

THE 2009 PHILIP C. JESSUP INTERNATIONAL LAW  
MOOT COURT COMPETITION

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

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**CASE CONCERNING OPERATION PROVIDE SHELTER**

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BETWEEN:

THE REPUBLIC OF ALICANTO

(Applicant)

and

THE COMMONWEALTH OF RAVISIA

(Respondent)

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**MEMORIAL FOR APPLICANT**

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## TABLE OF CONTENTS

<b>INDEX OF AUTHORITIES.....</b>	<b>iii</b>
<b>STATEMENT OF JURISDICTION.....</b>	<b>x</b>
<b>QUESTIONS PRESENTED.....</b>	<b>xi</b>
<b>STATEMENT OF FACTS.....</b>	<b>xii</b>
<b>SUMMARY OF PLEADINGS.....</b>	<b>xvii</b>
<b>PLEADINGS.....</b>	<b>1</b>
<b>A. OPS VIOLATES INTERNATIONAL LAW.....</b>	<b>1</b>
<b>1. The presence of Ravisian armed forces on Alicantan soil is illegal.....</b>	<b>1</b>
I. OPS is not a self-defence action.....	2
II. The Respondent did not have Security Council authorization.....	3
III. “Responsibility to Protect” requires Security Council authorization.....	4
IV. Alternative argument: circumstances do not allow for R2P.....	5
<b>2. Alicanto protects its people.....</b>	<b>6</b>
<b>3. Peaceful alternatives not attempted.....</b>	<b>6</b>
<b>4. There is no proportionality.....</b>	<b>7</b>
<b>B. RAVISIA MUST PROVIDE ITS INTELLIGENCE.....</b>	<b>8</b>
<b>1. Ravisia has an obligation to provide the information.....</b>	<b>8</b>
I. Ravisia must follow the rules of this Court.....	9
II. The information’s classification under Ravisian law is irrelevant.....	10
<b>2. The Court should request the Respondent’s intelligence.....</b>	<b>11</b>
I. Serious charges require disclosure.....	11
II. Procedural fairness demands disclosure.....	13
<b>3. If Ravisia refuses to provide its intelligence, it should not be allowed to rely on that data to support OPS.....</b>	<b>14</b>
I. Ravisia cannot rely on evidence it has not submitted to the Court.....	14
II. The Court should draw an adverse inference against Ravisia.....	14
<b>4. There is no legal rule prohibiting the Secretary-General from providing the information.....</b>	<b>15</b>
I. UN policy on confidential information provides for discretion on classification.....	16
<b>C. THE CONDUCT OF RAVISIAN SOLDIERS VIOLATES INTERNATIONAL LAW AND IS ATTRIBUTABLE TO RAVISIA.....</b>	<b>17</b>

<b>1. States can be held responsible for internationally wrongful acts.....</b>	<b>17</b>
<b>2. Ravisia’s conduct constitutes a breach of an international obligation. ....</b>	<b>17</b>
I. The conduct must be analyzed under international law. ....	17
II. Sexual exploitation of Alicantan children is in direct contravention of the CRC. ....	18
III. Sexual exploitation of children under the age of 18 violates international law. ....	18
IV. In this case, sexual exploitation can be characterized as rape, which violates a jus cogens norm. ....	20
V. Major-General Skylark had an obligation to control the troops under her direction....	21
VI. UNMORPH broadcasting was a breach of an international obligation.....	21
i) Ravisian Troops are illegally occupying Alicanto and cannot rely on Resolution 5440 or the SOFA for protection from responsibility.....	21
ii) If Resolution 5440 and the SOFA are found to apply they do not authorize the broadcast. ....	22
<b>3. The enumerated acts are attributable to Ravisia. ....</b>	<b>23</b>
I. Under UNMORPH, Ravisian Troops were organs of Ravisia. ....	23
II. The Troops were acting in their official capacity. ....	24
III. Whether the troops acted beyond their official capacity is irrelevant. ....	24
<b>D. ORDER RAVISIA TO IMMEDIATELY DELIVER THE FUGITIVE DONATI.....</b>	<b>25</b>
<b>1. Ravisia has no standing to exercise jurisdiction on Alicantan territory.....</b>	<b>25</b>
I. The dissolution of UNMORPH removed any legal authority for Ravisian troops to remain in Alicanto. ....	25
II. Ravisia has no jurisdiction over Donati under the SOFA or Resolution 5440.....	26
<b>2. If Ravisia is found to have some claim of jurisdiction, Alicanto’s claim of jurisdiction is preeminent.....</b>	<b>26</b>
I. Alicanto’s claim of jurisdiction is supported by customary international law, the SOFA and Resolution 5440. ....	26
II. Res judicata and ne bis in idem preclude any other nation from trying Donati for his crimes.....	27
<b>3. There are no reasons in international law not to extradite in this situation.....</b>	<b>28</b>
I. The absence of an extradition treaty does not create a right to refuse extradition.....	28
II. The Alicantan legislation relied upon is legitimate. ....	28
III. Donati’s trial in absentia was not carried out in a matter that violates any international or Alicantan laws.....	29
IV. Opposition to capital punishment is not sufficient grounds to refuse extradition.....	31
<b>PRAYER FOR RELIEF .....</b>	<b>33</b>

