

**IN THE
INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE
THE HAGUE, NETHERLANDS**

THE CASE CONCERNING THE ELYSIAN FIELDS

REPUBLIC OF ACASTUS

Applicant

v.

STATE OF RUBRIA

Respondent

2006

MEMORIAL FOR THE APPLICANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	vii
STATEMENT OF JURISDICTION.....	xvii
QUESTIONS PRESENTED	xviii
STATEMENT OF FACTS.....	xix
SUMMARY OF PLEADINGS	xxii
I. THE COURT MAY HEAR ALL CLAIMS IN THIS CASE PURSUANT TO THE PARTIES’ CONSENT TO JURISDICTION.....	1
A. ALL CLAIMS IN THIS DISPUTE FALL WITHIN THE RABBIT’S COMPROMISSORY CLAUSE	1
B. ACASTUS IS THE CONTINUATION OF NESSUS AND HAS ASSUMED ITS STATUS AS A MEMBER OF THE COURT	2
1. Acastus assumed Nessus’s status as a party to the Statute of the Court under the doctrine of continuity	2
<i>i. Relevant objective criteria demonstrate that Acastus is Nessus’s continuation</i>	<i>3</i>
<i>ii. Subjective circumstances also support Acastus’s claim of continuity</i>	<i>3</i>
2. Even if Acastus is not the permanent continuation of Nessus, it has temporarily assumed Nessus’s status.....	4
C. ALTERNATIVELY, ACASTUS HAS SUCCEEDED TO NESSUS’S MEMBERSHIP IN THE COURT.....	4
1. International law permits succession to membership in international organizations.....	5
2. The international community is estopped from rejecting Acastus’s claim of membership	6
D. ALTERNATIVELY, ACASTUS BECAME A PARTY TO THE STATUTE IN ITS OWN CAPACITY	7
1. Acastus became a member of the UN independent of its connection to Nessus	7
2. Alternatively, Acastus has joined only the Statute of the Court	8

E. ACASTUS HAS CONSENTED TO THE COMPULSORY JURISDICTION OF THE COURT	8
1. Acastus’s continuity or succession included its assumption of Nessus’s acceptance of compulsory jurisdiction	8
2. Alternatively, Acastus has accepted compulsory jurisdiction in its own capacity	9
3. Acastus’s acceptance of compulsory jurisdiction satisfies reciprocity to Rubria’s acceptance	9
II. BY PERMITTING CONSTRUCTION OF THE PROPOSED PIPELINE, RUBRIA WOULD VIOLATE THE RIGHTS OF ACASTUS’S CITIZENS OF ELYSIAN HERITAGE	10
A. ACASTUS HAS STANDING TO RAISE THIS CLAIM	10
1. Elysians are Acastian nationals.....	10
2. Rubria’s actions would violate <i>erga omnes</i> obligations	11
B. RUBRIA’S INVOLVEMENT IN THE PIPELINE PROJECT WILL VIOLATE THE ELYSIANS’ MINORITY RIGHTS	12
1. The duty to respect minority rights binds Rubria.....	12
2. The Elysians possess minority rights under international law	12
<i>i. The Elysians constitute a minority group.....</i>	<i>12</i>
<i>ii. Rubria’s obligation is not dependent on the Elysians’ citizenship</i>	<i>13</i>
3. The pipeline’s construction would violate Elysians’ minority rights to maintain their culture	13
4. Rubria’s failure to consult Elysians regarding the pipeline construction violates their right to participation.....	14
C. THE PIPELINE PROJECT IS INCONSISTENT WITH RUBRIA’S OBLIGATION TO RESPECT THE ELYSIANS’ INDIGENOUS LAND RIGHTS	15
1. Rubria must respect the Elysians’ land rights as an indigenous group.....	15
2. Elysians’ rights of self-determination guarantee continued access to their land	16

D. RUBRIA’S SOVEREIGNTY AND INTERESTS IN DEVELOPMENT DO NOT OVERRIDE ITS HUMAN RIGHTS OBLIGATIONS	17
III. RUBRIA IS RESPONSIBLE FOR PROF’S ACTIVITIES IN THE ELYSIUM, INCLUDING THE FORCED LABOR OF CIVILIANS	18
A. ACASTUS HAS STANDING TO BRING THIS CLAIM	18
1. Acastus may espouse the rights of its nationals	18
2. Preventing forced labor is an <i>erga omnes</i> obligation.....	18
B. RUBRIA IS RESPONSIBLE FOR PROF’S ACTIONS BECAUSE RUBRIA VIOLATED ITS TREATY AND CUSTOMARY INTERNATIONAL LAW OBLIGATIONS TO PREVENT FORCED LABOR.....	19
1. Rubria failed to take the affirmative measures to prevent forced labor required by the ICCPR and the ICESCR.....	19
<i>i. The ICCPR and the ICESCR prohibit forced labor and require affirmative measures to prevent it.....</i>	19
<i>ii. Rubria failed to take affirmative measures required to prevent forced labor</i>	21
2. Rubria violated its customary international law duty to prevent forced labor on its territory	21
<i>i. Customary international law prohibits forced labor and requires States to exercise due diligence to prevent it</i>	21
<i>ii. Rubria failed to exercise due diligence</i>	22
C. RUBRIA IS RESPONSIBLE FOR PROF’S ACTIVITIES BECAUSE PROF’S ACTIONS ARE IMPUTABLE TO RUBRIA	22
1. PROF’s conduct is imputable to Rubria because COG and PROF exercised elements of governmental authority	22
2. PROF’s conduct is imputable to Rubria because Rubria exercised control over both COG and PROF	24
<i>i. Rubria exercised effective control over both COG and PROF</i>	25
<i>ii. Rubria exercised overall control over both COG and PROF</i>	25

D. RUBRIA IS ALSO LIABLE FOR PROF’S ACTIONS AGAINST THE ELYSIANS BECAUSE IT BREACHED ITS CUSTOMARY INTERNATIONAL LAW DUTY TO PREVENT HARM TO ALIENS ON ITS TERRITORY	26
IV. THE OUTCOME OF THE <i>BORIUS</i> LITIGATION DOES NOT PLACE ACASTUS IN BREACH OF ARTICLE 52 OF THE RABBIT	27
A. ARTICLE 52 DID NOT REQUIRE APPLICATION OF THE MCRA IN THE <i>BORIUS</i> LITIGATION.....	27
B. THIS COURT SHOULD ACCEPT THE ACASTIAN COURT’S DETERMINATION OF LIABILITY UNDER ARTICLE 52 OF THE RABBIT	28
1. This Court should defer to the Acastian court’s interpretation of the MCRA as municipal law	28
<i>i. International tribunals defer to municipal courts in interpreting municipal laws ...</i>	<i>28</i>
<i>ii. Incorporation into the RABBIT did not change the MCRA’s municipal status</i>	<i>29</i>
2. This Court should defer to the Acastian court’s interpretation of the MCRA as corporate law	30
C. EVEN IF THIS COURT DOES NOT DEFER TO THE ACASTIAN COURT, IT SHOULD FIND THAT THE <i>BORIUS</i> DECISION IS CONSISTENT WITH ARTICLE 52 OF THE RABBIT	30
1. Distinguishing TNC from Rubria and COG is consistent with AIREs, the MCRA and customary international law	31
<i>i. Differentiation was objectively justified because AIREs and the MCRA are distinctive measures aimed at different entities.....</i>	<i>31</i>
<i>ii. Customary international law recognizes different legal obligations for State actors and private corporations</i>	<i>32</i>
2. The Acastian court properly determined that TNC’s conduct falls outside the scope of the MCRA.....	32
3. The Acastian court’s decision that the principle of limited liability shields TNC from liability is consistent with the RABBIT	33
<i>i. International law recognizes the principle of limited liability.....</i>	<i>33</i>
<i>ii. The RABBIT, including its incorporation of the MCRA, did not abrogate the principle of limited liability</i>	<i>33</i>

iii. *Limited liability shields TNC because it did not exercise actual control*34

V. CONCLUSION AND PRAYER FOR RELIEF34

INDEX OF AUTHORITIES

INTERNATIONAL TREATIES AND INSTRUMENTS

African Charter on Human and Peoples' Rights, 21 I.L.M. 58 (1982).....	12
American Convention on Human Rights, 1144 U.N.T.S. 123 (1992).....	20
Charter of the United Nations, 59 Stat. 1031 (1945).....	passim
Compromis.....	passim
Convention concerning Forced or Compulsory Labour (ILO Convention No. 29), 39 U.N.T.S. 55.....	19, 21
Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 28 I.L.M. 1382 (1989).....	12, 16
Convention Concerning the Abolition of Forced Labour, 320 U.N.T.S. 291 (1975).....	19, 21
Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. 1 (1997).....	32
Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948).....	14
Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 I.L.M. 1305 (1990).....	12, 14
Framework Convention for the Protection of National Minorities, 34 I.L.M. 351 (1995).....	14
International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966).....	passim
International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (1966) ..	passim
Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, 500 U.N.T.S. 241 (1961).....	2
Statute of the International Court of Justice, 59 Stat. 1055 (1945).....	1, 9, 10
Vienna Convention on Succession of States in Respect of Treaties, 17 I.L.M. 1488 (1978).....	4, 5
Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969).....	13, 27

INTERNATIONAL CASES AND ARBITRAL DECISIONS

Äärelä and Näkkäläjärvi v. Finland, HRC, Comm. No. 779/1997, U.N. Doc. CCPR/C/73/D/779/1997	15
American Bell International v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 170 (1986).....	26
Anglo-Iranian Oil Co. (<i>U.K. v. Iran</i>), Preliminary Objections, 1952 I.C.J. 93	1, 10, 27, 28
Application of the Convention of 1902 Governing the Guardianship of Infants (<i>Netherlands v. Sweden</i>), Judgment, 1958 I.C.J. 55	27, 28, 29
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (<i>Bosnia and Herzegovina v. Yugoslavia</i>), Preliminary Objections, 1996 I.C.J. 595	6, 9
Arbitral Award by the King of Spain (<i>Honduras v. Nicaragua</i>), 1960 I.C.J. 192.....	6
Arbitral Award of 31 July 1989 (<i>Guinea-Bissau v. Senegal</i>), Provisional Measures, 1990 I.C.J. 64	10
Barcelona Traction, Light and Power Company, Limited (<i>Belgium v. Spain</i>), Second Phase, Judgment, 1970 I.C.J. 3	passim
Belgian Linguistics, Merits, Eur. Ct. H.R., 45 I.L.R. 136 (1968).....	31
British Claims in the Spanish Zone of Morocco Arbitration (<i>U.K. v. Spain</i>) 2 R.I.A.A. 617 (1929).....	22
Caire Claim (<i>France v. Mexico</i>), 5 R.I.A.A. 516 (1929).....	24
Case No. 7615 (Brazil), Inter-Am. C.H.R., Report No. 12/85, O.A.S. Doc. OEA/Ser.L/V/II.66, doc. 10 rev. 1, 29-31 (1985).....	12
Certain German Interests in Polish Upper Silesia (<i>Germany v. Poland</i>), Judgment, 1925 P.C.I.J. (ser. A.) No. 6.....	1
Certain Norwegian Loans (<i>France v. Norway</i>), 1957 I.C.J. 9	10
Conditions of Admission of a State to Membership in the United Nations (Article 4 of the UN Charter), Advisory Opinion, 1948 I.C.J. 56.....	7
Corfu Channel (<i>U.K. v. Albania</i>), Merits, 1949 I.C.J. 4	10, 21, 22, 26
Diergaardt et al. v. Namibia, HRC, Comm. No. 760/1997, U.N. Doc. CCPR/C/69/D/60/1997 (2000)	15

