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Canada v. United States of America

Chios Carmody

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2014 NIAGARA MOOT COURT
COMPETITION

CANADA
V.
UNITED STATES OF AMERICA

THE CASE CONCERNING THE OSCAR WILDE

BENCH MEMORANDUM

Sponsored by the Canada-United States Law Institute (“CUSLI”)

2014 Niagara Problem written by Chios Carmody

Bench Memo written by Michael P. Scharf

with the assistance of
Elizabeth Horan, Noah Goldberg, Taylor Mick, Julia Miller, and
R. Mitch Wilcos

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PART 1: GENERAL INFORMATION

A. Introduction

The purpose of this Bench Memorandum is to provide judges in the Niagara Moot Court Competition a summary of the basic factual and legal issues in the 2014 Niagara Problem (the “Compromis”). This Bench Memorandum should be read in conjunction with the teams’ briefs that you are judging; the Compromis, which is in essence a stipulation of facts agreed to by the two Parties; and the Corrections/Clarifications which supplements the Compromis. The Compromis is intended to present the competitors with a balanced problem, such that each side has strengths and weaknesses in its case. This Bench Memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis, and Judges should not be surprised when, in evaluating either a Brief or an oral argument, they see arguments or authorities not discussed in this memorandum. Their absence from this Bench Memorandum does not suggest that such arguments are not relevant or credible.

B. Synopsis of the Facts

The 2014 Niagara Moot Court Case concerns two issues: First, whether an obligation exists under international law to recognize same-sex marriage. And second, the extent to which a state may assert its right to protect itself from terrorism by freezing the sale of a yacht where the proceeds were intended to pay a ransom to pirates.

Sam Chandra and Bill Hayter's Domestic Partnership

Sam Chandra met Bill Hayter while Sam was studying at Portland State University in 2005. The two quickly hit it off and moved in together just a few months after their relationship began. When Chandra graduated from PSU, Hayter offered him a position as a finance officer with Hayter's successful home renovation business, Hayter Homes Ltd. Chandra and Hayter shared living expenses and divided chores amongst each other at their home. They hiked, biked, and canoed together, and often hosted a mix of their gay and straight friends over for dinners and parties. The couple also purchased a 22-foot monohull sailboat, which they named *The Oscar Wilde*, and they would often spend their weekends sailing the through the waters of the Columbia River. The *Oscar Wilde* was registered and flagged a U.S. vessel.

In March 2007, Hayter proposed to Chandra at a fundraiser for the Portland Art Museum. The couple went to obtain a marriage license from the Clerk of Multnomah County, but were denied based on a 2004 amendment to the Oregon Constitution. "Measure 36" amended the constitution so that only marriages between one man and one woman were considered legally recognized. In 2007, however, the Oregon state legislature passed the Family Fairness Act, which created the status of "domestic partnership" and granted certain rights to same-sex couples who registered under the Act. Chandra and Hayter registered their relationship under the Act in March 2008. While the Oregon Constitution still did not recognize same-sex couples as legally wed, those in a domestic partnership were granted the right to make medical decisions in crises, to exercise rights and responsibilities related to property and inheritance, and to benefit from provisions to protect children and other dependents.

Following a downturn in the Oregon economy, Chandra and Hayter relocated to Vancouver, British Columbia.

The Freeze on the Sale of The Oscar Wilde

In May 2013, Chandra and Hayter were spending the night aboard *The Oscar Wilde* in international waters. At some point in the night, Hayter awoke to investigate a noise and was abducted by masked men who had boarded the ship. Chandra awoke to find Hayter missing, and immediately contacted the Canadian Coast Guard to search for him.

Two weeks after Hayter's disappearance, Chandra received an email from "Moses Andrew," an individual who identified himself as a member of the Namian Liberation Front (NLF). Andrew informed Chandra that Hayter was alive and healthy, but demanded Chandra pay a U.S. \$5 million ransom. The NLF is an organization working towards the creation of an independent state out of the

Namian Islands, which is currently part of the Republic of Minasia. In pursuit of this goal, the NLF has blown up bridges and buildings throughout Minasia and has been implicated in attacks in the Harjuro, the country's capital. The organization has been designated a terrorist organization on lists maintained by Public Safety Canada and the U.S. State Department. The NLF also maintains close ties with Somali pirates. The two groups have been known to conduct training and information exchange sessions together, and have been implicated in joint attacks on vessels.

In an effort to raise money for the ransom, Chandra set up a web-based appeal and considered selling *The Oscar Wilde*. Upon hearing of Chandra's fundraising, the U.S. Office of Foreign Asset Control (OFAC) froze the sale of ship and stated that any private efforts to contribute money would be contrary to international law. OFAC instituted its actions because it believed the ransom payment and the proceeds from *The Oscar Wilde* would materially assist terrorists in contravention to international law. Canada issued a Diplomatic Note asserting that OFAC's actions were unwarranted, but the U.S. rejected this, stating that every country has a right to protect itself from terrorists.

