

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

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## STATEMENT OF FACTS

Annolay and Reston are States Parties to the Vienna Convention to the Law of Treaties and both made several public statements in support of the Draft Articles on State Responsibility which were recognised by General Assembly Resolution 56/83. Moreover Annolay – unlike Reston - is party to several human rights conventions and to the Regional Anti-Corruption Convention [hereinafter RACC]. Reston however is only signatory to the latter. Annolay is a democratic, developed State. The neighbouring States of Reston and Cascadia came into being after the Kingdom of Dysfunctia fell apart in a violent civil war between the ethnic groups of Cascadians and Restonians. According to the UN Human Rights Commission [hereinafter UNHRC] hundreds of rapes of Cascadian women were committed monthly during this conflict by Restonian militia members as means of coercion and spreading intimidation and terror among the Cascadian population. Various human rights organisations ascertained that these rapes were committed systematically. The leader of the Restonian militia, Colonel Raskolnikov did nothing to stop this practice. In late 1999, after the end of the civil war, Raskolnikov was elected President of the newly established State of Reston. On his first day in office he granted full national amnesty covering both civil and criminal liability for crimes committed during the civil war.

Within the conservative culture of Cascadia, raped Women are ostracized by society and cast aside by their families. Thus, thousands of women were forced to live “on the fringe”. Representatives of the Schmandefare Company, owned by Mr. Schmandefare, a private Annolaysian citizen with no affiliation to the Annolaysian government, recruited hundreds of these women to work for the Company in Annolay. The Schmandefare Company granted loans to the women to finance the assistance in immigration procedures. These loans typically extend over ten years and are consistent with the laws of Cascadia, Annolay and Reston. Subsequently, the Cascadian women were granted permanent resident status by

Annolay. Annolaysian President Contrary was shocked and horrified to learn from a NGO report that most of these women were put in brothels where many of them were subject to restraints on their liberty and to abuse. The Annolaysian government has put together a blue ribbon panel of criminal-law and womens'-rights experts including prosecutors to examine allegations that appeals of the Cascadian women to Mr. Schmandefare and to police officials were routinely dismissed or ignored.

Reston has proclaimed its intent to try Mr. Schmandefare for the crime against humanity of trafficking in women and sexual slavery, although Mr. Schmandefare is currently resident and present in Annolay and regardless of whether he will be extradited or not.

The Dysfunctional civil war left thousands of children orphaned living in wretched conditions. Numerous Annolaysian couples went to Reston in order to adopt children and give them new families in Annolay. However, Restonian border officials required considerable bribes on a routine basis from these couples wanting to leave Reston with their children, irrespective of fulfilment of the adoption requirements. Only after considerable diplomatic pressure Reston reassigned merely 10 percent of the border officials implicated in the bribery.

## QUESTIONS PRESENTED

Annolay asks the Court:

- (1) whether Annolay has standing to claim reparations on behalf the Cascadian victims of systematic rape during the civil war now resident in Annolay;
- (2) whether Reston is responsible for the breach of international obligations concerning these rape victims;
- (3) whether Reston has to pay damages to Annolay as reparations to be distributed to the victims;
- (4) whether Reston is responsible for the breach of its international obligations with respect to the bribes exacted by its border officials from Annolaysian citizens;
- (5) whether Reston is obliged to pay restitution to Annolay on behalf of the Annolaysian adoptive parents;
- (6) whether Reston is entitled to exercise universal jurisdiction over Mr. Schmandefare, irrespective of the lack of custody;
- (7) whether Reston has standing concerning alleged breaches Annolays international obligations regarding the treatment of Cascadian women working in brothels in Annolay;
- (8) whether Annolay has breached any international legal obligations concerning these women.

## SUMMARY OF PLEADINGS

(1) Annolay may raise a claim against Reston on behalf of the Cascadian rape victims, as it bases its application upon a breach of obligations *erga omnes*. Exhaustion of local remedies is not required, since they are rendered ineffective by a national amnesty granted for crimes committed during the civil war.

(2) Reston is responsible for breaches of obligations *erga omnes*, since due to the principle of retroactive attribution the rapes committed by Restonian militia members are attributable to Reston, and since these rapes constitute war crimes, crimes against humanity and genocide. Furthermore, by granting the rapists full national amnesty, Reston has violated its customary international law obligation to prosecute.

(3) Reston must pay reparations to Annolay for distribution to the rape victims to act in accordance with the general principle, that an internationally responsible State is obliged to pay reparation if restitution is impossible. Annolay can base this demand on Article 48 of the ILC Articles on State Responsibility, which states that in case of a breach of an obligation *erga omnes* any State may claim reparation in the interest of the beneficiaries of the obligation breached.

(4) Reston is in breach of its international obligations regarding the bribes exacted by its border officials from Annolaysian adoptive parents, since these bribes are, first, as acts of State organs attributable to Reston, second, in violation of Reston's obligation not to defeat object and purpose of the Regional Anti-Corruption Convention to which Reston is a signatory, and third, in violation of the general principle of law that State organs have to refrain from bribery acts. Furthermore, Reston's reluctance to take measures against bribery violates customary international law, especially concerning the obligation to prevent improper financial gains from inter-country adoptions.

(5) Reston is obliged to pay restitution to Annolay on behalf of the bribed Annolaysian

citizens, as a State responsible for an internationally wrongful act is under an obligation to make restitution.

(6) Reston is not entitled to exercise universal jurisdiction over Mr. Schmandefare, since under customary international law there is no universal jurisdiction with respect to the offences he committed and since trial *in absentia* would violate international law. Anyway, Annolay is primarily entitled to exercise jurisdiction over Mr. Schmandefare as it can base its jurisdiction on the territoriality and nationality principles.

(7) Reston has no standing concerning the treatment of Cascadian women by Annolay as it cannot base its claim on diplomatic protection as the Cascadian women never had Restonian nationality. Moreover, in view of Reston's responsibility for the rapes, a claim by Reston on behalf of the Cascadian women would be contrary to the clean hands doctrine.

(8) Annolay has not breached any international obligations regarding the Cascadian women, as the conduct of Mr. Schmandefare, a private individual, is not attributable to it. Furthermore, the treatment of the women does neither constitute slavery, nor debt bondage. As, due to incoherent State practice and absence of *opinion iuris*, there is no customary law obligation to take specific measures against trafficking, Annolay cannot be held responsible for a violation with regard to trafficking.

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**Jurisdiction**

Annolay and Reston have agreed to submit their dispute concerning the women and children of the civil war to the ICJ pursuant to Art.36(1) of the Statute of the ICJ. The jurisdiction or competence of the Court has not been qualified or contested. There is no dispute as to the jurisdiction of the Court.

**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 IRRESPECTIVE OF THE VICTIMS' NATIONALITY.**

In order to have standing before the International Court of Justice (ICJ) the applicant must show a legal interest in the outcome of the case.<sup>1</sup> Such a legal interest exists with regard to obligations of one State owed to another, *e.g.* in the field of diplomatic protection, or with regard to obligations owed to the international community as a whole.<sup>2</sup> In the *Barcelona Traction* Case the ICJ reaffirmed that the latter are the concern of all States by stating that “in view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”<sup>3</sup> Such obligations include the prohibition of genocide, war crimes, crimes against humanity, and the obligation to protect basic human rights, including the prohibition of torture.<sup>4</sup> The rule that any State is entitled to invoke the responsibility of a State in breach of an *erga omnes* obligation enjoys wide support by doctrine,<sup>5</sup> and is confirmed by the International Law Commission (ILC) in

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<sup>1</sup> *Northern Cameroons* (Prel.Obj.), 1963 ICJ 15,33-4; *ibid.* 110 (Sep.Op.Fitzmaurice); *ibid.* 46 (Sep.Op.Wellington Koo). Cf. *S.S. "Wimbledon"*, 1923 PCIJ (Ser.A) No.1,6,20.

<sup>2</sup> *Barcelona Traction, Light and Power Company, Limited*, 1970 ICJ 3, 33; M.Dupuy, *Droit International Public*, 366(1998), J.D.Campos, *Curso de Derecho Internacional Público*, 336(6<sup>th</sup>ed.1998); C.Annacker, *Die Durchsetzung von Erga Omnes Verpflichtungen vor dem Internationalen Gerichtshof*, 29(1994); M.Díez de Velasco, *Instituciones de Derecho Internacional Público*, 180(9<sup>th</sup>ed. 1991).

