INTERNATIONAL LAW STUDENTS ASSOCIATION

2223 Massachusetts Avenue, N.W.
Washington, D.C. 20008-2864 U.S.A.
1-202-265-4375
CABLE "AMINTLAW"
FAX 1-202-797-7133

CONGRESS OF
INTERNATIONAL LAW SOCIETIES
PHILIP C. JESSUP
INTERNATIONAL LAW
MOOT COURT COMPETITION
CONFERENCE OF
INTERNATIONAL LAW JOURNALS

1990 PHILIP C. JESSUP INTERNATIONAL LAW

MOOT COURT COMPETITION

Case Concerning International Environmental Law

and

Antarctica

Leonia v. Vulpinia

MEMORANDUM OF LAW AND AUTHORITIES
FOR JUDGES

CONFIDENTIAL

NOTICE

This Memorandum is exclusively for the use of Judges in the 1990 Jessup Competition. It may not be shown to, read by or in any other way communicated or made available to competitors in the Jessup Moot Court Competition.

Written by Tullio Scovazzi, Professor of International Law; Marina Spinedi, Professor of International Organizations; Laura Pineschi, Doctor of Research in International Law, all at the University of Parma, Italy; and Jonathan I. Charney, Professor of Law at the Vanderbilt University School of Law.

TABLE OF AUTHORITIES

CONVENTIONS and TREATIES:

15. 1984 EEC directive 84/631 on the supervision and control within the EEC of the transfrontier shipment of hazardous waste (as modified by the 1986 directive 86/279).

16. The 1988 EEC resolution on transfrontier shipment of hazardous waste to third countries.

17. Laws of the Ivory Coast of 1988, Laws of Italy of 1988, reprinted in 28 ILM 391, 393 (1989).

18. Convention on the Law of the Sea, Part XII (1982).

19. RESTATEMENT (THIRD) of the Foreign Relations Law of the United States S902 comment a.

20. Organization of African Unity Res., adopted 23 May 1988, reprinted in 28 ILM 567, 568 (1989).

CASES

1. North Sea Continental Shelf Cases, 1969 ICJ Rep. para. 77.

2. Military and Paramilitary Activities in and Against Nicaragua, 1986 ICJ Rep. para. 184.

3. United States Diplomatic and Consular Staff in Tehran, 1980 ICJ Rep. para. 56-58.

4. Trail Smelter Arbitration, 3 Int'l Arb. Awards 1905, 1965 (1941).

5. Barcelona Traction Light and Power Company, 1970 ICJ Rep. para. 33.

6. Wimbledon Case, 1923 P.C.I.J. (Ser. A) No. 1.

7. Chorzow Factory, 1927 P.C.I.J. (Ser. A) No. 17 at 47.

8. Corfu Channel Case, 1949 I.C.J. Rep. 35.

9. In re Oil Spill by the "Amoco Cadiz" Off the Coast of France on March 16, 1978, MDL Docket 376. U.S. Dist. Ct. for the N. Dist. of Ill., Eastern Div., 1988 U.S. Dist. Lexis 16832, January 11, 1988.

10. Lusitania, 7 R. Int'l Arb. Awards 38 (1923).

11. I'm Alone, 3 R. Int'l Arb. Awards 1618 (1935).

Leonia v. Vulpinia

MEMORANDUM FOR JUDGES

I. INTRODUCTION

This Memorandum is intended to provide Judges with an analysis of the 1990 Jessup Problem, the "Case Concerning International Environmental Law and Antarctica." The Memorandum begins with a summary of the legal issues raised. Next, it briefly discusses the sources of international law. Finally, it analyzes the Problem itself.

The analysis of the Problem is not exhaustive. Its purpose is to highlight those issues the authors of the Problem believe to be of central importance. It must be emphasized that competitors, who have had the opportunity to study the Problem for several months, may conceive other approaches.

Judges should consider not only the oral advocacy skills of each competitor, but also the competitor's knowledge of the law and legal reasoning ability.

II. SUMMARY OF THE PROBLEM

The "Case Concerning International Environmental Law and Antarctica" revolves around three issues presented to the International Court of Justice (ICJ), two of which focus on the question of reparations. First, the parties ask the ICJ to decide whether Vulpinia has acted contrary to duties owed to Leonia arising under binding customary or conventional international law: (a) by permitting the placement of 100 drums of hazardous waste in Antarctica, and (b) by discharging the contents of five of those drums into the ocean adjacent to Antarctica during the recovery operation. Second, in the case of an affirmative answer to the first question, the ICJ is requested to assess whether Vulpinia is under an obligation to Leonia to take remedial measures or to provide reparations for the injury caused to the Antarctic environment. Third, should the answer to the second question be affirmative, the ICJ is asked to indicate what type of remedial measures or reparations would be appropriate.

The parties agreed to submit the matter to the ICJ in accordance with a special agreement. No question of consent to jurisdiction is presented to the Court. Any contention that the Court lacks such jurisdiction in the matter would be inappropriate.