## INDEX OF AUTHORITIES

<b><u>TREATIES AND CONVENTIONS</u></b>	<b>PAGE NUMBER</b>
<i>American Convention on Human Rights</i> , 1969, 1144 U.N.T.S. 123. ....	27
<i>Articles on State Responsibility</i> , G.A. Res. 56/83, U.N. GAOR, 56th Sess., Annex, Agenda Item 162, U.N. Doc. A/RES/56/83 (2001). ....	7, 17, 21, 23, 25, 26
<i>Charter of the United Nations</i> , 26 June 1945, Can T.S. 1945 No. 7. ....	1, 2, 3, 5, 15, 22, 25, 32
<i>Convention on the Rights of the Child</i> , 20 November 1989, 1577 U.N.T.S. 3. ...	18
<i>Convention on the Prevention and Punishment of the Crime of Genocide</i> , 9 December 1948, 78 U.N.T.S. 277. ....	12
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<i>International Covenant on Civil and Political Rights</i> , 19 December 1966, 999 U.N.T.S. 171. ....	13, 18, 27, 29, 30
<i>Marrakesh Agreement establishing the World Trade Organization</i> , 1867 U.N.T.S. 154. ....	13
<i>Rome Statute of the International Criminal Court</i> , 17 July 1998, 2187 U.N.T.S. 90. ....	20, 27
<i>Statute for the International Military Tribunal (Nuremburg Charter)</i> , 8 August 1945, 82 U.N.T.S. 279. ....	29
<i>Statute for the Special Tribunal for Lebanon</i> , UN SCOR, 5685 <sup>th</sup> Mtg., Annex, UN Doc S/RES/1757 (2007). ....	29
<i>Statute of the International Court of Justice</i> , June 26 1945, 33 U.N.T.S. 993. ....	8, 9, 11, 13, 14
<i>Statute of the International Criminal Tribunal for Rwanda</i> , S.C. Res. 955, UN SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994). ....	20, 27
<i>Statute of the International Criminal Tribunal for the Former Yugoslavia</i> , S.C. Res. 827, UN SCOR, 48 <sup>th</sup> Sess., UN Doc. S/RES/827 (1993). ....	20, 27
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Norms of Conduct for Peacekeeping Personnel, "Ten Rules: Code of Personal Conduct For Blue Helmets" online: UN Peacekeeping Operations <[http://www.un.org/Depts/dpko/dpko/Conduct/ten\\_in.pdf](http://www.un.org/Depts/dpko/dpko/Conduct/ten_in.pdf)>. .... 19

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<i>Amabile Case</i> , vol XIV, [1952] R.I.A.A. 115.	9
<i>Armed Activities on the Territory of the Congo (Congo v. Uganda)</i> (2006), 45 I.L.M. 271.	1, 3, 12, 24
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<i>East Timor Case (Portugal v. Australia)</i> , [1995] I.C.J. Rep. 90. ....	32
<i>Effect of Awards of the U.N. Administrative Tribunal</i> [1954], I.C. J. Rep. 53. ....	27
<i>Factory at Chorzow</i> (1927), Jurisdiction, P.C.I.J. (Ser. A) No. 9. ....	17
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<i>Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)</i> , [1986] I.C.J. Rep. 14. ....	1, 2, 3, 7, 10, 12, 17
<i>Minquiers and Ecrehos (France v. United Kingdom)</i> , [1953] I.C.J. Rep. 47. ....	14
<i>Nottebohm Case (Liechtenstein v. Guatemala)</i> , [1955] I.C.J. Rep. 4. ....	26
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<b><u>MISCELLANEOUS</u></b>	
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<i>Black’s Law Dictionary</i> , 8th ed. . . . .	12, 18
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“ <i>Star and Herald</i> ” Controversy, Moore, <i>Digest</i> , vol. VI 775. . . . .	25
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## STATEMENT OF JURISDICTION

The Republic of Alicanto (“the Applicant” or “Alicanto”) and the Commonwealth of Ravisia (“the Respondent” or “Ravisia”) submitted their dispute concerning Operation Provide Shelter (“OPS”) to the International Court of Justice (“ICJ”) on 30 September 2008, pursuant to article 40(1) of the *Statute of the International Court of Justice* (“ICJ Statute”). In accordance with article 36(1) of the ICJ Statute, each party will accept the judgment of the Court as final and binding.

## **QUESTIONS PRESENTED**

### **I.**

Whether the presence of Ravisian military forces in Alicanto has been and continues to be justified under international law;

### **II.**

Whether Ravisia has an obligation to produce the classified information that was delivered to the Secretary-General or, if Ravisia refuses, whether they have the right to rely on the intelligence directly or indirectly to support the legality of OPS;

### **III.**

Whether the Secretary-General may lawfully hand over the classified intelligence to Alicanto;

### **IV.**

Whether the conduct of Ravisian soldiers at Camp Tara was a violation of international law and if so, whether it is attributable to Ravisia;

### **V.**

Whether the fugitive Piccardo Donati (“Donati”) should be delivered to Alicanto to face the judicial sentence handed down by Alicanto.

## **STATEMENT OF FACTS**

Alicanto, a former colony of Ravisia, is an independent State and a member the Ravisian Family of Allied Nations (“R-FAN”). Alicanto is comprised of two ethnic groups: Dasu, comprising 30% of the population, and Zavaabi, comprising 50% of the population. The rest of the population is considered to be both Dasu and Zavaabi. While these two ethnic groups have co-existed harmoniously, the Dasu have traditionally been more prosperous.

### **TENSION IN THE ROCIAN PLATEAU**

New Benu, another former Ravisian colony, shares a border with Alicanto along the Rocian Plateau (“RP”), where the terrain makes law enforcement difficult. Illegal activities on the RP sparked violent conflict between New Benu authorities and smugglers on the RP. This culminated with the destruction of a New Benu surveillance plane in Alicantan airspace. Claiming that Alicanto was unwilling to handle the criminal activity occurring on the RP, New Benu conducted a bombing campaign in the region, resulting in 100 Alicantan, mostly Zavaabi, deaths.

### **THE GUARDIANS NEGOCIATE A PEACE PLAN**

The Guardians of the Talonnic Way (“the Guardians”) replaced the Alicantan Dasu-led government after the failure of a proposed peace plan that would have ceded Alicantan land to New Benu. After taking office, the Guardians began incorporating Talonnic principles into the Alicantan legal system. Prime Minister Gregory Simurg successfully negotiated the terms of a cease-fire agreement with New Benu without ceding any Alicantan territory. On 18 November 2005, Simurg and his New Bennuan counterpart requested the assistance of a United Nations (“UN”) peacekeeping force on the RP.

## **UNMORPH**

On 8 December 2005, the UN Security Council adopted Resolution 5440, authorizing the United Nations Mission Overseeing the Rocian Plateau and Hinterlands (“UNMORPH”) to commence on 1 February 2006. Ravisia contributed more troops than any other country and the Secretary-General appointed Major-General Leila Skylark of the Ravisian Army to direct the operation. A status-of-forces agreement (“SOFA”) was concluded with Alicanto and an operating headquarters (Camp Tara) located entirely on Alicantan territory was established.

## **RADIO PROGRAMMING DEEMED INCONSISTANT WITH TALONNIC FAITH**

In accordance Resolution 5440 and the SOFA, Alicanto allowed a radio station – staffed entirely by Ravisians – to be established at Camp Tara to facilitate communication and provide security information. This programming came to include material that was inconsistent with the tenets of the Talonnic faith. Nonetheless, Major-General Skylark refused to alter the content, opting instead to include a warning before each program.

