

BENCH MEMORANDUM

**THE CASE CONCERNING THE NAEGEA SEA
(Union of Ambrosia v. Republic of Rovinia)**

VERSION DATED 5 JANUARY 2025

****CONFIDENTIAL****

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2025 PHILIP C. JESSUP INTERNATIONAL
LAW MOOT COURT COMPETITION**

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I. INTRODUCTION

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The purpose of this document is to provide judges with a guide for some of the claims that teams might raise within their Memorials or oral round pleadings.

This document is by no means exhaustive. Teams are likely to come up with other arguments and quote other sources. It is important for judges to keep an open mind, while requiring teams to substantiate their arguments with appropriate facts and law.

II. QP1 and QP2

| Ambrosia’s prayers for relief | Rovinia’s prayers for relief |
|---|--|
| <p>(a) The Court has jurisdiction to entertain Ambrosia’s submission (b).</p> <p>(b) Rovinia violated the international legal rules on jurisdiction and immunity by arresting and prosecuting Ms. Gertrude Cross.</p> | <p>(a) The Court lacks jurisdiction to entertain Ambrosia’s submission (b) because it is outside the scope of the compromissory clause of the OCDP Charter.</p> <p>(b) Rovinia’s assertion of criminal jurisdiction over Ms. Cross, and her arrest and prosecution, are fully consistent with international law.</p> |

A. Timeline of Relevant Facts

| Date | Event | Ref. |
|------------------------|--|--------------|
| 2013 | Ambrosia’s President Derey ordered Interior Minister Cross (who oversees the National Police) to take “all necessary and lawful measures to apprehend persons engaged in illicit drug production, distribution, and use.” Cross launched the “Implementing the Law for a Safer Ambrosia (ILSA) program” to fulfil this task. | SAF, para. 8 |
| 17 March 2016 | The OCDP Charter, with the exception of the compromissory clause, entered into force. | para. 10 |
| June 2017 to July 2020 | The Ambrosian police abducted more than 150 Ambrosian citizens suspected of drug trafficking from their homes under the ILSA program. They were held in an undisclosed location without formal charges. The last abductee was released in December 2020. | para. 25 |
| 17 March 2021 | The OCDP Charter compromissory clause became effective. | para. 10 |
| Aug. 2022 | The NGO Human Rights International (HRI) published a report exposing for the first time the enforced disappearances under the ILSA program. | para. 25 |
| Sept. 2022 | The Ambrosian Prosecutor General launched a criminal investigation with the support of Acting President Zavala and published an interim report. The report included interviews with the former detainees and stated that between June 2017 and December 2020 family members of the missing persons had inquired with the National Police about the whereabouts and were merely “assured that their concerns would be addressed.” | para. 27 |
| Nov. 2022 | Minister Cross resigned and moved with her family to Rovinia. | para. 27 |
| Jan. 2023 | The Prosecutor General’s investigation concluded. He filed charges against five police officers for the crime of “kidnapping,” alleging that the officers rounded up the alleged victims and held them in an abandoned prison compound in the Blackwood Forest. | para. 28 |

| Date | Event | Ref. |
|-------------|--|-------------|
| | The officers were convicted and are currently serving lengthy prison sentences. The Prosecutor General concluded that there was insufficient evidence to support criminal charges against former Minister Cross. | |
| June 2023 | HRI published an update to its 2022 Report providing new evidence of the direct involvement of Cross in the abduction of Ambrosian nationals and alleging that the Ambrosian Prosecutor General had access to some of this evidence when he closed the investigation in January 2023. | para. 50 |
| June 2023 | Zavala stated that she was “appalled” by “deeply troubling” accusations against Cross and called on the Prosecutor General to reopen his criminal investigation. | para. 51 |
| June 2023 | Piretis reacted to the HRI Second Report, stating that the accusations were “significant,” but “now is not the time to jump to conclusions.” She noted that ILSA was an essential program for the stability of Ambrosia and the security of the region. | para. 52 |
| Dec. 2023 | Having returned to office, Derey stated he “knew nothing of the former Minister’s alleged involvement in wrongdoing” and maintained that the Ambrosian legal system was equipped to carry out an independent assessment of what happened. He reminded Ambrosians that “Ms. Cross was a loyal servant of the people” and ILSA saved many lives. | para. 57 |
| Jan. 2024 | Former Blackwood abductees posted a statement on X accusing President Derey of turning a blind eye to Cross’s crimes and asking that Cross be held accountable in Rovinia, where she now resided. | para. 60 |
| May 2024 | Rovinia’s General Prosecutor filed a complaint against Cross for the crime of “enforced disappearance.” One day later, the Permola Criminal Court found the complaint admissible and issued an arrest warrant. She was taken into custody where she remains to this day. | para. 61 |
| May 2024 | President Derey wrote to President Slimm of Rovinia demanding that Cross be immediately released and returned to Ambrosia. | para. 62 |
| May 2024 | President Slimm “respectfully decline[d] to release Ms. Cross.” | para. 63 |

B. QP1: The Court’s Jurisdiction

The jurisdiction of the Court is founded in Article 36, paragraph 1, of the Statute of the ICJ, and Article XXI of the OCDP Charter (SAF, para. 66).

Article XXI of the OCDP Charter states as follows:

- (a) Except as provided in paragraph (b), the Member States recognize, in relation to any other Member State, the jurisdiction of the International Court of Justice as

compulsory ipso facto, without the necessity of any special agreement, in all disputes of a juridical nature that may arise among them.

(b) The Member States do not recognize the jurisdiction of the Court in connection with disputes: (i) arising out of facts or situations occurring prior to the entry into force of this Article; or (ii) relating to judicial proceedings on matters which, in accordance with international law, are essentially within a Member State’s domestic jurisdiction.

(c) This Article shall become effective five years after the entry into force of the present Charter.

1. Key Claims

| Ambrosia | Rovinia |
|--|--|
| <p>The Court has jurisdiction <i>ratione temporis</i> and <i>ratione materiae</i> under Article XXI of the OCDP Charter to entertain the claims in submission (b), namely that Rovinia violated the international legal rules on jurisdiction and immunity by arresting and prosecuting Cross.</p> | <p>The Court has no jurisdiction <i>ratione temporis</i> and <i>ratione materiae</i> under Article XXI of the OCDP Charter to entertain the claims in submission (b).</p> |

2. Preliminary Issues on which both Teams should agree

- The jurisdiction of the Court is **not** based on a Special Agreement concluded by the Applicant and the Respondent. The Statement of Agreed Facts (SAF) is not a Special Agreement or *Compromis* granting jurisdiction to the Court. The Court’s jurisdiction is founded on Article XXI of the OCDP Charter in conjunction with Article 36(1) of the ICJ Statute (“*The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in . . . treaties and conventions in force*”).
- The objection raised by Rovinia in QP1 is limited to submission (b). Therefore, there is **no** jurisdictional objection regarding submissions (c) and (d). Applicant and Respondent agree that the Court has jurisdiction to entertain the claims in submissions (c) and (d), and that those claims are admissible.
- There is no question regarding the existence of a dispute. According to President Derey, the issues submitted to the Court are “disagreements of law and fact, which, according to the OCDP Charter . . . should be addressed and decided by a court of law” (SAF, para. 66). Rovinia does not dispute this characterization, but instead raises **limited** objections to the jurisdiction *ratione temporis* and *ratione materiae* of the Court (SAF, para. 67). Teams should identify that it is possible to make two distinct objections with regard to submission (b).

3. Jurisdiction *ratione temporis*

The question for the Court is whether QP2 “aris[es] out of facts or situations occurring prior to the entry into force” of Article XXI of the OCDP Charter. This objection corresponds to (i) of paragraph (b) of Article XXI of the OCDP Charter.

i. Key Facts

- The abductions of Ambrosian citizens took place between June 2017 and July 2020, and the last of the abductees were released in December 2020 (SAF, para. 25).
- The HRI Second Report suggests that Cross would have been involved in the abductions throughout that entire period (SAF, para. 50).
- The OCDP Charter compromissory clause became effective on 17 March 2021 (the “critical date”).
- In May 2022 Rovinia’s General Prosecutor filed a complaint against Cross for the crime of “enforced disappearance,” as incorporated in Rovinian domestic law. The complaint was found admissible, and an arrest warrant was issued. President Derey wrote to President Slimm of Rovinia demanding Cross’s immediate release, and President Slimm declined the request.

ii. The Main Arguments

| Ambrosia: | Rovinia: |
|--|--|
| <p>The dispute between the Parties, according to SAF, paras. 66-67 and submission (b), concerns alleged violations of the “international legal rules on jurisdiction and immunity.”</p> <ul style="list-style-type: none"> - The dispute “arose” when President Derey requested that Cross be returned to Ambrosia and President Slimm refused. This indisputably occurred after the “critical date” (entry into force after Article XXI on 17 March 2021). - The dispute also “aris[es] out of facts or situations” that occurred after the critical date. The “fact or situation” out of which the dispute arises is the exercise of criminal jurisdiction by Rovinia through the arrest and prosecution of Cross. There are no “facts or situations” prior to the critical date regarding the exercise of jurisdiction and immunities. <p>Ambrosia’s and Rovinia’s sole dispute is whether Rovinia’s conduct violates rules of jurisdiction and immunity of government officials. The Parties do not dispute the legality of the ILSA campaign or the legality of Cross’s conduct. Nor does Ambrosia dispute the legality of the Rovinian statute criminalizing enforced disappearances.</p> | <p>The Respondent can raise two main arguments:</p> <p>Argument 1:</p> <p>The dispute “aris[es] out of facts or situations” that occurred before the “critical date,” namely the acts of enforced disappearance of which Cross is accused in the criminal complaint (para. 67).</p> <p>If it weren’t for the commission of enforced disappearance, Rovinia would not have filed criminal charges against Cross, and consequently, there would be no dispute concerning the exercise of jurisdiction and immunity. The prosecution of Cross is a consequence of the acts of enforced disappearance.</p> <p>In deciding whether the Respondent breached its obligations concerning jurisdiction and immunity, the Court will necessarily examine acts, and decide on factual claims relating to those acts, which took place before the “critical date,” which is inconsistent with the rule of non-retroactivity.</p> <p>Argument 2:</p> <p>Rovinia acted pursuant to its obligation to prosecute under the ICPED. That</p> |

| Ambrosia: | Rovinia: |
|--|---|
| <p>The fact the enforced disappearance occurred prior to the critical date is completely irrelevant, because the commission of the crime is not the “real cause” of the dispute concerning the exercise of jurisdiction and application of immunity.</p> <p>Ambrosia’s argument is consistent with the rule of non-retroactivity. The acts of enforced disappearance are not at issue in the present case. The Court has not been asked for any finding with regard to conduct prior to 17 March 2021 and will only have to pronounce on Rovinia’s conduct after that day.</p> | <p>obligation arose the moment the acts of enforced disappearance were committed, which was before the entry into force of Article XXI of the OCDP Charter.</p> <p>In this sense, the “fact of situation” that gave rise to the dispute between the Parties is the existence of an obligation to prosecute under the ICPPED, which occurred before the “critical date.”</p> <p>For either reason, there is no jurisdiction <i>ratione temporis</i>.</p> |

iii. Legal Analysis

Article XXI of the OCDP Charter establishes a temporal limitation to the Court’s jurisdiction. Teams should be aware of the rule of non-retroactivity, according to which the provisions of a treaty do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty (Vienna Convention on the Law of Treaties, art. 28). Although there is some discussion concerning the application of this rule to compromissory clauses, in the present case, the rule has been explicitly incorporated into Article XXI of the OCDP Charter: “the dispute Parties cannot arise out of facts or situations occurring prior to entry into force of the compromissory clause, namely 17 March 2021”.

The key question is how to interpret the phrase, “disputes arising out of facts or situations.” According to the well-established jurisprudence of the Court, these kind of temporal limitation clauses refer to the “**real causes**” of the dispute. Interstate disputes form a conglomeration of distant and recent causes, but the “facts of situations” from which the dispute arises generally refers to the facts or situations which **crystallized the dispute**. This approach was, for example, followed by the Court in the *Interhandel case (Switzerland v. United States of America)*, *Preliminary Objections, ICJ, Reports, 1959*, where the “crystallization of the dispute” was located on the last relevant fact, namely to the date of the refusal of a claim from the other party (pp. 20–22).

In making this argument, teams should be aware of the distinction between the facts giving rise to the rights in dispute and the facts giving rise to the dispute itself. The temporal limitation attached to Article XXI of the OCDP Charter refers to the latter and not the former. Therefore, in the present case, the facts giving rise to the rights in dispute should not constitute a restriction of jurisdiction.

Teams may point to the following relevant cases:

- ***Phosphates in Morocco (Italy v. France) PCIJ Series A/B. No. 74, 1938***: The parties agreed that the dispute between them arose subsequent to the date of the French declaration accepting the jurisdiction of the Court. The issue that divided them concerned the date of the “situations or facts” with regard to which the dispute arose, that is, whether *that* date was prior to or subsequent to the declaration. The Court found that the subject of the dispute was the so-called “monopolization of the Moroccan phosphates” and the inconsistency of that monopoly regime with earlier French treaty obligations. This regime was established by legislation adopted before the critical date. It was that legislation, the Court ruled, with regard to which the dispute arose. Thus, the Court found it had no jurisdiction.
- ***Electricity Company of Sofia & Bulgaria (Belgium v. Bulgaria) PCIJ Series A/B. No 77, 1939***: The respondent, Bulgaria, argued that arbitral awards issued by the Bulgarian Mixed Arbitral Tribunal, which pre-dated the “critical date,” had to be treated as the “situations” that gave rise to the dispute. The Court rejected that argument, reasoning that the arbitral awards constituted the “source of the rights” claimed by the applicant, but not the “source of the dispute.” The Court stated that “a situation or fact in regard to which a dispute is said to have arisen must be the *real cause of the dispute.*” It further noted that “a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact.” (p. 82). The Court found it had jurisdiction.
- ***Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: ICJ Reports 1960***: The Court held the facts or situations to which regard must be had are those with regard to which the dispute has arisen or, in other words, those which must be considered as being the source of the dispute (its “real cause”). The Court explained that prior to 1954, the situation of the Portuguese enclaves may have given rise to a few minor incidents, but passage had been effected without any controversy. It was only in 1954 that a controversy as such arose relating to the existence of a right of passage and to India's failure to comply with the obligation to respect that right. It was from this situation that the dispute arose, even if the right of passage already existed and minor incidents had occurred. The Court found it had jurisdiction.
- ***Arbitral Award of 31 July 1989 case (Guinea-Bissau v. Senegal), ICJ Reports 1991***: the crystallization of the dispute for the purpose of establishing jurisdiction was founded on the date of the contestation of the arbitral award and not on the date of crystallization of the distinct dispute that the award had decided on the merits (p. 61, para. 24). The Court found it had jurisdiction.
- ***Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I. CJ. Reports 2005***: The Court had to decide whether, under the European Convention for the Peaceful Settlement of Disputes, the present dispute related to facts or situations that arose before or after the 1980 critical date. The Court observed that it is not contested that the present dispute was triggered by the decisions of the German courts in the 1990s Pieter van Laer Painting case. However, the critical issue is not the date when the dispute was triggered, but the date of the facts or situations in relation to which the dispute arose. The Court concluded that, although these proceedings were instituted as a result of decisions by a German court in the Pieter van Laer case, those events had

their source in specific measures taken by Czechoslovakia in 1945, as well as in the special regime created by the Settlement Convention. The decision on the Pieter van Laer case (1990s) was taken on the basis of Article 3 of the Settlement Convention. While that case triggered the dispute between Liechtenstein and Germany, the source or real cause of the dispute is to be found in the Settlement Convention and the Benes Decrees. The Court found it had no jurisdiction (para. 52).