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62	23
East Timor (<i>Portugal v. Australia</i>), Judgment, 1995 I.C.J. 90.....	11, 16
Eletronica Sicula S.p.A. (<i>U.S. v. Italy</i>), 1989 I.C.J. 15.....	29, 30
Fisheries Case (<i>U.K. v. Norway</i>), 1951 I.C.J. 116.....	28
Foremost Tehran v. Iran, 10 Iran-U.S. Cl. Trib. Rep. 228 (1986).....	26
Gabcikovo-Nagymaros Project Case (<i>Hungary v. Slovakia</i>), 1997 I.C.J. 7.....	23
Interhandel (<i>Switzerland v. U.S.</i>), Provisional Measures, 1959 I.C.J. 6.....	10
Iran-United States No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251 (1984).....	11
Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15	29
Kitok v. Sweden, HRC, Comm. No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985 (1988).....	14
LaGrand (<i>Germany v. U.S.</i>), Judgment, 2001 I.C.J. 466.....	2
Land and Maritime Boundary between Cameroon and Nigeria (<i>Cameroon v. Nigeria</i>), Preliminary Objections, 1996 I.C.J. 13.....	10
Länsman v. Finland, HRC, Comm. No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992.....	15, 17
Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, 2004 I.C.J. 136	11, 16, 17, 23
Legal Status of Eastern Greenland (<i>Denmark v. Norway</i>), 1933 P.C.I.J. (ser. A/B) No. 53	6, 28
Lubicon Lake Band v. Canada, HRC, Comm. No. 167/1984, U.N. Doc. A/45/40, Annex 9(A) (1990)	17
Mahuika v. New Zealand, HRC, Comm. No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993	14
Mavrommatis Palestine Concessions (<i>Greece v. Great Britain</i>), Judgment, 1924 P.C.I.J. (ser. A) No. 2	1, 18
Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79 (2002).....	15

Military and Paramilitary Activities in and Against Nicaragua (<i>Nicaragua v. U.S.</i>), Jurisdiction, 1984 I.C.J. 392	6
Military and Paramilitary Activities in and Against Nicaragua (<i>Nicaragua v. U.S.</i>), Merits, 1986 I.C.J. 14	24, 25
Minority Schools in Albania, Advisory Opinion, 1935 P.C.I.J. (ser.A/B) No. 64	29, 31
Monetary Gold Removed from Rome in 1943 (<i>Italy v. France, U.K. v. U.S.</i>), Preliminary Objections, 1954 I.C.J. 9.....	1
National Union of Belgian Police, 19 Eur. Ct. H.R. 19 (1975)	31
Neer v. Mexico (<i>U.S. v. Mexico</i>), 4 R.I.A.A. 60 (1926).....	10, 26
North Sea Continental Shelf (<i>Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands</i>), 1969 I.C.J. 3	7
Northern Cameroons (<i>Cameroon v. U.K.</i>), 1963 I.C.J. 15	13
Nottebohm (<i>Liechtenstein v. Guatemala</i>), 1955 I.C.J. 4.....	11
Oil Field of Texas v. Iran, Interlocutory Award, 1 Iran-U.S. Cl. Trib. Rep. 347 (1981)	23
Osman v. U.K., 29 Eur. Ct. H.R. 245 (2000).....	20
Panel Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS/79/R (Aug. 24, 1998)	28, 29
Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , GATT B.I.S.D. (39th Supp.) (June 19, 1992)	28, 29
Panel Report, <i>United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco</i> , GATT B.I.S.D. (41st Supp.) (Aug.12, 1994).....	29
Panevezys-Saldutiskis Ry. (<i>Estonia v. Lithuania</i>), 1939 P.C.I.J. (ser. A/B) No. 76	11
Prosecutor v. Tadic, ICTY, Case No. IT-94-1-A, Appeals Chamber Judgment (July 15, 1999)	24, 25
Right of Passage over Indian Territory (<i>Portugal v. India</i>), Preliminary Objections, 1957 I.C.J. 125.....	10
Rights of Nationals of the United States of America in Morocco (<i>France v. U.S.</i>), 1951 I.C.J. 109.....	27

Serbian Loans (<i>France v. Serbia</i>), 1929 P.C.I.J. (ser. A) No. 20	6, 28
SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13 (2003)	29, 34
SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6 (2004)	29, 34
South West Africa (<i>Ethiopia v. South Africa, Liberia v. South Africa</i>), Second Phase, Judgment, 1966 I.C.J. 6	31
Temple of Preah Vihear (<i>Cambodia v. Thailand</i>), 1962 I.C.J. 6	6, 9
Tinoco Claims (<i>Great Britain v. Costa Rica</i>), 1 R.I.A.A. 375 (1923).....	2, 7
United States Diplomatic and Consular Staff in Tehran (<i>U.S. v. Iran</i>), Judgment, 1980 I.C.J. 3	22, 23, 26
Velásquez-Rodríguez Case, Inter-Am Ct. H.R. (ser. C) No. 4 (1988)	20, 22, 32
Western Sahara, Advisory Opinion, 1975 I.C.J. 12.....	16
Yeager v. Iran, 17 Iran-U.S. Cl. Trib. Rep. 92 (1987).....	22, 23
Youmans v. Mexico (<i>U.S. v. Mexico</i>), 4 R.I.A.A. 110 (1926)	22, 24, 26
Young Loan Arbitration, 59 I.L.R. 495 (1980).....	27
NATIONAL CASES	
Association Protestante v. Radiodiffusion Television Belge, Belgium Conseil d'État, 47 I.L.R. 198 (1966)	31
Beth-El Mission v. Minister of Social Welfare, Israel Supreme Court, 47 I.L.R. 205 (1966).....	31
Bowlen v. The Queen, U.K. Appeals Cases, [1978] 1 F.C. 798.....	33
R. v. Chambre d'Accusation due Canton de Geneve, Switzerland Federal Tribunal, <i>in</i> LAMBERTUS ERADES, INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW – A COMPARATIVE CASE LAW STUDY 543 (1993).....	29
Re Sperry New Holland, [1985] O.J.E.C. No. L 376/2	33
Salomon v. A. Salomon & Co. Ltd., U.K. Appeals Cases, [1897] A.C. 22	33
Sumimoto Shoji America, Inc. v. Avagliano, 456 U.S. 176 (1982)	33

WORKS OF PUBLICISTS - ARTICLES

Antonio Cassese, 'The Self-Determination of Peoples,' in THE INTERNATIONAL BILL OF RIGHTS 92 (Louis Henkin ed., 1981)	16
Carlos M. Vazquez, <i>Direct vs. Indirect Obligations of Corporations under International Law</i> , 42 COLUM. J. TRANSNAT'L L. 936 (2005)	32
Edwin D. Williamson & John E. Osborn, <i>A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the U.S.S.R. and Yugoslavia</i> , 33 VA. J. INT'L L. 261 (1993).....	3
Hermann Mosler & Karin Oellers-Frahm, <i>Article 93</i> , in THE CHARTER OF THE UNITED NATIONS 1139 (Bruno Simma ed., 2002)	8
Illias Bantekas, <i>Corporate Social Responsibility in International Law</i> , 22 B.U. INT'L L.J. 309 (2004).....	31, 32
Karl Hofstetter, <i>Parent Responsibility for Subsidiary Corporations: Evaluating European Trends</i> , 39 INT'L COMP. L.Q. 576 (1990).....	33
Konrad Ginther, <i>Article 4</i> , in THE CHARTER OF THE UNITED NATIONS 117 (Bruno Simma ed., 2002)	8
Matthew Craven, <i>The Genocide Case, the Law of Treaties and State Succession</i> , 68 BRIT. Y.B. INT'L L. 127 (1997).....	6
Michael P. Scharf, <i>Musical Chairs: The Dissolution of States and Membership in the United Nations</i> , 28 CORNELL INT'L L.J. 29 (1995).....	5
Oscar Schachter, <i>State Succession: The Once and Future Law</i> , 33 VA. J. INT'L L. 253 (1993).....	2, 5
Oscar Schachter, <i>The Development of International Law through the Legal Opinions of the United Nations Secretariat</i> , 25 BRIT. Y.B. INT'L L. 91 (1948).....	6
Patrick Thornberry, <i>Self-Determination, Minorities, Human Rights: A Review of International Instruments</i> , 38 INT'L & COMP. L.Q. 867 (1989).....	16
Paul R. Williams, <i>State Succession and the International Financial Institutions</i> , 43 INT'L & COMP. L.Q. 776 (1994)	3
S. James Anaya, <i>Indigenous Rights Norms in Contemporary International Law</i> , 8 ARIZ. J. INT'L & COMP. L. 1 (1991).....	16
Salman Bal, <i>International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT</i> , 10 MINN. J. GLOBAL TRADE 62 (2001).....	19, 21

Steven R. Ratner, <i>Corporations and Human Rights: A Theory of Legal Responsibility</i> , 111 YALE L.J. 443 (2001).....	32
Thomas Franck, <i>The Emerging Right to Democratic Governance</i> , 86 AM. J. INT’L L. 46 (1992).....	12
Yoram Dinstein, <i>Collective Human Rights of Peoples and Minorities</i> , 25 INT’L & COMP. L.Q. 102 (1976).....	12, 16

WORKS OF PUBLICISTS - BOOKS AND TREATISES

CYNTHIA DAY WALLACE, <i>THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL – HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION</i> (2d ed. 2002).....	33, 34
D.J. HARRIS, <i>CASES AND MATERIALS ON INTERNATIONAL LAW</i> (6th ed. 2004)	10, 26
EDWIN M. BORCHARD, <i>THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS</i> (1915).....	18
IAN BROWNLIE, <i>PRINCIPLES OF PUBLIC INTERNATIONAL LAW</i> (6th ed. 2003).....	passim
JAMES CRAWFORD, <i>THE CREATION OF STATES IN INTERNATIONAL LAW</i> (1979)	3
JAMES CRAWFORD, <i>THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES</i> (2002)	19, 23, 25, 26
KONRAD G. BÜHLER, <i>STATE SUCCESSION AND MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS</i> (2001)	2, 5, 8
MALCOLM N. SHAW, <i>INTERNATIONAL LAW</i> (5th ed. 2003).....	18
MANFRED NOWAK, <i>UN COVENANT ON CIVIL AND POLITICAL RIGHTS</i> (1993).....	13, 16
P.T. MUCHLINKSI, <i>MULTINATIONAL ENTERPRISES AND THE LAW</i> (1995).....	33
S. JAMES ANAYA, <i>INDIGENOUS PEOPLE AND INTERNATIONAL LAW 3</i> (2d ed. 2004).....	16
SHABTAI ROSENNE, <i>THE LAW AND PRACTICE OF THE INTERNATIONAL COURT</i> (1997)	10
SIR RUPERT CROSS, <i>STATUTORY INTERPRETATION</i> (2d ed., 1987).....	32
YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1962).....	31
YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1966)	27
YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1970).....	31

UN RESOLUTIONS AND DOCUMENTS

Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, Int'l Law Comm'n, 53d Sess., U.N. A/CN.4/L.602/Rev.1 (2001).....	passim
Charter of Economic Rights and Duties of States (CERDS), G.A. Res. A/RES/39/163 (Dec. 17, 1984)	31
Concluding Observations of the Human Rights Committee on the Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland Relating to Hong Kong, U.N. Doc. CCPR/C/79/Add.57 (1995)	6
Concluding Observations on Chile, HRC, U.N. Doc. CCPR/C/79/Add.104 (1999).....	15
Concluding Observations on Sweden, HRC, U.N. Doc. CCPR/CO/74/SWE (2002)	15
Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries (ILO No. 107), 328 U.N.T.S. 247 (1959).....	16
Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8028 (Oct. 24, 1970).....	16
Declaration on Race and Racial Prejudice, U.N. Doc. E/CN.4/Sub.2/1982/2/Add.1, Annex V (1982)	12
Declaration on the Principles of International Cultural Cooperation, U.N. Doc. ST/HR/1/rev. 3 (1988)	14
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135 (Dec. 18, 1992).....	12
Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, art. 6, U.N. Doc. A/CN.4/L.573/Corr.1 (1999).....	11
Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994)	14
Francesco Capotorti, <i>Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities</i> , U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979).....	12, 13
G.A. Res. 47/1, U.N. Doc. A/RES/47/1 (Sept. 22, 1992).....	4, 7
General Comment 15, HRC, 42d Sess., U.N. Doc. CCPR/C/21/Rev.1 (July 22, 1986)	13

