

INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE 2006 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

**CASE CONCERNING
THE ELYSIAN FIELDS**

**THE REPUBLIC OF ACASTUS
(APPLICANT)**

v.

**THE STATE OF RUBRIA
(RESPONDENT)**

MEMORIAL FOR THE APPLICANT

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List of Abbreviations

AAACHR	CHR of the American Anthropological Association
ACHR	African Commission on Human and Peoples' Rights
Ad. Op	Advisory Opinion
<u>ALJR</u>	Australian Law Journal Reports
AIRES	The Acastian International Rights Enforcement Statute
AJIL	American Journal of International Law
A.L.R3d	American Law Reports 3d
ARIEL	Austrian Revue of International and European Law
Ariz. J. Int'l & Comp. Law	Arizona Journal of International & Comparative Law
Art(s).	Article or Articles
ATCA	Alien Tort Claims Act
BIT	Bilateral investment treaty
B.U. Int'l L. J.	Boston University International Law Journal
BYBIL	British Yearbook of International Law
CERD	<u>Committee on the Elimination of Racial Discrimination</u>
Ch.	Chapter
Chi. J. Int'l L.	Chicago Journal of International Law
Cir.	Circuit (Court)
Cornell Int'l L.J.	Cornell International Law Journal

Corp.	Corporation
Commentary	Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Act
COG	Corporation for Oil and Gas
CRC	Convention on the Rights of the Child
Del. J. Corp. L.	Delaware Journal of Corporate Law
Diss. Op.	Dissenting Opinion
Doc(s).	Document(s)
Draft Articles	Draft Articles on Responsibility of States For Internationally Wrongful Acts
Draft UNDRI	Draft United Nations declaration on the rights of indigenous peoples
ed./eds.	editor(s) or edition
<i>e.g.</i>	<i>ex gratia</i>
ECHR	European Court of Human Rights
FAO	Food and Agriculture Organization of the United Nations
FPIC	First Professionals Insurance Company
FYIL	Finnish Yearbook of International Law
GA	<u>General Assembly</u>
GAOR	General Assembly Official Record
Harv. Int'l L.J	Harvard International Law Journal
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights

ICCPR	International Covenant on Civil and Political Rights
ICESCR/CESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFHR	International Federation of Human Rights
ILC	International Law Commission
ILO	International Labour Organization
ILSA	The Institute of Local Studies and Appraisals
ILSA J. Int'l & Com. L.	International Law Student Association Journal of International and Comparative Law
IMF	International Monetary Fund
ITU	International Telecommunication Union
MCRA	Multinational Corporate Responsibility Act
Minn. J. Global Trade	Minnesota Journal of Global Trade
MNE	Multinational enterprise
Mtg	Meeting
N.Y.L. Sch. J. Hum. Rts.	New York Law School Journal of Human Rights
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International

OECD	Law and Politics Organization of Economic Cooperation and Development and Politics
Para(s).	Paragraph or paragraphs
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RABBIT	The Rubria-Acastus Binding Bilateral Investment Treaty
Rep.	Report(s)
RIAA	Report of International Arbitral Awards
Sess.	Session
SCOR	Security Council Official Records
TNC	The Trans-National Corporation
TRGS	Transactions of the Grotius Society
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNHCHR	Office of the United Nations High Commissioner for Human Rights
UN Norms	UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
UNDRM	Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
UNYB	United Nations Yearbook
USA/US	United States of America

U.S.F. L. Rev.	University of San Francisco Law Review
Va. Int'l L. J.	Virginia International Law Journal
v.	versus
VCLT	Vienna Convention on the Law of Treaties
VCSS	Vienna Convention on the Succession of States in Respect of Treaties
Vol.	Volume or volumes
WB	The World Bank
WIPO	World Intellectual Property Organization

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Statement of Facts

In 2000, Nessus dissolved into two states, Acastus and Rubria, where Nessus's capital city was immediately declared the capital of Acastus. Rubria is, and Nessus was, a party to the VCLT, the ICCPR, the ICESCR, and the VCSS. Nessus was a founding member of the UN, and was a party to the ICJ's Statute and accepted the ICJ's compulsory jurisdiction in all cases. Rubria is a member of the UN and the ILO. Acastus is a member of the OECD.

When Rubria applied for UN membership in 2001, Acastus informed the SG that it would continue the membership of Nessus in the UN and all of the organs and organizations of the UN system, including the ICJ. Similarly, Acastus would continue the party status of Nessus to all treaties for which the UN serves as depository.

In response, the SC adopted Res.2386, stating that "Acastus too should apply for membership in the UN". When interpreting SC Res.2386, the USG for Legal Affairs concluded that "the Resolution does not prevent Acastus from temporarily continuing the membership of Nessus in the UN until Acastus has been admitted as a new member state".

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

The border between Acastus and Rubria runs through the Elysium, a territory occupied by the Elysians since prehistory. The indigenous Elysians, Acastus' citizens, has a unique and ancient cultural heritage. Their language and religion are unrelated to those of their neighbors. The Elysian economy is insular, wholly agricultural, and unchanged since well before the industrial revolution. The Elysians depend completely upon their agricultural lands in the Rubrian portion of the Elysium for food. Neither state has ever restricted the movement of Elysians across their common border.

In Feb. 2003, Rubria and Acastus signed the RABBIT. Art.62 of which stipulates that “in case of any dispute relating to any right or obligation under this Treaty, the matter shall ... be referred to the ICJ”.

TNC is a privately-owned limited-liability company incorporated and headquartered in Acastus. It adopted a corporate code of conduct, in conformity with its obligations under Acastus' MCRA, which was incorporated into the RABBIT.

In May 2003, TNC and Rubria formed COG, a joint-venture corporation incorporated and headquartered in Rubria, for the purpose of developing and exporting the petroleum resources under the Rubrian portion of the Elysium. President Fides of Rubria promptly granted COG exclusive rights to operate within the region.

In Apr. 2004, COG experts recommended the construction of an oil and gas pipeline. This pipeline would destruct over half of the Elysians' agricultural lands, and block the only

narrow streams connecting the underground spring with the lands, greatly harming the agricultural yield of the remaining lands. The proposal was accepted by both shareholders of COG in Jun. 2004.

Conscious that the harm to local agriculture might provoke hostility from the Elysians, COG authorized and financed the creation of a private security concern - PROF, to accompany and guard their personnel. PROF consists largely of former members of the Rubrian armed forces, and its commanders are recently retired senior Rubrian army officers. COG provides PROF with vehicles and communication equipment and pays a fee covering PROF's personnel costs, other operating costs, and profit. The contract was approved by both shareholders of COG in Jul. 2004. COG has always maintained that PROF is responsible for determining what weapons or ammunition it might need, and for procuring those items on the open market. PROF employees wear distinctive hats when on duty.

When the pipeline proposal was announced publicly, it was immediately criticized in the international media. The ILSA, an internationally-respected non-governmental organization, expert in environmental and social consequences of industrial projects, concluded that the resulting destruction of the agricultural land would make it impossible for the Elysians to continue their traditional way of life, and that all Elysians would have to leave their ancestral homeland for inhospitable cities, or starve.

PROF had on at least ten occasions seized Mr. Borius, along with scores of other Elysians,

and forced them to perform dangerous work all day without compensation on the COG project.

In Sep. 2004, Mr. Borius and an unincorporated group brought an action for damages in an Acastian civil court against COG, Rubria, PROF, and TNC. The civil court dismissed TNC on the basis of the principle of limited liability, and that TNC, as a private company, is not a “subject” of international law; and held Rubria and COG jointly and severally liable to the plaintiffs for compensatory damages.

The Elysians have exhausted all local remedies available in Rubria concerning all matters in this case.

Statement of Jurisdiction

The Republic of Acastus and the State of Rubria have submitted by Special Agreement their differences concerning the Elysian fields, and transmitted a copy thereof to the Registrar of the Court pursuant to article 40(1) of the Statute. Therefore, both parties have accepted the jurisdiction of the ICJ pursuant to Article 36(1) of the Statute of the Court.

Summary of Pleadings

I. The Court has jurisdiction over all claims in this case, since:

Acastus has continued Nessus's party status to the Court's Statute since it has, as the continuation of Nessus, continued Nessus's UN membership. Such status is not affected by SC Res.2386, since it is not binding upon Acastus. Should the Court find that Acastus should apply for UN membership consistent with SC Res.2386, Acastus is entitled by the USG's interpretation of SC Res.2386 to temporarily continue, and *de facto* has continued Nessus's UN membership via its wide participation in the UN.

