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INTERNATIONAL MOOT COURT COMPETITION

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

CASE CONCERNING THE WOMEN
AND CHILDREN OF THE CIVIL WAR

REPUBLIC OF ANNOLAY

Applicant

v.

REPUBLIC OF RESTON

Respondent

SPRING TERM 2003

MEMORIAL FOR THE RESPONDENT

Bond University

Team Members:

Sefton Warner (Captain), Elena Tsangari,
Damien Agius, Anna Lyons, Jason Chai

CASE CONCERNING THE WOMEN AND CHILDREN OF THE CIVIL WAR

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I. STATEMENT OF JURISDICTION

The Republic of Annolay and the Republic of Reston have submitted the present dispute by Special Agreement to the International Court of Justice pursuant to Articles 36(1) and 40(1) of the Statute of the Court for final resolution. There is no dispute as to the court’s jurisdiction in this matter.

II. STATEMENT OF FACTS

Following three years of civil war, the Kingdom of Dysfuncntia was partitioned to create the Republics of Reston and Cascadia in September 1999. The Republic of Annolay, which borders Reston and Cascadia, assisted in the peace talks at the conclusion of the war. Annolay is a developed country in contrast to Reston, whose developing economy was devastated by the civil war.

In April 1997, War-Time Relief International claimed that Restonian militiamen were raping ethnic Cascadian women. However, Colonel Georg Raskolnikov, the leader of the Restonian militia, stated that he was powerless to stop the rapes.

Raskolnikov was announced as Reston’s first democratically elected President in November 1999. His first presidential task was to foster reconciliation within the country by granting an amnesty to all persons in Reston who were accused of crimes during the civil war. Further, he established crisis centers for war victims. Annolay has reopened the wounds of the war by seeking reparations for Cascadian women raped during the war.

Due to Cascadia’s conservative culture, rape victims were ostracized by their communities. The Schmandefare Company (‘Company’), an operator of numerous brothels, coerced thousands of these women to Annolay. The Company’s Chief Executive Officer, Fred Schmandefare, promised the women positions as nannies or domestic servants but despite all promises, the women were forced to work as prostitutes. The Company charged each woman an administrative fee of US\$10 000. To pay this amount the women took out compounding loans from the Company, the effect of which was to double the amount owed. Ongoing costs for shelter, clothing, food and medical attention were added to the compounding debt. Although illegal, prostitution and solicitation are rarely prosecuted in Annolay.

The Institute for Labor Studies and Advancement (‘I.L.S.A.’) published an article about Cascadian women forced to work in the Company’s brothels in May 2001. I.L.S.A. found that the women were mentally and physically abused. The report claimed that Annolaysian police and at least three

government departments ignored written appeals for help. The case of 'Heidi F' was reported as indicative of the treatment women experienced in the Company's brothels. 'Heidi F' was subjected to wretched conditions and severe restraints on her liberty. She fled from the brothel but Annolaysian police promptly returned her.

President Contrary denied Annolay's responsibility for the Company's abuse of the women. Following this, Reston expressed its intention to prosecute Schmandefare, applying the principle of universal jurisdiction. Reston seeks to prosecute Schmandefare for the crime against humanity of illegal trafficking for the purpose of sexual slavery.

In December 1999, the Annolaysian Regional Adoption Society ('A.R.A.S.'), through advertisements, called for the adoption of children orphaned in the civil war. A.R.A.S. charged a fee for its assistance to Annolaysian nationals seeking to adopt Restonian orphans. Reston's adoption laws obligated all prospective adoptive parents to attend mandatory fitness interviews. Successful applicants received a 'Certificate of Authorization for Foreign Adoption' ('certificate of fitness'), which was required for presentation at the border.

In January 2001, the *International Times-Picayune* reported that Reston's border officials were requesting fees from adopting parents, which was outside their authority. Although many Annolaysian adopting parents did not hold certificates of fitness for adoption, Annolaysian border officials seldom questioned them and in all cases allowed them to re-enter Annolay with a child. Upon the parents' return to Annolay, Annolaysian authorities swiftly concluded the adoption process. Consequently, a number of adopting parents admitted that they did not attend fitness interviews in light of Annolay's lax adoption administration process. Reston addressed the issue by permanently reassigning implicated border officials in March 2001.

Both Reston and Annolay are U.N. members and parties to Vienna Convention on the Law of Treaties, and both voted in favor of U.N. General Assembly Resolution 56/83 regarding the International Law Commission's Articles on State Responsibility. Annolay is a party to, and Reston is a signatory to, the Regional Anti-Corruption Convention.

After several failed attempts at mediation facilitated by the U.N. Secretary General's office, Annolay and Reston agreed to bring this dispute before the International Court of Justice for resolution.

III. QUESTION PRESENTED

Reston asks the court:

1. Whether Annolay has standing to bring a claim on behalf of the ethnic Cascadian women resident in Annolay;

2. Whether Reston acted lawfully regarding the treatment of ethnic Cascadian women during the civil war and must pay damages to Annolay;
3. Whether Reston has standing to bring an action regarding the treatment of ethnic Cascadian women;
4. Whether Annolay breached international law regarding the treatment of ethnic Cascadian women working in Annolaysian brothels;
5. Whether Reston may exercise universal jurisdiction to prosecute Mr. Schmandefare;
6. Whether Annolay's claim regarding border corruption is admissible;
7. Whether Reston acted lawfully regarding the conduct of its border officials; and
8. Whether Reston is required to pay restitution to Annolay in the amount of the bribes.

IV. SUMMARY OF PLEADINGS

- A. Reston is not responsible for the wartime rape of ethnic Cascadian women, nor is it liable to pay damages to Annolay on their behalf. Annolay does not have standing to bring a claim on behalf of wartime rape victims. Annolay cannot exercise diplomatic protection, as the Cascadian women are not nationals of Annolay. Standing cannot be asserted on the basis of obligations *erga omnes* because Annolay is not representing the international community. Alternatively, Reston did not breach any such obligations. The wartime rapes did not constitute genocide or torture so as to give rise to any obligation on Reston's part. Even if they did, the rapes are not attributable to Reston, and the Restonian militia leaders were unable to stop them. Reston's amnesty also justifies any breach of an obligation to prosecute Restonian militiamen. In any event, Reston is not liable to pay damages to Annolay because it is inappropriate for a state to request them on behalf of a limited group of victims for a breach of an obligation *erga omnes*.
- B. Annolay acted unlawfully regarding the treatment of Cascadian women in its territory. Reston has standing to bring this claim on behalf of the international community because slavery is an obligation *erga omnes*. The ethnic Cascadian women who worked in brothels in Annolay were held in slavery because the Schmandefare Company exercised rights of ownership over them. Annolay breached its customary obligation to respect and ensure freedom from slavery by failing to prevent and punish acts of slavery. The Cascadian women are not under any obligation to exhaust local remedies in Annolay.
- C. Reston may exercise universal jurisdiction to prosecute Fred Schmandefare for the crime against humanity of illegal trafficking for the purpose of

sexual slavery. Universal jurisdiction may be exercised over crimes against humanity, and trafficking for the purpose of sexual slavery is characterized as such an offence. The trial of Schmandefare *in absentia* is concordant with the content and purpose of the universality principle.

