BENCH MEMORANDUM
FOR JUDGES

THE CASE CONCERNING THE MAI-TOCAO TEMPLE
Version 1.4

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2012 Philip C. Jessup Competition

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ILSA welcomes comments and recommendations on the Bench Memo. Please send all suggestions to jessup@ilsa.org.

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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 2012 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

This year's compromis raises four primary issues: 1) the representation of a State before the ICJ, 2) the responsibility of Member States for the unlawful actions of International Organizations, 3) sovereign nations' immunity from suit in foreign domestic courts, and 4) the intentional destruction of a World Heritage Site.

The World Heritage Site at issue is the Mai-Tocao Temple, a site of great religious and archeological significance that is at the heart of a border dispute between the Applicant, Aprophe, and the Respondent, Rantania. In 1962, the Mai-Tocao War began, and over the next three years Aprophe secured and occupied the Mai-Tocao site and a portion of previously undisputed Rantanian territory. Aprophian forces captured 500 Rantanian peasants and forced them to labor to provide goods and services to the Aprophian soldiers.

The Mai-Tocao War ended with the Peace Treaty of 1965 (Annex III), waiving all claims by both States and their citizens for any damages that occurred during the War. The Peace Treaty also required arbitration to determine the lawful border. The arbitrator decided that the Mai-Tocao Temple was properly within Aprophe's territory. Both parties have fully complied with the arbitrator's decision.

In 1980, Rantania and three neighboring countries, Lamarthia, Verland, and Pellegrinia, ratified the Eastern Nations Charter of Human Rights, establishing the Eastern Nations Court, a regional human rights court. In 1990, these countries formed the Eastern Nations International Organization (ENI), a regional organization dedicated to economic development and mutual defense. In 1983, Aprophe and Rantania became parties to the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage. In 1988, the Mai Tocao site was inscribed in the World Heritage List with the support of both Aprophe and Rantania.

In 2000, Senator Mig Green was elected as Aprophe's President by an overwhelming popular vote. Over the next five years, Green's government instituted a series of measures designed to gain admittance to the ENI, including ratifying the Eastern Nations Charter in 2005. These measures were met with resistance from labor unions, opposition political parties, and nationalist groups in Aprophe who were routinely protesting by 2006.

In 2001, the documentary "Our Forgotten Workers" was released, highlighting the story of the Rantanian military internees during the Mai-Tocao War. It inspired an advocacy group, the International League for Solidarity and Access (ILSA), to bring suit in Aprophe on behalf of 60 former military internees. The suit was dismissed in 2002 in light of Aprophe's statute of limitations and the dismissal was affirmed by the Aprophian Supreme Court. Next, ILSA filed a similar complaint against Aprophe in Rantania. The Rantanian Trial Court dismissed on the grounds that Article XV of the 1965 Peace Treaty waived all claims on behalf of Rantanian civilians arising out of the Mai-Tocao War. The Rantanian Supreme Court affirmed this dismissal.

ILSA subsequently brought a petition before the Eastern Nations Court, which held in January of 2009 that denying petitioner's right to reparations on the basis of the 1965 Treaty amounted to a denial of justice and instructed the Supreme Court of Rantania to proceed in a manner consistent with this decision. In December of 2009, a Rantanian Trial Court, following the instructions of the Rantanian Supreme Court, considered Aprophe's defense that Aprophe was immune to suit within Rantania's courts. The Trial Court held that the doctrine of sovereign immunity does not extend to violations of peremptory norms of international law and awarded the military internees damages. Aprophe was not a party to the second set of proceedings in Rantania.

The Rantanian Trial Court granted an indefinite stay of execution of the judgment upon the request of the Rantanian Foreign Ministry. The lawsuit, coupled with Green's pro-ENI measures, strengthened anti-Rantanian sentiments in Aprophe. Beginning in 2010, dissident factions staged several nationwide strikes calling for Green's resignation. In response, in January 2011, Green invoked emergency powers to postpone the March 2011 elections by one year in the hopes that "order could be restored."

On January 13, 2011, Green ordered the Aprophian military to patrol major urban areas "to prevent and quell civil unrest." On January 15, Aprophian newspapers published an open letter from the chief of staff of Aprophe's armed forces, General Paige Andler, describing the suspension of elections as a clear attempt to subvert the will of the people and stated that the military would not carry out Green's order. Green immediately fired General Andler.

On the morning of January 15, 2011, national police attempted to arrest General Andler, but were turned away by armed soldiers. In the evening, army units loyal to Andler entered the Presidential Palace and other government institutions, causing Green and numerous ministers to flee to Rantania overnight. Andler declared herself the interim president and suspended Green's pro-ENI measures. In the face of opposition in parliament and in the streets, Andler declared a state of emergency and dissolved parliament, promising new elections would occur shortly. Forty Aprophian ambassadors renounced Andler and declared allegiance to Green.

Between January 18 and January 20, Andler's government established control over 90% of Aprophian territory. Approximately 800 soldiers in outlying regions remained loyal to Green and established bases in two villages in the north of Aprophe. Pro-Green civilians migrated to these villages. On January 20, Andler ordered 2,000 troops to confront the pro-Green forces. No troops loyal to Green surrendered and small-scale fighting between pro-Andler and pro-Green forces lasted until February 10, 2011.

On January 20, Green announced the formation of a government in exile in Rantania and, after requests by Green to intervene to restore his government, on January 22, Rantania introduced a resolution before the ENI Council stating that any response be undertaken by ENI rather than a Member State and recognizing Green as the lawful Aprophian President. On January 23, Andler denounced this resolution and Aprophe denounced the Eastern Nations Charter.

From February 10-13, the Aprophian army launched artillery strikes against the pro-Green villages, killing 60 soldiers and 80 civilians and injuring hundreds. On February 15, at Green's urging, Rantania proposed and the ENI Council approved "Activation Orders" for air strikes against military targets under Andler's control. The Council appointed Rantanian Major General Brewscha to head the campaign. At the same time, on the government's urging, the Rantanian judiciary lifted the stay of enforcement in the military internee trial and bailiffs seized US $10,000,000 in non-diplomatic property of Aprophe's government located in Rantania.

On February 18, the ENI's "Operation Uniting for Democracy" began, consisting of around-the-clock air strikes against pro-Andler military installations in and around the Aprophian capital. The campaign was conducted almost entirely by the Rantanian Air Force. From February 18-25, the campaign destroyed 14 of 15 military installations near Aprophe's capital and killed 50 soldiers, without civilian casualties, effectively destroying Aprophe's military capability.

Andler and her staff fled to the Mai-Tocao site. Rather than risking damage to the temples, Brewscha announced that ground forces would be mobilized to capture Andler. In response, Andler announced her intention to destroy one Mai-Tocao temple building every other day as long as the ENI military operation continued. The aerial bombardment of the capital continued and on March 3, 2011 Andler had one of the smaller buildings in the Mai-Tocao complex destroyed.

Rantania's President condemned this destruction and immediately grounded the Rantanian Air Force. On March 5, the ENI Council formally suspended Operation Uniting for Democracy. Andler returned to Aprophe's capital and on May 12, 2011 Aprophe filed an application with the ICJ registry instituting proceedings against Rantania, signed by Andler as "Interim President of Aprophe." After initial reservation, Rantania announced it would engage Aprophe before the ICJ on the condition that Aprohpe agree to withdraw its application and jointly submit a Compromis. The parties submitted the joint Compromis on September 12, 2011.

II. Legal Analysis

Question Presented 1:

Aprophe	**Rantania**
The Court may exercise jurisdiction over all claims in this case, since the Andler government is the rightful government of the Republic of Aprophe;	The Court is without jurisdiction over the Applicant's claims, since the Andler regime and its representatives cannot appear before this court in the name of the Republic of Aprophe;

QP 1 addresses the problem of representation in international law. Difficulties arise where competing authorities claim to represent the same country. In the United Nations, these matters are addressed by the Credentials Committee, together with the General Assembly. Only once was the International Court of Justice (ICJ) called to decide on a question of representation,[1] and it weighed both formal recognition and *de facto* control.

QP 1 raises three main questions: (1) whether the ICJ can rule on the representation of a state; (2) if so, whether Andler has the international capacity to act on behalf of Aprophe; and (3) whether anything changes if the coup d'etat violated international law.

Neither side should raise arguments pertaining to Aprophe's status as a State because such arguments miss the call of the question. Regardless of the government in control, Aprophe is still a State.

Procedurally, Aprophe must succeed on QP 1 or all other claims should be dismissed for lack of standing. This does not necessarily mean the agent for Aprophe must convince the judge in order to present their other arguments. If an Applicant fails to convince you that Aprophe may bring its claims, they should be allowed to continue to QPs 2-4 on the assumption that they may bring those claims.

Additionally, either side should be awarded points for a discussion of *forum prorogatum*, where, in essence, jurisdiction is established through the consent of the parties once proceedings have begun.

i. Whether the ICJ can rule on the representation of a State.

The Applicant may argue that Rantania's challenge to Andler's authority is a matter of domestic Aprophian law beyond the Court's jurisdiction and does not constitute a legal question concerning genuine issues of international law. Aprophe may cite *Nicaragua v. Honduras* stating that the Court must determine "that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law."[2] The UN Charter does not address potentially unconstitutional changes occurring within member states,[3] which may be seen as a deferral of the matter to internal politics and domestic law. Aprophe may conclude that, because international law is silent on rules for the determination of who is the Head of State of a given country, there is, objectively, no legal dispute on this matter within the Court's jurisdiction.

The Applicant should then establish that it has standing to bring its claims under the UN Charter and the Statute of the Court.

Rantania must argue that the issue involves questions of international law. Here, the topic was discussed by the UNGA, which called the UNSC to take action to "restore the constitutional order of Aprophe."

Some Applicants may argue that the issue of representation is political rather than legal and is thus inadmissible before the Court. This argument has two disadvantages. First, the political organ that could comment on Aprophe's representation is the UNGA, which has approved a Resolution condemning the coup. On the other hand, despite condemning Andler's *coup*, the GA has not actually denied Andler's capacity to act on Aprophe's behalf. The second drawback relates to the Court's general unwillingness to accept the "political aspects" argument against admissibility. As it stated in the Kosovo Advisory Opinion, "the Court has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question."[4]

Teams should not be encouraged to discuss the internal legality of Andler's actions. Given that the ICJ tends to regard domestic law as fact, and based on the *Genocide Case (Bosnia v. Serbia)* precedent, Aprophian legislation would

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[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595 [hereinafter the Genocide Case].

