THE REPUBLIC OF ACASTUS v. THE STATE OF RUBRIA: THE CASE CONCERNING THE ELYSIAN FIELDS

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I. STATEMENT OF JURISDICTION

The Republic of Acastus and the State of Rubria have agreed to submit the present controversy for final resolution by the International Court of Justice ("ICJ") by Special Agreement pursuant to Article 40, Paragraph 1 of the Statute of this Court.[1] In accordance with Article 36,[2] the jurisdiction of the Court comprises all cases that the parties refer to it.

II. STATEMENT OF FACTS

This dispute arises out of the responsibilities over alleged human rights violations committed in the Elysian Fields. The Elysium, inhabited by a community of approximately 5,000 indigenous Elysians, is a territory that runs through the border between the Republic of Acastus (Applicant) and the State of Rubria (Respondent). The residential villages of the Elysians are located north of the border in Acastus. The Elysians depend completely upon the fertile agricultural lands located south of Rubria for food. The Elysium has retained its unique prehistoric cultural heritage, with its own language and religion. Its economy is wholly agricultural. Their agricultural lands are stewarded by the

1. Statute of the International Court of Justice art. 40.
2. *Id.* at art. 36.

National Park Authority, an agency of the Rubrian government. An underground spring, situated fifty kilometers south of the Elysium, irrigates the entire agricultural land.

Up until this dispute, relations between Acastus and Rubria were friendly since their independence from the former Republic of Nessus which was dissolved in 2000. For several decades predating their independence, there was disagreement between the political factions in the north and south. With Nessus dissolved, the North then became Acastus and the South Rubria. The 600-kilometer border between Acastus and Rubria runs exactly along the 36th parallel.

The capital of Nessus, sitting in the North, is now the capital of Acastus. Acastus has continued the trade and industrial activities that distinguishably characterized the North before independence. Acastus granted the Elysians all rights of citizenship, and a seat in the Acastus Parliament reserved for the Elysians has been occupied by Mrs. Doris Galatea since 2002.

Notwithstanding Rubria's application for United Nations ("UN") membership in April 2001, Acastus sent a note to the UN Secretary-General at the same time, submitting Acastus's continuation of Nessus's membership in the UN, of all the UN organs including the ICJ, and all other treaties for which the UN serves as depository. Nessus was an original member of the UN and a party to several other treaties. Following the Under-Secretary-General for Legal Affairs' memorandum interpreting Resolution 2386 at the request of the Secretary-General, Acastus was allowed to temporarily continue the membership of Nessus in the UN. Acastus maintained the entire diplomatic core at the UN and its organs, including sitting behind nameplates reading "Acastus" and flying the flag of Acastus in place of the flag of Nessus. Furthermore, Acastus has assumed obligations under Nessus's multi-year plan to repay its 1999 dues.

Aiming to enhance foreign investment opportunities, the Acastus Parliament passed the "Multinational Corporate Responsibility Act" ("MCRA") in December 2002. The Act aims to ensure Acastus's business entities hold themselves to the same standards in both domestic and overseas affairs and thereby to encourage other states to enter into bilateral investment treaties ("BITs") with Acastus. There have been several BITs entered between Acastus and other states before Rubria and Acastus signed the Rubria-Acastus Binding Bilateral Investment Treaty ("RABBIT") in February 2003. The RABBIT not only contained provisions on investment, but also procedures for dispute resolution including reference to the ICJ. Acastus joined the Organization for Economic Co-operation and Development ("OECD") on January 1, 2003.

Following the discovery of rich oil deposits on the Rubrian side of the Elysium by geologists of Trans-National Corporation ("TNC"), a privately-owned limited liability company incorporated in Acastus, TNC entered into an agreement with the government of Rubria to form Corporation for Oil & Gas

("COG"), a joint-venture corporation incorporated in Rubria in May 2003. COG's aim is to develop and export petroleum resources discovered in the Elysium. TNC and the government of Rubria remain the two sole shareholders of COG. COG was granted exclusive operational rights in the region by the President of Rubria, Mr. Leon Fides.

In June 2004, despite reviewing alternative plans to extract and export the deposits for ten months, COG accepted a proposal that would lead to the destruction of over half of the Elysians' agricultural lands and would block the spring which the Elysians depend. The detrimental repercussions envisaged by the proposed construction of the pipeline were later confirmed by the Institute of Local Studies and Appraisals ("ILSA"), an internationally respected non-governmental organization ("NGO"). The ILSA observed that the Elysians were left with virtually no choice as it was unthinkably difficult for them to adapt to the lifestyles in the cities of Acastus and Rubria. After the proposal was made public, the Rubrian government did not raise any criticisms and thereby permitted the construction.

Fully aware of the harm posed, COG authorized and financed the creation of Protection & Retention Operations Force ("PROF") to guard their personnel, anticipating possible hostility from the Elysians. COG is the only client of PROF, paying a fee that covered almost all of the expenses incurred by PROF. COG further provided PROF with all necessary equipment to carry out their duties. PROF mainly consisted of former members and recently retired commanders of the Rubrian armed forces. The ILSA expert team found that PROF had *inter alia* seized young Elysian men to work for COG by waving weapons at them and forcing them to work under inhumane working conditions and perform dangerous work without compensation.

On September 30, 2004, Mr. Davide Borius, one of the men seized, brought an action against COG, PROF, Rubria, and TNC in an Acastus civil court, with the help of Mrs. Galatea and several NGOs. The plaintiffs submitted that the court had jurisdiction over the case against COG, PROF, and Rubria in accordance with the Acastian International Rights Enforcement Statute ("AIRES").

On November 8, 2004, the court dismissed the claim against TNC on the ground that it was not directly involved in the alleged violations and COG's corporate veil could not be pierced. PROF was also dismissed as a defendant because it did not conduct business nor have assets in Acastus and thus was not "present" there under the terms of AIRES.

Unlike TNC, Rubria is a direct alleged violator and the *situs* of the alleged violations. Further, Rubria was not immune from suit under Acastus's foreign sovereign immunity statute because of the commercial nature of Rubria's activities. The court retained Rubria as a defendant on November 10, 2004.

Although COG did not appear at any stage of the proceedings, the nature of its business was such as to come within the meaning of "present" under the AIRES. On January 15, 2005, the court found the two remaining defendants jointly liable to the plaintiffs, with compensatory damages amounting to 200 million Euros.

The Elysians have exhausted all local remedies available in Rubria to rectify the problems stipulated in the *Compromis*.

Noting Rubria's disagreement over the judgment, Acastus notified the Ministry of Justice of Rubria that Acastus intended to institute proceedings before the ICJ. Further noting Rubria's preliminary objection to the admissibility of the case, Acastus withdrew its application and started negotiations with Rubria. Thereafter, the construction was suspended while Acastus refrains from enforcing the *Borius* judgment against Rubria and COG.

On September 15, 2005, Acastus and Rubria jointly submitted the *Compromis*, agreeing to the stipulated facts of the dispute notwithstanding a disagreement on the Court's *ad hoc* jurisdiction. The Court has decided to hear arguments relating to jurisdiction and the merits of the case concurrently.

III. QUESTIONS PRESENTED

Acastus requests that the Court adjudge and declare that:

A) the Court has jurisdiction over all claims in this case, since Acastus has succeeded to Nessus's status as a party to the Statute of the Court;
B) by permitting the construction of the pipeline as proposed, Rubria would violate the rights of Acastus's citizens of Elysian heritage;
C) the activities of PROF in the Elysium, including the forced labor of civilians, are attributable to Rubria and are violations of international law; and
D) the outcome of the *Borius* litigation does not place Acastus in breach of Article 52 of the RABBIT.

IV. SUMMARY OF PLEADINGS

This Court has jurisdiction over all claims in this case, since Acastus has succeeded to Nessus's status as a party to the Statute of the Court. Acastus's succession of Nessus is evident from the presence of both "objective" and "subjective" factors. "Objective" factors include Acastus retaining Nessus's capital city as its capital city; sustaining Nessus's former economic relations; maintaining Nessus's diplomatic relations, within or outside the UN structure; and assuming Nessus's multi-year plan to repay outstanding dues. "Subjective"

factors are usually regarded as more important. Recognition of Acastus as the successor of Nessus by third states and Acastus's consistent self-conception of its succession have convincingly shown Acastus's succession to Nessus's status. Acastus's succession to Nessus's membership in the UN is also consistent with the general trend and practice of state succession laid down by former key state dissolutions, most notably in the case of British India, USSR, and SFRY.