- D. Reston is not responsible for corruption at its borders, nor liable to repay bribes in the form of restitution. Annolay's failure to prevent the illegal removal of Restonian children invokes the doctrine of 'unclean hands', which renders a claim for restitution inadmissible. In any event, Reston did not breach international law with respect to the bribes. The bribery is not attributable to Reston as the border officials were acting in their private capacity and outside their authority. Reston upheld the object and purpose of the Regional Anti-Corruption Convention and exercised due diligence to protect Annolaysian nationals by permanently reassigning implicated border officials. Furthermore, there is no customary obligation to prevent bribery of public officials exists, nor did Reston breach such an obligation. Reston also acted in the best interests of Restonian children, and thus did not violate any obligations concerning the children's rights. Even if Reston did breach international law, it does not owe Annolay reparations. Restitution would impose a disproportionate burden on Reston and Annolay cannot claim compensation because this remedy was not requested.

V. PLEADINGS

A. *Reston is not internationally liable for the treatment of Cascadian women during the civil war*

This dispute arises from a civil war that existed in the former sovereign territory of Dysfuncia [*Compromis* ¶1]. Annolay had no involvement in the war [*Compromis* ¶6] and no right to intervene in Dysfuncia's internal affairs.¹ Now, as then, international legal norms prevent Annolay from involving itself in matters existing between Restonians and Cascadians.

1. Annolay has no standing to bring this action

The action regarding rapes during the civil war is inadmissible, as Annolay cannot adequately invoke a basis for standing. Diplomatic protection allows a state to protect its injured nationals and requires the victim to have continuously held the nationality of the asserting state from the time of the injury until the

1. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 106-07 (June 27).

presentation of the claim.² The ethnic Cascadian complainants only recently acquired permanent residency in Annolay [*Compromis* ¶25], which is not a genuine and effective link of nationality for the purposes of diplomatic protection.³ Even if permanent residency is a sufficient link of nationality, the link was established after the injury occurred [*Compare Compromis* ¶3 & ¶25], and therefore was not continuous. Consequently, Annolay has no standing on the basis of diplomatic protection.

Also, Annolay may not derive standing from obligations *erga omnes* ('towards all') because it does not act on behalf of the international community. Obligations *erga omnes* are owed to the entire international community,⁴ so their breach injures that community.⁵ The international community is unable to bring a claim of its own, as it has no legal personality.⁶ Therefore, standing must be conferred on those member states prepared to act on its behalf.⁷ Annolay's claim of reparations for the narrow class of victims now resident within its territory is an inappropriate claim as it represents Annolay's own interests rather than those of the international community.⁸

2. See *Panevezys-Saldutiskis Railway (Est. v. Lith.)*, 1939 P.C.I.J. (ser. A/B) No. 76 (Feb. 28); *Petrolane v. Iran*, 27 Iran-U.S. C.T.R. 64 (1991); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 403 (1998); LASSA OPPENHEIM, *OPPENHEIM'S INTERNATIONAL LAW* § 150 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed., Addison-Wesley Pub. Co. 1998) [hereinafter OPPENHEIM]; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, <http://www.iusct.org/claims-settlement.pdf> (last visited Oct. 14, 2003).

3. See *Nottebohm (Second Phase) (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6); *Fleggenheimer Claim (Ital. v. U.S.)*, 25 I.L.R. 91 (Concil. Comm'n 1958); *United States ex rel. Mergé v. Italian Republic (Ital. v. U.S.)*, 14 R.I.A.A. 236, 246 (Concil. Comm'n 1955).

4. *Barcelona Traction, Light and Power Co., Ltd. (Second Phase) (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5) [hereinafter *Barcelona Traction*].

5. Bruno Simma, *Does the U.N. Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes*, in *FUTURE OF INTERNATIONAL LAW ENFORCEMENT* 136 (Jost Delbrück ed., Duncker & Humblot 1993); Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989*, 60 BRIT. Y.B. INT'L L. 1, 93 (1989).

6. CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* 286 (Ian Brownlie ed., Clarendon Press 1993); Claudia Annacker, *The Legal Regime of Erga Omnes Obligations in International Law*, 46 AUSTL. J. PUB. INT'L L. 131, 139 (1994); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 432 (1983).

7. RENE PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 292 (Cambridge University Press 2002); CHINKIN, *supra* note 6, at 286; Annacker, *supra* note 6, at 156; ANTONIO CASSESE, *INTERNATIONAL LAW* 16 (Oxford University Press 2001); see Simma, *supra* note 5, at 136; Oscar Schachter, *International Law in Theory and Practice*, in 13 DEVELOPMENTS IN INTERNATIONAL LAW 345 (Martinus Nijhoff Pub. 1991).

8. See CASSESE, *supra* note 7, at 201; K. Sachariew, *State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and its Legal Status*, 35 NETH. INT'L L. REV. 273, 284 (1988); see Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57, 98 (1989).

In any event, standing is limited to the established obligations *erga omnes*: the outlawing of acts of aggression and genocide, protection from slavery and racial discrimination,⁹ and the right to self-determination.¹⁰ Annolay has no standing to assert a breach of any other obligation.

2. Alternatively, Reston acted consistently with international law regarding the treatment of cascadian women

A state only breaches international law if conduct that is attributable to it breaches an international obligation.¹¹ The occurrence of the rapes prior to the establishment of Reston precludes Reston from being internationally responsible for the wartime rapes, and other rules of international law demonstrate that Reston did not breach any of the limited obligations *erga omnes*.

a. No obligations *erga omnes* may be invoked on the facts

i. The wartime rapes did not constitute genocide

The rapes perpetrated by the Restonian militiamen did not constitute genocide. Genocide requires an intention to destroy an ethnic group in whole or in part.¹² Such an intention must be formed prior to the commission of the offence.¹³ Rape is primarily a sexually or privately motivated offence.¹⁴ There is no evidence that the wartime rapes were intended to destroy the Cascadian group or that acts of rape were pre-meditated. Without clear evidence of such

9. *Barcelona Traction*, 1970 I.C.J. at 3.

10. *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90 (June 30).

11. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. Rep. 3 (May 24) [hereinafter *HOSTAGES*]; G.A. Res. 83, U.N. GAOR, 56th Sess., Supp. No. 10, at 2, U.N. Doc. A/Res/56/83 (2002) [hereinafter *ILC STATE RESPONSIBILITY*].

12. *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277; *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, art. 4(2), S.C. Res. 827, U.N. SCOR, 3217th Meeting, U.N. Doc. S/RES/827 (1993) [hereinafter *ICTY STATUTE*]; *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between 1 January and 31 December 1994*, art. 2(2), S.C. Res. 955, U.N. SCOR, 3453rd Meeting, U.N. Doc. S/RES/955 (1994) [hereinafter *ICTR STATUTE*]; *Statute for the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC), art. 6, U.N. Doc. A/CONF.183/9 (1998) [hereinafter *ROME STATUTE*]; *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 702 (1987) [hereinafter *RESTATEMENT*].

13. *Prosecutor v. Kayishema*, Judgment and Sentence, May 21, 1999, ICTR-95-I-T [hereinafter *Kayeshima*].

14. *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987); *see Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987).

intent rape should not be characterized as genocide.¹⁵ Additionally, genocide generally requires the involvement of the state.¹⁶ The absence of incitement or condonation by the Restonian leadership therefore precludes the characterization of the rapes as genocide.¹⁷ In any event, rape must be accompanied by aggravating acts, such as murder, to constitute genocide.¹⁸ There is no evidence that Cascadian women suffered any other attacks or restraints on their liberty and consequently genocide has not occurred.

ii. No other obligation *erga omnes* applies

No other obligation *erga omnes* recognized by this court [*see* §I:A] is applicable to the wartime rapes. Even if this court should expand on the limited number of obligations *erga omnes*, it is likely that it would only do so to include obligations regarding torture.

