavides, Universal Jurisdiction, A.M.D.I., 2001, 26.

⁷² Prosecutor v. Milosevic, ICTY, 2001, para. 14; Ambos, Establishing an International Criminal Court and an International Criminal Code, EJIL, 2001.

⁷³ Ratner & Abrams, *supra* note 11, 256.

are not regarded as evidence capable of proving facts.⁷⁵ Thus, the ILSA report and ITP articles do not constitute sufficient evidence to establish a *prima facie* case of crimes against humanity.

B. Alternatively, No Crime Against Humanity Has Been Committed.

Qualification of conduct as a crime against humanity requires a stringent test,⁷⁶ since these are considered the gravest crimes of international concern. Since Reston accused Schmandefare of “trafficking for the purpose of sexual slavery” there must be proof beyond reasonable doubt of all the elements of the crime against humanity of sexual slavery, which are: (i) the exercise of powers attaching to the right of ownership over persons; (ii) the causing of persons to engage in sexual acts; (iii) a context of a widespread or systematic attack against a civilian population; and (iv) the perpetrator’s knowledge that his conduct is part of such an attack.⁷⁷

1. Schmandefare’s Conduct does not Meet the Objective Elements of Sexual Slavery.

Reston has specifically alleged that Schmandefare’s actions amount to trafficking in women, which is one of the property rights included in this element.⁷⁸ Trafficking involves, *inter alia*, the use of coercion or deception.⁷⁹ As indicated in the *Compromis*, representatives of the Schmandefare Company recruited

⁷⁴ ICTY Rules of Procedure and Evidence, UN Doc IT/32, 2002, Rule 87(a); ICTY Statute, SC Res. 827, 1923, art 19(1); ICTR Statute, SC Res. 955, 1994, art 18(1); *Prosecutor v. Delalic*, (Trial), *supra* note 5, para. 601.

⁷⁵ *Nicaragua Case*, *supra* note 7, para. 62.

⁷⁶ Robinson, *Defining Crimes Against Humanity at the Rome Conference*, AJIL, 1999, 47; Washburn, *The International Criminal Court Arrives*, 2002, 4.

⁷⁷ Elements of Crimes, PCNICC/2000/1/Add.2, 2 Nov. 2000, art. 7(1)(g)-2; ICC Statute, *supra* note 21, art. 9.

⁷⁸ Elements of Crimes, *supra* note 77, art. 7(1)(g)-2, note 18.

⁷⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, UNGAR 55/25, 2001, art. 3(a); COE Framework Decision on Combating Trafficking in Human Beings, 2002, art. 1(a)(b).

women to work primarily as nannies or domestic servants, and they voluntarily accepted to come into Annolay to work for the Schmandefare Company, hence the women appear to have had a choice as to their work, since not all of them ended up working in brothels, and they were all granted permanent resident status, meaning that they had no legal restraints as to their freedom of work in the country. Thus, since no coercion or deception is evident, Schmandefare's conduct does not amount to trafficking, as one of the objective elements required by sexual slavery is not met.

2. Schmandefare's Conduct does not Meet the Contextual Elements of Sexual Slavery.

The contextual elements of a crime against humanity exclude isolated random acts from this category, since conduct must be part of a widespread or systematic attack against a civilian population,⁸⁰ pursuant to a State or organizational policy to commit such an attack.⁸¹ Absent State policy, the crime must be linked to the policy of an organization with State-like characteristics (*e.g.* control over territory or *de facto* authority).⁸² The instigation or direction by such an organization is what makes the act a crime against humanity,⁸³ and excludes acts of individuals acting on their own initiative pursuant to their own criminal plan.⁸⁴

⁸⁰ ICC Statute, *supra* note 21, art. 7(2)(a); Elements of Crimes, *supra* note 77, art. 7, Introduction, para. 3; Draft Code of Crimes Against the Peace and Security of Mankind, ILC Commentary, UN Doc. A/51/10/Corr.1, 1996, art. 18, 93.

⁸¹ *K.H.W. v. Germany*, EurCtHR, Loucaides Conc.Op., 2001; *Regina v. Finta*, 28 CR 4th 265, 1994; *Touvier Case*, Cass. Crim., 1992, *Pub. Prosecutor v. Menten*, 75 ILR 362, 1982, 362-363.

⁸² *Prosecutor v. Kupreskic*, ICTY, 2000, para. 552; *Prosecutor v. Tadic*, (Trial), *supra* note 10, para. 654; Cassese, *supra* note 3, 250-251; Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1999, 275.