Alternatively, Acastus has succeeded to Nessus's party status to the Court's Statute as a successor state of Nessus. First, Acastus is entitled to succeed to Nessus's party status to the Statute, by succeeding to Nessus's UN membership. Second, Acastus has succeeded to Nessus's party status to the Statute through treaty succession, pursuant to Art.34 of the VCSS.

II. By permitting the construction of the pipeline as proposed, Rubria would violate the rights of Acastus's citizens of Elysian heritage.

First, the Elysians, as Acastian citizens, enjoy special rights both as an indigenous people and as a minority, as well as fundamental human rights under international law. By permitting the pipeline construction, Rubria would violate the Elysians' rights to use their

ancestral lands, the rights to culture, religion and language, the rights to an adequate standard of living and health. Moreover, Rubria denied the Elysians' right to participate in decision-making of the pipeline proposal.

Second, development objectives are no justification for encroachments on human rights. Thus, Rubria cannot invoke rights attendant to its sovereignty over territory and natural resources to justify its violations of the Elysians' rights.

III. The activities of PROF in the Elysium, including the forced labor of civilians, are attributable to Rubria and are violations of international law.

First, the activities of PROF in the Elysium, including the forced labor of civilians, are attributable to Rubria, since: (i) PROF is de facto exercising public authority in the Elysium; or (ii) the activities of PROF are under the instruction of Rubria, or are under the control of Rubria according to the overall control test.

Second, as a state party to the ICCPR and the ICESCR, Rubria is obligated to ensure and respect the Elysians' rights thereunder. However, the activities of PROF violated the Elysians' right against forced or compulsory labor under Art.8(3) of the ICCPR, and their right to enjoy just and favorable conditions of work under Art.7 of the ICESCR.

IV. The outcome of the *Borius* litigation does not place Acastus in breach of Art.52 of the RABBIT. i.e. Acastus has enforced the MCRA and the AIRES by dismissing TNC

as a defendant while holding COG liable for the human rights abuses.

First, TNC is free from liability according to the MCRA, since: (i) TNC was protected by the “corporate veil”; (ii) TNC did not directly involve in the activities of COG; and, (iii) the MCRA itself does not impose corporate responsibility on TNC for all the activities of its subsidiary - COG.

Second, TNC is not a proper defendant under the AIREs, since TNC has no relation with the human rights abuses. Thus it did not satisfy the conditions for exercising jurisdiction under the AIREs and should be dismissed as a defendant.

Questions Presented

1. Whether The Court has jurisdiction over all claims in this case?
2. Whether Rubria violated the rights of Acastus's citizens of Elysian heritage by permitting the construction of the pipeline?
3. Whether the activities of PROF in the Elysium, including the forced labor of civilians, are attributable to Rubria and are violations of international law□
4. Whether the outcome of the *Borius* litigation placed Acastus in breach of Art.52 of the RABBIT□

I. The Court has jurisdiction over all claims in this case, since Acastus has succeeded to Nessus's party status to the Court's Statute.

All UN members are *ipso facto* parties to the Court's Statute,¹ and the Court exercises compulsory jurisdiction upon both state parties' acceptance of it.² When Rubria accepted such jurisdiction, it made a reservation requiring the opposing party to have been a party to the Statute for at least 12 months at the time of application to the Court. We submit that, consistent with Rubria's reservation, the Court has jurisdiction over all claims in this case initiated by Acastus in 2005. While UN precedents³ and most commentators⁴ distinguish state continuity from state extinction (the former means the same state continues to exist; the latter means one or more successor states have replaced the former state), Acastus has continued (1.) or alternatively succeeded to (2.) Nessus's party status to the Statute, including its acceptance of the Court's compulsory jurisdiction, when Nessus was dissolved in 2000.

1. Acastus has continued Nessus's party status to the Court's Statute since it has, as the

¹ UN Charter , in force Oct. 24, 1945, Art.93(1).

² ICJ Statute, in force Oct. 24, 1945, Art.36(2).

³ Letter from Chairman of the Sixth Committee to the Chairman of the First Committee, UN GAOR, 1st Comm., Annex 14g, 582-83, UN Doc.A/C.1/212 (1947).

⁴ e.g. O'Connell, State Succession in Municipal Law and International Law, Cambridge, 1967, 183; Crawford, The Creation of States in International Law, Oxford, 1979, 400; Vallat, Some Aspects of the Law of State Succession, 41 TRGS 123, 1955, 134; Jenks, State Succession in Respect of Law-making Treaties, 39 BYBIL 105, 1952, 133-34; Schachter, The Development of International Law Through the Legal Opinions of the United Nations Secretariat, 25 BYBIL 91, 1948, 105.

continuation of Nessus, continued Nessus's UN membership.

1.1. Acastus has continued Nessus's UN membership, and such status is not affected by SC Res.2386.

1.1.1. Acastus has continued Nessus's UN membership since it is the continuation of Nessus.

A UN member state does not cease to be a member unless its extinction as a legal personality has been shown.⁵ In two UN precedents, both India and Russia were respectively deemed to be the continuation of British India and USSR, *inter alia* because they preserved the capital, the control of most central government institutions and a majority of the resources.⁶ Also, their claims to continuity were widely recognized by third states⁷, the significance of which finds growing support in both legal doctrine⁸ and practice⁹ in marginal cases.

⁵ UN Doc.A/C.1/212, *supra* note 3.

⁶ e.g. Crawford, *supra* note 4, 406; Hall, A Treatise on International Law, A. Higgins 7th ed., 1917, 22; Scharf, Musical Chairs: The Dissolution of States and Membership in the United Nations, 28 Cornell Int'l L.J. 29, 1995, 50; Müllerson, New Developments in the Former USSR and Yugoslavia, 33 Va. J. Int'l L. 299, 1993, 304; Grant, A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law, 40 Va. J. Int'l L. 115, 1999, 136-137; Williamson/Osborn, AUS Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia, 33 Va. J. Int'l L. 261, 1993, 268.

⁷ *Id.*

⁸ e.g. Crawford, *supra* note 4, 406; Brownlie, Principles of Public International Law, 4th ed., 1990, 83; Müllerson, The Continuity and Succession of States, By Reference to the Former USSR and Yugoslavia, 42 ICLQ 473, 1993, 476; Shaw, State Succession Revisited, 5 FYIL 34, 1994, 45, 60.

⁹ e.g. Republic of Croatia et al. v. Girocredit Bank AG der Sparkassen, Austrian Supreme Court, 4 Ob 2304/96v, (Decision of Dec. 17, 1996), reprinted in 36 ILM 1523 (1997), 2

Similarly in this case, Acastus has satisfied these criteria of state continuation. First, Acastus has kept the capital city of Nessus and all the representatives of Nessus in the UN, and is home to considerable industry and trade. Second, third-party states have recognized Acastus's claim to continuity by considering their bilateral treaties with Nessus to have continuing effect between them and Acastus, and most states have approved the USG's interpretation entitling Acastus to temporarily continue Nessus's UN membership.

1.1.2. Acastus' status of continuing Nessus's UN membership is not affected by SC Res.2386, which is not binding upon Acastus.

The binding nature of SC resolutions depends on the Charter provisions invoked, and their wording.¹⁰ In this case, SC Res.2386 is not binding upon Acastus since:

First, there is no basis in the Charter for SC Res.2386. The SC decided therein, that Acastus should apply for UN membership, on the basis of its assertion that Nessus has ceased to exist.

However, the SC is only empowered to make recommendations to the GA concerning the admission of new states to the UN (Art.4 of the Charter). No provision of the Charter expressly empowers any UN organ to decide the preliminary question of state

ARIEL 489 (1997); Bühler, Casnote: Two Recent Austrian Supreme Court Decisions on State Succession from an International Law Perspective, 2 ARIEL 213, 1997, 225; Klabbers/Koskenniemi/Ribbelink/Zimmermann, State Practice Regarding State Succession and Issues of Recognition: the Pilot Project of the Council of Europe, Kluwer Law International, 1999, 34.

¹⁰ Case Concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Namibia Case), (Ad.Op.), ICJ Rep., 1971, 114.

continuity/extinction. In fact, as a matter of law, there is no operative principle for such determination. This matter must be settled through state practice and an evolving *opinio juris*.¹¹ Even if there was a UN organ to make such a determination, it would have been the GA, which is empowered to discuss any questions within the scope of the Charter (Art.10 of the Charter).