Torture only covers the intentional infliction of severe physical or psychological pain or suffering for an interrogative purpose with the acquiescence of a public official.¹⁹ The requisite pain and suffering must amount to more than a mere assault on personal integrity²⁰ and cause prolonged suffering of extreme intensity.²¹ Rape cannot constitute torture without such aggravating factors.²² There is no evidence that the rapes were prolonged nor is there evidence that the individual acts of rape were accompanied by additional injury. The rapes of

15. *Integration of the Human Rights of Women and the Gender Prospective: Violence Against Women, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. ESCOR, 55th Sess., Agenda Item 12(a), U.N. Doc. E/CN.4/1999/68 Add. 3 (1999); *Report of the International Commission of Inquiry on East Timor to the Secretary General*, U.N. High Comm'r for H.R., 54th Sess., Agenda Item 96, U.N. Doc. S/2000/59 (2000); JUDITH GARDAM & MICHELLE JARVIS, *WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 30* (Kluwer Law Int'l 2001); SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE 31-113* (Bantam Books 1975); AMNESTY INTERNATIONAL, *East Timor: Justice Past, Present and Future* (July 27, 2001), available at <http://web.amnesty.org/library/index/ENGASA570012001> (last visited Oct. 9, 2003); AMNESTY INTERNATIONAL, *WOMEN IN THE FRONTLINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN 44* (Amnesty Int'l 1991).

16. *Kayishema*, ICTR-95-1-T at 94.

17. *Kayishema*, ICTR-95-1-T; *Prosecutor v. Jelusic*, Dec. 14, 1999, IT-95-10; *Prosecutor v. Akayesu*, Sept. 2, 1998, ICTR-96-4-T.

18. *Kayishema*, ICTR-95-1-T; *Akayesu*, ICTR-96-4-T; Johan Vander Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 *FORDHAM INT'L L.J.* 286, 311 (1999).

19. *Ireland v. United Kingdom*, 25 *Eur. Ct. H.R.* (ser. A) at 66 (1978); *Greek Case*, 1969 *Y.B. EUR. CONV. ON H.R.* (Eur. Comm'n on H.R.) 186; M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 351* (Martinus Nijhoff Pub. 1999).

20. OSCAR M. UHLER ET AL., *COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 598* (Jean S. Pictet ed., Int'l Comm. of the Red Cross 1958).

21. *Ireland*, 25 *Eur. Ct. H.R.* at 66.

22. *Cyprus v. Turkey*, 4 *Eur. Ct. H.R.* 482 (1982); *Campos-Guardado*, 809 *F.2d* at 285; *Ireland*, 25 *Eur. Ct. H.R.* at 67.

Cascadian women were also not inflicted for an interrogative purpose.²³ Rape is primarily sexually or privately motivated²⁴ and there is no evidence that Restonian militiamen raped Cascadian women to gain information. In any case, there is neither condonation of the rapes nor clear acquiescence [*Compromis* ¶3] by public officials and as such, torture has not occurred.²⁵

b. In any event, Reston did not breach any obligation erga omnes

i. Reston did not breach any obligation prohibiting the wartime rapes

At customary international law, there is a general presumption of non-responsibility for the conduct of an insurrectional movement.²⁶ However, such conduct may be attributable to the state in the event that the movement is successful.²⁷ Although the conduct of the Restonian militia is attributable to Reston pursuant to this rule, the rapes perpetrated by individual militiamen are not. The conduct of individuals acting in their private capacity is not attributable to Reston.²⁸ Individual militiamen who act in the absence of command do so in their private capacity.²⁹ Doubt surrounds the extent to which the rapes were condoned by militia commanders [*Compromis* ¶3] and the existence of a command structure is questionable [*Compromis* ¶4]. The rapes were therefore committed by individual militiamen in the absence of either control³⁰ or command³¹ and are not attributable to Reston.

ii. Reston did not breach any obligation requiring it to prevent the wartime rapes

Should this court find Reston subject to customary obligations requiring it to prevent wartime rapes, Reston discharged these obligations. Any obliga-

23. *Greek Case*, 1969 EUR. CONV. ON H.R. at 186; *Prosecutor v. Delalic*, Nov. 16, 1998, IT-96-21-T (Sep. Dis. Ops. JJ. Hunt, D. & Bennouna, M., dissenting); BASSIOUNI, *supra* note 19, at 351.

24. *See Lazo-Majano*, 813 F.2d at 1434; *Campos-Guardado*, 809 F.2d at 285.

25. *See Prosecutor v. Musema*, Jan. 27, 2000, ICTR-96-13-1; *Prosecutor v. Furundzija*, Dec. 10, 1998, IT-95-17/1-T; BASSIOUNI, *supra* note 19, at 351.

26. JOHN BASSETT MOORE, 3 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2873 (1898); *id.* at 2881; *id.* at 2886; *id.* at 2900; *id.* at 2902; *Iliolo* (U.K. v. U.S.), 6 R.I.A.A. 158 (1925); *Solis* (Mex. v. U.S.), 4 R.I.A.A. 358 (1928); *Home Missionary Society* (U.K. v. U.S.), 6 R.I.A.A. 42 (1920).

27. ILC STATE RESPONSIBILITY, *supra* note 11, at art. 10(2).

28. *Solis*, *supra* note 26, at 362; JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 117 (Cambridge University Press 2002).

29. MOORE, *supra* note 26, at 2995-96.

30. *Dix* (U.S. v. Venez.), 9 R.I.A.A. 119, 120 (1902).

31. MOORE, *supra* note 26, at 2995-96.

tion to prevent rape is only breached if a state fails to take measures that are reasonably expected in the circumstances.³² The rapes were committed in the context of ethnic rivalry in existence for approximately 300 years [*Compromis* ¶2]. When Colonel Raskolnikov was informed of the rapes, he declared that he was powerless to stop them [*Compromis* ¶4]. Thus, in the context of the Dysfunction civil war, measures to prevent the rapes could not reasonably be expected from the Restonian militia leaders.

iii. Reston did not breach any obligation requiring it to prosecute the wartime rapes

Reston did not breach any obligation to prosecute those who committed rape because of the general amnesty declared by President Raskolnikov. Post-conflict states may avoid customary obligations to prosecute individuals by granting amnesties in the interests of reconciliation, stability and democracy, and to prevent the re-emergence of conflict.³³ National legislation,³⁴ the U.N. Security Council,³⁵ an international agreement,³⁶ judicial decisions³⁷ and the

32. Platform 'Ärzte Für das Leben' v. Austria, 13 Eur. Ct. H.R. (ser. A) at 210 (1988); Robert Weiner & Fionnuala Ni Aolain, *Beyond the Laws of War*, 27 COLUM. HUM. RGTS. L. REV. 293, 345 (1995); see also HLR v. France, 26 Eur. Ct. H.R. 29, 40 (1997); Velasquez Rodriguez, Inter-Am. C.H.R. 4 (1988), http://www1.umn.edu/humanrts/iachr/b_11_12d.htm (last visited Sept. 20, 2003).

33. See *Regina v. Bartle*, 37 I.L.M. 1302, 1317, 1322 (H.L. 1998); Azanian Peoples Org. v. President, 1996, (4) SALR 671, 690 (CC), <http://www.concourt.gov.za/files/azapo/azapo.pdf> (last visited Oct. 14, 2003); *United States v. Klein*, 80 U.S. 128 (1871); *Murphy v. Ford*, 390 F. Supp. 1372 (W.D. Mich. 1975); SYLVIE-STOYANKA JUNOD, COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) 4618 (Yves Sandoz et al. eds., 1987); W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 75, 79 (1996); THE FEDERALIST No. 74 (Alexander Hamilton); U.S. Delegation Draft, State Practice Regarding Amnesties and Pardons, to the International Criminal Court (Aug. 1997) (on file with ILSA Journal of International and Comparative Law).