Additionally, Canada issued a Diplomatic Note to the United States asserting that the U.S. had breached international law by failing to issue a marriage license to Chandra and Hayter. The U.S. responded that every nation has the right to establish what the pre-conditions for marriage are.

After high-level negotiations in late July 2013 failed, Canada and the United States agreed in August 2013 to submit the disputes about the marriage licenses and OFAC's blocking of *The Oscar Wilde* to a special chamber of the ICJ. Both countries further agreed that they would fully and immediately implement whatever decision the ICJ renders in the case.

C. Sources of International Law

This section is an introduction to public international law for judges who might not have professional experience or training in the field. Feel free to skip to Section IV if you have judged International Law Moot Courts in the past and/or feel that you have a good familiarity with the general principles of international law. There are important distinctions between international law and domestic legal systems. The most significant for the international law moot judge is the rigid definition of what sources of law are acceptable before the Court.

1. General

The conduct and rules of the International Court of Justice (the "ICJ") are governed by the Statute of the International Court of Justice (the "ICJ Statute"). Under Article 38(1) of its Statute, the International Court of Justice may consider the following sources of international law in order to decide disputes before it:

- 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) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Commentators disagree as to whether these sources are listed in order of importance.

Judges from common-law systems should note the status of precedent. Article 59 of the ICJ Statute deprives decisions of the Court any status as precedent, stating, “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” In practice, however, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(1)(d). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those evaluations in later decisions.

Decisions by other tribunals are dealt with in the discussion in Subsection E (“Decisions and Publicists”) *infra*.

Resolutions of the United Nations General Assembly are not, of themselves, binding before the Court. Although Resolutions may be evidence of customary international law, the General Assembly’s position in international law is not analogous to that of a domestic legislature, and resolutions of the General Assembly do not create positive international law.

2. Treaties

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty. Rules regarding treaty procedure and interpretation are defined in the 1959 Vienna Convention on the Law of Treaties¹ (the “VCLT”), which is accepted by both the United States and Canada as customary international law.

The fundamental principle relating to treaties, reiterated in Article 26 of the VCLT, is that of *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” In other words, once a State becomes a party to a treaty, it is bound by that treaty. Article 27 of the VCLT provides that a State cannot plead its Constitution, domestic laws, or domestic court cases as an excuse for non performance of a treaty obligation.

Article 34 of the VCLT adds that a treaty is generally not binding on a State which is not party to the treaty, and does not create rights or obligations for such a State. Article 18 tempers this rule with respect to States that have signed – but not yet ratified – a treaty: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty . . .” pending ratification, unless it has “made its intention clear not to become a party to the treaty.” For example, a State which has signed but not ratified a treaty forbidding testing of nuclear weapons would not be held to the minute procedural details of the treaty; however, actual nuclear- weapons testing by the State would

probably be seen as a violation of international law, constituting a breach of the “object and purpose” of the treaty.

The treaties potentially relevant to this case, to which both Canada and the United States are parties, include: the U.N. Charter, the Statute of the International Court of Justice, and the 1958 Law of the Sea Conventions. Note, while Canada is party to the 1982 UN Law of the Sea Convention (UNCLOS), the U.S. has signed but not yet ratified the 1982 Convention.¹

Even if a State is not party to a treaty, a treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this “back-door” means by which a treaty may become binding on non-parties. Judges should be aware, however, that situations arise where some provisions of a treaty – for example, many provisions of the 1982 Law of the Sea Convention – may reflect or codify customary international law, while other parts do not.

3. Customary International Law

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has binding force of law because the community of States treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a State whether or not it has affirmatively assented to that rule. The exception to this is that a State which has been “a persistent objector” to the rule of customary international law will not be bound by it.

In order to prove that a given rule has become a rule of customary international law, one must prove two elements: widespread state practice and *opinio juris* – the mutual conviction that the recurrence (of state practice) is the result of a compulsory rule.

“State practice” is the material element of customary international law, and simply means that a sufficient number of states behave in a regular and repeated manner consistent with the customary norm. As alluded to above, State practice may also be shown when a sufficient number of States sign, ratify, and accede to a convention. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create “regional customary international law” or whether the practice of particularly affected states, e.g. in the area of space law or antitrust law, can create custom that binds states which later become affected by these issues, although the ICJ appears to have acknowledged the possibility.²

Opinio juris is the psychological or subjective element of customary international law. It requires that the State action in question be taken out of a sense of legal obligation, as opposed to mere expediency. Put another way, *opinio juris*, is the “conviction of a State that it is following a certain practice as

¹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969), https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg_3&lang=en [hereinafter VCLT].

² North Sea Continental Shelf Cases (F.R.G. v. Den.), 1969 I.C.J. 1 (1969).

a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it.”³

Customary international law is shown by reference to treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations. Each of these items might be employed as evidence of State practice, *opinio juris*, or both.

With respect to the burden of proof, in *The North Sea Continental Shelf Cases*, the ICJ stated that the party asserting the existence of a rule of customary international law bears the burden of proving the existence of such a rule.

