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INTERNATIONAL LAW
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INTERNATIONAL LAW JOURNALS

CASE CONCERNING THE MILITARY PERSONNEL DATABASE

1996 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

BENCH MEMORANDUM *

(revised 3/5/96)

I. TERRORISM

A. Introduction

In the first instance, Ercola has sought a declaration from the Court that Filova's support for YLSA's activities, and its refusal to declare such activities illegal are violations of international law.[1] Presumably, the acts that Ercola will complain of include the bombing of the Stock Exchange,[2] the train station bombings,[3] and the disclosure of confidential information obtained from the ESPRI database.[4]

In order to evaluate this request for relief, the Court must answer the following questions: (1) how does the world community view acts of terrorism generally; and (2) do prohibitions against acts of terrorism, to the extent they exist, proscribe the types of acts committed by Filova?

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* This Bench Memorandum should be read in conjunction with the Jessup Judges' Handbook.

[1] Compromis at 10.

[2] Compromis at 5.

[3] Compromis at 7.

[4] Compromis at 7-8.

B. What Is Terrorism?

In order for there to be a prohibition in international law against terrorism, there must be a generally accepted definition of what the term means. Although there are conventions that outlaw the specific acts of hostage taking[5] and aircraft hijacking,[6] there is no international convention that defines and outlaws the general crime of "terrorism." Further, according to the Compromis, there is no treaty to which either of the two nations is a party that generally bans "terrorism."[7]

Customary international law is not much more helpful in defining "terrorism." The United Nations General Assembly has condemned "all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security."[8] Yet, the General Assembly failed to define the term "terrorism." Given what appears to be a lack of consistent state practice regarding terrorism, this omission by the General Assembly is not surprising.

In any event, a linchpin to Ercola's argument is its ability to point to a definition of terrorism from a source of international law recognized as authority under Article 38 of the Court's Statute. Ercola will undoubtedly be able to provide definitions of "terrorism" from different authors, and from a variety of international law documents.[9] The key to Ercola's success, and the point for the bench to emphasize, is whether and how any definition of "terrorism" has become international law.

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[5] International Convention Against the Taking of Hostages, *adopted* Dec. 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp. (NO. 39), U.N. Doc. A/34/819 (1979), *reprinted in* 18 I.L.M. 1457 (1979).

[6] Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), *signed into force* Dec. 4, 1969, 20 U.S.T. 219.

[7] Compromis at 11.

[8] U.N.G.A. Res. 40/61 G.A.O.R., 40th Sess. Supp. 53 (1985).

[9] Some scholars, for example, have defined terrorism in terms of the fundamental characteristics of public fear and intimidation. Henry S. Han, TERRORISM AND POLITICAL VIOLENCE: LIMITS AND POSSIBILITIES OF LEGAL CONTROL 52 (1993).

Should it be unable to provide an accepted definition of "terrorism," Ercola may be able to rely on more fundamental principles of international law in seeking relief from the Court. For example, Ercola can point to the United Nations Charter itself, to which both nations are parties, which lists as a purpose of the United Nations the maintenance of "international peace and security."[10] One position for Ercola to take is that acts of violence or threatened violence, generally characterized as terrorism, threaten peace and security, and are therefore proscribed by the Charter. The International Law Commission[11] has proposed a resolution which seems to support this position:

> No situation could be envisaged in which state support for persons or groups engaged or preparing to engage in the acts . . . of international terrorism would not violate basic rules of international law.[12]

Ercola can then argue that, irrespective of any dispute over the definition of terrorism, the acts committed by YLSA, and allegedly supported by Filova, are illegal because they threaten peace and security.

Finally, Filova may seek to distinguish between the violent acts committed by YLSA, such as the bombing of the Stock Exchange, and the acts of coercion associated with the theft and dissemination of the ESPRI database. Filova should be able to provide evidence of state practice

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[10] UNITED NATIONS CHARTER, art. 1, ¶ 1. Additionally, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States condemns the use of force against the territorial integrity or political independence of any state. G.A. Res. 2625 (XXV) (Oct. 24, 1970).

[11] The International Law Commission (ILC) is constituted by the U.N. Charter and warranted per Article 13. As a body of an intergovernmental organization, the twenty-five members serve in their individual capacities as "recognized" experts on international law, not as representatives of their governments (who choose them).