[2] Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69.

[3] HIGGINS, DEVELOPMENT OF INTERNATIONAL LAW THROUGH POLITICAL ORGANS, 132.

[4] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) 22 July 2010, para. 27 [hereinafter Kosovo Advisory Opinion].

play a limited role in this case because the Court is not normally concerned by the extra-constitutional assumption of constitutional powers.

ii. Whether Andler has the capacity to act on Aprophe's behalf internationally.

The focus of QP 1 is who represents a country when there are competing authorities claiming to be the government. Here both Mig Green and Paige Andler claim to be Applicant's Head of State. Aprophe should argue that the effective control doctrine determines the Head of State and Green is not a legitimate government in exile, while Rantania should argue that recognition determines the Head of State and that if the effective control test governs, Andler does not have effective control.

a. Effective control

The effective control standard favors the authority that is in a position to "employ the resources and direct the people of the State."[5] The government, therefore, is the entity "habitually obeyed by the bulk of the population of that state and which exercises effective authority within its territory."[6] Because Andler controls 90% of Aprophe's territory and 80% of the population, the Applicant has a strong case if the effective control standard prevails.

Aprophe should argue that the effective control standard reflects the general practice of States. It is connected to the concept of government, understood as "the exercise of authority with respect to persons and property within the territory of the State."[7] Aprophe might also refer to the decisions of the UN Credentials Committee, the organ that often decides on representation matters. Effective control was proposed by former UN Secretary General Trygve Lie to be the criteria for accreditation of governments at the United Nations.[8] Indeed, at least prior to 1990, the great majority of cases involving competing authorities for the same country were decided consistently with the effective control standard.[9]

Rantania should argue that effective control is not the established rule in international law to determine the representation of a state. Notably, the GA Resolution dealing with representation of a UN Member State – Res 396(V) – contains no reference to the effective control standard, even though this criterion was present in previous drafts.

Moreover, State practice is not uniform. Rantania may refer to the accreditation processes of Haiti, Sierra Leone, Cambodia, Liberia and Afghanistan to the UNGA. In all these cases, the Credentials Committee rejected the credentials of the delegations representing the entities with effective control over the population and territory of the respective states.

b. Recognition

The theory of recognition favors Rantania, not only because the Green government is more widely recognized than Andler's, but mainly due to the UNGA Resolutions on the subject.

Rantania may rely on the *Genocide Case (Bosnia v. Serbia)*, where the Respondent raised a preliminary objection on the grounds that Mr. Izetbegoviae, who appointed the Agents of Bosnia-Herzegovina and authorized the initiation of the proceedings, was not serving as President of the Republic of Bosnia-Herzegovina. According to the former Yugoslavia, the mandate of Mr. Izetbegoviae had expired when the Bosnian application was submitted to the Court. The ICJ rejected this argument, and affirmed:

> whereas the Agent of Bosnia-Herzegovina stated that President Izetbegoviae is recognized by the United Nations as the legitimate Head of State of the Republic of Bosnia and Herzegovina; whereas the Court has been seized of the case on the authority of a Head of State, treated as such in the United Nations; (…)

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[5] Letter Dated 8 March 1950 from the Secretary-General to the President of the Security Council Transmitting a Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, [hereinafter Letter Dated 8 March 1950].
[6] LAUTERPACHT, RECOGNITION, 87.
[7] CRAWFORD, CREATION OF STATES, p. 55.
[8] Letter Dated 8 March 1950, *supra* note 5.
[9] GRIFFIN, ACCREDITING DEMOCRACIES, p. 743.

> the Court may, for the purposes of the present proceedings on a request for provisional measures, accept the seisin as the act of that State.[10]

The Court reached the same conclusion on its judgment on the preliminary objections. "Mr. Izetbegoviae was recognized, in particular by the United Nations, as the Head of State of Bosnia and Herzegovina. Moreover, his status as Head of State continued subsequently to be recognized in many international bodies and several international agreements – including the Dayton-Paris Agreement – bear his signature."[11]

Aprophe should argue that recognition is a political – not legal – act, and does not establish the Head of State. It may refer to the dissenting opinion of Judge Kreca in the same case, where he considers it "an absurd situation" to grant recognition, "which is in practice an eminently political act," the power to change the internal political structure of a State.[12] In its favor, Aprophe has the majority of scholars and the general practice of States, according to which they do not recognize governments, but only States. The instrument of recognition, being it unilateral or collectively exercised, could also be considered an undue interference on the internal affairs of a Member State.

c. Government in Exile

Either side may argue whether Green's government is a legitimate government in exile. A government that does not have effective control over its territory may still be a legitimate government if it qualifies as a government in exile. A government in exile must at minimum: 1) claim to represent a recognized State, 2) represent the people of that State, and 3) be independent of its host. It also depends upon the international illegality of the government in *de facto* control.[13] Respondents will argue Andler cannot have effective control because Green's is a legitimate government in exile. Applicants will argue Green fails to meet these general criteria. Real world situations cut both ways.

iii. Whether there would be any consequence to the present case had the coup d'etat violated international law.

Aprophe will have to maintain that international law is silent on coups d'etat. Governments and the transfer of power are historically internal matters and were not condemned. Applicant may cite the Tinoco Claims Arbitration saying:

> to hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a de facto government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true.[14]

Aprophe may also make an analogy between coups and secession, and rely on the Kosovo Advisory Opinion and the Court's liberal approach to declarations of the governing body.[15] Rantania can respond by questioning the peacefulness, acquiescence of the people, and substantial time period of Ander's government.

Rantania should argue that coups d'etat have become illegal in international law. It may cite resolutions from regional and international organizations that condemn unconstitutional changes of governments, as well as several scholars supporting this position.[16] Art. 9 of the OAS Charter, for instance, provides:

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[10] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April1993, I.C.J. Reports 1993, p. 3, para. 13.

[11] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595, para. 44.

[12] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Dissenting Opinion of Judge *ad hoc* Kreca, I.C.J. Reports 1996, p. 658.

[13] See Stefan Talmon, *Who is a Legitimate Government in Exile? in* THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE (1999).

[14] Aguilar-Amory and Royal Bank of Canada claims (Great Britain v. Costa Rica) 18 October 1923, R.I.A.A. VOLUME I pp. 369-399.

[15] *See* Kosovo Advisory Opinion, *supra* note 4.

> "[a] Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.[17]

Several other documents of the OAS have similar dispositions. The African Union and the Commonwealth[18] also have approved documents condemning coups d'etat. The African Union's Constitutive Act has, among its principles, the "condemnation and rejection of unconstitutional changes of governments."[19] Several international declarations and UNGA Resolutions promote democracy and condemn interruptions of democratic governments.

Aprophe might respond that none of the documents condemning coups are binding on it: they are either declarations or treaties of regional organizations to which Aprophe is not a party. It may add that there is insufficient State practice and *opinio juris* to establish a customary rule condemning coups d'etat and may specifically refer to the international support of recent revolutionary movements during the "Arab Spring."

Even if coups d'etat are against international law, Rantania must also prove that the consequence of this violation would be the non-recognition of the new government and of its actions. However, Rantania itself engaged in negotiations with members of Andler's regime. The Applicant could then argue that Rantania, by dealing with the interim government to solve issues with Aprophe, acquiesced to the new situation, and may compare this scenario with the *Nicaragua* case[20] and of the *Temple of Preah Vihear* case.[21]

In contrast, Rantania might rely on the principle of "*ex injuria jus non oritur*," that a legal entitlement cannot arise from an unlawful act. In this regard, to state that "an unlawful act, or its immediate consequences, may become *suo vigore* a source of legal right for the wrong-doer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character."[22] Hence, the Respondent would argue that even if the Court considers that Rantania implicitly recognized Andler as the representative of Aprophe, this cannot turn the original unlawful act into a legal act. It might conclude that the ICJ should not therefore recognize the acts of Andler's regime, including the Special Agreement.

Question Presented 2:

Aprophe	**Rantania**
Rantania is responsible for the illegal use of force against Aprophe in the context of Operation Uniting for Democracy;	The use of force against Aprophe in the context of Operation Uniting for Democracy is not attributable to Rantania, and in any event, that use of force was not illegal;

QP 2 raises three core issues: (1) whether Operation Uniting for Democracy was unlawful; (2) whether Operation Uniting for Democracy is attributable to Rantania; and (3) if not, whether Rantania may be held responsible for taking advantage of ENI's separate legal personality to circumvent its obligation not to use force.

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[16] For a list of scholars who support this view: ASPREMONT, JEAN. RESPONSIBILITY FOR COUPS D'ETAT IN INTERNATIONAL LAW, p. 454.
[17] Charter of the Organization of American States, art. 9, 13 December 1951.
[18] Coolum Declaration, 2002.
[19] The Constitutive Act of the Organization of African Unity, art. 4, 11 July 2000.
[20] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392.
[21] Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962, p. 6.
[22] LAUTERPACHT, RECOGNITION, p. 421.

Before they address these issues, teams may wish to discuss whether Aprophe's claim is admissible. In the *Monetary Gold* case, the ICJ affirmed that it cannot rule upon the rights and obligations of States that are not party to the dispute.[23] Relying on this "Monetary Gold principle," Rantania may argue that the Court cannot exercise jurisdiction over Aprophe's claim because, in doing so, it will be ruling on the rights and obligations of Lamarthia, Pellegrinia and Verland.

In the Application of the Interim Accord of 13 September 1995 (Macedonia v. Greece), the Court distinguished *Monetary Gold* because:

> the Respondent's conduct can be assessed independently of NATO's decision, and the rights and obligations of NATO and its member States … do not form the subject-matter of the decision of the Court on the merits of the case; nor would the assessment of their responsibility be a "prerequisite for the determination of the responsibility" of the Respondent.[24]

Judges should not question teams too hard on this issue because it is not intended to be discussed at length.

i. The legality of Operation Uniting for Democracy

Before reaching attribution, teams will have to discuss whether the conduct in question has breached one of Rantania's international obligations. Aprophe must establish that the operation violated the prohibition on the use of force established by Article 2(4) of the UN Charter and customary international law.[25] Aprophe may note that Operation Uniting for Democracy was not authorized by the UNSC under Article 53 of the Charter, [26] and that in any event the use of military force by Rantania was not justified by the right of self-defense recognized by Article 51 of the Charter.