Second, the word “should” rather than “shall”, in SC Res.2386 indicates that it is suggestive but not binding. According to Black’s Law Dictionary, “shall” is mandatory whereas “should” is not. Such a clear distinction has been indicated in UN resolutions where both words were used in close proximity.¹²

1.2. Should the Court find that Acastus apply for UN membership consistent with SC Res.2386, Acastus is entitled to temporarily continue, and *de facto* has continued Nessus’s UN membership.

1.2.1. Acastus is entitled to temporarily continue Nessus’s UN membership pursuant to the USG’s interpretation of SC Res.2386.

The USG’s interpretation of SC Res.2386, which entitled Acastus to temporarily continuing Nessus’s UN membership prior to its admission to the UN, is binding upon the UN organization, gaining approval of the majority of states. Indeed, the USG for Legal Affairs – head of the OLA (central legal service for UN organs), is expressly empowered to prepare

¹¹ Bring, Correspondent’s Article: UN Membership of the Former Yugoslavia: Letter, 87 AJIL 244, 1993, 245.

¹² SC Res: 777, adopted 19 Sept. 1992; GA Res: 47/1, adopted 22 Sept. 1992.

legal opinions on the interpretation of the UN Charter and UN Resolutions.¹³ The binding force of the USG's interpretations is recognized by UN precedents. In the India/Pakistan case, there was no challenge to India's continued membership in the SC and the GA, consistent with the USG's legal opinion.¹⁴ In the Yugoslavia case, the UN system (including the ICJ)¹⁵ treated the FRY's membership consistently with the USG's interpretation, which held that SC Res.777 and GA Res.47/1 neither terminated nor suspended Yugoslavia's UN membership.¹⁶

1.2.2. Acastus *de facto* has continued Nessus's UN membership via its wide participation in the UN.

Membership in the UN creates a multiplicity of rights and obligations under the UN Charter, including participation (one of the most important "rights and privileges of membership" referred to in Art.5 of the Charter¹⁷) and payment of the arrears of the predecessor state.¹⁸

¹³ SG's bulletin ST/SGB/1997/8, entitled "Organization of the OLA", Sec.4.2(b).

¹⁴ UN GAOR, International Law Comm., 15th Sess., 2-4, UN Doc.A/CN.4/149 (1962); Scharf, *supra* note 6, 34; Blum, Russia Takes Over the Soviet Union's Seat at the United Nations, Part.III, <http://www.ejil.org/journal/Vol3/No2/art8.html> (visited on 17 Nov. 2005).

¹⁵ Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), (Preliminary Objections), ICJ Rep., 2003; The Prosecutor v. Milutinovic et al., No.IT-99-37-PT, (Trial Chamber III), ICTY (6 May 2003).

¹⁶ Letter from Carl-August Fleischhauer, USG for Legal Affairs, to Kenneth Dadzie, USG, UNCTAD (29 Sep.1992).

¹⁷ Wood, Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties, Max Planck Yearbook of United Nations Law, 1997, 249.

Flags, seats and nameplates in UN organizations are considered attributes of membership.¹⁹ Further, only member states can participate in the GA.²⁰ Indeed, in the Yugoslavia case, GA Res.47/1 expressly excluded the FRY from the GA.²¹

In the USSR case, in accord with Russia's letter to the SG claiming automatic continuation of the USSR's UN membership,²² the former USSR representatives sat behind new nameplates reading "The Russian Federation", took part in the SC meeting without challenge,²³ and took over all the USSR's rights and obligations under the UN, including the financial obligations.²⁴

Similarly in this case, Acastus *de facto* has continued Nessus's UN membership via its wide participation in the UN. Since 2002, in accord with Acastus's note to the SG (almost identical to that of Russia's) claiming automatic continuation of Nessus's UN membership,

¹⁸ Beemelmans, State Succession in International Law: Remarks on Recent Theory and State Praxis, 15 B.U. Int'l L.J. 71, 1997, 71.

¹⁹ The Prosecutor v. Milutinovic et al., *supra* note 15.

²⁰ Statement by Mr. Watson (USA), Prov. Verb. Record of the 3116th SC Meeting, UN Doc.S/PV.3116, 1992,12-13.

²¹ GA Res: 47/1, *supra* note 12.

²² Letter from Boris Yeltsin, President of the Russian Soviet Socialist Republic, to Javier Peres de Cuellar, SG of the UN (24 Dec. 1991), UN Doc.1991/Russia (1991).

²³ Paul Lewis, West Acts to Defer Issue of New UN Council Seats, NY Times, 3 Jan. 1992, A6.

²⁴ UN Doc.1991/Russia, *supra* note 22.

Acastus's delegation has been seated behind nameplates reading "Acastus" in the GA and various other UN bodies, and the flag of Acastus has been flown in place of Nessus's flag at all UN buildings, and Acastian government has assumed Nessus's UN membership dues.

2. Alternatively, Acastus has succeeded to Nessus's party status to the Court's Statute as a successor state of Nessus.

2.1. Acastus is entitled to succeed to Nessus's party status to the Statute, by succeeding to Nessus's UN membership.

If this Court does not recognize Acastus as the continuation of Nessus, Acastus is entitled to succeed to Nessus's UN membership, as a successor state of Nessus.

Although the UN Charter is silent on the question of succession to its membership, automatic succession to membership is supported by many states, and has been practiced by international organizations including UN specialized agencies. In the India/Pakistan case, there was substantial support within the First Committee of the GA for Argentina's position that both India and Pakistan should be treated equally and both could be members by inheritance,²⁵ in accord with Pakistan's own claim.²⁶ International organizations practicing automatic succession to membership include the ITU²⁷, IMF²⁸, WIPO²⁹, PCA³⁰, and others.

²⁵ GA (II), 1st Comm., 59th Meeting, 3; O'Connell, *supra* 4, 186.

²⁶ UN SCOR, 2nd Sess., 186th Meeting. 2027, UN Doc.S/496, A/CN.4/149 (1947).

²⁷ Documents of the ITU Conference at Atlantic City (1947), 216-17(1948).

²⁸ IMF, Press No.92/92, 1 (15 Dec. 1992).

Today, the UN is all the more universal with 191 members.³¹ Thus, in pursuing further universality and uniform practice within its system, the UN pragmatically should entitle Acastus to automatically succeed to Nessus's UN membership, in the same way new states succeed to multilateral treaties.³²

2.2. Acastus has succeeded to Nessus's party status to the Statute through treaty succession, pursuant to Art.34 of the VCSS.

2.2.1. Acastus has succeeded to Nessus's party status to the Statute, pursuant to Art.34(1)(a) of the VCSS.

Art.34(1)(a) of the VCSS entitles successor states to succeed to their predecessor states' party status to all treaties, regardless of whether the predecessor state continues to exist.

Nessus was a party to the VCSS. Thus, Acastus - a successor state of Nessus, in accord with its own claim, has succeeded to Nessus's party status to all treaties, including the Court's Statute. That is: Acastus is qualified to be a party in the Court's litigation, regardless of whether it is a UN member.³³ Such a status of Acastus is binding upon Rubria, which is also

²⁹ WIPO, 47 UNYB 1313 (1993).

³⁰ Succession of States to Multilateral Treaties: Second Study prepared by the Secretariat, UN Doc.A/CN.4/200 and Add.1&2, reprinted in 2 YBILC, 26ss, paras.99-127,(1968).

³¹ UN Press Release ORG/1360/Rev.1 (10 February 2004), Updated 24 Feb. 2005, <http://www.un.org/Overview/unmember.html> (visited on 6 Jan. 2006); Simma: The Charter of the United Nations - A Commentary, Oxford, 1994, 161.

³² Scharf, *supra* note 6, 69.

³³ Rosenne, The World Court: What It is and How It Works, Martinus Nijhoff Publishers, 5th ed., 1995, 84-85.

a party to the VCSS.

2.2.2. The exception to Art.34(1) under Art.34(2)(b) of the VCSS does not apply in this case.

Art.34(2)(b) provides that Art.34(1) does not apply, if it appears that the succession to a treaty by the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for the treaty's operation.