[12] I.L.C. Res. *International Terrorism, quoted in* John F. Murphy, PUNISHING INTERNATIONAL TERRORISTS: THE LEGAL-FRAMEWORK FOR POLICY INITIATIVES 59 (1985).

regarding terrorism distinguishing between acts of violence and acts of coercion.

C. The Scope Of The Prohibition

Assuming that Ercola can provide a generally accepted definition of "terrorism," the next issue to be evaluated is whether that definition covers the acts committed by YLSA. Presumably, Filova will argue that YLSA's acts are justified in light of the oppression of the Yttics in Ercola. Specifically, Filova seeks a declaration from the Court that YLSA's actions and Filova's involvement therein are consistent with the right of self-determination.[13] At this point, the argument can go down two separate paths: (1) the bench can accept for the moment that oppression has occurred, and can test the proposition that acts of violence and coercion should be allowed in such a circumstance; or (2) the bench can test the hypothesis that there has in fact been oppression of the Yttics by Ercola.[14]

A fundamental conflict in international law exists between the general prohibition against acts of aggression and the right of all peoples to self-determination.[15] In condemning acts of terrorism, the United Nations General Assembly nonetheless reaffirmed "the inalienable right to self-determination . . .".[16] The General Assembly at the same time recognized the "necessity of maintaining and safeguarding the basic rights of the individual . . .".[17] Furthermore, the argument should always be made that the right to self-determination does not include the right to revolt.

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[13] Compromis at 11.

[14] This second issue is discussed in a different section of this Memorandum.

[15] The right of self-determination is provided for in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[16] U.N.G.A. Res. 40/61 G.A.O.R., 40th Sess. Supp. 53 (1985).

[17] *Id.* This conflict between the right of self-determination and the necessity of safeguarding the rights of the individual is discussed in more detail in Section III. of this Bench Memorandum.

Filova may argue that, given these and other statements regarding self-determination, it has the right, and is in fact obligated, to assist YLSA in obtaining self-determination for the Yttics in Ercola.[18] This is evidenced by the statement made in a diplomatic note in which Filova reminded Ercola of the Yttics' right of self-determination.[19]

Ercola will obviously argue that acts of violence such as those committed by YLSA are aggression irrespective of the motivation, and are therefore illegal.[20] It may allege breach of its sovereignty and that theft of its state property was accomplished in collaboration with Filova. Ercola may argue further that if Filova is behind YLSA, then there is an issue of intervention. The bench should look for both parties to present evidence of state practice supporting their respective positions.

D. Filovan Support

Ercola seeks a declaration that Filovan *support* for YLSA's activities is illegal.[21] This raises the following questions: (1) whether support is necessary for a finding that Filova has violated international law; (2) if Filovan support of YLSA is necessary for a finding that Filova has violated international law, what level of support must Ercola show; and (3) whether there is evidence of Filovan support in the Compromis.

In international law, the principle of *sic utere tuo ut alienum non laedus* is tantamount to the golden rule of international law.[22] Basically, the principle requires that one nation not knowingly allow its

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[18] Certain scholars suggest that a right of humanitarian intervention exists in international law. *See, e.g.*, W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, 78 Am. Soc'y Int'l L. Proc. 74, 79 (1984).

[19] Compromis at 6.

[20] Additionally, Ercola can point to scholars who argue that there is no longer a right to intervene on humanitarian grounds. *See, e.g.*, Ian Brownie, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, App. II, 127-29 (1963).

[21] Compromis at 10.

[22] Rest. (Third) of Foreign Relations § 601 (1992).

territory to be used contrary to the rights of other states.[23] In this case, Ercola may argue that, irrespective of any specific support given to YLSA, Filova nonetheless has violated the principle of *sic utere tuo* by doing nothing to prevent YLSA from conducting terrorism against Ercola from Filovan soil. However, in recent years, the principle of *sic utere tuo* has been applied primarily to disputes involving pollution, rather than to acts of aggression.

The bench should look for examples of state practice regarding this issue to determine whether state support, as opposed to simple acquiescence, is a prerequisite to a finding that Filova has violated international law.