Rantania is not expected to object to the *prima facie* categorization of Operation Uniting for Democracy as a violation of the law on use of force, but it may contend that the wrongfulness of the Operation was precluded by the consent given by Mig Green, whom Rantania considers to be the legitimate president of Aprophe. Rantania may rely on Article 20 of the Articles on States Responsibility ("ASR") and Article 20 of the Draft Articles on the Responsibility of International Organizations ("DARIO"), pursuant to which "valid consent by [a State or an International Organization ("IO")] to the commission of a given act by [another state or IO] precludes the wrongfulness of that act in relation to that [State or the former organization] to the extent that the act remains within the limits of that consent."[27] Aprophe will argue Green cannot give valid consent because only Andler can represent Aprophe on the international plane. Even if Green could generally consent to some action in Aprophe, Aprophe may argue that Green could not validly consent to Operation Uniting for Democracy or in the alternative, that the Operation exceeded the scope of his given consent.

Thus, whether consent to Operation Uniting for Democracy was "valid" or not is tied to the claims made in QP 1. This was intentional, and you are not expected to spend much time inquiring into the legality of the operation. The main issue QP 2 brings is that of the responsibility of a member state for an act committed by an IO, not that of the legality of the use of force.

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[23] Monetary Gold (Italy v. UK, USA and France), p. 32.
[24] Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), para. 43 (citations to Monetary Gold (Italy v. UK, USA and France) and Certain Phosphate Lands in Nauru (Nauru v. Australia) omitted).
[25] UN Charter, Article 2(4).
[26] Article 53(1) reads: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state."
[27] Articles on the Responsibility of States for Internationally Wrongful Acts, art. 20, [hereinafter ASR]; Draft Articles on the Responsibility of International Organizations, art. 20 [hereinafter DARIO].

Some Respondents may argue that the ENI was acting in self-defense. This argument cannot succeed because the UN Charter requires "an armed attack [to occur] against a Member of the United Nations"[28] which has not occurred here. Some Respondents may also attempt to argue that the use of force was justified under a theory of humanitarian intervention. Scholars disagree on whether humanitarian intervention precludes the wrongfulness of a use of force. Regardless, without approval by the Security Council exercising its Chapter VII powers, even if after the fact, any use of force in a humanitarian intervention or responsibility to protect context is illegal under the UN Charter and state practice is too inconsistent to have formed a new custom. Here, rather than giving approval, the Security Council specifically denounced Operation Uniting for Democracy. Even if humanitarian intervention were an appropriate course of action, the situation here bears little relation to any action that has received Security Council approval, in that Andler's conduct towards the two pro-Green villages does not rise to the level of genocide or other crime against humanity.

ii. Attribution

The international responsibility of a State or an IO for an internationally wrongful act requires the act be attributable to the State or to the IO.[29] To establish that Operation Uniting for Democracy is attributable to Rantania, Aprophe may follow two lines of reasoning. The first is to question the applicability of the DARIO to the relationship between ENI and Rantania because either: 1) draft article 62 regarding the responsibility of a State member of an IO for an internationally wrongful act of that organization does not reflect custom or because 2) the ENI is not an IO with legal personality under international law. The second is to contend that, even if the DARIO apply, Rantania exercised effective control over Operation Uniting for Democracy.

a. The applicability of the DARIO

Both the ILC and the *Institut du droit international* have affirmed the rule in article 62 stipulating that a member state is only responsible for an internationally wrongful act of an IO if "it has accepted responsibility for that act towards the injured party" or if "it has led the injured party to rely on its responsibility."[30]

Aprophe may argue that draft article 62 does not reflect customary international law but there are some judicial precedents that appear to confirm the ILC's rule. Individual opinions in the *TIN Council* litigation[31] rejected the idea that international law imposes concurrent or subsidiary responsibility on members of an IO. The same is implicit in the *Behrami/Saramati* judgment of the European Court of Human Rights ("ECtHR"), discussed *infra*. Establishing that draft article 62 does not reflect existing law may be a challenge for Aprophe, but well-crafted arguments on the basis of principle and policy may prove persuasive. Rantania may rely on the works of the ILC and of the *Institut*.

Aprophe may contend that the ENI does not possess "objective legal personality" under international law, and therefore is not governed by the DARIO.[32] In the *Reparations* Advisory Opinion, the ICJ stated that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims."[33] Aprophe can question whether the four States that established the ENI had the same power. Good teams will pick up on the theoretical problems presented by the

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[28] UN Charter, art. 51.

[29] ASR, *supra* note 27, art. 2; DARIO, *supra* note 27, art. 4.

[30] DARIO, *supra* note 27, art. 62.

[31] Judgment of 27 April 1988, Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, ILR, vol. 80, p. 109. See also Amerasinghe, *Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent*, 85 AM. J. INT'L 259, 275-277 (1991) (concluding that "judicial precedents (…) strongly militate against the presumption that members are concurrently or subsidiarily liable for the obligations of the organization").

[32] DARIO, *supra* note 27, art. 2(a) - the DARIO only apply to IOs "established by a treaty or other instrument governed by international law and possessing its own international legal personality."

[33] Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174,185 [hereinafter Reparations Advisory Opinion].

Court's brief analysis, and creative arguments as to why international law does not require Aprophe's recognition of the ENI may be persuasive.

Aprophe can argue that IOs can only possess international legal personality when they have a "will" which is distinct from that of its members, that is, when they possess a certain degree of autonomy. Facts that may be helpful in this context are: the organization is composed of only four states and military operations adopted under the auspices of the organization appear to be conducted by individual member-states.

Rantania will seek to apply the reasoning of the *Reparations* opinion to the ENI. It will contend that even if legal personality was not conferred expressly to the ENI, the organization was "intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane."[34] Rantania will make reference to the ENI's mandate and attempt to draw comparisons between the ENI and other IOs whose personality is well accepted (such as the EU). Rantania may also point out that the ENI comprises several organs that denote a great degree of institutionalization, such as a Secretariat and a human rights court, and that the organization was given privileges and immunities under Article 84 of the ENI Charter. Rantania may finally suggest that previous negotiations relating to Aprophe's admission to the ENI under Mig Green's government signal Aprophe's recognition of ENI as an IO possessing its own legal personality.

b. Control over Operation Uniting for Democracy

Assuming the DARIO apply, under Article 7, the acts of organs or agents of a State placed at the disposal of an IO is an act of the organization only if the organization exercises effective control over that conduct.[35]

Aprophe may argue Rantania exercised effective control over the Operation because Rantania was the only State contributing troops to the Operation, which was led by a Rantanian reserve officer, who was appointed on the recommendation of Rantania. Additionally, the Rantanian President's order to ground the Rantanian forces following the temple detonation was immediately effective, suggesting Rantania retained effective control of its military forces.

Aprophe is expected to discuss the ECtHR's *Behrami/Saramati* applications, which may offer support for Rantania's claim that the ENI controlled Operation Uniting for Democracy. There, one of the plaintiffs claimed that the extra-judicial detention he was subjected to by the NATO-led Kosovo Force was attributable to France and Norway because operational control over the Force was exercised by NATO and not by the United Nations. The Court found that the "key question [was] whether the UNSC retained ultimate authority and control so that operational command only was delegated."[36] The Court concluded that this question had to be answered in the affirmative. Aprophe may question the validity of the "ultimate authority and control" test by pointing out that this relatively flexible threshold has been heavily criticized by scholars and even by the ILC in the commentary to draft article 7.[37]

Rantania may respond in two ways. First, it may argue that article 6 of the DARIO (Conduct of organs or agents of an IO) is applicable to the relationship between Rantania and the ENI. Under Article 6, "[t]he conduct of an organ or agent of an [IO] in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization."[38] Because the ILC has adopted very broad definitions of "organ" and "agent,"[39] Rantania may argue that, because of the Activation Orders, Operation Uniting for Democracy constitutes an "organ" of the ENI or that the Rantanian military acted as an "agent" of the ENI. According to the commentary, the criterion to determine whether an organ of a State has to be considered as equivalent to an organ of the organization is whether the former was "fully seconded to that organization," in which case

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[34] Reparations Advisory Opinion, *supra* note 33, at 179.
[35] DARIO, *supra* note 27, art. 7.
[36] Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, para. 133.
[37] See ILC Report 2011, pp. 27-28.
[38] DARIO, *supra* note 27, art. 6.
[39] Id., arts. 2(c) and (d).

"the organ's conduct would clearly be attributable only to the receiving organization."[40] Because what "to be fully seconded" means has not been fleshed out by international practice and judicial decisions, teams will have some leeway to reason either way.

Alternatively, Rantania may argue that, pursuant to Article 7, ENI had "effective control" over Operation Uniting for Democracy. It will primarily refer to the Activation Orders and to the framework established by the ENI Charter, whereby the command of the operation stays with Force Commander Brewscha and the ENI Military Committee, both of which are organs or agents of the ENI. Rantania may observe that although Brewscha is a reserve officer of the Rantanian army, Rantania exercises neither *de jure* nor *de facto* control over him. Rantania is also expected to rely on the *Behrami/Saramati* applications to affirm that the 'ultimate authority and control' test applies to the ENI and Operation Uniting for Democracy. It may observe that the degree of control exercised by the ENI over the Rantanian army was in any event much greater than the degree of control exercised by the UNSC in that case.

iii. Responsibility for abusing ENI's separate personality

Should the Court find that Operation Uniting for Democracy is solely attributable to ENI, Aprophe may claim that Rantania incurs responsibility for having taken advantage of the ENI's separate personality to commit an internationally wrongful act. Under Article 61 of the DARIO:

> [a] State member of an [IO] incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

The parties will disagree as to (1) whether Article 61 is applicable custom; and (2) whether Rantania "caused" the ENI to carry out Operation Uniting for Democracy.

The legal status of the DARIO—whether they are custom or merely an exercise of "progressive development of international law"—is relevant for all the questions in QP 2. But whereas draft articles 6 and 7 of the DARIO are analogous to the well-established articles 5 and 6 of the ASR and have been applied by international courts, draft article 61 poses a greater challenge to Aprophe. The argument can be made that draft article 61 is rooted in the principle prohibiting abuse of rights—arguably a positive norm of international law[41]—and the Resolution of the *Institut du droit international* lends some support for this view.[42] Aprophe may also refer to the series of precedents of the ECtHR mentioned in the commentary to draft article 61. One of these cases is *Waite and Kennedy v. Germany*, where the Court affirmed that "[i]t would be incompatible with the purpose and object of the Convention (…) if the Contracting States were [by the attribution of certain competences and immunities to IOs] absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."[43] However, it is not clear whether the Court is making a point on the general international law governing State responsibility that can be transposed to situations not covered by the European Convention on Human Rights.