That exception does not apply in this case. The Court has been established as Court for the entire world.³⁴ The purpose of making the Court's Statute an integral part of the UN Charter was not to restrict parties to the Statute to UN members only, but to secure for the Court the support of all UN members.³⁵ Indeed, there are parties to the Statute that are non-members of the UN (Art.93(2) of the Charter).³⁶ Thus Acastus's succession to the Court's Statute would not be incompatible with the object and purpose of the Statute, nor radically change the conditions for the Statute's operation.

II. By permitting the construction of the pipeline as proposed, Rubria would violate the rights of Acastus's citizens of Elysian heritage.

In this case, the Elysians, as Acastian citizens, enjoy special rights both as an indigenous

³⁴ *Id*, 84.

³⁵ *Id*, 26.

³⁶ ICJ: States, not Members of the United Nations, Parties to the Statute, <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicnonmembers.html> (visited on 27 Dec. 2005).

people and as a minority, as well as fundamental human rights under international law. Rubria, a state party to the ICCPR and the ICESCR, and a member of the UN and the ILO, would violate the Elysians' rights by permitting the pipeline construction (1. - 4.). Meanwhile, Rubria cannot invoke rights attendant to its sovereignty over territory and natural resources to justify its gross violations of the Elysians' personal rights (5.).

1. Rubria would violate the Elysians' right to use their ancestral lands.

It is firmly established by international jurisprudence³⁷ and state practice³⁸ that indigenous peoples are entitled to enjoy their own means of subsistence and use the lands they have

³⁷ e.g. ICCPR, in force 1976, Art.1(2); ICESCR, in force 1966, Art.1(2); Draft UNDRI ,Arts.21, 25&26; the ILO Convention No.169 (The Indigenous and Tribal Peoples Convention), Arts.13&14; the Proposed American Declaration on the Rights of Indigenous Peoples ,Art.18; the African Charter on Human and Peoples' Rights, Art.14; Concluding observations of the HRC: Canada (1999), UN Doc.CCPR/C/79/Add.105, para. 8; Concluding observations of the CESCR: Canada, 10/12/98, UN Doc.E/C.12/1/Add.31, para.43; Indigenous Peoples, CERD General Recommendation No.23, UN Doc.CERD/C/51/Misc.13/Rev.4, 1997, para.5; see generally UNHCHR, Standard Setting: Legal Commentary on the Concept of Free, Prior and informed Consent, UN Doc.E/CN.4/Sub.2/AC.4/2005/WP.1, paras.37-44; MacKay, Indigenous peoples' rights to lands, territories and resources: selected international and domestic legal considerations, FAO Corporate Document Repository, http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/007/y5407t/y5407t0g.htm(visited on 15 Jan 2006).

³⁸ e.g. Lubicon Lake Band v. Canada, Communication No.167/1984, Supp. No.40 (A/45/40), 1990; Kitok v. Sweden, Communication No.197/1985, UN Doc.CCPR/C/33/D/197/1985, 1988; Jouni E. Länsman et al.v. Finland, Communication No.671/1995, UN Doc.CCPR/C/58/D/671/1995; Apirana Mahuika et al. v. New Zealand, Communication No.547/1993, UN Doc.CCPR/C/70/D/547/1993 (2000), para.5.1; Mayagna (Sumo) Awas Tingni Community Case, IAHR,2001,No.79,para.149; Nigeria Case, ACHR, No.155/96(2001), paras.45&58.

traditionally occupied. The HRC has held that recognition and protection of land rights for indigenous peoples is an integral part of Art.27 compliance.³⁹ Indigenous peoples' land rights arise from their rights existing prior to the creation of states, namely, occupation and use of the land and traditional land tenure systems.⁴⁰ In this case, Rubria's pipeline construction would lead to the destruction of the agricultural lands, and thus would violate the Elysians' rights to enjoy their agricultural subsistence and to use the agricultural lands occupied by them since prehistory.

2. Rubria would violate the Elysian's rights to culture, religion and language.

Art.27 of the ICCPR acknowledges minorities' rights to enjoy their own culture, to profess and practice their own religion, and to use their own language (similarly under Art.2(1) of the UNDRM and Arts.13&14 of the Draft UNDRI). While the protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a

³⁹ Concluding Comments of the HRC: Canada (1999), *supra* note 37, para.8; Mexico (1994), UN Doc.CCPR/C/79/Add.32; Sweden (1995), UN Doc.CCPR/C/79/Add.58; Brazil (1996), UN Doc.CCPR/C/79/Add.66.

⁴⁰ Mayagna (Sumo) Awas Tingni Community Case, *supra* note 38, para.142; USA Case, case 11.140, Rep.No.75/02, IACHR, 2002, para.130; UN Doc.E/CN.4/Sub.2/AC.4/2005/WP.1, *supra* note 37, paras.40-44; MacKay, *supra* note 37; Anaya, Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources, paper presented at American Association of Law Schools Conference, January 2005.

whole,⁴¹ Rubria’s pipeline construction would grossly violate these rights of the Elysian minority as proven below.

2.1. The indigenous Elysians simultaneously constitute a “minority”.

For an indigenous people to be protected under Art.27 of the ICCPR (also the UNDRM), they need to simultaneously constitute a minority. Since many characteristics of indigenous peoples overlap with those of minorities, when making such judgment, only the criterion of numerical minority need be satisfied.⁴²

In this case, the indigenous Elysians simultaneously constitute a “minority”, since they are a community of only approximately 5,000 inhabitants compared to the large, polyethnic state of Nessus. Further, since members of a “minority” need not be nationals, citizens or permanent residents of the state party,⁴³ the Elysian minority (as Acastian citizens farming in Rubria), falls within the protection of Art.27.

2.2. Rubria would violate the Elysians’ right to enjoy their own culture.

Culture manifests itself in many forms, including a particular way of life associated with the

⁴¹ The Rights of Minorities, HRC General Comment No.23, UN Doc.CCPR/C/21/Rev.1/Add.5, 1994, para.9.

⁴² Nowak, UN Covenant on Civil and Political Rights CCPR Commentary, NP Engel Publisher, 1993, 493.

⁴³ HRC General Comment No.23, *supra* note 41, para.5.2.

use of land resources, especially concerning indigenous peoples.⁴⁴ In particular, land is the basis for indigenous peoples' economic survival, spiritual well-being and cultural identity; thus the loss of ancestral lands threatens their very survival as a community and a people.⁴⁵

HRC cases have established that measures whose impact amounts to a denial of rights under Art.27, are incompatible with the obligations therein.⁴⁶ In *Lubicon Lake Band v. Canada*, the HRC held that Canada's oil exploration of the Band people's territories threatened their way of life and culture, and violated Art.27 so long as it continued.⁴⁷ In *Jouni E. Länsman et al. v. Finland*, the HRC held that if Finland's logging plans were to be approved on a larger scale within the Sami people's ancestral lands or if the effects of logging already planned were more serious, it might constitute a violation of the Sami's right to culture under

⁴⁴ *Id.*, para.7; Day of General Discussion on the Rights of Indigenous Children, CRC Recommendations, 34th Session, 3 Oct.2003, para.4.

⁴⁵ ILO Convention No.169: A Manual, Geneva, ILO, 2003, 35; UN Working Paper on the Indigenous People and Their Relationship to Land, Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes, E/CN.4/Sub.2/2001/21, para.13; UNHCHR: Fact Sheet No. 9 (Rev. 1), The Rights of Indigenous Peoples, <http://www.unhchr.ch/html/menu6/2/fs9.htm>(visited on 31 Dec. 2005); UNHCHR: Robinson, Bridging the Gap between Human Rights and Development: from Normative Principles to Operational Relevance ,3 Dec. 2001, <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/2DA59CD3FFC033DCC1256B1A0033F7C3?opendocument>(visited on 15 Jan 2006); Mayagna (Sumo) Awas Tingni Community Case. IAHR, 2001, No.79, para.149.

⁴⁶ *Jouni E. Länsman et al.v. Finland*, *supra* note 38, para.10.3; *Ilmari Lansman et al.v. Finland*, Communication No.511/1992, UN Doc.CCPR/C/52/D/511/1992, para.9.4.

⁴⁷ *Lubicon Lake Band v. Canada*, *supra* note 38, para.33.