General Comment 23, HRC, 50th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 26, 1994).....	13, 14, 15
General Comment 3, CESCR, 5th Sess., U.N. Doc. E/1991/23 (1991)	20
Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.62, doc. 10 rev. 3 (1983).....	14
S.C. Res. 11, U.N. Doc. S/RES/11 (Nov. 15, 1946).....	8
S.C. Res. 777, U.N. Doc. S/RES/777 (Sept. 19, 1992).....	4
<i>Study of the Problem of Discrimination Against Indigenous Populations</i> , U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4.....	15
U.N. Doc. S7/SGB/18 (1964).....	6
U.N. GAOR, 16th Sess., 1104th mtg., U.N. Doc. A/C.3/SR.1104 (Nov. 14, 1961)	13
U.N. GAOR, 1st Comm., Annex 14g at 582-83, U.N. Doc. A/C.1/212 (Oct. 11, 1947)	2, 5
U.N. Global Compact, U.N. Doc. SG/S/6448 (1999).....	32
Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).....	16, 21
MISCELLANEOUS	
Arbitration Commission established by the International Conference on the Former Yugoslavia, Opinion No. 13, 96 I.L.R. 726, 728 (1993).....	5
Conference on Yugoslavia Arbitration Commission, Opinion 1 & 2, 31 I.L.M. 1488 (1992).....	11
Decision by the Council of Heads of State of the CIS, 31 I.L.M. 138, 151 (1992).....	3
OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, DAFFE/IME/WPG(2000)15/FINAL.....	30, 32
OECD, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: RESPONSIBILITY OF PARENT COMPANIES FOR THEIR SUBSIDIARIES (1980).....	33
<i>Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labor Organization to examine the observance by Myanmar of the Forced Labor Convention</i> , para. 203, available at http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar3.htm	19, 21

Restatement (Third) of Foreign Law § 210 cmt. f (1987) 4

STATEMENT OF JURISDICTION

In accordance with Article 40(1) of the Statute of the International Court of Justice, the Republic of Acastus and the State of Rubria have submitted a special agreement to this Court for the settlement of all differences concerning the Elysian Fields. Pursuant to Article 36(1), this Court has jurisdiction over disputes related to the RABBIT. The State of Rubria filed a preliminary objection to the jurisdiction of this Court under Article 36(2) over matters of the dispute unrelated to the RABBIT, which the Court subsequently joined to the merits of the argument.

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction over all claims in this case, considering the parties' status as members of the Court and their acceptance of compulsory jurisdiction?
2. Whether Rubria would violate the rights of Acastian citizens by permitting the construction of a pipeline through the agricultural lands of the Elysium?
3. Whether Rubria's involvement in PROF's exploitation of forced labor of the Elysians violated international obligations Rubria owed to Acastus?
4. Whether the Acastian court's decision in the *Borius* litigation was consistent with Acastus's obligations under Article 52 of the RABBIT?

STATEMENT OF FACTS

In 2000, the Republic of Nessus was peacefully divided into the Republic of Acastus and the State of Rubria. The two States have roughly equal territory and population, while the capital city of Nessus is now the Acastian seat of government. In 2001, Rubria, in its own capacity, applied for and was granted membership in the UN. It accepted the ICJ's compulsory jurisdiction with one reservation: cases in which the opposing State has not been a party to the Statute of the Court for at least twelve months prior to its application to the Court. Also in 2001, Acastus notified the Secretary-General of its continuation of the membership of Nessus in the UN and this Court. Shortly thereafter, the Security Council adopted Resolution 2386, noting its uncertainty over Acastian and Rubrian rights of succession and recommending that Acastus apply for UN membership in its own capacity. The Under-Secretary-General for Legal Affairs interpreted this resolution not to preclude Acastus's temporary assumption of Nessus's membership status. Very few States, other than Rubria, protested this interpretation. Acastus has since participated in the General Assembly and other UN bodies, its flag has been substituted for Nessus's, and it has commenced repayment of Nessus's outstanding UN dues.

In 2002, the Parliament of Acastus passed the "Multinational Corporate Responsibility Act" (MCRA), a municipal statute governing the conduct of Acastian corporations operating abroad. In 2003, Rubria and Acastus signed the Rubria-Acastus Binding Bilateral Investment Treaty (RABBIT), which incorporated the MCRA by reference. Under Article 52 of the RABBIT, Acastus must enforce all aspects of its municipal law in its form as of the date of the treaty's entry into force. The RABBIT also contains a compromissory clause permitting any dispute related to the treaty to be referred to this Court.

In 2003, the Rubrian government and Trans-National Corporation (TNC), a privately-owned limited-liability Acastian corporation, announced the creation of Corporation for Oil & Gas (COG), a joint-venture corporation incorporated and headquartered in Rubria, for the exclusive purpose of developing and exporting petroleum resources in Rubria. COG has its own full-time CEO and employees who work exclusively for COG. The Rubrian President granted COG complete rights to operate in the Rubrian half of the Elysium.

The Elysians are a group indigenous to the Elysium, an area now split between Acastus and Rubria. The group has a unique language, religion and cultural heritage. The Elysians live in Acastus, but have depended on agricultural fields located in the now-Rubrian portion of the Elysium since prehistory. Elysians have all rights of Acastian citizenship and are represented in the Acastian Parliament, but have never been allowed to participate in Rubrian elections. COG's plans for extraction and exportation includes an oil and gas pipeline that will require destruction of half the Elysians' agricultural lands and greatly harm the remaining lands' yield. According to the Institute for Local Studies and Appraisals (ILSA), the pipeline will make it impossible for the Elysians to continue their traditional way of life. Alternative routes for the pipeline were rejected for cost considerations. Both shareholders approved and agreed to finance the pipeline project. The Elysians have exhausted all local remedies available in Rubria regarding the potential construction to no avail.

Aware that destroying the Elysians' livelihood might provoke hostilities, COG authorized and financed creation of Protection & Retention Operations Force (PROF), consisting largely of former members of the Rubrian armed forces and commanded by recently retired senior army officers. Both shareholders approved a contract, under which COG was responsible for financing PROF.

The ILSA study also revealed that PROF had been seizing Elysians and forcing them to work on the pipeline project. PROF captured young men from the Elysian agricultural fields under threat of violence, and transported them to a site where they were forced to perform hard labor under the supervision of COG managers. One victim claimed to have been seized, with scores of others, on ten separate occasions during the previous two months. Rubria admits that it is now aware of PROF's activities but does not concede it was aware of the conduct at the time it occurred. COG, Rubria, PROF and TNC were sued in Acastian civil court for breaches of international law under the "Acastian International Rights Enforcement Statute" (AIRES) and the MCRA.

The Acastian court determined that AIRES did not provide a basis for jurisdiction over PROF or TNC, that the MCRA does not repeal the principle of limited liability, and that, under this principle, there was no case against TNC. The court determined that Rubria, sued directly as an alleged violator, was not protected by sovereign immunity or limited liability, and that AIRES provided a basis for jurisdiction over COG. After two months of evidence from the plaintiffs, including oral testimony from victims, the court found COG and Rubria jointly and severally liable to the plaintiffs for compensatory damages equal to 200 million Euros. Rubria refused to recognize the judgment.

Six weeks after this refusal, diplomatic options and local remedies having been exhausted, Acastus submitted an initial application to this Court, basing jurisdiction upon each party's acceptance of the Court's compulsory jurisdiction. Rubria filed a preliminary objection to the application claiming that Acastus is neither a UN member nor a party to the Statute, but conceded admissibility of the matters concerning the RABBIT. Acastus withdrew its initial application to allow both countries to approach the Court jointly.

SUMMARY OF PLEADINGS

I. The Court has jurisdiction to hear all claims in this dispute because (i) each claim relates to rights and obligations under the RABBIT and (ii) Acastus and Rubria are each members of the Court and have accepted compulsory jurisdiction. Article 62 of the RABBIT grants this Court jurisdiction over all claims relating to the treaty, and Rubria has advanced a broad interpretation of the rights and obligations covered by the RABBIT. Assessing Rubria's claims regarding the *Borius* litigation will require the Court to consider matters of law related to the pipeline project and Elysian forced labor, bringing all issues of the dispute within the coverage of the RABBIT. Acastus and Rubria have also accepted the Court's compulsory jurisdiction. Acastus has continued or succeeded to the status of Nessus, assuming its place as a party to the Court and its acceptance of compulsory jurisdiction. Alternatively, Acastus has become an independent member of the Court, and has accepted the Court's jurisdiction. As Rubria joined the UN in 2001 and accepted the Court's jurisdiction, this Court may hear all claims in this dispute.

II. Construction of the oil and gas pipeline will violate Rubria's obligation to respect the culture and indigenous rights of Elysians. Acastus raises this claim on behalf of its nationals, but asserts that Rubria's obligations are nonetheless *erga omnes*. Rubria owes Acastus the duty to respect the minority rights of Elysians, a duty which binds Rubria to take affirmative measures to protect the Elysian culture. Construction resulting in destruction of the Elysium, upon which Elysians have depended for thousands of years, would violate Rubria's obligations to respect the continued survival of the Elysians. Furthermore, as an indigenous group, Elysians have a right to continued access and utilization of the Elysium. Rubrian development interests cannot be invoked to justify egregious violations of the State's human rights obligations.

III. Acastus submits that Rubria is responsible for PROF's actions in the Elysium because (i)

Rubria violated its treaty and customary international law obligation to prevent forced labor and (ii) PROF's conduct is attributable to Rubria. Acastus has standing to bring this claim based on diplomatic protection and the *erga omnes* character of the obligation to prevent forced labor.

First, Rubria failed to take affirmative measures to prevent forced labor as required by the ICCPR and the ICESCR. Second, Rubria failed to exercise due diligence to prevent forced labor on its territory, as required by customary international law. Third, PROF's conduct is attributable to Rubria. COG and PROF both exercise elements of Rubrian governmental authority as a national petroleum company and police force, respectively. Additionally, attribution may be based on Rubria's exercise of both effective and overall control over COG and PROF. Rubria is also liable for PROF's conduct because it failed its customary international law duty to prevent harm to foreign nationals on its territory.

IV. The Acastian court's decision in the *Borius* litigation does not place Acastus in breach of Article 52 of the RABBIT for three reasons. First, the litigation falls outside the scope of the RABBIT's purpose because the litigation involved harm to Acastian citizens. Second, this court should accept the Acastian court's interpretation of the MCRA because international tribunals are bound by municipal courts' interpretation of municipal corporate law, and incorporating municipal law into a treaty has no effect on obligations created by that law. Third, the Acastian court's decision is consistent with the RABBIT and is supported by customary international law. Differentiation between TNC and Rubria is legally permissible since States and private corporations have different obligations under customary international law. The MCRA does not apply to TNC since it only regulates the conduct of corporations operating directly in foreign countries. Even if the MCRA does apply to TNC, the principle of limited liability shields TNC from liability because TNC did not exercise actual control over COG's daily operations.

PLEADINGS

I. THE COURT MAY HEAR ALL CLAIMS IN THIS CASE PURSUANT TO THE PARTIES' CONSENT TO JURISDICTION

This Court's exercise of jurisdiction depends on consent of the parties.¹ The Court has jurisdiction over all claims in this case based on both (i) the compromissory clause of the RABBIT, and (ii) the parties' status as members of the Court having accepted compulsory jurisdiction. Acastus, as the continuation or successor of Nessus, has assumed Nessus's status as a party to the Statute of this Court and its acceptance of compulsory jurisdiction. Alternatively, Acastus has independently become a member of the Court and accepted its compulsory jurisdiction.

A. ALL CLAIMS IN THIS DISPUTE FALL WITHIN THE RABBIT'S COMPROMISSORY CLAUSE

The RABBIT includes a compromissory clause, under which Acastus and Rubria consented to the Court's jurisdiction over "any disputes relating to any right or obligation" under the RABBIT.² Each claim presented in this dispute involves a disagreement of law related to the RABBIT.³ Rubria claims that the Acastian civil court decision breached Article 52 of the RABBIT.⁴ Although Acastus disputes this claim, assessing the claim requires determinations of international law that relate to the legality of the pipeline's construction and the forced labor of

¹ Statute of the International Court of Justice, art. 36(1), 59 Stat. 1055 (1945) [hereinafter ICJ Statute]; *Monetary Gold Removed from Rome in 1943 (Italy v. France, U.K. v. U.S.)*, Preliminary Objections, 1954 I.C.J. 9, 32; *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Preliminary Objections, 1952 I.C.J. 93, 102-03.

² *Compromis*, para. 16.