The construction of the pipeline as planned will render it impossible for the Elysians to continue their traditional way of life. This state of affairs will see them deprived of their rights under Article 27 of the ICCPR.[3] By failing to provide adequate legal protection for these rights, the State of Rubria is in breach of its obligations under Article 2(2) of the Covenant.[4] The restriction on the Elysians' rights was neither necessary nor prescribed by law, and so cannot constitute a lawful restriction under the ICCPR. As a matter of customary international law, the Elysian people, as indigenous occupiers, have special ownership/usage rights in the Elysian Fields and the natural resources pertaining thereto. These rights qualify the sovereign rights of Rubria over the land and its resources. This qualification prevents Rubria from maintaining the defense that its acts were the lawful exercise of its sovereign rights.

The activities of PROF violated the Elysian labourers' right to liberty and security, the right to fair and just remuneration for work, and the right to their own means of subsistence. PROF was also in violation of international treaties and custom which prohibit any form of forced labor.

COG is liable for PROF's illegal conduct since PROF is COG's empowered agent. Rubria is directly responsible for PROF's conduct due to its interest in and control of COG. Despite its status as the minority shareholder, Rubria had effective control over COG by way of its economic, legal and political connection with the corporation. Furthermore or alternatively, Rubria has an implied duty under the ICCPR, the ICSECR, ILO Conventions, and international custom to regulate the conduct of multi-national corporations within its jurisdiction to ensure the non-violation of human rights and other international commitments. Rubria has failed to discharge its duty to take reasonable and appropriate measures to secure the Elysians' rights.

The AIRES is concerned with claims under international law. As the primary rules of international law are addressed to states and state officials, TNC, as a non-state actor, is not a subject of international law. Currently, there is no binding agreement that directly imposes international obligations or duties

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3. International Covenant on Civil and Political Rights art. 27, G.A. Resolution 2200A (XXI), U.N. GAOR, 21st Sess., Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter *ICCPR*].

4. *Id.* at art. 2(2).

on corporations. TNC is also not bound by any "soft law" which seeks to impose international obligations directly on corporations.

Furthermore, TNC is not a proper party defendant within the meaning of the MCRA since it had no direct involvement in the activities of PROF in the Elysium. Despite the express incorporation of the OECD Guidelines, the MCRA does not repeal the principle of limited liability and hence TNC is protected by its separate legal status from that of COG. The approach of the Acastian court is in concert with decisions of other national courts.

V. PLEADINGS

A. The Court Has Jurisdiction Over All Claims in This Case, Since Acastus Has Succeeded to Nessus's Status as a Party to the Statute of the Court.

1. Nessus's Status

Nessus was a founding member of the UN and was a party to the Statute of the ICJ. Nessus accepted the ICJ's compulsory jurisdiction in all cases. In 2000, Nessus was dissolved and its territory was divided into Acastus and Rubria. Article 93(1) of the UN Charter provides that membership of the UN gives rise *ipso facto* to the presumption that it is a party to the Statute.[5] Acastus submits that the ICJ maintains its compulsory jurisdiction in all claims by virtue of having succeeded Nessus's membership in the UN and party status to the Statute.

2. Acastus Has Succeeded Nessus.

Scholars have noted that the law of state succession remains uncertain, and consistent state practice to establish an international custom is lacking.[6] In the absence of settled legal rules, this Court will want to consider all the relevant circumstances as a whole in this case when determining the status of Acastus. The circumstances to be considered may be grouped into "objective" and "subjective" factors. "Objective" factors are the variants of the basic criteria for statehood, such as retention of a certain amount of the former state's population, armed forces or seat of government,[7] while "subjective" factors include the state's claim to continuity and its self-conception and, "most importantly, the international recognition of, or acquiescence in, this claim by third states."[8]

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5. U.N. Charter art. 93, para. 1.

6. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 650 (5th ed. 1998).

7. KONRAD G. BUHLER, STATE SUCCESSION AND MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS 18 (2001).

8. Rein Mullerson, *The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia*, 42 INT'L & COMP. L.Q. 473, 476 (1993).

The classification provides not only clarity, but also possibly a "formula" or doctrine that could be applied in future cases. The subjective factors are "particularly important in doubtful or marginal cases."[9]

a. "Objective" Factors Are Present.

i. The General Rule is That "Objective" Factors Alone are Not Conclusive of Whether a New State Has Succeeded the Former State's Status.

The International Law Association has summarized in the 1996 Helsinki Conference that, *inter alia*, the name of the state and its capital; (minor) territorial change; changes of the population; changes of governmental or state power and constitutional change; and (temporary) *occupation bellica* do *not* affect the identity and continuity of a state.[10]

ii. Acastus's Capital City was the Former Capital City of Nessus. Acastus Has Sustained Nessus's Former Economic Relations and Industries.

The circumstances are consistent with the theory of "core or nucleus" of territory coined famously by Hall who wrote: "identity of a state therefore is considered to subsist so long as a part of the territory which can be recognised as the essential portion through the preservation of the capital or of the original territorial nucleus. . . . "[11]

iii. Acastus Has Satisfied the Essential Requirements for Membership in the UN as Laid Down in Article 4 of the UN Charter.

Article 4 of the UN Charter states that UN membership is open to all "peace-loving states which accept the obligations contained."[12] Acastus is a peace-loving state as evident by instituting the present proceedings before the ICJ and refraining from enforcing the *Borius* judgment. Acastus has willingly accepted the obligations as a UN member by *inter alia*, assuming annual obligations under Nessus's multi-year plan to repay its 1999 dues and continuing to participate in the UN and its agencies since Nessus's dissolution in 2000. Acastus's *bona fide* involvement in the UN is being recognized by the UN community evidenced by Acastus's delegation sitting behind "Acastus" nameplates in the UN and its agencies since 2000 and the flag of Acastus flown in place of the flag of Nessus.

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9. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 402 (1979).

10. BUHLER, *supra* note 7, at 14 (citing Report of the Sixty Seventh Conference held at Helsinki, Finland, (1996) Int'l Law Ass'n).

11. WILLIAM HALL & A. PEARCE HIGGINS, A TREATISE ON INTERNATIONAL LAW 22 (1917).

12. U.N. Charter, *supra* note 5, art. 4.

b. "Subjective" Factors Are Present.

i. Acastus is Recognized as the Successor of Nessus.

"Where there are substantial changes in the entity concerned, continuity may depend upon recognition (as in the case of India after 1947)."[13] There were no major objections to the Under-Secretary-General for Legal Affairs' memorandum interpreting Resolution 2386. Acastus can distinguish itself from the dissolution of the former Socialist Federal Republic of Yugoslavia ("SFRY") where UN members held different views resulting in different resolutions being adopted.[14] In addition, several third-party states that had bilateral treaties with Nessus have considered those treaties as continuing as between them and Acastus.[15]

ii. Acastus's Self Conception on its Succession of Nessus Has Been Consistent. The "Behaviour of the State Itself" is Important in Determining its Status.[16]

c. There is a Presumption of Continuance of the State.

There is a "presumption [of continuity]—in practice a strong one—[lies] in favour of the continuance, and against the extinction of an established State."[17] The international legal order is generally favorable to stability in international relations and the preservation of the *status quo*. The strong presumption of continuance of state should favour Acastus's continuance of Nessus's membership in the UN and Nessus's status as party to the Statute.

d. Acastus's Succession to Nessus's Membership is Consistent with the General Trend and Practice of State Succession Laid Down by Former Key State Dissolutions.

i. Example from India's Succession to British India's Membership of the UN.

The partition of British India into Dominions of India and Pakistan in 1947, occurring simultaneously with the former's attainment of independence,

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13. CRAWFORD, *supra* note 9, at 406.

14. Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29, 55–63 (1995).