⁸³ *Prosecutor v. Tadic*, (Appeal), *supra* note 10, para. 654-55; *Prosecutor v. Kayishema*, ICTR, 1999, para. 125-26; Draft Code of Crimes Against the Peace and Security of Mankind, ILC Commentary, *supra* note 80, art. 18, 93; *Prosecutor v. Nikolic*, 1995, para. 26.

⁸⁴ Draft Code of Crimes Against the Peace and Security of Mankind, ILC Commentary, *supra* note 80, art. 18; Slye, *Apartheid as a Crime Against Humanity: A Submission to the South African Truth and*

Schmandefare, as CEO and founder of the Schmandefare Company, which has no ties to any government or public agency, was acting pursuant to his own initiative. Indeed, it has not been disputed that he was responsible for organizing the recruitment and transportation of women from Cascadia to Annolay for employment in brothels. Moreover, the Schmandefare Company does not possess any State-like characteristics, and thus he could not be acting pursuant to the required organizational or State policy. Consequently, Schmandefare clearly was not under the control or instigation of a State or organization, which leaves out the possibility that he was acting pursuant to the required policy.

Additionally, the attack must be directed against a civilian population (individuals are victimized because of their membership to a targeted population).⁸⁵ The Schmandefare Company owned a large number of brothels prior to the Cascadian women's arrival, which means that the women working there were not only Cascadian. It follows that the women were not "victimized" specifically because they were Cascadian, hence this requirement is not met. Finally, the *mens rea* requirement is not met because, if as stated *supra*, Schmandefare's acts were not part of a widespread or systematic attack, it follows that he did not intend his acts to be of said nature. In sum, the elements of a *prima facie* case of the crime against humanity of sexual slavery are missing, thus, *prima facie* no crime subject to universal jurisdiction has been committed.

C. In The Further Alternative, Reston Is Banned From Exercising Universal Jurisdiction.

Universal jurisdiction is the most exceptional basis for jurisdiction,⁸⁶ used as an auxiliary form of

Reconciliation Commission, Mich. J. Int'l L., 1999, 284; Chesterman, An Altogether Different Order, Duke J. Int'l & Comp. L., 2001, 317.

⁸⁵ Prosecutor v. Vasiljevic, ICTY, 2002, para. 33; Prosecutor v. Kunarac, *supra* note 5, para. 421; Prosecutor v. Kordic, *supra* note 20, 178; Prosecutor v. Tadic, (Trial), *supra* note 10, para. 644.

⁸⁶ Benavides, *supra* note 71, 58; Bassiouni, Universal Jurisdiction for International Crimes, Va. J. Int'l L., 2001, 82; Scottish Parliament Information Center, The International Criminal Court and the Concept of Universal Jurisdiction, RN01/83, 2001, 5.

jurisdiction in conjunction with other bases of jurisdiction,⁸⁷ and only when the forum State has custody over the offender.⁸⁸ As evidenced by State practice, States must rely on treaties when asserting jurisdiction based on universality,⁸⁹ applying conventional rules regarding crimes of terrorism, drug trafficking, torture, etc.⁹⁰ Hence, since Reston is not a party to any convention which allows universal jurisdiction, it must rely on custom.

However, the state of the law does not evidence any consensus supporting the notion that crimes against international law should be justiciable in national courts on grounds of universality.⁹¹ On the contrary, according to Amnesty International, a passionate advocate of universal jurisdiction, merely a dozen States have asserted universal jurisdiction.⁹² Such scant practice cannot amount to customary law, as evidenced today more than ever by the stand of several ICJ justices, who very recently expressly denied said customary status in the *Arrest Warrant Case*. Thus, Reston is banned from exercising universal jurisdiction.

In any case, Reston's assertion of universal jurisdiction over Schmandefare breaches international law.

1. A Trial *In Absentia* would Breach International Law.

⁸⁷ *Att'y Gen. v. Eichmann*, 36 ILR 5, 1961, para. 11; *Case 19/47*, Spain Nat'l App. Ct., 1998; *Case 1/98*, Spain Nat'l App. Ct., 1998.

⁸⁸ Jordan, *Universal Jurisdiction in a Dangerous World*, Mich.J. Int'l L., 2000, 4; Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, L. & Contemp. Probs., 1996, 165.