When the international community has spoken to the issue of state supported terrorism, it has been ambiguous as to what level of support is necessary to constitute a violation of international law. The International Law Commission illustrates the ambiguity:

> *In some cases*, support for acts which might be regarded as acts of international terrorism *could be considered* aggression . . . *In other cases*, such support *might be* an interference in the internal affairs of another state.[24]

At no point does the Commission define what level of state support is necessary to constitute a violation of international law, evidencing how the international community appears to have left the question unresolved.

Ercola can look to other contexts in which the Court has defined the requisite level of state support for illegal activities. For example, in Military and Paramilitary Activities in Nicaragua, the Court condemned certain United States' activities in supplying materials to the contras in Nicaragua.[25] In the Corfu Channel case, the Court imputed responsibility to

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[23] Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22.

[24] Murphy, note 1, at 59 (emphasis added).

[25] Military and Paramilitary Activities in Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27, 1986).

the government of Albania for planting mines in the Corfu Channel, as the Court determined that the mines could not have been placed without the government's knowledge.[26] Finally, in the United States Diplomatic and Consular Staff in Tehran, the Court imputed responsibility to the Iranian government as a result of the government's failure to condemn the acts that occurred at the U.S. Embassy.[27] Given these various levels of state responsibility, Ercola should be prepared to give the Court a rule for determining whether there is actionable state support for an illegal act.

Ercola can also attempt to impute liability to Filova for YLSA's actions through an agency theory. The following quote makes it clear, however, that this area of law is still unsettled:

> It is clear that state responsibility attaches to acts committed by agents of a state or by private individuals acting on behalf of the state. *In the latter instance, the type of connection which must be established between the individuals (acting privately) and the state (in order to impute that individual's act to the state) is not very clear . . .*[28]

Any attempt to impute liability to Filova for YLSA's acts on the basis of agency will require Ercola to show that there is an accepted definition of agency in international law that would cover the relationship between Filova and YLSA.

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[26] Corfu Channel (U.K. v. Albania), 1949 I.C.J. 4 (April 19, 1949).

[27] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24, 1980).

[28] *United States v. Caro-Quintero*, 745 F.Supp. 599, 609 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd* 112 S.Ct. 857 (1992), *citing* 1 M. Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE, sec. 5.2 at 216 (1987) (emphasis added).

The Compromis leaves open for discussion whether Filova is actually supporting the activities of YLSA. On the one hand, the origin of an YLSA communique was traced to the Filovan Intelligence Service Center,[29] and another YLSA communique referred to Filova as YLSA's "brothers in revolution," stating that YLSA would be helped by its "friends in the Filovan Intelligence Service."[30] On the other hand, the Filovan Ambassador issued a diplomatic note for the Foreign Ministry denouncing the bombing in Ercola.[31] Irrespective of the rules the respective parties submit regarding the requisite level of a particular state's involvement in terrorist activities, each party should be prepared to explain how these facts warrant a finding in its favor.

II. EXTRADITION

A. Introduction

Ercola next seeks an order from the Court requiring that Filova extradite to Ercola those claiming responsibility for the Stock Exchange bombing.[32] Filova merely seeks an Order rejecting Ercola's request for relief.[33] However, Filova has already stated that the subject acts fall within the political offense exception contained in the bilateral extradition treaty between Filova and Ercola.[34] Presumably, in response to Ercola's request for relief, Filova will reiterate this position.

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[29] Compromis at 7.

[30] Compromis at 6.

[31] Compromis at 6.

[32] Compromis at 10.

[33] *Id.* at 11.

[34] Compromis at 10.

B. The Bilateral Extradition Treaty

There is a bilateral extradition treaty between Ercola and Filova.[35] That treaty requires extradition if a proper request for extradition has been made, and when the acts which form the basis of the extradition request are criminal in the jurisdictions of both nations.[36] The treaty also contains what is characterized as a "standard" exception for political offenses.[37]

There is insufficient evidence in the Compromis to determine whether Ercola's extradition request was proper. The Ercolan Foreign Ministry sent a demarche to the Filovan Embassy asking that those responsible for the Stock Exchange bombing be either prosecuted by Filova or extradited to Ercola.[38] This request appears to have gone through the appropriate diplomatic channels. Nonetheless, it would be appropriate for the bench to ask Ercola to explain why its request was procedurally proper.

In its only official statement regarding that treaty, the response to Ercola's demarche, Filova never stated that Ercola's extradition request was improper.[39] One factual argument available to Ercola is that, had the extradition request been somehow improper, Filova would have certainly mentioned it in its response to the demarche.