34. Indemnity Law for Security Personnel, No. 20 (1982) (Sri Lanka); Law No. 23.492, Dec. 24, 1986, (Arg.), <http://www.derechos.org/ddhh/arg/ley/final.txt> (last visited Sept. 20, 2003); Decreto Ley, No. 2.191 (1978) (Chile); Proclamations, No. 347-48 (1994) (Phil.); *The Situation in the Middle East, Agreement on the Gaza Strip and the Jericho Area*, U.N. GAOR & SCOR, 49th Sess., Agenda Item 38, U.N. Doc. AJ/49/180, S/1994/727 (1994); Immunity Decree 2000, No. 18 (2000) (Fiji); Promotion of National Unity and National Reconciliation Act, No. 34 (1995) (S. Afr.).

35. *Statement of the President of the Security Council*, U.N. SCOR, 48th Sess., 3238th mtg. at 120, U.N. Doc. S/INF/49 (1993); S.C. Res. 880, U.N. SCOR, 3303rd mtg., U.N. Doc. S/RES/880 (1993); see Rainer Grote, *The United Nations and the Establishment of a New Model of Governance for Central America: The Case of Guatemala*, 2 MAX PLANCK Y.B. OF U.N. L. (1998); *Lusaka Cease Fire Agreement*, U.N. SCOR, U.N. Doc. S/1999/815 (1999).

36. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 6(5), 1125 U.N.T.S. 609.

37. *Attorney General of Trinidad and Tobago and Another v. Phillip*, 1 A.E.R. 93, 396 (1995); *Border Guards Prosecution*, 100 I.L.R. 366 (BGH 1992).

opinions of publicists³⁸ evidence the customary status of this power. President Raskolnikov's amnesty to promote national healing [*Compromis* ¶22] is consistent with these established justifications.

3. In any event, Reston is not required to make reparations to Annolay

The consequence of an internationally wrongful act is that the delinquent state must make reparations to any other state that suffers injury³⁹ for which the wrongful act is the proximate cause.⁴⁰ Where Reston is not responsible for the rapes, it does not owe reparations.

In any event, the remedies available to an injured state are limited if standing is conferred on the basis of obligations *erga omnes*.⁴¹ Actions concerning obligations *erga omnes* are brought on behalf of the international community.⁴² It is inappropriate for a state to seek individual reparations for itself or a limited class of individuals when it is bringing an action on behalf of the international community.⁴³ Therefore, Annolay may not seek individual reparations for the Cascadian women within its territory. Satisfaction, which may consist of an expression of regret or a formal apology,⁴⁴ is the only appropriate remedy because it may be directed to the international community.⁴⁵

B. Annolay breached international law with respect to the treatment of Cascadian women in Annolay

Reston brings this claim in relation to the abhorrent treatment of Cascadian women in Annolay. Although Annolay seeks to protect these women in one respect by requesting that this court award them damages for wartime injury, Annolay has not afforded the women the protection they deserve within its territory.

38. Payam Akhvan, *The Yugoslav Tribunal at Crossroads: The Dayton Peace Accords and Beyond*, 18 HUM. RGTS. Q. 259, 271 (1996); Carla Edelenbos, *Human Rights Violations*, 7 LEIDEN J. INT'L L. 5, 13 (1994); Michael Scharf, *The Amnesty Exception to International Criminal Court*, 32 CORNELL INT'L L.J. 507, 521-23 (1999).

39. *Factory at Chorzów (Germ. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9, at 20 [hereinafter *Chorzów*]; ILC STATE RESPONSIBILITY, *supra* note 11, at art. 31; CHRISTINE D. GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 79 (Ian Brownlie ed., Oxford University Press 1987); BROWNIE, *supra* note 2, at 460.

40. DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 10 (Oxford University Press 1999); J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 735 (Martinus Nijhoff 1973); LOUIS HENKIN ET. AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 758 (West Wadsworth 1993).

41. Carney, *supra* note 8, at 98.

42. *Barcelona Traction*, 1970 I.C.J. at 33.

43. Sachariew, *supra* note 8, at 283.

44. ILC STATE RESPONSIBILITY, *supra* note 11, at art. 37; see Mark S. Ellies & Elizabeth Hutton, *Policy Implications of World War II Reparations and Restitution as Applied to the Former Yugoslavia*, 20 BERKELEY J. INT'L L. 342 (2002).

45. Crawford, *supra* note 28, at 232; BROWNIE, *supra* note 2, at 463.

1. Reston has standing to bring this action

A member state of the international community has standing to assert a breach of an obligation *erga omnes*⁴⁶ regardless of the nationality of the victim.⁴⁷ The sole condition is that the state acts on behalf of the international community [*see* §I:A]. Protection from slavery is an obligation *erga omnes* [*see* §I:A], and Reston is seeking a declaration from this court rather than any other form of reparation. Reston therefore has standing to assert a breach of the obligation to respect and ensure freedom from slavery.

2. Annolay breached its obligation to respect and ensure freedom from slavery

The Schmandefare Company's ['Company'] treatment of ethnic Cascadian women constituted slavery. Slavery is the situation in which entities exercise rights of ownership over individuals,⁴⁸ characterized by the victims' lack of true consent and lack of control over their own labor.⁴⁹ The Company deceived the Cascadian women by promising them employment as nannies or domestic servants, yet forced them to work in its brothels [*Compromis* ¶24]. Upon arrival in Annolay, the Company controlled the Cascadian women's work schedule, labour conditions, standard of living and financial position [*Compromis* ¶¶24 & 29]. The women also suffered mental and physical abuse and restraints on their liberty. The Cascadian women were also unable to escape the Company's control due to the compounding debt on their loans [*Compromis* ¶24]. Therefore, the Cascadian women were enslaved due to their lack of consent to work in brothels and the control the Company exercised over them.

46. East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30) 172, 221 (Weeramantry, dissenting), 266 (Szubiszewski, dissenting); ILC STATE RESPONSIBILITY, *supra* note 11, at art. 48; PROVOST, *supra* note 7, at 125; Giorgio Gaja, *Obligations Erga Omnes, International Crimes and Jus Cogens*, in INTERNATIONAL CRIMES OF STATE 154 (Maria Spinedi et. al., 1989); Thirlway, *supra* note 5, at 93; RESTATEMENT, *supra* note 12, § 702; Louis Henkin, *Human Rights & State 'Sovereignty'*, 25 GA. J. INT'L & COMP. L. 31, 42 (1995).

47. CASSESE, *supra* note 7, at 185, 201; THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 191, 194-95 (Clarendon Press 1989); ANDRE DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 68-69 (Martinus Nijhoff 1996); Schachter, *supra* note 7, at 208; RESTATEMENT, *supra* note 12, § 702, comment (b).

48. Convention to Suppress the Slave Trade and Slavery (1926), Sept. 25, 1926, art. 1, 36 Stat. 2183, 60 L.N.T.S. 253 [hereinafter SLAVERY CONVENTION]; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), Sept. 7, 1956, art. 7(a), 18 U.S.T. 3201, 266 U.N.T.S. 3 [hereinafter SUPPLEMENTARY SLAVERY CONVENTION]; DAVID J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 91 (1995).