<sup>3</sup> *Barcelona Traction*, *supra* fn.2,33.

<sup>4</sup> *Barcelona Traction*, *supra* fn.2,33; L.Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, 717,718(1988); M.Ragazzi, *The Concept of International Obligations Erga Omnes*, 95(1997).

<sup>5</sup> H.Kelsen, *Peace through Law*, 117(1944); L.Hannikainen, *Peremptory Norms*, *supra* fn.4,273,275,286; R.K.Woetzel, *The Nuremberg Trials in International Law*, 109(1962); S.Z.Feller, *Jurisdiction over Offences with a Foreign Element*, in *A Treatise on International Criminal Law*, 5,32-3(M.C.Bassiouni&V.P.Nanda eds.1973); ALI, 2 *Restatement (Third) of the Foreign Relations Law of the US*, Commentary on §703,179(1987).

Article 48 of its Articles on State Responsibility.<sup>6</sup> As Annolay's application is based upon a breach of obligations *erga omnes* concerning war crimes, crimes against humanity and genocide, it has standing before the Court, irrespective of the victims' nationality.

Generally, local remedies have to be exhausted before a State may raise an international claim on behalf of individuals.<sup>7</sup> However, ineffective remedies need not be pursued,<sup>8</sup> especially if rendered ineffective by legislative measures.<sup>9</sup> Restonian President Raskolnikov granted full national amnesty covering civil and criminal liability for crimes committed during the civil war.<sup>10</sup> Since the amnesty prevents Restonian courts from adjudging these crimes, existing local remedies are ineffective and their exhaustion is not required.

## B. RESTON IS RESPONSIBLE FOR BREACHES OF OBLIGATIONS *ERGA OMNES*.

The constitutive elements of an internationally wrongful act are the attribution of the conduct to a State and its qualification as a breach of an international obligation.<sup>11</sup>

### 1. The conduct of the Restonian militia is attributable to Reston.

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<sup>6</sup> Art.48(1)(b), ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, 53<sup>rd</sup> Session, annexed to UNGA-Res.56/83, Jan.28.2002, 56 UN-GAOR, Supp.No.10,59 UN-Doc.A/56/10(2001); Commentary on Art.48, ILC, *ibid*.

<sup>7</sup> *Interhandel* (Prel.Obj.), 1959 ICJ 6,27,46; Eagleton, *International Organization and the Law of Responsibility*, 76 RdC 319,351(1950-I).

<sup>8</sup> *Ambatielos Claim*, 12 RIAA 83,119(1956); E.M.Borchard, *The Diplomatic Protection of Citizens Abroad*, 821-822(1922).

<sup>9</sup> *Greece v. UK*, Appl.No.176/56, 2 YBECHR(1958-9) 182, 184; *First Greek Case, Denmark, Norway, Sweden, Netherlands v. Greece*, Appl.Nos.3321/67,3344/67, 12 YBECHR 194; C.F.Amerasinghe, *Local Remedies in International Law*, 208(1990); Trindade, *Exhaustion of Local Remedies in the Inter-American System*, 18 IndianJIL 345, 348 (1978).

<sup>10</sup> *Clarifications*, para 1.

<sup>11</sup> Art.2, ILC, *State Responsibility Articles*, *supra* fn.6; *United States Diplomatic and Consular Staff in Teheran*, 1980 ICJ 3,29; N.Quoc-Dinh *et al.*, *Droit International Public*, 743(6<sup>th</sup>ed.1999).

According to the well established principle of retroactive attribution,<sup>12</sup> as codified by the ILC, “the conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State [...] shall be considered an act of the new State under international law.”<sup>13</sup> This rule is based upon the organizational continuity between the newly founded State and the movement.<sup>14</sup> It is uncontested that the rapes were committed by the Restonian militia,<sup>15</sup> which succeeded in establishing Reston as an independent State. Moreover, former militia leader and now President Raskolnikov personifies and embodies the continuity between the Restonian militia and the State of Reston. Therefore, the conduct of the Restonian militia is attributable to Reston.

## 2. Reston is responsible for war crimes.

Under customary international law, which is formed by State practice *and opinio iuris*,<sup>16</sup> all parties to an internal armed conflict are bound to apply the rules enshrined in common Article 3 of the Geneva Conventions.<sup>17</sup> These rules are owed to the international community

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<sup>12</sup> *Georges Pinson Case (Fr.v.Mex.)*, 5 RIAA 327,353(Award, Oct.19,1928); *Pomeroy's El Paso Transfer Company (US v.Mex)*, 4 RIAA 551,563(Award, Oct.8,1930); *Bolívar Railway Company (Gr.Brit.v.Venez.)*, 9 RIAA 445,453(1903); R.Jenning&A.Watts(eds.), *Oppenheim's International Law*, 554(9<sup>th</sup>ed.,1992).

<sup>13</sup> Art.10(2), *State Responsibility Articles*, *supra* fn.6.

<sup>14</sup> Commentary on Art.10, ILC, *State Responsibility Articles*, *supra* fn.6; ILC, Report to the General Assembly, 1975 YILC, vol.2, 100; Velasco, *Instituciones*, *supra* fn.2, 648.

<sup>15</sup> *Compromis*, para.4.

<sup>16</sup> Art.38(1)(b), ICJ-Statute.

<sup>17</sup> Art.3, Geneva Convention[I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug.12,1949, 75 UNTS 31; Art.3, Geneva Convention[II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug.12,1949 75 UNTS 85; Art.3, Geneva Convention[III] relative to the Treatment of Prisoners of War, Aug.12,1949, 75 UNTS 135; Art.3, Geneva Convention[IV] relative to the Protection of Civilian Persons in Time of War, Aug.12,1949, 75 UNTS 287; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), UN-Doc.S/25704(May 3, 1993), paras.34-5, 32 ILM 1164,1170(1993); Franck, *Fairness in the International Legal and Institutional System*, 240 RdC 11,263(1993-III); T.Meron,

as a whole,<sup>18</sup> and according to the ICJ “constitute a minimum yardstick” laying down the duties to which all parties of the conflict are to comply with.<sup>19</sup> It is prohibited to submit non-combatants to torture or cruel, humiliating or degrading treatment.<sup>20</sup> Rape constitutes torture when it causes severe pain or suffering, is inflicted intentionally, and with the purpose of intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind.<sup>21</sup> According to the UNHRC “hundreds of rapes of Cascadian women” were committed monthly during the civil war by Restonian militia members, “used as means of coercion and spreading intimidation and terror among the Cascadian population.”<sup>22</sup> Since the humiliating rapes causing pain and suffering to the women were inflicted intentionally to intimidate and coerce the Cascadian population, they constitute torture and violate basic laws of war. As these rapes are attributable to Reston (*supra* I.B.1), it is responsible for war crimes.

### 3. Reston is responsible for crimes against humanity.

Under customary international law rape amounts to a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population in furtherance of a policy,<sup>23</sup> if the violator had knowledge of the attack.<sup>24</sup> It is

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*Human Rights and Humanitarian Norms as Customary Law*, 28(1989).

<sup>18</sup> Bothe, *War Crimes in Non-International Armed Conflicts*, in *War Crimes in International Law* 293,303(Y.Dinstein&M.Tabory eds.1996); Cassese, *The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30 ICLQ 416,431(1981).

<sup>19</sup> *Military and Paramilitary Activities in and Against Nicaragua*, (Merits)(Nicar. v.US), 1986 ICJ 14,114(Judgm. Jun.27).

<sup>20</sup> Common Art.3, Geneva Conventions I,II,III,IV, *supra* fn.17.

<sup>21</sup> Art.7(2)(e), Rome Statute of the International Criminal Court, Jul.17,1998, 37 ILM 999(1998).

<sup>22</sup> *Compromis*, para.4.

<sup>23</sup> Art.7(1), Rome-Statute *supra* fn.21; Art.7, Report of the Preparatory Commission of the

recognized that States as well as organizations may commit such crimes.<sup>25</sup> According to the UNHRC the rapes were widespread and various human rights organizations ascertained that they were committed systematically as a means to coerce and intimidate.<sup>26</sup> Thus, by applying the rule of retroactive attribution (*supra* I.C.1.), Reston is responsible for crimes against humanity.