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[40] ILC Report 2011, p. 85, para. 1.

[41] See ROBERT KOLB, LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC 422ff (on the virtual consensus in the literature that the abuse of rights doctrine has a place in positive international law). See also the Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), 1932, P.C.I.J. (Ser.A/B) No. 46 at 167 (in which the Permanent Court of International Justice decided that French fiscal legislation applied to free zones located in the French territory but that "a reservation [had to] be made as regards the case of abuse of rights, an abuse which, however, [could not] be presumed by the Court"); and World Trade Organization, United States—Import Prohibition of Certain Shrimp and Shrimp Products, par. 158, WTO Doc. WT/DS58/AB/R (Appellate Body Report, 1998) (in which the Appellate Body of the WTO stated that "one application of [the general principle of good faith], the application widely known as the doctrine of *abus de droit*, prohibits the abuse exercise of a state's rights").

[42] Higgins, Rosalyn, Fifth Commission Rapporteur, *The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties*, Institut de Droit International, art. 5(b): "In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or the abuse of rights."

[43] Waite and Kennedy v. Germany, European Court of Human Rights (Feb. 18, 1999), 67.

Concerning the relationship between the ENI and Rantania, Aprophe has to establish that: (1) the ENI has competence in relation to the subject matter of Rantania's obligations under the law regulating the use of force (this can be achieved by referring to Article 61 of the ENI Charter); and (2) the deployment of Operation Uniting for Democracy was "caused" by Rantania. To prove this second point, Aprophe may refer to the fact that Rantania is apparently the only ENI member state involved in the Operation; to the fact that Rantania campaigned for the operation and proposed the Activation Orders at Green's request; and to the possibility that, by doing so, Rantania meant to avoid the responsibility it may have incurred under international law had it acted unilaterally.

Rantania may accept that the ENI has competence in relation to the subject matter of its obligations under the law regulating the use of force, but will disagree that it has "caused" the ENI to deploy Operation Uniting for Democracy. It will propose that the words "causing to commit an act" be interpreted restrictively and suggest that there is no evidence that Rantania had any intention to take advantage of the ENI's separate personality. Rantania may further emphasize that proposing the Activation Orders and putting its army at the disposal of the ENI were ordinary acts that Rantania was entitled to perform as an ENI member. Rantania may also cite the Activation Orders' unanimous adoption.

Some of the Applicant teams may wish to refer to articles 58 and 59 of the DARIO, which stipulate, respectively, that a State incurs responsibility if it aids and assists, or if it directs or controls the internationally wrongful act of an IO.[44] According to both provisions, however, "[a]n act by a State member of an IO done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article."[45] Thus, Rantania may argue that the action of its military, taken on the basis of the Activation Orders and the ENI Charter, was in accordance with the rules of ENI. In order to advance plausible arguments based on draft articles 58 and 59, teams will have to present creative interpretations of the provisions.

Question Presented 3:

Aprophe	**Rantania**
the exercise of jurisdiction by Rantanian courts in the case of *Turbando, et al., v. The Republic of Aprophe* violated international law, thus Rantania may not permit its officials to execute the judgment;	the exercise of jurisdiction by Rantanian courts in the case of *Turbando, et al., v. The Republic of Aprophe* was consistent with international law, Rantanian officials may execute the judgment in that case;

As originally intended by the authors, QP 3 had four core issues: (1) whether Aprophe enjoys jurisdictional immunity from suit within the context of the *Turbando, et al.* litigation; (2) whether the application of rules on immunity would be incompatible with peremptory norms of general international law prohibiting forced labor; (3) whether Rantanian courts violated the 1965 Treaty by awarding compensation to the plaintiffs in *Turbando, et al., v. The Republic of Aprophe*; and (4) whether, in the present case, the decision to lift Aprophe's immunity was required and justified by the Eastern Nations Charter. Teams may also discuss a State's immunity from enforcement.

However, Judges should note that the Jurisdictional Immunities decision issued by the ICJ on February 3, 2012 has significantly impacted several intended arguments. This is also of importance to memorials judges, as memorials were finalized before this decision was issued. Specifically, the Court held that 1) the territorial torts exception requiring that immunity be lifted for cases involving personal injury inflicted in the territory of another State does not apply to personal injury "committed by the armed forces and other organs of a State in the conduct of armed conflict,"[46] and that 2) substantive *jus cogens* norms, such as slavery, do not conflict with the application of the procedural rule of jurisdictional

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[44] DARIO, *supra* note 27, arts. 58, 59.
[45] Id.
[46] Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment, 3 February 2012, pp. 33, para. 77 [hereinafter Jurisdictional Immunities].

immunity.[47] In other words, the Court has severely curtailed the scope of the "territorial torts exception" to jurisdictional immunity and has held that allegations of jus cogens violations do not trump jurisdictional immunity before foreign domestic courts. These rulings have made the respondent's argument considerably more difficult. Please keep in mind that participants should be scored on their strengths as oral advocates, rather than on the inherent strengths and weaknesses of the case.

The clearest potential source of law on jurisdictional immunity, the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property ("UN Convention"), has not entered into force. However, the ICJ has stated that the UN Convention represents custom.[48]

i. Applicability of the law on jurisdictional immunity

Aprophe will rely on the general rule whereby sovereign activities of a State, such as Aprophe's military operation in the 1960s, enjoy immunity before the national courts of other states, as affirmed by the ICJ in the Jurisdictional Immunities case.[49] Under Article 12 of the UN Convention, immunity is lifted for State acts causing personal injury within the territory of another State.[50] In the Jurisdictional Immunities case, the ICJ ruled that this "territorial torts exception" does not apply to personal injury committed in the conduct of armed conflict.[51] Rantania may contest the ICJ's recent ruling on this matter, arguing that the Court's finding of an armed conflict exception to Article 12 is based on the ILC's commentary to the *draft* UN Convention rather than the final Convention. Also, the States before the Court had not signed the convention, where here Aprophe has. Rantania may therefore argue that a plain reading of the Convention should prevail. Rantania may also attempt to distinguish Jurisdictional Immunities by arguing that the internment of Rantanian citizens cannot be considered to have been committed "in the conduct of armed conflict,"[52] despite being committed by Aprophe's military during an armed conflict.

a. Exceptions to the general rule on state immunity

Rantania may argue that the *Turbando et al.* litigation falls within the exceptional category of "personal injury and injury to property," for which there is no immunity. This was referred to as the "territorial torts exception" by the ICJ in the Jurisdictional Immunities case and is contained in Article 12 of the UN Convention:

> a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.[53]

The Respondent will argue that the "territorial torts exception" applies to sovereign acts in addition to private acts of the State. In Jurisdictional Immunities, the Court left this question open, but noted that there is strong support for the contention that the exception applies to both sovereign and private acts.[54] Assuming Rantania convinces the Court that the exception applies to sovereign acts, it may argue that the tortious acts underlying the *Turbando* litigation, having occurred

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[47] Id. at pp. 38, para 93.

[48] Id. pp. 23-24, para. 55.

[49] The general rule is expressed in Article 5 of the 2004 UN Convention on Jurisdictional Immunity of States and Their Property [hereinafter UN Convention]: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention." Exceptions to immunity are laid down in articles 10 to 17 of the Convention. The general rule reflects customary international law, is well accepted in the literature and has been affirmed by numerous domestic judgments.

[50] UN Convention Article 12.

[51] Jurisdictional Immunities, para. 93.

[52] Jurisdictional Immunities, para. 77.

[53] United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 12, 2004.

[54] Jurisdictional Immunities para 64, 77; *Yearbook of the International Law Commission*, [hereinafter International Law Commission] 1991, vol. II, Part Two, p. 45, para. 8.

in Rantanian territory and having been committed by the Aprophian army which was present there, would not enjoy immunity under international law. Therefore, Rantanian courts may entertain the claims of the military internees for the personal injury they suffered during the conflict.

Aprophe will respond that Article 12 was never intended as a general exception covering actions of the magnitude of a military operation. As the ICJ stated in Jurisdictional Immunities, Article 12 does not cover personal injury "committed by the armed forces and other organs of a State in the conduct of armed conflict."[55] Rather, the ILC commentary to the draft convention notes, "[t]he article is primarily concerned with accidents occurring routinely within the territory of the State of the forum, which in many countries may still require specific waiver of State immunity to allow suits for recovering damages to proceed."[56]

b. The armed conflict exception to UN Convention Article 12

Even if Article 12 does not apply to armed conflicts, Rantania may attempt to distinguish Jurisdictional Immunities by arguing that the situation giving rise to the claims was not within the context of an armed conflict. The internees were disarmed peasants forced to work in labor camps for two years. Rantania may argue that even if the original detainment qualifies as committed in the "conduct of an armed conflict," the entirety of the two year internment does not. After Aprophe's occupation and pacification of Rantanian territory in 1962, there is no evidence of further armed conflict between the parties in this region.

Considering the increased difficulty for the Respondent caused by the recent Jurisdictional Immunities case, Judges may consider giving increased leniency for creative arguments crafted by the Respondent on this issue and allow them to proceed with their other submissions.

ii. Immunity for Jus Cogens violations

The general rule of jurisdictional immunity only protects a state's sovereign acts. Rantania may therefore argue that acts in violation of *jus cogens* norms do not qualify as sovereign acts entitled to protection relying, *inter alia,* on Judge Cançado Trindade's dissenting opinion in Jurisdictional Immunities. However, the majority of the ICJ rejected this argument in the Jurisdictional Immunities case, ruling that there is no conflict between *jus cogens* norms and the application of sovereign immunity.[57] Judges should note that the authors' intended this line of argument to be balanced, but the recent ruling in Jurisdictional Immunities has skewed the argument heavily in Applicant's favor.

iii. Was the decision to lift immunity and award compensation required by the Eastern Nations Charter?

As an alternative method to demonstrate that immunity was properly lifted, Rantania may argue that the Eastern Nations Court, as the judicial organ established under the Eastern Nations Charter, is competent to adopt authoritative interpretations of the Charter. Even if Aprophe did not consent to be a party in proceedings brought before the Court, when it acceded to the Charter it accepted the *acquis* of a full-fledged system of human rights, which includes the jurisprudence of the Eastern Nations Court. Thus Aprophe would be in breach of the Charter in so far as it objects to Rantania's enforcing a decision of the main judicial organ of the Eastern Nations human rights system. Aprophe may argue that the Rantanian courts were only required to analyze immunity, not to waive it, and immunity should still apply. Aprophe may stress that it filed a reservation to the jurisdiction of the Eastern Nations Court and may also question the correctness of the Court's judgment.