³ *See Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment, 1925 P.C.I.J. (ser. A.) No. 6, at 14; *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment, 1924 P.C.I.J. (ser. A.) No. 2, at 11.

⁴ *Compromis*, para. 38.

Elysians. In interpreting a compromissory clause similar to the RABBIT's,⁵ this Court rejected the argument that it lacked jurisdiction over the related questions of international law.⁶ The Court should hold that the dispute about the pipeline's legality and forced labor of Elysians are within the scope of the RABBIT and thereby within the Court's jurisdiction.

B. ACASTUS IS THE CONTINUATION OF NESSUS AND HAS ASSUMED ITS STATUS AS A MEMBER OF THE COURT

The Court may resolve any claims falling outside the RABBIT's compromissory clause based on the parties' acceptance of compulsory jurisdiction. As the legal continuation of Nessus, Acastus assumed Nessus's membership in the UN and the Court and all rights and obligations therein,⁷ including the acceptance of compulsory jurisdiction. As Rubria has also accepted compulsory jurisdiction,⁸ this Court has jurisdiction over all claims.

1. Acastus assumed Nessus's status as a party to the Statute of the Court under the doctrine of continuity

Under the customary international law doctrine of continuity,⁹ a State assumes its predecessor State's treaty membership, and all rights and obligations therein. Customary international law presumes continuation unless there is a clear extinction of the State.¹⁰ The

⁵ See Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, art. 1, 500 U.N.T.S. 241 (1961).

⁶ LaGrand (*Germany v. U.S.*), Judgment, 2001 I.C.J. 466, 482-83.

⁷ KONRAD G. BÜHLER, STATE SUCCESSION AND MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS 287 (2001).

⁸ Compromis, para. 7.

⁹ Tinoco Claims (*Great Britain v. Costa Rica*), 1 R.I.A.A. 375 (1923).

¹⁰ U.N. GAOR, 1st Comm., Annex 14g at 582-83, U.N. Doc. A/C.1/212 (Oct. 11, 1947); Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 253, 258 (1993).

objective and subjective factors considered in determining continuity¹¹ demonstrate that Acastus is Nessus's legal continuation.

i. Relevant objective criteria demonstrate that Acastus is Nessus's continuation

Determining continuity requires reference to the predecessor State's seat of government, economy, land mass, population and military.¹² Acastus has the stronger economy and its capital city was Nessus's seat of government.¹³ Although it appears land mass, population, and armed forces were evenly divided,¹⁴ a successor State need not possess a clear majority of each characteristic in order to legitimate its continuity claim.¹⁵

ii. Subjective circumstances also support Acastus's claim of continuity

Assertions made by involved parties, third-party States and intergovernmental organizations must also be considered.¹⁶ Acastus claimed it was the legal continuation of Nessus in April, 2001.¹⁷ Rubria relinquished any claim to continuity by applying for UN membership, and failing for eight months to object to Acastus's claim. Several States have recognized

¹¹ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 400 (1979) [hereinafter CRAWFORD, *THE CREATION OF STATES*].

¹² Edwin D. Williamson & John E. Osborn, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the U.S.S.R. and Yugoslavia*, 33 VA. J. INT'L L. 261, 268 (1993).

¹³ Compromis, paras. 1, 2.

¹⁴ *Id.* para. 11.

¹⁵ CRAWFORD, *THE CREATION OF STATES*, *supra* note 11, at 404-05; Paul R. Williams, *State Succession and the International Financial Institutions*, 43 INT'L & COMP. L.Q. 776, 785 n.58 (1994).

¹⁶ CRAWFORD, *THE CREATION OF STATES*, *supra* note 11, at 406. See Decision by the Council of Heads of State of the CIS, 31 I.L.M. 138, 151 (1992).

¹⁷ Compromis, para. 8.

Acastus as assuming Nessus's place in bilateral treaties.¹⁸ The UN has substituted Acastus's name and flag for Nessus's and accepted Acastus's payments of Nessus's outstanding UN dues.¹⁹

2. Even if Acastus is not the permanent continuation of Nessus, it has temporarily assumed Nessus's status

The UN has accepted Acastus as at least temporarily assuming Nessus's place. Acastus has been allowed to participate in the General Assembly and other UN bodies.²⁰ The Under-Secretary-General for Legal Affairs found Acastus's temporary membership consistent with international law and Security Council Resolution 2386.²¹ The overwhelming response following this determination has been to allow Acastus full participation in place of Nessus. Past practice in the case of Yugoslavia also supports claims to temporary continuation.²²

C. ALTERNATIVELY, ACASTUS HAS SUCCEEDED TO NESSUS'S MEMBERSHIP IN THE COURT

Even if Acastus is not the continuation of Nessus, it has succeeded to Nessus's status before this Court. The Vienna Convention on Succession of States in Respect of Treaties recognizes that when States separate, treaties in force for the predecessor State "continue in force in respect of each successor State so formed."²³ Acastus, as a successor State formed by

¹⁸ Clarification 8.

¹⁹ Compromis, para. 12.

²⁰ *Id.*

²¹ *Id.* para. 10.

²² G.A. Res. 47/1, U.N. Doc. A/RES/47/1 (Sept. 22, 1992); S.C. Res. 777, U.N. Doc. S/RES/777 (Sept. 19, 1992). *Cf.* Compromis, para. 9.

²³ Vienna Convention on Succession of States in Respect of Treaties, art. 34(1), 17 I.L.M. 1488 (1978) [hereinafter Vienna Convention on Succession]. *See also* Restatement (Third) of Foreign Law § 210 cmt. f (1987).

Nessus's dissolution, undertook party status to the UN Charter, and succeeded to Nessus's membership in the Court.

1. International law permits succession to membership in international organizations

Although Rubria may argue that rules of automatic succession are inapplicable to the acquisition of UN membership, international law recognizes no strict preclusion.²⁴ Succession in intergovernmental organizations is restricted only by limits the organization imposes.²⁵ The UN may allow succession in individual cases, through general tacit agreement or the acquiescence of its membership.²⁶ The General Assembly has previously recognized the ability to address situations on case-by-case bases.²⁷

Rights of succession are particularly appropriate for a State's membership in the UN. Automatic succession should govern multilateral treaties of a universal character open to general ratification.²⁸ The UN, unlike a regional or trade based group, is intended for universal membership.²⁹ The rule of automatic succession, which has been accepted with respect to

²⁴ BÜHLER, *supra* note 7, at 291.

²⁵ *See* Vienna Convention on Succession, *supra* note 23, art. 4.

²⁶ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 637 (6th ed. 2003). *See also* Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 *CORNELL INT'L L.J.* 29, 33 (1995).

²⁷ U.N. Doc. A/C.1/212, *supra* note 10, at 582-83. *See also* Arbitration Commission established by the International Conference on the Former Yugoslavia, Opinion No. 13, 96 *I.L.R.* 726, 728 (1993).

²⁸ Schachter, *supra* note 10, at 259.

²⁹ Charter of the United Nations, art. 4, 59 Stat. 1031 (1945) [hereinafter UN Charter].

human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR),³⁰ should also govern UN Charter party status. This is consistent with the purposes of the UN and ensures that the protections of the Charter and UN agencies are not denied to peoples in periods immediately following State dissolution.³¹

2. The international community is estopped from rejecting Acastus's claim of membership

This court has recognized estoppel as a general principle of international law.³² The international community, through general acceptance of the Under-Secretary-General's memorandum, has made a clear and unambiguous statement accepting the legitimacy of Acastus's UN participation.³³ The memorandum was unconditional and authorized,³⁴ even if not binding,³⁵ and the UN accepted it in allowing Acastus's participation. Acastus detrimentally

³⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections, 1996 I.C.J. 595, 654-55 (Separate Opinion of Judge Weeramantry) [hereinafter *Genocide Convention Case*]; Concluding Observations of the Human Rights Committee on the Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland Relating to Hong Kong, U.N. Doc. CCPR/C/79/Add.57 (1995).

³¹ See Matthew Craven, *The Genocide Case, the Law of Treaties and State Succession*, 68 BRIT. Y.B. INT'L L. 127, 138 (1997).

³² Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. U.S.*), Jurisdiction, 1984 I.C.J. 392, 413-15; Temple of Preah Vihear (*Cambodia v. Thailand*), 1962 I.C.J. 6, 39 (Separate Opinion of Judge Alfaro); Arbitral Award by the King of Spain (*Honduras v. Nicaragua*), 1960 I.C.J. 192, 213.

³³ See Legal Status of Eastern Greenland (*Denmark v. Norway*), 1933 P.C.I.J. (ser. A/B) No. 53, at 69.

³⁴ See Serbian Loans (*France v. Serbia*), 1929 P.C.I.J. (ser. A) No. 20, at 46.

³⁵ But see U.N. Doc. S7/SGB/18 (1964); Oscar Schachter, *The Development of International Law through the Legal Opinions of the United Nations Secretariat*, 25 BRIT. Y.B. INT'L L. 91, 94 (1948).

relied on this statement,³⁶ by paying Nessus's outstanding dues and subjecting itself to the Court's compulsory jurisdiction. Accordingly, the UN and the international community are estopped from now rejecting the legitimacy of Acastus's current UN status.

D. ALTERNATIVELY, ACASTUS BECAME A PARTY TO THE STATUTE IN ITS OWN CAPACITY

1. Acastus became a member of the UN independent of its connection to Nessus

Acastus has satisfied the UN membership requirements articulated in the Charter.

Acastus is a peace-loving State that has accepted, and is willing and able to carry out, the obligations contained in the Charter.³⁷ The Charter criteria are exhaustive; this Court has held that the Security Council and General Assembly cannot consider other factors in membership decisions.³⁸ Acastus has also received the General Assembly's approval upon the Security Council's recommendation.³⁹ Security Council Resolution 2386, recommending that Acastus apply for membership, fulfills the Council's role in initiating Acastus's application. As of 2002, the General Assembly had accepted Acastus's application by allowing its full participation in General Assembly sessions.⁴⁰ This acceptance is consistent with past practice, as the General Assembly has never denied admission after the Security Council's initiation of an application,

³⁶ See *North Sea Continental Shelf (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, 1969 I.C.J. 3, 26; *Tinoco Claims*, *supra* note 9, at 383-84.

³⁷ UN Charter, *supra* note 29, art. 4.

³⁸ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the UN Charter)*, Advisory Opinion, 1948 I.C.J. 56, 62-64.

³⁹ UN Charter, *supra* note 29, art. 4.

⁴⁰ *Compromis*, para. 12. *Cf.* G.A. Res. 47/1, *supra* note 22.

and neither body offers detailed reasons for their admissions decisions.⁴¹ In becoming a UN member, Acastus also became party to the Statute of this Court.⁴² Acastus's status as a State Party to this Court since 2002 satisfies Rubria's twelve-month temporal reservation to compulsory jurisdiction.

2. Alternatively, Acastus has joined only the Statute of the Court

Even if Acastus is not a UN member, it has become a party to the Statute of the Court. A non-UN member may become a member of the Court.⁴³ Past practice indicates that this requires only that the State accept the provisions of the Statute and the obligations under Article 94 of the Charter, and contribute to the Court's expenses.⁴⁴ Acastus has accepted the relevant provisions and obligations and contributes to the Court's expenses through its payment of UN dues.⁴⁵

E. ACASTUS HAS CONSENTED TO THE COMPULSORY JURISDICTION OF THE COURT

1. Acastus's continuity or succession included its assumption of Nessus's acceptance of compulsory jurisdiction

In continuing or succeeding to Nessus's status as a party to the Statute of this Court, Acastus has assumed Nessus's rights and obligations.⁴⁶ This includes Nessus's acceptance of the Court's compulsory jurisdiction.

⁴¹ Konrad Ginther, *Article 4*, in THE CHARTER OF THE UNITED NATIONS 117, 185 (Bruno Simma ed., 2002).

⁴² UN Charter, *supra* note 29, art. 93(1).

⁴³ *Id.* art. 93(2).

⁴⁴ Hermann Mosler & Karin Oellers-Frahm, *Article 93*, in THE CHARTER OF THE UNITED NATIONS, *supra* note 41, at 1139, 1173.

⁴⁵ Compromis, paras. 8, 12. See S.C. Res. 11, U.N. Doc. S/RES/11 (Nov. 15, 1946).