#### 4. Reston is responsible for the commission of genocide by the Restonian militia.

The prohibition of genocide forms part of customary international law.<sup>27</sup> A State can itself be held responsible for the commission of genocide.<sup>28</sup> Causing serious bodily or mental harm to members of a group or imposing measures intended to prevent births within a group constitutes genocide if the acts are committed with intent to destroy, in whole or in

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International Criminal Court, Part II, UN-Doc.PCNICC/2000/1/Add.2 <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement>; *Public Prosecutor v.Menten*, 75 ILR 331, 362-3(Neth.Supr.Ct. Judgm. Jan.13,1981); *Barbie*, 78 ILR 125,137(Fr.Ct. of Cassation,Judgm. Dec.20,1985); *Touvier*, 100 ILR 338,350-2(Fr.Ct. of Appeal Judgm. Apr.13,1992); *Reg. v.Finta*, 104 ILR 285,359(Can.Supr.Ct. Judgm. Mar.24,1994).

<sup>24</sup> Art.5(g), Statute of the International Criminal Tribunal for the Former Yugoslavia, UNSC-Res.827, 32 ILM 1303(1993); Art.3(g), Statute of the International Criminal Tribunal for Rwanda, UNSC-Res.955, 33 ILM 1598(1994); Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424,426-7(1993); M.C.Bassiouni, *Crimes Against Humanity in International Criminal Law* 361(2<sup>nd</sup> ed.1999).

<sup>25</sup> Meron, *Crimes under the Jurisdiction of the International Criminal Court in Reflections on the International Criminal Court*, 47, 50(H.v.Hebel *et al.* eds.,1999).

<sup>26</sup> *Compromis*, paras.3,4.

<sup>27</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 ICJ 16, 23(Adv.Op. May 28); W.A.Schabas, *Genocide in International Law*, 3(2000).

<sup>28</sup> Art.9, Convention on the Prevention and Punishment of the Crime of Genocide, Dec.9, 1948, 78 UNTS 277; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Prel.Obj.)*(Bos.&Herz. v.Yug.), 1996 ICJ 595,616(Judgm. Jul.11); Kunz, *The United Nations Convention on Genocide*, 43 AJIL 738, 746(1949); Jorgensen, *State Responsibility and the 1948 Genocide Convention*, in *The Reality of International Law-Essays in Honour of Ian Brownlie*, 273,291(G.S.Goodwin-Gill&S.Talmon eds.1999).

part, an ethnical group.<sup>29</sup> This intent need not be clearly expressed, but may be inferred from the circumstances considering the means that were used.<sup>30</sup> The raped Cascadian women were suffering serious bodily as well as mental harm. Moreover, due to the rapes they were ostracized by society and cast aside by their families, a fact of which the militia leaders must have been aware in view of the conservative Cascadian society. The sheer number and systematic manner in which these rapes were committed preventing them from giving birth to children of Cascadian fathers provides further evidence that the Restonian militia possessed the intent to destroy the Cascadian ethnic group. Since the rapes are attributable to Reston (*supra* I.B.1.), it is responsible for genocide.

#### C. RESTON HAS BREACHED ITS OBLIGATION TO PROSECUTE THE RAPISTS.

A series or a recurrence of treaties laying down a similar rule may produce a norm of customary international law.<sup>31</sup> The rule that States are required to bring to justice perpetrators of certain international offences condemned by the international community is contained *e.g.* in conventions penalizing war crimes,<sup>32</sup> crimes against humanity<sup>33</sup> and

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<sup>29</sup> Art.2(b)(d), Genocide Convention, *supra* fn.28; Art.6(b)(d), Rome-Statute, *supra* fn.21; Art.2(2)(b)(d), ICTR-Statute, *supra* fn.24; Art.4(2)(b)(d), ICTY-Statute, *supra* fn.24; Joyner, *The United States and Genocide Convention*, 27 IndianJIL 411,411-7(1987). Cf. UNGA-Res.51/115, Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia, Dec.12, 1996, 51 UN-GAOR, Supp.No.49,266, UN-Doc.A/51/49(1996).

<sup>30</sup> *Prosecutor v.Karadzic and Mladic (Rule 61)*, ICTY, IT-95-5-R61 & IT-95-18-R61, para. 94, 108 ILR 86, 134.

<sup>31</sup> *Nottebohm Case (2<sup>nd</sup> Phase )*, (Liecht. v. Guat.), 1955 ICJ 4, 22-3 (Judgm. Jul.25); *Fisheries Jurisdiction (Merits) (UK v. Iceland)*, 1974 ICJ 3, 26(Judgm. Jul.25); A.D'Amato, *The Concept of Custom in International Law*, 118-9 (1971).

<sup>32</sup> Art.49, Geneva Convention I, *supra* fn.17; Art.50, Geneva Convention II, *supra* fn.17; Art.129, Geneva Convention III, *supra* fn.17; Art.146, Geneva Convention IV, *supra* fn.17; Preamble para.10, Arts.1,8,17, Rome-Statute, *supra* fn.21; Arts.2,3,29, ICTY-Statute, *supra* fn.24.

<sup>33</sup> Preamble para.10,Arts.1,7,17, Rome-Statute, *supra* fn.21; Arts.5,29, ICTY-Statute, *supra* fn.24.

genocide.<sup>34</sup> Therefore, the recurring inclusion of this rule in relevant legal instruments has transformed it into custom.<sup>35</sup> Moreover, failure to bring human rights offenders to justice leads to impunity and, by shattering belief in justice,<sup>36</sup> infringes the human right of the victims to an effective remedy.<sup>37</sup> The 1999 national amnesty for all persons accused of crimes committed during the civil war turned Reston into a safe haven for the rapists. Thereby, Reston has violated its international obligation to prosecute these criminals.

#### D. RESTON MUST PAY REPARATIONS TO THE RAPE VICTIMS.

Under international law every internationally wrongful act of a State entails its international responsibility and the responsible State is obliged to pay reparation if restitution is impossible.<sup>38</sup> As confirmed by Article 48 of the ILC Articles on State Responsibility, in case of a breach of an obligation *erga omnes* any State may claim performance of the obligation of reparation in the interest of the beneficiaries of the obligation breached.<sup>39</sup> Moreover, Reston is estopped from contesting the legal basis for

<sup>34</sup> Arts.5,6, Genocide Convention, *supra* fn.28; Preamble para.10,Arts.1,6,17, Rome-Statute; Arts.4, 29, ICTY-Statute, *supra* fn.24.

<sup>35</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Ariel Incident at Lockerbie* (Prov.Meas.)(Libya v. UK), 1992 ICJ 3, 69(Order Apr.14)(Diss.Op.Weeramantry); Bassiouni, *Reflections on International Extradition*, in *Festschrift für Otto Triffterer zum 65. Geburtstag*, 715, 729(K.Schmoller ed.,1996).

<sup>36</sup> Baeza, *Impunity, an Impossible Reparation*, 69 *NordicJIL* 27, 28(2000).

<sup>37</sup> UNHCR, *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, paras. 26, 27, UN-Doc.E/CN.4/Sub.2/1997/20/Rev. 1(1997) <http://www.derechos.org/nizkor/impu/joinet2.html>; Eide, *Preventing Impunity for the Violator and Ensuring Remedies for the Victim*, 69 *NordicJIL* 1, 1(2000); Cf. Art.8, *Universal Declaration of Human Rights*, UNGA-Res. 217 A(III), 3 UN-GAOR, 71, UN-Doc. A/810(1948).

<sup>38</sup> *Factory at Chorzów*, 1928 PCJI, (Ser.A) No.17, 4,46; Art.36(1), *State Responsibility Articles*, *supra* fn.6.