## **ALLEGATIONS OF SEXUAL ABUSE**

In October 2007 the International Legal Standards Alliance (“ILSA”), reported a “pattern of sexual exploitation” of Alicantan children perpetrated substantially by Ravisian troops. The Ravisian troops referred to the Alicantan children as “prostitutes” and exchanged money and food for sexual relations. A Commission established by the Secretary-General found that these girls acted out of hunger, poverty, and fear. Alicantan law explicitly prohibits adults from engaging in sexual relations with individuals 15 years or younger. In December 2007, Prime Minister Simurg stated that the conduct of the troops was offensive to the culture and religion of Alicantans and referred to the personnel as “corrupters of our women and youth.”

## **UN TERMINATES UNMORPH**

On 18 February 2008, Major-General Skylark filed a report stating that Alicanto had successfully established an armed police presence and trial courts and described the RP as being “essentially peaceful”. On 19 February 2008, the Security Council adopted Resolution 6590, which called for the termination of UNMORPH by 31 July 2008.

## **SECURITY COUNCIL RESOLUTION 6620**

In March 2008, the government of the Northeast Province of Alicanto adopted several Talonnic-based laws. On 28 April 2008 Prime Minister Simurg issued a statement supporting this and called upon the international community to respect the sovereignty of Alicanto.

Increased violence, particularly in the Northeast Province, prompted many Dasu to flee to New Benu via the RP. On 3 July 2008, the Security Council adopted Resolution 6620, which affirmed the sovereignty of Alicanto and reminded the international community that Alicanto has the primary responsibility for security within its borders. Resolution 6620 urged Alicanto to improve the humanitarian situation on the RP and stressed the need to negotiate a political solution. On 4 July 2008, the Permanent Representative of Alicanto denied allegations of ethnic cleansing yet reconfirmed its dedication to halting human rights abuses.

## **THE ASSASSINATION OF PRIME MINISTER SIMURG**

On 7 July 2008, Prime Minister Simurg was assassinated. The explosion that killed him also killed five of his aides, three bodyguards and two drivers. Police identified Piccardo Donati (“Donati”) as the assassin. The Alicantan Police commenced an extensive nation-wide manhunt for Donati. The assassination triggered conflict on the RP. One non-governmental organization (“NGO”) reported that thousands were killed and tens of thousands of Dasu began fleeing from

all parts of Alicanto. The same report indicated that there was some evidence of a sophisticated weapons cache, smuggled into Alicanto by radical Zavaabi organizations.

### **THE RAVISIAN PRESIDENT RELIES ON CLASSIFIED EVIDENCE TO SUPPORT INTERVENTION**

On 22 July 2008, the President of Ravisia stated that her government collected reliable intelligence indicating an imminent threat of ethnic cleansing in Alicanto. This information was passed to the UN Secretary-General who refused to release the information maintaining that he would only do so if the International Court of Justice (“ICJ”) declared it legally permissible.

### **SC DENIES TWO PROPOSED RESOLUTIONS**

The President of Ravisia then proposed two Resolutions to the Security Council:

- I. Extend UNMORPH for six months and expand the mandate to include protection of Alicantans from ethnic cleansing;
- II. Authorize collective action by Ravisia and other R-FAN members.

Neither resolution received approval. On the same day, the R-FAN Assembly voted in favour of unilateral intervention led by Ravisia. Alicanto voted against the intervention.

### **OPERATION PROVIDE SHELTER (“OPS”)**

On 31 July 2008, the Secretary-General announced the termination of UNMORPH. The next day, 6,000 Ravisian forces entered Camp Tara and began a new replacement military presence entitled Operation Provide Shelter (“OPS”), without Security Council approval. These Ravisian troops remained under the command of Major-General Skylark. Alicanto did not retaliate against OPS, nor did it prevent OPS forces from engaging in weapons inspection and riot control. Rather, it made a request to the Security Council to hold a meeting to discuss the situation. The request was denied.

## THE TRIAL OF DONATI

On 21 August 2008 the Alicantan police chief reported that the manhunt for Donati was unsuccessful. Accordingly, a trial against him began *in absentia* in accordance with Alicantan law. Human rights NGOs, though expressing reservation about Donati's evidence, reported that the trial was conducted in a manner consistent with the governing international norms according to international law and praised the Public Defender. On 1 September 2008, Donati was found guilty and sentenced to death by hanging. The subsequent appeal was rejected in a published opinion. On 17 September 2008, Major-General Skylark confirmed that Donati was at Camp Tara and refused to hand him over to Alicantan authorities.

Following bilateral negotiations, Alicanto and Ravisia submitted their dispute to the Court.

## SUMMARY OF PLEADINGS

**I.** OPS is an unprovoked violation of Alicantan sovereignty in breach of Art. 2(4) of the UN Charter and customary international law. Alicanto has made it clear that Ravisian troops are not welcome on the RP, yet 6 000 troops remain at Camp Tara. The UN Charter does not allow a State or regional organization to launch this type of military operation without the appropriate Security Council authorization. The Security Council rejected Ravisia's proposal for this invasion in July. Any military actions taken under the R2P doctrine, adopted in UNSC 1674, also require Security Council authorization. Even if R2P can be invoked without such authorization, the circumstances do not provide for the doctrine's application. OPS was launched as a pre-emptive measure based almost entirely on intelligence data Ravisia refuses to disclose. The requirement of proportionality for any military action under R2P is also absent, given the scope of OPS and the fact that the troops' invasion is open-ended.

**II.** The Statute and Rules of Court require States to provide any relevant documents in support of their arguments. Ravisia's intelligence is relevant to any justifications of OPS that rely on allegations of ethnic cleansing. Through its Statute, the Court can call upon States to produce information. Given the equality of the parties is a basic principle of this Court, and conclusive proof would be required for allegations of ethnic cleansing, the Court should call upon Ravisia for disclosure. If Ravisia refuses, the use of that evidence to support its claims would be in breach of the Court's Rules. The Court can and should draw an adverse inference against Ravisia under Art. 49 for non-compliance with a Court order. In the alternative, the Court should declare that the Secretary-General may lawfully provide the intelligence to Alicanto. The UN Charter is silent on this and past practice indicates the Secretary-General has discretion on the treatment of correspondence with States. Even the UN's policies on classified information leave the

Secretary-General with discretion. Delivering the intelligence to Alicanto would not violate international law.