⁴⁶ BÜHLER, *supra* note 7, at 287.

2. Alternatively, Acastus has accepted compulsory jurisdiction in its own capacity

Insofar as Acastus joined the UN independently or is a member only of the Court, Acastus has accepted compulsory jurisdiction. In 2001, Acastus indicated its acceptance by expressing its intention to assume Nessus's rights and obligations, which included compulsory jurisdiction.⁴⁷ Since the form and language of acceptance is left to the State,⁴⁸ this declaration demonstrating a clear intent to be bound constitutes legally sufficient acceptance.

Acastus reiterated its acceptance of compulsory jurisdiction in its initial application to the Court regarding this dispute, one month before submission of the Compromis.⁴⁹ Failure to submit acceptance directly to the Secretary-General was a mere procedural error for which Acastus should not be penalized. This Court has previously refused to deny jurisdiction based on an easily-remedied procedural defect.⁵⁰ Furthermore, according to Court procedure, the Registrar of the Court notifies the Secretary-General and all UN members, including Rubria, of the application.⁵¹ Acastus could easily have submitted its express acceptance to the Secretary-General, and its failure to do so clearly indicates Acastus's belief that its 2001 statement had constituted acceptance.

3. Acastus's acceptance of compulsory jurisdiction satisfies reciprocity to Rubria's acceptance

⁴⁷ Compromis, paras. 1, 8.

⁴⁸ *Temple of Preah Vihear*, *supra* note 32, at 31.

⁴⁹ Compromis, paras. 33, 35.

⁵⁰ *Genocide Convention Case*, *supra* note 30, at 613.

⁵¹ ICJ Statute, *supra* note 1, art. 40(3).

Rubria's reservation to compulsory jurisdiction requires that Acastus be a party to the Statute of the Court for twelve months prior to filing the Compromis but places no timing requirement on Acastus's acceptance of compulsory jurisdiction or Rubria's notification of this acceptance.⁵² Even if Rubria lacked knowledge of Acastus's acceptance, it does not bar this Court's exercise of jurisdiction.⁵³

II. BY PERMITTING CONSTRUCTION OF THE PROPOSED PIPELINE, RUBRIA WOULD VIOLATE THE RIGHTS OF ACASTUS'S CITIZENS OF ELYSIAN HERITAGE

Implementation of the pipeline project would destroy Elysian agricultural lands and culture and violate Rubria's duty to prevent harm to foreign nationals on its territory.⁵⁴ Rubria's actions would also violate the obligations owed to Acastian citizens to (i) protect minority rights and (ii) protect indigenous rights to land and self-determination. As the Elysians have exhausted all local remedies,⁵⁵ Acastus now raises claims on their behalf.

A. ACASTUS HAS STANDING TO RAISE THIS CLAIM

1. Elysians are Acastian nationals

⁵² Compromis, para. 7. See *Anglo-Iranian Oil Co.*, *supra* note 1, at 105; *Certain Norwegian Loans (France v. Norway)*, 1957 I.C.J. 9, 27.

⁵³ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, 1996 I.C.J. 13, 21; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Provisional Measures, 1990 I.C.J. 64, 68; *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, 1957 I.C.J. 125, 146. See ICJ Statute, *supra* note 1, article 36(4); 2 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 755 (1997).

⁵⁴ See *Corfu Channel (U.K. v. Albania)*, Merits, 1949 I.C.J. 4, 23; *Neer v. Mexico (U.S. v. Mexico)*, 4 R.I.A.A. 60 (1926), para. 4; D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 564-68 (6th ed. 2004).

⁵⁵ Clarification 11. See *Interhandel (Switzerland v. U.S.)*, Provisional Measures, 1959 I.C.J. 6, 27.

Acastus may raise claims before this Court on behalf of its nationals.⁵⁶ Elysians are Acastian nationals with genuine links to Acastus.⁵⁷ Even if Elysians are Acastian-Rubrian dual nationals, a State may raise the claims of dual nationals against the other country of nationality where the dominant and effective nationality is that of the aggrieved State.⁵⁸ Elysians' residence and political participation in Acastus give Acastus the dominant legal interest.

2. Rubria's actions would violate *erga omnes* obligations

In *Barcelona Traction*, this Court noted that certain obligations are owed not to individual States, but to the international community as a whole.⁵⁹ All States have an interest in asserting claims for violations of *erga omnes* obligations,⁶⁰ which include the protection of human rights,⁶¹ specifically self-determination⁶² and minority rights.⁶³

⁵⁶ *Nottebohm (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4, 24; *Panevezys-Saldutiskis Ry. (Estonia v. Lithuania)*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16.

⁵⁷ *See Nottebohm, supra* note 56, at 24.

⁵⁸ *Iran-United States No. A/18*, 5 *Iran-U.S. Cl. Trib. Rep.* 251, 265 (1984). *See also* Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, art. 6, U.N. Doc. A/CN.4/L.573/Corr.1 (1999).

⁵⁹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, 1970 I.C.J. 3, para. 34 [hereinafter *Barcelona Traction*]; see also BROWNLIE, *supra* note 26, at 488-90.

⁶⁰ *Barcelona Traction, supra* note 59, at 32. *See also* Articles on Responsibility of States for Internationally Wrongful Acts, art. 42(b), U.N. GAOR, Int'l Law Comm'n, 53d Sess., U.N. A/CN.4/L.602/Rev.1 (2001) [hereinafter *Articles on State Responsibility*].

⁶¹ *Barcelona Traction, supra* note 59, at 32.

⁶² *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Advisory Opinion, 2004 I.C.J. 136, 199 [hereinafter *Wall Opinion*]; *East Timor (Portugal v. Australia)*, Judgment, 1995 I.C.J. 90, 102.

⁶³ *Conference on Yugoslavia Arbitration Commission, Opinion 1 & 2*, 31 I.L.M. 1488 (1992).

B. RUBRIA'S INVOLVEMENT IN THE PIPELINE PROJECT WILL VIOLATE THE ELYSIANS' MINORITY RIGHTS

As a minority group, Elysians have a right to maintain their cultural practices and traditions. Instead of protecting this right, Rubria has licensed activities that will destroy the group's agricultural lands and culture.

1. The duty to respect minority rights binds Rubria

Article 27 of the ICCPR obligates States Parties to ensure the right of minorities "to enjoy their own culture, to profess and practice their own religion, [and] to use their own language."⁶⁴ This provision is a codification of customary international law⁶⁵ and widely recognized in international conventions⁶⁶ and declarations.⁶⁷ Recent State practice demonstrates its binding nature.⁶⁸

2. The Elysians possess minority rights under international law

i. The Elysians constitute a minority group

⁶⁴ International Covenant on Civil and Political Rights, art. 27, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR].

⁶⁵ Case No. 7615 (Brazil), Inter-Am. C.H.R., Report No. 12/85, O.A.S. Doc. OEA/Ser.L/V/II.66, doc. 10 rev. 1, 29-31 (1985); Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 102 (1976).

⁶⁶ Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), art. 3, 28 I.L.M. 1382 (1989) [hereinafter ILO Convention No. 169]; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, art. 32(1), 29 I.L.M. 1305 (1990) [hereinafter CSCE Copenhagen Meeting]; African Charter on Human and Peoples' Rights, art. 2, 21 I.L.M. 58 (1982).

⁶⁷ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135 (Dec. 18, 1992); Declaration on Race and Racial Prejudice, art. 1, U.N. Doc. E/CN.4/Sub.2/1982/2/Add.1, Annex V (1982).

⁶⁸ Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979), at 13 [hereinafter Capotorti Study]; Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 58 (1992).

Under ICCPR Article 27, a minority group is defined as a politically non-dominant, numerically inferior group exhibiting distinct religious and linguistic characteristics.⁶⁹ Elysians fall within this definition. The Elysians number only 5,000, and lack even basic political participation rights in Rubria. They have a distinct language and religion, an agrarian lifestyle, and an insular economy.

ii. Rubria's obligation is not dependent on the Elysians' citizenship

Rubria has a duty to guarantee the Elysians' minority rights regardless of their citizenship. Under the treaty interpretation principle *noscitur a sociis* – a term is defined by the words surrounding it – the ICCPR Article 27 reference to “persons” should be understood broadly in light of the Covenant’s separate use of the term “citizens.”⁷⁰ The drafters specifically rejected a proposal to make minority rights dependent on citizenship.⁷¹ Rubria must respect the rights of all minority groups existing in the State, including citizens, permanent residents and migrant workers.⁷² The Elysians fulfill the sole requirement that a minority have had some historical development in the State.⁷³

3. The pipeline's construction would violate Elysians' minority rights to maintain their culture

⁶⁹ *Capotorti Study, supra* note 68, at 13.

⁷⁰ ICCPR, *supra* note 64, arts. 25, 27. See *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 91 (Separate Opinion of Judge Spender); Vienna Convention on the Law of Treaties, art. 31(1), 1155 U.N.T.S. 331 (1969) [hereinafter VCLT].

⁷¹ U.N. GAOR, 16th Sess., 1104th mtg., U.N. Doc. A/C.3/SR.1104 (Nov. 14, 1961), § 7.

⁷² General Comment 23, HRC, 50th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 26, 1994), para. 5.2; General Comment 15, HRC, 42d Sess., U.N. Doc. CCPR/C/21/Rev.1 (July 22, 1986).

⁷³ MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS 485 (1993).

Rubria is obligated to protect the essential elements of Elysian culture.⁷⁴ A group's culture includes not only its traditions and practices, but also its way of life, including its use of ancestral and communal lands.⁷⁵ The Elysians have depended on the Elysium agricultural lands for thousands of years. Their use of the land is well established and essential to their existence. Destruction of the Elysium will force Elysians to move into urban areas to avoid starvation, thereby destroying the fundamental practices and identity of their culture.⁷⁶ Forced assimilation violates a minority group's right to preserve its culture.⁷⁷ Any economic activities Rubria undertakes must protect Elysians' continued access to the Elysium and enjoyment of their culture.⁷⁸

4. Rubria's failure to consult Elysians regarding the pipeline construction violates their right to participation

⁷⁴ *Mahuika v. New Zealand*, HRC, Comm. No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993, para. 9.3. *See also* International Covenant on Economic, Social and Cultural Rights, art. 15, 993 U.N.T.S. 3 (1966) [hereinafter ICESCR].

⁷⁵ *Kitok v. Sweden*, HRC, Comm. No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985 (1988); General Comment 23, *supra* note 72, para. 7; Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.62, doc. 10 rev. 3 (1983).

⁷⁶ *Compromis*, para. 24.

⁷⁷ *See, e.g.*, Framework Convention for the Protection of National Minorities, 34 I.L.M. 351 (1995); Draft Declaration on the Rights of Indigenous Peoples, art. 7(d), U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994); *CSCE Copenhagen Meeting*, *supra* note 66, art. 32; Declaration on the Principles of International Cultural Cooperation, art. 1, U.N. Doc. ST/HR/1/rev. 3 (1988); Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, 78 U.N.T.S. 277 (1948).

⁷⁸ *Mahuika v. New Zealand*, *supra* note 74, para. 9.9.

The ICCPR requires State consultation with minority group members regarding measures that will detrimentally impact minority group rights.⁷⁹ This duty required Rubria to “pay primary attention to the sustainability” of Elysian culture and way of life,⁸⁰ and to offer Elysians a “significant role in the decision-making process” regarding the pipeline project.⁸¹ There is no indication that Rubria in any way consulted with or even considered Elysians before planning the pipeline project that will result in the complete destruction of Elysian culture.

C. THE PIPELINE PROJECT IS INCONSISTENT WITH RUBRIA’S OBLIGATION TO RESPECT THE ELYSIANS’ INDIGENOUS LAND RIGHTS

As an indigenous people, Elysians have a right to their traditional lands independent of their rights as a minority group. The Elysians’ claim is based on thousands of years of consistent and absolute dependence on the Elysium. Such long-term possession and dependence is sufficient to establish an indigenous group’s legal possession,⁸² and destruction of the Elysium violates Rubria’s duty to respect indigenous rights.