Art.27.⁴⁸

Therefore, by analogy, the crucial question here is whether Rubria's pipeline proposal is of such a proportion as to deny the Elysians' rights under Art.27.⁴⁹ The answer is clear. In this case, similar to hunting and fishing for the Band people⁵⁰ and reindeer husbandry for the Sami people,⁵¹ agriculture constitutes an essential element of the Elysians' culture. The Elysian economy is insular and wholly agricultural, and the Elysians depend completely on the rich agricultural lands located in Rubria for food. Thus the destruction of the agricultural land would make it impossible for the Elysians to continue their traditional way of life, as is confirmed also by the ILSA's report. Similarly in the Chile case, the IFHR held that the realization of the Ralco dam would amount to the disappearing of the Pehuenche people's traditional way of life.⁵²

2.3. Rubria would violate the Elysians' rights to profess and practice their own religion and use their own language.

The existence of minorities cannot be imagined after the disappearance of the single element

⁴⁸ *Jouni E. Länsman et al.v. Finland*, *supra* note 38, paras.2.1&10.7; see also *Ilmari Lansman et al.v. Finland*, *supra* note 46, paras.2.1&9.8.

⁴⁹ *Jouni E. Länsman et al.v. Finland*, *supra* note 38, para.10.4.

⁵⁰ *Lubicon Lake Band v. Canada*, *supra* note 38, para.2.2.

⁵¹ *Jouni E. Länsman et al.v. Finland*, *supra* note 38, para.10.2.

⁵² Lorenzo Nesti, The Mapuche-Pehuenche and the Ralco Dam on the Biobio River: the Difficult Problem Protection of Indigenous Peoples' Right to (Their) Land, <http://www.unisi.it/ricerca/centri/cisai/nesti.htm>(visited on 22 Dec. 2005).

which constitutes them: their ethnic character, religion or language.⁵³ In this case, the Elysian religion and language are unrelated to those of their neighbors. Since most Elysians are illiterate and have little or no access to modern communications, it could be inferred that the Elysian religion and language have been passed down orally and physically within their small community. Once they are forced to scatter into the inhospitable cities as a result of the pipeline construction, their unique ethnic religion and language would face swift extinction.

3. Rubria would violate the Elysians' rights to an adequate standard of living and health.

Art.11 of the ICESCR (also Art.25(1) of the UDHR) acknowledges everyone's right to an adequate standard of living, from which emanates the indispensable rights to adequate food and water, and the right against forced evictions under the right to adequate housing.⁵⁴

Art.12 of the ICESCR acknowledges everyone's right to health. In this case, Rubria's pipeline construction would violate these rights of the Elysians, especially as an indigenous people, as proven below.

3.1. Rubria would violate the Elysians' rights to adequate food and water.

⁵³ UNHCHR, Fact Sheet No.9, *supra* note 45; Ballantyne, *Davidson, McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, (Diss. Op. Ndiaye) UN Doc.CCPR/C/47/D/359/1989&385/1989/Rev.1, 1993.

⁵⁴ The Right to Adequate Housing, ICESCR General Comment 4, 1991, UN Doc.E/1992/23, para.1; The Right to Adequate Food, ICESCR General Comment 12, 1999, UN Doc.E/C.12/1999/5, para.1; The Right to Water, ICESCR General Comment 15, 2000, UN Doc.E/C.12/2000/11, para.3.

The rights to adequate food and water require state parties to respect and avoid taking any measures that result in preventing indigenous peoples' existing access to adequate food,⁵⁵ and to ensure adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.⁵⁶

In this case, over half of the Elysians' agricultural lands would be destroyed by the pipeline construction. Moreover, the agricultural yield of the remaining lands would be greatly harmed due to the pipeline's severance of the remaining lands from the underground spring which irrigates the entirety of the agricultural lands. Since the Elysians depend solely on these lands for food, and have little or no access to running water, Rubria's pipeline construction would grossly violate their rights to adequate food and water.

3.2. Rubria would violate the Elysians' right against forced evictions and right to health.

The right to adequate housing prohibits "forced evictions" of indigenous peoples from the homes and lands which they occupy (also under Art.10 of the Draft UNDRI and Art.16(1) of the ILO Convention No.169). Thus a state party must refrain from forced evictions.⁵⁷

The right to health is regarded as a fundamental human right, indispensable for the exercise

⁵⁵ The Right to Adequate Food, *supra* note 54, paras.13&15.

⁵⁶ The Right to Water, *supra* note 54, para.7.

⁵⁷ The Right to Adequate Housing: Forced Evictions, ICESCR General Comment 7, 1997, UN Doc.E/1998/22, annex IV, paras.3&8.

of other human rights,⁵⁸ and requires state parties to refrain from interfering directly or indirectly with the enjoyment of this right.⁵⁹ In indigenous communities, the health of an individual is often linked to the health of the society as a whole, and has a collective dimension. Thus, development-related activities that lead to forced displacement of indigenous peoples from their traditional territories, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.⁶⁰ For example, in *Lubicon Lake Band v. Canada*, Canada's oil exploration resulted in marked deterioration in the Band people's health.⁶¹

In this case, according to the ILSA's report, the Elysians would have to leave their ancestral homeland for the inhospitable cities, or else starve as a result of the pipeline construction, similarly to how the building of the Pangué dam resulted in the relocation of the Pehuenche people in the Chile case.⁶² Thus Rubria's pipeline construction would result in forced evictions of the Elysians from their homes and agricultural lands, violating their right against forced evictions and right to health.

⁵⁸ The Right to the Highest Attainable Standard of Health, ICESCR General Comment 14, 2000, UN Doc.E/C.12/2000/4, para.1.

⁵⁹ *Id.*, para.33.

⁶⁰ *Id.*, para.27.

⁶¹ *Lubicon Lake Band v. Canada*, *supra* note 38, para.23.2.

⁶² Nesti, *supra* note 52.

4. Rubria denied the Elysians' right to participate in decision-making of the pipeline proposal.

As has been recognized by this Court since 1975, consent is the basis for relations between states and indigenous peoples.⁶³ Indigenous peoples' right to participate in decision-making on matters which affect them, and the principle of Free, Prior and Informed Consent (FPIC) of indigenous peoples to policies, programmes, projects and procedures affecting their rights and welfare, are being discussed in a wide range of international, regional and national processes,⁶⁴ including the ICCPR,⁶⁵ the ICESCR,⁶⁶ the CERD,⁶⁷ the UNDRM (Art.2), the Draft UNDRI (Arts.10, 12, 20, 27&30), the ILO Convention No.169 (Arts.2, 6, 7, 15&16, which holds consultation and participation as fundamental principles⁶⁸), and cases of the HRC,⁶⁹ IACHR⁷⁰ and ACHR.⁷¹ Moreover, Art.5 of the UNDRM and Art.15 of the ILO

⁶³ Western Sahara Case, (Ad. Op.), 16 Oct. 1975, ICJ Rep.1975; See also, Janis, The ICJ: Ad. Op. on the Western Sahara, 17 Harv. Int'l L.J. 609, 61 (1976).

⁶⁴ UN Doc.E/CN.4/Sub.2/AC.4/2005/WP.1, *supra* note 37, para.3.

⁶⁵ HRC General Comment No.23, *supra* note 41, para.7; HRC report to the GA in its 54th session concerning the situation in Chile, UN Doc.A54/40, Supp. No.40, Vol.1, point 218, 21 October 1999.

⁶⁶ ICESCR General Comment 7, *supra* note 57, para.13.

⁶⁷ Indigenous Peoples, CERD General Recommendation No.23, UN Doc.CERD/C/51/Misc.13/Rev.4, 1997, para.4; Concluding observations of the CERD: Australia, 24/03/2000, UN Doc.CERD/C/56/Misc.42/rev.3, para.9; Costa Rica, 20/03/2002, UN Doc.CERD/C/60/CO/3; USA, 14/08/2001, UN Doc.CERD/C/59/MISC.17/REV.3.

⁶⁸ ILO Convention No.169: A Manual, *supra* note 45, 21&24.

⁶⁹ e.g. Jouni E. Länsman et al.v. Finland, *supra* note 38, paras.10.5; Ilmari Lansman et al.v. Finland, *supra* note 46, para.9.8; see also Johnston & Turner, The Pehuenche, the World

Convention No.169 stipulate that national policies and programs shall be planned and implemented with due regard for the legitimate interests of minorities and indigenous peoples, as is confirmed also by HRC cases.⁷²

In this case, Rubria denied the Elysians' right to participate in decision-making of the pipeline proposal, inconsistently with the principle of FPIC. No evidence shows that Rubria had ever consulted with the Elysians, or that it took the Elysians' interests into consideration.