In response, Rantania may argue that it is not the proper role of the ICJ to review a judgment of the Eastern Nations Court and that, in probing the legality of the relevant acts under the Eastern Nations Charter, the ICJ should defer to the 2009 judgment.

Two ICJ judgments may be relevant in this context. In the Genocide Case, the ICJ had to consider what weight it should give to judgments of the ICTY. There the ICJ deferred to the ICTY's findings of fact and law within its specific

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[55] Jurisdictional Immunities, pp. 33, para. 77.

[56] International Law Commission, supra note 54, p. 45, para. 7.

[57] Jurisdictional Immunities, para. 93.

purview. Rantania may claim that the interpretation of the Eastern Nations Court lay directly "within the specific purview of its jurisdiction."[58] Aprophe may claim that the Eastern Nations Court had to address issues of general international law on which the ICJ would be in a better position to rule. Rantania may also benefit from the judgment of the ICJ in the *Diallo* case where the Court stated that is must "take due account" of the interpretation of a regional instrument by the bodies created to apply that instrument.[59]

Regarding the Rantanian Court's decision to award compensation, the Respondent may argue that, pursuant to VCLT Article 30(3), Article XV of the 1965 Treaty does not apply in so far as it is incompatible with the Eastern Nations Charter (in particular Article 13 of the Charter), a later treaty to which both States are party.

iv. The legal effects of the waiver contained in the 1965 Treaty

If Aprophe is not immune to suit and the Eastern Nations Charter does not supersede the 1965 Peace Treaty, Aprophe may argue that because the Rantanian courts ordered Aprophe to make reparation in connection with claims waived in the treaty, Rantania failed to execute the treaty in good faith, as required by Article 26 of the VCLT and custom. In *Jurisdictional Immunities*, the Court left open whether the peace agreements between Germany and Italy created binding waivers of individual claims.[60]

Rantania may argue that international law prohibits waiving claims relating to the violation of certain international human rights and international humanitarian laws ("IHL"). It may refer to Article 3 of the Hague Convention IV[61] and Article 148 of the Geneva Convention IV[62] and to the fact that States cannot absolve themselves of any liability entailed by grave breaches of the norms for conducting hostilities. Articles 7 and 8 of the Geneva Convention IV stipulate, on the one hand, that "[n]o special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them," and, on the other hand, that "[p]rotected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be." Rantania may thus argue that IHL prevents States from (1) absolving themselves of their liability and (2) renouncing the individual rights of victims of breaches of IHL. Rantania may also argue that neither of the parties had the power to waive the individual rights of their citizens, allowing Rantanian courts to sever the 1965 Treaty provision regarding the waiver of claims.

Aprophe may deny that IHL grants an individual right to reparation that would overcome the rights of States to settle questions of war damages as they deem appropriate. It may refer to situations where reparations were dealt with on the inter-state level,[63] and advance policy arguments for orderly and equitable settlement of war reparations.[64] Aprophe may cite the decision of the European Court of Human Rights on the admissibility of a petition made by the *Associazione Nazionale Reduci dalla Prigionia, dall Internamento e dalla Guerra di Liberazione*. There, Italian nationals sought compensation for acts perpetrated during World War II and the Court noted that "[w]hatever sufferings the applicants' forced labour brought about, none of the Conventions referred to by the applicants establishes any individual claims for compensation."[65]

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[58] The Genocide Case, *supra* note 1.

[59] Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, 30 November 2010, para. 67.

[60] Jurisdictional Immunities, para. 132.

[61] Convention Respecting the Laws and Customs of War on Land (IV), Art. 3. The same rule is adopted in Article 91 of Additional Protocol I to the Geneva Conventions.

[62] 1949 Geneva Convention IV.

[63] One example is the Germany refers to the Peace Agreement Italy celebrated with the Allied Powers in 1947, Article 77(4) of which would contain a full waiver by the Respondent of "all claims against Germany and German nationals outstanding on May 8, 1945", including "claims for loss or damage arising during the war." In the *Germany v. Italy* case, currently pending before the ICJ, the validity of this agreement is in dispute.

[64] Cf e.g. Pierre D'Argent, *Les réparations de guerre en droit international public* (Brussels 2002), p. 842.

[65] Decision as to the Admissibility of Application no. 45563/04 by Associazione Nazionale Reduci dalla Prigionia, dall Internamento e dalla Guerra di Liberazione and 275 Others against Germany, 4 September 2007, p. 14.

Both parties may refer to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The principles, adopted by General Assembly Resolution 60/147 (2005), do not express a univocal view as to whether international law confers an individual right of reparation to victims of violations of human rights law and IHL.[66]

v. Rantania as the court of last resort

Rantania may put forward an alternative argument urging the Court to find that immunity be lifted and the judgment enforced on the grounds that the military internees had no other means of redress. This will be a difficult argument considering the Court's statement in the Jurisdictional Immunities case: "The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress."[67] Rantania may attempt to further distinguish Jurisdictional Immunities by arguing that Germany had gone to great lengths to compensate the victims of its actions during World War II. In contrast, Aprophe, to the present day, has taken no actions to compensate the military internees. Additionally, there is no indication that any private claims against the individuals responsible would be possible, in contrast to the situation in Germany after World War II.

vi. State immunity from measures of constraint (enforcement)

As the ICJ stated in Jurisdictional Immunities, "the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts."[68] Article 19 of the UN Convention addresses State immunity from measures of constraint. Without ruling on whether all of Article 19 is custom, the Court determined that at least one of the three possible conditions presented in Article 13 must be satisfied.[69] They are: express consent, allocation of the property for satisfaction of a judicial claim, or that the property's use or intent for use is for activities not pursuing government non-commercial purposes.[70] The burden is on Rantania to establish one of these conditions. The first two are clearly not present. The property seized was "non-diplomatic property of the government" which does not likely satisfy the third condition.

Question Presented 4:

Aprophe	**Rantania**
Aprophe's destruction of a building of the Mai-Tocao Temple did not violate international law.	Aprophe violated international law by destroying a building of the Temple of Mai-Tocao.

QP 4 recalls the destruction of the Bamiyan Buddhas in Afghanistan in 2001 and the *Temple of Preah Vihear* Case, in particular the 2011 request for interpretation of the 1962 judgment (and Judge Cançado Trindade's separate opinion appended to the order on provisional measures).[71] The *compromis* adds a new dimension because there is a clear connection between the site and Rantania.

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[66] Cf. Tomuschat, Reparation in favor of individual victims of gross violations of human rights and international humanitarian law. In: Kohen et al (ed.) *Promoting justice, human rights and conflict resolution through international law* (2007), p. 569-590.

[67] Jurisdictional Immunities, para. 101.

[68] Jurisdictional Immunity, para. 113.

[69] Id., at p. 45, para. 118.

[70] UN convention, art. 19.

[71] *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Request for the Indication of Provisional Measures, Order of 18 July 2011. See especially Separate Opinion by Judge Cançado Trindade, para. 99: "Not everything can be subsumed under territorial sovereignty […]."

QP 4 has four core issues: (1) whether Rantania has any claims over the Mai-Tocao site in Aprophe; (2) whether the UNESCO World Heritage Convention ("WHC") prohibits Aprophe from destroying a site within its own territory; (3) if not, whether there is a customary norm preventing States from destroying sites within their territory; and (4) if it is internationally wrongful, whether one of the circumstances precluding wrongfulness applies.

As a preliminary matter, Rantania must demonstrate that the destruction of the temple is attributable to Aprophe. If Applicants establish that Andler is the legitimate Head of State, then her actions are attributable to Aprophe because she is an organ of the State.[72] If the Applicant fails to establish that Andler is the legitimate Head of State, Andler's actions are likely still attributable to Aprophe because she exercised elements of governmental authority.[73] These arguments apply even if Andler's action was *ultra vires*.[74] Applicants may attempt to avoid responsibility by arguing that Andler's conduct was only that of an insurrectional movement,[75] but this argument cannot be harmonized with the Applicant's position in QP 1.

i. What are the legal consequences of inscription on the World Heritage List of a site that has significance to more than one state?

The Parties are expected to examine the WHC and the system it created. Aprophe will argue that the WHC, from a plain reading of its text, attributes rights only to Aprophe over the inscribed property by referring to WHC Article 6.1:

> Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.

The beginning of the paragraph clearly establishes sovereignty of the territorial State over cultural heritage, while the end of the paragraph states that the protection is the duty of the international community, because the property is "world heritage."[76]

Rantania will use this juxtaposition to argue for a more nuanced understanding of cultural heritage, that takes into account not only the physical presence of the site, but also the cultural and spiritual connections to it. It will argue that the WHC shifted the interest in protecting cultural heritage to mankind as a whole[77] and that Rantania is an interested party. These considerations can be developed into an *actio popularis* argument, based on the *erga omnes* nature of obligations not to destroy the cultural heritage of mankind.

Here, the ICJ provides conflicting authority. In the 1966 *South West Africa* case, the Court declined to hear a claim on South Africa's conduct in the mandated territory of South West Africa (current-day Namibia), since Ethiopia and Liberia did not have a "legal right or interest in the subject-matter of their claim," which included a claim on the illegality of *apartheid*.[78] This judgment, however, was widely contested and decided by the President's vote. A strong countervailing argument for an *actio popularis* when obligations of a certain character are involved may be found in Judge Jessup's dissenting opinion.[79]

In the 1970 *Barcelona Traction* judgment, the Court affirmed –*obiter dicta*– that:

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[72] ASR, *supra* note 27, art. 4.
[73] Id., art. 5, 9.
[74] Id., art. 7.
[75] Id., art. 10.
[76] For a commentary, *see* Guido Carducci, *Articles 4-7. In*: THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 103-146, 115-116 (Francesco Francioni and Federico Lenzerini eds.) (Oxford UP, 2008).
[77] This argument is made generally by scholars working on the field. *See*, e.g., Francesco Francioni and Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14(4) EJIL 619 (2003).
[78] South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, p. 6, para. 6.
[79] Id., Dissenting Opinion of Judge Jessup.