15. Compromis, ¶ 8.

16. Rein Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 VA. J. INT'L L. 199, 303 (1993).

17. CRAWFORD, *supra* note 9, at 417.

was the first instance in which the UN was faced with the problems of succession to membership.[18] As contended by Professor Crawford, recognition of India's continuity by third states seems to have been of decisive significance.[19] Likewise, Acastus has been recognized by the majority of the UN member states. In considering the legal question of succession, the Sixth (Legal) Committee adopted several guidelines as general guidance for future cases.[20] They are, *inter alia*, (1) constitutional or territorial changes are presumed *not* to affect UN membership unless the extinction of a state as a legal personality recognised in the international order is shown; and (2) each case must be considered according to its merits and its particular circumstances.[21] Acastus has sustained Nessus's legal personality by evidence of continuance of Nessus's conventional obligations and diplomatic relations with third states. The merits of this case, as highlighted by both "objective" and "subjective" factors listed above, call for a strong inclination towards the conclusion that Acastus's succession has properly succeeded Nessus.

ii. Example from the Russian Federation's Succession to the Union of Soviet Socialist Republic's ("USSR") Membership of the UN.

With the dissolution of the USSR in 1991, Russian President Yeltsin sent a letter to the UN Secretary-General, declaring Russia would "continue" the membership of the USSR in the UN and requested that the UN replace the name "the Union of Soviet Socialist Republics" with the name "Russian Federation."[22] Shortly after, Russia took over the seat of the USSR in all UN organs, including its permanent seat in the Security Council.[23] Russia had not been subjected to any formal admission procedures.[24] In this context, Acastus's declaration of its succession of Nessus's status and the subsequent positive reactions from the international community towards Acastus's succession should be accepted as clear and sufficient evidence that Acastus has succeeded Nessus's status as a party to the Statute.

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18. Scharf, *supra* note 14, at 34; *see* Oscar Schachter, *The Development of International Law Through the Legal Opinions of the United Nations Secretariat*, 1948 BRIT. Y.B. INT'L L. 91, 101.

19. CRAWFORD, *supra* note 9, at 402.

20. Scharf, *supra* note 14, at 35; *see* U.N. GAOR, 1st Comm., Annex 14g, at 582–83, U.N. Doc. A/C.1/212 (1947) (letter from Chairman of the Sixth Committee to the Chairman of the First Committee).

21. Scharf, *supra* note 14, at 35–36; *see* U.N. GAOR, 1st Comm., Annex 14g, at 582–83, U.N. Doc. A/C.1/212 (1947) (letter from Chairman of the Sixth Committee to the Chairman of the First Committee).

22. Scharf, *supra* note 14, at 46; *see* Letter from Boris Yeltsin, President of the Russian Soviet Socialist Republic, to Javier Peres de Cuellar, Secretary-General of the United Nations (Dec. 24, 1991), U.N. Doc. 1991/RUSSIA (1991) [hereinafter Yeltsin U.N. Letter] (on file with author).

23. Scharf, *supra* note 14, at 47.

24. *Id.*

iii. Example from the Federal Republic of Yugoslavia's ("FRY") Succession to the SFRY's Membership of the UN.

FRY's succession to the SFRY's membership of the UN has been by far the most complicated precedent because both the "objective" and "subjective" factors present in the FRY case had not been compelling enough to denote a clear conclusion as to whether FRY was a successor of the SFRY.[25] With respect to the "objective" factors, even though FRY retained the former capital Belgrade and the whole governmental machinery, it comprises only about forty percent of the territory and forty-five percent of the population of the former SFRY;[26] whereas for the "subjective" factors, FRY's claim to "continue the state, international legal and political personality of the [SFRY]"[27] was vigorously debated and many third states had expressed doubts as to whether FRY was entitled to take over the SFRY's membership in the UN. It was evident from FRY's later suspension to participate in the work of the General Assembly that the disagreement existed.[28] Nonetheless, FRY was regarded as the continuation of the SFRY by this Court.[29] The international reaction experienced by Acastus was much more positive and as such, the acts of the international community are persuasive and clearly determinative of Acastus's succession of Nessus's status.

In the *Bosnia* case, jurisdiction *ratione personae* was established following the FRY's declaration regarding the continuation of the SFRY's membership.[30] Jurisdiction was established upon the intention expressed by the FRY to remain bound by the international treaties to which the SFRY was party.[31] Acastus's note to the UN Secretary-General in April 2001, declaring continuation of Nessus's membership should be given the same effect as the FRY's declaration.

Following the legal confusion caused by GA Resolution 47/1 regarding FRY's status, the Under-Secretary-General and Legal Counsel of the UN had

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25. Yehuda Z. Blum, *Membership of the "New" Yugoslavia: Continuity or Break?*, 86 AM. J. INT'L L. 830, 833 (1992).

26. *Id.* at 833.

27. The Ambassador, *Letter Dated 27 April 1992 from the Charge D'Affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the President of the Security Council, delivered to the Security Council*, U.N. Doc. S/23877 (May 5, 1992).

28. Application for Revision of Judgment of 11 July 1996 in Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. General List No. 122 ¶ 31 (July 11) [hereinafter *No. 122*].

29. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. General List No. 91 (July 11) [hereinafter *No. 91*].

30. *No. 91*, 1996 I.C.J. General List No. 91 (July 11).

31. *Id.*

provided a legal explanatory statement at the request of Permanent Representatives of Bosnia and Herzegovina and Croatia on 29 September 1992.[32] It explained that "the resolution [47/1] neither terminates nor suspends Yugoslavia's membership in the Organization."[33] In the present case, the Under-Secretary-General for Legal Affairs' memorandum interpreting Resolution 2386 had noted that "Nessus has ceased to exist . . . the resolution [2386] does not prevent Acastus from temporarily continuing the membership of Nessus in the United Nations."[34] However, it did not determine whether Nessus's membership was terminated or suspended and did not provide a time frame as to when Acastus's continuation of Nessus's status would lapse. Therefore, the argument that Acastus has succeeded Nessus's status has always been valid.

3. This Court Should *Not* Penalize a Defect in a Procedural Act which the Applicant Could Easily Remedy.[35]

"The ICJ, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law."[36] Procedural defects such as premature application are not adequate reasons for the dismissal of the applicant's suit.[37] Even if Acastus were to formally apply for UN membership and waited a year, giving effect to Rubria's reservation of requiring the opposing party to be a party to the Statute for more than a year, Acastus's "new" application filed in the ICJ would still be almost identical to the present one as the current conflict would remain unsettled. It defies common sense to require Acastus to institute fresh proceedings upon the compliance with formal UN membership application procedure.[38] This Court should maintain its compulsory jurisdiction over all claims in this case.

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32. *No. 122*, 1996 I.C.J. General List No. 122.

33. *Id.*

34. Compromis, ¶ 10.

35. *No. 91*, 1996 I.C.J. General List No. 91 (July 11).

36. Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 28 (Dec. 2) (citing The Mavrommatis Palestine Concessions (Greece v. Britain), 1924 P.C.I.J., Series A, No. 2, 34 (Aug. 30); *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 24–25 [hereinafter *Nicaragua*].

37. *No. 91*, 1996 I.C.J. General List No. 91 (July 11).

38. Northern Cameroons, 1963 I.C.J. 15, 28.

4. This Court Should Rule In Light of The Purpose and Object of the Statute.

In Article 31 of the Vienna Convention on the Law of Treaties ("VCLT"), a treaty should be interpreted in the light of its object and purpose.[39] The nature of the treaty is significant to its interpretation.[40] The ICJ was established to encourage the peaceful settlement of disputes, one of the UN's fundamental goals evidenced by Articles 1 and 2 of the UN Charter.[41] As with many treaties, it was the intention to involve as many states as possible. This intention is made clearer if seen in light of the different possible means by which jurisdiction can be conferred upon the ICJ. Therefore, the Statute aims to encourage peaceful settlement of disputes between more states. The Elysians had already exhausted all domestic remedies to rectify the problems and Acastus respectfully asks this Court to maintain its compulsory jurisdiction over all claims in this case so as to provide a peaceful resolution to this potentially destructive situation involving the lives and livelihood of an ancient people.

B. By Permitting The Construction of the Pipeline as Proposed, Rubria Would Violate the Rights of Acastian Citizens of Elysian Heritage.

