

BENCH MEMORANDUM FOR JUDGES

THE CASE CONCERNING THE ZETIAN PROVINCES

Version 1.5

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2011 Philip C. Jessup Competition

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Purpose of the Bench Memorandum

The purpose of the Bench Memorandum is to provide judges in the Jessup Competition with basic factual and legal information to enable evaluation of the written and oral performances of participating teams. This Bench Memorandum should be read in conjunction with the 2011 Jessup Problem (the "Compromis") and the Corrections and Clarifications to the Compromis.

The Compromis was designed to present the competitors with a balanced problem such that each side has both strengths and weaknesses. Jessup teams should be able to construct good arguments as both the applicant and as the respondent. As a judge, your task is to evaluate the quality of each team's analysis, their knowledge of international law, and their advocacy skills. Please make sure not to confuse this task with your own personal evaluation of the merits of the case.

Please note that this memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis. In particular, Judges should be aware that this Bench Memorandum has been condensed as much as possible, and does not purport to cover all relevant issues in detail. In many instances, relevant case law is not discussed, and should be addressed by the participants. The state practice and legal authorities cited herein are illustrative and not intended to be a comprehensive review of all relevant sources of law. As such, judges should not be surprised when participants present arguments or authorities which are not discussed in this memorandum. This does not suggest that such arguments are not relevant or credible.

I. Summary of the Case

The Applicant State, Ardenia, and the Respondent State, Rigalia share a mountainous border region inhabited by the Zetians, a nomadic people who practice the Masinto religion. Zetians enjoy full citizenship rights in both countries. The Zetian Democratic Party (ZDP) of Rigalia seeks to form an independent Zetian State consisting of the Northern Provinces of Rigalia and the Southern Provinces of Ardenia.

In 2009, the “Zetian separatists” began protesting against the Rigalian Government to gain independence and a greater share of the proceeds from natural resource exploitation in the Northern Provinces. The Rigalian government responded by arresting protestors. The separatists responded with violence, including suicide bomb attacks by individuals wearing Mavazis, a traditional religious garment required to be worn by women and young girls of the Masinto faith.

As the violence escalated, Rigalia responded by banning the Mavazi in public places and requesting that a third state, Morgania, provide Predator Drones for use against separatists hiding in the rugged mountainous border region. The Predator Drones were launched from a military base within Rigalia that was leased to Morgania, were operated by Morganians, and carried out more than 50 strikes against Zetian separatists at Rigalia’s urging, resulting in 230 civilian casualties. In one instance, Predator Drones targeted Adar Bermal, a top separatist commander, at his home in Ardenia, killing Bermal and his family. During this strike, the operator was distracted by a communication from Rigalian informants and targeted the nearby Bakchar Valley Hospital as well. Although the operator realized her mistake, it was too late to abort the missile launching sequence. The missile was fired and hit the hospital, killing 150 civilians and injuring 200 more.

As noted above, one of the ZDP’s complaints centered on the proceeds of natural resource exploitation in the Northern Provinces. In 1994, RRI, a Rigalian state-owned corporation, issued a call for tender for the exploitation of the Moria Mine, located within the Northern Provinces. MDI, an Ardenian state-owned enterprise, won the rights to exploit the mine’s reserves of Coltan, a valuable ore. The exploitation contract was renewed in 2002. Allegations arose that MDI had secured this contract renewal by payments to Clyde Zangara, the nephew of RRI’s President, Leo Bikra, as well as to the Zetian Refugee Fund, a charity founded by Clyde. Additionally, MDI was accused of paying undocumented fees to provincial Zetian tribal councils to ensure delivery of its product.

Rigalia sent a Request for Mutual Legal Assistance (MLA) to Ardenia, which initiated an inquiry but did not respond to the request. After strong lobbying efforts by MDI, Ardenia dropped the inquiry referring to public security and the potential expense of a full investigation. The Committee for Responsible Business Conduct (CRBC), a Rigalian NGO, filed a complaint against MDI and RRI for violating Chapter VI of the OECD’s MNE Guidelines. The complaint was filed with the Ardenian National Contact Point (NCP) a government office designed to resolve issues concerning the implementation of the MNE Guidelines. The Ardenian NCP responded that the complaint should be dealt with by the Rigalian NCP, the MNE Guidelines did not apply to RRI, and that it could not deal with the complaint since investigations had been launched in Ardenia and Rigalia.

Ardenia and Rigalia submitted their dispute to the ICJ on May 5, 2010. In a preliminary proceeding, the Court held that Morgania was not a necessary party to the case.

II. Legal Analysis

i. *Standing/Admissibility (Issues I and III)*

To allow teams to fully address the merits of the case, Judges who do not wish to debate standing/admissibility may direct Ardenia and Rigalia to proceed on the assumption that Ardenia has standing.

With respect to Issues I and III, Rigalia may first contest Ardenia’s standing to bring claims on behalf of the Zetians injured by and in Rigalia.

The facts strongly support Ardenia’s *direct* legal interest in Issue I, insofar as this claim relates to attacks in Ardenian territory. However, Issue I also asks, in part, whether Rigalia has violated international legal obligations *owed to the victims of the Drone strikes*, who include Zetian dual-nationals of Ardenia and Rigalia. These injuries

occurred in both Ardenia and in Rigalia. Rigalian teams have good cause to challenge the admissibility of Ardenia's claim insofar as it arises from injuries allegedly suffered by Zetians *in Rigalia*.

Issue III, by contrast, involves no direct injury at all. Thus, Ardenia *must* rely on an indirect legal interest in the injury suffered by Zetians as a result of the Mavazi ban. The difficulty is that the ban is a Rigalian domestic law applicable only in Rigalia. Thus, Rigalia will likely challenge the admissibility of Issue III altogether, arguing that Ardenia lacks standing to bring a claim on behalf of Zetian dual-nationals purportedly injured in Rigalia.

Ardenia may respond by 1) for Issue I, conceding a lack of standing to bring claims for injuries suffered by Zetian dual-nationals in Rigalia, and focusing instead on *direct* injuries Ardenia allegedly sustained due to strikes in Ardenia; 2) for Issues I and III, asserting a claim of diplomatic protection on behalf of injured Zetians since they are Ardenian nationals as well as Rigalian nationals; or 3) for Issues I and III, asserting that Rigalia violated an obligation owed *erga omnes* by targeting Zetians (with drones in Issue I and the Mavazi ban in issue III).

a. Diplomatic protection

Under the theory of diplomatic protection, Ardenia may assert a legal interest on the international plane where i) its nationals are injured by another State, and ii) those nationals have exhausted available legal remedies in the injuring State.¹

i. *Nationals are injured by another State*

1. *Predominant links test*

The *Compromis* states that all Zetians are dual citizens of Ardenia and Rigalia. Thus, Ardenia will argue that the first requirement for exercising diplomatic protection is met because its nationals were injured by another State. However, Rigalia may counter with the following principle from Art. 7 of the International Law Commission's Draft Articles on Diplomatic Protection: "A State of nationality may not exercise diplomatic protection in respect of a person *against a State of which that person is also a national* unless the nationality of the former State is *predominant*."² Ardenia may respond that the Zetians' Ardenian nationality is predominant, given that Ardenia offers more autonomy and support to the Zetians.³ Or, it may ask the Court to conclude that at least *some* of the Zetians are predominantly Ardenian, and therefore Ardenia should be permitted to proceed with respect to those citizens.

2. *Link of allegiance test*

In the alternative, Ardenia may argue by analogy that the traditional predominant links test should be substituted with or modified by the link of allegiance test. The ICTY found a "link of allegiance" between Serbia and ethnic Serb *nationals of Bosnia*, thus conferring standing upon ethnic Muslim nationals of Bosnia as against ethnic Serbs *of the same nationality*, based on the rationale that sovereignty should not be used as a shield to abuse human rights.⁴

ii. *Exhaustion of local remedies*

¹ Article 1 of the International Law Commission's (ILC's) Article on Diplomatic Protection adopted by the ILC's at its fifty-eighth session, in 2006, provides that 'diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility'.

² Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10) (2006) (emphasis added).

³ *Compromis* paras. 6, 7, 17, 19.

⁴ *Prosecutor v. Delalic, et. al.* (the *Celebici* case), Case No. IT-96-21-T, Trial Chamber Judgment, paras. 236-266 (1998); *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber Decision on the Defence Motion on Jurisdiction, para. 42 (1995); *Prosecutor v. Delalic, et. al.* (the *Celebici* case), Case No. IT-96-21-A, Appeals Judgment, paras. 51-106 (2001); *Prosecutor v. Tadic*, IT-94-1-A, Appeals Judgment, paras 165-168.

The second element for exercising diplomatic protection, exhaustion of local remedies, is satisfied because the *Compromis* states that a Rigalian lower court dismissed a claim contesting the legality of the drone program and the dismissal is not subject to appeal.

b. Legal interest in obligation owed erga omnes

Some Applicant teams may argue that Ardenia has standing because Rigalia has violated an obligation *erga omnes*, or a responsibility owed to the community of States as a whole. Such obligations derive from rights that are so important that all States have a legal interest in their protection. In *Barcelona Traction*, the ICJ listed several examples.⁵ Ardenia will be challenged to analogize the rights of Zetians at issue in this case with the acknowledged examples in *Barcelona Traction*, and will moreover have difficulty reconciling the dicta in that case with the fact that the ICJ has never upheld standing on the basis that the alleged violation of an *erga omnes* obligation conferred the requisite legal interest.

Rigalian teams may raise other arguments contesting standing, but to ensure that teams have sufficient time to address the substantive issues, it is recommended that Judges ask students to proceed to the merits.

Issue 1:

Ardenia	Rigalia
Rigalia’s Predator Drone strikes in Rigalia and in Ardenia violate international law and the Court should order their immediate cessation.	Rigalia’s Predator Drone strikes against Zetian terrorists in Rigalia and Ardenia are consistent with Rigalia’s rights under international law, and thus the Court has no authority to order cessation of the drone attacks.

This prayer for relief raises the legality of the drone strikes in general and involves four core questions: 1) do the strikes violate International Humanitarian Law; 2) do the strikes violate customary and conventional prohibitions against arbitrary deprivation of human life; 3) do the strikes violate customary and conventional prohibitions against the use of force; and 4) should the Court order the strikes to cease.

i. *International Humanitarian Law vs. International Human Rights Law*

International humanitarian law (“IHL”) is the body of law that applies during armed conflict and regulates the conduct of hostilities.⁶ International humanitarian law is distinct from international human rights law (“IHR”).⁷ If there is an armed conflict, IHL will apply, and the targeting of certain individuals will be lawful that would otherwise be unlawful in the absence of the armed conflict.

Rigalia will therefore attempt to establish that an armed conflict exists and that IHL governed its actions. However, in so doing it may need to concede a certain level of involvement of its armed forces in initiating the Drone strikes that is inconsistent with its argument in Issue II that it is not responsible for the strike against the Bakchar Valley Hospital.

Ardenia will argue principally that there is no armed conflict and IHL does not apply, and in the alternative that if there is an armed conflict, Rigalia has violated the applicable rules of IHL. Applicant will probably also argue that even if IHL applies, IHR continues to apply under the International Court of Justice’s jurisprudence in the *Nuclear Weapons Advisory Opinion* and *The Wall Advisory Opinion*.

a. International Humanitarian Law and the types of armed conflicts

⁵ “Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” *Case Concerning Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain) (Second Phase) ICJ Rep 1970 3 at paragraph 34.

⁶ Boleslaw Boczek, *International Law: A Dictionary*, (Maryland: Scarecrow Press, 2005).

⁷ Bill Bowring, *The Degradation of the International Legal Order?* (New York: Routledge-Cavendish, 2008).