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*[80]

The ILC adopted the Court's *dicta* in Article 48 of the ASR.[81]

Aprophe may rely on the earlier case-law and argue that Rantania has no legal interest in the integrity of the Mai-Tocao site. This will be a very difficult argument, because Rantania may argue that the site is of cultural importance to its own citizens, sovereignty over the territory on which the site stands was traditionally in dispute, Rantania expressed interest in the cultural aspect of the site upon its inclusion in the World Heritage list, and Aprophe itself recognized Rantania's interest in 1988 by joining a press release which stated that the "newly-inscribed Mai-Tocao World Heritage Site is one example of our region's proudly shared history and culture."

Additionally, an argument denying either (i) the very notion of *erga omnes* obligations or (ii) the *erga omnes* status of the obligation not to destroy World Heritage runs against a substantial body of authority.[82] Thus some Aprophian teams may concede Rantania's standing.

Rantanian teams, however, must address the fact that the ICJ has never acknowledged standing due to the *erga omnes* character of an obligation, and the mention of *erga omnes* obligations in international case law has tended to be *obiter dicta*.[83] Even the *Barcelona Traction* judgment was about the dismissal of Belgium's claim on diplomatic protection due to lack of standing.

Judges should note that there is a very thin dividing line between admissibility and merits on this issue. Teams should not be penalized for addressing some of these matters as part of the merits (sections ii to iv below) or vice-versa.

ii. Does the World Heritage Convention prohibit Aprophe from destroying a site within its own territory?

Here, the two key provisions are Articles 4 and 6 of the WHC. Some important portions are emphasized in bold:

> **Article 4**
>
> Each State Party to this Convention recognizes that **the duty of ensuring the** identification, **protection, conservation**, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated **on its territory, belongs primarily to that State**. It **will do all it can** to this end, to the utmost of its own resources and, **where appropriate, with any international assistance and co-operation**, in particular, financial, artistic, scientific and technical, which it may be able to obtain.
>
> **Article 6**
>
> 1. Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that **such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate**.

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[80] Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3., paras. 33-34.
[81] ASR, *supra* note 27, art. 48.
[82] Francesco Francioni and Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14(4) EJIL 619 (2003). On the notion of *erga omnes* generally, see e.g. Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RdC (1994) 217; MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* (2000).
[83] *See e.g.* East Timor (Portugal v. Australia), Judgment, I. C.J. Reports 1995, p. 90 (stating that self-determination is an *erga omnes* obligation, but holding that the Court has no jurisdiction); Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6 (stating that the prohibition of genocide is an *erga omnes* obligation, but holding that the Court has no jurisdiction).

2. The States Parties **undertake**, in accordance with the provisions of this Convention**, to give their help in the** identification, **protection, conservation** and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request.

3. Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 **situated on the territory of other States Parties** to this Convention.

Aprophe may contend that Article 6.3, in prohibiting the deliberate destruction of cultural heritage "situated on the territory of other States Parties," does not prohibit such deliberate measures within a State's own territory, and such prohibition is not found elsewhere in the text of the treaty. Aprophe may thus rely on the principle according to which restrictions on the sovereignty of States cannot be presumed,[84] and the rule of effective interpretation which dictates that "words should be given appropriate effect whenever possible."[85]

Rantania might refute the literal reading of Article 6.3, relying instead on the provisions in Articles 4 and 6 which refer to international co-operation and the idea of a "common heritage of mankind." In particular, Rantania may refer to Article 4 which sets forth a "duty of ensuring the [...] protection [and] conservation" of cultural heritage. Rantania could argue that this duty entails a prohibition against taking deliberate measures against cultural heritage; similar to the Court's finding that an obligation to "prevent" genocide logically entails an obligation for the State not to commit genocide itself.[86]

Rantania may also cite to its own special connection to Mai Tocao, as detailed *supra*, which would arguably set it apart from the hypothetical case of a site connected exclusively to the culture of a single State.

In any event, the parties should be prepared to argue about the existence of a customary norm prohibiting the destruction of a World Heritage site. Rantania would have to rely on such a norm in the absence of a treaty obligation.

iii. Is there a customary norm prohibiting the destruction of a World Heritage site?

Aprophe will argue that there is no norm prohibiting a sovereign state from destroying property, even cultural property, within its territory. Rantania will use the outcry after the destruction of the Bamiyan Buddhas, in particular the 2001 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, to argue for the existence of an emerging or crystallized customary norm against such actions.[87] Rantania will also argue that, even if it is not considered a directly interested party, the intentional destruction of cultural heritage is of concern to all states, an *erga omnes* obligation, because of the concept of "heritage of mankind."[88]

Parties will engage with the elements for the formation of custom, and time will be a particularly important point of contention here. Even if one agrees with Roger O'Keefe that a customary norm did not exist when the Bamiyan Buddhas were destroyed in 2001,[89] UNESCO issued a Declaration with wide support (it was adopted by consensus)

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[84] S.S. Lotus (France v. Turkey), PCIJ Series A No. 9 (1927); Nuclear Weapons, *supra* note 72, paras. 22-24; Kosovo Advisory Opinion, *supra* note 4, para. 56. *See contra*, Declaration of President Bedjaoui, para. 12 in the Nuclear Weapons opinion and Declaration of Judge Simma in the Kosovo opinion.

[85] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, General List No. 140, para. 134. *But see* an alternative use of effectiveness in the Dissenting Opinion of Judge Cançado Trindade to that same judgment.

[86] The Genocide Case, *supra* note 1, Judgment, I.C.J. Reports 2007, p. 43, paras. 166-167. *See contra*, Joint Declaration of Judges Shi and Koroma, Separate Opinion of Judge Owada, and Declaration of Judge Skotnikov.

[87] Scholars are divided as to whether such customary norm in fact exists. Defending the non-existence of a customary obligation, *see* Roger O'Keefe, *World Cultural Heritage Obligations to the International Community as a Whole?*. 53 ICLQ 189 (2004). Arguing that this norm exists, *see* Francesco Francioni and Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14(4) EJIL 619 (2003).

[88] *See*, e.g., Francesco Francioni and Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14(4) EJIL 619 (2003).

[89] *See* Roger O'Keefe, *World Cultural Heritage Obligations to the International Community as a Whole?*. 53 ICLQ 189 (2004).

immediately following the destruction of the Buddhas, condemning that act and similar ones that might occur in the future.

Teams might mention the Preah Vihear case before the ICJ. At the time of the original judgment in 1962, cultural heritage considerations were dismissed. Now, nearly 50 years later, the cultural importance of the Preah Vihear Temple cannot come up in the case currently before the ICJ because of jurisdictional constraints, but it is an important trigger behind the renewed dispute. The dispute was reignited during the negotiations that led to the inscription of the Temple on the World Heritage List in 2008. The Temple was damaged during the conflict and in July 2011, the ICJ issued an order for provisional measures requiring, *inter alia*, that troops from both Cambodia and Thailand be removed from the Temple area. Judge Cançado Trindade remarked on the Temple's importance and outstanding universal value, indicating even that "[t]he prohibition of destruction of cultural heritage of an outstanding universal value and great relevance for humankind is arguably an obligation *erga omnes*."[90]

Against this background, teams should be expected to argue for or against a customary norm. Aprophe might rely on the traditional demand for custom to be proven by reference to state practice and *opinio juris*.[91] It may argue there has been no verifiable practice of State abstention from destroying World Heritage sites out of a sense of legal obligation. Aprophe may also argue that the declarations by UNESCO member States are not dispositive since they do not in and of themselves provide evidence of practice, and in any event include the opinions of States whose interests are not specially affected.

Rantania may instead show that more recent ICJ cases have established the existence of custom by reference to declarations made by IOs such as the UN.[92] Other international tribunals, such as the ICTY, have also found the existence of custom by reference to treaties, declarations by States and IOs, and internal judicial decisions. Among many other customary norms, they have found that international law prohibits the destruction of cultural property, regardless of its location.[93]

Rantania may also argue that Aprophe has destroyed cultural property in violation of Article 53 of Additional Protocol I and Article 16 of Additional Protocol II to the Geneva Conventions of 1949, which are binding on Aprophe, and Article 27 of the Hague Regulations of 1907 and the Hague Convention of 1954, which apply as custom. Rantania may cite the judgment of the ICTY Trial Chamber in the *Strugar* case applying these provisions to the destruction of Old Town Dubrovnik.[94] Aprophe may counter that the 1954 Hague Convention contains an exception for military necessity (discussed *infra)*, and that the provisions of the Geneva Conventions and their Protocols only apply during international armed conflict, and present arguments as to why this situation does not rise to the level defined in Common Articles 2 and 3. Both sides may also address the distinction that other courts, in particular the ICTY, have applied these laws against individuals through criminal liability, not States.

iv. May the destruction of a cultural site, if unlawful, be otherwise justified?

If the destruction was internationally wrongful, Aprophe will argue that at least one of the various circumstances precluding wrongfulness found in ASR Articles 20-25 apply. They are: Consent, Self-defense, Countermeasures, Force Majeure, Distress, and Necessity. The 1954 Hague Convention refers to "military necessity." It is worth noting that the WHC does not contain any exception for necessity, military or otherwise.

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[90] Citing the article by Francesco Francioni and Federico Lenzerini, *supra.*

[91] *North Sea Continental Shelf,* Judgment, I.C.J. Reports 1969, p. 3.

[92] Some examples are the *Nicaragua* case and *Nuclear Weapons* opinion. For further reading, see Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL (2001) 757.

[93] *Prosecutor v. Strugar,* Case No. IT-01-42-T, Trial Judgment (31 Jan 2005), paras. 298-312. This case, however, dealt with the crime of destruction of cultural property by a military officer of one country (Yugoslavia) against the cultural property of another (Croatia). Good teams might try to make this distinction.

[94] Id.

a. Consent

Applicants may argue that by continuing the aerial bombardment of Aprophe after Andler issued her statement, Rantania acquiesced or consented to the destruction of the temple. The ASR requires consent be given before the fact and acquiescence is silence after the fact.[95] Neither situation clearly applies here.

b. Self-Defense

Aprophe might defend its actions under the principle of self-defense present in Article 21 of the ASR and Article 51 of the UN Charter. Self-defense requires: an armed attack, necessity, and proportionality. Teams may discuss the armed attack and proportionality elements, but this argument will likely hinge on whether Andler's actions were strictly necessary. A "military necessity" argument also arises as a potential exception to liability under the 1954 Hague Convention. Both these arguments are very similar to the Necessity argument *infra*.

c. Countermeasures

Aprophe will likely argue the destruction of the Temple can be justified as a countermeasure against the attacks by ENI/Rantania. Rantania will argue that, even if it could be considered a countermeasure, it fails to meet the proportionality tests (ASR Art. 51), especially given the importance of the Mai-Tocao Temple as the world heritage of mankind. There may also be a discussion as to whether the obligation to "call on the responsible State" stipulated by ASR Art. 52 has been met.