III. SOURCES OF INTERNATIONAL LAW

Under Art. 38, para. 1, of the Statute of the ICJ, the

Court has to apply:

> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> b) international custom, as evidence of a general practice accepted as law;
> c) the general principles of law recognized by civilized nations;
> d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, are considered subsidiary means for the determination of rules of law.

As the Court has been requested to decide whether Vulpinia is responsible for any breach of customary or conventional international law, only the two sources mentioned in paragraphs a) and b) above are relevant to the first question. The other two sources mentioned in paragraphs c) and d) above may be directly employed in the discussion of the other two questions and may indirectly contribute to proof of the first two sources for all of the questions presented to the Court.

A. International Agreements

An international agreement is concluded between two or more States (or other subjects of international law) in written form and governed by international law, regardless of whether it is embodied in a single instrument or in two or more related instruments or whatever its particular designation (convention, treaty, protocol, exchange of notes, etc.).

The rules of international law governing the conclusion, entry into force, respect, application, interpretation, amendment, modification, invalidity, termination, and suspension of international agreements are codified in the **1969 Vienna Convention on the Law of Treaties**, entered into force 27 January 1980 (hereinafter Vienna Convention). Leonia and Vulpinia are parties to this agreement and are bound by its provisions.

The consent of a State to be bound by an international agreement may be expressed, according to **Article 11** of the **Vienna Convention**, "by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." The choice of the means of expressing the consent of the State is thus left to the will of the parties. The exchange of notes between Leonia and Vulpinia of 2 February 1988 was clearly

intended to have an executive nature and to bind the parties subsequent to the exchange of notes. The other agreements listed in the Appendix to the present case became binding only after ratification or accession. It should be noted, however, that under **Article 18** of the **Vienna Convention:**

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty...

Among the issues connected with the law of treaties, the question of the effect of treaties on third States is of particular relevance for the present case. According to the **Vienna Convention,**

> **Art. 34.** A treaty does not create either obligations or rights for a third State without its consent.
>
> **Art. 35.** An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.
>
> **Art. 36.** A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

According to some authors, the parties to certain treaties may establish rules binding on non-member States (erga omnes) especially within a so-called "objective regime." The **1959 Antarctic Treaty** has been considered by some as an example of such a treaty. As it always happens with doctrinal positions, this view is opposed by other authors.

Certain treaties, especially those that establish international organizations, also provide procedures and machinery for the creation of additional rules (so-called "derived rules"). Whatever they are called (resolutions, declarations, recommendations, directives, regulations, etc.), the binding nature of such derived rules depends on the will of the parties, as expressed either in the original agreement or in subsequently binding international

agreements. In addition, such derived rules may codify a customary rule already in force. Even if, at their inception, they lack binding force, sometimes they may serve as the starting point for the formation of new customary rules. This frequently happens with the resolutions of the UN General Assembly.

In certain cases, the parties to an international agreement decide to meet periodically, in order to adopt further measures to carry out the objectives of the original agreement. The Consultative Parties to the Antarctic Treaty (i.e. the original parties and those other parties that have demonstrated their interest in Antarctica by conducting substantial scientific research activity there) attend the meetings provided for in **Article IX, paragraph 1** of the **Antarctic Treaty,**

> for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding: ... (f) preservation and conservation of living resources in Antarctica.

According to **Article IX, paragraph 4**, the recommendations adopted in the meetings of the Consultative Parties become effective when approved by all of the contracting parties whose representatives were entitled to participate in the meetings.

Of special relevance for the present case is the so-called "Antarctic Treaty system" (or Antarctic system) which is,

> the whole complex of arrangements made for the purpose of regulating relations among States in the Antarctic. At its heart are the Antarctic Treaty itself, numerous Recommendations adopted at meetings of the Antarctic Treaty Parties and which have become effective in accordance with the terms of the Treaty, action taken by the States concerned giving appropriate effects to those Recommendations, and two separate conventions dealing with the Conservation of Antarctic Seals (London 1977) and of Antarctic Marine Living Resources (Canberra 1980). Handbook of the Antarctic Treaty System vi (5th ed. 1987).

The recent **Convention on the Regulation of Antarctic Mineral Resource Activities** (Wellington, 1988) is also to be included in the Antarctic system. This Convention is not yet in force for any state.

B. Custom

According to the predominant view emerging from State practice, court decisions, and the literature, two elements are required for the creation of a rule of customary international law: a constant and uniform practice (diuturnitas) and the conviction that this practice is rendered obligatory by the existence of law requiring it (opinio juris vel necessitatis). These two elements were clearly set forth in the North Sea Continental Shelf Cases, 1969 ICJ Rep. para. 77:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough.

This was recently restated by in the judgment rendered in the case of Military and Paramilitary Activities in and against Nicaragua, 1986 ICJ Rep. para. 184:

> ...in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice.