IHL is codified primarily in the Four Geneva Conventions of 1949 and their two Additional Protocols. Both Ardenia and Rigalia are parties to these Conventions and Additional Protocols, and are therefore bound to comply with them. Depending on the *type* of armed conflict that exists, different provisions of the Geneva Conventions apply. It is critical for both sides to establish the type of conflict(s) that existed at all relevant times in order to determine what IHL obligations Rigalia owed to Ardenia.

In principle, IHL distinguishes between two types of armed conflicts: international and non-international.⁸ Sophisticated teams may recognize the existence of a transnational or transborder armed conflict, but should still be able to explain how that type of conflict fits within the international/non-international paradigm. Some teams may argue that the transnational armed conflict is non-international, others may argue that it is international, and still others may argue that it comprises both a non-international and an international armed conflict.

The conflict in this case is best understood by dividing it into two phases:

<u>Within Rigalia</u> Mid-2008 to Present ⁹	<u>Within Ardenia</u> September 2009 to Present ¹⁰
Factual Scenario	
Zetian separatist attacks and Rigalian/Morganian Drone strikes in Rigalia. Zetian separatists engage in violence and deadly attacks ¹¹ ; Rigalia responds by asking Morgania to deploy Predator Drones, <i>inter alia</i> , in the Rigalian border region and Drone strikes begin, ¹² 230 Zetian civilians are killed by Drone attacks in Rigalia. ¹³	Rigalian/Morganian Drone strikes in Ardenia. Rigalia asks Morgania to deploy Predator Drones, <i>inter alia</i> , in the Ardenian border region and Drone strikes begin ¹⁴ ; Drone strike kills Adar Bermal and family in Ardenia, Drone strike against hospital kills 150 in Ardenia. ¹⁵
<i>Note: Compromis</i> para. 29 states that more than 50 strikes are carried out overall, and 15 Zetian separatist leaders are killed, but does not definitively say whether this happens in Rigalia, Ardenia, or both.	
Type of Armed Conflict	
Strong factual support exists for teams to argue: 1) no armed conflict exists at all, and 2) a non-international armed conflict exists.	Strong factual support exists for teams to argue: 1) no armed conflict exists at all, 2) only a non-international armed conflict exists, 3) only an international armed conflict exists, and 4) both exist simultaneously.

⁸ Haopei Li, Sienho Yee & Tieya Wang, *International Law In the Post-Cold War World*, (New York; Routledge, 2001)

⁹ Relevant facts occur in mid-2008, however the first phase of the armed conflict, if any, likely began later; teams may argue various start dates.

¹⁰ Relevant facts occur in September 2009, however the second phase of the armed conflict, if any, likely began later; teams may argue various start dates.

¹¹ *Compromis* paras. 15,16, 18, 21 (Mid-to-late 2008 and 2009).

¹² *Compromis* para. 28 (September 2009).

¹³ *Compromis* para. 29 (September 2009 – March 2010).

¹⁴ *Compromis* para. 28 (September 2009).

¹⁵ *Compromis* para. 30 (March 2010).

Applicable IHL Rules

<p>1) If no armed conflict exists, IHL does not apply.</p> <p>2) If a non-international armed conflict exists, <i>inter alia</i>, Protocol II to the Geneva Conventions directly applies, and the proportionality test of Protocol I applies by operation of customary international law.</p>	<p>1) If no armed conflict exists, IHL does not apply.</p> <p>2) If a non-international armed conflict exists, <i>inter alia</i>, Protocol II to the Geneva Conventions directly applies, and the proportionality test of Protocol I applies by operation of customary international law.</p> <p>3) If an international armed conflict exists, <i>inter alia</i>, Protocol I to the Geneva Conventions directly applies.</p> <p>4) If both types of conflict exist, <i>inter alia</i>, Protocol II and the proportionality test of Protocol I apply vis-à-vis the parties to the non-international armed conflict (Rigalia and the Zetian separatist group), while Protocol I applies vis-à-vis the parties to the international armed conflict (Rigalia and Ardenia).</p>
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a. Non-international armed conflict

A non-international armed conflict is an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties [to the Geneva Conventions].”¹⁶ The requirements for an armed conflict of a non-international nature are (i) a certain intensity of hostilities, and (ii) at least one Party to the conflict must be an organized armed group, as opposed to a State.¹⁷

i. Phase I of the Conflict

The key issue is whether the facts support the existence merely of an internal disturbance, or whether they satisfy the requirements of an armed conflict. Armed conflicts are distinguished from internal disturbances by two basic criteria: (i) intensity of the hostilities, and (ii) organization of the armed group.¹⁸ The definition of non-international armed conflict excludes “a mere act of banditry or an unorganized and short-lived insurrection”,¹⁹ even if military force is used to quell the rebellion.²⁰ Ardenia will likely argue that the incidents in Rigalia are the type of low-intensity, sporadic hostilities specifically excluded from the definition of an armed conflict. Rigalia, on the other hand, will probably argue that an armed conflict does exist because both the intensity and organizational requirements have been met. These two criteria are cumulative, so Rigalian teams arguing in favor of the presence of an internal armed conflict should attempt to prove them both.

Intensity of the hostilities includes factors such as the seriousness of the attacks and whether there has been an increase in armed clashes, spread of clashes over the territory and over a period of time, an increase in the number of government forces and mobilization and distribution of weapons, whether the conflict has attracted the attention of the international community, the number of victims, the types of weapons used, quantity of troops and

¹⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 3, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art. 3, 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, Art. 3, 75 U.N.T.S. 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War 12 August 1949, Art. 3, 75 U.N.T.S. 287.

¹⁷ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment, ICTY Trial Chamber II, 30 November 2005, para. 84.

¹⁸ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment, ICTY Trial Chamber II, 30 November 2005, para. 84.

¹⁹ JEAN PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 50 (1952); Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, Article 8(2)(f).

²⁰ YVES SANDOZ ET. AL, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 § 4477 (1987) (“there are internal disturbances, without being an armed conflict, when the State uses armed force to maintain order”).

units deployed, occupation of territory, deployment of government forces to the crisis area, etc.²¹ The continuous character of a terrorist campaign,²² as well as the gravity of a single combat situation,²³ could arguably fulfill the intensity criterion. In support of its position, Ardenia may argue that this “sporadic fighting” did not involve the use of strategic military targets and that Rigalia responded principally with police measures, even after invoking emergency powers. Rigalia may counter by pointing out that “tensions increased” after the initial “sporadic fighting.” Zetian separatist attacks resulted in over 155 deaths, the Rigalian government declared war against the Zetian secessionist movement, and the military response included the deployment of soldiers and eventually escalated to the use of Predator Drones.²⁴

Organization of the parties includes factors such as presence of a command structure, ability to carry out military operations in an organized manner, a certain level of logistics, a certain level of discipline, and the ability of the group to speak with one voice.²⁵ Ardenia may argue that the *Compromis* does not establish the presence of a command structure, which includes a high command which gives orders, appoints other commanders, designates internal regulations, organizes weapons supply, authorizes military action, and receives information; the Zetian tribal leaders have been, at best, instigators of the violent conduct committed by a loosely connected group of Zetians, rather than commanders of an armed group. Moreover, Ardenia may argue that there is no evidence of capacity to control territory, or capacity of coordination. Rigalia may counter that there is evidence of a leadership structure: Zetian tribal leaders mounted the violent campaign, allegedly made a “secret agreement” with President Arwen in Ardenia, and were singled out by the Rigalian government as targets of the Predator Drone strikes. Adar Bermal, in particular, is described both as a “top commander” and a “prominent leader of the ZDP.”²⁶

ii. Phase II of the Conflict

The key issue is whether a non-international armed conflict, if established, retains its non-international character after Drone strikes begin targeting Zetian separatists in Ardenia. The prevailing view is that “internal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.”²⁷ Therefore, Rigalia will likely argue that the non-international, internal armed conflict between Rigalia and the Zetian separatist group continues as such even when elements of the conflict begin to take place in Ardenia. Ardenia, on the other hand, will argue principally that there is no non-international armed conflict during Phase II, because a non-international armed conflict did not exist during Phase I to begin with. As before, Ardenia will likely argue that the intensity of the hostilities and organization of the Zetian separatist group still fail to satisfy the threshold required to establish a non-international armed conflict.

b. International armed conflict

An international armed conflict is an armed conflict between two or more States.²⁸ Specifically, the ICRC defines an international armed conflict as “[a]ny difference arising between two States and leading to the intervention of members of the armed forces.”²⁹

²¹ *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-T, Judgment, ICTY Trial Chamber II, 10 July 2008, paras. 177-178.

²² *Public Committee against Torture in Israel v. State of Israel*, HCJ 769/02, 11 December 2005, para. 16 (citing a “murderous wave” of terrorist attacks as the basis for a conclusion on an armed conflict in Palestine).

²³ *Abella v. Argentina*, Case 11.137, Report No. 55/97, Inter-Am. Comm. H.R. (1997). para. 155 (“the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective - a military base. The officer in charge of the La Tablada base sought, as was his duty, to repulse the attackers, and President Alfonsín, exercising his constitutional authority as Commander-in-Chief of the armed forces, ordered that military action be taken to recapture the base and subdue the attackers.”)

²⁴ *Compromis* paragraphs 9, 15, 16, 18, 21, 27, 28, and 29.

²⁵ *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-T, Judgment, ICTY Trial Chamber II, 10 July 2008, paras. 194-206.

²⁶ *Compromis* paragraphs 9, 11, 13, 15, 18, 19, and 30.

²⁷ LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 136 (2002).

²⁸ *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case IT-94-1-A, 2 October 1995, para. 70.

i. Phase I of the Conflict

There is little factual support that an international armed conflict exists in Phase I, however judges should be aware that some Rigalian teams may attempt to argue that acts of the Zetian separatists are imputable to Ardenia, thus “internationalizing” the conflict. A dispute that would otherwise constitute a non-international armed conflict may be an international armed conflict, if “(i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).”³⁰ Both conduits lack the requisite factual support: Ardenian armed forces have not intervened directly by combating Rigalian military forces, and there is insufficient evidence of “overall control” by Ardenia over the Zetian separatists.³¹

ii. Phase II of the Conflict

A key issue is whether the *armed forces of both* States must be engaged to constitute an international armed conflict. The *Compromis* does not suggest that the Ardenian armed forces have been targeted, or that they have retaliated. Thus, teams may argue that since the members of the armed forces of only one State party to the conflict, Rigalia, are involved,³² the conflict is not of an international nature. Moreover, teams may suggest that the conflict is non-international because attacks have not been made on Ardenian infrastructure; rather, they were directed at Adar Bermal and other Zetian separatist leaders. The counterpoint to this is the view that “the determinant factor is whether the second State has given its consent to the military intervention, or at least acquiesced in it. ... Where ... the [S]tate opposes this intervention, or at least condemns it, this results in an armed conflict of an international character.”³³ Thus, teams may also argue that Ardenia’s opposition to Rigalia’s strikes against the Zetian separatists in its territory gives the conflict an international dimension.

iv. Compliance with applicable IHL

a. IHL applicable to non-international armed conflicts

If a non-international armed conflict exists, Protocol II to the Geneva Conventions will apply. The ICRC notes that “While State armed forces may be considered combatants for purposes of the principle of distinction [...], practice is not clear as to the situation of members of armed opposition groups.”³⁴ Legal opinion on this question can be roughly divided in two general approaches: (1) members of the armed group are liable to attack for the sole fact of their membership (“continuous combat function” theory);³⁵ and (2) members of the armed

²⁹ JEAN PICTET, *THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY*, p. 23 (1952).

³⁰ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 19 January 2007, ICC Pre-Trial Chamber I, para. 209.