4. General Principles of Law

The third source of international law consists of “general principles of law.” Such principles are gap-filler provisions: on occasion, the ICJ must have recourse to rules typically found in domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature, for example, the laws regarding burden of proof and admissibility of circumstantial evidence. Many other principles, for example estoppel, waiver, unclean hands, necessity, and *force majeure*, may sound to a common-law practitioner like equitable doctrines. The principle of general equity in the interpretation of legal documents and legal relationships is one of the most widely cited general principles of international law. The ICJ has upheld the application of equitable principles generally in, among other cases, the *North Sea Continental Shelf Cases* (1969). Its predecessor, the Permanent Court of International Justice, recognized equitable principles as part and parcel of international law in *The Diversion of Water from the Meuse*.⁴

It is important to note, however, that “equity” in this sense is a source of international law, brought before the Court under Article 38(1)(c) of the Statute of the ICJ. It is an *inter legem* application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono*, a separate matter treated under Article 38(2) of the Statute.

5. Decisions and Publicists

The final source of international law is judicial decisions and teachings of scholars. This category is described as “a subsidiary means of finding the law.” Judicial decisions and scholarly writings are, in essence, research aids for the Court, used for example to support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they address international law directly or demonstrate a general principle.

³ MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

⁴ 1937 P.C.I.J. (ser. A/B) No. 70, at 76-78.

“Teachings” refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published article constitutes an Article 38(1)(d) “teaching.” However, the provision is expressly limited to teachings of “the most highly qualified publicists.” For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. Within the context of a specific field of international law – for example, environmental law or law of the sea – there are additional experts who would be regarded within their field as “highly qualified publicists.”

D. Burdens of Proof

In the *Corfu Channel Case*⁵, the ICJ set out the burdens of proof applicable to cases before it. The Applicant (in this case Canada) normally carries the burden of proof with respect to factual allegations contained in its claim, by a preponderance of the evidence. In the case of counter-claims (the second issue in the present case), the Respondent (here the United States) bears the burden of proof.

Participants cannot, however, be held responsible for the lack of information in the *Compromis*. They can only be held responsible for the quality of their argument in light of the lack of detail. Judges should not dwell on the evidentiary gaps unless the competitors have themselves drawn implausible or unsupportable inferences.

PART II: LEGAL ANALYSIS

A. The United States’ Obligation Under International Law to Provide for Same-Sex Marriage

This issue raises three main questions: First, does the International Covenant on Civil and Political Rights (“ICCPR”) extend the right of marriage to same-sex couples? Second, how should Article 23(2) of the ICCPR be interpreted? Third, does customary international law require the United States (U.S.) to recognize the right of same-sex couples to marry?

1. Does the ICCPR extend the right of marriage to same-sex couples?

Under the ICCPR, discrimination is barred on any ground including “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁶ While state parties are primarily responsible for enforcement of the ICCPR, the Covenant also established the Human Rights Committee (“HRCtee”) as a secondary enforcement mechanism that can be utilized at the international level after all domestic remedies have been exhausted.⁷ Although HRCtee decisions do not constitute mandatory legal judgments, the decisions resemble judicial decisions in format, and are

⁵ *Corfu Channel Case (Merits)* (Br. v. Alb.), 1949 I.C.J. Rep. 4.

⁶ International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁷ *Id.* art. 28.

considered persuasive authority. Furthermore, the HRCttee is the authority for interpreting the rights in the ICCPR.⁸

The HRCttee has not taken an entirely uniform approach in interpreting the articles that are understood to address sexual orientation and same-sex marriage. For instance, ICCPR Article 26 states that “all persons are equal before the law . . . without any discrimination . . . on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” In *Toonen v. Australia*, the HRCttee held that “sexual orientation” is included in the reference to “sex” in Article 26, effectively making sexual orientation a protected class.⁹ In *Young v. Australia*, the HRCttee held that Australia violated article 26 of the ICCPR by denying Young a pension on the basis of his sex or sexual orientation.¹⁰ In *X v. Colombia*, the HRCttee similarly found that Colombia violated article 26 by failing to present a reasonable and objective basis for distinguishing between unmarried heterosexual couples and homosexual couples for the purpose of pension benefits.¹¹

Two members of the HRCttee joined in a separate dissenting opinion, questioning the jurisprudence that reads sexual orientation as a protected class under the ICCPR.¹²

ICCPR Article 23, on the other hand, specifically regards the right to marry, and states that:

“the right of men and women of marriageable age to marry and to found a family shall be recognized.”¹³

The U.S. may argue that the inclusion of the term “men and women” in the article is significant and limits the right of marriage to heterosexual marriages, noting that the rest of the ICCPR uses more universal and gender neutral terminology. This approach would find some support from *Joslin v. New Zealand*, where the HRCttee held that “mere refusal to provide for marriage between homosexual couples” does not violate the ICCPR.¹⁴ The HRCttee relied in part on the assertion that the term “men and women” in Article 23(2)—rather than gender neutral terms used elsewhere in the ICCPR—has been “consistently and uniformly understood as indicating” heterosexual marriage.¹⁵ Still, since more and more countries are recognizing the right of same-sex couples to marry, including Canada and parts of the U.S. and Mexico, the “consistent and

⁸ YOGESH TIYAGI, *THE U.N. HUMAN RIGHTS COMMITTEE: PRACTICE AND PROCEDURE* 51 (2011).