With regard to the dual criminality provision in the treaty, there is evidence in the Compromis that the bombing campaign violated criminal laws in Ercola.[40] What is missing is evidence that those acts are illegal in Filova. As a practical matter, when the subject crimes involve homicide, the dual-criminality requirement poses no serious impediment to extradition, as

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[35] Compromis at 11. According to the Clarifications to the Compromis, the treaty became effective in 1963.

[36] Compromis at 11.

[37] *Id.*

[38] Compromis at 9.

[39] Compromis at 10.

[40] Compromis at 9.

every state condemns homicide.[41] Further, Filova did not mention the dual criminality requirement in its response to the Ercolan demarche, which presumably indicates that dual criminality is not an issue here. Again, however, the bench should ask Ercola how the dual criminality requirement of the treaty is met in this case.

The principal issue regarding extradition, and the one that should occupy the majority of the competitors' time, is the political offense exception to extradition. Filova has already stated that the acts which form the basis for Ercola's extradition request "give rise to the political offense exception set out in" the bilateral extradition treaty between Ercola and Filova.[42]

Even though the Compromis refers to a "standard" political offense exception, a review of international law reveals that there is really no such thing. However, because there is a bilateral extradition treaty between Ercola and Filova, and because that treaty contains a political offense exception, which has been apparently invoked by Filova, both parties should be prepared to put forth a rule for evaluating the applicability of the exception. The bench should affirmatively inquire as to the particular rule advocated by each party.

Although treatment of the political offense exception varies widely, there are generally three tests that have been used to evaluate the appropriateness of the exception: (1) the Anglo-American test; (2) the French test; and (3) the Swiss test.

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[41] Geoff Gilbert, ASPECTS OF EXTRADITION LAW 47 (1991).

[42] *Compromis* at 10. The *Compromis* states that the bilateral treaty contains "a standard exception for political offenses." *Id.* at 11. The Clarifications to the Compromis state that the treaty's political offense exception reads as follows:

> b. Extradition shall be refused in the following circumstances . . . c) when the crime for which extradition is requested is of a political character.

The Anglo-American test provides that crimes become political offenses when they are "incidental to and formed a part of a political disturbance."[43] For the proponent of a political offense exception, this would appear to be the easiest test to satisfy. In this case, Filova would merely need to prove that the Stock Exchange bombing was incidental to a disturbance in Ercola that was political in nature.

The French test applies the political offense exception only when the offense is purely political.[44] In other words, if the offense involves a common crime, such as murder or destruction of property, the political offense exception will not apply. This is the hardest test to satisfy, and would appear not to be satisfied in this case, given the facts set forth in the Compromis. As an aside, the French test is the most infrequently applied of the three, and it appears that the test is no longer followed even in France.

The final test for the political offense exception, which is the most frequently used, is the Swiss test, which requires that the political aspects of a crime outweigh its common elements.[45] The application of the Swiss "proportionality" test in this case involves a comparison of the political aims of YLSA in bombing the Stock Exchange to the common nature of the crimes of homicide and destruction of property. In discussing the Swiss test, each party should be capable of balancing the relevant facts to support its respective position.

Irrespective of these various tests, the question to ask from the bench is why any of these tests would apply to theft of secret information.

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[43] *In re Castioni*, 1 Q.B. 149, 166 (1891).

[44] *In re Giovanni Gatti*, Ct. of Appeals, Grenoble, Fr., 1947 Ann. Dig. 145 (Case No. 70).

[45] *See, e.g., In re Nappi*, 19 I.L.R. 375 (Switz. Fed. Trib. 1952).

B. *Aut Dedere Aut Iudicare*

The principle of *aut dedere aut iudicare* means that a state has the obligation to either try or extradite an individual when a proper request has been made for that individual's extradition. Ercola may argue that the principle of *aut dedere aut iudicare* obliges Filova to either try or extradite those responsible for the Stock Exchange bombing, given Ercola's request for their extradition.

Presumably, Ercola would invoke the principle of *aut dedere aut iudicare* to avoid the political offense exception, as the doctrine arguably provides for only two alternatives -- prosecution or extradition. However, because Ercola and Filova have concluded a treaty that expressly provides for the political offense exception, it is unlikely that Ercola can now avail itself of the principle of *aut dedere aut iudicare* to nullify the exception.