³¹ *Id.*, para. 210. Indirect intervention requires a degree of control by the other State (Ardenia) over the armed group (Zetian separatists). Their relationship is not one of control but of alleged cooperation (¶ 20).

³² The *Compromis* nowhere indicates that Ardenian armed forces have been targeted nor that they have retaliated.

³³ Geneva Academy of International Humanitarian Law and Human Rights, Rule of Law in Armed Conflicts Project, “Qualification of Armed Conflict”, <http://www.adh-geneva.ch/RULAC/print.php?page=10> (8 October 2009).

³⁴ *Customary International Humanitarian Law*, Commentary to Rule 3.

³⁵ *San Remo Manual*, Rule 1.1.3 (“Civilians are all those who are not fighters”) and Rule 1.1.2(a) (“fighters are members of [...] organized armed groups”); *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ICTY Trial Chamber, 7 May 1997, para. 639 (“an individual [...] cannot be considered a traditional “non-combatant” because he is actively involved in the conduct of hostilities by membership in some form of resistance group”); *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC Pre-Trial Chamber I, para. 92 (“the killing of the following two categories of individuals, without violating international humanitarian law, cannot be considered unlawful, and therefore cannot be taken into consideration in assessing the Prosecution’s allegations for crimes against humanity: (i) those members of the SLM/A, the JEM or any other armed group opposing the [Government of the Sudan] in the ongoing armed conflict in Darfur [...]”); The concept of ‘continuous combat function’ is disputed among scholars. See e.g. Nobuo Hayashi, *Continuous Attack Liability without Right or Fact of Direct Participation in Hostilities – The ICRC Interpretive Guidance and Perils of a*

group may only be attacked while they are directly participating in hostilities.³⁶ To satisfy provisions of Protocol II, Rigalia may favor the “continuous combat function” theory, arguing that Bermal and other members of the Zetian separatist armed group were, by the sole fact of their membership, subject to lawful attack. Ardenia may counter with the second theory, arguing that Rigalia unlawfully targeted the Zetian separatists because it must and cannot show, in each case, that the targets were directly participating in hostilities at the time they were attacked.

Moreover, the ICRC has affirmed that the rules of precaution and proportionality enshrined in *Protocol I* – which applies directly to *international* armed conflicts – are applicable to non-international armed conflicts as well, under customary law.³⁷ Thus, the proportionality of the anticipated military advantage and the civilian casualties arising from the strikes in Rigalia must be assessed in accordance with the standard set out in Protocol I, discussed in more detail in the subsequent section. However, as the relevant facts surrounding *each discrete strike* in Rigalia are not presented in the *Compromis*, it will be difficult for teams to apply the balancing test to this phase of the conflict.

b. IHL applicable to international armed conflicts

If an international armed conflict exists, Protocol I to the Geneva Conventions will apply.³⁸ Protocol I permits combatants and civilians *directly participating in the hostilities* to be targeted with lethal force.³⁹ It will be difficult for Rigalia to prove that it has complied with this standard. Ardenia has a strong argument that the *Compromis* fails to establish that the targeted Zetian separatists were directly participating in hostilities at the time they were targeted and struck by Drones. Moreover, under Protocol I, combatants are defined as “all members of the armed forces of a party to the conflict.”⁴⁰ Ardenia may thus additionally argue that the separatists were not lawfully-targeted combatants because they did not belong to the armed forces of either Rigalia or Ardenia, the parties to the conflict in the event that it is international.

In addition, Protocol I, Article 51, prohibits indiscriminate attacks against non-military objectives; and attacks expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and military advantage anticipated.⁴¹ The facts necessary to analyze whether *each strike* meets the requirements of Article 51 are lacking. However, the necessary facts are arguably available for the attacks against Adar Bermal and the Bakchar Valley Hospital. Rigalia will likely assert that its attack against Bermal was proportionate, even though his civilian family members were unexpectedly killed at their home, because Article 51 permits attacks against important military objectives even when it is known that some civilian deaths or injuries will occur. Ardenia will likely counter that, even if the attack against Bermal is proportionate, the separate Drone strike against the Bakchar Valley Hospital constitutes an indiscriminate attack against a non-military objective. Rigalia may defend that the Bakchar Valley Hospital strike

Pseudo-Status, INTERNATIONAL HUMANITARIAN LAW – ANTECEDENTS AND CHALLENGES OF THE PRESENT TIME 56 (Joanna Nowakowska-Malusecka, ed., 2010)); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT. SEC. J. 5, 21-23 (2010).

³⁶ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THIRD REPORT ON THE HUMAN RIGHTS SITUATION IN COLOMBIA, OEA/Ser.L/V/II.102 (1999), Ch. IV. para. 55 (“It is important to understand that while these persons forfeit their immunity from direct attack while participating in hostilities, they, nonetheless, retain their status as civilians. Unlike ordinary combatants, once they cease their hostile acts, they can no longer be attacked, although they may be tried and punished for all their belligerent acts.”); *Abella v. Argentina*, Case 11.137, Report No. 55/97, Inter-Am. Comm. H.R. (1997); para. 198 (“the persons who participated in the attack on the military base were legitimate military targets only for such time as they actively participated in the fighting.”).

³⁷ *Customary International Law*, Rules 7-16.

³⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

³⁹ *Id.*

⁴⁰ Protocol I, Article 43(2); *Customary International Humanitarian Law*, Rule 3.

⁴¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

was initiated in conjunction with the strike against Bermal, and that the civilian casualties in that strike, as with the strike initiated just moments before, should be considered against the military advantage anticipated by targeting Bermal.

ii. *The Right to Life, Prohibition Against the Use of Force, and Self-Defense*

Ardenia and Rigalia are both parties to the International Covenant on Civil and Political Rights (ICCPR), part of the IHR body of law. Article 6 of the ICCPR states that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁴² Ardenia will likely argue that Rigalia’s drone strikes violate Article 6 by arbitrarily depriving the victims of their lives. Moreover, Ardenia may note that States may not derogate from this obligation “even in time of public emergency which threatens the life of the nation (art. 4).”⁴³ Rigalia may respond that the drone strikes were not wrongful because they constituted lawful measures of self-defense. The inherent right to self-defense enshrined in Article 51 of the UN Charter,⁴⁴ to which both Rigalia and Ardenia are parties, and is also a customary right.⁴⁵ Article 21 of the Responsibility of States for Internationally Wrongful Acts states that “[t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations.”⁴⁶

Similarly, Ardenia may argue that Rigalia’s incursion⁴⁷ and military activities⁴⁸ in Ardenian territory violate Article 2(4) of the UN Charter, which prohibits “use of force against the territorial integrity or political independence of any State.” Rigalia will likely respond that the force used was not unlawful, again by invoking Article 51 of the UN Charter; because the Zetian separatists perpetrated armed attacks against Rigalia, Rigalia may invoke its right to individual self-defense under Article 51, even by using force in Ardenia’s territory, because Article 2(4) cannot impair its inherent right to self-defense.⁴⁹

If Rigalia invokes self-defense in both cases above, it must satisfy several conditions. First, an armed attack must have occurred against Rigalia.⁵⁰ In this case, Rigalia may point to the armed attacks perpetrated by Zetian separatists in paragraph 28 of the Compromis. However, there is a controversy as to whether the requisite armed attack must be perpetrated by a State or whether a non-State actor, such as the Zetian separatists, may suffice. Ardenia may argue that Article 51 self-defense applies only to State actors, citing majority ICJ decisions in the *Nicaragua*⁵¹ and *Armed Activities*⁵² cases, wherein the Court specifically required the initial armed attack to come from a State in order to invoke self-defense. In addition, it will cite international scholars who agree that self-

⁴² ICCPR Article 6.

⁴³ Committee on Civil and Political Rights, General Comment No. 06 (1982).

⁴⁴ “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”

⁴⁵ See generally: IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 231–80 (1963); Bruno Simma (ed.) THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, pp 661–78 (1994); *Armed Activities* case, ICJ Reports 14, paras 193–201, 210–11, 236–7 (1986).

⁴⁶ UNITED NATIONS, INTERNATIONAL LAW COMMISSION, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, UN Doc. A/56/10, Art. 21 (2001).

⁴⁷ Bruno Simma, *Commentary to Article 2*, THE UNITED NATIONS CHARTER: A COMMENTARY 123 (Bruno Simma ed., 2006).

⁴⁸ *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, 2005 ICJ [hereinafter *Armed Activities*], p. 280.

⁴⁹ Anna Borgeryd, *Managing Intercollective Conflict: Prevailing Structures and Global Challenges* (Florida: Universal Publishers, 1999)

⁵⁰ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I. C. J. Reports (2003).

⁵¹ *Nicaragua v. United States of America*, Judgment, I.C.J. Reports 1986, para. 135

⁵² *Armed Activities*, para. 146

defense is only permissible against States.⁵³ Rigalia will respond that a growing sector of publicists⁵⁴ and State practice⁵⁵ support the applicability of the right of self-defense against non-State actors.

Second, Rigalia must show that its exercise of self-defense was necessary and proportional in accordance with the *Nicaragua*⁵⁶ and *Oil Platforms*⁵⁷ decisions of the ICJ and customary international law.⁵⁸ To satisfy this necessity prong, Rigalia must show that the need for self-defense was “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁵⁹ To satisfy this proportionality test, Rigalia must show that its drone strikes were substantially proportional to the threat posed by the separatists. Teams should recognize that this test applies, however, they will likely find it difficult to discuss whether the test has been met with respect to issue 1, as the relevant factual circumstances of each individual Predator Drone strike are not detailed in the *Compromis*. Instead, teams will likely focus their analysis of this test on the specific drone attacks against Adar Bermal and the Bakchar Hospital addressed in Issue 2.

iii. Court Order of Immediate Cessation of the Strikes

Rigalia may argue that the UN Security Council remains seized of this security matter, and therefore the Court lacks the authority to order their cessation. Ardenia may counter that it is improper for Rigalia to challenge the Court’s power now, in the merits phase of this case, because this objection should have, but was not, raised during the preliminary objections phase. In cases of use of force, often the question of the Court’s authority to adjudicate such claims is challenged by opposing the jurisdiction or admissibility of the claim in the preliminary objections phase. In this case, Rigalia did raise preliminary objections, however, the only issue decided was whether Morgania was an indispensable third party.

Ardenia will likely also argue that since the Court has jurisdiction to hear this claim, it has jurisdiction to address the requested reparation, as noted by the Court in *Factory at Chorzow*,⁶⁰ and that cessation of continuing wrongful conduct is regarded as a form of reparation, as held by the Court in *Nicaragua*.⁶¹

Rigalia’s strongest counter-argument is that the basis for an order for cessation is the existence of a *continuing* wrong; the Court must establish, as a substantive matter, that a particular breach of international law has not only occurred, but is continuing. Therefore, Rigalia may concede that where there is a continuing wrong, the responsible state is indeed obliged to cease the conduct,⁶² but argue that Ardenia has failed to establish a

⁵³ Gilbert Gillaume, *Terrorism in International Law*, 53 Int’l & Comp. L. Q. 537 (2004).

⁵⁴ For example, Rigalia may cite the separate opinion of ICJ judges Simma and Kooijmans in the *Armed Activities* case, and ICJ Judge Higgins’ separate opinion to the *Construction of a Wall* advisory opinion.

⁵⁵ For example, SC Res. 1368, 12 September 2001; the US invasion of Afghanistan in 2001 after the Al-Qaeda attacks of 2011; the Israeli attack on Lebanon after the Hezbollah attacks of 2006; the Turkish operations in Northern Iraq against the Kurdistan Workers’ Party (PKK) in the 1990’s; the Colombian bombing of a guerrilla camp in Ecuador in 2008; and the continued US drone operations in Pakistan.