<sup>39</sup> Art.48(2)(b), ILC, *State Responsibility Articles*, *supra* fn.6; D.Shelton, *Remedies in International Human Rights Law*, 22(1999); ALI, 2 *Restatement*, *supra* fn.5, Comment to §703, 179; L.Hannikainen, *Peremptory Norms*, *supra* fn.4, 273,275,286; Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the*

Annolay's claim for payment of reparations to the Cascadian women, since Reston made several public statements in support of the ILC Draft Articles on State Responsibility which were recognized by General Assembly Resolution 56/83.<sup>40</sup> As Reston is responsible for genocide, crimes against humanity and war crimes (*supra I.B*), it has breached obligations owed to the international community as a whole and Annolay, like any other State, may claim reparation on behalf of the victims.

**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 AMOUNT OF THE BRIBES TO ANNOLAY ON BEHALF OF THE ANNOLAYSIAN ADOPTIVE PARENTS.**

**A. ANNOLAY MAY EXERCISE DIPLOMATIC PROTECTION.**

As stated by the Permanent Court of International Justice, "it is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State."<sup>41</sup> While generally local remedies have to be exhausted before a State may raise a claim on behalf of individuals,<sup>42</sup> this rule is not applicable when the alleged violation forms part of a widespread administrative practice of a State,<sup>43</sup> which involves the repetition of acts and official tolerance thereof.<sup>44</sup> Restonian border officials solicited bribes on a routine basis for more than twelve months from

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*Slave Trade under Customary International Law*, 39 VJIL 303,306(1998/1999).

<sup>40</sup> Para.38, *compromis*, as amended by the clarifications.

<sup>41</sup> *Mavrommatis Palestine Concessions* (Merits), 1924 PCIJ (Ser.A) No.2, 6,12.

<sup>42</sup> *Supra* fn.7.

<sup>43</sup> *Second Cyprus Case, Greece v. UK*, Appl.No. 299/57, 2 YBECHR (1958/59) 188-92; Amerasinghe, *Remedies*, *supra* fn.9, 208.

<sup>44</sup> Amerasinghe, *Remedies*, *supra* fn.9, 209; *First Greek Case*, *supra* fn.9, 195-6; *Ireland v. UK* Appl.No.5310/71, 25 Publications of the EUR.Ct.HR 64 (1978).

individuals seeking to cross the border with a Restonian child.<sup>45</sup> Reston's tolerance of this widespread administrative practice is manifested in its reluctance to take effective measures against these acts of corruption. Despite considerable diplomatic pressure exerted by the Annolaysian government, Reston merely reassigned 10 percent of its organs implicated in the bribery. In view of the routine basis of the bribes exacted by Restonian border officials and Reston's tolerance thereof, the local remedies rule is inapplicable and Annolay is entitled to espouse a claim of diplomatic protection.

## B. RESTON IS IN BREACH OF ITS OBLIGATIONS CONCERNING THE BRIBES.

### 1. The acts of the Restonian border officials are attributable to Reston.

Under the law of State responsibility, the conduct of an organ of a State is to be considered an act of that State if the organ acts in an official capacity, even if it exceeds its authority or contravenes its instructions.<sup>46</sup> Specifying the concept of such *ultra vires* acts, the ILC explicitly recognized acts of bribery as covered by this rule of attribution.<sup>47</sup> In any event, systematic or recurrent conduct renders an organ's act attributable to the State, irrespective of the former's capacity.<sup>48</sup> The Restonian border officials routinely required the bribes while performing their usual function of controlling the exit and entry of persons from and into Reston. As the Restonian State organs acted in official capacity and the receipt of bribes was widespread and recurrent, the acts are attributable to Reston.

### 2. Reston violated its obligations to combat bribery.

a) *Reston violated its obligation as signatory State of the RACC.*

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<sup>45</sup> *Compromis*, para.13.

<sup>46</sup> Art.7, State Responsibility Articles, *supra* fn.6; ILC, Report to the General Assembly, 1975 YILC, vol.2, 64-70; *Maal Case*, 10 RIAA 730,732(1903); *Jean Baptiste Caire Case*, 5 RIAA 516,529-530(1929); *Royal Holland Lloyd, a Corporation, v.The United States* repr.in 26 AJIL 399, 410(1932).

<sup>47</sup> Commentary on Art.7, ILC, State Responsibility Articles, *supra* fn.6, para.8, fn.157.

<sup>48</sup> *Ibid.*

Article 18 of the Vienna Convention on the Law of Treaties (VCLT), to which Reston and Annolay are both parties, provides that a signatory State is obliged to refrain from acts which would defeat the object and purpose of a treaty, notwithstanding an eventual lack of ratification.<sup>49</sup> This obligation may require a States active conduct as to guarantee that the *status quo* at the time of signature is preserved.<sup>50</sup> A treaty's preamble provides a reliable guideline to ascertain object and purpose.<sup>51</sup> The Preamble to the Regional Anti-Corruption Convention, which is identical to the Council of Europe Criminal Law Convention on Corruption, states the aim to achieve a greater protection of society against corruption.<sup>52</sup> A State being signatory to the RACC thus has to abstain from any measures that might deteriorate the *status quo* prevailing at the time of signature. Confronted with allegations of the rampant corruption at Reston's borders President Raskolnikov declared that the "border corruption issue is a small one compared to the many other issues facing our country".<sup>53</sup> Only through further pressure Raskolnikov eventually reassigned border officials implicated in the bribery. However, merely 10 percent of the corrupt officials were replaced. By leaving the conduct of the majority of 90 percent unimpaired, Reston encouraged further acts of bribery. If such an attitude were to prevail other States would follow the negative example set by Reston and a common criminal policy in respect of corruption would remain but an illusion. Therefore, Reston has defeated object and purpose of the RACC. Thereby, it

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<sup>49</sup> Art.18, Vienna Convention on the Law of Treaties, May,23,1969, 1155 UNTS 331.

<sup>50</sup> ILC, Summary Records, 789<sup>th</sup> Meeting, YILC, vol.1, 97; M.E.Villiger, *Customary International Law and Treaties*, 322(1985).

<sup>51</sup> *Territorial Dispute*, 1994 ICJ 4, 25-6; Zemanek&Buffard, *The "Object and Purpose" of a Treaty: An Enigma?*, 3 ARIEL 311, 317,322(1998).

<sup>52</sup> Preamble, para 3, Council of Europe Criminal Law Convention on Corruption, Jan.27, 1999, ETS No.173.

<sup>53</sup> *Compromis*, para.15.

violated article 18 of the VCLT.

*b) Bribery is prohibited by a general principle of law.*

Legal principles that are found in all or virtually all national legal systems may constitute general principles of law, which are an independent source of international law, as explicitly recognized by jurisprudence.<sup>54</sup> Bribery is universally criminalized and condemned by virtually every country in the world.<sup>55</sup> In the light of the universal criminalization of bribery in national legal systems, the rule that State organs have to refrain from any acts of bribery has evolved as a general principle of law. The bribes exacted by Reston's State organs on a routine basis are thus in violation of international law.

*c) Bribery is prohibited under customary law.*

A series or recurrence of a similar rule in different conventions may suffice of itself to create a rule of customary international law.<sup>56</sup> Moreover, the continuous adoption of General Assembly Resolutions by consent may show the existence of an *opinio iuris*.<sup>57</sup> The fact that State practice is of relatively recent vintage does not bar the formation of a new

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<sup>54</sup> Art. 38(1)(c), ICJ-Statute; *Corfu Channel Case (Merits)(UK v.Alb.)* 1949 ICJ 4, 22(Judgm.Apr.9); *Affaire de l'Indemnité Russe (Russ. v.Turk.)*, 11 RIAA 421, 443(Sentence Nov.11,1912).

<sup>55</sup> Code Pénal, Art.432(11) (France); Código Penal para el Distrito Federal, Art.222 (Mexico); Decreto de Creación y Organización de la Oficina Anticorrupción, Decreto Nacional 102/99 (Argentina); Code Pénal du Canada, Art.119 (Canada); Revised Penal Code of the Philippines, Arts.210-212; Criminal Law of the People's Republic of China, Arts.385,386 (China); Code Pénal Tunisien, Arts.83-86 (Tunisia); German Penal Code [StGB] Arts.331-335 (Germany); Law of Ukraine, On Struggle Against Corruption (Vidomosti Verkhovnoyi Rady) Art.1,7 (Ukraine); Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CornellILJ 627,629(2000); Harms, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, *ibid.* 159,168(2000).

<sup>56</sup> *Supra* fn.31.