⁸⁹ *Pub. Prosecutor v. Djajic*, Bavarian High Ct., 1997; *Pub. Prosecutor v. Jorgic*, Dusseldorf High Ct., 26 Sep. 1997; *Pinochet Case*, Tribunal de Première Instance de Bruxelles; *Case No. X96-32.491 PF*, Judgment of the Ct. of Cass., Chambre Criminelle, 1998.

⁹⁰ Convention against the Taking of Hostages, 1983, art. 5, 8; Convention for the Suppression of Terrorist Bombings, 2001, art. 6; Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 2000, art. 4; Convention Against Torture, *supra* note 36, art. 5.

⁹¹ *Regina v. Bartle ex parte Pinochet*, Lord Slynn of Hadley, Eng. H.L., 1998; Shaw, *supra* note 54, 411; Cassese, *supra* note 3, 263; *Arrest Warrant of April 11*, Guillaume Sep.Op., ICJR, 2000, para. 6-7.

⁹² AI, Universal Jurisdiction (International Justice) <http://web.amnesty.org/web/Web.nsf/pages/UJhome>.

Trials *in absentia* are normally forbidden.⁹³ Indeed, although most States have prescribed laws against war crimes or crimes against humanity,⁹⁴ until 2002 only five allowed trials *in absentia*.⁹⁵ Moreover, the rejection of trials *in absentia* is clearly evidenced by States' accord not to include this possibility under the ICC Statute. Also, even perpetrators of the most serious international crimes have been afforded the right to be present at trial,⁹⁶ further evidencing a general rejection of trials *in absentia*.

Reston may argue that the *Lotus Case* supports the exercise of universal jurisdiction *in absentia*, based on the *dicta* that, unless conduct is expressly prohibited by international law, it is permitted.⁹⁷ However, since in *Lotus* the acts occurred at high seas, assertion of jurisdiction over the defendants did not conflict with the territorial jurisdiction of any State. In contrast, Reston's assertion of jurisdiction over Schmandefare would conflict with Annolay's territorial jurisdiction. Hence, based on such distinguishing features, and on the fact that a cloud of doubt continues to hang over *Lotus*,⁹⁸ its invocation is dubious at best. Accordingly, Reston's intention to prosecute Schmandefare *in absentia* contradicts international law.

2. A Trial *In Absentia* would Breach Schmandefare's Right to Due Process.

A State's power to exercise universal jurisdiction requires that the accused be present at trial and the

⁹³ Lawyers Committee for Human Rights, Universal Jurisdiction, 2002, 9; AI, Universal Jurisdiction, IOR 53/003/2001, 2001; Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the ICTY and the ICTR, UN Doc. A/54/634, 1999, para. 10-11.

⁹⁴ Arrest Warrant of 11 April 2000, Ranjeva Declaration, ICJR, 2000, para. 8; AI, Universal Jurisdiction, *supra* note 92, Ch 2.

⁹⁵ Bol: Penal Code, art. 1(7); Burundi: Décret-Loi No. 1/6, 4 Apr. 1981, art. 4; El Sal: Penal Code, 1998, art. 10; Peru: Penal Code, 1998, art. 2(5); Switz: Code Pénal Militaire Suisse.

⁹⁶ Pub. Prosecutor v. Djajic, *supra* note 89; Prosecutor v. Akayesu, *supra* note 10; Prosecutor v. Furundzija, *supra* note 23; Prosecutor v. Blaskic, *supra* note 10.

⁹⁷ SS Lotus, PCIJ, 1927, 19.

⁹⁸ Higgins, Problems and Process: International Law and How We Use It, Oxford, 1994, 77.

observance of international due process norms.⁹⁹ The right to due process has acquired customary status, as derives from its recognition in human rights instruments,¹⁰⁰ suggesting a pattern of State practice. *Opinio juris* follows from its inclusion in most States' national legislation,¹⁰¹ and application by international and national tribunals.¹⁰² Moreover, even if trials *in absentia* may be performed under exceptionally justified reasons,¹⁰³ the accused must be sufficiently informed of proceedings, and he must voluntarily have waived his right to be present,¹⁰⁴ none of which has happened here. Indeed, Reston has *a priori* voiced its intention to try Schmandefare *in absentia* even before proper notice was issued. Therefore, he was not given the opportunity to be present or to waive such right; hence a trial *in absentia* would breach Schmandefare's due process rights.

3. Reston's Exercise of Universal Jurisdiction Breaches the Principle of Good Faith.

In exercising its right to assert universal jurisdiction, a State must act in good faith,¹⁰⁵ a principle that

⁹⁹ Schachter, *supra* note 3, 270; Princeton Principles on Universal Jurisdiction (Macedo, ed.), 2001, pple. 1(2), 1(4).