**III.** Under customary international law and the *Articles on State Responsibility* (“ASR”), a State will be held responsible for internationally wrongful acts where there is a breach of an international obligation that is attributable to the State. The conduct of Ravisian soldiers at Camp Tara constitutes a gross violation of international law. The sexual exploitation of Alicantan children contravenes the CRC (to which Ravisia is a party) and violates the widespread prohibition on sexual exploitation applying to UN peacekeepers. Alternatively, the acts can also be characterized as rape and thus a violation of customary international law and *jus cogens* norms. Further Major-General Skylark had an obligation, under the SOFA, to control the troops under her direction. Broadcasting continued by Major-General Skylark, was a direct violation of Alicantan sovereignty for which no authorization is found in either the SOFA or Resolution 5440. Ravisian troops remain organs even as part of UNMORPH and as such, Ravisia is responsible for violations perpetrated by them.

**IV.** Ravisia has no standing to exercise jurisdiction on Alicantan territory. The dissolution of UNMORPH removed any legal authority for Ravisian troops to remain in Alicanto. Alternatively, if Ravisia is allowed to remain on Alicantan territory, neither the SOFA nor Resolution 5440 provide for jurisdiction over Alicantan nationals. If the Court finds Ravisia has some jurisdictional claim, Alicanto’s claim of jurisdiction is preeminent. Alicanto’s claim of jurisdiction is supported by customary international law, the SOFA and 5440. This position is further supported by the fact that *res judicata* and *ne bis in idem* preclude any other nation from trying Donati for his crimes. The absence of an extradition treaty does not create a right to refuse extradition and there are no reasons not to extradite. The Alicantan legislation relied upon to

bring Donati to justice is legitimate. Donati's trial in absentia was not carried out in a matter that violates any international or Alicantan laws. Facing capital punishment is not sufficient grounds to refuse extradition. Consequently, Ravisia should be ordered to immediately deliver Donati to Alicanto so that his lawful sentence may be carried out.

## PLEADINGS

### A. OPS VIOLATES INTERNATIONAL LAW.

#### 1. The presence of Ravisian armed forces on Alicantan soil is illegal.

1. The UN Charter prohibits States from using force against “the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”<sup>1</sup> This principle of non-intervention stems from the customary right of sovereign States to conduct their domestic affairs without outside interference.<sup>2</sup> There have been 6,000 Ravisian troops on Alicantan soil since August 2008. Their presence is a serious violation of this principle and of the UN Charter.

2. The ruling in *Congo v. Uganda* demonstrates that in the absence of UN Security Council authorization, foreign troops cannot legally remain on a territory without the host State’s consent.<sup>3</sup> Even where a State has consented to the presence of foreign troops, it can withdraw that consent at any time “without further formalities.”<sup>4</sup> Alicanto requested a UN peacekeeping force in November 2005 but withdrew its consent to the force’s presence in December 2007. The

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<sup>1</sup> *Charter of the United Nations*, 26 June 1945, Can T.S. 1945 No. 7, art. 2(4) [*Charter*].

<sup>2</sup> *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 [*Nicaragua*]; *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082 (1970) [*Friendly Relations*]; *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, UN GAOR, 20th Sess., Supp. No. 14, UN Doc. A/6220 (1965), art. 1. [*Res. 2131*]

<sup>3</sup> *Armed Activities on the Territory of the Congo (Congo v. Uganda)* (2006), 45 I.L.M. 271 [*Congo*].

<sup>4</sup> *Ibid.* at para. 47.

Security Council terminated the peacekeeping operation as of 31 July 2008.<sup>5</sup> Alicanto has since made it clear that Ravisian troops are not welcome on the RP.

3. The UN Charter contains two exceptions to the prohibition on the use of force: self-defence under Article 51 and enforcement action under the appropriate Security Council authorization.<sup>6</sup> These exceptions cannot be used to justify the Respondent's military action because they do not apply in these circumstances.

*I. OPS is not a self-defence action.*

4. To establish self-defence, the Respondent would have to show it used force in response to an armed attack.<sup>7</sup> Such an attack must have either taken place or be underway to trigger self-defence.<sup>8</sup> There is no unilateral right to use force in self-defence without an armed attack.<sup>9</sup>

5. In *Nicaragua v. United States of America*, this Court described "armed attack" as the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces or its substantial involvement therein."<sup>10</sup> This description is contained in Article 3 of the UN General Assembly's *Resolution on the Definition*

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<sup>5</sup> Compromis at para. 24.

<sup>6</sup> *Charter*, *supra* note 1, art. 42.

<sup>7</sup> *Nicaragua*, *supra* note 2 at para. 51; *Oil Platforms (Islamic Republic of Iran v. USA)*, [2003] I.C.J. Rep. 161 at para. 51 [*Oil Platforms*].

<sup>8</sup> Mary Ellen O'Connell, "The Myth of Preemptive Self-Defense" (2002) The ASIL Task Force Task Force on Terrorism, online: <<http://www.asil.org/taskforce/oconnell.pdf>>.at 5. *Oil Platforms*, *ibid.* at 51.

<sup>9</sup> *Ibid.*; *Oil Platforms*, *supra* note 7.

<sup>10</sup> *Nicaragua*, *supra* note 2 at para. 195.

*of Aggression*, annexed to Resolution 3314.<sup>11</sup> This Court has said “[the description] may be taken to reflect customary international law”<sup>12</sup> and that States do not have a right of ‘collective’ armed response to acts which do not constitute an ‘armed attack’.<sup>13</sup> Alicanto has never launched any type of armed attack against the Respondent or violated Ravisia’s sovereignty in any way. Even in the face of the Respondent’s military campaign, Alicanto has not retaliated with armed force.

6. In addition, there is no record of the injury or death of any Ravisian nationals on the RP. Speculation to the contrary cannot justify this invasion as a self-defence action. The UN Charter does not allow States to invoke self-defence to protect “perceived security interests” beyond the scope of Article 51.<sup>14</sup> Self-defence is not at issue in this case.

*II. The Respondent did not have Security Council authorization.*

7. The UN Charter vests the power to authorize collective military force in the Security Council.<sup>15</sup> The Charter does not prevent regional organizations from addressing matters related to peace and security<sup>16</sup> but any “enforcement action” is prohibited without prior Security Council authorization.<sup>17</sup> As former UN Secretary-General Kofi Annan has said, if international law allowed States or “ad hoc coalitions” to take unilateral action, such logic would be a

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<sup>11</sup> *Resolution on the Definition of Aggression*, G.A. Res 3314 (XXIX), UN GAOR, 29th Sess., Supp. No. 31, U.N. Doc.A/9631 (1974).