<sup>57</sup> *Nicaragua*, *supra* fn.19, 100; *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, 255.

rule of customary law.<sup>58</sup> Numerous multilateral conventions impose the obligation to criminalize national and transnational bribery of public officials.<sup>59</sup> Simultaneously, the General Assembly has adopted a plethora of resolutions condemning bribery.<sup>60</sup> State practice displays that virtually all States have enacted anti-bribery legislation.<sup>61</sup> For these reasons, a customary rule obliging States to prohibit and criminalize bribery has evolved. Hence, the conduct of Reston's organs in conjunction with its reluctance to take measures against bribery is contrary to international law.

*d) Reston has breached its obligations concerning the Rights of the Child.*

Where a convention enjoys widespread and representative participation this might suffice of itself to create rules of customary international law.<sup>62</sup> The UN Convention on the Rights of the Child (CRC) has been ratified by 191 States,<sup>63</sup> and its provisions can thus be considered to reflect customary international law. The rule contained in Art. 21(d) of the

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<sup>58</sup> *North Sea Continental Shelf Cases*, 1969 ICJ 4, 43(Judgm. Feb.20); Sorensen, *Principes de Droit International Public, Cours Général*, 101 RdC 2,40(1960-III); Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RdC 1, 25(1978-I); Baxter, *Treaties and Custom*, 129 RdC 25,67(1970-I).

<sup>59</sup> Art.8, UN Convention Against Transnational Organized Crime, UNGA-Res 55/25, Annex I, Nov.15,2000, 55 UN-GAOR, Supp.No.49, 44, UN-Doc.A/55/49; Art.6,7, Inter-American Convention Against Corruption, Mar.29,1996, 35 ILM 724(1996); Art.3, Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, Jun.25,1997, Off.Jl., Ser.C 195, 1; Art.1, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec.18,1997, 37 ILM 1(1998).

<sup>60</sup> UNGA-Res. 54/205, Prevention of Corrupt Practices and Illegal Transfer of Funds, Dec.27,1999, 54 UN-GAOR, Supp.No.49,187, UN-DocA/54/49 (1999); UNGA-Res 55/188, Preventing and Combating Corrupt Practices and Illegal Transfer of Funds and Repatriation of such Funds to the Countries of Origin, Dec.20, 2000,55 UN-GAOR, Supp.No.49,260, UN-Doc.A/55/49(2000).

<sup>61</sup> *Supra* fn.55.

<sup>62</sup> *North Sea*, *supra* fn.58, 43.

<sup>63</sup> Status of Ratification of the Convention of the Rights of the Child, <http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm>.

CRC,<sup>64</sup> was reiterated and implemented by Art. 32 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.<sup>65</sup> It lays down that a State must take all measures to ensure that nobody, including private agencies and other persons,<sup>66</sup> derives an improper financial gain out of an activity related to an inter-country adoption.<sup>67</sup> When requiring bribes from Annolaysian couples who had fully abided by Restonian adoption laws, the border officials were acting in performance of their duty to control if the requirements for inter-country adoptions had been complied with. Through their activity, which is related to inter-country adoptions, they have obtained an improper financial gain. By not taking the measures designed to put an end to the conduct of its border officials, which is attributable to Reston (*supra* II.B.1), it has violated its customary obligation to ensure that nobody shall derive an improper financial gain from an inter-country adoption.

#### C. RESTON IS UNDER THE DUTY TO MAKE RESTITUTION TO ANNOLAY.

A 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

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<sup>64</sup> Art.21(d), United Nations Convention on the Rights of the Child, Nov.20, 1989, 1577 UNTS 3.

<sup>65</sup> Art.32, Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1933, 32 ILM 1139 (1993); R.Hodgkin&P.Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 276 (1998); G.Parra-Aranguren, Hague Conference on Private International Law, Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, Commentary on Art.32,para.1, <<http://www.hcch.net/e/conventions/exp133e.html>>.

<sup>66</sup> G.Parra-Aranguren, Explanatory Report, *supra* fn.65, Commentary on Art.32,para.1.

<sup>67</sup> Art.21(d), CRC, *supra* fn.64; Art.32(1), Hague Convention, *supra* fn.65; Art.20, 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, UNGA-Res 41/85, Dec.3,1986, 41 UN-GAOR, Supp.No.53, 299, UN-Doc. A/41/53.

committed.<sup>68</sup> As Reston is responsible for internationally wrongful acts of bribery (*supra II.B.I*) which resulted in financial losses for the Annolaysian adoptive parents, it is obliged to make restitution, *i.e.* to repay the amount of money which was illegally required, to Annolay to be distributed to the Annolaysian adoptive parents.

Moreover, pursuant to a general principle of law nobody shall enrich himself at the expense of another without legal justification.<sup>69</sup> The consequence of unjust enrichment lies in the State's duty to make restitution to those at whose expense the enrichment occurred.<sup>70</sup> In the case of a State organ being bribed, the respective State finds itself under the obligation to confiscate the proceeds of this offence.<sup>71</sup> If Reston were allowed to keep the profits of this confiscation this would amount to unjust enrichment and entail its obligation to make restitution.

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

Reston is not party to any convention containing a provision permitting the exercise of universal jurisdiction and may thus not claim jurisdiction on treaty-basis.

The exercise of universal jurisdiction as customary law remains controversial,<sup>72</sup> in particular as it may infringe sovereign rights of third States.<sup>73</sup> In any event, two conditions

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<sup>68</sup> Art.35, State Responsibility Articles, *supra* fn.6; Jiménez de Aréchaga, *International Responsibility*, in *Manual of Public International Law* (M. Sorensen), 531, 565 (1968).

<sup>69</sup> Schreuer, *Unjustified Enrichment in International Law*, 22 AJCL 281,281 (1974); Friedmann, *General Course in Public International Law*, 127 RdC 39,154-155(1969-II).

<sup>70</sup> O'Connell, *Unjust Enrichment*, 5 AJCL 2,2 (1956); D.B. Dobbs, *Handbook on the Law of Remedies*, 224 (1973).

<sup>71</sup> Art.12, UN Organized Crime Convention, *supra* fn.59.

<sup>72</sup> *R. v. Bow Street Magistrate, ex parte Pinochet*, 119 ILR 51,67(House of Lords, Judgm. Nov.25,1998); *Arrest Warrant of 11 April 2000* (Congo v. Belg.), 41 ILM 536,567 (ICJ Judgm. Feb.14, 2002)(Diss. Op. Oda); Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 BYIL 1,12(1982).

<sup>73</sup> Cottier, *What Relationship Between the Exercise of Universal and Territorial*

seem to have crystallized: first it may be exercised only over the most grave offences and second, only by the State that has apprehended the perpetrator.

#### A. UNIVERSAL JURISDICTION IS LIMITED TO SPECIFIC CRIMES.

According to doctrine the scope of crimes that qualify for the application of universal jurisdiction is limited to piracy, genocide, torture, war crimes and crimes against humanity.<sup>74</sup> Practice displays that even States considered very liberal in implementing universal jurisdiction limit national legislation to these offences.<sup>75</sup> Additional offences such as hijacking are subject to universal jurisdiction only on treaty basis.<sup>76</sup> This is exemplified by national legislation which makes the exercise of universal jurisdiction dependent on treaties with a corresponding obligation.<sup>77</sup> Slavery is not part of the recognized catalogue of

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*Jurisdiction, in International and National Prosecution of Crimes under International Law*, 843,851(Fisher *et al.* eds.2001); *Arrest Warrant*, Verbatim Record 2000/32, para.45, <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>. Cf. Reydams, *Prosecuting Crimes under International Law on the Basis of Universal Jurisdiction*, in *International and National Prosecution of Crimes under International Law*, 799,815(Fisher *et al.* eds.2001).

<sup>74</sup> *Arrest Warrant*, *supra* fn.72,560 (Sep.Op. Guillaume); Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554, 569 (1995); Reiss, *The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine*, 20 CornellLJ 281, 303 (1987); Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NewEnglandLR 363, 372 (2001); Sadat, *Redefining Universal Jurisdiction*, 35 NewEnglandLR 241, 244 (2001).