- ***Jurisdictional Immunities of the State (Germany v. Italy) ICJ Reports 2012***: the Court specified that the relevant facts for the crystallization of the dispute were the decisions of the Italian courts of 2004 and 2011, which were subsequent to the title of jurisdiction contained in the European Convention on the Settlement of Disputes of 1957. It did not consider for the purpose of jurisdiction the incriminatory fundamental facts, namely the acts committed by Germany during the Second World War, significantly predated the title of jurisdiction (p. 118, para. 44.) The Court found it had jurisdiction.

4. Jurisdiction *ratione materiae*

The question before the Court is whether the dispute between the Parties concerning the arrest and prosecution of Cross “relat[es] to judicial proceedings on matters which, in accordance with international law, are essentially within a Member State’s domestic jurisdiction.”

At the outset, both teams should understand that the purpose of the phrase “in accordance with international law” is to preclude Romania from arguing that this is a self-judging exception. In other words, this is an objective and not subjective (or self-judging) exception. The objective criteria for determining whether a dispute relates to matters which are essentially within a State’s domestic jurisdiction is international law. This formulation is analogous to several optional declarations made under Article 36(2) of the ICJ Statute (e.g.: Barbados, Botswana, Canada, Djibouti, Honduras, Poland, among others).

i. Key facts

- Both Parties have been parties to the ICPED “at all relevant times” (SAF, para. 68).
- Article 1 of the OCPD Charter stipulates that one of the purposes of the organization is to “enhance collaboration in law enforcement.”
- The investigation of Ambrosia’s Prosecutor General concluded with charges being filed against five police officers for the crime of kidnapping under the Ambrosian Criminal Code (SAF, para. 28), of which they were convicted.
- Romania’s General Prosecutor filed a complaint against Cross for the crime of enforced disappearance under the Romanian Criminal Code. She is being prosecuted in Romania and is currently in pre-trial arrest (SAF, para. 61).
- The investigation in Ambrosia against Cross continues to this date.

ii. Main arguments

| Ambrosia | Rovinia |
|---|---|
| <p>Two cumulative conditions need to be met for the <i>ratione materiae</i> exception of Article XXI:</p> <p>a) the dispute has to relate to judicial proceedings;</p> <p>and</p> <p>b) the judicial proceedings have to be on matters essentially within a Member State’s domestic jurisdiction.</p> <p>Applicants might quickly concede that the dispute relates to judicial proceedings, because the question of exercise of jurisdiction and immunity arise in the context of judicial proceedings in Rovinia. However, the dispute does not relate to judicial proceedings “<u>on matters essentially within a State’s domestic jurisdiction.</u>” Thus, the second condition fails.</p> <p>For Ambrosia, a dispute concerning alleged violations of the international legal rules on jurisdiction and immunity raises questions of international law. Whether a State, through its judiciary, lawfully exercised universal jurisdiction and whether, in doing so, violated any rules of immunity, are questions of international law. They do not relate to matters within a State’s domestic jurisdiction.</p> <p>Ambrosia does not seek a pronouncement from the Court on the merits of the criminal proceedings in Rovinia, which would be matters essentially within a State’s domestic jurisdiction. Rather, Ambrosia seeks only a pronouncement on two questions of international law, even if those questions arise in the context of ongoing judicial proceedings.</p> <p>The Applicant may also argue that the <i>ratione materiae</i> exception contained in</p> | <p>The dispute between the Parties is triggered by the arrest and prosecution of Cross. The decision to prosecute: (a) relates to a judicial proceeding, as charges have been brought against her, and (b) is a matter essentially within Rovinia’s domestic criminal jurisdiction.</p> <p>Condition (a) is less controversial, but condition (b) requires closer attention.</p> <p>The Respondent should argue that the dispute relates to judicial proceedings on matter “essentially” within its domestic criminal jurisdiction because the arrest and prosecution took place in Rovinian territory and the charges were brought only under the Rovinian Criminal Code (see SAF, para. 67).</p> <p>The <i>ratione materiae</i> exception of Article XXI does not require that an issue is “exclusively” within Rovinian domestic jurisdiction. It is sufficient that the issue is “essentially” within its domestic jurisdiction. Consequently, while the arrest and prosecution of Cross may raise <i>some</i> questions of international law, the exercise of ordinary criminal jurisdiction for a crime codified in Rovinian domestic law, and with regard to a person found in its territory, are “essentially” matters within its own domestic jurisdiction.</p> <p>Rovinia may also add that Ambrosia itself has treated any conduct relating to the abductions as issues of domestic criminal jurisdiction, and not of international law. For example, the officials involved in the abductions were convicted of the crime of kidnapping under Ambrosian criminal law. Furthermore, President Derey said that “justice must be pursued here in our country, where the evidence and the alleged victims are located.” Thus, in Ambrosia’s view, the prosecution of the crimes committed in the</p> |

| Ambrosia | Rovina |
|---|---|
| <p>Article XXI of the OCDP Charter should be interpreted narrowly. It may rely on SAF, para. 10, according to which Member States sought to exclude “disputes relating to the domestic prosecution of persons accused of illegal fishing, drug trafficking, or smuggling.” The exception in Article XXI should be read in this context, which does not include the prosecution of grave crimes like enforced disappearance.</p> | <p>context of the ILSA program are matter “essentially” within a State’s domestic jurisdiction.</p> |

iii. Additional issues that the Parties may raise

It may be tempting for the Respondent to argue that submission (b) is a matter essentially within its domestic jurisdiction because the crime of enforced disappearance, which triggered the arrest and prosecution of Ms. Cross, is only a crime under domestic law. However, if Respondent teams make this argument in QP1, it will be difficult for them to argue in favor of exercising universal jurisdiction in QP2. Conversely, if the Applicant teams advance the position that Cross is being prosecuted for a crime under international law in order to win their argument in QP1, they will have a harder time in QP2 arguing against the exercise of universal jurisdiction. Teams should be cautious. Respondent teams should rely, however, on the fact that the arrest and prosecution of Cross were carried out pursuant to the crime of enforced disappearance *under domestic law* (the Rovinian Criminal Code), not international law. Thus, Rovinia is exercising its ordinary criminal jurisdiction.

Applicant teams may wish to argue that the claims in submission (b) are not matters essentially within a Member State’s domestic jurisdiction, because they fall within the purposes of the OCDP Charter. According to Article I of the OCDP Charter, one of the purposes of the OCDP is to “to enhance collaboration in law enforcement.” Furthermore, President Derey, who championed the creation of the OCDP, highlighted the need to create a regional body to tackle the increase in drug trafficking and transnational organized crime (SAF, para. 10). It is doubtful that the arrest and prosecution of Cross is an example of law enforcement collaboration or transnational organized crime. However, Applicant teams could attempt to use these elements to argue that OCDP Member States agreed to bring these issues within the competences of the OCDP.

iv. Legal analysis

Teams should know the test used by the Court to determine its jurisdiction *ratione materiae*, as laid out in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Preliminary Objections, I.C.J. Reports 2024*, according to which:

“[I]t must be ascertained whether the actions or omissions of the respondent complained of by the applicant fall within the scope of the treaty allegedly violated, in

other words whether the facts at issue, if established, are capable of constituting violations of obligations under the treaty.” (para. 136).

The *ratione materiae* exception in Article XXI of the OCDP Charter excludes matters that fall “essentially” within a State’s domestic jurisdiction. In this sense, the exception is broader than a traditional reserved domain exception, which excludes matters “exclusively” or “solely” within a State’s jurisdiction. Thus, the use of the term “essentially” gives more space for Rovinia to craft arguments: even if there were rules of international law incidentally applicable to the dispute, the Court could still find that it has no jurisdiction.

The decisive question for the Court is not whether Rovinia was or was not competent, under international law, to arrest and prosecute Cross, but rather whether the arrest or prosecution of Cross was governed *in some respect* by rules of international law. In other words, to establish its jurisdiction, the Court must find that Ambrosia, in submission (b), is asking the Court to adjudicate upon questions of international law, and not municipal law.

Teams may point to the following relevant cases:

- ***Nationality Decrees in Tunis and Morocco, PCIJ Rep Ser. B, No. 4***: The Permanent Court of International Justice held that matters that are “solely” within the domestic jurisdiction of a State are “matters which are not, in principle, regulated by international law” and “with respect to which States, therefore, remained sole judge.” While this case involved matters “solely” and not “essentially” within the domestic jurisdiction of the State, the later jurisprudence of the Court has used the same test even without the term “solely.”
- ***Interpretation of Peace Treaties, Advisory Opinion: ICJ Reports 1950***: the Court held that “the interpretation of the terms of a treaty . . . could not be considered as a question *essentially* within the domestic jurisdiction of a State. It is a question of international law which, by its very nature, lies within the competence of the Court.”
- ***Interhandel (Switzerland v. United States), ICJ Reports 1959***: the United States argued that the Court didn’t have jurisdiction to entertain disputes concerning “matters within the domestic jurisdiction of the United States.” The Court rejected the US objection, noting that Switzerland was invoking a treaty, and questions of interpretation or application of that treaty fell under international law and not within the domestic jurisdiction of the United States (pp. 24–25). The Court specifically followed the test of *Nationality Decrees in Tunis and Morocco*.
- ***Right of Passage over Indian Territory (Portugal v. India) ICJ Reports, 1960***: the Court rejected India’s objection, which was very similar to the ones raised by the US in *Interhandel*. The Court considered that since Portugal had invoked a treaty, international custom and the general principles of international law, it amounted to placing its claims on the ground of international law and not in the domestic domain of India (pp. 32–33).

According to this view, in order to remove an area from the sphere of domestic jurisdiction, it would be sufficient that this area be regulated by international law only in certain respects. Conversely, for the exception to apply, the matter would have to appear to be not even *prima facie* affected by rules of international law.

Rovinia may wish to draw distinctions with the Court’s contentious cases, where the relevant exceptions invoked by the respondents used the term “exclusively” or “solely,” but not “essentially.” Rovinia may, for example, rely on some practice relevant to Article 2(7) of the UN Charter which shows that the term “essentially” should be interpreted more broadly. There is practice showing that matters essentially within a State’s jurisdiction retain that character even when they become the object of an international obligation arising out of an international agreement, since they don’t have to be “solely” within the domestic jurisdiction of a State.¹

It is also important for teams to be aware that the characterization of a matter as domestic or otherwise depends upon the development of international law: the concept of domestic jurisdiction does not denote specific areas which are clearly defined. The development of international law has led to the rules of international law governing or affecting many fields (*Nationality Decrees in Tunis and Morocco, PCIJ Rep Ser. B, No 4*).

Finally, teams should not rely in cases where the Court faced exceptions of a self-judging nature. For example, in the *Case of Certain Norwegian Loans*, the Court found that it had no jurisdiction because of a reservation excluding disputes relating to “matters which are essentially within the national jurisdiction as understood by the Government of the French Republic” (*Judgment of July 6th, 1957: I.C. J. Reports 1957*). However, in that case, the Court was giving effect to a self-judging provision. The *ratione materiae* exception in Article XXI of the OCPD Charter is not self-judging.

C. QP2: The Arrest and prosecution of Ms. Cross

The question before the Court is whether Rovinia, by exercising criminal jurisdiction over the alleged crimes committed by Cross, violated any rules of international law. In a nutshell, the question is, firstly, about the legality of universal jurisdiction: does it violate any rule of international law? Do States have a right (or even a duty) to exercise universal jurisdiction in certain cases? Secondly, QP2 deals with the controversial scope of and limitations and exceptions to immunity *ratione materiae* of State officials before foreign criminal courts.

1. Key Claims

| Ambrosia | Rovinia |
|--|--|
| Respondent’s arrest and prosecution of Cross for the crime of enforced disappearance violates the international legal rules relating to the exercise of criminal jurisdiction and the immunity of state officials. | Respondent’s assertion of criminal jurisdiction over Cross, including her arrest and prosecution for the crime of enforced disappearance, are fully consistent with international law. |

¹ UNGA (VII), 1st Committee, 548th mtg, para 55; UNGA (III/2), 1st Committee, 265th mtg, 276; UNGA (XI), Plen, 577th mtg, para 102; UNGA (XII), Special Political Committee, 61st mtg, para 36.