Evidence of custom may be found, inter alia, in the actions of States in international relations, governmental correspondence, official instructions to diplomatic agents and State officers, statements of State representatives to international conferences or international organizations, acts of domestic legislation, and decisions of municipal courts. International agreements can play a role in the evolution and content of customary rules. Sometimes, a treaty may become the starting point for the creation of new customary rules. In other cases, the provisions of a treaty may restate the already existing customary rules. A careful analysis of the relevant State practice is always necessary in order to ascertain how far provisions contained in international agreements reflect existing customary rules.

The period of time that must elapse before the creation of a new customary rule is relative. In certain sectors of international law (the law of the sea, space law, and perhaps environmental law), customary rules have come into existence within a short period of time. The fast development of new technologies and the urgent need to solve unexpected problems

may accelerate the formation of new rules. The more numerous, widespread, and uniform the practice is, the shorter the time that may be necessary for the creation of a new rule.

> ... the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law '... provided that'... within the period in question, short though it may be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform... North Sea Continental Shelf Cases, **1969 ICJ Rep. para. 74.**

In addition to state practice supporting the rule, it must be established that nations have formed an opinion that the behavior is obligatory under international law. Government statements, resolutions of international organizations, opinions of writers, and the circumstances of the state practice will be relevant to proof of this opinio juris. Some argue that such opinio juris may be presumed when substantial uniform state practice is established. Others suggest that evidence of substantial opinio juris will diminish the quantity of state practice needed to establish a rule of customary law.

Firm opposition of a number of States, especially if they constitute an important and interested sector of the international community, may prevent the formation of a customary rule. However, once the rule has come into existence, it need not have been expressly approved by a given State in order to be binding on that State. It is open to debate whether the rule is binding also on the State that has expressly and persistently objected to it during the period of formation (so called "persistent objector").

C. Hierarchy of Sources

The sources of international law are not in a hierarchical scale. The priority given to conventions in Article 38 of the ICJ Statute merely reflects the fact that treaties frequently establish specific regimes (lex specialis) which derogate from general law (lex generalis). In interpreting a treaty, "any relevant rules of international law applicable in the relations between the parties" must be taken into account [**Vienna Convention, Art. 31, para. 3(c)**]. This may mean that subsequent customary rules can influence the interpretation of treaties previously concluded by the parties.

There are, however, said to be rules of customary international law from which no derogation by subsequent treaty is permitted (jus cogens). According to **Article 53 of**

the Vienna Convention,

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

As regards the relationship between international and municipal law, a State cannot invoke the provisions of its internal law as a justification for its failure to perform an international obligation. Therefore, Vulpinia cannot avail itself of the fact that its legislation did not prohibit or limit the transfrontier shipment of hazardous waste.

IV. ANALYSIS OF THE CASE

The customary rules on the Law of State Responsibility, may be reflected in the Draft adopted in first reading by the United Nations International Law Commission [(1985) 2(2) Y.B. Int'l L. Comm'n 19-27, 40 U.N. GAOR Supp. (No. 10), U.N. Doc. A/40/10, (hereinafter "ILC Draft"]. According to this Draft, the ICJ must satisfy itself: (A) that there has been a conduct attributable to Vulpinia under international law, which constitutes a breach of an international obligation (either customary or conventional) incumbent upon Vulpinia; (B) that such obligation is owed to Leonia, i.e. that the conduct of Vulpinia constitutes the breach of a right pertaining to Leonia; and, (C) that no circumstance precluding the wrongfulness of the conduct has occurred.

A. Is there a conduct attributable to Vulpinia which constitutes a breach of an international obligation?

There are two different, though connected, aspects of the conduct of Vulpinia that are relevant in the present case: the placement of 100 drums of hazardous waste in Antarctica, and the discharge into the sea of the contents of five of those drums during the recovery operations.

1. The Placement of the Drums

As regards the attribution of the conduct, Vulpinia could plead that the placement of the drums in Antarctica was an act of private persons and that the vessel which transported the drums was privately-owned. The conduct of private persons is not attributable to a State, unless such persons acted on behalf of the State (see Art. 8 and 11 of

the ILC Draft, Part One; see also the judgment in the case concerning United States Diplomatic and Consular Staff in Tehran, 1980 ICJ Rep. para. 56-58). It was never claimed that Dr. Detritus acted on behalf of Vulpinia, or that Vulpinia covertly entrusted Dr. Detritus with the placement of waste in Antarctica.

Leonia could counter that in order to determine whether there is a wrongful conduct attributable to Vulpinia, what is relevant is not what Dr. Detritus did, but what the organs of Vulpinia did not do. More precisely, Leonia could argue that Vulpinia is responsible for the omissions of both its legislative organs (which did not enact the appropriate legislation), and its executive organs (which did not watch over the substances which left Vulpinian ports, and did not prevent Dr. Detritus from shipping hazardous materials outside the sphere of national jurisdiction). Under international law omissions of organs of a State may be considered as acts of that State (see Art. 3 (a), 5 and 11, para. 2, of the ILC Draft, Part one, and para. 61 of the United States Diplomatic and Consular Staff in Tehran, supra).