⁹ *Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992/ (1994).

¹⁰ *Young v. Australia*, Comm. No. 941/2000, U.N. GAOR Hum. Rts Comm., 78th Sess., U.N. Doc. CCPR/C/78/D/941/2000 (2003).

¹¹ *X v. Colombia*, Comm. 1361/2005, U.N. GAOR Hum. Rts Comm., 89th Sess., U.N. Doc. CCPR/C/89/D/1361/2005 (2007).

¹² *Id.*

¹³ ICCPR, *supra* note 6, art. 23(2).

¹⁴ *Joslin v New Zealand*, Comm. No. 902/1999, U.N. GAOR Hum. Rts Comm., 75th Sess., U.N. Doc. CCPR/C/75/D/902/1999 (2002).

¹⁵ *Id.* para. 8.2.

uniform understanding” of the meaning of article 23(2) discussed in *Joslin* may no longer be valid.¹⁶

2. Interpreting the ICCPR

The question, then, is how Article 23(2) of the ICCPR is reconciled with the broader context of the Covenant given the differing HRCtee approaches. Canada may argue that decisions by the HRCtee are not broadly binding. Instead Canada may propose interpreting the ICCPR by way of the Vienna Convention on the Law of Treaties (“VCLT”), which guides interpretation to the “object and purpose” of a treaty and requires analysis of text, context, and purpose.¹⁷ VCLT Art. 31(1) states that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁸

The preamble of the ICCPR recognizes “the inherent dignity and . . . the equal and inalienable rights of all members of the human family.”¹⁹ Furthermore, Article 26 of the ICCPR provides for the “equal protection” of “all persons.”²⁰ Canada may use these provisions, along with the VCLT, to show that the ICCPR should be interpreted so as to require the recognition of same-sex marriage.

Even if the U.S. were to concede that HRCtee decisions are not binding, it may still argue *lex specialis derogate legi generali* (the *lex specialis* maxim) in interpreting the ICCPR. The maxim gives precedence to the more specific law, here Article 23(2) over the general law, Article 26, because the more specific law is supposed to take better account of the context in which the law is to be applied.²¹ This would imply, then, that the ICCPR does *not* require the recognition of same-sex marriage. The *lex specialis* maxim, however, is just one of a number of interpretive tools to be used.²²

3. Customary International Law

Canada may attempt to argue that customary international law recognizes the rights of same-sex couples to be married. Customary international law is binding, and a claim can be brought against a state to conform to custom even if that state has qualms with a certain treaty provision. In order to show that a norm has crystallized into customary international law, Canada must demonstrate the existence of two elements: a widespread and consistent state practice and *opinio juris* (belief that the practice is required by law). Evidence of custom can be found, among other sources, in states conforming to treaties and states reports to treaty bodies.

Sexual orientation and same-sex marriage are not explicitly mentioned in any of the principal United Nations human rights instruments. There are,

¹⁶ *Id.* at para. 8.2.

¹⁷ VCLT, *supra* note 14, art. 31(1).

¹⁸ VCLT, *supra* note 1, art. 31(1).

¹⁹ ICCPR, *supra* note 6, preamble.

²⁰ *Id.* at art. 26.

²¹ U.N. International Law Commission, Report of the International Law Commission on its Fifty-Eighth Session, 251(7), U.N. Doc. A/61/10 (Jan. 10, 2006).

²² *Id.* at 251(6).

however, a number of human rights documents that, despite not explicitly mentioning same-sex marriage, reveal custom to protect the right of same-sex couples to marry if they so choose. For instance, Article 7 of the Universal Declaration on Human Rights (“UDHR”) affords universal equal protection: “All are equal before the law and are entitled to equal protection of the law.”²³ Article 12 of the UDHR recognizes the right to privacy: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence . . . Everyone has the right to the protection of law against such interference.”²⁴ Finally, the right to marry is found in Article 16 of the UDHR: “Men and women of full age . . . have the right to marry and to found a family.”²⁵ If Canada can use these instruments to demonstrate a widespread practice and *opinion juris*, it may be able to assert a new custom of international law.

The U.S., however, may argue that the use of gender specific terminology in Article 16 limits the right to marriage to opposite sex couples. Furthermore, a 2011 report on discrimination against LGBT people from the U.N. High Commissioner for Human Rights repeated the holding from *Joslin* that same-sex marriage is not an obligation of states.²⁶

In addition, Canada may make reference to several recent U.N. General Assembly resolutions indirectly supportive of LGBT rights.²⁷ The United States may point out that none of these have been adopted by a majority of the U.N. membership, that a number of counter-resolutions have been put forward by blocs of states opposed to LGBT rights, and that in any event, none of the resolutions identify U.N. member states as obligated to provide same-sex marriage.²⁸ Canada may counter, in turn, that a 2008 French-Dutch Declaration in the General Assembly expressing “concern at continued evidence in every region of acts of violence and related human rights violations based on sexual orientation and gender identity” has received support from 97 countries so far, including in March 2009 from the U.S.²⁹ In addition, within the U.N. human