⁵⁶ *Nicaragua Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* Merits Judgment, I.C.J. Reports 1986, para. 194 (hereinafter “*Nicaragua*”).

⁵⁷ Iran, *Supra* note 21, para. 74

⁵⁸ See: British and Foreign State Papers 29, 1137–8; British and Foreign State Papers 30, 195–6; Robert Jennings *The Caroline and McLeod Cases*, American Journal of International Law 32, 82 (1938).

⁵⁹ The Caroline (exchange of diplomatic notes between Great Britain, Ashburton, and the United States, Webster 1842), 2 J. Moore, Digest of International Law 409, 412 (1906).

⁶⁰ It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. See. *Factory at Chorzow*, Jurisdiction, Judgment No. 8. P.C.I.J., Series A. No. 9, p. 21.

⁶¹ In *Nicaragua* case, the Court ordered that the United States of America should immediately cease and refrain from any action restricting access to or from Nicaraguan ports, and, in particular, the laying of mines. See. ICJ Reports 1984, p. 187.

⁶² UNITED NATIONS, INTERNATIONAL LAW COMMISSION, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, UN Doc. A/56/10, Arts. 14, 30 (2001); A/RES/56/83(2002); *Nicaragua; Costa Rica v. Portugal*.

breach of a continuing nature. Since customary international law requires each use of force to be addressed separately on its individual merits as to whether it was a necessary and proportional exercise of self-defense,⁶³ the requested Court order would improperly presuppose the illegality of future strikes in contravention to Rigalia’s inherent right to self-defense under Article 51 of the UN Charter; even if the Court holds that all *past* strikes are unlawful, Rigalia will likely assert that this holding cannot conclusively determine the legality of future strikes.

Issue 2:

Ardenia	Rigalia
The attack on the Bakchar Valley hospital is attributable to Rigalia, Rigalia has an obligation to investigate the attack and to compensate Ardenia therefore and, moreover, the attack was a disproportionate and unlawful act of aggression against the people of Ardenia.	The attack on the Bakchar Valley hospital was not attributable to Rigalia and Rigalia has no obligation to investigate the attack or to compensate Ardenia therefore; moreover, the act was not an act of aggression but part of a legitimate and proportionate operation to defend against Zetian terrorists.

This Issue raises four core questions: 1) whether the attack against the Bakchar Valley Hospital is an act of aggression in violation of the prohibition on the use of force, 2) whether the attack is attributable to Rigalia, 3) whether Rigalia has a duty to investigate the attack, and 4) whether Rigalia has a duty to compensate Ardenia for damages caused by the attack. Because Issue 1 addresses the legality of the drone attacks overall, the attack on the Bakchar Valley Hospital may be referenced in Issue 1. However, as a strategic point, teams may discuss the legality of that particular attack primarily under Issue 2. Note that some concepts, such as whether the law of armed conflict (IHL) applies and self-defense under Article 51 of the UN Charter are central to both Issues 1 and 2. Therefore, efficient teams will likely set forth the full analysis of these concepts in either Issue 1 or Issue 2, but not both, and refer back to that analysis and distinguish it where necessary.

i. Act of Aggression

This prayer for relief requires Applicant to prove that the Bakchar Valley attack is an unlawful act of aggression that is not justified under Art. 51 self-defense. An act of aggression is more extreme than a use of force against a State, and is distinguishable by its gravity and severity. Judges Elaraby⁶⁴ and Simma⁶⁵ have both referred to gravity, in particular, as the defining factor in acts of inter-State aggression. UN General Assembly Resolution 3314’s definition of aggression states that “the invasion or attack by the armed forces of a State of the territory of another State”⁶⁶ constitutes prima facie evidence of an act of aggression, although the Security Council may, in conformity with the UN Charter, conclude that the consequences are not of sufficient gravity to conclude that an act of aggression as been committed.⁶⁷ Ardenia will argue that Rigalia’s predator drone strike against the Bakchar Valley Hospital constitutes a use of force. Next, Ardenia will argue that the strike was of sufficient gravity and severity to constitute an act of aggression. Ardenia will likely focus on the damage caused during the attack and the civilian casualties. In contrast, Rigalia will likely argue that the gravity of the military operation was too small to constitute an act of aggression since a single predator drone fired only two missiles, which is distinguishable from the much higher gravity of the conflict in the *Armed Activities* case.⁶⁸

Resolution 3314 also states that the definition of aggression shall not “be construed as in any way enlarging or diminishing the scope of the [UN] Charter, including its provisions concerning cases in which the use of force is lawful.”⁶⁹ Therefore, even if Ardenia is successful in establishing that the Bakchar Valley attack constitutes an act of aggression, Rigalia may argue that the attack was nonetheless a lawful act of self-defense under Article 51 of the

⁶³ Supra note 21, para 51

⁶⁴ *Armed Activities*, Judge Elaraby Separate Opinion, para. 18

⁶⁵ Ibid. at, para. 2

⁶⁶ General Assembly Resolution 3314, Art. 3(a), (1974).

⁶⁷ General Assembly Resolution 3314, Art. 2, (1974).

⁶⁸ *Armed Activities*

⁶⁹ General Assembly Resolution 3314, Art. 6, (1974).

UN Charter. However, to be successful, Rigalia must also establish that the right to self-defense is engaged by armed attacks⁷⁰ perpetrated by non-State actors, and that the act of aggression was a necessary and proportional response to the armed attack.⁷¹

Additional and distinct discussion about whether the response was necessary and proportional is appropriate in Issue 2 because the Corrections and Clarifications to the Compromis provide new facts surrounding the attack on Bakchar Valley Hospital. Paragraph 30 of the Compromis was thereby amended to establish that Adar Bermal “was a prominent leader of the ZDP and major decision-maker in the planning and initiation of all military activities within Rigalia.” This will assist Rigalia with satisfying the necessity and proportionality test. Both teams will likely rely on the Court’s application of this test in *Nicaragua* to argue whether the facts in this case satisfy it.⁷²

ii. Attribution

If Ardenia successfully demonstrates that the attack was unlawful, it must next demonstrate that Rigalia is internationally responsible for the attack.⁷³ In order for Rigalia to be responsible, the attack must be attributable to it.⁷⁴ The law of attribution is codified in the International Law Commission’s Responsibility of States for Internationally Wrongful Acts, noted and commended to States by the UN General Assembly in A/RES/56/83.⁷⁵ Ardenia will likely argue that Rigalia directed or controlled the wrongful conduct under Article 8, and the attack on the Hospital is therefore attributable to Rigalia.⁷⁶ Second, Ardenia may argue that Morgania placed its military State organ at the disposal of Rigalia, and that the Morganian military acted with the government authority of Rigalia, thereby attributing the wrongful acts of Morgania’s military to Rigalia.⁷⁷ In response, Rigalia will argue that while it may have directed or controlled a portion of the drone campaign, it did not direct or control the relevant wrongful conduct, namely the erroneous targeting and attack of the Hospital, which was done by a Morganian officer located in Morgania and supervised by Morganian military superiors. Rigalia will apply an analogous defense to counter Ardenia’s Article 8 attribution argument, noting that the Morganian organ tasked with targeting and launching was not at the disposal of Rigalia’s governmental authority.

iii. Obligation to Investigate

Both IHL and international human rights law instruments include the duty to investigate alleged breaches.⁷⁸ The content of this obligation varies depending upon the instrument(s) that apply, so the argument will differ depending upon the grounds under which Ardenia has established illegality.

Under IHL, States are obliged to investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.⁷⁹ This obligation is contained in each of the

⁷⁰ See Issue I for further analysis of whether the inherent right to self-defense under Article 51 of the UN Charter applies vis-à-vis non-State actors.

⁷¹ *Supra* note 21 at para 51.

⁷² *Nicaragua*, *Supra* note 22

⁷³ Niels Blokker & Nico Schrijver, *The Security Council and the Use of Force, Theory and Reality-A Need for Change?* (Leiden, Martinus Nijhoff Publishers, 2005)

⁷⁴ *Ibid.*

⁷⁵ UNITED NATIONS, INTERNATIONAL LAW COMMISSION, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, UN Doc. A/56/10, Chapter II (2001); A/RES/56/83(2002).

⁷⁶ UNITED NATIONS, INTERNATIONAL LAW COMMISSION, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, UN Doc. A/56/10, Art.8 (2001); A/RES/56/83(2002).

⁷⁷ UNITED NATIONS, INTERNATIONAL LAW COMMISSION, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, UN Doc. A/56/10, Art. 6 (2001); A/RES/56/83(2002).

⁷⁸ United Nations Commission on Human Rights, Res. 2000/58, 25 April 2000, preamble 10 (“the need to...observe international human rights and humanitarian law in situations of conflict”) and 4 (calling on Russia to “investigate promptly alleged violation of human rights and breaches of international humanitarian law committed in the Republic of Chechnya”).

four Geneva Conventions and is arguably a rule of customary international humanitarian law binding on all States engaged in armed conflict.⁸⁰

Under international human rights law, teams will likely focus on the International Covenant on Civil and Political Rights, which obligates States to undertake to ensure that “any person whose rights or freedoms ... are violated shall have an effective remedy.”⁸¹ The Human Rights Committee, in commentary on Article 2, has stated that parties to the ICCPR “are under an obligation to investigate alleged rights violations and to make available appropriate judicial remedies and compensation to victims.”⁸² This obligation is emphasized in relation to alleged violations of the right to life.⁸³ Teams will likely raise cases from various regional human rights tribunals to further refine the scope of this obligation.⁸⁴

If the attack is attributable to Rigalia, it will be difficult for it to argue that it has no duty to investigate it. Therefore, Rigalia will likely rely primarily on its stronger argument that the attack is not attributable to it in the first place, and that it therefore has no duty to investigate. Rigalia may also attempt to distinguish the case law mentioned above that Ardenia will offer. Finally, even if Rigalia is responsible for the attack, it may note that there is little precedent for the duty to investigate a breach of international law occurring outside its territory committed by foreign agents.

iv. Compensation

Teams should recognize that, as a general rule of international law, States must make reparations for breaches of international obligations.⁸⁵ There are three types of reparations: 1) restitution, or attempting to make the injured party whole; 2) compensation for actual and financially assessable damages; and 3) satisfaction, which is essentially a public admission of fault and expression of regret.⁸⁶ The question raised by the prayer for relief is specifically whether Rigalia owes *compensation* to Ardenia as a result of the Bakchar Valley Hospital attack. “Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.”⁸⁷ It is also limited to “financially assessable”⁸⁸ damage, that is, actual damage to property or persons, but can include so called “moral” damages, such as loss of loved ones.⁸⁹ Rigalia’s strongest defense will be to assert that because the attack is not attributable to it, Rigalia breached no international legal obligation for which compensation is owed. Second, Rigalia may argue that the damages suffered are not

⁷⁹ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules, ICRC and Cambridge University Press, 2005 (ICRC Customary Law Study), Rule 158*

⁸⁰ *Ibid.*

⁸¹ ICCPR Article 2(3)(a).

⁸² *Blanco v. Nicaragua*, Comm. No. 328/1988 20, Hum. Rts. Comm. (1988) para. 5.3.

⁸³ *Bautista de Arellana v. Colombia*, Comm. No. 563/1993 Hum. Rts. Comm. (1993).

⁸⁴ Note that in accordance with Articles 59 and 38(1)(d) of the Court’s Statute, the Court shall apply, *inter alia*, judicial decisions as persuasive authority to determine the rules of law. As support for this practice, teams may cite past examples of the Court’s consideration of the interpretations of human rights tribunals, such as the case of *Ahmadou Sadio Diallo*, where the Court ascribed “great weight” to judicial and commentarial interpretations of the ICCPR Human Rights Committee. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, 2010 ICJ [hereinafter *Ahmadou Diallo*], p. 66.