¹⁰⁰ UDHR, UN Doc. A/810, 1948, art. 10; ICCPR, *supra* note 36, art. 14; ECHR, 1953, art. 6; ACHR, 1969, art. 8; AFHR, 1986, art. 7.

¹⁰¹ Arg: Const., art. 18; Can: Const., art. 4, §7; Chile: Const., art. 19; PRC: Const., art. 8(1); Colom: Const., art. 28; Ecuador: Const., art. 24; Mex: Const., art. 18; Nor: Const., art. 99; S. Afr: Const., art. 12(1)(a); Spain: Const., art. 17; Venez: Const. art. 47.

¹⁰² *Reid v. Jamaica*, UNHRC, Comm. No. 356/1989, 1993; *Maxwell v. UK*, EurCtHR, 1994; *US (B.E. Chattin) v. Mex.*, US-Mex Cl. Comm., 1927; *Lala v. Neth.*, EurCtHR, 1994.

¹⁰³ UNHCR, Gral. Comm., art. 13, 14, 1984, para. 11; HRW, Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court, 1998, §J, Comment to art. 63[56].

¹⁰⁴ *Mbenge v. Zaire*, UNHRC, Comm. No. 16/1977; *Conteris v. Uruguay*, UNHRC, Comm No. 139/1983; *Colozza v. Italy*, EurCtHR, 1985; *Wolf v. Panama*, UNHRC, Comm. No. 289/1988.

¹⁰⁵ Brownlie, Principles of Public International Law, *supra* note 1, 313; Princeton Principles on Universal Jurisdiction, *supra* note 99, pple. 1(4),(5); O'Higgins, Unlawful Seizure and Irregular Rendition, BYIL, 1960, 292.

controls the exercise of rights by States.¹⁰⁶ Facts show that Reston's assertion of jurisdiction over Schmandefare is retaliatory to Annolay's purpose of seeking reparation for the war victims, since a decision to exercise universal jurisdiction must be based on legal considerations, not political interference.¹⁰⁷ The Restonian Min. of Justice expressed his intention to try Schmandefare the same day that he received a memorandum from President Raskolnikov stating: "Annolay's President challenges the conduct of Restonian militiamen (...), but at the same time, (...) fails to protect the human rights of women in her own country(...). Please have your Department investigate this." Clearly, this statement was not based on legal considerations, and the Court should dismiss Reston's bad faith claim for universal jurisdiction.

D. The Court Should Award Declaratory Relief.

This Court has awarded declaratory judgments establishing obligations on States to act in certain ways, and providing detailed guidance on their future conduct.¹⁰⁸ Accordingly, Annolay requests the Court to declare that Reston is not entitled to exercise universal jurisdiction over Schmandefare.

IV. ANNOLAY HAS NOT BREACHED ANY INTERNATIONAL LEGAL OBLIGATIONS DERIVING FROM THE ALLEGED TREATMENT OF CASCADIAN WOMEN WORKING IN BROTHELS IN ANNOLAY, AND IN ANY EVENT, RESTON HAS NO STANDING TO ENFORCE ANY SUCH OBLIGATIONS.

A. Reston Lacks Standing To Bring This Claim Before The Court.

Annolay will first deal with the issue of *locus standi*, since States must raise their objections to admissibility in a timely manner (*i.e.* at the earliest stages of the case) lest it be presumed that they have tacitly waived such an objection.¹⁰⁹ As established *supra*, a State other than the injured State can invoke another State's

¹⁰⁶ UN Charter, 1945, art. 2 (1); Cheng, *supra* note 42, 121; Bassiouni, Universal Jurisdiction for International Crimes, *supra* note 86, 87.

¹⁰⁷ AI, 14 Principles on the Effective Exercise of Universal Jurisdiction, IOR 53/01/99, pple. 8; Princeton Principles on Universal Jurisdiction, 2001, Commentary, 43.

¹⁰⁸ Haya de la Torre, ICJR, 1951, 61; Temple of Preah Vihear Case, ICJR 6, 1962.

responsibility for breaches of obligations *erga omnes*.¹¹⁰ In this case, obligations regarding trafficking in women have not acquired *erga omnes* status. Indeed, *erga omnes* obligations are defined as peremptory norms recognized as such by the international community as a whole,¹¹¹ which is not the case of obligations on trafficking, due to lack of international consensus as to a definition of trafficking and the varying practice and *opinio juris* of States.¹¹² Hence, Reston has no standing to bring this claim.