²³ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, Human Rights Council, 19th Sess., para. 68, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

²⁷ See for instance “Extrajudicial, summary or arbitrary executions”, A/C.3/67/L.36 (9 Nov. 2012). In addition, in December 2010 the U.N. Secretary General, Ban Ki Moon, delivered a landmark speech in which he called for the worldwide decriminalization of homosexuality and for other measures to tackle violence and discrimination against LGBT people. Since then, the Office of the U.N. High Commissioner for Human Rights has noted that the core legal obligations of states with respect to the protection of human rights of LGBT people include prohibiting discrimination on the grounds of sexual orientation and gender identity. Canada may argue that the inability of LGBT people to fully wed in all U.S. states is in violation of this obligation.

²⁸ The relevant resolutions condemn executions. They do not obligate countries to provide a right of same-sex marriage.

²⁹ See “Joint Statement on Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity”, presented to the U.N. General Assembly Dec. 18, 2008.

rights framework, countries that criminalize LGBT acts or do not recognize same sex unions have been told to change their laws during the Universal Periodic Review process. Several Special Rapporteurs commissioned by the HRCtee have made statements supportive of LGBT rights in their reports.³⁰

Canada may also attempt to argue that same-sex marriage, if not part of customary international law, is emerging as an obligation in the regional custom of North America. Canada and Mexico have legalized same-sex marriage, while in 2013 the U.S. has repealed the discriminatory Defense of Marriage Act, and a growing number of sub-federal jurisdictions are legalizing same-sex marriage across the country. Still, it is arguable that, in order for regional custom to exist, there must be a common custom throughout the entire Americas. Currently, only Argentina, Brazil, Canada, and Mexico and the U.S. recognize the right to same-sex marriage *federally* compared to dozens of countries that do not, and North America has no common human rights framework. The U.S. may point to these facts as evidence that no regional custom exists. Canada may counter that in 2008 all 34 member countries of the Organization of American States - including the U.S. - unanimously approved a declaration affirming that human rights protections extend to sexual orientation and gender identity.³¹

B. OFAC's Blocking of the Sale of The Oscar Wilde

The U.S. Office of Foreign Asset Control blocked the sale of *The Oscar Wilde* in order to prevent Chandra from making the ransom payment demanded for Hayter's release. The parties dispute the legality of the block. This issue raises many questions about the definition of a "terrorist," the scope of "terrorism," and the competing claims of sovereignty and jurisdiction.

1. Classifying Moses Andrew as a Pirate or Terrorist

When determining if the U.S. Office of Foreign Asset Control's (OFAC) blockage on the sale of *The Oscar Wilde* violates international law, the first issue to be addressed is whether Moses Andrew is a terrorist. The major argument of both parties will likely focus on Moses Andrew's motive for kidnapping Bill Hayter. Traditionally, acts of piracy are recognized as being done for private

³⁰ The HRCtee has held that States are not required, under international law, to allow same-sex couples to marry. Yet, the obligation to protect individuals from discrimination on the basis of sexual orientation extends to ensuring that unmarried same-sex couples are treated in the same way and entitled to the same benefits as unmarried opposite-sex couples. See *Young v. Australia*, Comm. No. 941/2000, U.N. GAOR Hum. Rts Comm., 78th Sess., U.N. Doc. CCPR/C/78/D/941/2000, para. 10.4 (2003). The HRCtee has welcomed measures to address discrimination in this context. In its concluding observations on Ireland, the Committee urged the State party to ensure that proposed Irish legislation establishing civil partnerships not be "discriminatory of non-traditional forms of partnership, including taxation and welfare benefits." See "Concluding Observations of the Human Rights Committee on Ireland", CCPR/C/IRL/CO/3, para. 8 (July 22, 2008).

³¹ "Human rights, sexual orientation and gender identity", O.A.S. AG/RES. 2435 (XXXVIII-O/08) (2008) expressing concern about violence directed toward LGBT people in the Americas and instructing the OAS's Committee on Juridical and Political Affairs to include the resolution on its agenda when addressing the U.N. General Assembly. The document garnered support from Caribbean nations that criminalize homosexual acts.

ends;³² they are based on pecuniary gain with no discernible political ends. On the other hand, terrorism is motivated by political objectives that extend past the immediate attack.³³ Determining the motivation for kidnapping Bill Hayter and the likely purpose of the ransom money will be the key issue in deciding if Moses Andrew is a terrorist.

According to the United Nations Convention on the Law of the Sea (UNCLOS) Article 101, piracy is defined as “illegal acts . . . committed for private ends . . . and directed . . . against another ship.”³⁴ The key part of the definition that Canada will most likely focus on is that the act was done for “private ends,” a key distinction from most definitions of terrorism, which are viewed as acts done for political reasons.³⁵ Private ends are generally understood to mean stealing money, cargo, and vessels for self-enrichment.³⁶ A United States court, however, recently reviewed the definition of “private ends” in relation to piracy and concluded that private ends included actions undertaken on “personal, moral, or philosophical grounds.”³⁷ The court also noted that the perpetrators may consider their acts to be serving the public good, but this does not automatically mean that the ends are public.³⁸ Canada will most likely argue that the kidnapping of Bill Hayter was done for the ransom payment and is thus an act of piracy, not terrorism.