1. The Construction of the Pipeline as Proposed Violates Rubria's Obligations under Article 27 of the ICCPR.

Rubria is a state party to the International Covenant on Civil and Political Rights ("ICCPR"). Article 27 of the ICCPR states that: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[42]

The jurisprudence of the United Nations Human Rights Committee ("UNHRC") on Article 27 has been developed largely through cases brought to it under the Optional Protocol.[43] These cases demonstrate that Article 27 can form the basis at international law for compelling states to recognize and take active steps to preserve the "special relationship of indigenous peoples with

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39. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, *available at* http://www.worldtradelaw.net/misc/viennaconvention.pdf#search=%22article%2031%20vienna%20convention%22 (last visited Sept. 26, 2006).

40. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

41. U.N. Charter, *supra* note 5, at arts. 1–2.

42. *ICCPR*, *supra* note 3, at art. 27.

43. Look in footnote 43 when ILL comes in

their land."[44] As the treaty body has been specifically authorized by sovereign state parties to administer the treaty, the UNHRC's opinion is of great persuasive value. In its General Comments, the UNHRC has stated that:

With regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. . . .[45]

In *Länsman v. Finland*, the UNHRC affirmed the principle that Article 27 protects traditional practices of indigenous groups and their right to do so on traditional lands.[46] This case concerned the alleged disturbance of reindeer breeding—which formed part of the Saami custom—by government authorized quarrying of the Etela-Riutusvaara Mountain.[47] While the UNHRC concluded that, on the facts, the scale of quarrying was not sufficient to illicit the impact on alleged reindeer breeding, it was noted that a significant expansion of the quarrying *would* put Finland in breach of Article 27.[48] The Committee also gave significant weight to the fact that the Saami were consulted over the licensing process.[49]

In *Ominayak v. Canada*, the UNHRC found Canada in breach of its Article 27 obligations as against the indigenous Lubicon Lake Band.[50] The facts, closely analogous to the instant case, were thus: the Band had, since time immemorial, occupied an area of approximately 10,000 square kilometers of lake territory in Alberta, Canada.[51] They continued to practice their traditional means of subsistence, namely: hunting, fishing, and trapping.[52] The Provincial Government of Alberta granted forestry leases, as well as oil and gas exploration licenses over almost all of the 10,000 square kilometers to various private corporations.[53] The UNHRC placed considerable emphasis on the fact

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44. SARAH PRITCHARD, INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS 196 (1998).

45. *General Comment No. 23: The Rights of Minorities*, U.N. CCPR Human Rights Committee, 50th Sess., 1314th Mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994).

46. Commc'n No. 511/1992: Finland, Aug. 11, 1994, CCPR/C/52/D/511/1992.

47. *Id.* ¶ 9.6.

48. *Id.*

49. *Id.*

50. Ominayak v. Canada, [1990] Commc'n No. 167/1984, U.N. Hum. Rts. Comm., A/45/40, vol. II, annex IX.A [hereinafter *Ominayak*].

51. *Id.*

52. *Id.*

53. *Id.*

that the leasing process was carried out without consultation with or representation of the Band or its interests.[54] The environmental impact of the forestry and exploration activities was such that it would prevent the Band from engaging in its traditional way of life altogether.[55] The UNHRC found that the Canadian Government's failure to legally protect the Band's traditional way of life constituted a breach of its Article 27 obligations.[56]

Acastus submits that the environmental damage attendant on the construction of the pipeline would result in the loss of rights of Acastian citizens of Elysian heritage, which rights are guaranteed under Article 27.[57] Over half the Elysians' agricultural lands would be directly destroyed by the construction process.[58] The agricultural capacity of the other half would be destroyed by the blocking of water supplies.[59] It will be recalled that "[t]he Elysians depend completely on the rich agricultural lands located in Rubria for food."[60] According to the ILSA report of September 2004, it will no longer be possible for the Elysians to subsist on the Elysian Fields, or to practice their traditional way of life.[61] The report concludes: "If the pipeline is built according to plan, each and every Elysian will have a very simple choice: leave their ancestral homeland for the inhospitable cities of Acastus and Rubria, or starve."[62] Acastus submits that the ILSA report is evidence of the highest quality, and should be accepted by this Court. It is further submitted that the sudden rural-urban migration of the Elysians would do irreparable harm to customs, language, and religion of the people.[63]

It is submitted that the deprivation of the Article 27 rights of the Elysians creates positive obligations against Rubria to enact positive legal measures to protect their rights. The UNHRC held that this requirement arises pursuant to Article 2(2) of the ICCPR, which obligates state parties to the Covenant to, *inter alia*, "adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[64] These rights arise irrespective of the fact that the victims are not citizens of Rubria, since Article

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54. *Id.*

55. *Ominayak*, [1990] Commc'n No. 167/1984, U.N. Hum. Rts. Comm., A/45/40, vol. II, annex IX.A.

56. *Id.*

57. Compromis, ¶ 37.

58. *Id.* ¶ 21.

59. *Id.*

60. *Id.* ¶ 5.

61. *Id.* ¶ 24.

62. Compromis, ¶ 24.

63. PRITCHARD, *supra* note 44.

64. *ICCPR*, *supra* note 3, at art. 2(2).

2(1) of the ICCPR states that "[T]he rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . national or social origin. . . ."[65] On the facts, Rubria has passed no laws nor instituted any legal proceedings to protect the Article 27 rights of Acastian citizens of Elysian heritage. It is therefore submitted that Rubria has violated the rights of these people.

2. Rubria's Actions Do Not Constitute a Legitimate Restriction of Elysians' Rights.

Acastus concedes that the rights under ICCPR Article 27 are of such character that they may properly be subject to restrictions. However, it is submitted that, in conformity with international human rights practices, such restrictions must meet two criteria: they must be prescribed by law, and no greater than are necessary.[66]

With regard to the first requirement, the European Court of Human Rights held in *Hashman and Harrup v. United Kingdom* that the phrase "prescribed by law" in the context of the restriction on human rights must be taken to mean "through legislative process."[67] Rubria has not enacted any legislative, legal, or quasi-legal measures purporting to restrict the Elysians' rights under Article 27.

The second requirement is that restriction on rights must be "necessary."[68] In the plain sense, the term "necessary" connotes that there must exist some concern or reason for the restriction that is objectively commensurate to—or greater than—the importance to the upholding of the right. The UNHRC case of *Kitok v. Sweden* laid down a stricter necessity test for the restriction of the Article 27 rights.[69] It is summarized here by the Australian Human Rights and Equal Opportunities Commission: "[T]o be valid and not breach Article 27, a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole."[70]

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65. *Id.* at art. 2(1).

66. International Covenant on Economic, Social, & Cultural Rights art. 4, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3(*entered into force* Jan. 3, 1976) [hereinafter *ICESCR*]; *ICCPR*, *supra* note 3, arts. 18, 21, 22.

67. Hashman v. U.K., 25594/94 Eur. Ct. H.R. 133 (1999).

68. *ICESCR*, *supra* note 66, at art. 4; *ICCPR*, *supra* note 3, arts. 18, 21, 22.

69. Kitok v. Swed. Commc'n No. 197/1985, U.N. Human Rights Comm'n, U.N. Doc. CCPR/C/33/D/197/85.

70. *Id.* ¶ 9.2; *see also* The fight against racism: Principles of non-discrimination and equality, *available at* http://www.hreoc.gov.au/social_justice/nt_issues/fight.html#21 (last visited Sept. 26, 2006).

The reason for the restriction of the Elysians' rights in this case is strictly financial; other routings for the pipeline could have been pursued by COG but were dismissed on grounds of cost alone.[71] Acastus submits that the monetary gain by project stakeholders cannot render a restriction of the livelihood rights and cultural rights as "necessary" in the objective sense. The strict *Kitok* necessity demands that the restriction be necessary *specifically for the protection of the right bearers themselves.*[72] It has not been argued by Rubria—and such an argument could not stand on the facts—that the restriction of the Elysians' rights would promote the long-term viability of the Elysians themselves. It is submitted, therefore, that the restrictions do not meet the necessity requirement under any formulation.

Based on these submissions, namely that any restriction that has taken place on the rights of Acastian citizens of Elysian heritage arising from Article 27 of the ICCPR was neither prescribed by law nor necessary, Acastus submits that any such restrictions cannot be viewed as legitimate in light of Rubria's international obligations under international law.