⁸⁵ UNITED NATIONS, INTERNATIONAL LAW COMMISSION, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, UN Doc. A/56/10, Art. 31 (2001); A/RES/56/83(2002).

⁸⁶ UNITED NATIONS, INTERNATIONAL LAW COMMISSION, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, UN Doc. A/56/10, Art. 34-37 (2001); A/RES/56/83(2002).

⁸⁷ UNITED NATIONS, INTERNATIONAL LAW COMMISSION, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, UN Doc. A/56/10, Commentaries to Art. 34, para. 5 (2001); A/RES/56/83(2002).

⁸⁸ UNITED NATIONS, INTERNATIONAL LAW COMMISSION, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, UN Doc. A/56/10, Art. 36 (2001); A/RES/56/83(2002).

⁸⁹ UNITED NATIONS, INTERNATIONAL LAW COMMISSION, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES, UN Doc. A/56/10, Commentaries to Art. 36, para. 16 (2001); A/RES/56/83(2002).

“financially assessable,” however this will be a difficult argument. So long as Ardenia can successfully argue that the attack is attributable to Rigalia, it will have the easier argument here establishing that both the damage to the hospital and the deaths of its civilians are financially assessable and must be compensated.

Issue 3:

Ardenia	Rigalia
Rigalia’s ban of the Mavazi for Zetian women and girls violates their rights under international law.	Rigalia’s limited ban of the Mavazi for Zetian women and girls is consistent with international law.

The Mavazi Ban prohibits “all Rigalians, including Zetians, from wearing a Mavazi in public or from receiving public services while wearing a Mavazi.” As the Mavazi is a religious garment traditionally worn only by women and girls, this prayer for relief focuses on the tension between religious freedom and gender equality.

Ardenia and Rigalia are parties to several relevant treaties, specifically the UN Charter, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). These conventions contain various rights that are relevant to the Mavazi ban, such as the right to freedom of religious expression,⁹⁰ the right to freedom from discrimination based on gender or religion,⁹¹ and the right for minority groups to enjoy their own culture and practice their own religion.⁹²

i. Restrictions on Religious Expression

Ardenia may claim that the Mavazi ban violates any of the above rights, however, in practice, tribunals and law review articles considering similar legislation tend to focus on Article 18 of the ICCPR, specifically Article 18(3). Article 18(3) states that the “freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁹³ Similar language is included in several regional human rights conventions and is substantially mirrored by Article 14(3) of the Convention on the Rights of the Child.

General Comment 22 of the Human Rights Committee, the Committee charged with overseeing and interpreting the ICCPR, specifically includes distinctive clothing or head coverings as manifestations of religion covered by Article 18(3).⁹⁴ For a regulation to comply with Article 18(3), a three-pronged test must be satisfied: 1) it must be prescribed by law; 2) it must be in pursuit of public safety, order, health, or morals or the fundamental rights and freedoms of others, and 3) it must be necessary to protect one of the above interests.⁹⁵ Paragraph 8 of General Comment 22 of the Human Rights Committee adds a fourth prong, non-discrimination.⁹⁶ It will be difficult for Ardenia to argue that the Mavazi ban does not comply with Article 18(3), as nearly all similar legislation has been upheld by various tribunals. Good Ardenian teams will seek to distinguish leading cases that are in Rigalia’s favor by showing that the facts in the instant case do not support elements 2) or 3) of the traditional test, and that the ban is discriminatory.

ii. Analysis of the ICCPR Article 18 Three-Part Test and Non-Discrimination

b. Prescribed by Law

The “Mavazi ban” was passed by Rigalia’s Parliament. Ardenian teams will likely concede this element.

⁹⁰ ICCPR Article 18; CRC Articles 13 and 14;

⁹¹ ICESCR Article 2; CRC Article 2; CEDAW Article 2; ICCPR Article 2.

⁹² ICCPR Article 27; CRC Article 30.

⁹³ ICCPR Article 18(3).

⁹⁴ Human Rights Committee, General Comment 22, Paragraph 4, CCPR/C/21/Rev.1/Add.4

⁹⁵ ICCPR Article 18(3) is nearly identical to Article 9(2) of the European Convention on Human Rights, so cases decided by the European Court on Human Rights may offer guidance to applicants.

⁹⁶ Human Rights Committee, General Comment 22, Paragraph 8, CCPR/C/21/Rev.1/Add.4

- c. In pursuit of public safety, order, health, or morals, or the fundamental rights and freedoms of others.

This list of acceptable interests is exhaustive.⁹⁷ Rigalia will likely defend the ban as protecting public safety, relying on the difficulty of identifying individuals wearing Mavazis and its alleged role in terrorist attacks against Rigalian citizens, with particular focus on the suicide bombing carried out by an individual wearing a Mavazi. Ardenia may respond by minimizing the threat posed by the Mavazi. Rigalia may also claim that the ban protects various rights of the Zetian women, such as the right to work and the right to freedom from discrimination on the basis of gender. Ardenia will likely counter that the ban actually infringes on these rights by restricting a woman's ability to choose to wear a Mavazi and by limiting access to essential public services on discriminatory grounds.

- d. Necessary and Proportional

The ICJ, quoting the Human Rights Committee, has explained that actions “‘must conform to the principle of proportionality’ and ‘must be the least intrusive instrument amongst those which might achieve the desired result’”⁹⁸ to be considered necessary. In practice, governments are given a margin of appreciation to determine whether limitations are proportionate. Ardenia will likely question how the prohibition on receiving public services is necessary to protect public safety. Both sides can be pressed on possible alternative measures that Rigalia could have taken to meet the stated goal.

- e. Non-discriminatory

Although not included in the text of Article 18(3), the Human Rights Committee has stated that “in interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26,”⁹⁹ which include religion and gender. This prohibition on discrimination on the grounds of religion and gender is also included in the ICESCR, CEDAW, and the CRC, among numerous other international agreements.

Ardenia will likely argue that the ban is discriminatory towards the Masinto religion and towards women. Ardenia may point to the Rigalian President's description of Zetian tribal customs as “barbaric,” and the fact that the legislation specifically refers to the “Mavazi” rather than religious garments as a whole, to demonstrate that anti-Masinto sentiment underlies the legislation. Additionally, it is likely that the parties will debate the unsettled and controversial question of whether banning religious garments frees women from oppression, or is instead another form of oppression. Rigalia may focus on the fact that the Mavazi ban applies to all Rigalians, and does not specifically target either women or Zetians.

iii. *Right to Enjoy Culture and Practice Religion*

Under the ICCPR and the CRC, religious minority groups, such as the Zetians who practice the Masinto religion, are afforded additional rights to enjoy their own culture and practice their own religion. However, the Human Rights Committee has stated that these rights may not be “legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.”¹⁰⁰ Therefore, Rigalia will likely argue not only that the Mavazi ban is lawful, but also that the traditional practice regulated by the ban is inconsistent with the rights to equality and non-discrimination under articles 2, 3, and 26 of the ICCPR. Ardenia may respond that the traditional practice of wearing the Mavazi is consistent with these principles, in part because it is not prescribed by law. Rigalia may respond that the authority of the tribal customs and leaders that mandate this practice, as well as the severity of the consequences that ensue when the practice is not complied with, constitute *de facto* law.

⁹⁷ Ibid.

⁹⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 at para 136.

⁹⁹ Human Rights Committee, General Comment 22, Paragraph 8, CCPR/C/21/Rev.1/Add.4.

¹⁰⁰ Human Rights Committee, General Comment 23, Paragraph 8, CCPR/C/21/Rev.1/Add.5.

Issue 4:

Ardenia	Rigalia
Ardenia did not violate the OECD Anti-Bribery Convention or the OECD Decision on MNE Guidelines.	Ardenia's failure to investigate and prosecute the alleged corruption and to provide MLA to Rigalia constitute breaches of the OECD Anti-Bribery Convention, and the failure of the Ardenian NCP to respond to the complaint by the CRBC constitutes a breach of the OECD Decision on MNE Guidelines.

This prayer for relief raises three distinct issues, each with a variety of sub-issues: 1) whether Ardenia's failure to respond to Rigalia's request for MLA in relation to its investigation of MDI violated the Anti-Bribery Convention; 2) whether Ardenia's decision to suspend the investigation of MDI was influenced by considerations of national economic interest in violation of the OECD Anti-Bribery Convention; and 3) whether the Ardenian National Contact Point (NCP) responded to the inquiry of the Committee for Responsible Business Conduct (CRBC) in accordance with the OECD Decision on the Multinational Enterprise (MNE) Guidelines.

i. Scope of the Anti-Bribery Convention

The first two issues involve the OECD Anti-Bribery Convention and associated instruments. To proceed on either issue, Rigalia must demonstrate that the corruption investigation and the MLA request fall under the scope of the OECD Anti-Bribery Convention.

The OECD Anti-Bribery Convention and the Commentaries to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), adopted in 1997 and which entered into force in 1999, establish international legal obligations for States Parties to effectively criminalize bribery of foreign public officials in international business transactions.¹⁰¹ The OECD Working Group on Bribery (Working Group) is the Conference of States Parties to the Convention and is the mechanism for systematic follow-up to monitor and promote the full implementation of the Convention, as provided for in Article 12. The Working Group has adopted a number of corruption-related OECD instruments¹⁰² along with reports on States Parties implementation of the Convention.¹⁰³ Although these instruments and reports are not legally-binding, they have been adopted by all States Parties to the Anti-Bribery Convention and therefore should inform its interpretation consistent with the general rules of treaty interpretation contained in Article 31 of the *Vienna Convention on the Law of Treaties*.

The bribery allegations against MDI are two-pronged, concerning 1) the renewal of its contract with RRI in 2002, allegedly secured by payments to an NGO affiliated with the nephew of an RRI director and directly to the nephew; and 2) its day-to-day extraction activities, which allegedly involve payments to members of a local tribal council. To determine whether these incidents constitute "bribery of a public official", teams will need to analyze the definition of that offense in Article 1 of the Convention: "Intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."

Participants should be prepared to discuss the following issues:

¹⁰¹ OECD Working Group on Bribery, Annual Report 2008, <http://www.oecd.org/dataoecd/21/24/44033641.pdf>

¹⁰² Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009); Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009); Recommendation of the Council on Bribery and Officially Supported Export Credits (2006); Recommendation of the Development Assistance Committee on Anti-Corruption Proposals for Bilateral Aid Procurement (1996); OECD Guidelines for Multinational Enterprises – Section VI.

¹⁰³ For Phase 1, Phase 2 and Phase 3 reports on States Parties' implementation of the OECD Anti-Bribery Convention, please refer to: www.oecd.org/corruption.

- a. Did MDI intentionally offer, promise or give an undue pecuniary advantage to a foreign public official?

Rigalia will likely argue that MDI's payments to Clyde Zangara, Leo Bikra's nephew, were an indirect pecuniary advantage to Leo Bikra intended to secure the renewal of MDI's contract with Bikra's company, RRI. Ardenia may make a factual argument to contest whether the intent of the payments was to influence Leo Bikra.

The Convention allows States to implement an exception for small facilitation payments. Ardenia has implemented such an exception, and will likely argue that the payments to the tribal councils would qualify as valid small facilitation payments in order to secure standard public services. Rigalia may argue that subsequent instruments adopted by the States Parties to the Anti-Bribery Convention (e.g. 2009 Recommendation on further combating foreign bribery (2009 Recommendation)) and state practice (only 5 out of 38 States Parties to the Anti-Bribery Convention maintain small facilitation payments as an exception to the foreign bribery offence) indicate that small facilitation payments are no longer acceptable, regardless of the amount, and therefore the payments qualify as an undue pecuniary advantage. In addition, the 2009 Recommendation stipulates that in all cases, small facilitation payments must be accurately accounted for in a company's books and financial records.