49. Sandhya Drew, *Human Trafficking: A Modern Form of Slavery*, 4 EUR. HUM. RTS. L. REV. 481, 487 (2002).

As ethnic Cascadian women were enslaved in Annolay, Annolay breached customary international law. Customary international law is formed by general and consistent practice and *opinio juris*.⁵⁰ International⁵¹ and regional instruments,⁵² national constitutions⁵³ and the work of publicists,⁵⁴ demonstrate that every state must respect and ensure freedom from slavery under customary international law. Freedom from slavery is also a *jus cogens* norm.⁵⁵ The customary obligation to respect and ensure freedom from slavery is not negated by occasional non-observance of the slavery prohibition.⁵⁶

Annolay breached its customary obligation to respect and ensure freedom from slavery. This obligation requires a state to prevent,⁵⁷ investigate⁵⁸ and

50. N. Sea Continental Shelf (Germ. v. Den., Neth.), 1969 I.C.J. 3 (Feb. 20); *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. at 98.

51. See International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 8, 999 U.N.T.S. 717 [hereinafter ICCPR]; SLAVERY CONVENTION, *supra* note 48, at art. 2; SUPPLEMENTARY SLAVERY CONVENTION, *supra* note 48, at art. 1.

52. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; see Arab Charter on Human Rights, Sept. 15, 1994, *reprinted in* 18 HUMAN RIGHTS L.J. 151, 152 (1997); American Convention on Human Rights, July 18, 1978, 9 I.L.M. 673; African Charter on Human and Peoples' Rights, July 20, 1979, art. 5, 21 I.L.M. 58.

53. ETH. CONST. art. 18; LA CONSTITUCION ARG. DE 1853 [Constitution] art. 15; BOSN. AND HERZ. CONST. art. 2; CONGO CONST. art. 31; CYPRUS CONST. art. 10; FIJI CONST. ch. 24; NIHONKOKU KENPO [Constitution] preamble (Japan); KENYA CONST. art. 73; NAMIB. CONST. art. 9; NEPAL CONST. art. 20; PAK. CONST. art. 11; CONSTITUCION DE LA REPUBLICA DE PARAGUAY [Constitution] art. 10 (Para.); SIERRA LEONE CONST. art. 19; S. AFR. CONST. art. 13; ZAMBIA CONST. art. 14; SUDAN CONST. art. 20; RWANDA CONST. art. 17; SING. CONST. art. 15; U.S. CONST., amend. XIII §§ 1, 2.

54. OPPENHEIM, *supra* note 2; LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 189 (Martinus Nijhoff 1995); RESTATEMENT, *supra* note 12, § 702; MERON, *supra* note 47, at 10; Hurst Hannum, *Human Rights, in THE UNITED NATIONS AND INTERNATIONAL LAW* 151 (Christopher Joyner ed., 1997).

55. HENKIN, *supra* note 54, at 39; LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS IN INTERNATIONAL LAW), 446 (Coronet Books 1989); Schachter, *supra* note 7, at 343; M. CHERIF BASSIOUNI, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445 (1991); Drew, *supra* note 49, at 481.

56. Anglo-Norwegian Fisheries Case (U.K. v. Nor.) 1951 I.C.J. 116, 138 (Dec. 18); Schachter, *supra* note 7, at 338; Bruno Simma & Phillip Alston, *The Sources of Human Rights Law*, 12 AUSTRALIAN Y.B. INT'L L. 82, 97 (1988-1989).

57. Zafiro (U.K. v. U.S.), 6 R.I.A.A. 160 (1925); Rodriguez, *supra* note 32; Keir Starmer, *Positive Obligations Under the Convention*, in UNDERSTANDING HUMAN RIGHTS PRINCIPLES 146 (Jeffrey Jowell & Jonathan Cooper eds., 2002).

58. Rodriguez, *supra* note 32; Janes Claim (Mex. v. U.S.), 4 R.I.A.A. 82 (1926); Godinez Cruz, Inter-Am. C.H.R. 5 (1989), <http://www1.umn.edu/humanrts/iacht/C/8-ing.html> (last visited Oct. 11, 2003); Naomi Roht-Arriaza, *Nontreaty Sources of the Obligation to Investigate and Prosecute*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 39 (Naomi Roht-Arriaza ed., Oxford University Press 1995).

prosecute⁵⁹ acts of slavery. A state must intervene in non-government affairs in its territory when slavery is reasonably predictable or suspected,⁶⁰ when an individual has sought protection from a government agency,⁶¹ or where the victim is vulnerable to breaches of personal integrity.⁶² The Cascadian women sought the protection of the Annolaysian government, yet were ignored [*Compromis* ¶28]. They were also vulnerable to breaches of personal integrity because of their ignorance of the Annolaysian language and culture and their impoverished status [*Compromis* ¶22].

Annolay breached its duty to prevent slavery by failing to enforce its anti-prostitution laws or to monitor the actions of the Company [*Compromis* ¶23]. Annolay also breached its duty to investigate acts of slavery. Investigation must be exhaustive, swift and impartial.⁶³ Annolay's failure to investigate swiftly and exhaustively, despite the written appeals of the brothel workers [*Compromis* ¶28] and the police officer's knowledge of the situation of 'Heidi F.' [*Compromis* ¶29], evidence a breach of its duty. The blue ribbon panel established by President Contrary [*Compromis* ¶30] has failed to discharge the obligation to investigate because it has not fulfilled its purpose to identify those responsible [*Clarification* ¶9]. Finally, Annolay breached its obligation to prosecute acts of slavery. Annolay has not prosecuted anyone responsible for the enslavement of women. Annolay cannot escape responsibility for its conduct based on any attribution principle because its omissions, including those of its government agencies and police,⁶⁴ are attributable to it.⁶⁵

3. The Cascadian women were under no obligation to exhaust local remedies

Individuals are not required to exhaust local remedies before a state may bring an action on their behalf if local remedies are available or effective.⁶⁶ There is no evidence that effective remedies were available to the enslaved

59. Rodriguez, *supra* note 32; Janes, *supra* note 58; Cruz, *supra* note 58; Roht-Arriaza, *supra* note 58, at 29.

60. Rebecca Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 145 (1994).

61. *Id.*

62. *A. v. United Kingdom*, 27 Eur. Ct. H.R. 611 (1999).

63. Rodriguez, *supra* note 32.

64. Pugh (U.K. v. Pan.), 3 R.I.A.A. 1441, 1448 (1933); Roper (Mex. v. U.S.), 4 R.I.A.A. 145 (1927); Langdon (U.S. v. Pan.), 6 R.I.A.A. 325 (1933); Cibich (Mex. v. U.S.), 4 R.I.A.A. 57 (1926); ILC STATE RESPONSIBILITY, *supra* note 11, at art. 4(2); CRAWFORD, *supra* note 28, at 94.

65. Advisory Opinion on Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. (Apr. 29); ILC STATE RESPONSIBILITY, *supra* note 11, at art. 4; OPPENHEIM, *supra* note 2, § 165; CHITTHARANJAN F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 38 (Clarendon Press 1967).

66. *Altestor v. Uruguay*, 70 I.L.R. 248, 253 (U.N. H.R. Comm. 1982); ILC STATE RESPONSIBILITY, *supra* note 11, at art. 44(b); CRAWFORD, *supra* note 28; Schachter, *supra* note 7, at 213-14.