2. The exercise of criminal jurisdiction

i. Preliminary Remarks

Applicant teams should not engage with the merits of the Rovinian criminal case. In fact, there is an ongoing investigation against Cross in Ambrosia, and the Rovinian Criminal Court has not yet issued a decision. The SAF is drafted to prevent teams from arguing that the crimes were never committed, and, importantly, the prayer for relief in submission (b) does not ask them to do so. Teams are expected to engage in depth with ongoing debates about the existence, scope, and requirements for exercising universal jurisdiction for the crime of enforced disappearance.

ii. Main Arguments

| Ambrosia | Rovinia |
|--|---|
| <p>States cannot freely exercise universal criminal jurisdiction because it violates territorial sovereignty and the prohibition of interference in a state's domestic affairs. Criminal responsibility should only be pursued in Ambrosia, where the alleged crime occurred, and the evidence and victims are located. Furthermore, Cross is an Ambrosian national.</p> <p>However, there are certain cases in which treaties or customary international law create a right for States to exercise universal jurisdiction. In Ambrosia's view, the alleged crime committed by Cross is <u>not</u> one of those cases. Since Rovinia does not have a right to exercise universal jurisdiction, the general prohibition applies.</p> <p>Ambrosia will have to explain why neither the ICPPED nor customary international law provides a right for Rovinia to exercise universal jurisdiction in the present case.</p> <p>Ambrosia should argue that the requirements for the exercise of universal jurisdiction under ICPPED Art. 9(2) are not met. Rovinia does not have a right to exercise universal jurisdiction because, under Art. 9(2), that right can <i>only</i> be exercised if extradition has not been requested or is not possible. In other words, Rovinia should have granted Ambrosia's extradition request</p> | <p>Rovinia could reject the existence of a general rule prohibiting the exercise of universal jurisdiction. In this sense, it may rely on the <i>Lotus</i> principle to claim that its assertion of jurisdiction is lawful because there is no prohibitive rule.</p> <p>More importantly, Rovinia will have to explain why it has a right (and perhaps even a duty) to exercise universal jurisdiction with regard to the crimes allegedly committed by Cross. The right may be founded in the ICPPED or customary international law.</p> <p>Art. 9(2) of the ICPPED expressly permits Rovinia to exercise universal jurisdiction over the alleged crime of enforced disappearance. Cross was present in Rovinia and stands accused of conduct that is criminal under the laws of Rovinia. This justifies the exercise of universal jurisdiction by the courts of Rovinia under the ICPPED, regardless of the nationality of the perpetrator, the victims and the place where the crime occurred.</p> <p>In response to Ambrosia's claims that the requirements of Art. 9(2) are not met, Rovinia may argue two points:</p> <ol style="list-style-type: none">1. There is no obligation to extradite before exercising criminal jurisdiction. |

| Ambrosia | Rovinia |
|---|--|
| <p><i>before</i> prosecuting Cross. Art. 9(2) should be read as attributing priority to the extradition of the accused person, since the principle of subsidiarity is inherent regarding the exercise of universal jurisdiction.</p> <p>Regarding customary law, Ambrosia will have to argue that it does not provide Rovinia a right to exercise universal jurisdiction. Ambrosia may emphasize that the exercise of universal jurisdiction contains a requirement of subsidiarity. Given that Ambrosia was carrying out a good faith investigation, Rovinia could not exercise criminal jurisdiction.</p> <p>In both cases, Ambrosia will need to show that it had all the legal tools to prosecute Cross. It may point to the fact that five officers have been already convicted for the crime of kidnapping, which is analogous in substance to the crime of enforced disappearance. Furthermore, it may claim that Ambrosia has always shown willingness to prosecute Cross. For example, after the publication of the second HRI Report, Acting President Zavala called upon the Prosecutor General to reopen the criminal investigation against her (SAF, para. 51). The Prosecutor General formally reopened the criminal investigation against Cross's and Ambrosia formally requested her extradition in the framework of the ongoing investigation.</p> | <p>2. Rovinia was not required to extradite because it is not credible that Ambrosia would prosecute Ms. Cross.</p> <p>Rovinia may recall the following: the Transitional Council said that the accusations against Cross were "significant," but the ILSA program was essential, and it was not the time to jump to conclusions (SAF, para. 52). President Derey has showcased the breadth of his pardon power, which could well be used to shield Ms. Cross from prosecution or punishment. He stated that "Ms. Cross was a loyal servant of the people," and the ILSA saved many lives (SAF, para. 57). Furthermore, he said that information should be kept confidential (SAF, para. 62). According to Clarification #5, Cross is only being investigated for certain crimes; she has not been indicted in Ambrosia and there is no arrest warrant. It is unclear whether she is being investigated for enforced disappearances.</p> <p>Rovinia may also point to the fact that Ambrosia has not codified the crime of enforced disappearance in its domestic law.</p> <p>As an alternative argument, Rovinia may argue that its right to exercise universal jurisdiction arises under customary international law. Rovinia may try to argue that customary law provides a broader basis for the exercise of universal jurisdiction than ICCPED Art. 9(2). In particular, Rovinia may argue that it may exercise universal jurisdiction even if there is an extradition request.</p> |

iii. Legal analysis

There is no single globally accepted definition of universal jurisdiction, but it can be described as "criminal jurisdiction based solely on the nature of the crime, without regard to the territory where the crime was committed, the nationality of the alleged or convicted

perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction.”²

There is a general discussion in international law regarding the legality of universal jurisdiction. Some scholars are of the view that, in order to be lawful, an exercise of universal criminal jurisdiction must be expressly permitted under a treaty or customary law. This position is based on the principle of territorial sovereignty (exclusivity of jurisdiction) and the prohibition of interference in a state’s domestic affairs. Other scholars are of the view that there is no rule prohibiting the exercise of universal jurisdiction, and thus, following the *Lotus* principle, it is generally lawful.³ However, Ambrosia and Rovinia are parties to the ICPPED, which, in Article 9(2) establishes a right to exercise universal jurisdiction with respect to the crime of enforced disappearance.

Thus, the key issue is whether Article 9(2) empowers Rovinia to exercise universal jurisdiction in light of Ambrosia’s request for extradition relating to an ongoing investigation against Cross.

Article 9(2) of the ICPPED provides:

Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized. (emphasis added).

Teams may point to the following general cases:

- ***SS Lotus (France v Turkey), Judgment No. 9, PCIJ, 1927:*** The Court examined whether Turkey had violated international law by initiating criminal proceedings against a French lieutenant who oversaw the watch on board the ship *Lotus* when it collided on the high seas with another ship. The PCIJ held that the features of criminal law do not preclude States from extending their legislative and judicial powers to situations occurring outside their territory. In particular, it stated: “*though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty*” (p. 20).
- ***R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 3), 1999:*** The House of Lords recognized the exercise of universal jurisdiction in *the Pinochet*

² Princeton Principles on Universal Jurisdiction, adopted on 27 January 2001, S. Macedo (ed.), *The Princeton Principles on Universal Jurisdiction*, Princeton University, Program in Law and Public Affairs, 2001; and S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, Philadelphia, University of Pennsylvania Press, 2004.

³ A. Cassese, *Is the Bell Tolling for Universality?*, *Journal of International Criminal Justice* (2003); B Ntahiraja, *The Legality and Scope of Universal Jurisdiction in Criminal Matters*, *Nordic Journal of International Law* (2022).

case with respect to the commission of acts of torture. It stated that: “if the states with the most obvious jurisdiction do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction” (p. 591).

- **Arrest Warrant (DRC v Belgium), ICJ Rep. 2002:** The case related to the criminal proceedings initiated by Belgium against the Congolese Minister of Foreign Affairs for his conduct in the DRC. The Court did not address the legality of universal jurisdiction claimed by Belgium, because such legality was not contested anymore by the applicant State (the DRC) in its final submissions. However, several judges, in their Separate Opinions, suggested that universal jurisdiction was not generally lawful, and, in each case, it should be grounded on specific rules of conventional or customary rules.
- **Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) ICJ Rep. 2012:** The Court examined whether Senegal was in breach of its obligations under the Convention against Torture for having failed to adopt the necessary legislation enabling its judicial authorities to prosecute persons suspected of committing torture. The Court held that “[t]he Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction” (para. 75). It further noted that the purpose behind universal jurisdiction is “to prevent alleged perpetrators ... from going unpunished, by ensuring that they cannot find refuge in any State” (para. 120).

Teams may also rely on the following materials:

- **ICPPED Committee recommendations:** The Committee has recommended incorporating enforced disappearances into universal jurisdiction legislations (Slovakia, 2019 (CED/C/SVK/CO/1, para 13). In particular, it recommended that State parties to the ICPPED should submit any cases of enforced disappearance to the competent authorities for the purpose of prosecution, regardless of whether an extradition request against the suspect has been submitted beforehand (France, 2013 (CED/C/FRA/CO/1, para. 23) (emphasis added).
- **State practice:** Teams may also rely on state practice. The UNGA Sixth Committee’s working group on universal jurisdiction noted that Argentina, Colombia, France, Greece, Kyrgyzstan, Morocco, Netherlands, Panama, Spain, Thailand and Ukraine report that their national legislation permits the exercise of universal jurisdiction for enforced disappearance.
- **Institut de Droit International:** recognized that: every State has the right to punish acts committed abroad by an alien found in its territory when these acts constitute an offence against general interests protected by international law ... provided that the extradition of the accused is not requested or the offer is refused by the State in whose territory the offence was committed or of which the accused is a national (Art 5 (‘Res’) IV/1931) (emphasis added).

3. Immunity of State officials from the criminal jurisdiction of foreign national courts

The question for the Court is whether, by arresting and prosecuting Cross, Rovinia violated the rules providing functional immunity to State officials from the criminal jurisdiction of foreign national courts.

i. Preliminary Remarks

This part of QP2 does not concern personal immunity of state officials, which benefits only current Heads of State, Heads of Government, and Ministers of Foreign Affairs (“the Troika”). Teams are expected to engage with the scope of functional immunity of State officials. The topic has been addressed in the recent work of the ILC, notably in the ILC report of 2022 containing the draft articles and commentaries on the project “Immunity of State officials from foreign criminal jurisdiction.”

ii. Main Arguments

| Ambrosia | Rovinia |
|---|--|
| <p>Rovinia’s decision to arrest and prosecute Cross violates the rules of immunity <i>ratione materiae</i> to which she is entitled under customary international law.</p> <p>Under customary international law, State officials enjoy immunity <i>ratione materiae</i> from the exercise of foreign criminal jurisdiction with respect to acts performed in “an official capacity.” That immunity continues after the individuals concerned have ceased to be State officials.</p> <p>Cross was the Minister of Interior when the alleged crimes took place. Thus, she was a “State official” who performed acts “in her official capacity.” She is entitled to immunity from prosecution in courts outside of Ambrosia.</p> <p>The fact that Cross may have acted <i>ultra vires</i> in relation to the alleged enforced disappearances, does not strip her of immunity. Article 7 of ARSIWA is fully applicable.</p> <p>Second, customary international law does not allow for limitations or exceptions to immunity <i>ratione materiae</i> for crimes under international law, including enforced disappearance.</p> <p>Third, the ICPPED, including Article 9(2) and Article 2, cannot be understood as an implicit waiver of immunity.</p> | <p>Rovinia’s decision to arrest and prosecute Cross does not violate the rules of immunity <i>ratione materiae</i>, since she is not entitled to them with respect to acts of enforced disappearance.</p> <p>First, Cross cannot be considered as acting in “an official capacity” regarding acts that constitute the crime of enforced disappearance.</p> <p>Furthermore, if she acted <i>ultra vires</i> she would not be entitled to immunity for lack of attribution of her acts to the State. The rule of Article 7 ARSIWA does not apply in the context of immunity.</p> <p>In any event, limitations or exceptions apply to immunity <i>ratione materiae</i> for the commission of crimes under international law, including enforced disappearances.</p> <p>Finally, the signature of ICPPED, notably Articles 2 and 9(2), constitute an implicit waiver of immunity.</p> |

iii. Legal analysis

The main framework of analysis of teams is state practice and *opinion juris*, since they are trying to establish the existence of a rule of customary international law. In this context, teams should rely on decisions by domestic courts. In discussing this issue, teams should also engage with the Draft Articles prepared by the ILC on the immunity of state officials from foreign criminal jurisdiction. However, the work of the ILC in this matter is highly controversial.

Functional immunity attaches to all (former) State officials, but only in respect of those “acts performed in an official capacity” (official acts). The exact scope of the rule of functional immunity remains contentious. There are essentially two controversies: first, the definition and scope of an act “performed in an official capacity” (official act); and second, the limitations or exceptions to functional immunity.

Teams should address three issues in this part of QP2:

- (i) Whether Cross acted in an official capacity when she committed the alleged crimes.
- (ii) Whether functional immunity applies to the acts allegedly committed by Cross.
- (iii) Whether Article 9(2) of the ICPPED constitutes a waiver of immunity.

1. Whether Ms. Cross acted in an official capacity when she committed the alleged crimes

The legal question for teams is how to distinguish in the criminal context between acts performed in “an official capacity” and acts performed in a “private capacity,” and in particular, the effect of acts carried out *ultra vires*.

The general rules concerning the application of functional immunity are found in articles 2 and 5 of the ILC Draft Articles:

Article 2 Definitions

For the purposes of the present draft articles:

- (a) “State official” means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;
- (b) an “act performed in an official capacity” means any act performed by a State official in the exercise of State authority.

Article 6 Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.
2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.
3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

According to the ILC, the following elements must be present for an act to be “performed in an official capacity”:

- **The Link:** There must be a link between the act performed by the official and the State. Not *every* act performed by a State official is automatically an “act performed in an official capacity.” There must be a “direct connection” between the act and the exercise of State functions and powers. According to the ILC, this requirement is met if the acts performed by State officials are in the interest of the State. The connection justifies the recognition of immunity in order to protect the principle of the sovereign equality of States.⁴
- **Attribution:** For an act to be characterized as an act performed “in an official capacity,” it must be attributable to the State; otherwise it would not be possible to identify any self-interest on the part of the State, and immunity (whose ultimate objective is to protect the principle of the sovereign equality of States) would not be justified.⁵ The ILC has expressed doubts as to whether the criteria for attribution set out in articles 7–11 of the ARSIWA are applicable.

Article 7 of ARSIWA establishes the rule of attribution in cases of excess of authority (*ultra vires*): “the conduct of [a person] empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.” The ILC has explained that only “where the conduct is so removed from the scope of their official functions, that it should be assimilated to that of private individuals” will the *ultra vires* acts of state officials be deemed to have been performed in a private capacity.⁶

The applicability of article 7 in the context of immunity is controversial. The last report by the ILC (2024) explained that some governments were of the view that immunity did not apply to *ultra vires* acts. Other governments considered that there was little evidence in practice to support the conclusion that official conduct must be lawful to enjoy immunity. They stressed that it would be erroneous to suggest that just because an act was performed *ultra vires* it was not done in the exercise of official capacity and therefore did not attract immunity.⁷

Teams may point to the following authority to determine what constitutes acts performed in an official capacity:

- ***Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002:*** The Court established that functional immunity is not available for acts performed “in a private capacity” (para. 61).
- ***Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J., Reports 2008:*** The Court noted that for functional immunity to apply, it had to be “concretely” verified before it that the acts were “indeed acts within the scope of their duties as organs of State” (para. 196).