3. The Sovereignty Rights of Rubria Do Not Absolve It of Liability for the Alleged Breaches as Rubria's Sovereignty Rights Are Qualified by the Elysians' Right of Self-Determination.

Acastus submits that the Elysians have a right to self-determination at international law. This includes the right to continue to subsist on their traditional lands, and the right to participate in the management of natural resources pertaining to those lands as well as a share in any profits derived from exploitation of those resources.

Nessus acquired its sovereignty over the Elysian Fields through the method of occupation, as the absence of any war or succession treaty between the Elysians and Nessus rules out other methods of acquisition. In order to lawfully acquire territory by occupation, the territory in question must have been, at the time of occupation, *terra nullius*—or "territory belonging to no one"—at international law.[73] Until the 20th century, many smaller indigenous societies that occupied territory were considered too "backwards" and lacking in sufficient socio-political complexity to be considered occupiers at international law.[74]

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71. Compromis, ¶ 21.

72. Kitok, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), ¶ 4.3.

73. Western Sahara, Advisory Opinion, 1975 I.C.J. 11 (Oct. 16).

74. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT'L L. REV. 263, 263 (1997).

Acastus submits that where territory is acquired by a state in this fashion, customary international law confers special rights on those indigenous people. These special rights qualify the sovereignty rights of the state. These rights, characterized broadly as "self-determination rights," include, *inter alia*, special property interests in land and natural resources. This right need not be the absolute form of property rights observable in many municipal law regimes.[75] This right could, in the instant case, be discharged in a number of ways ranging from consultation and profit sharing to a rerouting of the pipeline.

This practice by states is evidenced in many international treaties. Article 15 of the ILO Convention No. 169, to which it is likely that Rubria is a party, requires that: "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to *participate in the use, management and conservation* of these resources." (Emphasis added).[76] Article 1(1) of the ICCPR (which is identical to Article 1 of the ICESCR) states that: "All peoples have the right of self-determination."[77] This statement is further elaborated upon in Article 1(2): "All peoples may, for their own ends, freely dispose of their natural wealth."[78] Article 7 of the Draft Declaration on the Rights of Indigenous Peoples states that: "Indigenous peoples have the collective and individual right not to . . . prevention of and redress for: . . . (b) any action which has the aim or effect of dispossessing them of their lands, territories or resources."[79] This right is further developed in Articles 26–28 of the Draft Declaration.[80]

Acastus submits that a sense of obligation amongst state actors that they are bound by customary norm to safeguard these rights is evident amongst those states in which indigenous people reside or subsist. The following are examples of such *opinio juris*: the High Court of Australia in *Mabo v. Queensland [No. 2]* overturned the long-held presumption at common law that Australia had been *terra nullius* at the time of its occupation due to the "backwards" nature of its aboriginal inhabitants.[81] The High Court of Australia granted "native title" to the applicant, an indigenous Aboriginal, and in doing

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75. *See generally* Kuwait Airways Corp. v. Iraqi Airways Co., 2 A.C. 883 (2002).

76. The International Labor Organization Convention (No. 169) Concerning the Protection of Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382, at art. 15 (*entered into force* Sept. 5, 1991).

77. *ICCPR*, *supra* note 3, at art. 1(1).

78. *Id.* at art. 1(2).

79. Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. ESCOR, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, art. 7, U.N. Doc. E/CN.4/Sub.2/1994/2/Add1 (Apr. 20, 1994).

80. *Id.* at arts. 26–28.

81. Mabo v. Queensland II, (1992) 175 C.L.R. 1.

so recognized that indigenous heritage gives rise to certain property rights at law, including the right to access the land and practice traditional agriculture thereon, as well as the right to exclude other uses of the land such as mining or urban development.[82] In the *Awas Tingni* case, the Inter-American Court of Human Rights injuncted the government of Nicaragua from licensing a Korean corporation to log communal lands of the Mayagna people.[83] In a decision followed by that tribunal in several subsequent cases, the Inter-American Court recognized Indigenous property rights as arising from Article 21 of the American Convention on Human Rights and pledged to protect them.[84] The Canadian Government has also recognized these rights "through the Indian Act of 1970 and Treaty 8 of 21 June 1899 (concerning aboriginal land rights in northern Alberta)."[85] This treaty is now enshrined in the Canadian Constitution.[86] New Zealand has protected similar land rights through the Maori Land Act of 1993 and the Treaty of Waitangi Act of 1975.[87] Chapter 12 of South Africa's Constitution protects the rights of indigenous inhabitants, including the customary law of indigenous peoples as it applies to land.[88]

Acastus submits that the effect of this customary norm in the instant case is that it restricts the right of Rubria to dispose of the land constituting Elysian Fields and the natural resources thereupon. Without considering full extent of this restriction, it is submitted that Rubria's right to grant licenses of an exclusive character over the entire lands of the Elysian Fields to COG without consulting or seeking approval from the Elysians must fall within such a restriction, as it gives no account at all to the self-determination rights of the Elysians. It is submitted, therefore, that national sovereignty rights cannot form the basis of a defense at international law for Rubria's inactions.

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82. *Id.*

83. Case of the Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. Court H.R. (Ser. C) No. 79 (Judgment on merits and reparations of Aug. 31, 2001), in 19 ARIZ. J. INT'L & COMP. L. 395 (2002) (pub. abridged ver.) [hereinafter *Awas Tingni* case].

84. *See* S. James Anaya, *Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT'L ENVTL. L & POL'Y 237, 239 (2005); Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, doc. 5 rev. 1 at 860 (2002); Maya Indigenous Communities of the Toledo District, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, ¶ 61 (2004).

85. *Ominayak*, Commc'n No. 167/1984, CCPR/C/38/D/167/1984 (1990), ¶ 2.3; *see also* Delgamuukw v. British Columbia, 3 S.C.R. 1010, ¶ 206 (1997); *see generally* R. v. Marshall, 3 S.C.R. 456 (1999) (citing R. v. Badger, 1 S.C.R. 771, ¶ 79 (1996)).

86. Canada Constitution.

87. Treaty of Waitangi Act, 1975; Maori Land Act, 1993.

88. South Africa Constitution, ch. 12.

C. The Activities of Prof in the Elysium, Including the Forced Labor of Civilians, are Violations of International Law and are Attributable to Rubria.

1. The Activities of PROF in the Elysium, Including Forced Labor, Are Violations of International Law.

Article 9(1) of the ICCPR states, *inter alia*, that "everyone has the right to liberty and security of person.[89] No one shall be subjected to arbitrary arrest or detention." By kidnapping and detaining the Elysian laborers, PROF violated the Elysians' right to liberty and security of the person.

Article 8(3) of ICCPR provides that no one shall be required to perform forced or compulsory labor.[90] ILO Declaration on Fundamental Principles and Rights at Work requires member states to eliminate all forms of forced and compulsory labor.[91] By forcing the Elysian labourers to work on the pipeline project against their will, the conduct of PROF fell afoul of the interests protected by ICCPR Article 8(3) and the ILO Declaration.

PROF is also in breach of international custom which similarly prohibits forced labor. The existence of such a custom is evidenced in Article 23(1) of the Universal Declaration of Human Rights,[92] Article 4 of the European Convention on Human Rights,[93] Article 6(2) of the American Convention on Human Rights,[94] Article 1 of the ILO Forced Labor Convention,[95] Article 1 of the Abolition of Forced Labor Convention,[96] and various resolutions of the U.N. General Assembly.[97]

Furthermore, the Elysian laborers were forced to work all day on the pipeline project and they were only given a small bag of sorghum as payment

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89. *ICCPR*, *supra* note 3, at art. 9(1).

90. *Id.* at art. 8(3)(a).

91. International Labor Organization Declaration on Fundamental Principles and Rights at Work, 1998, *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN (last visited Sept. 26, 2006).

92. Universal Declaration of Human Rights, G.A Res. 217A, at 71, U.N. Doc. A/810 (1948).

93. Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which *entered into force* on Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998, 213 U.N.T.S. 222.

94. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S., 1144 U.N.T.S. 143, *available at* http://www.cidh.org/Basicos/basic3.htm (last visited Sept. 26, 2006).