Filova may address the principle of *aut dedere aut iudicare* by arguing that those responsible for the Stock Exchange bombing are being tried in Filova. However, those individuals are being tried for possession of unregistered firearms.[46]

Ercola will probably argue in response that it has sought extradition for the crime of homicide among other crimes. Therefore the proceeding in Filova hardly satisfies the obligation of *aut dedere aut iudicare*.

III. MINORITY RIGHTS

A. Introduction

Filova seeks a declaration from the Court that Ercola's treatment of the Yttic minority violates international law.[47] The Compromis alludes to several circumstances extant in Ercola which Filova will undoubtedly point to as the basis for this claim. These include: (1) the fact that public employers refuse to give paid leave for Yttics holidays, a lead which is followed by most private employers in Ercola;[48] (2) the fact that

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[46] Compromis at 10.

[47] Compromis at 11.

[48] *Id.* at 1.

Nicastrian is statutorily mandated to be the official language in Ercola;[49] (3) the fact that it is forbidden to conduct public business in any foreign language;[50] and (4) the fact that Ercolan law outlaws any political party promoting separatism.[51] Ercola will undoubtedly deny that these acts constitute violations of the Yttics' rights.

B. International Law And Minority Rights

It seems beyond dispute that, under international law, any minority group has the right to maintain its individual status. For example, the International Covenant on Civil and Political Rights (ICCPR) provides that:

> In those states in which ethnic, religious or linguistic miniorities 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.[52]

The UNESCO Declaration on Race and Racial Prejudice provides for "the right to be different and the right to cultural identity . . .".[53]

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[49] *Id.*

[50] *Id.*

[51] *Id.* at 4-5.

[52] International Covenant on Civil and Political Rights, art. 27.

[53] *See* Natan Lerner, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 17 (1991).

It will be difficult for Ercola to argue otherwise, except with the possible counter-argument that the ICCPR also provides as follows:

> The exercise of the rights provided for in paragraph 2 of this article[54] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be as are provided by law and are necessary:
>
> * * * *
>
> (b) For the protection of national security or of public order ...

Article 20 of the ICCPR dictates the following standards:

> Any propaganda for war shall be prohibited by law.[55]
>
> Advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[56]

In fact, although both the ICCPR and the ICESCR provide for the right to self-determination, this right does not include the right to revolt.

Ercola may try to avoid arguments involving the ICCPR or the ICESCR by arguing that it merely signed the human rights instruments in 1986,[57] and that there is a distinction between signing and ratification of a

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[54] "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds ..." International Covenant on Civil and Political Rights, art. 19, ¶ 2.

[55] International Covenant on Civil and Political Rights, art. 20.

[56] Id.

[57] Compromis at 11.

convention.[58] Filova, however, may argue that although there is a difference between signing and ratifying, a signature reflects evidence of acceptance of the standards within the covenants, and that at the least the standards may be recognized as customary international law. Another argument should be made that a signatory should adhere to the agreement in good faith.

Ercola can and may point to examples where individual states have oppressed minorities, arguing that state practice evidences a lack of uniformity on the issue of minority rights.

The more likely, and more palatable approach available to Ercola is to argue that the subject actions do not oppress the Yttic minority. Specifically, Yttics are not forbidden from observing their religious holidays -- they simply do not receive paid leave. Further, Yttics can continue to speak their language, notwithstanding the fact that Nicastrian has been declared the official language of Ercola. Ercola can also argue that having a single language for the transaction of business eliminates ambiguities, which in turn enhances efficient commerce within Ercola. Ercola can point to other countries, such as which have official languages. Even the United Nations designates certain languages as "official."

With regard to Ercolan law, which outlaws separatist political parties, Ercola can take the position that such a law, in and of itself, does nothing to prevent the Yttics from maintaining their identity within Ercola. In response, Filova would have to prove that minority rights include the right to secede from a state.

Beyond addressing the specific allegations raised by Filova, Ercola can point to its constitution, which provides for freedom of religion, speech, and association.[59] Further, the Yttics are apparently allowed to participate in the electoral and legal processes in Ercola.[60] The bench should therefore spend some time inquiring of Filova exactly what principles of international law have been violated, and how they have been violated.