<sup>12</sup> *Nicaragua*, *supra* note 2 at para. 195.

<sup>13</sup> *Ibid.* at para. 211.

<sup>14</sup> *Congo*, *supra* note 3 at para. 148.

<sup>15</sup> *Charter*, *supra* note 1, art. 42.

<sup>16</sup> *Ibid.*, art. 52(1).

<sup>17</sup> *Ibid.*, art. 53(1).

“fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last 58 years.”<sup>18</sup>

8. It may be argued that the Economic Community of West African States’ (ECOWAS) military initiatives in Sierra Leone and Liberia set appropriate precedents for OPS but such is not the case. The ECOWAS Monitoring Group’s intervention in Liberia was in response to a civil war and its legality has been questioned but not tested.<sup>19</sup> The intervention in Sierra Leone was in response to a violent coup d’état and the presence of foreign troops received the elected president’s consent.<sup>20</sup>

9. The Respondent addressed the Security Council at an emergency session on 23 July 2008, proposing an extension and expansion of UNMORPH’s mandate or authorization for collective action led by Ravisia and its allies in R-FAN. The Security Council considered, debated and rejected both proposals. The Respondent’s activities under OPS are therefore illegal.

III. “Responsibility to Protect” requires Security Council authorization.

10. The Responsibility to Protect (“R2P”) doctrine allows for the use of force in dire circumstances of humanitarian need. It reflects the obligation on States to protect people from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>21</sup> The doctrine has become

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<sup>18</sup> Gareth Evans, “When is it Right to Fight” (2004) 46:3 Survival 59 at 60.

<sup>19</sup> Anthony Chukwuka Ofodile, “The Legality of ECOWAS Intervention in Liberia” 32 Colum. J. Transnat’l L. 381, 410 (1994).

<sup>20</sup> Ademola Abass, “Africa at the Crossroads: Current Themes in African Law: VI. Conflict Resolution in Africa: The Implementation of ECOWAS’ New Protocol and Security Council Resolution 1270 in Sierra Leone: New Developments in Regional Intervention,” 10 U. Miami Int’l & Comp. L. Rev. 177.

<sup>21</sup> *World Summit Outcome Resolution*, GA Res. 60/1, UN GAOR, 60th Sess., Supp No. 13, UN Doc. A/RES/60/1 (2005) at para. 139 [*Outcome Document*]; *A More Secure World: Our Shared Responsibility, Report of the UN Secretary-General’s High-Level Panel on Threats, Challenges and Change*, UN GAOR, 59<sup>th</sup> Sess., UN Doc A/59/565 (2004) [*High-Level Panel*];

part of international law through UN Security Council Resolution 1674.<sup>22</sup> The Resolution allows States to take collective action in a timely and decisive manner, but only through the Security Council and in accordance with the purposes of the UN Charter on a case-by-case basis.<sup>23</sup>

11. Resolution 1674 is the only expression of the R2P doctrine that is rooted in international law. Therefore, the doctrine cannot be invoked without a Security Council vote in favour of military action.<sup>24</sup> The Security Council rejected Ravisia's proposal for military intervention so OPS is not being carried out under R2P. Consequently, the doctrine does not apply in these circumstances.

*IV. Alternative argument: circumstances do not allow for R2P.*

12. Even if the R2P doctrine can be invoked to justify military force without Security Council authorization, it does not apply in this case because other requisite elements are not present. The Respondent would have to establish that the Alicantan government is "manifestly failing" to protect its population from ethnic cleansing and that peaceful means are inadequate to do so.<sup>25</sup> The use of force would also have to be proportionate to the conflict that prompted it.<sup>26</sup>

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*Responsibility to Protect: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) [*ICISS Report*].

<sup>22</sup> *Protection of Civilians in Armed conflict*, SC Res. 1674, UN SCOR, 5430th Mtg., UN Doc. S/RES/1674 (2006) at para. 4 [*Res. 1674*].

<sup>23</sup> *Ibid.*; *Outcome Document*, *supra* note 21 at para. 139.

<sup>24</sup> *Outcome Document*, *ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> Judith Gail Graham, "Proportionality and Force in International Law" (1993) 87 A.J.I.L. 391 at 391; *ICISS Report*, *supra* note 21 at para. 4.39; *High-Level Panel*, *supra* note 21 at para. 126.

## **2. Alicanto protects its people.**

13. To justify the use of force as a preventive measure, there must be clear evidence that the government is unwilling or unable to protect its people from imminent disaster.<sup>27</sup> There has been no manifestation of failure on the Alicantan government's part to protect the people within its borders. Alicanto has faced challenges in some areas and has responded by imposing martial law in the Northeast and Northwest provinces.<sup>28</sup> It has assured the international community that it will not tolerate human rights abuses and that allegations of ethnic cleansing or systematic abuse of minority groups are untrue.

14. Vague predictions based on confidential evidence cannot be enough to justify a military invasion.<sup>29</sup> R-FAN initiated OPS as a preventative measure. The Respondent alleges an impending ethnic cleansing but the accuracy of that prediction is unknown because the Respondent refuses to elaborate on its intelligence. As a result, there is no evidence that Alicanto would not be able to protect its population if ethnic cleansing began.

## **3. Peaceful alternatives not attempted.**

15. In accordance with Resolution 1674, the R2P doctrine should only be invoked to justify military actions where peaceful means are inadequate.<sup>30</sup> Article 2(3) of the UN Charter obligates members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." OPS has been framed as a preemptive measure based on predictions of a crisis. The invasion's supporters claimed before the

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<sup>27</sup> *ICISS Report, ibid.* at para. 3.11; *Outcome Document, supra* note 21 at para. 139.

<sup>28</sup> *Compromis*, Appendix III at para. 8.

<sup>29</sup> Richard Falk, "Future Implication of the Iraq Conflict: What Future for the UN System of War Prevention" (2003) 97 *A.J.I.L.* 590 at 598 (QL).

<sup>30</sup> *Outcome Document, supra* note 21 at para. 139.

Security Council that this crisis was “imminent”<sup>31</sup> but there is nothing beyond the Respondent’s vague assertions and untested allegations from a few NGOs to suggest any impending disaster.