⁴ ILC Annual Report on the work of the seventy-third session (2022), Chapter VI, p. 209, para. 23.

⁵ ILC Annual Report on the work of the seventy-third session (2022), Chapter VI, p. 209, para. 23.

⁶ ILC, ‘Articles on the Responsibility of States for Internationally Wrongful Acts’ in Ybk ILC [2001] vol II (2) p. 46 (chapter II, comment 7).

⁷ ILC Annual Report on the work of the seventy-fifth session (2024), Chapter VI, p. 69, para. 80.

- **ILC Special Rapporteur on the immunity of state officials from foreign criminal jurisdiction (Mr. Kolodkin):** immunity *ratione materiae* from which a serving or former state official benefits is not restricted by reference to the distinction between *acta jure imperii* and *acta jure gestioni* applicable to State officials.
- ***Prosecutor v. Blaškić, ICTY, Appeals Chamber, Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997:*** The decision of the Appeals Chamber noted that the question of whether a state official acted in an official capacity is, at least at a basic level, the same as the question whether an individual occupied the position of an organ of the state for the purposes of the attribution of conduct within the meaning of article 4(1) of the ARSIWA.
- ***R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 3), 1999 (Lord Browne-Wilkinson; Lord Goff; Lord Millet):*** The decision by the House of Lords considers that the fact that officials act in excess of authority or instructions, contrary to instructions, or contrary to the general law, including the criminal law, of the state of which they are officials does not of itself mean that their acts are not performed in an official capacity. This view was also accepted by the ILC in relation to the immunity *ratione materiae* from foreign criminal jurisdiction of consular officers,⁸ and argued by the ILC's first special rapporteur on the immunity of state officials.⁹

Teams may discuss the significance of the motive of the act to determine whether it was “performed in an official capacity.” It is one thing to consider an abuse of state authority as nonetheless an act “performed in an official capacity” if the motive for the abuse is the official’s furtherance of the perceived interests of the state. It is arguably something else to consider an abuse of authority as an act performed in an official capacity when its motive is purely or predominantly personal. Nonetheless, under the customary rules on the attribution of conduct for the purposes of state responsibility, motive is immaterial. An act may be for an ulterior personal purpose and still be attributable to the state as an act of an organ of the state acting in that capacity, provided that the act was purportedly or apparently an exercise of state authority.¹⁰ The First ILC Special Rapporteur (Kolodkin) shared this view.¹¹

It is settled that unlawful acts can be considered acts “performed in an official capacity.” It is more controversial, however, whether crimes under international law (like torture or enforced disappearance) can be acts “performed in an official capacity.”¹²

⁸ See paragraphs 2 and 3 of the commentary to draft article 43 of the ILC’s Draft Articles on Consular Relations, Yearbook of the International Law Commission 1961, vol II, 92, 117, the provision which became article 43(1) of the VCCR

⁹ Second report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevitch Kolodkin, Special Rapporteur, UN doc A/CN.4/631 (10 June 2010), p. 15–19, paras 27 and 29–3.1

¹⁰ See, e.g., *Mallén v United States of America*, 4 RIAA 173, 177, paras 7–9 (Mexico-US General Claims Commission 1927)

¹¹ Second report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevitch Kolodkin, Special Rapporteur, UN doc A/CN.4/631 (10 June 2010), p. 15, para 27.

¹² E.g., *Argentine Republic v. Amerada Hess Shipping Corporation and Others*, United States Supreme Court, 23 January 1989, 488 U.S. 428, International Law Reports, vol. 81, p. 658; *McElhinney v. Williams*, Supreme Court of Ireland, 15 December 1995, *ibid.*, vol. 104, p. 691.

- In the case of acts that are unlawful under international law, several domestic courts have considered them inconsistent with the nature of State functions, thus concluding they are **not** acts performed “in an official capacity.”¹³
- *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 3), 1999*: Lord Goff believed that they were official acts that benefited from immunity. Lord Hope considered them “criminal yet governmental.” Lord Saville referred to “official torture,” Lord Millett as “public and official acts,” and Lord Phillips as “criminal and official.” On the other hand, Lord Browne-Wilkinson and Lord Hutton stated that torture cannot be “a public function” or a “governmental function.”
- The Israeli Supreme Court in the *Eichman* case provided: “Of such odious acts it must be said that in point of international law they are completely outside the ‘sovereign’ jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission.”

Teams should also discuss whether there is something inherent to the crime of enforced disappearance that affects whether it can be an act “performed in an official capacity.” Teams may argue that enforced disappearance, like torture, can only be committed by state officials. The Conventions Against Torture and the ICPPED expressly establish that enforced disappearance can only be committed by State officials or at their instigation or with their support or acquiescence of the State.

Article 2 of the ICPPED stipulates: “For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law” (emphasis added).

2. Whether functional immunity applies to the acts allegedly committed by Cross.

In draft article 7, the ILC included a list of crimes under international law in respect of which immunity *ratione materiae* shall not apply. These crimes are to be understood according to their definition in the treaties, including the ICPPED, enumerated in the annex.

Article 7 Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance.

¹³ *Pinochet, Belgium*, Court of First Instance of Brussels, Judgment of 6 November 1998, International Law Reports, vol. 119, p. 345; *Bouterse, Netherlands*, Court of Appeal of Amsterdam, 20 November 2000; *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadeia (Greece), Judgment of 30 October 1997 (American Journal of International Law, vol. 92, No. 4 (1998), p. 765).

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

There are two approaches to draft article 7. One view is that the commission of such crimes can never be considered a function of the State, and they therefore cannot be regarded as “acts performed in an official capacity.”¹⁴ Thus, immunity would not apply. The other view holds that crimes under international law are “acts performed in an official capacity” because they either require the presence of a State element or else must have been committed with the backing, express or implied, of the State machinery. For the proponents of this view, article 7 is an exception to immunity by virtue of the gravity of these acts.¹⁵

The ILC did not pick either of these approaches. However, it gave two arguments to support including draft article 7 in the Draft Articles:¹⁶

- There has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of conduct that constitute crimes under international law. This trend, according to the ILC, is reflected in judicial decisions taken by national and international courts, and the adoption of national legislation.
- It is necessary to recognize the unity and systemic nature of international law and to prevent immunity from becoming a procedural mechanism to block the implementation of international law norms regarding accountability and individual criminal responsibility.

The key question for teams here is whether article 7(1)(f) reflects a rule of customary international law. The issue is highly controversial. Teams should refer to state practice and *opinio juris*, including:

- ***Germany's Federal Court of Justice, 2021 (Afghan officials case) and 2024 (Syrian officials case)***: In 2021, the Federal Court stated that individuals are entitled to functional immunity deriving from state immunity, but no such immunity existed for individuals accused of war crimes. It found an exception to functional immunity limited to “subordinate” State officials and to the war crime of torture. In 2024, however, the Federal Court extended this jurisprudence to all foreign State officials “regardless of status and rank” and to all crimes under international law.
- ***Lozano case, Italian Court of Cassation, 2008***: based its denial of immunity on the violation of fundamental rights, which have the status of *jus cogens* norms and must therefore take precedence over the rules governing immunity.
- ***Prosecutor v. Blaškić, ICTY, Appeals Chamber, Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997***: The Appeals Chamber considered that the exception to immunity arose “from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide.” In the view of the

¹⁴ See, e.g., *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ Rep 2012, p. 125, para. 60 (discussing *acta jure imperii* in the context of State immunity).

¹⁵ *Attorney General of the Government of Israel v. Adolf Eichmann, Israel, Supreme Court, 29 May 1962*, pp. 309–310.

¹⁶ ILC Annual Report on the work of the seventy-third session (2022), Chapter VI, p. 232, para. 9.

Appeals Chamber, “under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity” (para. 41).

- ***The Syrian case in French courts:*** the Paris Judicial Court issued an arrest warrant for four Syrian nationals, including the president, Bashar Al-Assad, for alleged complicity in international crimes committed throughout the country’s protracted civil war. The decision was affirmed by the Paris Court of Appeals.
- ***Arrest Warrant of 11 April 2000 (DRC v. Belgium), ICJ Rep. 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal:*** “It is now increasingly claimed in the literature that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone can perform. This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public state acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions.”

The following is relevant jurisprudence arguing against a rule of customary international law:

- ***Hissène Habré case, Dakar Court of Appeals. 2005:*** refused, on the grounds of functional immunity, to extradite Hissène Habré, Chad’s former Head of State to Belgium, which wanted to prosecute him for torture, genocide, crimes against humanity and war crimes.
- ***Bush case, French Court of Cassation, 2021:*** The criminal chamber of the French Court of Cassation held that the allegation against former President Bush and other U.S. government officials that torture was committed at Guantanamo Bay did not warrant an exception to immunity.
- ***Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), ICJ Rep. 2012.*** This is a case of State immunity, not immunity of State officials from the criminal jurisdiction of foreign national courts. However, as a matter of principle, the ICJ stated that: “customary international law does not treat a State’s entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated” (para. 84).
- ***Jones and Others v. UK, Nos. 34356/06 and 40528/06, ECtHR, 2014:*** expressly recognized that there appeared to be “some emerging support in favor of a special rule or exception in public international law in cases concerning civil claims for torture,” and that, “in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States” (paras. 213 and 215).

Teams may also give the following additional arguments against a rule of customary international law:

- Immunity is a procedural matter and, consequently it is not possible to assume that the existence of criminal responsibility for an international crime, which is a substantive matter, precludes immunity from foreign criminal jurisdiction. The ICJ in ***Arrest Warrant of 11 April 2000 (DRC v. Belgium), ICJ Rep. 2002*** stated that “Immunity from criminal jurisdiction and individual criminal responsibility are quite separate

concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.”

- The lack of immunity before an international criminal court is not relevant to the issue of immunity from the jurisdiction of national courts.
- None of the global treaties addressing specific crimes (e.g., genocide, war crimes, apartheid, torture, enforced disappearance) contain any provision precluding immunity *ratione materiae* of State officials.

The hallmark *Pinochet (No. 3)* case can be used to argue both ways. It is true that the UK House of Lords held that former President Pinochet did not benefit from immunity. However, it is also true that immunity was denied only with respect to acts falling within the scope of the Convention against Torture, in light of its provisions.

Teams may consider the following positions of States expressed in the context of the ILC Draft Articles. Thirty nine States submitted written comments to the Draft Articles (see [here](#)).

- 23 out of 39 States were favorable to the inclusion of restrictions to functional immunity with respect to crimes under international law.¹⁷ Of these 23, eleven expressly considered that it was a rule of customary international law.
- Eleven out of 39 States were overall critical to the rule contained in draft Article 7. Not all views are the same.¹⁸ Israel, Iran, Russia, Singapore, and the United Arab Emirates continued to hold an absolute view on immunity, with some arguing for a complete deletion of draft Article 7. Other States, such as Brazil, France, and the United Kingdom, adopted a more nuanced opposition, either by admitting to the existence of a trend towards the inapplicability of immunity to crimes under international law or advocating to maintain draft Article 7 if conditioned to the express indication that it constitutes *lex ferenda*.

3. Whether Article 9(2) of the ICPPED constitutes a waiver of immunity.

Teams may also argue whether Article 9(2) of the ICPPED constitutes a waiver of immunity. According to Article 9(2) each State Party shall take such measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction. On this basis, Respondent teams may argue that under the ICPPED they have a duty to prosecute Cross, which is incompatible with immunity because enforced disappearance is an act that can be only committed by the State (see Article 2 of the ICPPED). Therefore, if functional immunity applies to enforced disappearance, it would be impossible for a State Party to comply with its obligations under the ICPPED.

Respondent teams may find some support in the *Pinochet (No. 3)* case in which the UK House of Lords held that States that are party to the Convention against Torture cannot invoke functional immunity if their officials are prosecuted for torture in other State Parties. The House

¹⁷ Australia, Austria, Czech Republic, Estonia, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Norway, Denmark, Finland, Iceland, Sweden, Netherlands, Poland, Portugal, Romania, Sierra Leone, Spain, Sweden, Switzerland, and Ukraine.

¹⁸ Brazil, France, Iran, Israel, Japan, Russia, Saudi Arabia, Singapore, United Arab Emirates, United Kingdom, and the United States.

of Lords reasoned that since the involvement of a state official is part of the definition of torture, and as the Convention imposes an obligation on States to prosecute persons suspected of torture who are within their territory, the only logical conclusion to be that functional immunity was not applicable (*Regina. v. Bow Street Stipendiary Magistrate and others, Ex parte Pinochet (No. 3)*, 199, p. 169–170).

III. QP3: The legality of the fishing licenses granted by Rovinia

QP3 concerns the legality of the licenses granted by Rovinia to fish in the entirety of the Triton Shoal, part of which Ambrosia claims as its Exclusive Economic Zone (EEZ). This QP requires participants to engage with various controversial legal issues related to the law of the sea arising from climate-change-induced sea-level rise.