1. Rubria must respect the Elysians’ land rights as an indigenous group

Land rights are particularly important to the cultural survival of indigenous groups.⁸³

Customary international law guarantees indigenous groups access to the lands they have

⁷⁹ General Comment 23, *supra* note 72, para. 7; *Äärelä and Näkkäljärvi v. Finland*, HRC, Comm. No. 779/1997, U.N. Doc. CCPR/C/73/D/779/1997, para. 7.6; *Länsman v. Finland*, HRC, Comm. No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992, para. 9.6.

⁸⁰ Concluding Observations on Chile, HRC, U.N. Doc. CCPR/C/79/Add.104 (1999), para. 22.

⁸¹ Concluding Observations on Sweden, HRC, U.N. Doc. CCPR/CO/74/SWE (2002), para. 15.

⁸² *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79 (2002), para. 151; *Diergaardt et al. v. Namibia*, HRC, Comm. No. 760/1997, U.N. Doc. CCPR/C/69/D/60/1997 (2000), para. 106.

⁸³ *See Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, at 39.

traditionally occupied and imposes on States the obligation to protect this right.⁸⁴ Rubria may not lawfully remove indigenous groups, or transfer control of group land to another State or company, without providing adequate compensation in the form of lands of equal quality.⁸⁵

2. Elysians' rights of self-determination guarantee continued access to their land

Under customary international law, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), Rubria is obligated to respect and ensure the right to self-determination,⁸⁶ which this Court has recognized as fundamentally important.⁸⁷ As an indigenous group, distinct not only in race, religion and culture but in community identity,⁸⁸ Elysians have a collective right of self-determination.⁸⁹ The right recognizes an indigenous group's right to use their land and resources, and both the ICCPR and the ICESCR provide that

⁸⁴ ILO Convention No. 169, *supra* note 66, art. 16; Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries (ILO No. 107), art. 11, 328 U.N.T.S. 247 (1959); S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1, 8 (1991). *See also* Universal Declaration of Human Rights, art. 17, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

⁸⁵ ILO Convention No. 169, *supra* note 66, art. 16; NOWAK, *supra* note 73, at 25; Anaya (1991), *supra* note 84, at 8; Antonio Cassese, 'The Self-Determination of Peoples,' in THE INTERNATIONAL BILL OF RIGHTS 92, 103 (Louis Henkin ed., 1981).

⁸⁶ UN Charter, *supra* note 29, arts. 1(2), 55; ICCPR, *supra* note 64, art. 1; ICESCR, *supra* note 74, art. 1; Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations, Principle 7, G.A. Res. 2625 (XXV), U.N. Doc. A/8028 (Oct. 24, 1970).

⁸⁷ *Wall Opinion*, *supra* note 62, at 171-72; *East Timor*, *supra* note 62, at 102; *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 31.

⁸⁸ S. JAMES ANAYA, *INDIGENOUS PEOPLE AND INTERNATIONAL LAW* 3 (2d ed. 2004).

⁸⁹ Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT'L & COMP. L.Q. 867, 878 (1989); Dinstein, *supra* note 65, at 108.

“in no case may a people be deprived of its own means of subsistence.”⁹⁰ The special dependence of indigenous populations like the Elysians, whose survival depends on access to the lands, makes them especially vulnerable to such deprivation.

D. RUBRIA’S SOVEREIGNTY AND INTERESTS IN DEVELOPMENT DO NOT OVERRIDE ITS HUMAN RIGHTS OBLIGATIONS

Rubria may not invoke development interests to justify violating customary norms and treaty obligations. While Rubria will argue that it has sovereign rights of development, a State may not derogate from human rights obligations for reasons of enhancing development.⁹¹ Exploitation of economic opportunities does not justify Rubrian interference with Elysians’ minority and indigenous rights.

The Human Rights Committee confronted a similar situation in *Lubicon Lake Band v. Canada*.⁹² The Committee held that Canada violated its ICCPR obligations in allowing private oil and gas exploration activities to threaten the Lubicon.⁹³ The State was required to forgo the economic development opportunity that threatened the indigenous group’s survival as a people.⁹⁴ While Rubria may institute development plans with limited impact on the Elysian way of life in compliance with its international obligations, projects such as the pipeline, resulting in complete denial of the group’s rights, are internationally prohibited.

⁹⁰ ICCPR, *supra* note 64, art. 1(2); ICESCR, *supra* note 74, art. 1(2).

⁹¹ ICCPR, *supra* note 64, arts. 4, 47; ICESCR, *supra* note 74, art. 25. *See also Wall Opinion*, *supra* note 62, at 193-94.

⁹² *Lubicon Lake Band v. Canada*, HRC, Comm. No. 167/1984, U.N. Doc. A/45/40, Annex 9(A) (1990).

⁹³ *Id.* paras. 32.2-33.

⁹⁴ *Id.*; *Länsman v. Finland*, *supra* note 79, para. 9.4.

III. RUBRIA IS RESPONSIBLE FOR PROF'S ACTIVITIES IN THE ELYSIUM, INCLUDING THE FORCED LABOR OF CIVILIANS

Rubria is responsible for PROF's actions because Rubria violated its treaty and customary international law duties to prevent forced labor on its territory. Additionally, PROF's activities are attributable to Rubria because (i) COG and PROF exercised governmental authority and (ii) Rubria exercised control over COG and PROF.

A. ACASTUS HAS STANDING TO BRING THIS CLAIM

1. Acastus may espouse the rights of its nationals

States have a universally accepted right to protect citizens abroad,⁹⁵ including espousing claims before international tribunals.⁹⁶ Acastus may espouse a claim on behalf of Elysians because Elysians are Acastian nationals with a genuine link to Acastus.⁹⁷ Diplomatic options and local remedies have been exhausted.⁹⁸

2. Preventing forced labor is an *erga omnes* obligation

Erga omnes obligations are owed to the international community as a whole.⁹⁹ Recognition of the obligation to prevent forced labor as *erga omnes* derives from two sources. First, there is a basic human right to be free from forced labor and this Court has recognized

⁹⁵ BROWNLIE, *supra* note 26, at 391-92; EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 29 (1915).

⁹⁶ *Mavrommatis Palestine Concessions*, *supra* note 3, at 12; MALCOLM N. SHAW, INTERNATIONAL LAW 722-23 (5th ed. 2003).

⁹⁷ *See supra* Section II.A.1.

⁹⁸ Compromis, para. 32; Clarification 11.

⁹⁹ *Barcelona Traction*, *supra* note 59, at 32.

basic human rights as *erga omnes* obligations.¹⁰⁰ Second, the prohibition on forced labor is a preemptory norm¹⁰¹ and preemptory norms give rise to *erga omnes* obligations.¹⁰²

B. RUBRIA IS RESPONSIBLE FOR PROF'S ACTIONS BECAUSE RUBRIA VIOLATED ITS TREATY AND CUSTOMARY INTERNATIONAL LAW OBLIGATIONS TO PREVENT FORCED LABOR

Forced labor is “work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹⁰³ Capturing the Elysians and exacting labor under threat of violence¹⁰⁴ constitutes forced labor.

1. Rubria failed to take the affirmative measures to prevent forced labor required by the ICCPR and the ICESCR

i. The ICCPR and the ICESCR prohibit forced labor and require affirmative measures to prevent it

Rubria is a party to the ICCPR and the ICESCR.¹⁰⁵ Both prohibit forced labor¹⁰⁶ and require affirmative measures to prevent it.¹⁰⁷ ICCPR Article 2 requires parties “to respect and to

¹⁰⁰ *Id.*

¹⁰¹ Convention Concerning the Abolition of Forced Labour, 320 U.N.T.S. 291 (1975) [hereinafter Abolition of Forced Labour Convention]; *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labor Organization to examine the observance by Myanmar of the Forced Labor Convention*, para. 203, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar3.htm> [hereinafter Myanmar Report]; Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 67-69 (2001).

¹⁰² BROWNLIE, *supra* note 26, at 488-89; JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 242-43 (2002) [hereinafter CRAWFORD, ILC COMMENTARY].

¹⁰³ Convention concerning Forced or Compulsory Labour (ILO Convention No. 29), art. 2(1), 39 U.N.T.S. 55 [hereinafter Forced Labour Convention].

¹⁰⁴ Compromis, para. 26.

¹⁰⁵ *Id.* para. 36.

¹⁰⁶ ICCPR, *supra* note 64, art. 8(3)(a); ICESCR, *supra* note 74, arts. 6(1), 7(a).

ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”¹⁰⁸ This imposes positive obligations on parties to prevent private actors from violating the guaranteed rights. The Inter-American Court of Human Rights interpreted a provision almost identical to that of the ICCPR¹⁰⁹ as creating an affirmative duty not only to investigate, prosecute and punish, but also to *prevent* violations.¹¹⁰ Specifically, the court recognized an obligation to take reasonable steps to prevent human rights violations.¹¹¹ This affirmative duty includes “*all* those means of a legal, political, administrative and cultural nature that promote the protection of human rights.”¹¹²

The ICESCR also requires affirmative steps to realize Covenant rights.¹¹³ Adopting legislation is not sufficient; “the phrase ‘by all appropriate means’” in the Covenant “must be given its full and natural meaning.”¹¹⁴

The ICCPR and the ICESCR require Rubria to take affirmative measures, including, but not limited to, enacting legislation to prevent forced labor on its territory. The duty to take reasonable measures applies where Rubria should have known of the violation.¹¹⁵

¹⁰⁷ ICCPR, *supra* note 64, art. 2(1); ICESCR *supra* note 74, art. 2(1).

¹⁰⁸ ICCPR, *supra* note 64, art. 2(1).

¹⁰⁹ *See* American Convention on Human Rights, art. 1(1), 1144 U.N.T.S. 123 (1992).

¹¹⁰ Velásquez-Rodríguez Case, Inter-Am Ct. H.R. (ser. C) No. 4, para. 166 (1988).

¹¹¹ *Id.* paras. 166, 174.

¹¹² *Id.* para. 175 (emphasis added).

¹¹³ ICESCR, *supra* note 74, art. 2(1).

¹¹⁴ General Comment 3, CESCR, 5th Sess., U.N. Doc. E/1991/23 (1991), para. 4.

¹¹⁵ *See* Osman v. U.K., 29 Eur. Ct. H.R. 245, para. 116 (2000).

ii. *Rubria failed to take affirmative measures required to prevent forced labor*

As noted in *Corfu Channel*, where conduct in question occurs on territory under the exclusive control of a State, other States may use circumstantial evidence and inferences of fact to impute liability to the territorial State.¹¹⁶ A major participant in and site of the pipeline project, Rubria knew of the plan and its impact. There is no evidence that Rubria took any affirmative measures to prevent forced labor.

2. Rubria violated its customary international law duty to prevent forced labor on its territory

i. *Customary international law prohibits forced labor and requires States to exercise due diligence to prevent it*

Customary international law, as defined by State practice and *opinio juris*, recognizes a prohibition on forced labor.¹¹⁷ This custom is evidenced by the 168 countries that have ratified the Convention Concerning Forced or Compulsory Labour,¹¹⁸ the many other international instruments prohibiting forced labor¹¹⁹ and the numerous States prohibiting forced labor at the constitutional level.¹²⁰

Customary international law obligates States to exercise due diligence to prevent private illegal activity, such as forced labor, on their territory, where the State knows, or should have

¹¹⁶ *Corfu Channel*, *supra* note 54, at 18.

¹¹⁷ *See Myanmar Report*, *supra* note 101, paras. 200-03; *Bal*, *supra* note 101, at 67-69.

¹¹⁸ *Forced Labour Convention*, *supra* note 103.

¹¹⁹ *See, e.g.*, *Abolition of Forced Labour Convention*, *supra* note 101; *ICCPR*, *supra* note 64; *ICESCR*, *supra* note 74; *UDHR*, *supra* note 84.

¹²⁰ *Myanmar Report*, *supra* note 101, at n.206.

known, of the violation.¹²¹ When a State fails to meet this obligation, it is responsible for the harmful conduct that results.¹²²

ii. Rubria failed to exercise due diligence

In *Corfu Channel*, this Court inferred a due diligence violation by Albania based on the assumption that, had Albania engaged in conduct typical of coastal States, the Channel could not have been mined without its knowledge.¹²³ The Court should infer that Rubria knew, or should have known, of the danger to the Elysians and, in failing to prevent it, violated its due diligence obligation to prevent forced labor. Rubria was an essential participant in the pipeline project and aware of possible conflict. Additionally, PROF consists largely of former Rubrian Armed Forces members commanded by recently retired senior army officers, and its actions occurred over an extended period.¹²⁴

C. RUBRIA IS RESPONSIBLE FOR PROF'S ACTIVITIES BECAUSE PROF'S ACTIONS ARE IMPUTABLE TO RUBRIA

PROF's actions are imputable to Rubria because (i) PROF and COG exercised elements of governmental authority and (ii) Rubria exercised control over COG and PROF. Either basis provides sufficient grounds for imputing liability.