5. Rubria cannot invoke rights attendant to its sovereignty over territory and natural resources to justify its violations of the Elysians' rights protected under the international human rights law.

In the contemporary world, no state enjoys unfettered sovereignty. Especially in the arena of international human rights law, the duties and obligations of states defined therein clearly condition and constrain state sovereignty.⁷³ Thus, development objectives are no justification for encroachments on human rights.⁷⁴ While natural resources must be used to

Bank Group and Endesa S.A. Violations of Human Rights in the Pangué and Ralco Dam Projects on the BíoBío River, Chile, Rep.AACHR, Mar. 1998, 10.

⁷⁰ e.g. USA Case(Mary and Carrie Dann v. USA), *supra* note 40, para.131.

⁷¹ e.g. Nigeria Case, *supra* note 38, para.58.

⁷² e.g. Jouni E. Lämsman et al. v. Finland, *supra* note 38, paras.10.5; Ilmari Lansman et al. v. Finland, *supra* note 46, para.9.8; UN Doc.A54/40, *supra* note 65. Apirana Mahuika et al. v. New Zealand, *supra* note 38, para.9.9.

⁷³ UN Doc.E/CN.4/Sub.2/AC.4/2005/WP.1, *supra* note 37, para.52.

⁷⁴ Concluding Observations of the CERD, UN Doc.CERD/C/64/CO/9/Rev.2, 2004, para.15; Vienna Declaration and Programme of Action, World Conference on Human

promote economic, social and cultural development, this principle must be exercised consistently with the rights of indigenous peoples.⁷⁵ Indeed, the HRC holds that the scope of a state's freedom to pursue economic development in exercising sovereignty over its territory and natural resources is to be assessed by reference to the obligations it has undertaken in Art.27 of the ICCPR.⁷⁶

Thus, Rubria, as a member of the UN and the ILO, who undertakes obligations in the ICCPR and the ICESCR as a state party, cannot invoke rights attendant to its sovereignty over territory and natural resources to justify its gross violations of the Elysians' rights.

III. The activities of PROF in the Elysium, including the forced labor of civilians, are attributable to Rubria and are violations of international law.

1. The activities of PROF in the Elysium, including the forced labor of civilians, are attributable to Rubria.

1.1. PROF is *de facto* exercising public authority in the Elysium.

When conduct of ostensibly private actors is sufficiently connected with the exercise of

Rights, UN Doc.A/CONF.157/23 12 Jul.1993 ,para.10; MacKay, Indigenous Peoples' Right to FPIC and the WB's Extractive Industries Review, IV(2) Sustainable Dev. Law & Policy 43-66, 53 (2004).

⁷⁵ UN Doc.CERD/C/64/CO/9/Rev.2, *supra* note 74, para.11; Schrijver, Sovereignty over Natural Resources: Balancing Rights and Duties, Cambridge University Press, 1997, <http://dissertations.ub.rug.nl/FILES/faculties/jur/1995/n.j.schrijver/h11.pdf> (visited on 3 Jan. 2006).

⁷⁶ HRC General Comment No.23, *supra* note 41, para.3.2.

public power, under “the color of the authority” or “by virtue of the official capacity”, the private acts can be deemed as acts of the *de facto* state agent.⁷⁷ It has been widely accepted in international jurisprudence that such acts are attributable to States.⁷⁸ This attribution principle is intended to remove the incentive for a State to avoid responsibility by denying the existence of an official or legal connection between itself and its agent.⁷⁹

To identify whether an entity is acting under the color of public authority, two essential criteria should be examined: (i) the content of the powers; and (ii) the purposes for which they are to be exercised.⁸⁰

Applying the two criteria to this case, it is apparent that PROF is exercising public authority in the Elysium. First, PROF is exercising policing and regulatory powers in the Elysium. It has long been recognized that in some circumstances, states may invest private organizations with public powers, as in the case of private railway companies permitted to maintain a

⁷⁷ Derek Jinks, State Responsibility For Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups, 4 Chi. J. Int'l L. 83(2003), 83.

⁷⁸ The Zafiro case, 4 RIAA, 1925, 160; Stephens Case, 4 RIAA, 1927, 67; Lehigh Valley Railroad Company, and others (USA) v. Germany (Sabotage Cases): "Black Tom" and "Kingsland" incidents, 8RIAA, 84 (1930); and 8RIAA, 225 (1939); Commentary to the Draft Articles on Responsibility of States For Internationally Wrongful Acts, adopted by the ILC at its 53 session, 2001, (A/56/10), (chp.IV.E.1), Art.8, para.2.

⁷⁹ Gregory Townsend, State Responsibility For Acts Of De Facto Agents, 14 Ariz. J. Int'l & Comp. Law 635(1997), 635-636.

⁸⁰ Commentary, *supra* note 78, 94.

police force, and shall assume responsibility for the acts of such organizations.⁸¹ In this case, although PROF is designated as a “private security concern”, its capacity goes beyond private endeavors. It is empowered to maintain order in the Elysium, which has been classified as a “public park”. Also, its personnel are allowed to bear arms and seize civilians. Second, the purposes of its activities are solely for the benefit of the pipeline project, in which Rubria is not only a shareholder, but also a primary beneficiary.

1.2. The activities of PROF are under the instruction, direction and control of Rubria.

The conduct of a person or group of persons shall be considered as an act of a state under international law if the person or group of persons is in fact acting under the instruction, direction or control of that state in carrying out the conduct.⁸² This principle of attribution is widely accepted in international jurisprudence.⁸³ We submit that this Court should apply this principle to the present issue, as proven below.

1.2.1. PROF was financed, paid and equipped by Rubria through COG.

⁸¹ League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Vol. III: Responsibility of State for Damage caused in their Territory to the Person or Property of Foreigners (Doc. C. 75. M. 69. 1929. V.), 90.

⁸² Draft Articles on Responsibility of States For Internationally Wrongful Acts, adopted by the ILC at its 53 session (2001), (A/56/10), (chp.IV.E.1), Art.8.

⁸³ See, e.g., *the Zafiro case*, *supra* note 78; *Stephens Case*, *supra* note 78; *Lehigh Valley Railroad Company, and others (USA) v. Germany(Sabotage Cases): Black Tom and Kingsland incidents*, *supra* note 78.

In establishing the control test which attributes conducts of private groups to the state, international decisions have recognized the financing or logistic support of a private group by the state as an essential factor.⁸⁴ In the *Nicaragua* case, the Court held that the USA was responsible for the training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua.⁸⁵ Similarly in this case, PROF was financed, paid and provided with vehicles and communication equipment by COG. The Rubrian Ministry of Natural Resources as one party to COG, not only approved but also contributed to the financing and equipment of PROF.

1.2.2. PROF's commitment of forced labor was under the instruction or direction of Rubria.

Rubria may argue that the Court in the *Nicaragua* case also found that the financing and equipment of the Contras by the USA were insufficient to attribute violation of humanitarian law to the USA.⁸⁶ Such an argument is inapplicable here, because in this case it can be reasonably deduced that the commitment of human rights abuses by PROF was under the direction of Rubria: (i) Rubria, rather than PROF, has the incentive to use forced labor for

⁸⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (Merits), ICJ Rep., 1986, 51, para.86; *Prosecutor v. Dusko Tadic a/k/a "Dule" (sentencing judgment)*, IT-94-1, <http://www.un.org/icty/cases-e/index-e.htm> (visited on 14 Jan2006), para.151.

⁸⁵ *The Nicaragua case*, *supra* note 84, para.98.

⁸⁶ *Id*, para.109.

the pipeline project; (ii) the seizure of the Elysians as forced labor by PROF was not incidental but systematic, as is evidenced by the frequency of the seizure (at least ten times during Aug. and Sep. according to Mr. Borius) and by the coordination between PROF and COG managers. Evidently, PROF was acting under the instruction or direction of COG. The powers exercised by PROF have public elements, which cannot be conferred by a private company. Thus, it is reasonable to deduce Rubria instructed or directed the activities of PROF.