16. Prior to the 1999 North Atlantic Treaty Organization strikes in Kosovo, the international community made several attempts to resolve the Kosovo conflict peacefully by discussing the crisis with Yugoslav and Kosovar representatives.<sup>32</sup> Likewise, in the deliberations on UN Security Council Resolution 1706, Security Council members emphasized the need to seek Sudan’s consent for a military intervention.<sup>33</sup> In the instant case, the Respondent never attempted to engage Alicanto diplomatically on the situation concerning the RP and it refuses to share its intelligence with Alicantan authorities. Therefore, there is no evidence that the peaceful means to resolve the “crisis” – if indeed one existed – were inadequate.

#### **4. There is no proportionality.**

17. Proportionality is a customary requirement for the use of any countermeasure<sup>34</sup> and for the use of force in self defence.<sup>35</sup> It is therefore a requirement for any military action, including any action taken under the R2P doctrine.<sup>36</sup>

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<sup>31</sup> Compromis at para. 37.

<sup>32</sup> Kerry Tetzlaff, “Humanitarian Intervention Post-Kosovo: Does a Right to Humanitarian Intervention Exist in Customary International Law After Kosovo? If Not, is there a Trend Towards the Creation of a Right to Humanitarian Intervention in Customary International Law?” online: (2007) 4 N.Z. Post Graduate E-Journal.  
<[http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%204%20\(2006\)/KerryHIPOSTKOS.pdf](http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%204%20(2006)/KerryHIPOSTKOS.pdf)>.

<sup>33</sup> *Reports of the Secretary-General on the Sudan*, SC Res. 1706 (2006), UN SCOR, 5519th Mtg., UN Doc. S/RES/1706 (2006).

<sup>34</sup> *Articles on State Responsibility*, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Annex, Agenda Item 162, U.N. Doc. A/RES/56/83 (2001), art. 51 [ASR].

<sup>35</sup> *Nicaragua*, *supra* note 2 at paras. 102-03.

<sup>36</sup> *ICCIS Report*, *supra* note 21; *High-Level Panel*, *supra* note 21.

18. The Ravisian operation is not proportional to any underlying threat given the nature of the work in which OPS troops have been engaged. There has been an equipped force of 6,000 troops at Camp Tara since August, engaged in illegal weapons seizures and riot control in the Northeast Province. These are basic police duties the Alicantan authorities are capable of managing. Despite the absence of any crisis, Ravisia’s “temporary” mission remains open-ended.<sup>37</sup> The Respondent claims OPS will end once any alleged threat is gone but has not provided any information on how the threat is being assessed. Thus, the action is not proportional and cannot be justified under the R2P doctrine.

## **B. RAVISIA MUST PROVIDE ITS INTELLIGENCE.**

19. The Court should call upon Ravisia to provide the intelligence data it delivered to the Secretary-General in July. If the Respondent refuses, Ravisia should not be permitted to rely on that evidence to assert the legality of OPS.

### **1. Ravisia has an obligation to provide the information.**

20. All members of the UN are *ipso facto* parties to the Statute of this Court.<sup>38</sup> Therefore, Ravisia is bound by the Statute to provide “all papers and documents in support” of its case<sup>39</sup> and a “certified copy” of every document “shall be communicated” to Alicanto.<sup>40</sup>

21. The obligation on parties to produce evidence to which opposing parties do not have access has been characterized as a “generally recognized” duty in international law.<sup>41</sup> As one

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<sup>37</sup> Compromis at para. 51.

<sup>38</sup> *Charter*, *supra* note 1, art. 93(1).

<sup>39</sup> *Statute of the International Court of Justice*, June 26 1945, 33 U.N.T.S. 993, art. 43 [*ICJ Statute*].

<sup>40</sup> *Ibid.*, arts. 43(2)(4).

tribunal has noted, even where the circumstances severely limit the party's means of proof, the party is not "relieved of the obligation to submit the best available evidence in support of his claim and to make a full and complete disclosure of all pertinent facts."<sup>42</sup> The difficulty of producing documents does not excuse their nonproduction, especially where the documents are of primary importance.<sup>43</sup>

I. Ravisia must follow the rules of this Court.

22. This Court's jurisdiction comprises all cases referred to under the Statute.<sup>44</sup> The parties to this dispute jointly drafted a compromis accepting this Court's compulsory jurisdiction.<sup>45</sup> Therefore, the Respondent agreed to be bound by the Rules of Court ["the Rules"].<sup>46</sup> According to Article 50 of the Rules, States must provide "certified copies of any relevant documents adduced in support of the contentions contained in the pleading."<sup>47</sup> Ravisia must therefore provide the documents it cites as well as any documents upon which it relies to support its arguments.<sup>48</sup> The Respondent's intelligence data is relevant as it is the only information alleged to contain "extremely reliable evidence" of ethnic cleansing in Alicanto. The Respondent

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<sup>41</sup> Durward V Sandifer, *Evidence Before International Tribunals* (New York: University Press of Virginia, 1975) at 153 [*Sandifer*].

<sup>42</sup> *Amabile Case*, vol XIV, [1952] R.I.A.A. 115 at 128.

<sup>43</sup> *Sandifer*, *supra* note 41 at 153.

<sup>44</sup> *ICJ Statute*, *supra* note 39, art. 36(1).

<sup>45</sup> *Compromis*, art. 4.

<sup>46</sup> ICJ, *Rules of Court* (adopted 14 April 1978) [*Rules of Court*].

<sup>47</sup> *Ibid.*, art. 50.

<sup>48</sup> Stefan Talmon, "Article 43" in Zimmermann, et al., eds. *The Statute of the International Court of Justice: A Commentary*, (New York: Oxford University Press, 2006) at 998 para. 57 [*ICJ Statute Commentary*].

publicly relied on it to assert a crisis, to justify OPS and to convince the Secretary-General to refer this issue to the Security Council.

23. This Court has recognized that its statutory provisions and rules on evidence and pleadings are “designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent’s contentions.”<sup>49</sup> Recognizing the Respondent’s duty of disclosure would strengthen the Court’s ability to meet these objectives and enhance its effectiveness in resolving disputes.<sup>50</sup> Other international tribunals have acknowledged the importance of a legal obligation to produce evidence. The World Trade Organization (“WTO”) Appellate Body, for example, has concluded that if parties were free to decide whether to obey a request for evidence, the panel could be prevented “from carrying out its task of finding the facts constituting the dispute before it and inevitably, from going forward with the legal characterization of those facts.”<sup>51</sup>

II. The information’s classification under Ravisian law is irrelevant.

24. The provisions of the Statute of this Court are treaty obligations the Respondent is bound to perform in good faith.<sup>52</sup> The fact that Ravisia has classified its intelligence data under domestic law does not affect this obligation. States cannot invoke domestic laws to justify the breach of a treaty obligation.<sup>53</sup>

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<sup>49</sup> *Nicaragua*, *supra* note 2 at para. 31.