1. PROF's conduct is imputable to Rubria because COG and PROF exercised elements of governmental authority

¹²¹ See, e.g., British Claims in the Spanish Zone of Morocco Arbitration (*U.K. v. Spain*) 2 R.I.A.A. 617 (1929); *Velásquez-Rodríguez*, *supra* note 110, para. 183; *Youmans v. Mexico (U.S. v. Mexico)*, 4 R.I.A.A. 110 (1926).

¹²² See, e.g., United States Diplomatic and Consular Staff in Tehran (*U.S. v. Iran*), Judgment, 1980 I.C.J. 3 [hereinafter Diplomatic and Consular Staff]; *Corfu Channel*, *supra* note 54; *Yeager v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 92 (1987); *Youmans*, *supra* note 121.

¹²³ *Corfu Channel*, *supra* note 54, at 23.

¹²⁴ *Compromis*, para. 19, 23.

The Articles on State Responsibility,¹²⁵ a codification of international law,¹²⁶ recognize two categories of State actors: “State organs” and entities empowered to exercise elements of governmental authority.¹²⁷ COG and PROF are not “State organs,” but did exercise elements of governmental authority when they “acted on behalf of the State, having been charged by some competent organ of the [Rubrian] government.”¹²⁸

Rubria granted COG exclusive rights to natural resources located on national parkland,¹²⁹ essentially creating a national petroleum company. The Iran-U.S. Claims Tribunal’s observation that the National Iranian Oil Company was “one of the instruments by which the Government of Iran conducted and currently conducts the country’s national oil policy”¹³⁰ is equally applicable to Rubria and COG. As an instrument of the Rubrian government COG’s actions are attributable to Rubria.

Empowering a private entity with police powers is the quintessential example of exercising governmental authority.¹³¹ PROF was created, with Rubria’s consent, to respond to

¹²⁵ Articles on State Responsibility, *supra* note 60.

¹²⁶ *See, e.g., Wall Opinion, supra* note 62, para. 140; *Gabcikovo-Nagymaros Project Case (Hungary v. Slovakia)*, 1997 I.C.J. 7; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, 1999 I.C.J. 62.

¹²⁷ Articles on State Responsibility, *supra* note 60, arts. 4, 5. *See also Yeager, supra* note 122; *BROWNIE, supra* note 26, at 423.

¹²⁸ *Diplomatic and Consular Staff, supra* note 122, at 33.

¹²⁹ *Compromis*, para. 20.

¹³⁰ *Oil Field of Texas v. Iran, Interlocutory Award*, 1 Iran-U.S. Cl. Trib. Rep. 347, 356 (1981).

¹³¹ CRAWFORD, *ILC COMMENTARY, supra* note 102, at 100-01.

possible violence on national parkland.¹³² The preference for former military and senior army officers¹³³ suggests a military command structure. This indicates that PROF was empowered to carry out policing functions Rubria normally exercised.

Even if PROF's actions were *ultra vires*, Rubria is responsible. A State is responsible for *ultra vires* actions of an entity exercising elements of governmental authority acting within its apparent authority.¹³⁴ Former military members wearing distinctive insignia¹³⁵ act under their Rubria-conferred authority.

2. PROF's conduct is imputable to Rubria because Rubria exercised control over both COG and PROF

A State is responsible for the actions of private entities that it directs or controls.¹³⁶ State responsibility arises where there is either effective¹³⁷ or overall control.¹³⁸ The degree of control exercised for attribution varies according to the facts of the case.¹³⁹ Rubria exercised both effective and overall control over COG and PROF.

¹³² Compromis, para. 23.

¹³³ *Id.* para. 19.

¹³⁴ See Caire Claim (*France v. Mexico*), 5 R.I.A.A. 516, 530 (1929); *Youmans*, *supra* note 121, at para. 14; Articles on State Responsibility, *supra* note 60, art. 7; CRAWFORD, *supra* note 102, at 106-09; BROWNLIE, *supra* note 26, at 426-27.

¹³⁵ Clarification 6.

¹³⁶ Articles on State Responsibility, *supra* note 60, art. 8.

¹³⁷ Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. U.S.*), Merits, 1986 I.C.J. 14, 65 [hereinafter *Nicaragua Merits*].

¹³⁸ Prosecutor v. Tadic, ICTY, Case No. IT-94-1-A, Appeals Chamber Judgment, para. 145 (July 15, 1999).

¹³⁹ *Id.* para. 117.

i. Rubria exercised effective control over both COG and PROF

“Effective control” sufficient to sustain attribution of wrongful conduct requires that the State (i) be involved in determining the strategy and tactics for the wrongful conduct and (ii) be able to bring about a cessation of the wrongful conduct.¹⁴⁰ Rubria exercised effective control over both COG and PROF because Rubria was instrumental in their creation and could terminate PROF’s illegal activities.

COG only exists as a result of Rubria’s collaboration. COG’s pipeline project was completely dependent on the exclusive rights Rubria granted. Therefore, Rubria was in a position to immediately restrict or terminate the pipeline project.¹⁴¹ PROF was created for the sole purpose of protecting the Rubrian pipeline project and its existence depends on the project’s continuation. Rubria exercised effective control over PROF because it consented to the strategic decision to use PROF and was in a position to terminate PROF’s activities.¹⁴²

ii. Rubria exercised overall control over both COG and PROF

In *Prosecutor v. Tadic*, the ICTY Appeals Chamber adopted an alternative to *Nicaragua*’s “effective control” standard, finding that “overall control” involving “participation in the planning and supervision of military operations” constituted the requisite level of control.¹⁴³

Although an ownership interest does not necessarily establish responsibility for corporate actions, corporate actions are attributable to the State when the State uses its interest to obtain a

¹⁴⁰ *Nicaragua Merits*, *supra* note 137, at 62-63. See also CRAWFORD, ILC COMMENTARY, *supra* note 102, at 110-11.

¹⁴¹ *Compromis*, paras. 19-20.

¹⁴² *Id.* para. 23.

¹⁴³ *Prosecutor v. Tadic*, *supra* note 138, para. 145.

specific result.¹⁴⁴ Rubria, a major participant in planning and supervising the pipeline project, used COG to exploit its petroleum resources and further its goal of increasing foreign investment.¹⁴⁵ Therefore, Rubria exercised overall control over COG and the pipeline project.

In addition to depending on Rubria for its continued existence, PROF consisted of former Rubrian military members,¹⁴⁶ with the military command structure and training that Rubria provided. This suggests a familiarity with the region, the people and their vulnerabilities that PROF was able to exploit, and supports an inference that Rubria exercised overall control over PROF.

D. RUBRIA IS ALSO LIABLE FOR PROF'S ACTIONS AGAINST THE ELYSIANS BECAUSE IT BREACHED ITS CUSTOMARY INTERNATIONAL LAW DUTY TO PREVENT HARM TO ALIENS ON ITS TERRITORY

Rubria had a customary international law duty to protect foreign nationals from harm,¹⁴⁷ including an obligation to take reasonable measures to secure their protection.¹⁴⁸ Where aliens are injured as a result of willful neglect or insufficient governmental action, Rubria is responsible.¹⁴⁹ Injury occurred to Acastian citizens¹⁵⁰ on Rubrian territory. Though aware of the

¹⁴⁴ See, e.g., *Foremost Tehran v. Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228 (1986); *American Bell International v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 170 (1986); CRAWFORD, ILC COMMENTARY, *supra* note 102, at 112-13.

¹⁴⁵ *Compromis*, paras. 17, 19-23.

¹⁴⁶ *Id.* para. 23.

¹⁴⁷ See, e.g., *Corfu Channel*, *supra* note 54, at 23; *Neer*, *supra* note 54, para. 4; HARRIS, *supra* note 54, at 564-68.

¹⁴⁸ *Diplomatic and Consular Staff*, *supra* note 122, at 32; *Youmans*, *supra* note 121, paras. 11-12.

¹⁴⁹ See, e.g., *Corfu Channel*, *supra* note 54, at 23; *Neer*, *supra* note 54, para. 4.

¹⁵⁰ See *supra* Section II.A.1.

Elysians' vulnerability, PROF's familiarity with the region, and its training,¹⁵¹ Rubria does not appear to have made any attempt to protect the Elysians or to prevent PROF's illegal actions.

IV. THE OUTCOME OF THE *BORIUS* LITIGATION DOES NOT PLACE ACASTUS IN BREACH OF ARTICLE 52 OF THE RABBIT

Under RABBIT Article 52, Acastus must enforce all aspects of its domestic law, including the Multinational Corporate Responsibility Act (MCRA). The Acastian court's determination that TNC is not liable does not place Acastus in breach of Article 52 because (i) the *Borius* litigation falls outside the scope of the RABBIT; (ii) a municipal court's interpretation of domestic corporate law deserves deference; and (iii) the court's determination is consistent with the RABBIT and supported by customary international law.

A. ARTICLE 52 DID NOT REQUIRE APPLICATION OF THE MCRA IN THE *BORIUS* LITIGATION

This Court has noted that a treaty cannot give rise to binding obligations “in a field outside the matter with which it was concerned.”¹⁵² A treaty is understood according to the plain meaning of its terms, in accordance with its purpose.¹⁵³ Purpose may be determined by recourse to extrinsic evidence, such as circumstances surrounding the treaty's conclusion.¹⁵⁴ The RABBIT's primary purpose, as evidenced by the Rubrian president's statement, was to increase

¹⁵¹ Compromis, paras. 3, 5, 23.

¹⁵² Application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands v. Sweden*), Judgment, 1958 I.C.J. 55, 71 [hereinafter *Guardianship of Infants*]. See also *Anglo-Iranian Oil Co.*, *supra* note 1, at 110.

¹⁵³ VCLT, *supra* note 70, art. 31; Rights of Nationals of the United States of America in Morocco (*France v. U.S.*), 1951 I.C.J. 109, 183-84, 197-98.

¹⁵⁴ VCLT, *supra* note 70, art. 32; Young Loan Arbitration, 59 I.L.R. 495, 543-48 (1980); 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 241 (1966).

Acastian investment in Rubria.¹⁵⁵ The MCRA was incorporated into the RABBIT to protect Rubrians doing business with Acastian enterprises and is only applicable when Acastian corporations harm Rubrian investors. As the *Borius* litigation involved Acastian citizens harmed by a Rubrian corporation, it is outside the scope of the RABBIT and Article 52 is inapplicable.

B. THIS COURT SHOULD ACCEPT THE ACASTIAN COURT'S
DETERMINATION OF LIABILITY UNDER ARTICLE 52 OF THE RABBIT

In the *Borius* litigation, the Acastian court interpreted the MCRA to find TNC not liable for COG's actions.¹⁵⁶ In determining whether Acastus has complied with the RABBIT, this Court is bound by the Acastian court's interpretation of its municipal and corporate law.

1. This Court should defer to the Acastian court's interpretation of the MCRA as municipal law

i. International tribunals defer to municipal courts in interpreting municipal laws

Legislating is an element of sovereignty, and respect for sovereignty requires deference to a municipal court's interpretation of municipal laws.¹⁵⁷ This Court has repeatedly held that municipal court interpretation of municipal law binds international tribunals.¹⁵⁸ Other international tribunals also recognize this principle.¹⁵⁹ These tribunals have recognized that only

¹⁵⁵ Compromis, para. 17.

¹⁵⁶ *Id.* para. 28.

¹⁵⁷ *Anglo-Iranian Oil Co.*, *supra* note 1, at 142; *Legal Status of Eastern Greenland*, *supra* note 33, at 48.

¹⁵⁸ See *Fisheries Case (U.K. v. Norway)*, 1951 I.C.J 116, 132-38; *Guardianship of Infants*, *supra* note 152, at 72-78; *Serbian Loans*, *supra* note 34, at 46.