<sup>75</sup> Act concerning the Punishment of Grave Breaches of International Humanitarian Law (Belgium), repr. in 38 ILM 921,921-4(1999); Swiss Military Penal Code of Jun.13, 1927,Section 109(Switzerland), [www.admin.ch/ch/d/st/3/321.0.de.pdf](http://www.admin.ch/ch/d/st/3/321.0.de.pdf); Smis, Van der Borgh, *Belgium, Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, Introductory Note*, 38 ILM 918, 918-20 (1999).

<sup>76</sup> Bassiouni, *Universal Jurisdiction for International Crimes*, 42 VJIL 81,82(2001); Schachter, *International Law in Theory and Practice*, 178 RdC 9, 262 (1982-V); Scharf, *Universal Jurisdiction*, *supra* fn.74, 372; Gilbert, *Crimes Sans Frontières: Jurisdictional Problems in English Law*, 63 BYIL 415,416(1992); Randall, *Universal Jurisdiction under International Law*, 66 TexasLR 785,816(1988).

<sup>77</sup> Van Elst, *Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions*, 13 LeidenJIL 815,829(2000); German Penal Code, Sec.6, para.9 <http://www.bib.uni-mannheim.de/bib/jura/gesetze/stgb-at1.shtml#STRAFG-TIT1>; Sec.7

offences over which universal jurisdiction may be exercised. This is confirmed by reference to treaties regarding slavery and similar offences which do not provide for universal jurisdiction,<sup>78</sup> but merely contain provisions requiring States to make slavery a criminal offence under domestic law.<sup>79</sup> Solely over slave *trade* a State may exercise universal jurisdiction if the offender has been seized on the High Seas or on its territory and thus no other State has jurisdiction.<sup>80</sup>

Reston has proclaimed its intent to try Schmandefare for trafficking in women and sexual slavery. These are, however, not crimes over which universal jurisdiction may be exercised and Reston is thus not entitled to try Schmandefare for these offences.

#### B. SCHMANDEFARE'S CONDUCT DOES NOT CONSTITUTE A CRIME AGAINST HUMANITY.

In principle Annolay does not contest that universal jurisdiction may be exercised over crimes against humanity. As mentioned above, the furtherance of a policy is a constituent

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Finnish Penal Code, <http://wings.buffalo.edu/law/bclc/finnish.htm>; Ch.1,Art.9, Chinese Penal Code, <http://www.qis.net/chinalaw/prclaw60.htm>.

<sup>78</sup> Bassiouni, *International Crimes*, *supra* fn.76,112-3. Cf. Clark, *Offences of International Concern: Multilateral State Treaty Practice in the Forty Years since Nuremberg*, 57 *NordicJIL* 49,54,57(1988).

<sup>79</sup> Art.6, Slavery Convention, Sept.25,1926, 60 LNTS 253; Arts.3,5,6, Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept.7,1956, 266 UNTS 3; Art.3,5, International Agreement for the Suppression of the White Slave Traffic, May 18,1904, 1 LNTS 83; Art.3, International Convention for the Suppression of the Traffic in Women and Children, Sept.30,1921, 9 LNTS 416; Art.25, International Labour Organization Convention Concerning Forced or Compulsory Labour No.29, Jun.28,1930,39 LNTS 55; Art.8 Convention for the Suppression of the Traffic in Persons and the Exploitation of Prostitutes and Others, Dec.2,1949, 96 UNTS 271; Art.5, Protocol to Suppress Prevent and Punish Trafficking in Persons, Especially Women and Children, supplementing the Draft United Nations Convention on Transnational Organized Crime, UNGA-Res.55/25, Annex II, Nov.15,2000, 55 UN-GAOR, Supp.No.49, 60, UN-Doc.A/55/49.

<sup>80</sup> Scharf, *Universal Jurisdiction*, *supra* fn.74, 368; Schachter, *International Law*, *supra* fn.76, 262; Bassiouni, *International Crimes*, *supra* fn.76, 113; Art.13, Convention on the High Seas, Apr.29,1958,450 UNTS 82; Art.99 United Nations Convention on the Law of the Sea, Dec.10,1982,500 UNTS 95.

element of such a crime.<sup>81</sup> In particular this policy must be actively promoted,<sup>82</sup> either by a State or an actor with some form of control over territory.<sup>83</sup>

Schmandefare is a private person with no affiliation to the Annolaysian government and without any governmental control over any part of its territory. Furthermore, there is no evidence that Schmandefare pursues any policy, but runs the brothels for economic profit. Accordingly, his conduct cannot be qualified as a crime against humanity, rendering Reston's attempt to exercise universal jurisdiction contrary to international law.

### C. UNIVERSAL JURISDICTION REQUIRES THE PRESENCE OF THE ACCUSED.

The custody of the State over the alleged criminal is a prerequisite for the exercise of universal jurisdiction. This is evidenced by the practice of States,<sup>84</sup> international tribunals,<sup>85</sup> as well as doctrine<sup>86</sup>. Even treaties providing for universal jurisdiction unanimously require that the accused is present in the *forum* State.<sup>87</sup> In the absence of any State practice to the

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<sup>81</sup> *Supra* fn.23.

<sup>82</sup> Report of the Preparatory Commission of the International Criminal Court, *supra* fn.81,9.

<sup>83</sup> *Prosecutor v. Tadic*, ICTY, IT-94-1,112 ILR 1,220(Trial Chamber, Judgm., May 7,1997); G.Robertson, *Crimes Against Humanity*, 241, 335(2000); Bassiouni, *Crimes*, *supra* fn.24, 245.

<sup>84</sup> *Attorney General of the Government of Israel v. Adolf Eichmann*, 36 ILR 4, 298 (Isr. Supr. Ct., Judgm. May 29,1962); *Demjanjuk v. Petrovsky*, 79 ILR 534, 545 (US Ct. of Appeal, 6<sup>th</sup> Circ., Judgm. Oct.31,1985); *Polyukhovic v. Commonwealth of Australia*, 91 ILR 1,118(Australia, High Ct., Aug.14,1991).

<sup>85</sup> *Prosecutor v. Furundzija*, ICTY, IT-95-17/1, 121 ILR 213,262(Trial Chamber II, Judgm. Dec.10,1998).

<sup>86</sup> *Arrest Warrant* *supra* fn.72,560 (Sep.Op. Guillaume); Bassiouni, *Universal Jurisdiction*, *supra* fn.76,139; *Harvard Research in International Law, Jurisdiction with respect to Crime* 29 AJIL(Supp.), 439, 573 (1935); Schachter, *International Law*, *supra* fn.76, 264; Gasiokwu, *The Pinochet-British Extradition Episode: Issues and Problems in International Law*, 40 IndianJIL 71, 725 (2000).

<sup>87</sup> Art.49, Geneva Convention I, *supra* fn.17; Art.50, Geneva Convention II, *supra* fn.17; Art.129, Geneva Convention III, *supra* fn.17; Art.146, Geneva Convention IV, *supra* fn.17; Art.19 Geneva Convention of the High Seas, *supra* fn.80; Art.5, Convention

contrary it may not be conceived that the alleged customary obligation is broader than the conventional one.<sup>88</sup>

Schmandefare is currently resident and present in Annolay. Reston however has uttered its intention to try Schmandefare regardless of whether he will be extradited to Reston or not. Consequently, Reston's attempt to exercise universal jurisdiction over Schmandefare would violate international law since the presence of the accused is a precondition for the exercise of universal jurisdiction.

**D. EVEN IF RESTON WERE ENTITLED TO EXERCISE UNIVERSAL JURISDICTION THIS EXERCISE IS SUBSIDIARY.**

Even if a State can find a basis for the exercise of extraterritorial jurisdiction it has to submit this exercise to a balancing test of reasonableness,<sup>89</sup> as any extraterritorial exercise of jurisdiction entails the danger of infringement of other State's sovereignty.<sup>90</sup> Criteria that need to be esteemed are *i.a.* the nationality of the person accused and the extent to which the conduct took place on the territory of the other State.<sup>91</sup> Thus a State may only exercise

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Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, June 26,1987,23 I.L.M. 1027 (1984); Art.7, Convention for the Supression of the Unlawful Seizure of Aircraft, Dec.16,1970, 860 UNTS 105; Art.7, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept.23,1971, 974 UNTS 177; Art.7, International Convention Against the Taking of Hostages, Dec.17,1979, 1316 UNTS 205.