<sup>50</sup> Christian Tams, “Article 49” in Zimmermann, et al., eds. *The Statute of the International Court of Justice: A Commentary*, (Oxford: OUP, 2006) at 1106 para. 20.

<sup>51</sup> *Brazil – Export Financing Programme for Aircraft (Complaint by Brazil)* (1999), WTO Doc. WT/DS46/AB/R (Appellate Body Report) at para. 188.

<sup>52</sup> *Vienna Convention on the Law of Treaties*, May 23 1969, 1155 U.N.T.S. 331, art. 26.

<sup>53</sup> *Ibid.*, art. 27.

## 2. The Court should request the Respondent's intelligence.

25. The basic documents of this Court provide broad powers to request evidence and seek legal or factual information.<sup>54</sup> Article 49 of the Statute authorises the Court to “call upon the agents to produce any document or to supply any explanations” it needs.<sup>55</sup> Article 62(1) of the Rules authorizes the Court to request any evidence or explanation it considers necessary “for the elucidation of any aspect of the matters in issue.”<sup>56</sup> The Statute and Rules are silent on the appropriate circumstances in which to call upon parties, leaving discretion with the Court. The exercise of that power would be appropriate in this dispute given the severity of the allegations and the implications of non-disclosure on procedural fairness before this Court.

### I. Serious charges require disclosure.

26. The burden of proof before this Court depends on the severity of the allegations submitted.<sup>57</sup> The Court has said it requires “proof at a high level of certainty appropriate to the seriousness of the allegation.”<sup>58</sup> Therefore, any claim against a State that involves charges of “exceptional gravity must be proved by evidence that is fully conclusive.”<sup>59</sup>

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<sup>54</sup> Simone Halink, “All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the Armed Activities Case” (2008) 40 N.Y.U. J. Int. L. & Pol. 13 at 18 [*Halink*]; *ICJ Statute Commentary*, *supra* note 48 at 1107 para. 22.

<sup>55</sup> *ICJ Statute*, *supra* note 39.

<sup>56</sup> *Rules of Court*, *supra* note 46.

<sup>57</sup> *Halink*, *supra* note 54 at 24.

<sup>58</sup> *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia & Montenegro))*, Merits, [2007] I.C.J. General List No. 91 at para. 210 [*Bosnia*].

<sup>59</sup> *Corfu Channel (United Kingdom v. Albania)*, Merits, [1949] I.C.J. Rep. 4 at 17 [*Corfu Channel*].

27. The seriousness of an allegation predicting widespread ethnic cleansing cannot be understated. In practice, the term “ethnic cleansing” is “nearly synonymous with genocide because mass murder is a characteristic of both.”<sup>60</sup> Genocide is a clear and serious violation of international law.<sup>61</sup> The Court has concluded that allegations of genocide require conclusive proof.<sup>62</sup> The same should be required for allegations of ethnic cleansing.

28. The Court “favours contemporaneous evidence from persons with direct knowledge” of facts or events.<sup>63</sup> Judge Bustamante has observed that “the overriding interests of justice give the Court the faculty of taking such steps as are possible to induce the parties to clarify what is not sufficiently clear.”<sup>64</sup> Without the Ravisian intelligence, the foundation for the Respondent’s claims is unclear. The Court is left with the Secretary-General’s report, which is based on Ravisian intelligence, and a few unverified claims from NGOs to justify the legality of OPS. This Court has found that “widespread reports of fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value than their original source.”<sup>65</sup> Given this consideration, the Court should call upon Ravisia to disclose its intelligence.

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<sup>60</sup> Black’s Law Dictionary, 8th ed., s.v. “ethnic cleansing”.

<sup>61</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277.

<sup>62</sup> *Ibid.* at para. 209.

<sup>63</sup> *Congo*, *supra* note 3 at para. 61.

<sup>64</sup> *Barcelona Traction, Light and Power Company, Limited (Preliminary Objections) (Belgium v. Spain)* (Bustamante, J.), [1964] I.C.J. Rep. 6 at 80.

<sup>65</sup> *Nicaragua*, *supra* note 2 at para. 63.

## II. Procedural fairness demands disclosure.

29. The equal treatment of parties in the adjudication of disputes has been expressed as a basic principle of this Court.<sup>66</sup> This reflects a core principle of procedural fairness accepted throughout international law.<sup>67</sup> The WTO's Appellate Body has concluded that States have a duty to provide procedural fairness to each other within their domestic law.<sup>68</sup> Article 18 of the WTO's Dispute Settlement Understanding prohibits *ex parte* communications.<sup>69</sup> The Statute of this Court makes it clear that the Court will not allow UN members and non-members to be "in a position of inequality before the Court."<sup>70</sup>

30. The right to see evidence is a core principal of procedural fairness. If Ravisia is permitted to justify its military operation with intelligence it does not disclose, Alicanto will be placed at a significant disadvantage in this proceeding. It is extremely difficult for Alicanto to comment on evidence it has not examined. There is no way for Alicanto or the Court to test the validity of such evidence. This is a unique set of circumstances in which a critical document is entirely within the Respondent's control. Judge Owada has stated that one of the purposes of Article 49 of the ICJ Statute is to safeguard the equality of the parties and ensure that the "utmost justice is

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<sup>66</sup> *Ibid.* at para. 31.

<sup>67</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 14 [ICCPR]; *Universal Declaration of Human Rights*, G.A. Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13 UN Doc A/810 (1948), art.10 [UDHR].

<sup>68</sup> *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WTO Doc WT/DS58/AB/R (Appellate Body Report).

<sup>69</sup> *Marrakesh Agreement establishing the World Trade Organization*, 1867 U.N.T.S. 154, Annex 2.

<sup>70</sup> *ICJ Statute*, *supra* note 39, art. 35.

brought to bear on the final finding of the Court . . . so that the Court may get at the whole truth as the basis for its final conclusion.”<sup>71</sup>

31. States may have legitimate security concerns but those concerns must be balanced with the need for equality between parties before this Court. Given the drastic imbalance of equality that could result from non-disclosure in this case, the Court should call upon the Respondent to produce its intelligence, at least in an edited or redacted form.