Cascadian women and the burden lies with Annolay to prove otherwise.⁶⁷ There is no evidence that the Annolaysian legal system provided the ethnic Cascadian women with individual rights to obtain redress for the injury they suffered. The purpose of the 'blue ribbon panel' was to identify possible offenders involved in the slavery and did not grant any rights to the victims. Even if domestic remedies did exist, they were not available to the Cascadian women. The women were held in slavery and therefore could not access potential avenues for any redress. Any complaints the women made to Annolaysian government organs proved ineffective [*Compromis* ¶28] and there is no evidence that Annolay's investigations will result in the release of ethnic Cascadian women from slavery.

C. Reston is entitled to exercise universal jurisdiction over Fred Schmandefare ('Schmandefare')

International law is founded on the sovereign equality of all states.⁶⁸ Reston's sovereignty permits it to exercise jurisdiction as it sees fit, unless it is restricted from doing so by international law. Annolay bears the burden of proving customary norms exist to limit Reston's sovereignty.⁶⁹

1. Reston may exercise universal jurisdiction over crimes against humanity

States may use the principle of universality to obtain jurisdiction over an alleged offender whose crime is of such gravity and magnitude that it offends all humankind.⁷⁰ Numerous offences, including crimes against humanity, have been recognized to give rise to universal jurisdiction.⁷¹ Crimes against humanity are of a peculiarly universal character vesting in every state the authority to prosecute anyone who participated in their commission.⁷² Reston is legally permitted to exercise universal jurisdiction over Schmandefare and to prosecute him on behalf of the international community for any offence that constitutes a crime against humanity.

67. *Greece v. United Kingdom*, 25 I.L.R. 27, 29 (Eur. Comm'n H.R. 1958); A. A. CACADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW* 134, 146 (Cambridge University Press 1983).

68. U.N. CHARTER art. 2(1).

69. *N. Sea Continental Shelf*, 1969 I.C.J. at 3.

70. Attorney Gen. of Isr. v. Eichmann, 316 I.L.R. 227 (Sup. Ct. Isr. 1962) [hereinafter *Eichmann*]; CASSESE, *supra* note 7, at 262; STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* 161 (2001); BASSIOUNI, *supra* note 19, at 229.

71. BASSIOUNI, *supra* note 19, at 240; Schachter, *supra* note 7, at 267; RATNER, *supra* note 70, at 162; John Murphy, *International Crimes*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 362, 375 (Christopher Joyner ed., 1997).

72. *Eichmann*, 316 I.L.R. at 227.

2. Trafficking for the purpose of sexual slavery is a crime against humanity

Trafficking is the movement of people across borders with the use of threat, violence or coercion.⁷³ It has recently been recognized as a crime against humanity in the Rome Statute of the International Criminal Court.⁷⁴ This classification is confirmed by the nature of trafficking. Crimes against humanity are serious acts that are harmful to human beings because they strike down what is most essential to them: their life, liberty, physical welfare, health or dignity.⁷⁵ Trafficking has the same effects, particularly when it is committed for the purpose of sexual slavery.

Alternatively, trafficking is a form of slavery.⁷⁶ Slavery is a recognized crime against humanity⁷⁷ that occurs where an entity exercises rights of ownership over an individual.⁷⁸ Traffickers inevitably exercise rights of ownership over victims because they control the removal, transfer and destination of the victims. Often the victims cannot escape the control of their traffickers because of financial dependence, fear and physical restraint. Trafficking for the purpose of sexual slavery is slavery, because the victims are ultimately forced into situations where others exercise rights of ownership over them.

3. Reston may exercise universal jurisdiction over Schmandefare *in absentia*

States may utilize universal jurisdiction to prosecute an individual accused of an international crime irrespective of whether the individual is in their custody.⁷⁹ The purpose of universal jurisdiction is to prosecute individuals who

73. United Nations Convention Against Transnational Organized Crime, Nov. 2, 2000, 40 I.L.M. 335 (2001); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 9, 1949, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 272, 282 (entered into force July 25, 1951); *Advancement of Women, Traffic in Women and Girls, Report of the Secretary General*, U.N. GAOR, 15th Sess., Agenda Item 109, U.N. Doc. A/50/150 (1995); Radhika Coomaraswamy & Lisa M. Kois, *Violence Against Women*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAWS 202 (Kelly D. Askin & Dorean Koenig eds., 1999).

74. ROME STATUTE, *supra* note 12, at art. 7(2)(c).

75. Prosecutor v. Erdemovic, Sentencing Judgment, Nov. 29, 1996, IT-96-22-T.

76. ROME STATUTE, *supra* note 12, at art. 7(2)(c); BASSIOUNI, *supra* note 19, at 454.

77. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL art. 6(c); CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST art. 5(c); ICTY STATUTE, *supra* note 12, at art. 5(c); ICTR STATUTE, *supra* note 12, at art. 3(c); ROME STATUTE, *supra* note 12, at art. 7(2)(c); BASSIOUNI, *supra* note 19, at 215.

78. SLAVERY CONVENTION, *supra* note 48; SUPPLEMENTARY SLAVERY CONVENTION, *supra* note 48; RATNER, *supra* note 70, at 112.

79. Organic Law of the Judicial Power art. 23 (B.O.E. 1985, 157) (Spain); Law of 16 June 1993 (Belg.); Law of 19 Feb. 1999, art. 7 (Belg.); Codice Penale [C.p.] art. 7.5 (Italy); CASSESE, *supra* note 7, at 26.

have committed crimes that are universally condemned.⁸⁰ Therefore, custody of the offender does not impact upon the purpose of the universality principle. This court recently confirmed that the exercise of universal jurisdiction *in absentia* is not a violation of international law.⁸¹ The alleged offence of Schmandefare is one that is deeply offensive and harmful to the international community. Reston is permitted to prosecute Schmandefare using universal jurisdiction regardless of the fact that he is not in its custody.

D. Reston has acted consistently with international law with respect to the bribery and need not make restitution

Annolaysians did not only instigate the transfer of Cascadian women into Annolay, but also the transfer of Restonian children. Annolay is claiming restitution for bribes paid to Restonian border officials by Annolaysian adoptive parents, but it has no basis for such a claim in international law.

1. Annolay's unclean hands render this action inadmissible

A state's involvement in illegal acts in international law prevents the state from claiming redress. This is known as the 'clean hands doctrine' and it is supported by judicial decisions⁸² and publicists.⁸³ Annolay failed to prevent the illegal removal and retention of Restonian children and thus acted unlawfully. Its claim is therefore inadmissible under the clean hands doctrine.

80. MARTIN DIXON & ROBERT MCCORQUODALE, *CASES AND MATERIALS ON INTERNATIONAL LAW* 304 (Oxford University Press 2000); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 82, 88 (2001).

81. Concerning the Arrest Warrant of 11 April 2000 (*Congo v. Belg.*), 2002 I.C.J. 121 (Feb. 14) (Oda, Van Den Wyngaert, dissenting) (Higgins, Kooijmans & Buergenthal, dissenting).

82. Nicaragua (*Nicar. v. U.S.*), 1984, I.C.J. 1, 268 (Nov. 26) (Schwebel, dissenting); Tehran Hostages (*U.S. v. Iran*), 1980, I.C.J. 1, 53, 62 (Morozov, Tarazi, dissenting); Diversion of Water from the Meuse (*Neth. v. Belg.*), 1937 P.C.I.J. (ser. A/B) No. 70, at 50, 77 (Anzilotti & Hudson, dissenting); Mavrommatis Palestine Concessions (*Greece v. U.K.*), 1925 P.C.I.J. (ser. A), No. 5, at 50; Legal Status of Eastern Greenland (*Den. v. Nor.*), 1933 P.C.I.J. (ser. A/B) No. 53, at 95; SIR EDMUND GRIMANI HORNBY, REPORT OF THE MIXED COMMISSION ON PRIVATE CLAIMS ESTABLISHED UNDER THE CONVENTION BETWEEN GREAT BRITAIN AND THE UNITED STATES OF AMERICA OF THE 8TH FEBRUARY 1853 397-98 (Harrison & Sons 1856); see Chorzów *supra* note 39, at 31; Medea and the Good Return (*Gren. v. U.S.*), 3 Int. Arb. 2730, 2731 (Cl. Comm. 1857); Pelletier, 2 Int. Arb. (Haiti v. U.S.), 1749, 1750 (Cl. Trib.); I'm Alone (*Can. v. U.S.*), 3 R.I.A.A. 1609, 1618 (1935).