As regards the breach of an international obligation, Leonia could rely on customary international law. It may argue that the transboundary movement of hazardous wastes is subject to certain restrictions and is even prohibited in certain circumstances. This case could be considered as falling under the general rule declared by Tribunal in the famous Trail Smelter Arbitration, 3 R. Int'l Arb. Awards 1905, 1965 (1941):

> ...under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the property or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Such a rule has also been extended to cover areas beyond the limits of national jurisdiction, such as in the high seas, outer space, and Antarctica. (Incidentally, any contention regarding claims of sovereignty in Antarctica would be inappropriate, since the case deliberately arises in an unclaimed sector which, under any theory, would be terra nullius).

As stated in Principle 21 of the 1972 Stockholm Declaration on the Human Environment,

> States have, in accordance with the Charter of the United Nations and the principles of international law

> ...the responsibility to ensure that activities within their own jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

See also Principle 21 of the World Charter for Nature, U.N. G.A. Res. 37/7 (1982), reprinted in 22 ILM 455 (1983).

Vulpinia could reply that such a principle is not yet a rule of customary international law. Thus, it is not binding on States. It is principally enshrined in documents having the nature of mere recommendations (soft law). Moreover, the extension of this rather vague principle to cover also the transfrontier movements of hazardous waste is far from established in international practice.

Leonia could counter that decisions recently taken by certain regional international organizations constitute evidence of a general practice already accepted as law. References could be to the 1984 OECD decision and recommendation on transfrontier movements of hazardous waste, the 1986 OECD decision and recommendation on exports of hazardous waste from the OECD area, the 1988 OECD decision on transfrontier movements of hazardous waste (which revises the definitions of waste and hazardous waste and classifies them for purposes of transfrontier control), the 1984 EEC directive 84/631 on the supervision and control within the EEC of the transfrontier shipment of hazardous waste (as modified by the 1986 directive 86/279), the 1988 EEC resolution on transfrontier shipment of hazardous waste to third countries.

Of course, the last and most important element of international practice is the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature 22 March 1989 [Basel (hereinafter the Basel Convention)]. The Basel Convention, though signed by Leonia and Vulpinia, is not yet in force. Under Article 4, paragraph 6, of the Basel Convention, the disposal of waste is prohibited in the area where the Antarctic Treaty is applicable:

> The Parties agree not to allow the export of hazardous wastes or other wastes for disposal within the area South of 60 South Latitude, whether or not such wastes are subject to transboundary movement.

Further evidence of international practice is the national legislation recently adopted by a number of countries after it became known that hazardous wastes had been covertly exported to developing countries [see, for example, the Laws of Ivory Coast of 1988 and the Laws of Italy of 1988, reprinted in 28 ILM 391,393 (1989)].

Finally, the behavior of certain States, which have agreed to re-import wastes exported by their nationals, may provide some evidence that States are conscious that such export of hazardous waste is an internationally wrongful act, and that it must be redressed by the re-establishment of the status quo ante. A good example in this respect would be the behavior of Italy. It has re-imported waste covertly shipped by Italian nationals, after countermeasures were taken by Nigeria to detain in a Nigerian port, an Italian ship that was not otherwise involved in the incident.

Probably, the best defense for Vulpinia would be to argue that if there is any customary rule of international law restricting such transfrontier disposal of hazardous waste, it developed subsequent to the events in the instant case. More precisely, Vulpinia could maintain that the existence of customary rules on the transfrontier movement of hazardous waste can be determined only after the entry into force of the Basel Convention through its ratification by an adequate number of States. Before that moment, the conduct of Vulpinia may not be deemed prohibited by any binding rule of customary law. Moreover, as soon as the facts became known, Vulpinia showed all of its good faith by cooperating with Leonia to recover the drums.

Leonia also could rely on conventional international law to argue that the Antarctic Treaty system creates a special objective regime which also binds non-member States. It would argue that a basic principle of the Antarctic Treaty system obligates States to protect the unique Antarctic environment. The **Antarctic Treaty Preamble** calls attention to the "interest of all mankind" in Antarctica, and the **Convention on the Conservation of Antarctic Marine Living Resources [Canberra, 1980 (hereinafter Canberra Convention)]** recognizes "the importance of safeguarding the environment and protecting the integrity of the ecosystem of the seas surrounding Antarctica."

Reliance upon the Antarctic Treaty alone would not be particularly persuasive, since it prohibits only the disposal of "radioactive waste material" **(Art. V, para. 1)**. Since it does not prohibit the disposal of other wastes, and it does not contain general language calling for the protection of the Antarctic environment, the Treaty may be interpreted to allow the disposal of other wastes.

The Antarctic Treaty parties' concern for problems created by waste disposal has, however, found expression in other parts of the Antarctic system. The Code of Conduct for Antarctic Expeditions and Stations Activities **(Annex to Rec. VIII-11)** recommends procedures for the disposal of solid and liquid waste. Methods and standards for monitoring and regulating the generation and disposal of wastes of coastal and inland stations in environmentally sound manners are

currently under review by the Scientific Committee on Antarctic Research (SCAR). SCAR is the scientific arm of the Antarctic system. If particular restrictions are to be applied with respect to wastes generated in Antarctica, it is difficult to accept the view that the Antarctic continent could become the receptacle for wastes produced elsewhere.