1.2.3. The activities of PROF are under the control of Rubria according to the overall control test.

Should this Court find that no specific instruction or direction was given by Rubria to PROF in the human rights abuses, we submit that the link between Rubria and PROF meets the overall control test set forth in the Tadic case.⁸⁷

In the Tadic case, the ICTY stressed that international law does not require a high threshold for the test of control in each and every circumstance,⁸⁸ and applied an overall control test for the purpose of attribution. Under the overall control test, if a state has an overall control over an organized and hierarchically structured group, then all acts of the members of the

⁸⁷ Jan Arno Hessbruegge, The Historical Development of the Doctrines of Attribution and Due Diligence in International Law, 36 N.Y.U. J. Int'l L. & Pol. 265 (2002), 304; Derek Jinks, *surpa* note 77, 89.

⁸⁸ The Tadic case, *supra* note 84, para.117.

group are attributable to the state regardless of whether or not the state has issued specific instructions to those individuals.⁸⁹ This test is solidly based on international decisions, such as the *Kenneth P. Yeager* case,⁹⁰ the *Loizidou v. Turkey* case,⁹¹ the *Jorgic* case,⁹² and the *Stephens* case.⁹³ In the *Stephens* case, the Mexico-United States General Claims Commission attributed to Mexico acts committed during a civil war by a member of the Mexican “irregular auxiliary” of the army, which among other things lacked both uniforms and insignia.⁹⁴ The Commission did not enquire as to whether or not specific instructions had been issued concerning the killing of the USA national by that guard.

This Court should apply the overall control test in the instant case, and find Rubria responsible for the acts of PROF. First, PROF is an organized group distinguishable from individuals acting on behalf of a state without instructions. A group, for the purpose of applying the overall control test, typically has a structure, a chain of command and a set of rules as well as the outward symbols of authority.⁹⁵ PROF, as a private military company

⁸⁹ *Id.*, para.122.

⁹⁰ *Kenneth P. Yeager v. Islamic Republic of Iran*, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV, 37.

⁹¹ *Loizidou v. Turkey* (Merits), ECHR, 18 Dec.1996 (40/1993/435/514).

⁹² *Nikola Jorgic case*, Düsseldorf Supreme Court, 26 Sep.1997, 2 St E 8/96.

⁹³ *Stephens Case*, *supra* note 78.

⁹⁴ *Id.*

⁹⁵ *The Tadic case*, *supra* note 84, para. 120.

(PMC),⁹⁶ obviously has corporate structures. Also, its employees consist largely of former members of the Rubrian armed forces, and its commanders are recently retired senior Rubrian army officers. Additionally, the PROF employees wear distinctive hats when on duty, which can be considered symbols of authority. Second, the overall control required by international law may be deemed to exist when a state has a role in organizing, coordinating or planning the actions of the group, in addition to financing, training and equipping or providing operational support to that group.⁹⁷ Even if Rubria did not give specific instructions to PROF in the seizure of the Elysians, it nonetheless approved the contract with PROF, and as one shareholder, it engaged in the decision-making regarding the activities of PROF.

2. The activities of PROF are violations of international law.

Rubria is a party to both the ICCPR and the ICESCR, under which fundamental human rights are guaranteed. The activities of PROF violated the Elysians' rights therein.

2.1. The activities of PROF violated the Elysians' right against forced or compulsory labor under Art.8(3) of the ICCPR.

“Forced or compulsory labor” under Art.8(3) of the ICCPR (also under the ILO Conventions Nos.29&105) means any work or service which is exacted from any person under the

⁹⁶ Devin R. Desai, Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies, 39 U.S.F. L. Rev. 825(2005), 826.

⁹⁷ The Tadic case, *supra* note 84, para.137.

menace of any penalty; for which the person has not offered himself voluntarily.⁹⁸ In this case, the activities of PROF violated the Elysians' rights against forced labor. The Elysians were forced to work in the pipeline project under the compulsion of PROF, who waved weapons and shouted at them, grabbing as many strong young men as could be found.

2.2. The activities of PROF violated the Elysians' right to enjoy just and favorable conditions of work under Art.7 of the ICESCR.

Art.7 of the ICESCR recognizes the right of everyone to the enjoyment of just and favorable conditions of work, in particular: (a) remuneration which provides all workers, as a minimum, with: (i) fair wages and equal remuneration for work, (ii) a decent living for themselves and their families; (b) safe and healthy working conditions; and (c) rest, leisure and reasonable limitation of working hours. In this case, such rights were violated by PROF, who forced the Elysians to perform dangerous work all day without compensation, and returned them to their fields long after sunset, leaving with them only a small bag of sorghum. As those workers constituted the main labor force in Elysian society, the Elysians obviously did not get enough remuneration to provide for themselves and their families.

IV. The outcome of the *Borius* litigation does not place Acastus in breach of Art.52 of the RABBIT.

⁹⁸ *Bernadette Faure v. Australia*, Communication No.1036/2001, UN Doc.CCPR/C/85/D/1036/2001, para. 7.5; A Global Alliance Against Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report Of The Director-General, International Labour Conference 93rd Session 2005, http://www.ilo.org/dyn/declaris/declarationweb.download_blob?Var_DocumentID=5059(visited on 1 Jan, 2006).

According to Art.52 of the RABBIT, Acastus undertakes to enforce the MCRA and the AIREs in carrying out its obligations under the RABBIT. In the *Borius* litigation, the Acastian civil court dismissed TNC as a defendant and held COG liable for the human rights abuses. This outcome does not place Acastus in breach of Art.52 of the RABBIT, since TNC is free from liability under the MCRA (1.) and is not a proper defendant under the AIREs (2.).

1. The outcome of the *Borius* litigation does not contravene the MCRA since TNC acted totally in compliance with the standards therein.

1.1. TNC is protected by the “corporate veil” against liability for the activities of COG according to the principle of limited liability.

1.1.1. The principle of limited liability should be applied in the *Borius* case and no exceptional circumstances exist.

The principle of limited liability insulates the shareholders or investors from the liabilities of a corporation. According to this principle, a corporation is a separate legal unit with its own rights and responsibilities separate from those of its shareholders.⁹⁹ This principle has been acknowledged at the national level by international law and it should be applied in the *Borius* case.¹⁰⁰ As an exception to this principle, courts are allowed to “pierce the corporate veil” in some circumstances, in order to hold a parent company accountable for the acts of its

⁹⁹ Phillip I. Blumberg, The Multinational Challenge to Corporation Law, Oxford, 1993, 8.

¹⁰⁰ Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, ICJ Rep., 1970, paras. 56-58.

subsidiaries.¹⁰¹ Although the standards for “piercing the corporate veil” vary among countries, it is widely acknowledged that at least two tests must be met: (i) there must be such a unity of interest between the corporate personalities that they do not function as separate personalities and (ii) failure to disregard the separate nature of the corporate entities would result in fraud or injustice.¹⁰² Mere ownership of a subsidiary does not justify the imposition of liability on a parent.¹⁰³

Neither of the tests can be met in the *Borius* case. In fact, the plaintiffs of the *Borius* case did not contend that TNC was the “alter ego” of COG.

1.1.2. The MCRA does not repeal the principle of limited liability applied by the Acastian court.

The MCRA is incorporated by reference into the RABBIT, hence constitutes an integral part of the RABBIT. Therefore, the MCRA shall be interpreted in its context (Art.31 of the VCLT). The context, for the purpose of the interpretation of a treaty, shall comprise any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty (Art.31(2)(b) of the VCLT).

Section Three of the MCRA directs Acastian courts to refer to the General Policies of the

¹⁰¹ *Id.*

¹⁰² *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir.2001).

¹⁰³ *Pearson v. Component Tech. Corporation*, 247 F.3d 471, 484 (3d Cir.2001).

OECD Guidelines and the UDHR, in interpreting and implementing the standards of the MCRA. Therefore we submit that the OECD Guidelines and the UDHR provide the context for the interpretation of the MCRA.

The General Policies of the OECD Guidelines stipulate that enterprises should respect the human rights of those affected by their activities, in accord with the host government's international obligations and commitments.¹⁰⁴ However, in implementing the Guidelines, the Clarifications of the Guidelines acknowledge that the question of whether parent companies should assume responsibility for certain financial obligations of subsidiaries as part of good management practice raises complex problems in view of the limited liability principle embodied in the national laws of adhering countries. Therefore the Guidelines cannot supersede or substitute for national laws governing corporate liability, nor do they imply an unqualified principle of parent company responsibility.¹⁰⁵ In other words, the MCRA does not repeal the centuries of Acastian legal tradition that establishes the principle of limited liability, which was applied by the Acastian civil court in the *Borius* case.