<sup>88</sup> M.Villiger, *Customary International Law and Treaties*, 181(2<sup>nd</sup> ed.1997).

<sup>89</sup> *Mannington Mills Inc. v. Congoleum Corporation*, 595 F2d 1287, 24 AILC 267,274-5(1969-1978) (U.S.Ct.App., 3d Cir., 1979); *Timberlane Lumber Co. v. Bank of America N.T. &S.A.*, 549 F.2d 597,24 AILC 303,317-8(1969-1978) (U.S.Ct.App., 9<sup>th</sup> Cir., 1977); Lowenfeld, *International Litigation and the Quest for Reasonableness*, 75 RdC 9,245 (1994-I); *Barcelona Traction*, *supra* fn.2, 105(Sep.Op.Fitzmaurice).

<sup>90</sup> *Lotus*, 1927 PCIJ ( Ser.A.) No.10, 6, 56-7(Diss.Op. Finnlay); *Lotus*, 1927 PCIJ (Ser.C.)No.13, 332, 337, *Remarks by Professor Fedozzi*, Documents relating to the Judgment; Mayer, *Internationales Strafrecht*, *supra* fn.73, 609-10.

<sup>91</sup> ALI, 1 *Restatement (Third) on the Foreign Relations Law of the US*, §403; *Mannington Mills Inc.v. Congoleum Corporation*, *supra* fn.89, 275.

universal jurisdiction after balancing these criteria<sup>92</sup> and only if neither another State can exercise jurisdiction based on the principle of territoriality or nationality<sup>93</sup> nor the State in which the accused is present is willing try him.<sup>94</sup>

Furthermore, according to the principle of *ne bis in idem* no one shall be tried or punished twice for an offence he has already been convicted for.<sup>95</sup> If criminal proceedings are opened in two countries the alleged perpetrator runs danger of being convicted twice.<sup>96</sup>

Schmandefare, an Annolaysian national is currently present on Annolaysian territory, where he also allegedly committed the crimes for which he is accused by Reston. Thus, balancing these facts by taking into consideration that Annolay can base prosecution on the territoriality principle and Schmandefare is an Annolaysian national results in the consequence that Annolay is primarily entitled to exercise jurisdiction. The blue ribbon panel containing also prosecutors from the Ministry of Justice is currently inspecting the matter. According to the facts determined by the *compromis* Annolay is a democratic State with a functioning judicial system which will try Schmandefare if the accusations are justified. Thus Reston's exercise of jurisdiction would interfere with Annolay's right to exercise jurisdiction and would thereby violate Annolay's sovereignty. The trial of

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<sup>92</sup> S.Ratner&J.Abrams, *Accountability for Human Rights Atrocities in International Law*, 141(1997).

<sup>93</sup> Bassiouni, *International Crimes*, *supra* fn.76,96; *cf. Arrest Warrant supra* fn.72,586 (Sep.Op. Higgins,Kooijmans,Buergenthal).

<sup>94</sup> *Arrest Warrant, supra* fn.72,586 (Sep.Op. Higgins Koojmans, Buergenthal); 331/99(Spanish Nat.Court,2000), [www.derechos.org/nizkor/guatemala/doc/espana.html](http://www.derechos.org/nizkor/guatemala/doc/espana.html); Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, NewEnglandLR 399, 416(2001).

<sup>95</sup> Art. 14(7) ICCPR; Art. 4 7<sup>th</sup> Additional Protocol of the ECHR; M.Nowak, *U.N. Covenant on Civil and Political Rights*, 272-3(1993).

<sup>96</sup> Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 EJIL 67, 85 (1990).

Schmandefare can only result in a sentencing of Schmandefare or in his acquittal. Thus, a second trial in Reston would violate his right not to be tried twice for the same offence. Hence, Annolay is primarily entitled to exercise universal jurisdiction over Schmandefare. Any subsequent exercise of jurisdiction by Reston would constitute a violation of Schmandefare's human rights.

**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 IS NOT ENTITLED TO RAISE A CLAIM.**

**1. Reston cannot base its claim on diplomatic protection.**

Under customary international law a State can raise a claim of diplomatic protection only on behalf of its nationals.<sup>97</sup> Since there is no formal legal link between Reston and the Cascadian women, Reston cannot base its claim on diplomatic protection.

**2. Reston is not entitled to invoke treaty obligations *vis-à-vis* Annolay.**

A treaty does not create rights for a third State, unless the parties to the treaty so intend.<sup>98</sup> Furthermore, a State that has not recognized in regard of itself the admissibility of State complaints alleging human rights violations may not lodge such a complaint.<sup>99</sup> As Reston is not a State Party to any human rights convention,<sup>100</sup> Reston has no standing to invoke alleged breaches of the respective conventions.

**3. Reston has no standing to raise a claim on behalf of the Cascadian women, as this would be contrary to the doctrine of clean hands.**

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<sup>97</sup> *Supra* fn.41.

<sup>98</sup> Arts.34,36(1), Art.18, VCLT, *supra* fn.49.

<sup>99</sup> Art.41(1)ICCPR, *supra* fn.7; Art. 21(1),Torture Convention, *supra* fn.38.

<sup>100</sup> *Compromis* paras.38, 39.

Under the clean hands doctrine, a basic principle of equity and justice,<sup>101</sup> a State may not lodge a claim concerning the very subject matter in which it itself has acted wrongfully either morally or legally.<sup>102</sup> This doctrine requires that the injured party must not have been at the origin of the wrong or have aggravated it through his own behaviour.<sup>103</sup> Reston is responsible for systematic rapes of Cascadian women (*supra* I). Due to the rapes these women were ostracized by society and a good part of them therefore left Cascadia.<sup>104</sup> Furthermore, the Cascadian women were denied any possibilities to see their rapists brought to justice (*supra* I.C). The rapes, for which Reston bears responsibility, constitute legally and morally wrongful acts. Considering Reston's acts and omissions in regard to the Cascadian women, it is incompatible with the principle of equity and justice to permit Reston to act on behalf of the Cascadian rape victims.

## B. ANNOLAY HAS NOT BREACHED ANY INTERNATIONAL LEGAL OBLIGATIONS REGARDING THE CASCADIAN WOMEN.

### 1. The treatment of Cascadian women by Schmandefare is not attributable to Annolay.

A State is not responsible for the acts of private individuals it does not directly control, because such acts are not considered as occurring on its behalf.<sup>105</sup> Likewise, the conduct of a private individual may not be considered an act of State unless the State acknowledges and

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<sup>101</sup> ILC, Report on the Work of its 51<sup>st</sup> Session, May 3-Jul.23,1999, UN-Doc.A/54/10, para.413.

<sup>102</sup> *Lectric Law Library's Lexicon*, <http://www.lectlaw.com/def/c202>; *Professor Smith's Remedies Tutorial*, <http://www.west.net/~smith/equity.htm>; *Black's Law Dictionary*, 250 (6<sup>th</sup> ed. 1990); *law.com dictionary*, <http://dictionary.law.com/definition2.asp?selected=211&bold=llll>.

<sup>103</sup> Swiss Directorate of International Law, *Diplomatic Protection* (2000) IV[http://www.eda.admin.ch/sub\\_dipl/e/home/thema/intlaw/diplo.html](http://www.eda.admin.ch/sub_dipl/e/home/thema/intlaw/diplo.html).

<sup>104</sup> *Compromis*, paras.22-25.

<sup>105</sup> *Nicaragua*, *supra* fn.19, 62s; *Teheran*, *supra* fn.19, 29.

adopts said conduct as its own.<sup>106</sup> Such an acknowledgement must be made in a clear and unequivocal manner.<sup>107</sup> Annolay neither acknowledged, nor adopted as its own Schmandefare's conduct, who is a private citizen and has no formal ties to the Annolaysian government.<sup>108</sup> To the contrary, leading Annolaysian politicians dissociated themselves in strong terms from the regrettable and demeaning treatment imposed upon the Cascadian women. Thus, the treatment the Cascadian women suffered is not attributable to Annolay.