The U.S. will argue that Moses Andrew is in fact a terrorist, and the kidnapping of Bill Hayter was an act of terrorism. There is no internationally comprehensive or accepted definition of terrorism.³⁹ The UN describes terrorism as, “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes.”⁴⁰ The Canadian Criminal Code defines acts of terrorism as acts done “in whole or in part for a political, religious or ideological purpose, objective or cause.”⁴¹ Finally, the United States Code defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents . . .”⁴² All three of these definitions state that terrorist acts are done for a political purpose.

Moses Andrew identified himself as a member of the NLF in his ransom email, and indicated that Bill Hayter was being held by NLF guerillas. The goal of the NLF is political, and thus the U.S. may argue that the kidnapping of Bill Hayter and ransom demand are politically motivated. The NLF has been

³² United Nations Convention on the Law of the Sea (“UNCLOS”), art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; Geneva Convention on the High Seas, art. 15, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter Geneva Convention].

³³ Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L.J. 257, 258 (2002-2003).

³⁴ UNCLOS, *supra* note 32, art. 101.

³⁵ Garmon, *supra* note 33, at 258.

³⁶ *Id.* at 146.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Garmon, *supra* note 33, at 269.

⁴⁰ G.A. Res. 49/60, para. 31, U.N. Doc. A/RES/49/60 (Dec. 9, 1994).

⁴¹ Criminal Code, R.S.C. 1985, c. C-46, s 83.01(1) (Can.).

⁴² 22 U.S.C.A. § 2656f (d)(2) (West 2004).

designated as a terrorist organization on lists maintained by Public Safety Canada and the U.S. State Department.⁴³ Finally, the U.S. could argue that the motive for the attack was not a simple financial gain, but a financial gain that will fund the ultimate goal of liberating the Namian Islands—the political goal of the NLF. Therefore, the kidnapping was an act of terrorism, not piracy. Still, there is no direct evidence that the payment, if made, would end up in the hands of terrorists, a point Canada is likely to emphasize.

2. Does the projected ransom payment to the NLF constitute terrorist financing under international law?

The International Convention for the Suppression of the Financing of Terrorism (“Terrorism Financing Convention”) aims to avert terrorist activities by targeting financial sources; it criminalizes providing money to support terrorist groups and activities and requires signatories to prosecute or extradite such offenders.⁴⁴ Under Art. 2(1)(a), any act that constitutes an offence in the Convention’s nine annexed treaties is an act of terrorism.⁴⁵ However, Art. 2(1)(b) states that acts other than the ones in Art. 2(1)(a) that may be covered by the Convention, but only if those acts “intended to cause death or serious bodily injury” with the purpose to “compel a government or an international organization to do or to abstain from doing any act.”⁴⁶

Canada will likely argue that the Terrorism Financing Convention annexes do not include piracy. Thus, if the Convention does not define piracy as terrorism in one of its annexes, then financing piracy would only be a violation if it satisfies Art. 2(1)(b)’s requirements. As discussed above, the United Nations Convention on the Law of the Sea (UNCLOS) Art. 101 defines piracy as an as any illegal act “of violence or detention . . . committed for private ends” against another vessel while on the high seas or in a country’s territorial waters.⁴⁷ This conflicts with the text of Art. 2(1)(b) under which acts of terrorism must have a political, rather than private, motive.⁴⁸ Under the UNCLOS definition, piracy would not satisfy Art. 2(1)(b)’s requirements, and financing piracy would not be a violation of the Terrorism Financing Convention.

The United States, however, may counter that the Convention does include piracy in its terms. First, although Art. 2(1)(b) seems to eliminate piracy, Art. 2(1)(a), and the treaties it references, could be read to incorporate such private acts of terrorism as piracy.⁴⁹ The International Convention Against the Taking of

⁴³ *Id.*

⁴⁴ International Convention for the Suppression of the Financing of Terrorism, Oct. 30, 2013, 2178 U.N.T.S. 197 [hereinafter ICSFT]. As of 2013, 132 countries have signed the Convention, including Canada and the United States. See also Pierre Klein, International Convention for the Suppression of the Financing of Terrorism (2009), http://legal.un.org/avl/pdf/ha/icsft/icsft_e.pdf.

⁴⁵ *Id.* at art. 2(1)(a).

⁴⁶ *Id.* at art. 2(1)(b).

⁴⁷ UNCLOS, *supra* note 32, art. 101.

⁴⁸ ICSFT, *supra* note 44, art. 2(1)(b).

⁴⁹ Andreas Kolb et al., *Paying Danegeld to Pirates—Humanitarian Necessity or Financing Jihadists*, 15 MAX PLANCK Y.B. OF U.N. LAW 105, 129 (2011) [hereinafter Kolb].