1.2. TNC is free from liability since it didn't directly involve in the activities of COG.

¹⁰⁴ OECD Guidelines for Multinational Enterprises, General Policy, (2) , www.ausncp.gov.au/content/docs/170_189_20020901_annual.pdf visited on 15 Jan. 2006 □.

¹⁰⁵ The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, 14, www.ausncp.gov.au/content/docs/170_189_20020901_annual.pdf visited on 15 Jan. 2006 □.

To justify its allegation that TNC's conduct in Rubria violated international human rights norms, Rubria may argue that TNC, as the shareholder, aided or abetted the human rights abuses. Such an allegation is unacceptable. Standards for aiding or abetting are recognized by the ICTY¹⁰⁶ and the ICTR¹⁰⁷, and upheld by US courts in the *Unocal*¹⁰⁸ and *Chevron*¹⁰⁹ as "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime".¹¹⁰ In *Unocal*, the court found Unocal may be held liable for aiding and abetting the Myanmar Military in subjecting Burmese to forced labor on the grounds that (i) its subsidiaries were its alter egos; (ii) Unocal, rather than its subsidiaries, employed the Military to provide security along the pipeline and showed the Military where to do it; and (iii) Unocal knew the Military was likely to use and did in fact use forced labor.¹¹¹ In the present case, TNC cannot be held to have aided or abetted the human rights abuses, because: (i) TNC is not the alter ego of COG, as proven above; (ii) the contract between COG and PROF as approved by TNC was only purported to accompany

¹⁰⁶ *Prosecutor v. Furundzija*, IT-95-17/1 T (10 Dec. 1998), 235; *Prosecutor v. Kunarac*, IT-96-23-T&IT-96-23/1-T, (22 Feb. 2001), <http://www.un.org/icty/foca/trialc2/judgement/index.htm>(visited on 13 Nov. 2005), 391; *Prosecutor v. Tadic*, ICTY-94-1(May 7, 1997), www.un.org/icty/tadic/trials2/judgement/index.htm(visited on 13 Nov.2005), 688.

¹⁰⁷ *Prosecutor v. Musema*, ICTR-96-13-T (Jan. 27, 2000), 126.

¹⁰⁸ *Doe v. Unocal Corp* , 395 F.3d 932 (2002), 950-953.

¹⁰⁹ *Bowoto v. Chevron* , 312 F.Supp.2d 1229 (2004), 1247-1248.

¹¹⁰ *Doe v. Unocal Corp* , *supra* note 108, 951.

¹¹¹ *Id.* 953.

and to guard COG's personnel; and (iii) the existence of forced labor may have been known to the managers of the COG, who were in charge of the day-to-day business. However, there is no evidence showing that TNC had any knowledge of it.

1.3. The MCRA does not impose corporate responsibility on TNC for all the activities of its subsidiary - COG.

Section Four of the MCRA provides that an Acastian corporation shall, "in its conduct abroad, comply with all governing norms of conventional and customary international law".

We submit that neither conventional nor customary international law imposes responsibility on TNC to guarantee the activities of COG.

1.3.1. No norms of conventional law impose obligations on TNC to guarantee the activities of its subsidiary.

The relevant conventions regarding human rights, ratified by both Acastus and Rubria, are the ICCPR and the ICESCR. However, both conventions are instruments of international law that bind ratifying governments rather than non-state actors such as corporations.¹¹²

Therefore, no norms addressing the obligations of TNC can be derived from conventional law.

1.3.2 State practice does not support the imposition of liability on the parent company for the acts of its subsidiaries lacking parent's direct involvement in the human rights abuses.

¹¹² Frank C. Newman & David Weissbrodt, International Human Rights: Law, Policy and Process (2nd ed), 1996, 5-16; Barbara A. Frey, The Legal and Ethical Responsibilities of Transnational Corporation in the Protection of International Human Rights, 6 Minn. J. Global Trade 153, 1997, 163.

To establish the existence of norms of customary international law, one requirement is consistent state practice.¹¹³ State practice endorsing a parent company's direct liability for the acts of its subsidiaries is not evident.

First, this can be demonstrated in the reluctance of States to endorse direct parent liability in international CSI instruments. Among the most influential international CSI instruments,¹¹⁴ the OECD Guidelines, as demonstrated above, explicitly clarify that they do not imply an unqualified principle of parent company responsibility;¹¹⁵ the UN Global Compact and the UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, although calling for MNCs to ensure human rights standards within the corporations,¹¹⁶ are considered to be aggressive, and are not well received by many states.¹¹⁷

¹¹³ Asylum Case, (Columbia v. Peru), ICJ Rep., 1950, 266; Alina Kaczorowska, Public International Law, 2002, 15.

¹¹⁴ Ilias Bantekas, Corporate Social Responsibility in International Law, 22 B.U. Int'l L. J. 309, 2004, 319.

¹¹⁵ Doe v. Unocal Corp., *supra* note 108.

¹¹⁶ UN Global Compact, Principles 1 and 2, www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html visited on 15 Jan. 2006; UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, C, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

¹¹⁷ Surya Deva, UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction? 10 ILSA J. Int'l & Comp. L. 493; Jacob Gelfand, The Lack of Enforcement in the UN Draft Norms: Benefit or

Second, similar cases have been initiated in courts of several countries,¹¹⁸ and the outcome of these cases demonstrates that many states are clearly against parent company responsibility. In the USA, where many lawsuits against MNCs for violations of human rights are filed,¹¹⁹ none of the cases have yet resulted in a judgment against a parent company incorporated in US.¹²⁰ In the UK, the principles of separation of corporate identity and *forum non conveniens* have been firmly upheld by courts in overseas personal injury cases against UK parent corporations.¹²¹ In Australia, a 1998 court judgment refused to hold an Australian parent company, James Hardie, liable for asbestosis suffered by an employee at its New Zealand subsidiary, on the basis that the parent's separate legal identity prevented

Disadvantage? (Global Law Working Paper 01/05 Symposium – “Transnational Corporations and Human Rights”), http://www.nyulawglobal.org/workingpapers/GLWP0105Gelfand_000.rtf (visited on 15 Jan. 2006); Alexis M. Taylor, The UN and the Global Compact, 17 N.Y.L. Sch. J. Hum. Rts. 975(2001), 978.

¹¹⁸ See generally, Halina Ward, Governing Multinationals : The Role of Foreign Direct Liability, http://www.riia.org/pdf/briefing_papers/governing_multinationals.pdf (visited on 12 Jan. 2006).

¹¹⁹ Beth Stephens, Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts, in Menno T. Kamminga & Saman Zia-Zarifi (eds.), Liability of Multinational Corporations under International Law, Kluwer Law International, 2000, 228.

¹²⁰ EarthRights International, In Our Court: ATCA, Sosa and the Triumph of Human Rights, July, 2004, <http://www.earthrights.org/pubs/inourcourt.doc> (visited on 12 Dec. 2005).

¹²¹ Richard Meeran, Liability of Multinational Corporations: A Critical Stage in the UK, in Menno T. Kamminga & Saman Zia-Zarifi (eds.), *supra* note 119, 251.

the imposition of a duty of care under the law of negligence.¹²²

2. The outcome of the *Borius* litigation does not contravene the AIRES.

The holding of COG, and the dismissal of TNC as defendants by the Acastian court, were consistent with the AIRES. According to the AIRES, a proper defendant should demonstrate:

(i) a violation of international law, including international law of human rights; (ii) that the violation took place outside the national territory; (iii) that the defendant is present or may be found in Acastus. However, as has been proved above, TNC has no relation with the human rights abuses, and thus is not a proper party defendant in a case under the AIRES.

V. Prayer for relief.

Acastus respectfully requests that the Court Declare:

(i) the Court has jurisdiction over all claims in this case, since Acastus has succeeded to Nessus's status as a party to the Statute of the Court;

(ii) by permitting the construction of the pipeline as proposed, Rubria would violate the rights of Acastus's citizens of Elysian heritage;

(iii) the activities of PROF in the Elysium, including the forced labor of civilians, are

¹²² James Hardie and Coy Pty Limited v Seltsam Pty Limited, 73 ALJR 232, S64/1998 (22 March 1999),

<http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/hca/transcripts/1998/S64/3.html?query=%7e+%20%28%28james+hardie+ visited on 15 Jan. 2006>

attributable to Rubria and are violations of international law; and

(iv) the outcome of the Borius litigation does not place Acastus in breach of Art.52 of the

RABBIT.