83. BROWNLIE, *supra* note 2, at 508; BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 155 (Cambridge University Press 1953); ELIZABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES (Transnational Pub's 1984); Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, in 92 RECUEIL DES COURS 119 (1957); Oscar Schacter, *International Law in the Hostage Crisis, in AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS* 344 (Paul H. Kreisberg ed., 1985).

States have a customary obligation to prevent the illegal removal or retention of children.⁸⁴ Removal of children is illegal where an entity's custodial rights over a child are violated without the entity's consent. Reston had custodial rights over the children removed from its territory because they were orphans [*Compromis* ¶9] and thus wards of the state.⁸⁵ Reston's custodial rights were breached as children were removed without its consent [*Compromis* ¶13]. Annolay took no action whatsoever to determine whether Restonian children entering its territory were illegally removed [*Compromis* ¶13] or to ensure that illegally removed children were returned to Reston. Annolay therefore breached its customary obligation to prevent the illegal removal or retention of children, and consequently its claim regarding the bribery is inadmissible.

2. Reston acted consistently with international law with respect to the bribery

a. *The conduct of the Restonian border officials is not attributable to Reston*

The conduct of minor officials is not attributable to the state merely because they are agents of the state.⁸⁶ Where minor officials act in their private capacity, their conduct is not attributable to the state.⁸⁷ The particular circumstances of each case must be considered when determining the capacity of any individual official.⁸⁸ Officials motivated by personal profit act in their private capacity.⁸⁹ The Restonian border officials kept the proceeds of the bribes for themselves [*Clarifications* ¶5], so their conduct is not attributable to Reston.

In any event, the conduct of minor officials is not attributable to the state where the conduct falls outside their apparent authority.⁹⁰ Restonian border officials were not authorized to exact money unlawfully and acted without the

84. See CONVENTION ON THE RIGHTS OF THE CHILD art. 11(1), 35 [hereinafter CRC]; HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION art. 3(a); G.A. Res. 41/85, U.N. GAOR, 95th Plenary Mtg., at art. 19, U.N. Doc. A/RES/41/85 (1986).

85. George Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant*, 25 DEPAUL L. REV. 895, 896 (1976).

86. ILC STATE RESPONSIBILITY, *supra* note 11, at art. 7.

87. Mallen (Mex. v. U.S.), 4 R.I.A.A. 173, 174-75 (1927); MOORE, *supra* note 26, at 2999-3000, 3012-13, 3018-20; Caire (Fr. v. Mex.), 5 R.I.A.A. 516, 531 (1929); OPPENHEIM *supra* note 2, § 165; AMERASINGHE, *supra* note 65, at 53.

88. CRAWFORD, *supra* note 28, at 99.

89. See *Yeager v. Islamic Republic of Iran*, AWD 324-10199-1, 17 Iran-U.S. C.T.R. 92, 111 (1987).

90. REBECCA M.M. WALLACE, INTERNATIONAL HUMAN RIGHTS TEXT AND MATERIALS 177 (Sweet & Maxwell Ltd. 1997); AMERASINGHE, *supra* note 65, at 53; IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY PT. 1, at 145 (Clarendon Press 1983); Theodor Meron, *International Responsibility of States for Unauthorized Acts of Their Officials*, 33 BRIT. Y.B. INT'L L. 85, 104 (Oxford University Press 1957); Jimenez Arechega, *International Responsibility*, in MANUAL OF PUBLIC INTERNATIONAL LAW 548 (Max. Sorensen ed., 1968).

approval of the Restonian government [*Compromis* ¶13]. The bribery of Annolaysian parents therefore fell outside the apparent authority of the border officials and is not attributable to Reston.

b. Reston has upheld the object and purpose of the Regional Anti-Corruption Convention [R.A.C.C.]

Signatories have an obligation not to defeat the object and purpose of a treaty before it enters into force.⁹¹ The object and purpose of a treaty is defeated when a signatory's conduct is intended⁹² to do so. The purpose of the R.A.C.C. is to prevent and prohibit corruption.⁹³ Reston never intended to defeat the object and purpose of the R.A.C.C. but instead demonstrated good faith by permanently reassigning border officials implicated in the bribery [*Compromis* ¶17].

Furthermore, a failure to act immediately to requests for investigation does not completely defeat the object and purpose of the R.A.C.C., especially when Reston's delicate, post-conflict status is considered [*Compromis* ¶15]. Consequently, the failure of Reston to respond immediately to information regarding the exaction of bribes by a small number of Restonian officials does not evidence the state's intention to defeat the object and purpose of the entire R.A.C.C.⁹⁴

c. Reston fulfilled its obligation to exercise due diligence to protect the rights of aliens within its territory

States have a duty to protect the rights of other states and the rights of aliens within their territories in customary international law.⁹⁵ States only breach this duty if they do not exercise due diligence to discharge it.⁹⁶ This can

91. VIENNA CONV. art. 18.

92. SAMUEL B. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 48 (Columbia University Press 1904); ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 94 (Cambridge University Press 2000); J. MERVYN JONES, *FULL POWERS AND RATIFICATION: A STUDY OF THE DEVELOPMENT OF TREATY- MAKING PROCEDURE* 70 (Cambridge University Press 1946).

93. Criminal Law Convention on Corruption (Regional Anti-Corruption Convention), 38 I.L.M. 505 [hereinafter R.A.C.C.].

94. See AUST, *supra* note 92, at 94; JONES, *supra* note 92, at 71.

95. Island of Palms (Neth. v. U.S.), 2 R.I.A.A. 829, 831 (Perm. Ct. Arb. 1928); Elettronica Sicula (U.S. v. Ital.), 1989 I.C.J. 15 (July 20); BROWNLIE, *supra* note 90, at 162; Richard B. Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 7 (Richard B. Lillich ed., 1983); AMERASINGHE, *supra* note 65, at 281-82; Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, in *STATE RESPONSIBILITY IN INTERNATIONAL LAW* 97, 110 (Ren Provost ed., 2002).

96. MOORE, *supra* note 26, at 3033-34, 3039, 3041; Sevey (Mex. v. U.S.), 4 R.I.A.A. 474 (1929); Boyd (Mex. v. U.S.), 4 R.I.A.A. 380 (1928); Mead (Mex. v. U.S.), 4 R.I.A.A. 653 (1930); Kennedy (Mex. v.

only be proven if every reasonable and impartial person would recognize measures that a state takes as insufficient.⁹⁷ Reston took reasonable steps to discharge its obligation by permanently reassigning border officials implicated in the bribery and it therefore did not breach it [*Compromis* ¶17].

d. There is no customary law to prevent the bribery of public officials

For customary international law to be established, rigorous conformity of state practice is required.⁹⁸ State practice preventing bribery of public officials is inconsistent⁹⁹ in its criminalisation of active and passive bribery,¹⁰⁰ the size and type of bribes prohibited¹⁰¹ and the type of public officials liable.¹⁰² The inconsistency in state practice is further evidenced by the lack of legislation prohibiting bribery in developing states.¹⁰³ This distinct lack of consistent state practice negates the existence of a customary obligation to prevent bribery of public officials. In any event, Reston did not breach any obligation requiring it to prevent bribery for the same reasons as it did not breach its obligations to prevent injury to aliens [*see* §IV:B:3].