Hostages, from 1979, and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, referenced by the Terrorism Financing Convention, both apply to piracy, a private act.⁵⁰ Using this view, Art. 2(1)(a) could arguably include piracy as a terrorist act.

The United States may also claim that paying the ransom is illegal under Art. 2 because the money could be used to fund further terrorism activity. Art 2(1) makes it a crime to, directly or *indirectly*, provide any funds with the intent to further terrorism activity.⁵¹ Selling *The Oscar Wilde* and using the money for the ransom payment could give the NLF the necessary financing to continue its illegal actions. This could promote further kidnappings and piracy that, under the Convention, are terrorist-type activities.

Even if the Terrorism Financing Convention does include piracy as an act of terrorism, paying ransoms for the release of hostages may not actually be an offence under the Convention. To violate Art. 2, not only must the financing go to an act defined in Art. 2(1)(a)-(b), the payments must also be “unlawfully” provided or collected.⁵² If paying ransom to safely recover hostages constitutes a legal practice, then such payment would not be “unlawfully provided.”

A 2010 African Union report proposing new measures to combat terrorism included a section that recommended a prohibition on ransom payments to terrorist groups, and “requested the international community to consider the payment of ransom to terrorist groups as a crime.”⁵³

This proposal could be taken to infer that the payment of a ransom is not a violation of the Convention. The Swiss Legislature, when adapting to the Convention, found even ransom payments that may fund terrorism could be justified.⁵⁴ In Britain, sec. 15 of the Terrorism Act 2000 criminalizes fundraising for terrorist organizations.⁵⁵ However, in *Masefield AG v. Amlin Corporate Member Ltd.*, the Court ruled that no legislation existed which criminalized ransom payments.⁵⁶ The Court also held that, since ransom payments can be recovered as “sue and labour expenses . . . it cannot be against public policy . . . to pay a ransom.”⁵⁷ In Germany, paying a ransom may violate Section 129(a) of the Criminal Code, which deals with terrorist organizations.⁵⁸ However, German citizens have been ransomed from pirates, suggesting that, when lives are at stake, ransom payments are allowable.⁵⁹ Even

⁵⁰ *Id.* at 129.

⁵¹ *Id.* at art. 2.

⁵² *Id.* at art. 2.

⁵³ African Union, Report of the Chairperson of the Commission on Measures to Strengthen Cooperation in the Prevention and Combating of Terrorism, African Union Peace and Security Council Doc. PSC/PR/2 (CCXLIX) 7 (Nov 22, 2010).

⁵⁴ Kolb, *supra* note 49, at 136.

⁵⁵ *The Terrorism Act 2000*, 2000, c. 3, §15.

⁵⁶ *Masefield AG v. Amlin Corporate Member Ltd.*, [2011] EWCA Civ. 24 63.

⁵⁷ *Id.* para. 64.

⁵⁸ Criminal Code [Germany], s. 159a, http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

⁵⁹ James Macharia, *Somali Pirates Free Tanker and Seize Cargo Ship*, Reuters, Dec. 28, 2010, <http://uk.reuters.com/article/2010/12/28/uk-somalia-piracy-idUKTRE6BR0YP20101228>.

the United States seems to support the idea that ransom payments are legal. In *Peters v. Warren Ins. Co.*, the United States Supreme Court held that ransom is a “necessary means of deliverance from a peril insured against, and acting directly upon the property.”⁶⁰ These instances, along with the 2010 African Union report, could support Canada’s argument that ransom payments are not unlawful.

The United States, however, may counter that, under U.S. law, the ransom payment is illegal. United States Executive Order 13536, implemented by President Barack Obama in April 2010, criminalizes any monetary contributions, including ransoms, to Somali pirates and those connected to the pirates.⁶¹ Since evidence suggests the NLF is connected to Somali pirates, paying the ransom to the NLF would violate the Executive Order.

The ransom payment might also violate United Nations Security Council Resolution 1373, which came into force in 2001, before the Convention.⁶² Resolution 1373 was enacted soon after September 11, 2001, as a way of imposing uniform norms on all U.N. members.⁶³ Like the Convention, the Resolution prohibits funding terrorist groups and imposes an obligation to prevent such financing on states.⁶⁴ Unlike the Convention, however, the Resolution is mandatory for all U.N. members, not just signatories.⁶⁵

Canada may argue that the Convention, adopted in 1999, is simply restated in Res. 1373. The Resolution was created to cover many of the same issues as the Convention, and was in part based on the Convention.⁶⁶

3. Does the Law of the Flag or the Law of the Jurisdiction in Which a Vessel is Located Prevail in the Event of a Conflict?

According to the UNCLOS Art. 91(1), ships have the nationality of the State whose flag they fly.⁶⁷ Thus, the term “flag State” refers to the State whose nationality a ship bears.⁶⁸ Here, *The Oscar Wilde* was flagged as a U.S. vessel. Generally, the nationality of a ship has three functions: it indicates (a) which State is permitted under international law to exercise its jurisdiction and control over the vessel; (b) which State is obliged to implement the duties listed in Art. 94 of UNCLOS and enforce national and international safety, labor, and environmental protection standards; and (c) which State is entitled to extend diplomatic protection to the vessel and its crew. Thus it is usually the flag state that is entitled to assert jurisdiction over its vessels.