A. The Parties’ Prayers for Relief

| Ambrosia | Rovinia |
|---|---|
| Rovinia’s issuance of licenses to fish in those parts of the Triton Shoal within 200 nautical miles of Ambrosia’s fixed baseline violates international law and must cease, with existing licenses revoked. | Rovinia’s issuance of licenses to fish in the entirety of the Triton Shoal, which is located in the high seas, is in conformity with international law. |

B. Timeline for QP3

| Date | Event | Ref. |
|------|---|--------------|
| 1980 | All seven states located in the Paine Peninsula define the baselines from which their 200 nautical miles zones are measured as “ambulatory.” | SAF, para. 5 |
| 1980 | Ambrosia adopts domestic legislation measuring the breadth of its maritime zones from normal baselines and asserting its exclusive right to fish up to 200 nautical miles from those lines. | Clar. 2 |
| 1982 | Rovinia adopts domestic legislation measuring the breadth of its maritime zones from normal baselines and asserting its exclusive right to fish up to 200 nautical miles from those lines. | Clar. 2 |
| 1999 | Ambrosia ratifies UNCLOS and deposits with the Secretary-General of the United Nations large-scale nautical charts depicting its ambulatory baselines in effect at the time. | Clar. 3 |
| 2013 | Ambrosian Institute of Science (AIS) researchers begin work on the impact of global warming on fish movements. The Triton Shoal, parts of which are located within 200 nautical miles of the Ambrosian coast, is of no commercial significance at that point in time. | para. 21 |

| Date | Event | Ref. |
|--------------|--|------------------|
| 2014 | <p>The Intergovernmental Panel on Climate Change (IPCC) confirms that:</p> <ul style="list-style-type: none"> ➤ climate change would lead to sea-level rise ➤ the Peninsula’s coastline had receded an average of 1.5 meters annually since the 1980s, and the recession was accelerating ➤ the effects of sea-level rise in the Peninsula would be disparate, with Ambrosia most affected, and Rovinia least affected, among the seven states. | para. 9 |
| 15 May 2015 | <p>States in the Paine Peninsula sign the OCDP Charter. Article 1 states purpose of the regional organization is</p> <p>“(c) to promote coordination in managing natural resources and ensuring their equitable and sustainable use;</p> <p>(d) to respect the maritime rights of all Member States; and</p> <p>(e) to protect the inhabitants of the Peninsula from risks arising from natural catastrophes.”</p> | paras. 10 and 12 |
| 23 Nov. 2015 | <p>Ambrosia adopts a “Freezing Law” fixing its baselines “at the low-water lines existing on 1 November 2015.” Rovinia does not comment when Ambrosia adopted the Freezing Law.</p> | para. 13 |
| March 2016 | <p>Five other OCDP Member States begin considering similar freezing legislation. Rovinia reacts by sending <i>notes verbales</i> to each of them, contending that the proposed statutes, if enacted, “would violate the law of the sea and longstanding regional practice.”</p> | para. 14 |
| March 2016 | <p>Ambrosia submits new coordinates reflecting the low-water line existent on 1 November 2015. The Rovinian Permanent Representative to the United Nations objects to those coordinates shortly after they are tendered, calling them “a violation of the law of the sea and longstanding regional practice.”</p> | Clar. 3 |
| May 2016 | <p>At the request of Rovinia, the issue of freezing legislation is included in the agenda for the first session of the OCDP Assembly. In his statement, the Ambrosian delegate emphasizes that the</p> <p>“regional practice reflects the law as it now stands for our Paine Peninsula. International law, including the law of the sea, must allow states to</p> | para. 15 |

| Date | Event | Ref. |
|-------------|---|----------------|
| | address the fundamental change of circumstances that global warming presents to the entire planet.” | |
| May 2016 | Six states support a resolution endorsing “the fixing of baselines to limit the effects of coastal erosion caused by climate change” as “consistent with existing international law, including UNCLOS.” Rovinia votes against the measure, preventing its passage according to the Charter. | para. 16 |
| May 2016 | After the OCDP meeting, Rovinia’s Ambassador delivers a <i>note verbale</i> to Ambrosia’s Ministry of Foreign Affairs stating, <i>inter alia</i> , that its freezing laws are without effect, and that Rovinia retains the right to grant licenses to fish in the high seas. | para. 17 |
| Aug. 2016 | All OCDP members except Rovinia have adopted legislation intended to ensure the stability of their respective maritime boundaries. In each instance, Rovinia protests “this unwarranted and illegal measure.” | para. 18 |
| Dec. 2016 | <p>At the meeting of the OCDP Assembly, Ambrosia and Caron propose a draft resolution affirming that</p> <p>“National laws concerning the measurement of baselines adopted by six Member States are consistent with and reflect our understanding of current international law, including UNCLOS. The practice enshrines a regional rule applicable to all states of the Paine Peninsula, which has also been adopted by states elsewhere in the world, especially those particularly impacted by sea-level rise.”</p> <p>Six states vote in favor, but Rovinia’s opposition again meant that the resolution was not adopted.</p> | paras. 19 & 20 |
| Since 2016 | Dec. Since 2016, Ambrosia has submitted a similar resolution at each annual meeting of the OCDP Assembly, and each time it has drawn six votes in favor and Rovinia’s vote against. | para. 20 |
| 2018 | AIS oceanographers note significant concentrations of tuna on the Triton Shoal. | para. 21 |
| 2018 | Ambrosia’s coastlines had receded to such an extent that, if the baselines were established at the actual low-water line, all of the Triton Shoal would be outside its EEZ. | para. 22 |
| 2 July 2018 | Rovinia begins granting fishing permits for yellowfin tuna covering the entire Shoal, which it considered to be entirely in the high seas. In response, Ambrosia sends a series of four | para. 22 |

| Date | Event | Ref. |
|--|---|----------|
| | <i>notes verbales</i> , each protesting the licenses, claiming that, pursuant to the Freezing Law, portions of the Triton Shoal were located within Ambrosia’s EEZ, and insisting that any licenses must exclude those areas. Rovinia does not reply to any of those communications. | |
| 6 March 2023 | The OCDP Assembly adopted a resolution expressing solidarity with Ambrosia in light of the Divilina catastrophe referring to the importance of fixed baselines for fishing-dependent areas. The Rovinian delegate abstains, which she explained is motivated by “the urgent need to address the suffering of Divilina and the desire to continue the positive relations between Ambrosia and Rovinia.” | para. 33 |
| 24 May 2024 | At a press conference, President Derey says: “(…) I regret to acknowledge that controversies between us regarding Rovinia’s continued issuance of fishing licenses for areas that are within our EEZ, (…) jeopardize our historically cordial relationship. I expect that Rovinia will reassess its legal positions in due course, so that we can achieve an amicable resolution of these misunderstandings.” | para. 64 |
| End of May/ beginning of June 2024 | A spokesperson of the Rovinian Foreign Ministry replies: “(…)we will not renounce our rights to fish in the high seas, and we remain entitled to enforce our country’s laws and judicial decisions without interference from foreign powers.” | para. 65 |

C. Relevant Facts

By 1980, all seven states located in the Paine Peninsula had defined the baselines from which their 200 nautical miles zones are measured as “ambulatory,” meaning that they would always reflect the low-water line along the coast at any given time (SAF, para. 5).

Following the adoption of domestic legislation in 1980 and 1982, respectively, Ambrosia and Rovinia measured the breadth of their maritime zones from normal baselines, asserting the exclusive right to fish up to 200 nautical miles from those lines (Clar. 2). Upon its ratification of UNCLOS in 1999, Ambrosia deposited with the Secretary-General of the United Nations large-scale nautical charts depicting its ambulatory baselines in effect at the time. Those were not updated until March 2016 (Clar. 3).

The practice of using ambulatory baselines changed in light of scientific reports, notably by the Intergovernmental Panel on Climate Change (IPCC) in 2014, confirming that climate change would lead to sea-level rise (SAF, para. 9). In 2015, Ambrosia adopted a “Freezing

Law” fixing its baselines “at the low-water lines existing on 1 November 2015” (SAF, para. 13). In March 2016, Ambrosia submitted new coordinates reflecting the low-water line existent on 1 November 2015. The Rovinian Permanent Representative to the United Nations objected to those coordinates shortly after they were tendered, calling them “a violation of the law of the sea and longstanding regional practice.” (Clar. 3).

Despite repeated protests from Rovinia, the five other states on the peninsula passed similar laws and ultimately reaffirmed the “fixed baselines approach” within the framework of the OCDP (SAF, para. 14-20).

By 2018, Ambrosia's coastlines had receded so far that if the baselines were set at the actual low water mark, the entire Triton Shoal would be outside the EEZ. Claiming that the Triton Shoal was now located in the high seas, Rovinia issued fishing permits for the Triton shoal. Ambrosia repeatedly protested the issuance of the licenses claiming that parts of the Triton Shoal were still within Ambrosia's EEZ (SAF, para. 22).

D. Key claims

| Ambrosia | Rovinia |
|--|---|
| Rovinia’s issuance of licenses to fish in those parts of the Triton Shoal within 200 nautical miles of Ambrosia’s fixed baseline violates UNCLOS Articles 56(1)(a) and 58(3) since these parts are within Ambrosia’s EEZ. | Rovinia’s issuance of licenses to fish in the entirety of the Triton Shoal, which is located in the high seas, is in conformity with UNCLOS Article 87(1)(e). |
| Article 5 UNCLOS allows States to fix their baselines. In accordance with Ambrosia’s “Freezing Law,” the recession of Ambrosia’s coastline after 1 November 2015 does not affect the position of its baselines or the outer limits of its EEZ. | UNCLOS Article 5 prescribes that the baseline moves with the actual low-water mark. Accordingly, the recession of Ambrosia’s coastline shifts its EEZ’s outer limits inwards. |
| In accordance with the rules on State responsibility, Rovinia must refrain from issuing licenses and revoke the existing licenses. | In the absence of an internationally wrongful act, the Court should dismiss Ambrosia’s claims. |

E. Overview of legal issues

The Parties agree that the Court has jurisdiction to entertain Ambrosia’s claims and that these are admissible (SAF, paras. 66 and 67). QP3 requires the participants to discuss the legality of Rovinia’s issuance of fishing licenses regarding the entirety of the Triton Shoal.

1. The legality of issuing fishing licenses

The legality of a State’s granting of permits to vessels to fish is frequently before international courts and tribunals. It was discussed, *inter alia*, in the ICJ’s judgment in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v.*

Colombia) (2022).¹⁹ The legality of these licenses depends on the status of the area under UNCLOS to which the licenses apply.

If that area forms part of Ambrosia’s EEZ, Ambrosia has the exclusive right to fish therein. It could then argue that Rovinia violates UNCLOS Articles 56(1) and 58(3).

Article 56 (“Rights, jurisdiction and duties of the coastal State in the exclusive economic zone”) provides that:

“1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil (...).”

Article 58 (“Rights and duties of other States in the exclusive economic zone”) provides that

“3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”

Rovinia claims that the entirety of the Triton Shoal forms part of the high seas. In the high seas, all States have the freedom of fishing in accordance with Article 87(1)(c) UNCLOS (“Freedom of the high seas”), which provides that

“1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (...) (e) freedom of fishing, subject to the conditions laid down in section 2.”

Teams should be able to identify the above-mentioned provisions contained in UNCLOS that determine the rights of States in the respective maritime zones. Good teams should also be able to show that they understand that QP3 turns on the question about how to identify the limits of maritime zones in times of sea-level rise and proceed to the question about how to identify the outer limits of the EEZ. Weaker teams might immediately jump to the question about the interpretation of Article 5 or identify different rules for examining the legality of the fishing licenses.

2. The determination of the outer limits of maritime areas facing sea-level rise

The outer limits of a State’s EEZ are determined by Article 57 of UNCLOS, which states that “[t]he exclusive economic zone shall not extend beyond 200 nautical miles from the

¹⁹ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 266, para. 134: “the Court concludes that Colombia has violated Nicaragua’s sovereign rights and jurisdiction in its exclusive economic zone by authorizing vessels to conduct fishing activities in Nicaragua’s exclusive economic zone”).

baselines from which the breadth of the territorial sea is measured.” Clarifications 2 and 3 leave no doubt that the baselines of the two States are “normal baselines” and that Article 5 applies.

Article 5 (“Normal baselines”) provides that

“Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.”

The crucial question that teams are expected to address in QP3 is whether Article 5 allows States to “fix” their baselines in response to climate change-induced sea-level rise to prevent the recession of baselines and the consequent impact on maritime entitlements, or whether it prescribes an “ambulatory” understanding of baselines, where the baselines shift with the natural changes in the coastline.

Teams are expected to engage with the interpretation of UNCLOS in accordance with Articles 31-33 of the 1969 *Vienna Convention on the Law of Treaties* (VCLT).

Teams should focus on whether the subsequent practice of States and international organizations has an impact on the interpretation of Article 5, either as subsequent practice in the sense of VCLT Article 31(3)(b) and 32 or as a customary rule that qualifies as a “relevant rule of international law applicable in the relations between the Parties” (Article 31(3)(c)). Teams will discuss whether a rule of customary international law has formed either at the universal level, as a rule of particular customary international law, or at the regional level among member States of the OCPD.

Teams will (a) identify relevant practice of States and international organizations, (b) engage with the differing requirements and thresholds for the role of such practice as subsequent practice under Article 31(3)(c) VCLT, as subsequent practice under Article 32 VCLT, as a rule under general customary international law, as a rule of particular customary international law, and as regional or local custom, (c) engage with controversial concepts such as “specially affected States” and the “persistent objector,” and (d) address the role of practice of and within international organizations and the effect of a parallel customary rule on the interpretation and application of a multilateral treaty.

In addition to the argument that State practice informs the interpretation of Article 5, Ambrosia may argue that such a rule modifies or overrides Article 5.

Some teams might explore whether a fundamental change of circumstances, per VCLT Article 62, justifies a “fixed baselines” approach. However, this doctrine primarily pertains to maritime delimitation agreements, which are not at issue in the present case.