U.S.), 4 R.I.A.A. 194 (1927); *Smith (Mex. v. U.S.)*, 4 R.I.A.A. 469 (1929); *Ermerins (Mex. v. U.S.)*, 4 R.I.A.A. 476 (1929); *Cibich, supra* note 64, at 58; *Mallen, supra* note 87, at 173; *Chapman (Mex. v. U.S.)* 4 R.I.A.A. 632 (1930).

97. *Neer (Mex. v. U.S.)*, 4 R.I.A.A. 60 (1926).

98. *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. at 186; *N. Sea Continental Shelf*, 1969 I.C.J. at 3; *OPPENHEIM, supra* note 2, § 27; *CASSESE, supra* note 7, at 119.

99. W. PAATII OFOSU-AMAAH, ET AL., *COMBATING CORRUPTION: A COMPARATIVE REVIEW OF SELECTED LEGAL ASPECTS OF STATE PRACTICE AND MAJOR INTERNATIONAL INITIATIVES 7* (World Bank 1999); W. MICHAEL REISMAN, *FOLDED LIES: BRIBERY CRUSADES AND REFORMS 63* (Free Press 1979); MARSHALL B. CLINARD & DANIEL J. ABBOTT, *CRIME IN THE DEVELOPING COUNTRIES: A COMPARATIVE PERSPECTIVE 53* (John Wiley & Sons 1973); RONALD WRAITH & EDGAR SIMPKINS, *CORRUPTION IN DEVELOPING COUNTRIES 51* (W. W. Norton & Co. 1963); Leon Sheleff, *International White Collar Crime, in WHITE COLLAR & ECONOMIC CRIME: MULTIDISCIPLINARY AND CROSS NATIONAL PERSPECTIVES 51* (Peter Wickman & Timothy Dailey eds., 1980).

100. *Compare* R.A.C.C. *supra* note 93, at art. 13, with Organization of Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, art. 1, 37 I.L.M. 1 [hereinafter OECD BRIBERY CONVENTION].

101. *Compare* Public Bodes Corrupt Practices Act, 1889, § 7 (Eng.), with The Prevention of Corruption Act, 1993, § 2 (Tanz.), with The Corrupt Practices Act, 1995, § 3 (Malawi), with Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, art. 2, E.T.S. No. 173, 38 I.L.M. 505 (1999) [hereinafter EUROPE CRIMINAL LAW CONVENTION].

102. *Compare* R.A.C.C., *supra* note 93, at art. 1(a), and EUROPE CRIMINAL LAW CONVENTION, *supra* note 101, at art 1(a), with OECD BRIBERY CONVENTION, *supra* note 100, at art. 4(a).

103. Luke Allnut, et al., *Commonwealth of Independent States, in* GLOBAL CORRUPTION REPORT 2001, at 116 (Luke Allnut, et al. eds., 2001), http://gcr.netscript.kunde.sserv.de/download/gcr2001/rr_cis.pdf (last visited Oct. 14, 2003); U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000, available at <http://www.state.gov/g/drl/rls/hrrpt/2000/> (last visited Oct. 4, 2003); Gitau Warigi, East and East-Central Africa, in GLOBAL CORRUPTION REPORT 2001, at 70 (Luke Allnut, et al. eds., 2001), http://gcr.netscript.kunde.sserv.de/download/gcr2001/rr_eec_africa.pdf (last visited Oct. 14, 2003).

e. Reston satisfied any obligation to prevent violations of children's rights

If Reston was required to take action to prevent the illegal removal of children or other similar conduct, it satisfied its obligation. Obligations concerning children must be interpreted in light of the child's best interests.¹⁰⁴ Reston consistently acted in the best interests of the children and thus did not breach any obligation regarding its treatment of the children. Reston provided facilities to care for orphaned children as best it could after the civil war [*Compromis* ¶9]. It also compelled prospective adoptive parents of Restonian children to attend fitness interviews and to obtain certificates of fitness before they were able to adopt a Restonian child [*Compromis* ¶11]. Finally, Reston reassigned the border officials implicated in bribery [*Compromis* ¶17] in order to prevent further illegal removal of Restonian children. These facts indicate that Reston acted in the best interest of Restonian children and thus it could not have breached any of its obligations regarding children.

3. Reston is not obligated to make reparations to Annolay

The consequence of an internationally wrongful act is that a state must make reparations to any other state that suffers injury¹⁰⁵ for which the wrongful act is the proximate cause.¹⁰⁶ Any willful or negligent contribution to the injury suffered by either the victims or the state itself must be taken into account.¹⁰⁷ Such contribution negates or reduces any reparations owed.¹⁰⁸

Annolaysian adoptive parents with certificates of fitness negligently contributed to their injury because they knew of their legal right to return to Annolay with their child. Annolaysian nationals without certificates of fitness willfully contributed to their injury because they knew they could not cross the border without a certificate of fitness and therefore the only way of returning to Annolay with their child was to pay bribes to border officials [*Compromis* ¶13].

Annolay seeks reparations for the bribes exacted from its nationals in the form of restitution [*Compromis* ¶41]. Restitution may not be awarded, however, if it would result in a burden disproportionate to the benefit derived.¹⁰⁹ This burden includes threats to political independence or the economic stability of a

104. CRC, *supra* note 84, at art. 3(1).

105. Chorzów, *supra* note 39, at 20; ILC STATE RESPONSIBILITY, *supra* note 11, at art. 31; GRAY, *supra* note 39, at 79; BROWNLIE, *supra* note 2, at 460.

106. SHELTON, *supra* note 40, at 101; VERZIJL, *supra* note 40, at 735; HENKIN, *supra* note 40, at 758.

107. ILC STATE RESPONSIBILITY, *supra* note 11, at art. 39; CRAWFORD, *supra* note 28, at 232.

108. SHELTON, *supra* note 40, at 94; GRAY, *supra* note 39, at 23; BROWNLIE, *supra* note 2, at 508; CRAWFORD, *supra* note 28, at 240-41; HENKIN, *supra* note 40, at 757.

109. ILC STATE RESPONSIBILITY, *supra* note 11, at art. 35.

state.¹¹⁰ Reston is a developing state with a devastated economy [*Compromis* ¶8]. To provide restitution to the Annolaysian adoptive parents would require Reston to locate every implicated border official and every Annolaysian national. The administrative and economic burden this would place on Reston is disproportionate to any benefit derived by the Annolaysian parents. Compensation may not be awarded as an alternative because Annolay did not request it.¹¹¹

VI. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Republic of Reston respectfully requests that this Court:

1. DECLARE that Reston acted lawfully regarding the treatment of ethnic Cascadian women during the civil war and is not liable to pay Annolay damages;
2. DECLARE that Annolay violated international law regarding the treatment of Cascadian women working in Annolaysian brothels;
3. DECLARE that Reston is entitled to exercise universal jurisdiction over Mr. Fred Schmandefare; and
4. DECLARE that Reston acted lawfully regarding the bribes exacted by its border officials and is not liable to repay them.

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110. CRAWFORD, *supra* note 28, at 7, 217; VERZIJL, *supra* note 40, at 744; See Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2600 (1991).

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