Moreover, certain recommendations provide for prior environmental impact assessment, which could also become relevant in the case of hazardous waste disposal:

> No act or activity having an inherent tendency to modify the environment over wide areas within the Antarctic Treaty Area should be undertaken unless appropriate steps have been taken to foresee the probable modifications and to exercise appropriate controls with respect to the harmful environmental effects such uses of the Antarctic Treaty Area may have. (Rec. VIII-13.)
>
> [The Parties] will refrain from activities having an inherent tendency to modify the Antarctic environment unless appropriate steps have been taken to foresee the probable modifications and to exercise appropriate controls with respect to harmful environmental effects. (Rec. IX-5.)

It is, however, a matter of fact that Vulpinia is not a party to the Antarctic Treaty and, therefore, may not be directly bound by recommendations or conventions arising from the Antarctic system, unless it is an objective regime binding erga omnes on all States, or Vulpinia specifically accepts an obligation. This is a simple, but solid defense for Vulpinia, in light of the many difficulties with the erga omnes and objective regime theories, including their potential conflict with the provisions of the Vienna Convention.

2. The Discharge into the Sea

Apart from any problem arising from the movement of hazardous waste, the irreparable loss of a species of Antarctic fauna was the result of a discharge into the sea from the five drums.

As regards the problem of attribution to Vulpinia of these actions, Leonia can point out that the persons who discharged the drums were acting on behalf of and under the authority of Vulpinia. Their conduct is, thus, attributable to the State of Vulpinia (see Art. 8(a) of the ILC Draft, Part One). Unlike the placement of the drums, Vulpinia's responsibility arises here from an affirmative act, not an act of omission.

As regards the breach of international obligations arising from either customary law or multilateral treaty law, Vulpinia may contend that even if the placement of the drums in Antarctica were considered to have been a wrongful act, the wrong was redressed by the recovery operation. Thus, it may be argued that the damage arose only from the discharge of the contents of the five drums into sea. The idea behind this argument would be to suggest that the damage is the result of an action which was also the result of the negligence of Leonia. Furthermore, the wrongfulness could be excluded by a fortuitous event (see infra). In response, Leonia must stick to the argument that the contents of five drums that polluted the Antarctic sea had been placed in Antarctica by Vulpinia and had not been removed.

Several provisions of the **1982 United Nations Convention on the Law of the Sea, Part XII** (hereinafter, **LOS Convention**)] confirm and specify the general obligations of States to protect and preserve the marine environment. Particularly relevant in this regard are **Article 194, paragraph 5**, on the protection of rare ecosystems and endangered species and **Article 195** on the prohibition of transferring hazards from one area to another or transforming one type of pollution into another. While the **LOS Convention** is not yet entered into force, Leonia can argue that the substance of the provisions included in **Part XII of the Convention** has the status of customary international law binding upon all States. Furthermore, since both of the instant States have signed the Convention, **Article 18 of the Vienna Convention** may impose relevant obligations on these States. It is not settled, however, that these provisions of the **LOS Convention** are customary law, nor is it settled that Article 18 of the Vienna Convention would have any substantive impact on the instant question.

Within the Antarctic system, Leonia could quote the **Recommendations on the Conservation of Antarctic Fauna and Flora**, namely **Recommendation I-VIII** and **Recommendation II-II**, as well as the **Agreed Measures for the Conservation of Antarctic Fauna and Flora (Recommendation III-VIII)**. In the latter, the most appropriate provision would be **Article VII, para. 3**, according to which,

> each participating Government shall take all reasonable steps towards the alleviation of pollution of the waters adjacent to the coast and ice shelves.

On the other hand, attention should be paid to the fact that most of the provisions of these Agreed Measures relate to native mammals and native birds and thus, do not directly protect starfish. Nor is it clear that Vulpinia would be bound by this recommendation.

The treaty especially intended to "safeguard the environment and protect the integrity of the ecosystem of the seas surrounding Antarctica" is the Canberra Convention, which defines marine living resources as "the populations of fin fish, mollusks, crustaceans, and all other species of living organisms, including birds, found south of the Antarctic Convergence." (Art. I, para. 2) Once again, Vulpinia would put forward the solid objection that it is not bound by any instrument of the Antarctic system.

Two points need perhaps to be underscored. The first is that the waters adjacent to a terra nullius are to be considered as high seas. Any contentions invoking the regimes of the territorial sea or the exclusive economic zone would be completely beyond the scope of the Problem.