95. Forced Labour Convention, June 28, 1930, 39 U.N.T.S. 55.

96. Abolition of Forced Labour Convention, June 25, 1957, 320 U.N.T.S. 291.

97. G.A. Res. 52/140, ¶ 1, U.N. Doc. A/Res/52/140 (Dec. 12, 1997); G.A. Res. 53/162, U.N. Doc. A/Res/53/162 (Feb. 25, 1999); G.A. Res. 56/231, U.N. Doc. A/Res/56/231 (Feb. 28, 2002).

for their labor. Their rights are violated under Article 7 of ICSECR, which protects a person's right to fair and just remuneration for work.[98]

The Elysian economy is insular and wholly agricultural. According to Elysian tradition, children, pregnant women, and the physically and mentally handicapped do not labor in their fields. As the Elysian men were forced to work on the pipeline during the daytime and only allowed to return to their fields in the evening, the Elysians were deprived of their own means of subsistence, contrary to Article 1 of the ICSECR.[99]

2. COG is Liable for PROF's Activities.

Pursuant to a contract concluded in July 2004, PROF was engaged by COG to carry out various operations in the Elysium in return for a fee which covered operating costs and profits.[100] Although PROF has a separate corporate identity from COG, it was created and financed by COG solely for the purpose of carrying out the COG contract. PROF was empowered by COG to determine and purchase the weapons and ammunitions necessary for its operations.[101] More importantly, PROF was authorized by COG to practice forced labor, as evidenced by the fact that the Elysians were deposited at sites to work under the instructions of COG managers. Therefore, PROF is an empowered agent of COG.

It is submitted that private security companies are capable of violating human rights if armed violence is used to kill, detain, kidnap or otherwise coerce.[102] Companies that use such private security firms are clearly responsible for the conduct of their agents.[103] It is not disputed that PROF used force or threatened to use force in kidnapping and coercing the Elysians to work on the pipeline project. COG is therefore responsible for the conduct of PROF.

98. *ICESCR*, *supra* note 66, art. 7.

99. *Id.* at art. 1.

100. Compromis, ¶ 23.

101. *Id.*

102. Compromis, ¶ 30.

103. Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria, Commc'n No. 155/96 (2001); Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, 2001–2002, ¶¶ 50, 58, 62; Juan Carlos Zarate, *The Emergence of a New Dog of War; Private International Security Companies, International Law, and the New World Order*, 34 STAN. J. INT'L L. 75, 152–53 (1998).

3. The Activities of PROF in the Elysium Are Attributable to Rubria.

Conduct attributable to the state can consist of actions or omissions.[104] The activities of PROF are attributable to Rubria due to its interest in and control of COG and/or its omission to take appropriate measures to secure the rights of the Elysians.

a. Rubria is Directly Responsible for PROF's Conduct Due to its Interest in and Control of COG.

In the case of corporate entities, international law recognizes the separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion.[105] The conduct of corporate entities in carrying out their activities is prima facie not attributable to the state.[106] However, where there is evidence that the state is using its interest in or control of a corporation in order to achieve a particular result, the conduct in question can be attributed to the state.[107]

In the *Foremost Tehran v. Iran* case, a decision not to pay dividends to the company's shareholders, including the claimant American company, was attributable to the Iranian State.[108] The Iran-US Claims Tribunal based its decision on the fact that the State of Iran was represented on the company's board of directors and these representatives had influenced the board of directors' meeting at which the decision was taken for the purpose of expropriating shareholders.[109]

A state is also responsible for the acts of non-state entities if the private conduct is directed or controlled by the state.[110] The non-state entities are not state organs and the conduct does not have to involve "governmental authority."[111]

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104. International Law Commission, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 70 U.N. GAOR, 53rd Sess. (2001) [hereinafter *Commentaries to Draft Articles*].

105. *Id.* at 107.

106. *Id.*

107. *Id.* at 108.

108. Foremost Tehran, Inc. v. Islamic Republic of Iran, 10 Iran-U.S.C.T.R. 228 (1986).

109. Ademola Abass, *Consent Precluding State Responsibility: A Critical Analysis*, 55 INT'L & COMP. L. Q. 211 (2004).

110. International Law Commission, Draft Articles of the Responsibility of States for Internationally Wrongful Acts, UN GAOR, 56th Session, Supp. No. 10, Article 8, UN Doc. A/56/10 (2001) [hereinafter Draft Articles].

111. JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 140 (2002).

In the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, this Court accepted that a state can be liable for humanitarian violations committed by non-state actors outside its territory.[112] It was held that for the conduct of non-state actors to give rise to legal responsibility of the state, it would have to be proved that the state had effective control of the non-state actor's operations in the course of which the alleged violations were committed.[113]

The issue in the present case is whether Rubria used its interest and control of COG for a particular purpose and whether such control was effective. The Rubrian government and TNC incorporated COG expressly and solely for the purpose of developing and exporting the petroleum resources in the south of the Elysium.[114] This is in concert with Rubria's post-independence policy to encourage investment by multinational companies, especially those involved in extracting mineral and oil resources. Clearly, Rubria would like to use its interest in COG as a vehicle to advance its local economy, despite its knowledge that the operation of COG would jeopardize the livelihood and rights of the Elysians.

Rubria may contend that its government is only the minority shareholder of COG and hence it did not have effective control of the latter's decision. However, it is submitted that a majority shareholding is not a prerequisite to effective control over a corporate entity. In the case of private corporations, effective control can flow from the economic, legal and political connection between the corporation and the state.[115] In this case, it can be established that Rubria had effective control over the activities of COG and PROF by way of the following facts:

A) Rubria is responsible for almost half (forty-nine percent) of the funding for COG;[116]
B) COG was incorporated under the laws of Rubria;[117]
C) The agricultural lands to be exploited for oil are under the stewardship of the National Parks Authority ("NPA"), an agency of the Rubrian government;[118] and

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112. *Nicaragua*, 1986 I.C.J. at 63, ¶ 111.

113. *Id.* ¶ 112.

114. Compromis, ¶ 19.

115. 115. JÄGERS, *supra* note 111, at 171; Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 525 (2001).

116. Compromis, ¶ 19.

117. *Id.*

118. *Id.* ¶ 5.

D) The Rubrian government granted COG the exclusive rights to operate within the region to COG.[119]

Hence, Rubria had effective control over COG and is directly responsible for the human rights violations by PFOF, which acted as COG's agent.

b. Rubria has Failed to Take Reasonable and Appropriate Measures to Secure the Elysians' Rights.

i. States have an Implied Duty to Regulate Activities of Private Entities to Avoid Human Rights Violations.

Rubria is a party to the ICCPR, ICSECR, and the ILO.[120] These conventions impose an obligation on the party states' governments to regulate the conduct of multi-national corporations within their jurisdiction in order to uphold the principles contained within them.[121]

This general obligation can also be found in international human rights law and it has appeared in the case-law of international human rights bodies. For example, the Inter-American Court in the *Velasquez-Rodriguez* case decided that Honduras was responsible, even if the alleged human rights violations had not been carried out by agents acting under the cover of public authority.[122] This was because the state failed to prevent these violations or to punish those responsible.[123]

In the *Diplomatic and Consular Staff* case, this Court concluded that the responsibility of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps," in circumstances where such steps were evidently called for.[124]

Similarly, in *Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, the African Commission of Human and People's Rights held that Nigeria failed to discharge its duty to protect citizens from damaging acts done by private parties by failing to enact appropriate legislation and institute effective enforcement measures against breaches, contrary to the

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119. *Id.* ¶ 20.

120. *Id.* ¶ 36.

121. Daniel Aguirre, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*, 35 CAL. W. INT'L L.J. 53, 66 (2004); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights paras. 6, 7 & 18 (Jan. 22–26, 1997), *available at* http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html (last visited Oct. 4, 2006).

122. . Velasquez-Rodriguez case, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶182 (1988).

123. *Id.* ¶ 178.

124. United Nations Diplomatic and Consular Staff in Tehran, (U.S. v. Iran), 1980 I.C.J. 3, 31–32 (May 24).

minimum conduct expected of governments and therefore, it acted contrary to the African Charter on Human and People's Rights.[125]

In the present case, Rubria failed to discharge its duty to prevent the illegal activities of PROF, including forced labor, which took place within Rubrian territory. When entering into the bilateral agreement with Acastus, RABBIT, Rubria specifically insisted on having the corporate responsibility provision of the MCRA incorporated to ensure that human rights would be observed by Acastian corporations.[126] Rubria, however, failed to satisfy the minimum requirement of enacting similar legislation on its part.[127]

ii. Actual Knowledge of the Violations is not Required to Constitute Breach.