- b. Does the case involve foreign public official(s)?

In the Convention, a foreign public official is defined as "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization."

Rigalia will argue that both Leo Bikra and the tribal councils qualify as foreign public officials vis-à-vis Ardenia. Leo Bikra is the president of a state-owned enterprise and therefore falls under the above definition of a foreign public official (see Commentaries 14 and 15). The issue of the tribal councils is less clear, as is the status of the territories they occupy. The Convention includes any person exercising a de facto public function and 'foreign country' is not limited to States (see Commentaries 16 and 18). Ardenia may argue that Rigalia has been unable to control the Northern Provinces, and that they are effectively governed by the tribal councils.

- c. Did MDI gain an improper advantage as a result of its payments?

Rigalia will argue that MDI received two improper advantages: 1) the renewal of the contract to exploit the Moira Mine, and 2) protection from the tribal councils. These advantages were indeed gained, the question Rigalia must satisfy is whether they were a direct result of MDI's payments. Ardenia will likely argue that there is no evidence that RRI's decision to renew the contract was based on anything but MDI's performance during the first 5-year contract period. Furthermore, there are no allegations against MDI of using bribery to obtain the initial contract.

On the question of improper protection from the tribal councils, Ardenia will likely argue that the payments were in return for standard services, such as security and the free movement of goods, rather than with the intent to influence a foreign public official in the exercise of his or her duties in order to obtain or retain a business advantage.

- ii. *Did Ardenia's failure to respond to the MLA Request violate the Anti-Bribery Convention?*

An MLA request is a formal request by a State for assistance from another State in the investigation and prosecution of a crime, usually made for the purposes of gathering and sharing evidence.¹⁰⁴ Article 9 of the Anti-Bribery Convention governs MLA for investigations and proceedings within the scope of the Convention. In the present case, Rigalia has sent an MLA request to Ardenia to assist in the investigation of alleged bribery by MDI. Ardenia has declined to respond to the MLA request, citing, *inter alia*, that its domestic bank secrecy legislation bars it from complying with the request for MDI's bank records.

¹⁰⁴ Sarah Joseph & Adam McBeth, *Research Handbook on International Human Rights Law*, (United Kingdom: Edward Elgar Publishing Limited, 2010)

Assuming that Rigalia is successful in demonstrating that the investigations are within the scope of the Convention (see above), Ardenia may defend its actions on the grounds that:

- a. The requested information falls outside of the scope of the investigation.

In particular, Ardenia may contest the request for correspondence *between* the ZRF and the tribal councils as irrelevant, because MDI is under investigation for separate, direct payments to the ZRF and to the tribal councils. Rigalia may counter that the correspondence could include evidence relevant to both investigations.

- b. Ardenia's domestic legislation prevents it from disclosing MDI's bank records.

In paragraph 24 of the *Compromis*, Ardenia states that it was attempting to comply with the MLA request, but that its legislation did not allow authorities to access information on bank records. The difficulty with this argument is that Article 9(3) of the Convention explicitly prohibits Parties from declining MLA requests on the ground of bank secrecy. Ardenia may counter that the wording in Article 9(3) stipulates that bank secrecy may not be the *only* ground for declining an MLA request. On this basis, Ardenia could argue that in the current case bank secrecy was one of multiple legitimate grounds for refusing to respond to the request. This would be a subject for debate, as there is no further clarification in the Commentaries to the Convention. The only other relevant material would be the provision in paragraph III(vi) of the 2009 Recommendation that Member countries take meaningful steps to further examine laws and regulations on banks and other financial institutions to ensure that adequate records would be kept and made available for investigation.

- c. The MLA request has not been explicitly denied therefore no violation has occurred.

In paragraph 24 of the *Compromis*, Ardenia states that it was still attempting to comply with the MLA request, and may therefore argue that since the MLA request was not denied, no violation has yet occurred. Rigalia will likely counter that assistance must be "prompt and effective"¹⁰⁵ under the Convention.

iii. Did Ardenia's decision to drop the investigation of MDI violate the Anti-Bribery Convention?

Assuming that the Convention applies to the investigation of MDI (see above), the Parties will likely focus on Article 5 of the Convention: "Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

The central question is whether the *reason* for the dismissal of the investigation is legitimate.

The term "national economic interest" is not defined in the Convention. To establish that Ardenia was influenced by national economic interest, Rigalia may rely on a newspaper article in which Ardenia's President "hinted that this decision [to dismiss the investigation] was founded in part on a concern over the cost of the investigation, which could have resulted in the loss of hundreds of jobs and millions of dollars for Ardenian industry." Ardenia will likely highlight the independence of the public prosecutor and dismiss the President's statements as inconclusive.

Ardenia will likely argue that the investigation was dismissed due to considerations of national security. Rigalia will likely respond that the investigation was actually dismissed out of invalid considerations of national economic interest, discussed above, and in any event, that national security concerns are not a valid reason to dismiss an investigation. Although the Convention does not explicitly prohibit consideration of national security concerns, Rigalia may argue that, in this case, national security concerns would qualify as invalid considerations of the "potential effect upon relations with another State." Alternatively, Rigalia may argue that under customary international law and the Vienna Convention on the Law of Treaties, national security exceptions must be explicitly included in treaties to be valid. This position has been argued by Professor Susan Rose-Ackerman, who notes that

¹⁰⁵ OECD Anti-Bribery Convention, Article 9(1), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

implying a broad national security exception for all treaties would negate the need for well-recognized, and limited, exceptions under customary international law, such as self-defense and necessity.¹⁰⁶

If the Court finds that Ardenia's reasons for dismissing the investigation are invalid, Ardenia may argue that a single, isolated failure to continue an investigation into a potentially credible case of foreign bribery does not constitute a "material breach" of the Convention, and that Rigalia would need to demonstrate a systematic pattern of failure. Ardenia would rely on state practice, specifically that the majority of Convention Parties do not have any foreign bribery convictions and often come under scrutiny for their enforcement efforts, yet have not been found to have violated the Convention. Rigalia would counter with specific instances where the Working Group on Bribery expressed serious concerns about whether a single breach was consistent with the OECD Anti-Bribery Convention, such as the United Kingdom's dismissal of an investigation into BAE Systems for alleged corruption relating to arms deals with Saudi Arabia.¹⁰⁷

iv. Did Ardenia violate the 2000 Decision of the OECD Council on the MNE Guidelines?

The OECD Declaration on International Investment and Multinational Enterprises contains, in its incorporated Annex, the Guidelines for Multinational Enterprises (MNE Guidelines), which are recommendations to multinational enterprises operating in or from adhering countries.¹⁰⁸ They provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. Both the Declaration and its Guidelines are political commitments and are not legally binding by virtue of the Declaration alone.¹⁰⁹

However, the 2000 Decision of the OECD Council on the MNE Guidelines (Council Decision) is an Act of the OECD that is legally binding on all its State Parties.¹¹⁰ The Council Decision establishes an implementation mechanism which adhering governments must set up within their domestic system.¹¹¹ This implementation mechanism of National Contact Points (NCPs) is responsible for promoting the MNE Guidelines and helping to resolve issues that arise, under the procedures that govern a "specific instance", which is a complaint on specific facts submitted to the NCP.¹¹² The Council Decision also provides for elements of Procedural Guidance that Parties must take into account when operating their NCPs.

In addition to these two instruments, the Investment Committee, comprised of all the Parties to the Declaration, has adopted a set of commentaries to the Guidelines and to the Procedural Guidance (the Commentaries), which constitute the official interpretation of the instruments by the Parties.¹¹³

The relevant provisions for this issue are contained in the Procedural Guidance. Therefore, the first question is whether the Council Decision's legally binding obligation for parties to take "due account" of the

¹⁰⁶ See Rose-Ackerman and Billa, *Treaties and National Security*, 40 N.Y.U. Int'l L. & Pol. 437-496 (2008) available at http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_058871.pdf.

¹⁰⁷ OECD, *OECD to conduct further examination of UK efforts against bribery*, 14 March 2007 (http://www.oecd.org/document/12/0,3343,en_2649_34859_38251148_1_1_1_1,00.html).

¹⁰⁸ OECD Guidelines for Multinational Enterprises, <http://www.oecd.org/dataoecd/56/36/1922428.pdf>

81 The Legal Status of An OECD Act and the Procedure For Its Adoption, <http://www.oecd.org/dataoecd/26/29/31691605.pdf>

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Annual Report on the OECD Guidelines for Multinational Enterprises 2008, (London: OECD Publishing, 2009)

¹¹³ OECD Investment Committee, available at http://www.oecd.org/document/24/0,2340,en_2649_34863_2373464_1_1_1_1,00.html

Procedural Guidance obligates Ardenia to comply with the Procedural Guidance.¹¹⁴ Participants should be prepared to discuss what it means to take “due account” of the Procedural Guidance.

Assuming that Ardenia is obligated to comply with the provisions of the Procedural Guidance, Rigalia will likely claim that the Ardenian NCP failed to make an initial assessment as required under the Procedural Guidance. The Procedural Guidance requires an NCP to “[m]ake an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them.”¹¹⁵ Paragraph 13 of the Official Commentaries on the Decision provides a non-exhaustive list of specific criteria for making such an assessment. Rigalia will likely argue that the Decision should be interpreted in light of the Commentaries which are the official interpretation by the parties to the Decision according to Article 31 paragraph 3 a) of the Vienna Convention on the Law of Treaties.¹¹⁶ Under this list, a two-day assessment without involvement of either of the Parties and the Rigalian NCP would not qualify as a proper initial assessment. Ardenia will likely counter that the OECD documents do not contain a specific timeframe for conducting an initial assessment¹¹⁷, so no violation has yet occurred, and, in the alternative, that the NCP rendered an informed decision not to examine the issue on its merits in which it laid out the details of its reasoning, which constitutes a proper initial assessment.

In any event, Rigalia will likely argue that the grounds provided by Ardenia to dismiss the claim without considering the merits were not valid under the Procedural Guidance. The Ardenian NCP refused to examine the CRBC’s complaint on three grounds: a) that the complaint was outside its competence, and should have been dealt with by the Rigalian NCP where the alleged corruption occurred, b) that the MNE Guidelines do not apply to RRI, and c) that it could not respond to the complaint since investigations had been launched in Ardenia and Rigalia. An analysis of whether these grounds are legitimate is as follows:

a. The Competence of the Ardenian NCP

Ardenia will likely argue that all events relating to the alleged crime, including the payment of funds and the provision of any undue advantage, took place entirely within Rigalia, and therefore it is the Rigalian NCP that should consider the CRBC’s complaint. Rigalia may counter that the fact that the issue occurs in Rigalia is not a reason *per se* for the Ardenian NCP to refuse to address the complaint, since the Commentaries state that such issues are “generally” dealt with by the NCP of the country in which the issue arose, but do not require this nexus.¹¹⁸

b. RRI and the MNE Guidelines

The MNE Guidelines apply to multinational enterprises, but do not provide a definition of a multinational enterprise. Ardenia will note that the Guidelines state that MNE’s are usually companies or entities established in more than one country.¹¹⁹ There is no evidence that RRI has any offices, owners, or operations outside of Rigalia. However, the Guidelines do state that “multinational and domestic enterprises are subject to the same expectations

¹¹⁴ OECD Decision on MNE Guidelines, Article I(1), available at

<http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=c%282000%2996/final&doclanguage=en>

¹¹⁵ OECD MNE Procedural Guidance, Section 1(c)(1), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

¹¹⁶ The general rule of interpretation of treaties is given by article 31 of the Convention on the Law of Treaties (Vienna Convention).