The second point is both subtle and difficult. It concerns the relevance of dumping and of the rules on dumping arising from customary international law and from the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter [London, 1972 (hereinafter Dumping Convention)]. It may be argued persuasively that this law has little relevance to the present case for the following reasons. First, the placement of the drums on an ice-shelf may not be considered as dumping at sea since ice-shelves are not frozen sea, but permanent ice formations that are identified with the continental ice masses to which they are attached. They contain fresh water and are different from pack-ice, which is frozen sea. The whole Antarctic system tends to assimilate ice-shelves to land. Second, Dumping Convention (to which, Vulpinia is not a party) arguably is not relevant since it is applicable to "any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea." (Art. III, para. 1) It may be applicable to wastes which are let to flow into the sea from land, as in the present case. Third, the assumption that the discharge of the five drums into the sea is dumping under customary international law is questionable.

Leonia could argue that by discharging the contents of the drums into the sea, Vulpinia committed a separate breach of the international obligation arising from the exchange of notes between the parties of 2 February 1988. That agreement obligated it to recover the drums in order to re-establish the situation that previously existed.

B. Does the conduct of Vulpinia constitute a breach of a right pertaining to Leonia?

Even if the Court were to conclude that Vulpinia has breached one or more international obligations, it must also be ascertained whether this breach constituted an

infringement of a right pertaining to Leonia. To put it in another way, was Leonia an injured State? This is the most difficult issue of the case.

Leonia could plead that any breach of an obligation incumbent upon a State always corresponds to the infringement of a right attributed to another State. The customary obligations of Vulpinia were owed to all of the members of the international community, including Leonia itself. Vulpinia could respond that customary international rules impose obligations which exist in specific situations only towards one or more directly affected States. In the present case, Leonia suffered no direct injury as a consequence of the conduct of Vulpinia. Neither could Leonia act on behalf on the international community.

Once again, Leonia would introduce here the erga omnes doctrine, recalling that there are customary rules establishing obligations owed to the international community as a whole. A well-known quotation can be taken from Barcelona Traction Light and Power Company, **1970 ICJ Rep.** para. 33):

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

Leonia could also refer to **Article 5, paragraph 2, of the ILC Draft, Part Two**, where the injured State has been defined broadly. It includes, if the right infringed arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law. This is said to arise,

> if it is established that...(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or (iii) the right has been created or is established for the protection of human rights and fundamental freedoms.

Leonia could also mention the **RESTATEMENT (Third) of the Foreign Relations Law of the United States S902 comment A:**

> When a State has violated an obligation owed to the international community as a whole any State may bring a

> claim in accordance with this section without showing that it has suffered a particular injury.

Actually, one of the examples referred to as giving rise to obligations erga omnes relates to the rules on the preservation of areas beyond the limits of national jurisdiction, as there is no State that could plead that it is more affected than the others in case of a breach. In the absence of an obligation erga omnes, no state would be in the position to protect the interests of all mankind in the environment of areas beyond national jurisdiction.

As regards its entitlement to bring an action, Leonia would also stress that the parties to the Antarctic system are bound to exert appropriate efforts to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the **Antarctic Treaty (Art. X)** or to the objectives of the **Canberra Convention (Art. XXII). Moreover**, the parties to the Antarctic system are entrusted with the "prime responsibilities for the protection and preservation of the Antarctic environment" **(Canberra Convention Preamble).**

Vulpinia would respond that the examples of obligations erga omnes, even if this concept were to be accepted on a theoretical level, do not include the domain of the protection of the environment. The above-quoted paragraph of the Barcelona Traction Light and Power Company is followed by another (para. 34.), which states that,

> Such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

Both parties, even if aiming at completely different conclusions, could put forward very interesting contentions on the question of whether the protection of the Antarctic environment can today be considered as falling in the category of the basic rights of the human person or whether additional categories have been added subsequent to the judgment in that case.

As regards the "prime responsibility" of parties to the Antarctic system, Vulpinia, relying upon the usual assumption that treaties cannot bind third parties, could admit merely that such a "responsibility" produces rights and obligations only among the parties to the system.

Another assumption that Leonia could put forward in order to strengthen its erga omnes contention is that Vulpinia has committed an international crime, as mentioned

in Article 19, paragraph 3, of the ILC Draft, Part One:

> ...an international crime may result, inter alia, from:
> ...(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

Under Article 5, paragraph 3, of the ILC Draft, Part Two, international crimes injure all States.

The particular seriousness of the export of hazardous waste has been recently affirmed by the Organization of African Unity in a Resolution adopted on 23 May 1988, declaring that "the dumping of nuclear and industrial wastes in Africa is a crime against Africa and the African people" [Reprinted in 28 ILM 567, 568 (1989)].

Here, the discussion between the parties could focus on the importance of the obligation in question. Will the placement of the 100 drums be considered conduct in breach of an obligation of essential importance for the preservation of the human environment? Might the extinction of an animal species be seen in a different way?

C. Did Circumstances Precluding Wrongfulness Occur?

Even if defeated on the previous issues, Vulpinia could rely on two circumstances precluding the wrongfulness of its conduct, namely the consent of Leonia and a fortuitous event.

1. Consent

According to Article 29 of the ILC Draft, Part One,

> 1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.
> 2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law....