The relevant provisions on countermeasures include: they must be made against a State to induce that State to comply with its international obligations,[96] are limited to the non-performance of certain obligations by the State making the countermeasure,[97] they must, as far as possible, be reversible to allow resumption of all obligations involved,[98] they cannot be the use of force or a reprisal,[99] they must be proportional,[100] and there must first have been a call for compliance and offer to negotiate.[101] These provisions largely reflect customary law and teams should be prepared to discuss each requirement in turn.

d. Force Majeure

Force majeure requires an unforeseen event, beyond the control of the State, which makes it materially impossible for the State to perform its obligations under the circumstances.[102] Force majeure does not apply if the State making the claim either created the situation or assumed the risks of the situation.[103] Though warfare can amount to force majeure, it will be difficult for Aprophe to establish that Operation Uniting for Democracy made it materially impossible for Aprophe to comply with its obligation to protect cultural heritage property under the World Heritage Convention and customary international law or that Aprophe did not create the situation or assume the risk.

e. Necessity

A State may only invoke necessity to preclude wrongfulness when its action was the only way to safeguard an essential interest against grave peril, the action does not impair an essential interest of the State towards which its obligation exists, and the State did not contribute to the situation.[104] The 1954 Hague Convention refers to "imperative

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[95] ASR, *supra* note 27 art. 20.
[96] Id., art. 49(1).
[97] Id., art. 49(2).
[98] Id., art. 49(3).
[99] Id., art. 50(1)(a) and (c).
[100] Id., art. 51
[101] Id., art. 52(1)(a) and (b).
[102] Id., art. 23.
[103] Id.
[104] Id., art. 25.

military necessity," and "unavoidable military necessity."[105] The Second Additional Protocol states that imperative military necessity may only be invoked to direct an act of hostility against cultural property when that cultural property has, by its function, been made into a military objective and there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.[106] Similar arguments will apply under any standard of necessity. Applicant will have a difficult time establishing that it did not contribute to the situation, that the temple was the only place Andler could flee to, and that destroying the temple was the only way to obtain military advantage and safeguard an essential interest.

[105] 1954 Hauge Convention, arts. 4(2), and 11(2)

[106] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, art. 6, 26 March 1999.

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

2500 – 2000 BCE	- Evidence of permanent human habitation at Mai-Tocao site as early as this period. The Mai Tocao temple and surrounding area has great historic and religious significance to inhabitants in the region. (¶3)
1698	- Aprophe founded. (¶1) (NOTE: The date of Rantania's founding is never given)
c. 1700 – 1962	- Border conflicts between Aprophe and Rantania of various scales. (¶4)
1960	- Aprophe and Rantania become parties to the UNESCO Constitution. (Clarification 1)
August 1962	- Mai Tocao War begins. (¶5)
1962-1964	- Skirmishes occurred on Aprophe-Rantania border, resulting in hundreds of civilian casualties and the destruction of several towns and villages. (¶5) - Security Council declared itself seized of the matter of the Mai Tocao War. (¶5) - Aprophian Army secured and pacified Mai Tocao site, occupied undisputed Rantanian territory, and placed 500 Rantanian peasants into forced labor. (¶6)
July 1965	- Conflict reaches a stalemate. Aprophe and Rantania resort to UN Secretary General and engage in peace negotiations. (¶7)
End of Year 1965	- Aprophe and Rantania conclude Peace Agreement (the 1965 Treaty). (¶7)
1966	- Both Aprophe and Rantania are admitted to the United Nations. (¶47) - Both are parties to the Vienna Conventions on Diplomatic and Consular Relations. (¶47)
1968	- Arbitral Tribunal called by 1965 Treaty reaches decision on Aprophe and Rantanian border, placing Mai Tocao site within Aprophe, as well as a portion of previously undisputed Rantanian territory. (¶9) - Hundreds of Rantanian villagers are relocated to the Rantanian side of the border. (¶9) - Aprophe becomes a party to the Geneva Conventions of 1949. (¶47)
1970	- Both Aprophe and Rantania are parties to the Vienna Convention on the Law of Treaties. (¶47)
1971	- Aprophe becomes a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. (¶47)

1976	- Rantania becomes a party to the Geneva Conventions of 1949, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. (¶47)
1980	- Rantania, Lamarthia, Verland, and Pellegrinia ratify Eastern Nations Charter of Human Rights, establishing the Eastern Nations Court. (¶10)
1983	- Aprophe and Rantania become parties to 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention"). (¶47)
1986	- Rantania elected to World Heritage Committee for three-year term. (¶11) - Aprophe proposed that Mai Tocao site be inscribed on World Heritage List. (¶11)
1988	- Mai Tocao inscribed in the World Heritage List with support of both Aprophe and Rantania. (¶12)
1990	- Rantania, Lamarthia, Verland, and Pellegrinia created Eastern Nations International Organization (ENI). (¶13)
November 2000	- Aprophian Senator Mig Green elected as President of Aprophe. (¶14)
January 2001	- Green's representatives met with ENI Council, receiving a list of preconditions for Aprophe's application for membership. (¶14)
2001-2006	- Green instituted a number of measures in Aprophe to meet preconditions for membership in the ENI, including acceding to the Eastern Nations Charter in 2005, though not subjecting itself to the compulsory jurisdiction of the Eastern Nations Court until full membership is achieved. (¶15)
August 2001	- "Our Forgotten Workers" is released, a documentary bringing to the public's attention the story of the Rantanian military internees, and attracting attention of the International League for Solidarity and Access (ILSA), a Rantanian advocacy group. (¶16)
November 2001	- ILSA instituted proceedings against Aprophe in local Aprophian court on behalf of former Rantanian military internees. (¶17)
June 13, 2002	- After the Aprophian trial court granted a motion to dismiss ILSA claim in light of Aprophe's statute of limitations, the Aprophian Supreme Court affirmed this decision. (¶17)

June 2002	- ILSA instituted proceedings in Rantania. Trial Court subsequently dismissed on grounds of Article XV of the 1965 Treaty. Rantanian Supreme court affirmed this decision. (¶18)
2004	- Aprophe signed but did not ratify the United Nations Convention on Jurisdictional Immunities of States and Their Property. (¶47)
2006	- Labor unions, opposition political parties, and nationalist groups within Aprophe routinely organize strikes and demonstrations to protest the measures to join ENI. (¶15, Correction 1)
January 2009	- After considering a petition filed by ILSA against Rantania on behalf of the military internees, the Eastern Nations Court determined that denying petitioner's right to reparations on the basis of the 1965 Treaty amounted to a denial of justice and instructed the Supreme Court of Rantania to proceed in a manner consistent with this decision. (¶19)
December 12, 2009	- Following the instruction of the Rantanian Supreme Court, a Rantanian trial court considered Rantania's defense of sovereign immunity, holding that the doctrine of sovereign immunity does not extend to violations of peremptory norms of international law. (¶20) - Rantania's trial court rules in favor of the former military internees, awarding damages. Aprophe did not participate in these proceedings or appeal the decision. (¶20)
December 2009	- Aprophe's Minister of Foreign Affairs denounced the Rantanian trial court decision. (¶21) - Rantanian trial court granted an indefinite stay of enforcement of the judgment upon the request of the Rantanian Foreign Ministry. (¶22)
2010	- In response to the outcome of the lawsuit, anti-Rantanian sentiments within Aprophe strengthened. Dissident factions in Aprophe staged several nationwide strikes calling for Green's resignation. (¶23)
November 2010	- National poll of Aprophe indicates 60% of Aprophians favor efforts to join ENI. (¶23)
January 10, 2011	- Responding to strikes, Green invokes emergency powers announcing the postponement of the March 2011 elections by one year. (¶24)
January 13, 2011	- Green ordered Aprophian military to patrol major urban areas "to prevent and quell civil unrest." (¶24)

January 15, 2011	- Major Aprophian newspapers publish an open letter from General Paige Andler, chief of staff of the Aprophian armed forces, describing suspension of elections as a clear attempt to subvert the will of the people. The letter ended stating that the military would not carry out Green's order to prevent and quell civil unrest. (¶25) - Green immediately fired Gen. Andler in response to the open letter. (¶26)
January 16, 2011	- In the morning, national police officers arrive at Andler's apartment in Aprophe's capital and were turned away by armed soldiers loyal to Andler. (¶26) - In the evening, Army units loyal to Andler entered Presidential Palace and other government installations. (¶27) - Green and ministers fled to Rantania overnight. (¶27)
January 17, 2011	- Andler declares herself interim president of Aprophe and suspended pro-ENI measures instituted by ENI. (¶27)
January 18, 2011	- In face of opposition in parliament and in the Capital's streets, Andler declared a state of emergency and dissolved parliament, promising that new elections would be "called soon." (¶28)
January 18-20, 2011	- Forty Aprophian Ambassadors renounced Andler and declared allegiance to Green. (¶29) - Andler's government established order over 90% of Aprophian territory, including the armed forces in and around the capital. Approximately 800 soldiers in outlying regions remained loyal to Green and established bases in two villages in the north of Aprophe. Pro-Green civilians migrated to these villages. (¶29)
January 20, 2011 – February 10, 2011	- Small-scale fighting between pro-Andler and pro-Green forces took place. (¶30) - Andler's assaults on pro-Green units were condemned by several nations. (¶31)
January 20, 2011	- Andler ordered 2,000 troops to the two villages to confront the pro-Green military. Andler's troops demanded surrender. No troops loyal to Green surrendered. (¶31) - Green announced the formation of a government in exile in Rantania. (¶31)
January 22, 2011	- After requests by Green to intervene to end the fighting and restore his government, Rantania introduced a resolution before the ENI Council, stating that any response be undertaken by ENI rather than any individual Member State. The resolution passed unanimously, recognizing Green as the lawful President of Aprophe. (¶31)
January 23, 2011 – September 12, 2011	- Each ENI Member State and 27 other nations formally announced that they would conduct diplomatic relations only with the Green regime. By September 12, 2011, 14 nations recognized Andler's government. (¶31)

January 23, 2011 - Andler denounces ENI resolution. Aprophe denounced Eastern Nations Charter. (¶32)