See Relationships Between International Investment Agreements-OECD. Available at

<http://www.oecd.org/dataoecd/8/43/31784519.pdf>

⁸⁹ Guide to the OECD Guidelines for Multinational Enterprises’ Complaint Procedure: Lesson From Past NGO Complaints.

¹¹⁸ Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, para 13, available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

¹¹⁹ Supra Note 80

in respect of their conduct wherever the Guidelines are relevant to both.”¹²⁰ Rigalia will likely claim that the Guidelines are relevant to RRI because it is doing business with a foreign company.

c. Concurrent Investigations in Ardenia and Rigalia

Paragraph 14 of the Commentaries on the OECD Decision list a number of criteria for an NCP to rely upon when making an initial assessment and includes “how similar issues have been, or are being treated in other domestic or international proceedings.” Therefore, Ardenia may argue that the Ardenian NCP is entitled to dismiss the complaint on the grounds that both Ardenia and Rigalia are conducting investigations into the same facts. Rigalia may counter that the Procedural Guidance section of the Council Decision does not expressly limit the competence of NCP’s when legal proceedings have been initiated on similar allegations, which is mentioned in the Commentaries as only one criterion to examine among many others.

Even if the reasons provided by the Ardenian NCP are invalid, Ardenia may argue that providing invalid reasons is not a violation of the Council Decision, as the OECD documents provide the NCP with significant discretionary powers. Rigalia would counter that providing invalid reasons would be contrary to the object and purpose of the Decision and that interpreting the Decision as such would be in violation of Article 31 of the Vienna Convention.

d. Cooperation with Rigalian NCP

Rigalia may also raise the Ardenian NCP’s failure to answer the CRBC’s request for a meeting or to cooperate with the Rigalian NCP as violations of the Council Decision.

Section 1(C)(2) of the Procedural Guidance states: “Where the issues raised merit further examination, [the NCP will] offer good offices to help the parties involved to resolve the issues ... and where relevant [will]: ... b) Consult the National Contact Point in the other country or countries concerned. ... d) Offer, and, with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with these issues.”¹²¹

Section I(2) of the Council Decision also contains a requirement for National Contact Points in different countries to cooperate “if such need arises.”¹²²

Ardenia will likely defend the decision of its NCP not to organize a meeting by arguing that “good offices” are only offered when the NCP considers that the issues raised merit further examination. Under this reasoning, if the Ardenian NCP conducted a proper initial assessment, it would be under no further obligation to meet with the parties. Likewise, Ardenia will likely defend the decision not to contact the Rigalian NCP by arguing that the need did not arise. The Ardenian NCP provided three different reasons for which it dismissed the complaint, so there was no need to discuss the matter further with Rigalia’s NCP.

¹²⁰ OECD Guidelines for Multinational Enterprises, Section I(4), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

¹²¹ OECD MNE Procedural Guidance, Section 1(c)(2), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

¹²² OECD Decision on MNE Guidelines, Article I(2), available at

<http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=c%282000%2996/final&doclanguage=en>

Appendix A: Introduction to International Law

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

General

The conduct and rules of the International Court of Justice (ICJ) are governed by the Statute of the Court. Under Article 38(1) of the ICJ Statute, the ICJ may consider the following sources of international law in order to decide disputes before it:

- (a) treaties or conventions to which the contesting States are parties;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) general principles of law recognized by civilized nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Commentators disagree as to whether the first three sources are listed in order of importance.

Judges from common-law systems should note the status of precedent. Article 59 of the ICJ Statute states that decisions of the Court are binding *only on the parties to the case*, and are without formal effect as precedent. In practice, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(1)(d). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those evaluations in later decisions.

Resolutions of the United Nations General Assembly are not, of themselves, binding upon the Court. Although Resolutions may be evidence of customary international law, the General Assembly is not analogous to a domestic legislature.

Treaties

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty. Rules regarding treaty procedure and interpretation are defined in the Vienna Convention on the Law of Treaties.

Article 26 of the VCLT sets out the fundamental principle relating to treaties, *pacta sunt servanda*, which provides, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Once a State becomes a party to a treaty, it is bound by that treaty.

Article 34 of the VCLT adds that a treaty does not create rights or obligations for State that are not parties to the treaty. However, even if a State is not party to a treaty, the treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this "back-door" means by which a treaty may become binding on non-parties. The ICJ has also recognized this possibility in the F.R.G. v. Denmark, North Sea Continental Shelf Cases, 1969. Judges should be aware, however, that situations arise where some provisions of a treaty – for example, many provisions of the International Covenant on Civil and Political Rights -- may reflect or codify customary international law, while other parts do not.

Article 31 of the VCLT states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The article further provides that the context of a treaty can be taken from a variety of sources including the treaty's preamble and annexes, any prior or subsequent agreements between the parties related to the treaty, and any relevant rules

of international law. Article 32 states that when interpretation methods under Article 31 would lead to an ambiguous or unreasonable result, supplementary methods of interpretation can be used, including reference to the preparatory work of the treaty and the circumstances of its conclusion.

Customary International Law

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

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

“State practice” is the objective element, and simply means a sufficient number of states behaving in a regular and repeated manner consistent with the customary norm. Evidence of state practice may include a codifying treaty, if a sufficient number of states sign, ratify, and accede. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create “regional customary international law” or whether the practice of particularly affected states, *e.g.* in the area of space law, can create custom that binds other states, although the ICJ has acknowledged the possibility.

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

Customary international law is shown by reference to treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations. Each of these items might be employed as evidence of state practice, *opinio juris*, or both. In the North Sea Continental Shelf Cases, the ICJ stated that the party asserting a rule of customary international law bears the burden of proving it meets both requirements.

General Principles of Law

The third source of international law consists of “general principles of law.” Such principles are gap-filler provisions, utilized by the ICJ in reference to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature (*e.g.*, burden of proof and admissibility of evidence). Many others, such as waiver, estoppel, unclean hands, necessity, and *force majeure*, may sound familiar to a common-law practitioner as equitable doctrines. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited general principles of international law.

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

Decisions and Publicists

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

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

“Teachings” refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published article constitutes an Article 38(1)(d) “teaching.” However, the provision is expressly limited to teachings of “the most highly qualified publicists.” For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. Within the context of a specific field, there are additional scholars who would be regarded as “highly qualified publicists.”

Burdens of Proof

In the Corfu Channel Case, the ICJ set out the burdens of proof applicable to cases before it. The Applicant normally carries the burden of proof with respect to factual allegations contained in its claim by a preponderance of the evidence. The burden falls on the Respondent with respect to factual allegations contained in a cross-claim. U.K. v. Albania, 1949. However, the Court may draw an adverse inference if evidence is solely in the control of one party that refuses to produce it.

Appendix B: Timeline of Events

Timeline

- 1924** Ardenia and Rigalia come into existence. Agreement entered into between the two states to grant full citizenship rights in both states to the Zetian people (¶ 8).
- 1994** Leo Bikra on behalf of Rigalian Refining Inc. calls for tenders for a 5 year exploration and development contract for the Moria Mine (¶ 10).
- 1995** Ardenia joins the OECD (Cl.2).
- 1997** Mineral Dynamics Incorporated awarded the contract to exploit the Moria Mine (¶ 10).
- 2000** Mineral Dynamics launches its website on which it publishes information about its support for the Zetian Refugees Fund (¶ 11).
- 2002** Mineral Dynamics Incorporated's contract to exploit the Moria Mine extended by ten years, reportedly secured by an offer of support of the Zetian Refugees Fund and a payment of cash and shares in MDI amounting to \$10 million, held in trust by Clyde Zangara, thought to be being funneled to support the Zetian Democratic Party (¶ 12).
- Oct 2005** Rigalia leases Fort Raucus to Morgania (¶ 27).
- 3-5 May 2008** Joint Tribal Council meeting of the Northern Provinces which issued a Manifesto calling for increased autonomy for the Zetian tribal areas of Ardenia and Rigalia with the ultimate goal of independence. Meeting dominated by members of the Zetian Democratic Party (¶ 13).
- May 2008** In response to the May 5th Manifesto, President Khutai made comments concerning the Zetian religion and culture which sparked protests and violence in the Northern Province and in parts of Ardenia. Regalia responded by invoking emergency powers in the Constitution banning groups from organizing and assembling in public. A bill was also introduced into the Rigalian parliament banning the wearing of the Mavazi in public and from receiving public services whilst wearing it (¶ 14, 15, 16).
- May-Dec 2008** A group of Zetian tribal leaders mount a violent campaign pressing for full independence by attacking infrastructure in Rigalia, kidnapping citizens of Rigalia, and demanding the release of arrested Zetian protestors in exchange for the safe release of the kidnap victims (¶ 18).
- December 2008** A bridge is blown-up by Zetian separatists in Rigaliaville killing more than 130 Rigalians (¶ 18).
- Jan-Feb 2009** A series of suicide bombings take place at two government buildings, a school and a hospital, killing 25 and wounding 112. One of the suicide bombers was a man wearing a Mavazi (¶ 18).
- 15 March 2009** *Rigalian Daily Monitor* publishes a report that sometime in January 2009, President Arwen met with Rigalian and Ardenian Zetian tribal leaders where she promised to permit tribal customs, including the wearing of the Mavazis, and support a Zetian state on Rigalian territory in return for a promise not to seek secession of part of Ardenia and not to direct violence against Ardenian citizens or their government (¶ 20).

- 22 March 2009** President Khutai declares his government to be at war with the Zetian secessionist movement. Parliament also approved the ban on the wearing of the Mavazi (¶ 21).
- 30 April 2009** Rigalia sends a request for mutual legal assistance to Ardenia (¶ 23).
- 3 June 2009** The Public Prosecutor of Ardenia drops the investigation into Mineral Dynamics Inc. (¶ 25).
- 15 June 2009** President Arwen gives an interview to *The Ardenian Times-Picayune* hinting that the investigation into Mineral Dynamics Inc. was dropped due to concerns partly over cost and partly because of the risk it could result in the loss of jobs and damage Ardenia's economy (¶ 25).
- 1 July 2009** Committee for Responsible Business Conduct files a complaint against Mineral Dynamics Inc. and Rigalian Refining Inc. to the National Contact Point established by Ardenia (¶ 26).
- 3 July 2009** The National Contact Point of Ardenia refuses to examine the complaint of the Committee for Responsible Business Conduct (¶ 26).
- 14 September 2009 to end March 2010** Predator Drones have, at the urging of Rigalia, carried out more than 50 strikes killing 15 important Zetian separatist leaders and an estimated 230 Zetian civilians in Rigalia (¶ 29).
- 15 March 2010** Predator Drone strike killing Adar Bermal, his family and killing 150 and wounding 200 at the Bakchar Valley hospital (¶ 30).
- 20 March 2010** President Arwen condemns Rigalia's drone program as illegal (¶ 32).
- 22 March 2010** The UN Security Council discussed the Zetian situation and urged Ardenia and Rigalia to resolve their differences by peaceful means (¶ 32).
- 23 to 24 March 2010** Rigalia raises the pending mutual legal assistance request during examination of Ardenia's implementation of the OECD Anti-Bribery Convention (¶ 24).
- 28 March 2010** President Arwen sends a diplomatic note to President Khutai (¶ 33).
- 15 April 2010** President Khutai responds to President Arwen (¶ 34).
- 25 April 2010** Diplomats from Ardenia and Rigalia met to try and negotiate a settlement of the Zetian situation (¶ 35).
- 05 May 2010** Ardenia brought this claim before the International Court of Justice invoking Article 36(2) of the Court's Statute (¶ 35).