The problem of the existence of a consent by Leonia is particularly relevant with respect to the recovery operation. (It would be much more difficult for Leona if the Court were to conclude that Leonia tacitly consented to the initial placement of the drums). Vulpinia could point out that before the beginning of the recovery operation, the

Government of Leonia was informed of the plan to discharge the contents of the five drums into the sea and that it did not raise any objections. Leonia could respond that its task was only to monitor the activities. It did not have the authority to choose the best way to carry them out. Under the 1988 exchange of notes, the fulfillment of the obligation to recover the drums and to remove them from the Antarctic area was incumbent only on Vulpinia.

2. Fortuitous Event

According to **Article 31, paragraph 1, of the ILC Draft, Part One,**

> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to...an unforeseen external event beyond its control which made it materially impossible for the State to... know that its conduct was not in conformity with that legal obligation.

Vulpinia could plead that the existence of a unique species of starfish in the waters near the Stella Maris ice shelf was an unforeseen external event beyond its control. Vulpinia took every reasonable precaution to avoid damages to the environment during the recovery operation. It was not his fault if Professor Handlin (the head of an expedition officially sponsored by Leonia) did not inform the world scientific community and the public at large of his discovery. On this point Vulpinia could use the Leonian erga omnes argument to its advantage and argue that Leonia had an obligation to make freely available to the international community all scientific observations resulting from its research activities in Antarctica. (**See Article III of the Antarctic Treaty** and several other documents of the Antarctic system).

Leonia could counter that, even if Vulpinia had not been aware of Professor Handlin's discovery, it could have foreseen the presence in the remote Antarctic waters of still unknown species. Moreover, it is common knowledge that the placement of hazardous waste in such a unique ecosystem could disrupt the delicate balance existing between its elements. The reasonable probability that such activities would have negative effects may be sufficient to exclude any claim that this was a fortuitous event. [**Principle 11(a) of the World Charter for Nature states that:** "Activities which are likely to cause irreversible damage to nature shall be avoided"]

D. What remedial measures, if any?

As regards the assertion that Vulpinia has an obligation to take remedial measures or to provide for reparation, Leonia could rely on the undisputed rule of international law that the breach of an obligation by a State towards another State engages the international responsibility of the former. This rule is confirmed by hundreds of examples of international practice from the 1923 Permanent Court of International Justice (PCIJ) judgment in the Wimbledon Case, 1923 P.C.I.J. (Ser. A), No. 1, (August 17, 1923) to the 1986 ICJ judgment in Military and Paramilitary Activities in and against Nicaragua, to Article 1, of the ILC Draft, Part One. International responsibility entails the obligation to take remedial measures to correct a breach of international law.

Vulpinia could put forward the subtle argument that, even if there was wrongful conduct, it is not under an obligation to provide for remedial measures to Leonia. In other words, even if the Antarctic environment was damaged by the discharge into the sea from the five drums, Leonia is not entitled to receive remedial measures.

Leonia could counter that Vulpinia breached an international obligation owed to the international community as a whole when it caused the extinction of a species. Every State suffered damage arising from the loss of a part of the world's natural heritage, as well as from the loss of an opportunity to engage in scientific research. Since the species lived in an area that is terra nullius, any member of the international community, Leonia included, is entitled to seek remedial measures. Leonia may seek reparations on behalf of the international community in order to support activities that would further the environmental protection goals of the Antarctic system. Otherwise, no international legal person would be able to seek a remedy. Consideration may be given to remedies sought collectively by the Antarctic Treaty parties or the United Nations. The legal and practical obstacles to this action may be formidable. Authorization given by such entities may be more feasible.

As regards the problem of the type of remedial measures, the general rule is that,

> reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Chorzow Factory, 1927 P.C.I.J., (Ser. A), No. 17, at 47.

Depending on the circumstances of the case, reparation can include: restitution in kind (also known as re-establishment of the status quo ante); reparation by equivalent (mainly, monetary compensation); satisfaction for the legal and moral damage (apologies, disavowal of the act and, according to some, punitive damages); and, guarantees of

no repetition of the wrongful conduct (punishment of the responsible individuals, adoption of appropriate legislative and administrative provisions, etc.).

With the sole exception of restitution in kind, which is impossible ("ad impossibilia nemo tenetur"), Leonia could ask for different types of reparation. On this point, the Leonians could display all of their imagination, while the interest of the Vulpinians would be to avoid any form of monetary compensation. They could quote the ICJ judgment in the Corfu Channel Case, 1949 I.C.J. Rep. 35, insofar as it stated that the declaration that a conduct amounts to a breach of an international rule can be in itself an appropriate form of satisfaction.

Leonia could ask for apologies, guarantees that the wrongful conduct would not be repeated, adoption of legislative measures forbidding exportation of wastes to Antarctica, and the creation of an appropriate monitoring system.