January 29, 2011 - UN General Assembly adopted Resolution A/RES/65/598 condemning Andler's actions and calling upon "the Security Council to consider immediate action under Chapter VII of the UN Charter to preserve peace and restore constitutional order of Aprophe." (¶33)

February 10- 13, 2011 - Aprophian army launched artillery strikes against pro-Green villages, killing 60 soldiers and 80 civilians and injuring hundreds more. (¶34)

- Green urged ENI Council to take immediate steps to prevent "an imminent humanitarian crisis." (¶34)

February 15, 2011 - Rantania proposed and ENI Council approved "Activation Orders" for air strikes against military targets under Andler's control. At Rantania's suggestion, the Council appointed a Rantanian national to head the campaign as Force Commander. (¶35)

- Rantania's President Perego requested that Rantania's judiciary lift its stay of enforcement proceedings of the ruling in favor of the former Rantanian military internees. This motion was granted and bailiffs seized US$10,000,000 in non-diplomatic property of the government of Aprophe located in Rantania. (¶36)

February 18, 2011 - "Operation Uniting for Democracy" began, consisting of around-the-clock air strikes against verified pro-Andler military installations in and around the Capital of Aprophe. This campaign was conducted almost entirely by the Rantanian Air Force. (¶37)

February 18-25, 2011 - Operation Uniting for Democracy destroyed 14 of 15 military installations near Aprophe's capital and killed 50 soldiers. There were no civilian casualties. (¶38)

February 25, 2011 - An independent military think tank reported that Aprophe's military was effectively destroyed. (¶38)

- UN Security Council met in emergency session to discuss "the escalating cycle of violence in Aprophe." (¶38)

February 27, 2011 - Andler and staff fled from the capital to the Mai Tocao National Park. (¶39)

February 28, 2011 - Major-General Brewscha, the ENI Force Commander, announced that rather than risking damage to the Mai Tocao site through aerial bombardment, ENI ground forces would be mobilized within days to enter Aprophe and capture Andler. (¶39)

- Andler announced her intention to destroy one building in the Mai Tocao temple every other day as long as ENI military operation continued. (¶40)

March 1, 2011 - UN Security Council adopted resolution condemning Operation Uniting for Democracy and calling upon the ENI Member States to end the Operation. (¶41)

March 3, 2011	- After continued aerial bombardment near Marcelux, Andler had one of the smaller buildings in the Mai Tocao complex destroyed, without casualties. (¶42)
March 4, 2011	- The World Heritage Committee issued a press release calling the March 3 detonation at the Mai-Tocao site "tragic." (Clarification 4)
March 5, 2011	- Rantania's President condemned damage to Mai Tocao Temple and ordered an immediate grounding of the Rantanian air force. ENI Council formally suspended Operation Uniting for Democracy. (¶43)
March 5 – May 12, 2011	- Andler's government returned to Aprophe's capital. (¶44)
May 12, 2011	- Aprophe filed an application with the ICJ Registry instituting proceedings against Rantania, signed by Andler as "Interim President of Aprophe." (¶44) - After receipt of Application, the Rantanian Attorney General declared Rantania would not consent to jurisdiction of the Court. (¶45)
July 1, 2011	- Facing public pressure, the Rantanian Attorney General announced it would engage Aprophe before the ICJ on condition that Aprophe agree to jointly submit the compromis. (¶46)
July 20, 2011	- Aprophe withdrew its application to the ICJ. (¶46)
July 20 – September 12, 2011	- Parties met, negotiated, and agreed to the Compromis. (¶46)

Appendix C: Guide to People, Places, and Acronyms

Andler, Paige

Interim President of Aprophe, formerly chief of staff of the Aprophian armed forces. Led military overthrow of President Mig Green's government on January 17, 2011.

Aprophe Applicant state, a developing nation of about 50 million people, located to the immediate west of Rantania.

Barrow, Ken A.

Aprophian Minister of Foreign Affairs.

Brewscha, Otaz

Major-General of the Rantanian armed forces. Appointed as Force Commander of Operation Uniting for Democracy.

Eastern Nations Charter of Human Rights

Treaty between Rantania, Lamarthia, Verland, and Pellegrinia that established the Eastern Nations Court, a regional human rights court.

Eastern Nations International Organization (ENI)

Regional organization devoted to strengthening economic cooperation and political ties among its members, Rantania, Lamarthia, Verland, and Pellegrinia. The Treaty Establishing the ENI (Annex III) guarantees free movement across borders for citizens of ENI Member States and contains a mutual defense pact.

ENI see Eastern Nations International Organization.

Gateau, Odelle

Rantanian Attorney General.

Ginyo, Fro Rantanian filmmaker who produced the documentary "Our Forgotten Workers" bringing to public attention the story of the Rantanian military internees.

Green, Mig Aprophian Senator elected as Aprophe's President in November of 2000. Instituted a series of measures designed to gain Aprophian admittance to the ENI. Overthrown by General Paige Andler's military coup in January of 2011. Set up government in exile in Rantania.

ILSA see International League for Solidarity and Access.

International League for Solidarity and Access (ILSA)

A Rantanian advocacy group whose mission includes initiating litigation on behalf of victims of alleged human rights abuses. ILSA initiated proceedings in Aprophe, and subsequently in Rantania, on behalf of the Rantanian military internees depicted in the documentary "Our Forgotten Workers."

Lamarthia Neighboring state to Rantania and fellow member of the Eastern Nations Organization.

Mai-Tocao Temple

Famous religious and archeological site located near modern Aprophian-Rantanian border. Consists of a complex of six small stone buildings and one central temple. Regarded as central to the cultural heritage of both Aprophian and Rantanian nationals. Subject of 300 years of contention between Aprophe and Rantania. Namesake of the "Mai –Tocao War," and inscribed on the World Heritage List in 1988. One of the six small stone buildings was destroyed in 2011 by Interim Aprophian President Paige Andler as an attempt to stop Operation Uniting for Democracy.

Mai-Tocao War

Border conflict between Aprophe and Rantania that lasted from August 1962 – July 1965. During the conflict, Aprophe secured and pacified the Mai-Tocao Temple site and rounded up Rantanian villagers living nearby. More than 500 Rantanian peasants were forced to labor to provide goods and services to the Aprophian military. This conflict was ended by the Peace Agreement of 1965.

Marcelux The capital city of Aprophe.

National Homeland Brigade

Lightly armed Aprophian brigade ordinarily tasked with patrolling Aprophian borders. 800 members of the National Homeland Brigade remained loyal to Mig Green during General Andler's military overthrow of Green's government.

"Our Forgotten Workers"

Award-winning documentary that brought to public attention the story of the Rantanian military internees. Released in August 2001.

Operation Uniting for Democracy

Military air-strike campaign conducted by the Eastern Nations Organization that targeted Aprophian military forces loyal to General Paige Andler.

Perego, Sue

Rantanian President.

Quick Reactionary Forces (QRF)

Elite Aprophian military force remaining loyal to General Andler.

QRF see Quick Reactionary Forces.

Rantania Respondent state, a federal state with a developing industrial economy and a population of 90 million, located to the immediate east of Aprophe. Member of the Eastern Nations Organization.

Rantanian Military Internees

A group of Rantanian civilians that were captured by Aprophian soldiers during the Mai-Tocao War. These internees were forced to labor to provide goods and services to Aprophian military forces. Sued the governments of Aprophe, and subsequently Rantania, over this internment.

Pellegrinia Neighboring state to Rantania and fellow member of the Eastern Nations Organization.

Sterfel Institute

Independent military think tank operating within Aprophe.

Turbando, et al., v. The Republic of Aprophe

Lawsuit on behalf of 60 former Rantanian military internees alleging that the plaintiffs had been forced to engage in uncompensated labor for the Aprophian military. This lawsuit was brought by ILSA in the Rantanian courts.

Verland Neighboring state to Rantania and fellow member of the Eastern Nations Organization.

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 preparatoires*? When are the records of the drafting and negotiations of a treaty relevant?
6. When interpreting a treaty, does the Court look to the plain meaning, or the intent?
7. What specific remedies is the Applicant/Respondent seeking? Is the ICJ permitted by its Statute to grant those remedies?
8. What is the basis of standing for the party seeking relief?
9. What is the standard of proof with respect to this issue? Which party bears the burden of proof?
10. If this Court determines that the lack of factual certainty allows multiple, conflicting inferences, what should this Court do then?
11. 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. Substantive Questions

1. Is it appropriate for the ICJ to make a ruling on the destruction of the temple absent further comment from the World Heritage Committee (which is responsible for implementing the World Heritage Convention)?
2. The Friendly Relations Declaration, GA Res 2625, says that no State has the right to intervene "for any reason whatsoever" in the domestic affairs of another State. Isn't that exactly what Rantania has done here through ENI?
3. Can a head of State consent to the use of force against his or her own people? If so, is there a limit?
4. Is there any rule of international law restricting what a State may do to cultural heritage sites within its own boarders?
5. For this Court's purposes, does it legally matter if Andler has or has not been recognized as the Head of State by other States?
6. Does the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict apply to this situation when neither State is a party to that convention?
7. Aprophe acceded to the Eastern Nations Charter with a reservation to the jurisdiction of the Eastern Nations Human Rights Court, was this reservation valid? Is Aprophe bound by the Eastern Nations Court's decisions? By its interpretations of law?
8. In Article XV of the 1965 Peace Treaty, the parties waived all claims for themselves and for their citizens. Does a State have the right to waive the individual claim of a citizen? Does it matter when the waiver was made?
9. Can the destruction of the Mai-Tocao building be a valid countermeasure even if the destruction of the temple was irreversible, i.e. did it allow the "resumption of performance of the obligations in question?"

10. Was the destruction a measure taken *against a State* (i.e. Rantania) if the World Heritage Site concerns humanity as a whole?
11. Was the destroying the temple proportional? If so, to what?
12. Is hostage taking legal in international Law? Isn't that was Andler did with the temple?
13. Are the obligations to respect cultural property "peremptory norms of general international law" such that no countermeasures may be taken affecting the performance of those obligations?
14. If Andler is the legitimate government (QP 1), how can her actions not be attributable to Aprophe (QP 4)? Conversely, is Andler is not the legitimate government (QP 1), how can her actions be attributable (QP 4)?
15. Does a government need a military to be legitimate (at least 14 States have no official military, at least 5 more have no standing army)?
16. If agents cite Hersch Lauterpacht's 1947 RECOGNITION IN INTERNATIONAL LAW, has recognition changed in form or function since then? Similar question for other pre modern-era works.