F. The main arguments

The following table gives a non-exhaustive overview of arguments that may be raised by the participants and potentially brought up in questions by judges.

| Ambrosia | Rovinia |
|--|---|
| 1. Interpretation of Article 5 of UNCLOS in accordance with Articles 31-33 VCLT | |
| The determination of baselines in the “Freezing Law” is compatible with the interpretation of Article 5 of UNCLOS in light of its object and purpose, context and subsequent State practice. | The concept of baselines set out in Article 5 of UNCLOS is “ambulatory.” This is supported by treaty interpretation. |
| a) “ordinary meaning” (Article 31(1) VCLT) | |
| The concept of ambulatory baselines is not prescribed by Article 5 of UNCLOS. Rather, the text says, “as marked on large-scale nautical charts”, which indicates that the line is not the actual low-water line. | The text refers to the “low-water line along the coast” and that the charts are only means to identify the baseline, but not to define it. |
| b) “context” (Articles 31(1), 32 VCLT) | |
| There is no obligation to update charts or coordinates in UNCLOS in situations where the actual low-water line changes. | Article 5 has to be read in context with the other provisions on baselines which cater to specific geographic circumstances and permit, in those clearly defined circumstances, the adoption of artificial baselines (see, in particular, Article 7(2) UNCLOS). Moreover, the publicity requirements contained in Article 16(1) and Article 47(8) do not apply to Article 5. This means that Article 5 is ambulatory. |
| c) “object and purpose” (Article 31(1) VCLT) | |
| The object and purpose of Article 5 is to ensure the stability of its maritime entitlements, which would be defeated if its baselines are to move inwards in times of sea-level rise. Moreover, the “ambulatory” approach is impractical given that it would require states “to provide real-time notification of changing baselines and limits through continuous detection, depiction, and dissemination of the physical and legal geography.” ²⁰ | The object and purpose of Article 5 is to establish the baseline based on the geographic reality on the ground in line with the principle that “the land dominates the sea.” It may also invite abuses of such a possibility and blur the distinction between normal and artificial baselines. |
| d) “relevant rules of international law” (Article 31(3)(c) VCLT) | |
| (1) Customary rule allowing for fixing baselines | |

²⁰ C Lathorp, ‘Baselines’, in D Rothwell et al, *The Oxford Handbook on the Law of the Sea*, OUP 2015, pp. 69-90, pp. 77-78.

| Ambrosia | Rovinia |
|--|--|
| <p>Note: Some teams may want to engage with the practice of States and IOs at this stage arguing that a customary rule has formed that allows for fixing baselines (Ambrosia) or confirms an ambulatory understanding (Rovinia).</p> | |
| <p>In addition to the problems regarding the establishment of such a customary rule (see below), teams for Ambrosia would then need to argue this rule is a “relevant rule of international law applicable in the relations between the Parties” (Article 31(3)(c)).</p> <p>Here, Ambrosia would need to argue that the term “relevant rule of international law” includes customary international law. If Ambrosia argues that such as customary rule only exists among a limited group of States, it will need to argue that “applicable in the relations between the Parties” means “Parties to the dispute” (i.e. Ambrosia and Rovinia) and not “Parties to UNCLOS.”</p> | <p>In addition to the arguments that Rovinian teams could raise against the existence of a customary rule allowing for fixed baselines, Rovinian teams could also argue that, in any event, such a customary rule could not be considered as a “relevant rule of international law” in the sense of Article 31(3)(c) VCLT.</p> <p>Rovinia could argue that it is not “applicable in the relations between the Parties” if this customary rule exists only between a limited group of States given that Article 31(3)(c) VCLT requires that such a rule is applicable between all Parties to the treaty that is being interpreted (here: UNCLOS).</p> |
| <p>(2) Legal certainty and predictability</p> | |
| <p>The “fixed baselines” approach contributes to greater legal certainty and predictability.</p> | <p>Deviating from the existing understanding of baselines set out in UNCLOS contributes to legal uncertainty.</p> |
| <p>(3) Intangibility of boundaries/<i>uti possidetis</i></p> | |
| <p>Article 5 of UNCLOS has to be interpreted in light of the principles of stability of boundaries and <i>uti possidetis</i>, which support the concept of fixed baselines.</p> | <p><i>Uti possidetis</i> is not applicable in the context of maritime boundaries since it is predominantly or exclusively applied in the context of succession of States. Moreover, it is not a general principle of law.</p> |
| <p>The concept of <i>uti possidetis</i> “provides that states emerging from the dissolution of a larger entity inherit as their borders those administrative boundaries which were in place at the time of their independence.” In other words, <i>uti possidetis</i> preserves pre-existing boundaries. Even though it has primarily been used in the context of decolonization and dissolution of states, it is transposable to the present case.</p> | <p>In any event, the principles of stability of boundaries and <i>uti possidetis</i> cannot, if they are at all applicable, override UNCLOS, which is <i>lex specialis</i> regarding the determination of baselines.</p> |
| <p>(4) Equity</p> | |
| <p>Article 5 of UNCLOS has to be interpreted in light of the principle of equity (references to equity are contained, inter alia, in the preamble of the 1982 UNCLOS and Article 3(1) of the UNFCCC).</p> | <p>Equity cannot modify existing legal provisions in UNCLOS.</p> |

| Ambrosia | Rovinia |
|---|---|
| <p>Ambrosia is the most affected, and Rovinia least affected, among the seven states in the Paine (SAF, 9).</p> | |
| <p>(5) Natural prolongation / “land dominates the sea”</p> | |
| <p>In <i>Maritime Delimitation in the Area between Greenland and Jan Mayen</i>, Judgment, I.C.J. Reports 1993, p. 38, para. 80, “The Court would observe that <i>the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent</i>, is a legal process based solely on the possession by the territory concerned of a coastline.”</p> | <p>The ICJ did not mean to make any pronouncement on the impact of sea-level rise on maritime entitlements. The principle of “land dominates the sea” is too abstract and from too different a context to be transposed to the situation of sea-level rise.</p> |
| <p>e) “subsequent practice” (Articles 31(3)(b) and 32 VCLT) <i>Note:</i> Here, teams are expected to engage extensively with the 2018 Conclusions of the ILC on “Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties.”</p> | |
| <p>Article 31(3)(b) VCLT does not require positive agreement by all States parties to UNCLOS; especially where a group of States is specially affected and the other parties remain silent.</p> | <p>Subsequent State practice does not suffice to change this understanding. Article 31(3)(b) VCLT requires the practice of all parties to UNCLOS. The inaction of States can only be counted as practice if circumstances existed that called for a reaction. Such circumstances are not present here.</p> |
| <p>In any event, Article 32 VCLT allows a consideration of State practice that does not cross the threshold of Article 31(3)(b) VCLT.</p> | <p>Even if the limited practice could be considered under Article 32 VCLT, Article 32 VCLT is only a supplementary means of interpretation and cannot as such lead to such a far-reaching change in the understanding of Article 5 of UNCLOS.</p> |
| <p>The practice of the majority of States in the Paine Peninsula (6 out of 7 States) since 2015 supports a fixed baselines approach (SAF, para. 13-20).</p> | <p>On the contrary, if the Court were to consider only the limited practice of the States in the Paine Peninsula, it would support an ambulatory approach since this is what the States have consistently done between 1980 and 2015 (SAF, 14, 15, Clar. 3).</p> |
| <p>f) <i>Travaux préparatoires</i> (Article 32 VCLT)</p> | |
| <p>The drafting history reveals that the drafters intended to provide a readily identifiable spatial reference point for the determination of the normal baseline: ➤ During the 1930 Conference several States, e.g. Germany, proposed a</p> | <p>The concept of “normal” baselines was developed in distinction from straight baselines, which supports an ambulatory reading (referring, e.g. to the preparatory works and Hague codification conference in 1930, which influenced the preparation of</p> |

| Ambrosia | Rovinia |
|---|---|
| <p>particular low-water line to allow for a readily identifiable baseline (“sea level adopted in the charts”),²¹ which was adopted by the Subcommittee II.²²</p> <p>➤ In 1953, the ILC Special Rapporteur proposed the “high-water line” (“shoreline”) as the reference point for the baseline (which is the mark left by the tide at high water and thus a tangible, visible manifestation of the coast).²³</p> | <p>Article 3 of the 1958 Convention on the Territorial Sea and Contiguous Zone that, in turn, influenced the drafting of Article 5).</p> |
| <p>The fact that the “proviso” in Article 5 was deleted could also be interpreted as a rejection of the view that the actual low-water line is the normal baseline.</p> | <p>Both at the 1930 Hague Conference as well as during the debate of the 4th session of the ILC a “proviso” to Article 5 was discussed, according to which “The line of low-water mark is that indicated on the charts officially used by the coastal State, <i>provided the latter line does not appreciably depart from the line of mean low-water spring tides.</i>” It was later deleted, but demonstrates that the drafters considered the actual low-water line to be the normal baseline.</p> |
| <p>2. Interpretation of Article 5 of UNCLOS in light of a potential customary rule in the sense of Article 38(1)(b) ICJ Statute allowing for “fixed baselines”</p> <p><i>Note:</i> With respect to the identification of customary international law, teams are expected to engage with the 2018 Conclusions of the ILC on the “Identification of customary international law.”</p> | |
| <p>a) The (non-) existence of a rule under general/universal customary international law</p> | |
| <p>There is a customary international law rule in the sense of Article 38(1)(b) ICJ Statute allowing for fixed baselines.</p> | <p>There is no customary international law rule allowing for fixed baselines since the two elements, practice and <i>opinio juris</i>, required under Article 38(1)(b) ICJ Statute are not met.</p> |
| <p>There is a clear trend in the practice of States and IOs that points towards the recognition of fixed baselines.</p> <p>This includes, in particular, the practice of SIDS and, as prominent examples, the declarations of PIF and AOSIS member States of 2021.</p> | <p>A trend is not sufficient to meet the threshold of Article 38(1)(b) ICJ Statute.</p> |

²¹ Bases of Discussion for the Conference Drawn up by the Preparatory Committee: Volume II — Territorial Waters, League of Nations Doc C.74.M.39.1929.V (15 May 1929) 36.

²² M François, Rapporteur, ‘Report of the Second Committee: Territorial Sea’ (1930) 24(3) American Journal of International Law 234, 247.

²³ International Law Commission, Report of the International Law Commission: Covering the Work of its Sixth Session, UN GAOR, 9th sess, Supp No 9, UN Doc A/2693 (1954) 14.

| Ambrosia | Rovinia |
|---|--|
| <p>Several States and international organizations have changed their position since 2020 and signal openness to a fixed-baselines approach (e.g., Bulgaria, Cyprus, Germany, Greece, Hungary, Ireland, Italy, New Zealand, Portugal, Romania, Slovenia, Spain, the United States of America, and the EU).²⁴</p> | |
| <p>The ILA Report of 2024 on Sea-level rise notes a new trend since mid-2022 towards the interpretation of Article 5 as allowing for “fixed baselines.”²⁵</p> | <p>The ILC report of 2023 notes that “it was opined that it was too early to draw any related conclusions as to the existence of widespread practice and <i>opinio juris</i> in favor of fixed baselines and the preservation of maritime zones, whether on the regional or the international plane.”²⁶ and that “the current practice was insufficient to justify the existence of either a regional or a general rule of customary international law.”²⁷</p> |
| <p>The silence of some States does not prevent the emergence of customary international law. Even States that have adopted an ambulatory approach for their own baselines, have not protested the practice of States affected by climate-change induced sea-level rise to fix their baselines.</p> <p>According to Conclusions 6(1) and 10(3) of the 2018 ILC Conclusions on the Identification of customary international law confirm that inaction of States/their failure to react may serve as evidence for customary international law.</p> | <p>The practice of States needs to be virtually uniform. There are still some States that have not yet expressed or specified their views on this issue. The UK, for example, asked for ‘caution when interpreting the silence of some States’ or the ‘absence of contest’, since these ‘should not be interpreted as agreement’ with any view or position.</p> |
| <p>Any alleged lack of practice/<i>opinio juris</i> does not prevent the emergence of a customary international law rule. When establishing the existence of the two-elements of customary international law, the practice of “specially affected” States should be given particular weight. Here, the practice of</p> | <p>The concept of “specially affected States” has not been recognized in international law.</p> |

²⁴ See e.g., statements at: Sixth Committee, 78th session, 23rd to 28th meeting, 23–27 October 2023; Statement by the USA in the UN Security Council, UN Doc. S/PV.9260, 14 February 2023, at 15.

²⁵ ILA Final Report (Athens Conference 2024), paras. 41-45.

²⁶ Para. 149.

²⁷ Para. 152.

| Ambrosia | Rovinia |
|---|---|
| <p>“specially affected States” is unequivocally affirming the possibility of fixing baselines.</p> <p>Several specially affected States have made statements to this effect and amended their practice regarding baselines (e.g., 2021 PIF Declaration; 2021 AOSIS Declaration).</p> <p>Ambrosia is the most affected, and Rovinia least affected, among the seven states in the Paine (SAF, 9).</p> | |
| <p>The concept of a “persistent objector” is highly controversial in international law.</p> | <p>In any event, the interpretation put forward by Ambrosia is not opposable to Rovinia given that it has persistently objected against the practice of “fixed baselines.”</p> |
| <p>In any event, Rovinia does not meet the requirements since it abstained from voting against a resolution by the OCDP that affirmed the “fixed baselines approach” (SAF, 33). Moreover, Rovinia does not comment when Ambrosia adopted the Freezing Law (SAF, 13).</p> | <p>The fact that Rovinia abstained does not undermine its position given that it had issued an explanation of vote affirming that the abstention was motivated by the catastrophe and the desire to maintain friendly relations (SAF, 33).</p> |
| <p>b) The (non-) existence of a rule under particular customary international law.</p> | |
| <p>Even if the current state of practice does not suffice to meet the threshold for a rule under general customary international law, Conclusion 16 of the 2018 Conclusions of the ILC confirm that rules of customary international law may also emerge among a limited group of States.</p> | <p>The commentaries on Conclusion 16 clarify that “Each of these States must have accepted the practice as law among themselves. In this respect, the application of the two-element approach is stricter in the case of rules of particular customary international law.”</p> |
| <p>The practice of States that are in a comparable situation as the States in the Paine Peninsula, i.e. threatened by sea-level rise, is virtually consistent in the adoption of a “fixed baselines” approach.</p> | <p>Even if the practice among States that are particularly vulnerable vis-à-vis sea-level rise is consistent, such a rule would not be opposable to Rovinia.</p> <p>Given that a stricter standard applies to particular custom, Rovinia cannot be bound by a rule of particular customary law simply by virtue of sharing a similar geographic situation against its express will.</p> |
| <p>c) The (non-) existence of a rule under regional customary international law among the States in the Paine Peninsula.</p> | |
| <p>In any event, a rule of regional or local custom has emerged within the group of States in the Gulf of Paine.</p> | <p>There is no regional custom applicable among member States of the OCDP.</p> |

| Ambrosia | Rovinia |
|--|--|
| <p>The ICJ explicitly recognized that regional custom is covered by Article 38(1)(b) ICJ Statute in the <i>Asylum</i> case. Since then, it has referred to regional/local custom in a series of cases, e.g., the <i>Right of Passage</i> case, the <i>Military and Paramilitary Activities in and against Nicaragua</i> case, and the <i>Certain Navigational and Related Rights</i> case.</p> | <p>Even if the ICJ has recognized that regional custom is covered by Article 38(1) ICJ Statute, it has indicated that a threshold exists for such custom: the practice was usually of a long duration and such a rule can only emerge with the acceptance of all States.</p> |
| <p>This is supported by the fact that all OCDP member States, with the exception of Rovinia, have adopted domestic legislation analogous to the one adopted by Ambrosia; the adoption of the joint declaration of Permanent Representatives of OCDP member States endorsing the fixed baselines approach; its reaffirmation by OCDP member States (SAF 14-20, 33).</p> | <p>The practice referred to by the Applicant only covers a very short period of time (2015-2024).</p> |
| <p>The practice of States within the OCDP is particularly relevant for the establishment of regional custom in light of the purpose of the OCDP set out in its Article 1 (SAF 10). This is further supported by Article 4(2) of the ILC Conclusions on customary international law.</p> | <p>The practice within international organizations is merely evidence for the establishment of a customary rule and cannot replace the practice of States (see Conclusion 12 of the ILC Conclusions on customary international law).</p> |
| <p>The fact that Rovinia protested against these acts is legally irrelevant given that the concept of “persistent objector” does not exist in international law. Even if this concept exists, its requirements are not met given that Rovinia had stopped protesting as of 6 March 2023 (SAF 33).</p> | <p>Moreover, Rovinia has consistently objected this practice by sending numerous notes verbales (SAF 11 and 18), by protesting the adoption of resolutions bilaterally and multilaterally, and by issuing fishing permits for the territory in question, and is thus a “persistent objector” towards which the alleged rule is not opposable (SAF 14-20).</p> <p>The fact that Rovinia abstained when the OCDP affirmed the fixed baselines approach is legally irrelevant since this was merely a political, “ex gratia” decision of temporary duration without renouncing the legal position (SAF 33).</p> |
| <p>d) Effect of a rule under customary international law on Article 5 UNCLOS</p> | |
| <p>The current practice has modified Article 5 of UNCLOS as “overriding custom.”</p> | <p>Even if the current State practice were sufficient, it cannot modify UNCLOS since it would circumvent the amendment provisions set out in Articles 312-316 of UNCLOS.</p> |