As regards monetary compensation, Leonia could plead that international law provides no collective mechanism in case of breach of obligations erga omnes for the implementation of protections to the environment. In a case, such as the present one, where there is no State specially affected, the request for monetary compensation might be made by any of the States to which the obligation was owed. Leonia is particularly qualified to request a pecuniary reparation, since it is an Antarctic Treaty Consultative Party and has a special responsibility to ensure that no one engages in activities incompatible with the Treaty. Moreover, its intention is to utilize the money for activities to protect the Antarctic environment.

Vulpinia could respond that pecuniary compensation is due only to the State that has suffered a direct material damage. How can Leonia represent the other States to which the obligation also exists? Will Vulpinia also be liable to other States after it provides satisfaction to Leonia? Perhaps Vulpinia should pay a sum directly to an international organization or to an international scientific institution with specific competence or responsibilities in the field of the Antarctic environment. It is not clear how such an award would operate, how such an organization could make a claim, and what authority the Court may have to make such an award.

In the special agreement of the parties submitting the matter to the Court the precise remedy, including the amount to be paid, if any, has been expressly excluded from the case. If the parties were to dwell upon monetary damages (which they should not), they would have to face the very difficult question of monetizing ecological damage. Such

standards have not yet been defined either at the public international level level or at the level of general principles of law recognized by nations in their domestic laws. (See, for example, the very different conclusions reached in 1985 by the French Tribunal of Bastia in the case of the Red Muds of Scarlino, and in 1988 by the United States District Court in Illinois in the case of the Amoco Cadiz,) Vulpinia could point out that the species of starfish in question was devoid of any commercial value and that its morphological characteristics had already been studied and documented by Professor Handlin himself.

Vulpinia could also rely on the argument that Leonia contributed by its negligent conduct to the damage. Consequently, the compensation should be reduced, as stated in Article 8, paragraph 5, of the draft submitted to the ILC by the present rapporteur on State responsibility:

> Whenever the damage ... is partly due to causes other than the internationally wrongful act, including possibly the contributory negligence of the injured State, the compensation shall be reduced accordingly.

Finally, if Leonia asked for punitive damages, Vulpinia could respond that most scholars share the opinion that such damages cannot be awarded under international law. International tribunals have usually rejected claims for punitive damages (see, for example, Lusitania 7 R. Int'l Arb. Awards 38 1923)]. The only case in which they were granted was in I'm Alone, 3 Int'l Arb. Awards 1618 (1923). Moreover, the circumstances of the instant case, in which Vulpinia acted without any willful intent, would not be likely to justify such a request.

The Philip C. Jessup International Law Moot Court Competition

1990 PART I

LEONIA

v.

VULPINIA

Case concerning
International Environmental Law and
Antarctica

RICHARD R. BAXTER AWARD RESULTS
(Best Memorials Overall — Applicant and Respondent)

INTERNATIONAL LAW STUDENTS ASSOCIATION

2223 Massachusetts Avenue, N.W.
Washington, D.C. 20008-2864 U.S.A.
1-202-265-4375
CABLE "AMINTLAW"
FAX 1-202-797-7133

CONGRESS OF
INTERNATIONAL LAW SOCIETIES
PHILIP C. JESSUP
INTERNATIONAL LAW
MOOT COURT COMPETITION
CONFERENCE OF
INTERNATIONAL LAW JOURNALS

1990 RICHARD R. BAXTER AWARD RESULTS

Case Concerning International Environmental Law
and
Antarctica

JUDGES: **Virginia Green,** Esq., Reed Smith Shaw & McClay; Washington, D.C.
Scott Hajost, Esq., Senior Attorney, Environmental Defense Fund, Washington, D.C.
Mark Wojcik, Esq., Grunfeld, Desiderio, Lebowitz & Silverman, New York, New York

Applicant	Pts.	Respondent	Pts.
1. S. Texas Coll. of Law (U.S.A.)	35	1. Univ. of Melbourne (Australia)	30
2. Univ. of Limburg (The Netherlands)	29	2. Univ. of Limburg (The Netherlands)	27
3. Univ. of Toronto (Canada)	26	2. Univ. of Toronto (Canada)	27
4. Lewis & Clark (U.S.A.)	23	4. So. Ill. Univ. (U.S.A.)	26
4. Grad. Inst. Int'l Stud. (Switzerland)	23	5. S. Texas Coll. of Law (U.S.A.)	20
6. S. Ill. Univ. (U.S.A.)	22	5. Grad. Inst. Int'l Stud. (Switzerland)	20
7. Univ. of Melbourne (Australia)	16	7. Duke University (U.S.A.)	16
8. Vanderbilt Univ. (U.S.A.)	14	7. Vanderbilt Univ. (U.S.A.)	16
9. Univ. of Washington (U.S.A.)	13	9. Lewis and Clark (U.S.A.)	14
9. Duke University (U.S.A.)	13	9. Univ. of Washington (U.SA.)	14
11. George Wash. Univ. (U.S.A.)	12	9. Univ. of San Diego (U.S.A.)	14
12. Univer. of San Diego (U.S.A.)	8	12. George Wash. Univ. (U.S.A.)	10