“Port state jurisdiction” refers to a legal relationship between the vessel and the sovereign territory in which the vessel is located, where the flag State is

⁶⁰ *Peters v. Warren Ins. Co.*, 39 U.S. 110 (1840).

⁶¹ Exec. Order No. 13,536, 75 Fed. Reg. 72 (April 15, 2010).

⁶² Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT’L L. 593, 594 (2003) [hereinafter Happold].

⁶³ *Id.* at 594.

⁶⁴ S.C. Res. 1373, art. 1, 2, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

⁶⁵ Happold, *supra* note 62, at 594.

⁶⁶ Kolb, *supra* note 49, at 147.

⁶⁷ UNCLOS, *supra* note 32, art. 91.

⁶⁸ *Id.*, art. 1.

different than the port State.⁶⁹ On the basis of its territorial sovereignty, the port State may regulate the conditions for the access to and the stay of foreign vessels in its ports. Here, *The Oscar Wilde* was moored in Canadian territory, giving Canada port state jurisdiction. When the flag state and port state differ, as is the case here, competing claims for jurisdiction arise. The issue, then, is which jurisdiction prevails in the event of such a conflict.

Canada asserts that the OFAC freeze is a violation of its rights as a port state to control chattels in its territory. UNCLOS recognizes that a state's sovereignty extends to its territorial sea, and includes the ability to exercise full jurisdiction therein. UNCLOS Art. 2(1) states that the "sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."⁷⁰

The Oscar Wilde is within this territory described — it is moored in Vancouver — and, Canada will argue, is therefore subject to the sovereign control of Canada. "By entering a foreign port or foreign internal waters, a . . . ship and its crew comes temporarily within the territorial jurisdiction of the port State; it becomes subject to the laws and enforcement powers of that state."⁷¹ As such, the vessel is subject to the laws of Canada. Furthermore, while *The Oscar Wilde* does fly the flag of the U.S., its only active owner resides within Canada and is a Canadian citizen. As such, he is entitled to place his own property up for sale, so long as this sale does not violate Canadian or international law. As per the Canadian Diplomatic Note issued to the United States, "the actions of OFAC were unwarranted in this instance since 'the payment of a ransom is not contrary to international law.'"⁷² This statement seems to suggest that, in addition to being legal under international law, the sale of *The Oscar Wilde* is regarded as legal according to Canadian law. Therefore, the OFAC's blocking of the sale of *The Oscar Wilde* is ineffective as it violates Canada's ability to control chattels within its sovereign territory.

The exercise of port State jurisdiction, however, is not absolute. A distinction must be made with regard to the effects the activities on board the foreign vessel have on the port state's territory or interests.⁷³ It is generally accepted that activities that affect coastal interests are subject to port State jurisdiction.⁷⁴ The U.S. may argue that the abduction itself occurred in international waters. It would then follow that the flag State has jurisdiction over the vessel, as no port State can be said to have jurisdiction while the vessel is in international waters.⁷⁵ In addition, Canada and the U.S. both have a coastal interest in preventing

⁶⁹ *Id.* para. 31.

⁷⁰ UNCLOS, *supra* note 32, art. 2(1).

⁷¹ See UNCLOS, *supra* note 32, art. 11 (ports considered part of territorial sea) and art. 2 (sovereignty extends to territorial sea).

⁷² *Compromis*, para. 23.

⁷³ GEORGE C. KASOULIDES, PORT STATE CONTROL AND JURISDICTION: EVOLUTION OF THE PORT STATE REGIME (1993).

⁷⁴ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 213.

⁷⁵ UNCLOS, *supra* note 32, art. 87(1).

abductions off their respective coasts. Since the exact location of the abduction is unknown, both countries may have equally viable recourse with regard to coastal interest. The U.S. may emphasize this equality by pointing to the fact that it was a U.S. citizen, Bill Hayter, that was abducted.

Furthermore, the U.S. may argue that it had the right to freeze the sale based on the text of the U.N. Charter itself. Article 103 of the U.N. Charter provides that: “In the event of a conflict between the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”⁷⁶ The OFAC Freeze was made pursuant to United Nations Security Council Res. 1373, which condemns terrorism financing. This Resolution was made under Chapter VII of the U.N. Charter and is binding on all U.N. member states. Accordingly, the U.S. will likely argue that, if completed, the sale of *The Oscar Wilde* would be used for the express purpose of paying ransom. This ransom would be paid to a member of a terrorist organization and thus finance future terrorist acts, a violation of Security Council Res. 1373. Because adhering to Res. 1373 conflicts with Canada’s assertion of port state jurisdiction and sovereignty under UNCLOS Art. 2, the U.S. will argue that obligations under Res. 1373 should prevail.

⁷⁶ U.N. Charter art. 103.