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[58] According to the Vienna Convention on the Law of Treaties, Ercola as a non-party cannot invoke the provisions of the Covenant against a party.

[59] Compromis at 1.

[60] *Id.* at 4, 5.

C. Standing

Ordinarily, there must be a nationality link between a nation and its claim before the Court.[61] It is fairly clear that there is no nationality link between Filova and the claim it brings regarding the Yttics. As the Clarifications to the Compromis provide, "Yttics born in Ercola are Ercolan citizens." Therefore, Filova will need some alternative basis to give it standing to assert this particular claim.

The most logical basis for Filova to assert in support of its claim is that Ercola, in violating the rights of the Yttics, has breached an international obligation *erga omnes*. An obligation *erga omnes* is a basic obligation under international law. If, in fact, Ercola's treatment of the Yttics is a violation of an obligation *erga omnes*, then any nation, including Filova, has an interest in asserting a claim that such a violation has occurred.[62] Therefore, Filova would have standing to bring its claim.

For support, Filova can point to the United Nations Charter itself which imposes on all nations the obligation to protect human rights.[63] This argument, of course, depends upon whether Ercola has in fact violated the Yttics' human rights. This, in turn, puts the Court in the position of having to adjudicate the merits of Filova's claim prior to resolving the issue of whether Filova has standing to bring the claim. The bench should ask the assistance of the parties in resolving this fundamental procedural issue.

Filova can also assert that, because of the ethnic identity between the Filovans and the Yttics, Filova has the requisite national interest in its claim on behalf of the Yttics. Given the fact that the Yttics are Ercolan citizens, however, this argument does not appear very persuasive.

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[61] R. Jennings and A. Watts, OPPENHEIM'S INTERNATIONAL LAW, vol. 1, 9th ed. 512 (1992).

[62] *Barcelona Traction Light and Power Co.*, ICJ Rep. 1970 at 32; Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 Minn. L. Rev. 349, 416 (1988-89).

[63] U.N. CHARTER, arts. 55 & 56.

IV. PRIVACY

A. Introduction

As part of its claim for damages, Ercola alleges that the privacy of its citizens has been breached as a result of the release of confidential information.[64] The basis of Ercola's claim will be the theft and publication of sensitive material about Ercolan military personnel stolen from the ESPRI database. In order to be successful on its claim, Ercola must first establish that a right to privacy is recognized under international law.

B. Is There An International Right To Privacy?

The International Covenant of Civil and Political Rights, to which Filova is a party, provides, in relevant part, as follows:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> Everyone has the right to the protection of the law against such interference or attacks.[65]

Ercola will seek to invoke the provisions of this Covenant against Filova. However, according to the Vienna Convention on the Law of Treaties,[66] Ercola as a non-party cannot invoke the provisions of the Covenant against a party. Therefore, Ercola must look to customary international law to establish a right of privacy.

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[64] Compromis at 10-11.

[65] International Covenant of Civil and Political Rights, Mar. 23, 1976, Art. 17, ¶¶ 1 & 2, 999 U.N.T.S. 171.

[66] Vienna Convention on the Law of Treaties, Mar. 21, 1986, 1155 U.N.T.S. 331, art. 34.

There are several other documents on which Ercola can rely that refer to a generally recognized right of privacy. These include the Universal Declaration of Human Rights (art. 12),[67] the American Convention (art. 11),[68] and the European Convention (art. 8).[69] The language in the International Covenant on Civil and Political Rights essentially mirrors the language contained in these other documents.

There are other conventions which regulate the use of electronic data of a personal nature. Of note in this circumstance is the Council of Europe's Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, which provides as follows:

> [P]ersonal data revealing racial origin, political opinion or religion or other beliefs as well as personal data concerning health or sexual life may not be processed automatically unless domestic law provides appropriate safeguards.[70]

On their face, the documents evidencing a right to privacy in international law appear to regulate conduct between a government and its citizenry. Ercola should therefore be prepared to explain how international norms regarding privacy affect the actions taken by one state against the citizens of another state.

In addition to these transnational instruments, Ercola can also point to state practice in the form of nations who have legislated a right to privacy in their domestic laws. These nations include the United States and

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[67] G.A. Res. 217A (III), U.N. GAOR 3d Sess. at 71, U.N. Doc. A/810 (1948).

[68] American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123.