Reston may then try to prove that trafficking breaches the *erga omnes* prohibition against slavery. However, that idea is not widely accepted, since States consider trafficking to be a prohibited, yet distinct practice from slavery,¹¹³ as derives from the treatment of trafficking as a distinct crime in specialized conventions.¹¹⁴ At most, trafficking may be a contemporary form of slavery, not “slavery” as originally understood (*i.e.* the status of persons over whom powers attaching to the right of ownership are exercised),¹¹⁵ and there is no evidence that the *erga omnes* status of slavery extends to its contemporary forms, since their substantive content has not been identified.¹¹⁶ Thus, Reston’s attempt to base its *locus standi* on a supposed *erga omnes*

¹⁰⁹ *Case Concerning Certain Phosphate Lands in Nauru*, ICJR, 1992, para. 31-6; *Velazquez Rodriguez Case*, *supra* note 14, para 88; *Loizidou v. Turk.*, EurCtHR, 1995, para. 42-5.

¹¹⁰ ARS, *supra* note 3, art. 48(1)(b); *Barcelona Traction*, *supra* note 1; *South West Africa Cases*, Jessup Sep.Op., ICJR, 1962; *Case Concerning East Timor*, ICJR, 1995.

¹¹¹ VCLT, *supra* note 51, art. 53.

¹¹² UNSG Rep. on Trafficking in Women and Girls, UN Doc. UN/9/50/369, para. 23; UNSG Rep. on Trafficking in Women and Girls, UN Doc. A/57/170, para. 2; Farrior, The International Law on Trafficking in Women and Children for Prostitution, Harv. Hum. Rts. J., 1997, 219; Demleitner, Forced Prostitution, Fordham J. Int’l, L., 1994, 192.

¹¹³ Rassam, Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law, Va. J. Int’l L., 1999, 309; Dunbar, The Past, Present, and Future of International Trafficking in Women for Prostitution, Buff. Wom. L. J., 1999-2000, 117.

¹¹⁴ Women’s Convention, 1979, art. 6; Trafficking Convention, 1951, art. 1.

¹¹⁵ Slavery Convention, 1927, art. 7(a).

breach through trafficking in women is, at the very least, highly questionable.

B. Alternatively, Annolay Has Not Breached Obligations Regarding The Treatment of Cascadian Women.

1. Reston Cannot Enforce Any Obligation Upon Annolay.

Reston will argue that the conventional “obligation to prevent, prosecute and punish trafficking in women”¹¹⁷ is customary. However, this is not so, as derives from these facts: (i) the most recent treaty on trafficking has been ratified by only 8 States;¹¹⁸ (ii) the Trafficking Convention has been ratified only by one third of States in over 50 years;¹¹⁹ and (iii) until very recently, there was no consensus on the definition of trafficking,¹²⁰ which has today not been adopted by the majority of States.¹²¹ Moreover, differences in State practice and *opinio juris* on this subject¹²² remove any possibility of customary status. On the contrary, State practice shows that: (i) persistent patterns of trafficking in women are common around the world, both into

¹¹⁶ Dunbar, *supra* note 113, 116; Rassam, *supra* note 113, 308.

¹¹⁷ Convention Against Trafficking, *supra* note 114, art. 1, 2, 16; Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 79, art. 2(a); Women’s Convention, *supra* note 114, art. 6.

¹¹⁸ UNSG Rep. on Trafficking in Women and Girls, UN Doc. A/57/170, *supra* note 112, 2.

¹¹⁹ Demleitner, *supra* note 112, 172; Convention Against Trafficking, Ratification Status, UNTC, <http://www.unhchr/html/menu3/b/treatylla.htm>.

¹²⁰ UNSG Rep. on Trafficking in Women and Girls, UN Doc. UN/9/50/369, para. 23; HRW, Owed Justice: Thai Women Trafficked into Debt Bondage in Japan, 2000; Emerton, Trafficking of Women into Hong Kong for the Purpose of Prostitution, U. H.K., 2000.

¹²¹ UNSG Rep. on Trafficking in Women and Girls, A/57/170, *supra* note 112, 2; UNGA Special Sess. on Children, Statement by McClean, 2002.