G. Potential questions

For the Applicant:

- Why can we consider subsequent practice when interpreting Article 5 of UNCLOS?
- Can you give us an example where the practice of “specially affected” States was recognized?
- Do you have any examples from State practice where the regional practice among a group of States changed the interpretation given to a multilateral treaty?
- Can you provide us with the relevant practice from the statement of agreed facts that would substantiate a regional custom that allows for “fixed baselines”?
- Can we simply circumvent the amendment provisions set out in UNCLOS by recourse to custom?
- Has any State ever invoked Article 62 UNCLOS with respect to a multilateral treaty?

For the Respondent:

- Does the text of Article 5 prescribe an “ambulatory” approach? What are your authorities for this understanding?
- Why should we ignore the wealth of practice and trend in State practice that suggests a “fixed baselines” approach?
- Do you think that the Court should ignore the disparate effects of sea-level rise on the two Parties here? Do you consider your legal position equitable given that Ambrosia is the most affected, and Rovinia least affected, among the seven states in the Paine (SAF, para. 9)?
- Didn’t your State acquiesce to the “fixed baselines” approach when abstaining from voting against the resolution adopted on 6 March 2023?
- Do you find it equitable to maintain this interpretation of Article 5 in light of sea-level rise? Would you not agree that the VCLT has provided mechanisms for these unforeseen changes? Why do they not apply here?

H. Digest of practice, case law and literature

➤ Relevant State practice outside the United Nations

- Pacific Islands Forum (PIF) Leaders’ ‘Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-level Rise’ (6 August 2021).

In this declaration, the PIF members declared, *inter alia*, that “maintaining maritime zones established in accordance with the Convention, and rights and entitlements that flow from them, notwithstanding climate change-related sea-level rise, is supported by both the Convention and the legal principles underpinning it.”

Ambrosia may rely on this (a) as evidence for State practice and (b) to compare it to the practice of the OCDP.

- Alliance of Small Island States (AOSIS) Leaders’ Declaration (22 September 2021)

Member States “Affirm that there is no obligation under the United Nations Convention on the Law of the Sea to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations, and that such maritime

zones and the rights and entitlements that flow from them shall continue to apply without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.”

Ambrosia may want to rely on this (a) as evidence for State practice and (b) to compare it to the practice of the OCDP.

- National legislation of States (see, in particular, [online database of the Division for Ocean affairs and the law of the sea: ‘Maritime Space: Maritime Zones and Maritime Delimitation’](#)).

Both Ambrosia and Rovinia will rely on national legislation to support either dominance of the ambulatory understanding (Rovinia) or the fixed baselines approach (Ambrosia).

➤ Statement of States in the United Nations

- States and international organizations have submitted comments regarding the impact of sea-level rise on maritime entitlements in the context of the work of the ILC study group (see, in particular, [from 2021-2023](#)).

Both Ambrosia and Rovinia will be able to point to statements in support of their view. It should be noted that a certain trend can be identified. States that have initially emphasized their understanding of Article 5 as ‘ambulatory’ have recently signaled openness towards the preservation of maritime entitlements in the specific situation of sea-level rise.

- Observations by States in the 6th Committee of the United Nations on the work of the ILC study group on Sea-level rise

States and international organizations have discussed the implications of sea-level rise for the determination of baselines and the outer limits of maritime zones in the context of their debates on the work of the ILC study group on sea-level rise in the Sixth Committee of the UN General Assembly, e.g., [Sixth Committee, 78th session, 23rd to 28th meeting, 23–27 October 2023 \(Cluster I\)](#).

Both Ambrosia and Rovinia will be able to point to statements in support of their view. It should be noted that a certain trend can be identified. States that have initially emphasized their understanding of Article 5 as ‘ambulatory’ have recently signaled openness towards the preservation of maritime entitlements in the specific situation of sea-level rise.

- Statements of States in the Security Council

States have discussed the implications of sea-level rise in the UN Security Council, e.g., on 14 February 2023 in response to a letter dated 2 February 2023 from the Permanent Representative of Malta to the United Nations addressed to the Secretary-General (S/2023/79), [UN Doc. S/PV.9260](#), 14 February 2023.

Ambrosia may point to the statement by the United States (p. 12), which “announced a new policy on sea level rise in maritime zones. That policy affirmed our commitment to preserving the legitimacy of States, maritime zones and

associated rights and entitlements that have been established consistent with international law and that are not subsequently updated despite sea level rise caused by climate change. The United States will not challenge such maritime zones, even if they are not subsequently updated to reflect sea level rise caused by climate change. Our new policy reflects the approach taken by the Pacific Islands Forum and the Alliance of Small Island States. We encourage others to adopt practices consistent with that approach and will work with partner countries to establish and maintain baselines and maritime zone limits.”

Ambrosia may also point to the statement by Japan (p. 18): “I would like to make clear Japan’s position that it is permissible for coastal countries to preserve the existing baselines and maritime zones established under the United Nations Convention on the Law of the Sea, notwithstanding the regression of coastlines caused by climate change. We are confident that such an interpretation is legitimate and will ensure legal stability and predictability, in particular for SIDS.”

➤ **Relevant case law**

- *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, ICJ Rep 2009, p. 213.*

The ICJ identified a customary rule establishing a right of the inhabitants of the Costa Rican bank of the San Juan River to fish in the river for subsistence purposes in the *Navigational and related rights* case in 2009. On the one hand, the ICJ pointed to “practice which had continued undisturbed and unquestioned over a very long period.” On the other hand, the ICJ identified relatively few instances of such practice.

Ambrosia could point out that the Court accepted a rule of local custom in that case. Rovinia could highlight that the Court did so after having pointed to the long duration of that practice.

- *Right of Passage over Indian Territory (Portugal v. India), Merits, ICJ Rep 1960, p. 6.*

The ICJ accepted Portugal’s claim to a right of passage over Indian territory based on a “long continued practice.”

Ambrosia could point out that the Court accepted a local custom in that case. Rovinia could highlight that the Court did so after having pointed to the long duration of that practice.

- *Fisheries (United Kingdom v. Norway), Judgment of December 18th, 1951, I.C.J. Reports, p. 116.*

“The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation [of baselines and outer limits] is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.” (p.132)

Rovinia might refer to this case in support of its argument that Ambrosia's 2015 "Freezing Law" cannot fix the baselines.

- *Colombian Peruvian asylum case, Judgment of November 20th, 1950 (Colombia v. Peru), ICJ Rep 1950, p. 266.*

"The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law.'" (pp. 276-277)

The Court concluded that Colombia had neither proved that such custom existed between certain Latin American States only, nor that such a custom – even if it existed – was opposable to Peru 'which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.'" (pp. 277-278).

Rovinia could invoke this case to show that Ambrosia has the burden of proof to establish the existence of a customary rule and that, in any event, such regional custom could not be opposable to Rovinia if it had not participated in the practice/accepted it.

Ambrosia can refer to the case to argue that regional custom is covered by Article 38 of the ICJ Statute.

➤ **Work of the International Law Commission (ILC)**

- Reports of the ILC Study Group on "Sea-level rise in relation to international law" (see, e.g., [the ILC Report of 2023](#) and the "[Additional paper to the first issues paper \(2020\)](#) by Bogdan Aurescu and Nilüfer Oral (74th session of the ILC (2023))")

Within the ILC Study Group, "it was opined that it was too early to draw any related conclusions as to the existence of widespread practice and *opinio juris* in favor of fixed baselines and the preservation of maritime zones, whether on the regional or the international plane. Emphasis was nonetheless placed on the new trend of practices and views of States based on a good-faith interpretation of the United Nations Convention on the Law of the Sea." (ILC Report of 2023, para. 149). It was also stated that "the Commission should not take a one-sided position, as both the permanent and ambulatory approaches were legal and viable" (ibid, para. 150). "It was further emphasized that the current practice was insufficient to justify the existence of either a regional or a general rule of customary international law. It could nonetheless be used to support a particular interpretation of the United Nations Convention on the Law of the Sea." (ibid, para. 152).

Both Ambrosia and Rovinia can rely on the ILC study group's works in support of their respective legal positions. However, it should be noted that the ILC decided

to address this topic in a study group, which does not reflect the views of the plenary.

- ILC, Conclusions and commentaries on ‘Identification of customary international law’, ILC Report, UN doc A/73/10, 2018, chap. V, paras. 53-66.

The ILC Conclusions on the ‘Identification of customary international law’ play a prominent role in the debate about the impact of sea-level rise on baselines (see, e.g., in the reports on sea-level rise by the ILC study group and the ILA committee.

In the conclusions and commentaries, the ILC addresses, *inter alia*, the relevance of practice within international organizations, the role of inaction/silence of States, the concepts of ‘specially affected States’, the “persistent objector” and “particular customary international law.”

Both Ambrosia and Rovinia may refer to the conclusions in support of their arguments.

- ILC, Conclusions and commentaries on ‘Subsequent agreements and subsequent practice in relation to the interpretation of treaties’ ILC Report, UN doc A/73/10, 2018, chap. IV, paras. 39–52.

The ILC Conclusions on the ‘Subsequent agreements and subsequent practice in relation to the interpretation of treaties’ play a prominent role in the debate about the impact of sea-level rise on baselines (see, e.g., in the reports on sea-level rise by the ILC study group and the ILA committee.

In the conclusions and commentaries, the ILC addresses, *inter alia*, the requirements of subsequent practice under Article 31(3)(b) and 32 VCLT respectively, the relevance of inaction, as well as the relevance of practice of international organizations.

Both Ambrosia and Rovinia may refer to the conclusions in support of their arguments.

➤ **Work of the International Law Association (ILA)**

- Final Report of the ILA Committee, ‘International Law and Sea-level Rise’ (Athens Conference 2024), pp. 40-50, and Interim Report of the ILA Committee (Lisbon Conference 2022), pp. 6-21.

The two reports by the ILA Committee on ‘International Law and Sea-level Rise’ emphasize the trend towards a recognition of fixing baselines in light of sea-level rise. However, both reports are also careful not to present this development as having changed the existing law, but rather remain ambiguous in this regard.

The 2022 report noted that “The Committee was agreed that, while there is a broad consensus that the potential negative effects resulting from sea level rise on the maritime entitlements of coastal States, and in particular the low-lying island States, should be avoided, on the basis of the evidence available to the Committee so far, it seems that to date no such agreement has been reached.” (p. 21).

The 2024 report “confirmed the approach recommended in its 2018 Report and ILA Resolution 5/2018 so that baselines and limits of maritime zones that are in compliance with the LOSC and deposited with the UN Secretary General, and have not met with objection by other States, should continue in place even if the territory involved gradually changes as a result of climate change-related impacts including sea level rise in the process or submergence.” (p. 47).

Ambrosia might rely on the analysis by the 2024 and 2022 ILA Reports on sea-level rise. Rovinia might respond that the Committee itself carefully avoided presenting its findings as *lex lata*.

- [Final Report](#) of the ILA Committee, ‘Baselines under the International Law of the Sea’ (Sofia Conference 2012).

The Committee engaged in an extensive discussion about whether the normal baseline in Article 5 is the actual low-water line or the chartered line. It concluded that “the legal normal baseline is the actual low-water line along the coast at the vertical datum, also known as the chart datum, indicated on charts officially recognized by the coastal State.” (pp. 25 and 31).

Specifically with respect to sea-level rise, it is noted that “the normal baseline is ambulatory, moving (...) landward to reflect changes caused by erosion and sea level rise. Under extreme circumstances the latter category of change could result in total territorial loss and the consequent total loss of baselines and of the maritime zones measured from those baselines. The existing law of the normal baseline does not offer an adequate solution to this potentially serious problem.” (p. 31).

Rovinia might rely on the analysis by the 2012 ILA Report on baselines. Ambrosia might point out that the ILA Committee recognized that its interpretation of Article 5 does not provide an adequate solution and that it is moreover outdated and superseded by State practice.