[69] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

[70] Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Jan. 28, 1981, Eur.T.S. No. 108.

most of the nations in the European Community. In fact, in the European Community, only Britain has no legislated right to privacy.[71]

These national and international instruments, taken in combination, may evidence state practice sufficient to establish a customary international norm regarding privacy. Filova will undoubtedly argue that state practice regarding privacy is insufficient to establish customary norms on that subject, and whatever definition exists is too narrow to provide for the relief sought by Ercola.

C. Is Filova Responsible For YLSA's Alleged Violation Of The Right Of Privacy?

Filova will probably argue that any violation of the Ercolans' right of privacy is the responsibility of YLSA, and not Filova. Many of the same factual and legal issues pertaining to terrorism will be relevant to the issue of Filova's alleged violation of the right of privacy.[72]

It is unclear from the facts when or where the original theft of the ESPRI database occurred. If the theft of the database itself, as opposed to the dissemination of information contained in the database, is the basis for Ercola's privacy claim, the principle of *sic utere tuo* is not readily available to Ercola, as it is not clear that there was a violation of international law on *Filova's* territory. However, it is fairly clear that the *dissemination* of the information occurred from Filova, thereby making Filova subject to a claim that it breached the principle of *sic utere tuo* by allowing its territory to be used to the detriment of Ercola.

Regarding the general notion of state responsibility, Ercola can argue that, just as in the Corfu Channel case, the Court can infer Filova's knowledge of YLSA's actions.[73] Communique No. 6, which contained the sensitive information about Ercola's military personnel, was traced to the

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[71] Dowrick, *Council of Europe: Juristic Activity 1974-86, Part II*, 36 Int'l & Comp. L.Q. 878, 888 (1987).

[72] *See* § I(D), *supra*.

[73] Corfu Channel (U.K. v. Albania), 1949 I.C.J. 4 (April 19, 1949).

Ercolan Intelligence Service Center.[74] Ercola can ask the Court to infer that Filova must have known that a message was being sent from its own intelligence center. Filova can certainly respond that there is no direct evidence of that knowledge.

V. REMEDIES

A. Damages

Ercola seeks monetary damages from Filova for costs Ercola has incurred for creating a new database, and for injuries suffered by Ercolan citizens.[75] The Court, and its predecessor, the Permanent Court of International Justice, have awarded monetary damages in the past.[76] Further, such monetary damages are available even in the absence of a statutory provision providing for such damages.[77] Therefore, if Ercola can establish that Filova has breached international law, it would be entitled to monetary damages to compensate it for such breach.

Filova, in turn, can refer to the conventions on the treatment of electronic information which provide for monetary sanctions against a nation that compiles, stores, and maintains a database in the event that information stored in such database is not adequately protected. The upshot is that the Ercolans' cause of action is, in actuality, against Ercola, and not against Filova.

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[74] Compromis at 7-8.

[75] Compromis at 10-11.

[76] Corfu Channel (U.K. v. Albania), 1949 I.C.J. 4 (April 19, 1949); Chorzow Factory Case, 1928 P.C.I.J. No. 17.

[77] Chorzow Factory Case, 1928 P.C.I.J. No. 17

B. Injunctive Relief

Ercola also seeks injunctive relief in the form of an order compelling Filova to deliver all copies of the ESPRI database and code, and to refrain from making further use of those materials.[78] The ICJ has issued injunctive relief in the past.[79] In this case, to receive the injunctive relief it seeks, Ercola must show that it is illegal for Filova to retain and use copies of the ESPRI database. Other than for possible reasons of national security, it is unclear how Ercola will argue the illegality of Filova's actions on this point. On the other hand, Filova has little apparent interest in retaining and using the ESPRI database. Therefore, it should have no practical objection to the injunctive relief sought by Ercola.

C. Declaratory Relief

Both parties are seeking declaratory judgment on a number of grounds.[80] The Court has issued declaratory judgment in the past.[81] Assuming that the parties can prove their respective claims, there would appear to be no impediment to receiving the declaratory relief they seek.

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[78] Compromis at 10.

[79] Military and Paramilitary Activities in Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27, 1986).

[80] Compromis at 10-11.

[81] North Sea Continental Cases (Fed. Rep. Ger. v. Den. & Neth.), 1969 I.C.J. Rep. 3, 6, 53-54.