¹⁵⁹ Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS/79/R (Aug. 24, 1998) at *23 [hereinafter WTO Patent Protection Decision]; Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, GATT B.I.S.D. (39th Supp.) (June 19, 1992) at 206 [hereinafter GATT Alcoholic Beverages].

municipal courts may determine whether interpretations of municipal law are correct,¹⁶⁰ and that a State's internal law should be presumed to conform to the State's treaty obligations.¹⁶¹

ii. Incorporation into the RABBIT did not change the MCRA's municipal status

This Court has previously deferred to municipal court interpretations of municipal law incorporated by reference in a treaty provision¹⁶² Absent "clear and convincing evidence" of party intent, a bilateral investment treaty (BIT) cannot create obligations not stipulated in the BIT¹⁶³ and the extent of a State's obligation under a BIT should be determined by its municipal law.¹⁶⁴ The RABBIT was not intended to create additional obligations for Acastian corporations, as evidenced by the language of Article 52: "Acastus shall enforce all aspects of its domestic law *in its form as of the date of the entry into force* of the RABBIT."¹⁶⁵ Similarly, the Acastian Prime Minister's statement only reiterated the MCRA standards and did not impose any

¹⁶⁰ *WTO Patent Protection Decision*, *supra* note 159, at *23-26.

¹⁶¹ *GATT Alcoholic Beverages*, *supra* note 159; Panel Report, *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, GATT B.I.S.D. (41st Supp.) (Aug.12, 1994) at 131.

¹⁶² *See Elettronica Sicola S.p.A. (U.S. v. Italy)*, 1989 I.C.J. 15, 50-51; *Guardianship of Infants*, *supra* note 152, at 72-78, 102-09; *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser.A/B) No. 64; *R. v. Chambre d'Accusation due Canton de Geneve*, Switzerland Federal Tribunal, *in* LAMBERTUS ERADES, *INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW – A COMPARATIVE CASE LAW STUDY* 543 (1993).

¹⁶³ *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13 (2003), paras. 166-67 [hereinafter *Pakistan Award*].

¹⁶⁴ *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6 (2004), para. 128 [hereinafter *Philippines Award*].

¹⁶⁵ *Compromis*, para. 15. *See Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15, at 17-18.

additional duties on Acastian corporations.¹⁶⁶ The MCRA remains municipal in character, despite its incorporation into the RABBIT.

2. This Court should defer to the Acastian court's interpretation of the MCRA as corporate law

This Court has recognized the particular importance of municipal law in addressing corporate law issues.¹⁶⁷ A corporation is created under domestic law and international law lacks its own rules in this area.¹⁶⁸ Whenever legal issues concerning corporation and shareholder treatment arise, relevant rules of municipal law govern.¹⁶⁹ The 2000 OECD Guidelines for Multinational Enterprises, which the MCRA references,¹⁷⁰ also notes that municipal law should govern corporate liability.¹⁷¹ The MCRA is a corporate law statute designed to regulate conduct of Acastian corporations¹⁷² and, therefore, the Acastian court's interpretation deserves greater deference than would regular municipal law.

C. EVEN IF THIS COURT DOES NOT DEFER TO THE ACASTIAN COURT, IT SHOULD FIND THAT THE *BORIUS* DECISION IS CONSISTENT WITH ARTICLE 52 OF THE RABBIT

The Acastian court's determination that TNC is not liable is consistent with Article 52 because (i) differentiation between TNC and Rubria is legally permissible; (ii) the MCRA does

¹⁶⁶ Compromis, para. 14.

¹⁶⁷ *Barcelona Traction*, *supra* note 59, at 34-38.

¹⁶⁸ *Id.*; *Elettronica Sicula S.p.A.*, *supra* note 162, at 86-89 (Separate Opinion of Judge Oda).

¹⁶⁹ *Barcelona Traction*, *supra* note 59, at 34-38.

¹⁷⁰ Compromis, Annex A.

¹⁷¹ OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, DAF/FE/IME/WPG(2000)15/FINAL, at 10 [hereinafter OECD Guidelines].

¹⁷² Compromis, Annex A.

not apply to TNC; and (iii) even if the MCRA does apply to TNC, the principle of limited liability protects TNC from liability.

1. Distinguishing TNC from Rubria and COG is consistent with AIRES, the MCRA and customary international law

The customary international law principle of non-discrimination does not guarantee mechanical application of equality in all circumstances.¹⁷³ This Court recognizes the propriety of legal differentiation supported by objective justifications.¹⁷⁴

i. Differentiation was objectively justified because AIRES and the MCRA are distinctive measures aimed at different entities

Jurisdiction under AIRES is limited to international legal persons.¹⁷⁵ As TNC is not an international legal person,¹⁷⁶ AIRES is inapplicable. Also, AIRES is designed to regulate all violations of international law.¹⁷⁷ In contrast, the obligation imposed by MCRA Section Four is that Acastian corporations acting in foreign countries must comply with “governing norms of conventional and customary international law.”¹⁷⁸ MCRA Section Three provides principles for interpreting and implementing the statute, including Section Four. The Section Three principles

¹⁷³ South West Africa (*Ethiopia v. South Africa, Liberia v. South Africa*), Second Phase, Judgment, 1966 I.C.J. 6, 302-16; Belgian Linguistics, Merits, Eur. Ct. H.R., 45 I.L.R. 136, 163-66, 173-74 (1968); National Union of Belgian Police, 19 Eur. Ct. H.R. 19, 92 (1975).

¹⁷⁴ *Minority Schools in Albania*, *supra* note 162. See also *Association Protestante v. Radiodiffusion Television Belge*, Belgium Conseil d’État, 47 I.L.R. 198 (1966); *Beth-El Mission v. Minister of Social Welfare*, Israel Supreme Court, 47 I.L.R. 205 (1966); 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, para. 69 (1970).

¹⁷⁵ Compromis, paras. 27-28.

¹⁷⁶ Clarification 4. See BROWNLIE, *supra* note 26, at 65; 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32 (1962); Illias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT’L L.J. 309, 313-14 (2004).

¹⁷⁷ Compromis, para. 27.

¹⁷⁸ *Id.* Annex A.

indicate that the Section Four obligation is limited by the standards set out in the General Policies of the OECD Guidelines and the Universal Declaration of Human Rights.¹⁷⁹ This restricts liability under the MCRA because violations must be interpreted in light of the policies of the foreign nation in which the violation allegedly occurred.¹⁸⁰ A finding of liability under AIRES does not necessitate a finding of liability under the MCRA.

ii. Customary international law recognizes different legal obligations for State actors and private corporations

Customary international law does not impose human rights obligations directly on non-State actors.¹⁸¹ Instead, obligations are imposed indirectly by requiring the State to punish private conduct.¹⁸² Therefore, customary human rights norms that create duties for State actors do not create the same obligations for private corporations.¹⁸³ TNC, a privately-owned corporation,¹⁸⁴ may be treated differently than Rubria, a State, and COG, a corporation exercising governmental authority.

2. The Acastian court properly determined that TNC's conduct falls outside the scope of the MCRA

¹⁷⁹ *Id.* See SIR RUPERT CROSS, STATUTORY INTERPRETATION 9 (2d ed. 1987).

¹⁸⁰ *OECD Guidelines*, *supra* note 171, at 11-12; U.N. Global Compact, Principle 1, U.N. Doc. SG/S/6448 (1999); Bantekas, *supra* note 176, at 328.

¹⁸¹ *Velásquez-Rodríguez*, *supra* note 110, paras. 182-86. See also Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations under International Law*, 42 COLUM. J. TRANSNAT'L L. 936, 938 (2005).

¹⁸² Articles on State Responsibility, *supra* note 60, art. 9; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, arts. 1-2, 4, 37 I.L.M. 1 (1997). See also Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 492-504 (2001).

¹⁸³ Ratner, *supra* note 182, at 482.

¹⁸⁴ Clarification 4.

The MCRA identifies those it regulates: Acastian corporations acting “abroad.”¹⁸⁵ The MCRA does not cover the behavior of foreign companies Acastians invest in, and Acastus never intended such extraterritorial reach. TNC never operated directly in Rubria and was never accused of direct involvement in PROF’s activities. TNC’s investment in COG as a shareholder does not qualify as an act “abroad” under the MCRA.

3. The Acastian court’s decision that the principle of limited liability shields TNC from liability is consistent with the RABBIT

i. International law recognizes the principle of limited liability

This Court has recognized and applied limited liability.¹⁸⁶ All major industrial countries recognize the principle in the context of parent-subsidary corporations.¹⁸⁷ A parent company is not automatically responsible for the subsidiary’s unlawful behavior; liability depends on the extent of control the parent exercises.¹⁸⁸ Courts have held parent companies not liable for the acts of subsidiaries where the parent lacked actual control over the subsidiaries’ activities.¹⁸⁹

ii. The RABBIT, including its incorporation of the MCRA, did not abrogate the principle of limited liability

¹⁸⁵ Compromis, Annex A.

¹⁸⁶ *Barcelona Traction*, *supra* note 59, at 33. *See also* Sumimoto Shoji America, Inc. v. Avagliano, 456 U.S. 176, 189 (1982); *Salomon v. A. Salomon & Co. Ltd.*, U.K. Appeals Cases, [1897] A.C. 22; CYNTHIA DAY WALLACE, *THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL – HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION* 658 (2d ed. 2002).

¹⁸⁷ *See generally* OECD, *INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: RESPONSIBILITY OF PARENT COMPANIES FOR THEIR SUBSIDIARIES* (1980).

¹⁸⁸ *See* P.T. MUCHLINKSI, *MULTINATIONAL ENTERPRISES AND THE LAW* 325-27 (1995); Karl Hofstetter, *Parent Responsibility for Subsidiary Corporations: Evaluating European Trends*, 39 INT’L COMP. L.Q. 576, 587-88 (1990); WALLACE, *supra* note 186, at 632-38.

¹⁸⁹ *Re Sperry New Holland*, [1985] O.J.E.C. No. L 376/2; *Bowlen v. The Queen*, U.K. Appeals Cases, [1978] 1 F.C. 798.

This Court has held that a treaty cannot abrogate a general principle of international law, in the absence of explicit intent.¹⁹⁰ The RABBIT does not include any provisions abrogating limited liability and there is no evidence that either party intended to renounce this legal principle by incorporating the MCRA. Article 52's requirement that Acastus enforce "all aspects" of its domestic law in carrying out its obligations under the RABBIT¹⁹¹ supports application of limited liability.

iii. Limited liability shields TNC because it did not exercise actual control

This Court has previously recognized that municipal law should govern decisions to pierce the corporate veil, and refused to pierce where municipal law only permitted it in exceptional circumstances.¹⁹² Under the limited liability principle, the corporate veil is usually pierced only if the parent company exercised control over the subsidiary's day-to-day operations or manifestly abused the corporate form.¹⁹³ TNC did neither. COG's own CEO and employees controlled its day-to-day activities and TNC only participated in COG's management as a shareholder.¹⁹⁴ In addition, although COG's existence depended on Rubria's grant of exclusive rights to Elysium resources, TNC exercised no such similar control. The corporate veil protects TNC from liability for COG's actions.

V. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Applicant, the Republic of Acastus, respectfully requests

¹⁹⁰ See *Ellectronica Sicula S.p.A.*, *supra* note 162, para. 50; *Pakistan Award*, *supra* note 163, at 166-67; *Philippines Award*, *supra* note 164, at 128.

¹⁹¹ *Compromis*, para 15.

¹⁹² *Barcelona Traction*, *supra* note 59, at 34-38; WALLACE, *supra* note 186, at 658.

¹⁹³ See *supra* note 188 and accompanying text.

¹⁹⁴ Clarification 5.

that this Honorable Court find, adjudge, and declare as follows:

1. That the Court has jurisdiction over all claims in this case, as both parties have accepted the Court's compulsory jurisdiction; and
2. That the proposed pipeline construction would violate the rights of Acastian citizens; and
3. That PROF's exploitation of forced labor of the Elysians violated international obligations owed by Rubria to Acastus; and
4. That the Acastian court's decision in the *Borius* litigation was consistent with Acastus's international obligations.

Respectfully submitted,

Agents for the Applicant