## 2. Annolay has not breached its international obligations.

### a) *Annolay may not be held responsible for slavery.*

The term slavery in a technical legal sense as used by international instruments is understood in a restrictive manner,<sup>109</sup> *i.e.* as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, thus depriving the respective human being of legal personality.<sup>110</sup> No ownership rights were exercised over the Cascadian women. They retained their legal capacity as they were granted permanent resident status by Annolay and granted considerable loans by Schmandefare. Thus, they were treated as subjects, not as objects of law and, although Annolay in no way endorses the treatment Cascadian women suffered, the definition of slavery is not fulfilled. Consequently, Annolay cannot be held responsible for slavery.

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<sup>106</sup> Art.11, State Responsibility Articles, *supra* fn.6.

<sup>107</sup> Commentary on Art. 11, ILC, State Responsibility Articles, *supra* fn.6.

<sup>108</sup> *Compromis*, paras.23-26.

<sup>109</sup> M.Nowak, *U.N. Covenant on Civil and Political Rights* 147 (1993); Schreiber, *Convention Supplémentaire des Nations Unies relative à l'Abolition de l'Esclavage, de la Traite des Esclaves et des Institutions et Pratique analogue à l'Esclavage*, 2 AFDI 547,553 (1956); Vitta, *La Défense Internationale de la Liberté et de la Moralité Individuelle*, 45 RdC 561, 599 (1933-III).

<sup>110</sup> Art.1(1), Slavery Convention, *supra* fn.79; Art.7(a), Supplementary Convention, *supra* fn.79; Art.7(2)(c), Rome-Statute, *supra* fn.21; Dottridge&Weissbrodt, *Review of the Implementation of and Follow-up to the Conventions on Slavery*, 42 GYIL 242, 244 (1999); Fischer, *Esclavage et Droit International*, 60 RGDIP 71, 80 (1957).

b) *The definition of debt bondage is not satisfied.*

The definition of debt-bondage requires three elements to be met: first, the status or condition must arise from a pledge by the debtor of his personal services; second, the value of these services must not be applied towards a liquidation of the debt; and finally, the length and nature of the services must not be limited and defined.<sup>111</sup> According to the *Compromis*, loans of the type given by Schmandefare typically extend over ten years and such loans are consistent with the laws of Cascadia, Annolay and Reston.<sup>112</sup> The income of the Cascadian women was used to satisfy the loans and at the time of the commencement of work the nature of the work was defined. Therefore, the treatment of the women does not amount to debt bondage and Annolay may not be held responsible.

c) *Annolay may not be held responsible for trafficking in women.*

Despite current international and regional initiatives to combat trafficking in women, which is generally held to fall outside the scope of slavery,<sup>113</sup> no customary obligation to take specific measures against trafficking has yet crystallized as evidenced by lack of uniform State practice and *opinio iuris*. With regard to the former, over 40 States have not enacted specific laws criminalizing trafficking,<sup>114</sup> and if they exist at all, they are rarely

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<sup>111</sup> Art.1(a), Supplementary Convention, *supra* fn.79; Rassam, *Forms of Slavery*, *supra* fn.39,332; Dottridge&Weissbrodt, *Slavery Conventions*, *supra* fn.110,255; Lassen, *Slavery and Slavery-Like Practices: United Nations Standard and Implementation*, 57 *NordicJIL* 196, 207(1988).

<sup>112</sup> *Compromis*, para.24.

<sup>113</sup> Rassam, *Forms of Slavery*, *supra* fn.39,342.

<sup>114</sup> Cf. US Department of State, *Trafficking in Persons Report*, 17s (2002), <http://www.state.gov/documents/organization/10815.pdf>; Third and Fourth Reports Submitted by Zambia to the Committee on the Elimination of Discrimination Against Women, Aug.12, 1999, UN-Doc.CEDAW/C/ZAM/3-4, 22; Initial Report Submitted by Lithuania to the Committee on the Elimination of Discrimination Against Women, UN-Doc.CEDAW/C/LTU/1,8-9.

enforced.<sup>115</sup> The absence of *opinio iuris*, on the other hand, is manifested by a lack of consensus on a coherent definition of the term trafficking,<sup>116</sup> particularly concerning the requirement of coercion and of an illicit or clandestine transfer.<sup>117</sup> Moreover, even States parties to the CEDAW, which unlike other relevant treaties enjoys a considerable number of ratifications, do not consider themselves bound to immediately adopt rigorous legislative, administrative or judicial measures against trafficking in women, but have decided to primarily set up specific inquiry commissions to study the problem.<sup>118</sup> The CEDAW itself, which addresses the issue of trafficking in women in its art.6,<sup>119</sup> remains programmatic in character,<sup>120</sup> and it is not clear by which means the suppression of trafficking in women

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<sup>115</sup> Trapalis, *Extraterritorial Jurisdiction: A Step Towards Eradicating the Trafficking of Women into Greece for Forced Prostitution*, 32 Golden GateULR 207, 229 (2002); Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential*, 10 HarvardHRJ 212, 213-214 (1997); Rassam, *Forms of Slavery*, *supra* fn.39,325. Cf. US Department of State, *Trafficking Report*, *supra* fn.114, 17s.

<sup>116</sup> Dottridge&Weissbrodt, *Slavery Conventions*, *supra* fn.110, 260; Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BuffaloHRLR 54, 60 (2001); Report of Special Rapporteur on Violence against Women, its Causes and Consequences, E/CN.4/1997/47 (1997).

<sup>117</sup> CEDAW Committee, Report of the Committee on Progress achieved in the Implementation of the Convention, CEDAW/C/1995/7, para.358,1994; Trafficking in Women for Sexual Exploitation, Jun.1996 International Organization for Migration, <http://www.iom.int/documents/publication/en/mip%5Fitaly%5Ftraff%5Feng.pdf>; UNGA-Res.49/166,Traffic in women and girls, Dec.23,1994,49 UN-GAOR, Supp.No.49,182,UN-Doc.A/49/49 (1994); Chuang, *Redirecting the Debate over Trafficking in Women: Definition, Paradigm, and Context*, 11 HarvardHRJ 65, 65 (1998).

<sup>118</sup> Third and Fourth Reports Submitted by Belgium to the Committee on the Elimination of Discrimination Against Women, Sept.19,1998, UN-Doc.CEDAW/C/BEL/3-4, 42; Second and Third Report Submitted by Burkina Faso to the Committee on the Elimination of Discrimination against Women, Feb.25, 1998, UN-Doc.CEDAW/C/BFA/2-3, 7.

<sup>119</sup> Art.6, Convention on the Elimination of All Forms of Discrimination Against Women, Dec.18,1979, 19 ILM 33 (1980).

<sup>120</sup> Art.24, CEDAW, *supra* fn.119.

should be achieved.<sup>121</sup> It is rather upon the State to decide for itself which measures are the most appropriate.<sup>122</sup>

In view of incoherent State practice as well as the absence of *opinio iuris*, there is no customary obligation to take specific measures with regard to trafficking and, hence, Annolay is not in breach of international law. In any event, Annolay has established a blue-ribbon panel, resembling the inquiry commissions frequently found in State practice, in order to investigate the alleged occurrence of trafficking and pending the results will take appropriate measures.

May it please the Court to adjudge and declare that

I. Reston has breached its international obligations and must pay damages to Annolay distributed as reparations to those victims of systematic rape during the Dysfunction war;

II. Reston is in breach of its obligations with respect to the bribes exacted by its border officials from Annolaysian citizens and is obliged to pay restitution in amount of the bribes to Annolay;

III. Reston is not entitled to exercise universal jurisdiction over Mr. Schmandefare;

IV. Annolay has not breached any international obligations deriving from the alleged treatment of the Cascadian women working in brothels in Annolay and in any event Reston has no standing has no standing to enforce these obligations.

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<sup>121</sup> CEDAW Committee, Report of the Committee on Progress achieved in the Implementation of the Convention, CEDAW/C/1995/7, para. 358, Nov.14,1994.

<sup>122</sup> Cook, *State Accountability under the Convention on the Elimination of all Forms of Discrimination Against Women*, in *Human Rights of Women*, 228, 231(R.J.Cook ed., 1994); R.Wallace, *International Human Rights, Text and Materials*, 32 (1997); Cook, *Reservations to the Convention on the Elimination of all Forms of Discrimination against Women*, 30 VJIL 643, 687(1989/90).