¹²² Farnior, *supra* note 112, 219; Chiang, Trafficking in Women, In: Women and International Human Rights Law, Vol. 1, 1999, 357; UNHCHR Rep., Recommended Principles and Guidelines on Human Rights and Human Trafficking; Shahinian, Trafficking in Women and Girls, EGM/TRAF/2002/EP.1, 2002, 7.

developed countries (e.g. in the US 50,000 trafficked women),¹²³ and underdeveloped countries (e.g. India and Thailand);¹²⁴ and (ii) the culprits of this practice are rarely punished. Indeed, trafficking and prostitution of women are today a sad but extremely common reality. Hence, customary law does not provide Reston any grounds for enforcing the obligation to prevent and punish trafficking upon Annolay.

2. Alternatively, Annolay Complied with its Due Diligence Obligation.

Reston cannot argue that Annolay was insufficiently diligent in dealing with the matter of the Cascadian women since, as established *supra*, State obligations are not clear regarding trafficking in women, hence it is unrealistic to hold States legally responsible for lack of due diligence.¹²⁵ In any case, Annolay created a blue-ribbon panel to look into the matter merely two weeks after the ILSA report was published, which evidences the State's diligence on the matter. These panels have been created all over the world to resolve human rights violations,¹²⁶ such as in Argentina.¹²⁷ A blue-ribbon panel expedites results since proceedings need not follow rigid procedures, and their ability to gather evidence is enhanced.¹²⁸ Moreover, although the panel has taken over a year to produce results, this is a reasonable period of time, since trafficking is an

¹²³ Nelson, Sex Trafficking, Hous. J. Int'l L., 2002, 554; Hyland, Protecting Human Victims of Trafficking, Berkely Women's L. J., 2001, 30; Finzel, Trafficking of People, Harv. J. on Legis., 2001, 280; Richard, International Trafficking of Women into the US, US Dep. of Justice, <http://usinfo.state.gov/>.

¹²⁴ Inglis, Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework, Buff. Hum. Rts. L. Rev., 2001, 55; HRW, A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand, 1993.

¹²⁵ Chiang, Trafficking in Women, *supra* note 122, 356.

¹²⁶ Jody, Truth Commission in El Salvador and Guatemala, B.C. Third World L.J., 1997, 307; US Institute of Peace, Truth Commissions Digital Collection, <http://www.usip.org/library/truth.html>; A Culture of Reconciliation in Africa: Transformative Justice, The Restoration of Dignity and Reconciliation, <http://www.jiia.or.jp/pdf/lax.pdf>.

¹²⁷ Ratner & Abrams, *supra* note 11, 234, 235.

¹²⁸ Schlunck, Truth and Reconciliation Commission, ILSA J. Int'l & Comp. L., 1998, 415-17; Vasallo, Truth and Reconciliation Commissions, U. Miami Inter-Am. L. Rev., 2002, 160.

extremely complex problem.¹²⁹ Thus, Annolay has been diligent in dealing with this matter.

C. The Court Should Provide Declaratory Relief.

Declaratory judgments provide satisfaction for breaches of international law,¹³⁰ and have been willingly granted by this Court and its predecessor.¹³¹ Accordingly, Annolay requests that this Court award a declaratory judgment stating that it has not breached its international obligations deriving from the alleged treatment of Cascadian women working in brothels in Annolay.

V. PRAYER FOR RELIEF.

Annolay respectfully requests that the Court: **Declare** that Reston has breached its international obligations with respect to the rape victims now resident in Annolay and **Order** payment of damages to be distributed to those victims; **Declare** that Reston has breached its international obligations with respect to the bribes exacted from Annolaysian citizens, and **Order** payment of restitution in the amount of the bribes; **Declare** that Reston is not entitled to exercise universal jurisdiction over Schmandefare; and **Declare** that Reston has no standing to raise a claim regarding the treatment of Cascadian women working in brothels in Annolay, and that, in any event, Annolay has not breached any international legal obligations in that respect.

¹²⁹ UNHCHR, Statement to the Asia-Pacific Symposium on Trafficking in Persons, Tokyo, 2000; HRW, Memorandum of Concern: Trafficking of Migrant Women into Greece, July 2001; Hauber, The Trafficking of Women for Prostitution, B.C. Int'l & Comp. L. Rev., 1998, 185.

¹³⁰ Fitzmaurice, The Law and Procedure of the International Court of Justice, Cambridge, Vol.2, 1986, 584.

¹³¹ Aerial incident Case, ICJ, 1959; Mavromatis Palestine Concessions Case, PCIJ, 1924, 51.