It has been argued that the simple fact of harm by a corporation, where a government does not have adequate prior or concurrent knowledge of that harm, cannot trigger state responsibility.[128] Thus, Rubria may contend that it was not aware of PROF's conduct, including forced labor, at the time the conduct was occurring.

However, the findings of the ILSA report, including the incidents of forced labor committed by PROF, were published in September 2004.[129] It is submitted that Rubria had at least constructive knowledge of PROF's conduct.

Furthermore, the agricultural lands cultivated by the Elysians are under the stewardship of the NPA, an agency of the Rubrian government.[130] Additionally, Rubria had appointed four directors of COG, to whom the chief executive officer of COG reported.[131] Even if the Rubrian government did not have actual knowledge of PROF's conduct, its knowledge can be imputed through the NPA and its interest and control of COG.

In the *Corfu Channel* case, this Court found Albania liable for a failure to act when it knew or should have known of the illegal conduct taking place within its territory.[132]

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125. 15th Annual Activity Report of the African Commission on Human and People's Rights, *supra* note 103.

126. Compromis, ¶ 15.

127. Aguirre, *supra* note 121, at para. 15(j).

128. Craig Scott, *Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS 563–96 (A. Eide, C. Krause & A. Rosas eds., 2d ed. 2001).

129. Compromis, ¶ 24.

130. *Id.* ¶ 5.

131. *See generally Id.*

132. Corfu Channel case, (U.K. v. Alb.), 1949 I.C.J. 4, 4, 23.

Rubria was the *situs* of PROF's activities which violated the Elysians' human rights.[133] Rubria ought to have known of the illegal conduct and its failure to prevent or penalize such activities gave rise to a breach of its obligations under ICCPR, ICSECR, ILO, and customary international law.

iii. Serious Harm has Been Caused to the Elysians.

In the *Länsman* cases, the UNHRC required a threshold of seriousness of harm before a state's duties to prevent the harm were triggered, and, even then, a state may discharge such duties by fulfilling its obligation to consult with the potentially affected groups.[134] This duty to consult and negotiate in good faith was confirmed by this Court in the *Case Concerning the Gabcíkovo-Nagymaros Project.*[135] The UNHRC decided that Finland had not violated its legal obligations, noting that the amount of quarrying that had already taken place had not caused significant harm.[136] It also noted that the authors of the complaint had been consulted before the quarrying permit was issued.[137]

The present case can be distinguished from the *Länsman* cases in that the Elysians were never consulted on the building of the oil pipeline. Hence, Rubria is in breach of its duty of good faith. Serious harm has been caused to the Elysians due to the forced labor, the lack of adequate compensation, and the deprivation of opportunities to cultivate their agricultural lands during daytime.

D. The Outcome of the Borius Litigation Does Not Place Acastus in Breach of Article 52 of the RABBIT.

It is submitted that the Acastian court acted lawfully in dismissing TNC as a defendant in the claims under AIRES and the MCRA, and hence Acastus is not in breach of Article 52 of the RABBIT.[138]

1. TNC Is Not Liable for the Conduct of PROF under AIRES Since It Is Not a Subject of International Law.

a. The Nature of Claims under AIRES.

Under AIRES, Acastian courts have subject matter jurisdiction over cases in which it is claimed that international law, including but not limited to the

133. Compromis, ¶ 30.

134. Commc'n No. 511/1992, CCPR/C/52/D/511/1992, ¶ 8.4.

135. Case Concerning the Gabcík ovo-Nagymaros Project, 1997 I.C.J. 3, 7.

136. Commc'n No. 511/1992, CCPR/C/52/D/511/1992, ¶¶ 9.6, 10.

137. *Id.* ¶ 9.6.

138. Compromis, ¶ 15.

international law of human rights, has been violated outside the national territory, so long as the defendant is present or may be found in Acastus.[139]

As found by the domestic court of Acastus, TNC, as a private company, is not a "subject" of international law, which governs the rights of states and other international legal persons, and therefore is not a proper party defendant in a case under AIRES.[140]

b. TNC is Not a Subject of International Law.

To determine the obligations of corporations for human rights violations under international law, the status of corporations under international law must be first addressed.[141] Under present international law, entities only owe responsibilities to the international community when they are considered to be subjects of international law.[142]

A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.[143] The question then turns onto whether a corporation has i) rights, ii) duties, and iii) whether it is able to enforce its rights in international law.

In terms of international rights, it has been accepted that business enterprises have rights under international law, whether the economic right under investment treaties to receive nondiscriminatory treatment, or political rights such as freedom of speech.[144] As for the ability of a corporation to enforce its rights, there is also evidence that corporations have been provided with the possibility of enforcing their rights through arbitration. Other examples include the United Nations Compensation Commission, through which corporations can bring claims for compensation against Iraq,[145] and the Seabed Disputes Chamber,[146] which has jurisdiction relating to disputes between parties to a contract.

However, in terms of duties, the classic position is that the primary rules of international law are addressed to states and state officials, not non-state

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139. *Id.* ¶ 27.

140. *Id.* ¶ 28.

141. JÄGERS, *supra* note 111, at 19.

142. Jägers, *Multinational Corporation under International Law*, *in* HUMAN RIGHTS STANDARD AND THE RESPONSIBILITY OF TRANSNATIONAL CORP., THE HAGUE 259, 261 (1999).

143. Reparation for Injuries in the Service of the UN case, 1949 I.C.J. 174, 179.

144. Addo, *The Corporation as a Victim of Human Rights Violations*, *in* HUMAN RIGHTS STANDARD AND THE RESPONSIBILITY OF TRANSNATIONAL CORP., THE HAGUE 187, 191 (1999).

145. SC Res. 692, U.N. Doc. S/RES/692 (May 20, 1991).

146. *Annex VI of the UN Convention on the Law of the Sea*, 21 I.L.M. 1261 (1982).

actors.[147] The most commonly cited example of international legal norms imposing obligations on corporations is the European concept of *Drittwirkung*, under which certain provisions of the European Convention of Human Rights are understood to contemplate "horizontal effect," meaning that they apply as between private parties.[148] However, it is submitted that such a concept does not conflict with the classic position, as European authorities have demonstrated that it is the state that has the obligation to ensure that private parties behave in certain ways towards other private parties.[149]

Similarly, in *Velasquez-Rodriguez*, although the Inter-American Court recognized that the Inter-American Convention on Human Rights had a horizontal effect similar to that of the European Convention, it affirmed the responsibility of the state for its failure to prevent or punish private conduct that infringed human rights, but it did not hold that private individuals who inflict such injuries are guilty of violating the Convention.[150]

Therefore, although corporations have rights and are sometimes able to enforce their rights by bringing international claims, there is no binding agreement that directly imposes international obligations or duties on corporations. Therefore, TNC, as a corporation, is not a subject of international law and is not a proper party defendant in the claim under AIRES.

c. Furthermore, TNC is Not Bound by Any "Soft Law" Which Seeks to Impose International Obligations Directly on Corporations.

While the U.N. Global Compact,[151] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,[152] and the OECD Guidelines for Multinational Enterprises ("the OECD Guidelines")[153] all urge toward some form of legal personality, they are not clear or precise enough to establish on their own a customary rule on international legal

147. BROWNLIE, *supra* note 6, at 58.

148. Jägers, *supra* note 142, at 265.

149. López Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1994); Guerra v. Italy, 26 Eur. Ct. H.R. 357 (1998); *see also* Carlos M. Vázquez, *Direct vs Indirect Obligations of Corporations under International Law*, 43 COLUM. J. TRANSNAT'L L. 928, 937 (2005).

150. Velasquez-Rodriguez case, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

151. UN Global Compact, *available at* http://www.un.org/Depts/ptd/global.htm (last visited Oct. 4, 2006).

152. ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, *available at* http://www.ilo.org/public/english/standards/norm/sources/mne.htm (last visited Oct. 4, 2006).