IV. QP4: The Seizure and Sale of “The Falcon”

A. Prayers for relief

| Ambrosia | Rovinia |
|---|--|
| Rovinia’s seizure and sale of Ambrosia’s aircraft pursuant to the Permola court’s decision on 14 July 2023 on the basis of the Transitional Council’s purported waiver of immunity violated international law | Rovinia’s judicial seizure and sale of “The Falcon” on the basis of the Transitional Council’s waiver of immunity were in accordance with international law. |

B. Key events

| Date | Event | Ref. |
|---------------------|---|---------------|
| February 2019 | Prosper Derey is re-elected president for a second seven-year term, alongside a new Vice-President, Mary Zavala. She has a military aircraft repurposed as her official plane (“The Falcon”). | SAF, para. 23 |
| 25 April 2022 | President Derey ends up in a coma, and Zavala takes charge as Acting President under the Ambrosian Constitution. | para. 24 |
| February-March 2023 | Protests erupted in response to Zavala’s inadequate response to destruction wrought by a hurricane, resulting in resignations by many members of government. | paras. 29-37 |
| 10 March 2023 | The National Assembly fails to adopt a response to the deteriorating political situation | para. 36 |
| 13 March 2023 | Having met senior members of the National Assembly and members of the armed forces, Ms. Rooney Piretis (a Member of the National Assembly that represents the district hit by the hurricane) announced the establishment of a Transitional Council | para. 38 |
| 13 March 2023 | Instead of returning to Ambrosia, Zavala diverts her return flight in returning from a conference to Rovinia, due to the fast-developing political situation. | para. 39 |
| 14 March 2023 | Zavala declares that “the constitutional government of Ambrosia remains fully functional” and that “remain[s] Acting President.” She condemns the Transitional Council “an illegitimate group of insurrectionists who have no status under our Constitution, [and who] have shown a blatant disregard for the rule of law.” She clarified that she would continue operating from abroad for the time being. | para. 40 |
| 14 March 2023 | When returning to a Rovinian airport, Zavala was informed by police officers that the Falcon had been impounded pending further proceedings in <i>O’Mander Corp v Union of Ambrosia</i> . She took a commercial flight to a neighboring state, Caron. | para. 41 |
| 17 March 2023 | Following a scheduled hearing on the legal status of the Falcon in a Rovinian court, Piretis purported to waive the immunity owed to Ambrosia in respect of the plane. | para. 44 |
| 18 March 2023 | Zavala issued her own statement, indicating that, as “the only lawful Acting President of Ambrosia,” she had instructed lawyers “to take every lawful measure to ensure that the immunity of the plane is respected.” | para. 45 |

| Date | Event | Ref. |
|------------------|--|--------------|
| 28 March 2023 | The Rovinian judge, Charlie Timbre, postponed hearings pending the Foreign Ministry’s input on who has the authority to speak for Ambrosia. | para. 47 |
| March-June 2023 | Despite some violent clashes and the detention of various individuals, the Transitional Council came to control all parts of Ambrosia and ensured the disbursement of funds for reconstruction after the hurricane. | para. 48 |
| June 2023 | By this time, 15 states declared that they still recognized Zavala as Acting President of Ambrosia, while 25 had announced that they recognized the Transitional Council. | para. 49 |
| 14 July 2023 | The Rovinian judge read an excerpt from the Foreign Minister’s response: the Transitional Council exercises effective control and appears to be performing all essential government functions, compels Rovinia “to recognize the Council as the government of Ambrosia.” This was so while acknowledging “questions about the process by which the Council came into power.” On this basis, the court held that any immunity owed to the plane had been properly waived. Its seizure and sale was ordered, selling for USD 55 million. | paras. 53-54 |
| 19 December 2023 | President Derey returned to Ambrosia, causing the Transitional Council to dissolve itself and Zavala to resign. | paras. 55-56 |

C. The key issues

QP4 arises from Ambrosia’s purported waiver of immunity made by the Transitional Council and accepted by the Rovinian court in respect of The Falcon.

The principal contentious issue is whether the Transitional Council or Zavala qualify for governmental status as a matter of international law insofar as Rovinia is concerned.

Teams must make their arguments through the lens of the law of immunities, on which the SAF seeks to leave no contested issue (see Clar. 8, in particular), except perhaps for the customary status of the UNCJISP. Teams are also expected to explain that it is only through its government that a state may be represented internationally. Once it is made clear that a State may waive its immunities only through its government, it is clear that the identity of Ambrosia’s government at the time of the purported waiver is the key issue for QP4. If Zavala remained the Acting President when the Transitional Council purported to waive the Falcon’s immunity, then the purported waiver by Piretis lacked legal effect. If the Transitional Council enjoyed governmental status when Piretis purported to waive the immunity that otherwise attaches to the Falcon, then the waiver is valid and Rovinia’s conduct in disregarding the immunity is lawful.

N.B. The wording of Ambrosia’s prayer for relief on QP4, which focuses on “Rovinia’s seizure and sale of Ambrosia’s aircraft pursuant to the Permola court’s decision on 14 July

2023” intends to exclude from consideration the original “impoundment” of the aircraft (SAF, para. 43).

D. The applicable background rules concerning State immunity

The United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (UNCJISP) is not in force. While some teams may argue that the relevant customary international legal rules concerning immunities are not identical to those contained in UNCJISP, teams are nevertheless expected to focus their arguments on the understanding that the relevant provisions reflect existing customary international law. To this end, regard can be had to the Court’s 2012 Judgment in *Germany v Italy; Greece intervening*, paragraph 55 of which acknowledges that relevant State practice exists, among other places, in relation to the adoption of the UNCJISP. While the Court does not take a stance on the customary status of Article 19 in general (see para. 117 thereof), the provision is generally understood, in relevant part, to reflect custom.²⁸

Article 19 of the UNCJISP regulates the scope of State immunity from post-judgment measures of constraint. Under this article, and as acknowledged by Clarification 8, the Falcon qualifies as property that is ordinarily immune from judicial action. The above fact pattern, coupled with Clarification 8 (as well as SAF, paras. 44-46, and the wording of the prayer for relief), make clear that there is no argument about the Falcon not performing a “sovereign non-commercial purpose” under Article 19. Subject to any applicable exception, both the judicial seizure and sale by Rovinia’s courts on 14 July 2023 and 25 August 2023 respectively, would thus violate the law of immunities.

The key exception here is the waiver. Under Article 19(a)(iii) of the UNCJISP, a State may waive its entitlement to see certain property benefit from immunity owed to it. Although the UNCJISP does not expressly provide this, it is generally accepted that a State may be represented internationally only through its government. Thus, the principal question is whether Zavala or the Transitional Council enjoyed governmental status at the time of the purported waiver of immunity.

E. The representative capacity of a State’s government

It is generally only through its government that a State may be represented internationally. Most notably for present purposes, the head of State, the head of government, and the minister for foreign affairs each possess *ex officio* plenary capacity to represent the State for the purposes of international law. This is reflected in, among other places, rules concerning the representation of a State in specific contexts. The Vienna Convention on the Law of Treaties, the ILC’s Guiding Principles on Unilateral Declarations, and the ICJ’s 2006 Judgment in *DRC v Rwanda* all support this notion.²⁹

²⁸ See e.g. France, *Court of Cassation, Société NML Capital v. Argentina and Total Austral*, Case No. 10-25.938, 28 March 2013, 2013 *Bulletin I* No. 62: ‘according to customary international law, as reflected by the UN Convention of 2 December 2004, on Jurisdictional Immunity of States and Their Property, if States may waive, by written agreement, their immunity from execution on property ... it may be renounced only in an express and special manner’ (unofficial translation from French).

²⁹ See e.g. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 7(2)(a); *Armed Activities on the Territory of the Congo (New Application: 2002)*

Nevertheless, some Applicant teams might make an unconvincing alternative argument that, even if Zavala was the President at the relevant time, the government of a state does not have representative capacity when it does not control the relevant territory.³⁰

F. The objective existence of a State's government?

One preliminary question in terms of assessing whether Zavala or Piretis is the head of government is whether international law provides any objective criteria for the identification of a State's government.

On the one hand, the International Law Association suggests that this is not, or is at least no longer, the case,³¹ especially since the variation in practice from the 1990s onwards (see the section below for further details). Such arguments tend to rely on the appearance of inconsistent practice from which no objective criteria can be found to be consistently applied.³²

On the other hand, the foundations of international law can be taken to dictate otherwise. In the absence of any objective framework, States would be free to recognize whomever they so wish as the government of a State. This would be at odds with the sovereign discretion of each State to choose its government and its form of government and to conduct its domestic and international relations.³³ Moreover, it has been argued that a careful analysis of contemporary practice does lend itself towards the existence of an objective framework.³⁴ Not only do States purport to recognize a specific government on account of its satisfaction of certain objective considerations. Those considerations indeed appear to be applied with sufficient consistency.

G. The criteria for governmental status

N.B. The distinction between de jure and de facto governments is outdated and unhelpful. Neither teams nor judges are expected to engage with this distinction or terminology, although it may be useful as shorthand, especially for Ambrosia, to refer to the government that, in its

Democratic Republic of the Congo v Rwanda, Jurisdiction and Admissibility [2006] ICJ Rep 6 p. 27, para. 46; ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts' in Ybk ILC [2001] vol II(2) p. 39 (chapter II, comment 5); ILC, Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries [1991] vol II(2) p. 19, para. 19 and the references contained therein; LC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations' in *ILC Report* (2006) UN Doc A/61/10, 369, 372 (Principle 4).

³⁰ See e.g. Wright, 'United States Intervention in Lebanon' (1959) 53 AJIL 112, 120. See also Ruys and Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen' (2016) 65 ICLQ 61, 81–4.

³¹ International Law Association, Resolution 3/2018, available at https://www.ila-hq.org/en_GB/documents/conference-resolution-sydney-2018-english, para. 6.

³² See also e.g. Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 MJIL 393; Ruys and Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen' (2016) 65 ICLQ 61; International Law Association, "Resolution 3/2018."

³³ See e.g. *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, paras. 205, 263; Pavlopoulos, *The Identity of Governments in International Law* (OUP 2024), pp. 36-38.

³⁴ Pavlopoulos, *The Identity of Governments in International Law* (OUP 2024), pp. 94-141, available at <https://www.ilsa.org/Jessup/Jessup2025/Basic%20Materials/Chapter%204.pdf>.

view, enjoys governmental status and a government that exercises control but does not enjoy governmental status.

General observations

Invariably, teams will have to rely on particular examples and secondary materials to support their positions. While teams are not expected to be fully aware of all relevant situations (let alone to all facts pertaining to all situations), they should be in a position to explain why their position is more convincing than that of the opposing team.

Focus on effective control

It is accepted that effective control was the main traditional criterion for governmental status. The criterion of autonomy is another important consideration,³⁵ although not of direct relevance to the current Problem.

Under the traditional framework, an autonomous claimant that secured effective control qualified for governmental status. This allowed coups and effective regimes established after revolutions and civil wars to be accepted, even if there continued to exist a pre-existing government that was in exile (e.g. Spanish Civil War).

That said, as a result of a presumption in favor of the incumbent government, an autonomous claimant that already enjoyed governmental status could retain that status once it lost control, insofar as no rival autonomous claimant secured effective control. So, while the Spanish Civil War was ongoing, the incumbent Republican regime maintained governmental status.

Since the 1990s, practice has not accorded with the above framework.

Move towards constitutionality

Given the move away from effective control since the early 1990s, Applicant teams may argue that effective control is no longer relevant to the same extent. Instead, much of the practice gives greater weight to the constitutionality of a given claimant such that a constitutional autonomous claimant will enjoy governmental status even if it never exercised effective control and even if a rival claimant has such control. Examples in this regard concern practice relating to the governments of Haiti (1991), Honduras (2010), Libya (2014-), Côte d'Ivoire (2010) and The Gambia (2016).³⁶ Practice relating to Venezuela (2019-) also suggests that constitutionality is an important consideration, possibly greater than effective control.

Conversely, Respondent teams may argue that, in the absence of coherent practice and a clear new framework, the pre-1990 framework continues to comprise the framework for the

³⁵ *Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v Costa Rica)* (1923) I UNRIAA 375, available at https://legal.un.org/riaa/cases/vol_1/369-399.pdf, 381; Pavlopoulos, *The Identity of Governments in International Law* (OUP 2024), pp. 101-6.

³⁶ See also Pavlopoulos, *The Identity of Governments in International Law* (OUP 2024), pp. 106-120.

assessment of governmental status. This would accord primacy to autonomous unconstitutional governments in effective control.³⁷

Democratic or other legitimacy?

As an alternative argument, both Applicant and Respondent may argue that democratic legitimacy has come to be relevant to the enjoyment of governmental status (SAF, paras. 23 and 47 respectively). In this regard, reliance can be had on many of the examples noted above in relation to the significance of constitutionality (the constitutional governments that have been prioritized have tended to be democratically elected). Other examples, including those concerning governments that purport to have democratic aspirations, may also be discussed, such as the recognition of the National Transitional Council of Libya (2011) and various interim governments.³⁸

Relatedly, Respondent may also suggest that the requirement of popular representativity is of particular significance for so-called governments-in-exile and is not satisfied by Ms Zavala (SAF, para. 47).³⁹ Applicant may argue that, represented also through her constitutional and democratic election, Ms Zavala has a degree of popular representativity.

The limited recognition accorded to the Taliban in 2021 might also suggest that effective control is insufficient and that some form of 'legitimacy' is relevant to the enjoyment of governmental status. (But practice ultimately suggests that democratic legitimacy is less convincing as grounds for enjoyment of governmental status. This is reflected, for example, in the limited recognition given to the National Unity Government of Myanmar (2021)⁴⁰).

H. Questions for the Parties

- What are the customary rules concerning waiver of a state's immunity? Where do we find supporting practice and *opinio juris*?
- Who may speak on behalf of a State in waiving the immunity of a State? Where do we find support for this?
- What is the relevance of recognition to the enjoyment of governmental status? Does Rovinia's recognition of the Transitional Council render the Transitional Council the government of Ambrosia vis-à-vis Rovinia?
- What is the relevance of democratic representativity to the enjoyment of governmental status?
- Must a government exercise effective control to enjoy governmental status?
- What is the relevance of constitutionality to the enjoyment of governmental status?

³⁷ See also ICC Office of the Prosecutor, 'The determination of the Office of the Prosecutor on the communication received in relation to Egypt' (8 May 2014) available at <https://www.icc-cpi.int/news/determination-office-prosecutor-communication-received-relation-egypt>.

³⁸ See e.g., Weller, 'Myanmar: Testing the Democratic Norm in International Law' (*EJIL:Talk!*, 30 March 2021); Erika de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020) 67-8.

³⁹ Talmon, 'Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law' in Goodwin-Gill and Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999) 499.

⁴⁰ See also, e.g. Roth, *Governmental Illegitimacy in International Law* (OUP 2000); Pavlopoulos, *The Identity of Governments in International Law* (OUP 2024) pp. 126-136.