Appendix C: Guide to People, Places, and Acronyms

- Ardenia** Applicant state, geographically small and located to the North of Rigalia. It is a developed and prosperous nation, with the exception of the Southern Provinces. Ardenia is comprised of ten provinces and has a highly decentralized system of government (§5ff).
- Ardenian Times-Picayune, The** Ardenia's largest national newspaper (§ 25).
- Arwen, Glenda** President of Ardenia (§ 17, 20, 21, 25, 32, 33).
- Bakchar** One of two provinces that make up the Southern Provinces of Ardenia, the other being Teka (§ 5).
- Bakchar (Valley) Hospital** A 300-bed public hospital in Ardenia which was struck by a Predator Drone stroke on the night of 15 March 2010 (§ 30, 32, 33, 34).
- Bermal, Adar** Prominent leader of the Zetian Democratic Party (§ 30).
- Bikra, Ilona** Ethnic Zetian, wife of Leo Bikra. Most of her family live in the Ardenian province of Bakchar (§ 11).
- Bikra, Leo** Ethnic Rigalian. President and Director General of Rigalian Refining Inc. Married to Ilona Bikra, a Zetian. Uncle of Clyde Zangara (§ 10, 11, 22, 23).
- Committee for Responsible Business Conduct** A Rigalian non-governmental organization that receives 30% of its total operating budget from the Rigalian Government (§ 26, 34, Cl.1).
- CRBC** see Committee for Responsible Business Conduct.
- Finch, Charlene** Justice Minister of Rigalia (§ 22, 23).
- Fort Raucus** A Morganian Air Force Base located in Rigalia, which was leased to Morgania in October 2005. It is home to soldiers and civilians from both Morgania and Rigalia (§ 28, 29).
- ILSA** see International Loan Syndicate Association.
- International Loan Syndicate Association** A nonprofit humanitarian organization giving microcredit loans to Zetians in the areas around the border (§ 19).
- Joint Tribal Council** Meeting of all the tribal councils of the Northern Provinces held in May 2008, the first such meeting for 20 years (§ 13)
- Junonia** The province of Ardenia in which the capital of Ardenia, Junoniaville, is situated. It is composed of a mixture of Zetians, Junonians and Donaxes in approximately equal numbers (§ 5, 7).
- Junoniaville** Capital city of Ardenia, located in the province of Junonia: a sophisticated international city (§ 5, 17).
- Khutai, Teemu** President of Rigalia (§ 14, 15, 16, 21, 22, 27, 28, 29, 33, 34).
- Masinto** Religion practiced by ethnic Zetians, the orthodox tenets of which require women and girls over 14 to wear a Mavazi (§ 3).

- Mavazi** The traditional head covering which orthodox Masinto tenets require women and girls over 14 to wear. It covers the entire head, including the face. It is made from the hide of the Zorax (§ 3, 7, 16, 17, 18, 20, 21, 33, 34).
- May 5th Manifesto** Manifesto issued by the Joint Tribal Council of the Northern Provinces issued on 5th May 2008, calling for increased autonomy for Zetian tribal lands and ultimately for independence (§ 13, 14).
- MDI** see Mineral Dynamics Inc.
- Mineral Dynamics Inc.** A major Ardenian state-owned corporation specializing in mineral extraction and transportation. In 1997 it was awarded the contract to exploit the Moria mine (§ 10, 11, 12, 22, 23, 25, 26, 27, 34).
- MLA** Mutual Legal Assistance (§ 23, 24, 34).
- Morgania** A highly developed, industrial nation which has been giving financial and military support to Rigalia (§ 27, 28, 30, 31, 36, Cl.6).
- Morganville** Capital of Morgania (§ 29, Cl.6).
- Moria** One of three large provinces that make up the Northern Provinces of Rigalia, the others being Tritar and Sirana (§ 2).
- Moria Mine** Coltan mine located in the Northern Provinces (§ 10, 12, 22).
- NCP** National Contact Point established in accordance with the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises (§ 26, 34, Cl.1).
- Northern Provinces** An underdeveloped and quite mountainous area of Rigalia, comprised of the three large provinces of Moria, Tritar and Sirana, amounting to approximately one-third of Rigalia's land mass. It is almost exclusively populated by people of Zetian ethnicity who practice the Masinto religion. It is governed by tribal councils which are comprised of Zetians. It is the site of Rigalia's most important natural resource, columbite-tantalite (coltan) (§ 2, 3, 4, 6, 10, 12, 13, 14, 15, 16, 21, 29).
- Predator Drones** Unmanned aircraft (§ 28, 29, 32, 33, 34).
- Ratko, Sophia** President of Morgania, long-term friend and ally of President Khutai (§ 27, 28).
- Rigalia** Respondent state comprised 65% ethnic Rigalians and 35% ethnic Zetians. It is a developing nation with several prosperous cities. Rigalia's cities are largely inhabited by ethnic Rigalians. It is a highly centralized state comprising 12 provinces (§ 1ff).
- Rigalian** An ethnic group that constitutes 65% of the Rigalian population (§ 1).
- Rigalian Daily Monitor** A newspaper carrying stories concerning President Arwen's meetings with Rigalian and Ardenian Zetian tribal leaders (§ 20).
- Rigalian Refining Inc.** A company owned by Rigalia which is in charge of industrializing Rigalia's coltan reserves. Invited tenders for exploration of Moria Mine (§ 10, 12, 23, 26).
- Rigaliaville** Capital of Rigalia, largely inhabited by ethnic Rigalians (§ 1, 12, 18).

- RRI** see Rigalian Refining Inc.
- Strong, Sam** Public Prosecutor of Ardenia (§ 25).
- Teka** One of two provinces that make up the Southern Provinces of Ardenia, the other being Bakchar (§ 5).
- Tritar** One of three large provinces that make up the Northern Provinces of Rigalia, the others being Moria and Sirana (§ 2).
- Sirana** One of three large provinces that make up the Northern Provinces of Rigalia, the others being Moria and Tritar (§ 2).
- Southern Provinces** An area of Ardenia, which comprises about 20% of its territory which is made up of the Provinces of Teka and Bakchar. The population is 90% Zetian (§ 5, 7)
- Zangara, Clyde** Founder of Zetian Refugees Fund. Nephew of Leo Bikra. Most of his family live in the Ardenian province of Bakchar (§ 11, 12, 22, 23).
- ZDP** See Zetian Democratic Party
- Zetian** An ethnic group which make up 35% of Rigalia, they predominantly practice the Masinto religion. A traditionally nomadic people who move around the villages of both the Northern Provinces of Rigalia and the Southern Provinces of Ardenia; they have citizenship of both countries, although most Zetians have now settled in either one country or the other (§ 1ff).
- Zetian Democratic Party** Goal to unite the five majority Zetian provinces into a single state and has made several secession efforts in Rigalia. Reportedly represents 75% of Zetians living in Rigalia and has tried to encourage Zetians in Ardenia to join, although they have not actively participated in the secessionist movement (§ 9, 11, 12, 13, 15, 16, 18, 30).
- Zetian Refugees Fund** Charity incorporated in Ardenia founded Clyde Zangara. Its mission statement claims it is to provide educational opportunities and humanitarian assistance to Zetians living in both Ardenia and Rigalia; it has offices in both countries. Suspected by Rigalia of promoting Zetian autonomy and many of its board members are known supporters of the Zetian Democratic Party (§ 11, 12, 15, 22, 23, 24).
- Zorax** A small deer species native to the Northern Provinces which Zetians hold sacred and the hide of which is used to make the Mavazi (§ 3).
- ZRF** see Zetian Refugees Fund

Appendix D: Suggested Questions for the Oral Rounds

I. International Law Generally

1. Is there any priority or hierarchy of the sources of international law mentioned in Art. 38 of the ICJ Statute?
2. What is customary international law? What are the elements of customary international law?
3. When asserting a state's obligation under customary international law:
 - A. Where can we find evidence of relevant state practice?
 - B. What is *opinio juris*? How is it proven?
4. Is the ICJ bound by its prior decisions?
5. What are *travaux préparatoires*? When are the records of the drafting and negotiations of a treaty relevant?
6. What specific remedies is the Applicant/Respondent seeking? Is the ICJ permitted by its Statute to grant those remedies?
7. What is the basis of standing for the party seeking relief?
8. What is the standard of proof with respect to this issue? Which party bears the burden of proof?
9. If this Court determines that the lack of factual certainty allows multiple, conflicting inferences, what should this Court do then?
10. If a state has conflicting obligations under two treaties (or under a treaty on the one hand and customary international law on the other), which obligation controls? What principles does the Court use to determine which obligation controls?

II. The Predator Drone Strikes

1. Does the ICJ have the power to commission an inquiry to investigate the drone incident?
2. Is the use of Predator Drones in any conflict unlawful?
3. Can Ardenia seek assurances of non repetition of the strikes?
4. Does this qualify as an armed conflict? If so, what kind of armed conflict?
5. Can sporadic terrorist attacks qualify as an armed attack?
6. Is there a difference between an armed attack and an armed conflict?
7. How does the organization of the Zetian separatist group compare to the organization of groups under cases concerning the application of international humanitarian law?
8. Under what circumstances can a state lawfully exercise force in self-defense?
9. Is it absolutely necessary to notify the UN Security Council of an exercise of self-defense?
10. Is there evidence that the Zetian separatists were directly participating in hostilities?
11. How does the Court determine whether a deprivation of life has been arbitrary?
12. Is lethal force allowed under human rights law?
13. How is proportionality determined in international humanitarian law?
14. How is proportionality determined in the context of the use of force in self defense?
15. Can a State use force in self defense in response to an armed attack committed by non-State actors?
16. Were the anticipated civilian deaths proportional to the anticipated military advantage?
17. Was the attack on the Bakchar Valley Hospital an indiscriminate attack?
18. Are the Draft Articles on State Responsibility a codification of public international law or progressive development?
19. Does the ICCPR apply extraterritorially to Rigalia's actions in Ardenian territory?
20. What is the difference between an act of aggression and a use of force?

III. The Mavazi Ban

1. How does the court resolve conflicting obligations within a treaty?
2. How does the court resolve conflicting obligations between two human rights instruments?
3. Is there a hierarchy among the rights listed in the International Covenant on Civil and Political Rights?
4. What is the purpose of the the Mavazi Ban? Is this purpose valid under Article 18(3) of the International Covenant on Civil and Political Rights?
5. What type of evidence should the court review to determine whether an act is discriminatory?
6. What is the standard to determine discrimination? How is it fulfilled/not-fulfilled in this case?

7. What is the standard to determine proportionality? How is it fulfilled/not-fulfilled in this case?
8. What is the standard to determine whether an act is necessary?

IV. The OECD Anti-Bribery Convention

A. Bribery

1. Is the Anti-Bribery Convention binding upon Ardenia?
2. Are the tribal chiefs “public officials” under the OECD documents?
3. What, if any, undue pecuniary advantage did MDI offer or provide?
4. What, if any, improper advantage did MDI gain?
5. What factors support a finding that Leo Bikra/the Tribal Chiefs are public officials?

B. The Investigation

1. Can the Court use President Arwen’s statements regarding the investigation as evidence of the reason for the dismissal of the investigation?
2. What qualifies as a national economic interest?
3. Is national security a valid reason to dismiss an investigation?

C. MLA Request

1. What is the source of an obligation to respond to a request for mutual legal assistance?
2. What remedy is Rigalia asking for? Does the court have the authority to grant that remedy?

D. National Contact Points

1. Is the Procedural Guidance to the MNE Guidelines binding on Ardenia?
2. What does it mean to take “due account” of the Procedural Guidance?
3. What status do the Commentaries to the MNE Guidelines have under international law?
4. What remedy is Rigalia asking for? Does the court have the authority to grant that remedy?