153. The OECD Guidelines for Multinational Enterprises, Text, Commentary and Clarifications, DAFF/IME/WPG(2000)15/FINAL, *available at* http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime-wpg(2000)15-final (last visited Oct. 4, 2006).

personality for corporations.[154] They are essentially "soft law," *i.e.*, they are only voluntary in nature and they do not on their own impose any binding obligations on corporations.[155]

Rubria may seek to rely on Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("Norms"), which aspire to hold businesses accountable for their human rights abuses.[156] However, although the Norms are not voluntary, they are still in the form of recommendations and have not attained the status of a treaty which would create legally binding obligations on private corporations.[157]

In any event, the very first principles of the Norms, entitled "General Obligations," state that the Norms are in no manner intended to reduce the obligations of governments to promote, secure the fulfillment of, respect, ensure respect for, or protect human rights.[158] The Norms would be misused if they were employed by a government to justify failing to protect human rights fully or to provide appropriate remedies for human rights violations. This idea is reinforced in paragraph 19 of the Norms, which provides that nothing in the Norms should be construed as diminishing states' obligations to protect and promote human rights or as limiting rules or laws that provide greater protection of human rights.[159]

Hence, even under the Norms, Rubria is still obliged to ensure that human rights are being protected within its territory and there is no justification for shifting its liability to TNC or any other corporate entities.

2. TNC Is Not a Proper Party Defendant within the Meaning of the MCRA.

a. TNC had No Direct Involvement in PROF's Activities in the Elysium.

According to section 1 of the MCRA, the purposes of the Act are to, *inter alia*, ensure that business entities incorporated in Acastus conduct themselves abroad by the same standards to which they are held in their domestic affairs.[160]

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154. Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 314 (2004).

155. David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 913 (2003).

156. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. ESCOR C.H.R., 55th Session, 22nd mtg., UN Doc. E/CN.4/Sub/2/2003/12/Rev.2 (2003) [hereinafter *Norms*].

157. Weissbrodt & Kruger, *supra* note 155, at 914.

158. *Norms*, *supra* note 156.

159. *Id.* ¶ 19.

160. Compromis, Annex A(1).

This provision limits the jurisdiction of the Acastian civil courts to claims against business entities which carry out operations outside the territory of Acastus. In fact, the words "conduct abroad" or "operating abroad" appear five times in the entire Act. They demonstrate that the Act only applies to corporations which *actively conduct* their businesses outside the Acastian territory. Therefore, using either a purposive or literal interpretation of the Act, liability under the Act can only be imposed on corporations which are directly involved in activities that violate customary international law.

In the present case, TNC did not have any direct involvement in the alleged activities of PROF. Rather, it was COG that operated the pipeline project in the Elysium and engaged PROF to commit various violations against the Elysians, including forced labor. As there is also no evidence that TNC was the alter ego of COG, TNC should not be named as a defendant within the meaning of the MCRA.

b. The MCRA does not Repeal the Principle of Limited Liability Despite the Incorporation of the OECD Guidelines.

The MCRA has expressly incorporated the General Policies set out in the OECD Guidelines for interpreting and implementing the standards of the Act.[161] Rubria may argue that TNC, as a parent company, is responsible for PROF's conduct, since under the OECD Guidelines, parent companies are responsible to ensure that their subsidiaries observe the Guidelines.[162] However, it must be emphasized that such obligation was mentioned only in the clarifications of the Concepts and Principles of the Guidelines. Nowhere in the General Policies, to which the MCRA specifically refers, including the corresponding official commentary and clarification, is such an obligation stipulated.

In any event, the clarifications under Concepts and Principles confirm that the Guidelines are not meant to supersede or substitute for national laws governing corporate liability and they do not imply an unqualified principle of parent company responsibility.[163] Therefore, the Acastian court, in interpreting the MCRA, had the discretion to adopt the principle of limited liability and acknowledge the existence of a corporate veil protecting TNC from being held liable for the conduct of its subsidiaries. Such discretion has been well recognized by the European Court of Human Rights under the margin of appreciation doctrine. The doctrine suggests that insofar as the standard for a protected right is satisfied, states are allowed a wide discretion when choosing

161. *Id.* at A(3).

162. The OECD Guidelines for Multinational Enterprises, *supra* note 153, at 9.

163. *Id.* at 10.

the means of enforcing international law and assessing its impact on their citizens.[164]

c. Examples From Other States Demonstrate a Similar Approach to Assessing Liability of Parent Companies.

In order to decide whether the Acastian court was correct in adopting the limited liability approach in the *Borius* litigation, it would be useful to consider other national courts' decisions on similar matters. In Australia, a 1998 court judgment refused to hold an Australian parent company, James Hardie, liable for asbestosis suffered by an employee at its New Zealand subsidiary, on the basis that the parent's legal identity prevented the imposition of a duty of care under the law of negligence.[165] It also noted that "the law pays scant regard to the commercial reality that every holding company has the potential [to] and, more often than not, in fact, does, exercise complete control over the subsidiary."[166]

Another useful reference can be made to the Alien Tort Claims Act ("ATCA") of the United States. Similar to the MCRA, the ATCA gives U.S. district courts power to hear civil claims by foreign citizens for injuries caused by actions "in violation of the law of nations or a treaty of the United States."[167] In *Bowoto v. Chevron Texaco Corp.*, ;B218;B218the U.S. court decided that whether to hold a parent company liable for the acts of its subsidiary is a fact-based inquiry, and the general rule is to respect the corporate form, unless to do so would work an injustice upon innocent third parties.[168] The court rejected the plaintiff's alter-ego theory because there was "no evidence to support a finding that incorporation was undertaken in bad faith or that observing the corporate form would achieve an inequitable result.;B219;B219"[169]

Rubria may seek to rely on another ATCA case, *National Coalition Government of Burman v. Unocal Inc.*, in which a U.S. district court held that a corporation could be held liable for its overseas joint venture's violations of international human rights.[170] However, such a decision has been criticized as

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164. ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE EUR. CT. H.R. 17 (2002).

165. Briggs v. James Hardie & Co. Pty. Ltd. 16 NSWLR 549 (1989).

166. *Id.* at 577.

167. Alien Tort Claims Act of 1789, *available at http://www.globalpolicy.org/intljustice/atca/atcaindx.htm* (last visited Oct. 6, 2006).

168. Bowoto v. Chevron Texaco Corp., 312 F.Supp.2d 1229 (N.D. Cal. 2004).

169. *Id.* at 1247.

170. Nat'l Coal. Gov't of Union of Burma v. Unocal Inc., 176 FRD 329 (C.D. Cal. 1997).

a misapplication of international law and discouraging to foreign investments in countries with poor human rights records.[171]

d. No Injustice Has Been Caused by Dismissing TNC as a Defendant.

Rubria may contend that if Rubria is liable for COG's business operations in the Elysium, by the same token TNC should also be liable because of its controlling interest in COG. Otherwise, TNC would be receiving preferential treatment.

However, it should be noted that the Acastian court's decision against Rubria is based on the provisions of AIRES, not the MCRA. More importantly, the decision is not premised on the fact that it was a shareholder of COG, but as a violator of the Elysians' internationally-guaranteed human rights. As suggested by the above-mentioned Australian case *Briggs*, a controlling interest does not automatically impose liability on the parent company for the wrongful acts conducted by the subsidiary.

Furthermore, there is no evidence that the court's decision has caused any injustice upon the plaintiffs or any innocent third parties, nor is there any indication that COG was created for fraudulent purposes by TNC to evade any existing or potential liabilities.

VI. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons in this Memorial, the Republic of Acastus respectfully requests that this honourable Court:

i) **DECLARE** that this Court has jurisdiction over all claims in this case since Acastus has succeeded to Nessus's status as a party to the Statute of the Court;
ii) **DECLARE** that Rubria violated the rights of Acastus's citizens of Elysian heritage;
iii) **DECLARE** that the activities of PROF in the Elysium, including the forced labor of civilians, are attributable to Rubria and are violations of international law;
iv) **DECLARE** that the outcome of the Borius litigation does not place Acastus in breach of Article 52 of the RABBIT.

171. Pia Zara Thadhani, *Regulating Corporate Human Rights Abuses: Is Unocal the Answer*, 42 WM. & MARY L. REV. 619 (2000); David I. Becker, *A Call for the Codification of the Unocal Doctrine*, 32 CORNELL INT'L L.J. 183, 206 (1998).

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