**3. If Ravisia refuses to provide its intelligence, it should not be allowed to rely on that data to support OPS.**

*I. Ravisia cannot rely on evidence it has not submitted to the Court.*

32. Under Article 56(4) of the Rules, parties cannot refer in their oral arguments to “the contents of any document which has not been produced in accordance with Article 43 of the Statute” unless the information is “part of a publication readily available.”<sup>72</sup> Ravisia would be in breach of this rule if it were permitted to make submissions that rely on information it refused to disclose. In the past, this Court has decided not to draw any conclusion related to claims based on undisclosed documents.<sup>73</sup>

*II. The Court should draw an adverse inference against Ravisia.*

33. The Court does not have the power to compel a State to provide evidence. However, Article 49 of the Court’s Statute authorizes the Court to “take formal note” of any refusal of a request for information.<sup>74</sup> Where a State refuses such a request, this article authorizes the Court

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<sup>71</sup> *Oil Platforms (Islamic Republic of Iran v. USA)*, Separate Opinion, (Owada J.) [2003] I.C.J. Rep. 161 at para. 47.

<sup>72</sup> *Rules of Court*, *supra* note 46.

<sup>73</sup> *Minquiers and Ecrehos (France v. United Kingdom)*, [1953] I.C.J. Rep. 47 at 54.

<sup>74</sup> *ICJ Statute*, *supra* note 39.

to infer that the requested evidence “would have exposed facts unfavourable to that party.”<sup>75</sup> The Court has the authority to draw adverse inferences in response to non-compliance with an order for evidence.<sup>76</sup> The Court should exercise that power in this case. The Court has never formally drawn an adverse inference in response to non-compliance but, where it accepted a State’s refusal, the evidence in question was not vital to the Court’s finding.<sup>77</sup>

**4. There is no legal rule prohibiting the Secretary-General from providing the information.**

34. If the Court will not call on the Respondent to provide its information, it should declare that international law does not prohibit the Secretary-General from doing so. The Secretary-General’s responsibilities as chief administrative officer are outlined in Articles 97-101 of the UN Charter. Those articles do not address the treatment of classified information.

35. Past practice indicates the Secretary-General has considerable discretion as to how to treat information under his or her control. On his or her own authority, the Secretary-General has submitted pleadings to this Court, even where he or she had no direct legal interest.<sup>78</sup> Former Secretary-General Dag Hammarskjöld withheld information from the Security Council during the Congo Crisis in 1960 on the basis that the information at issue was addressed to him.<sup>79</sup>

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<sup>75</sup> *Barcelona Traction, Light and Power Company, Limited* (Second Phase) (Belgium v. Spain) (Jessup, J.), [1970] I.C.J. Rep. 3 at para. 97.

<sup>76</sup> *Halink*, *supra* note 54 at 19.

<sup>77</sup> *Corfu Channel*, *supra* note 59.

<sup>78</sup> Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, (The Hague: Kluwer Law International, 1997) Vol. I at 334 and Vol. III at 1751; See ex. *International Status of South-West Africa*, Advisory Opinion, [1950] I.C.J. Rep. 128.

<sup>79</sup> Bruno Simma, ed. *The Charter of the United Nations: A Commentary*, 2nd ed. (New York: Oxford University Press, 2002) at 1048.

I. UN policy on confidential information provides for discretion on classification.

36. The Secretariat has rules of conduct for the management of confidential information.<sup>80</sup> The rules reflect UN policy, not binding obligation. In fact, the rules authorize the Secretary-General to release the Ravisian intelligence. As recipient of the information, the chief executive of the Secretariat has discretion to determine whether information should be classified. According to Rule 3.1, where information is received from an outside source, the recipient “shall decide whether the information is sensitive...under the overall supervision and guidance of the head of (the) department or office.”<sup>81</sup>

37. The rules also leave the Secretary-General in control of the declassification of sensitive information. Under Rule 4.4, the organization should consider the expectations of the source of the information and, where appropriate, it can seek the source’s consent before declassifying the information.<sup>82</sup> This rule is permissive, not mandatory. The fact that the UN’s own rules provide discretion on the classification of sensitive information demonstrates the Secretary-General is not under a legal obligation to withhold the information.

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<sup>80</sup> *United Nations Secretary-General's Bulletin on Information Sensitivity, Classification and Handling*, UN Doc. ST/SGB/2007/6 (12 February 2007).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

## **C. THE CONDUCT OF RAVISIAN SOLDIERS VIOLATES INTERNATIONAL LAW AND IS ATTRIBUTABLE TO RAVISIA.**

### **1. States can be held responsible for internationally wrongful acts.**

38. “Every internationally wrongful act of State entails the international responsibility of that State.”<sup>83</sup> Along with responsibility comes an obligation to make reparation.<sup>84</sup> This customary principle is the basis of State responsibility in the ASR.<sup>85</sup>

39. Article 2 of the ASR states “[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.” Article 47 of the ASR states “where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.” Even in cases with several responsible parties, each State’s conduct must be assessed independently.<sup>86</sup>

### **2. Ravisia’s conduct constitutes a breach of an international obligation.**

#### *1. The conduct must be analyzed under international law.*

40. The determination of an internationally wrongful is governed exclusively by international law. Whether the act in question is lawful under domestic law is irrelevant.<sup>87</sup>

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<sup>83</sup> *ASR, supra* note 34, art 1.

<sup>84</sup> *Factory at Chorzow* (1927), Jurisdiction, P.C.I.J. (Ser. A) No. 9 at 21; *Corfu Channel, supra* note 59 at 23; *Nicaragua, supra* note 2 at para. 283; Ian Brownlie, *Principles of Public International Law* 6<sup>th</sup> ed (New York: Oxford University Press Inc., 2003) at 420 [Brownlie].

<sup>85</sup> *ASR, supra* note 34, arts. 1, 31.

<sup>86</sup> *Corfu Channel, supra* note 59 at 22-23.

<sup>87</sup> *ASR, supra* note 34 Article 3; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (1932), Advisory Opinion, P.C.I.J. (Ser. A/B) No. 44. at 4; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1996] I.C.J. Rep. 174 at 180.

II. Sexual exploitation of Alicantan children is in direct contravention of the CRC.

41. Ravisia is bound as a party to the *Convention on the Rights of the Child* (“CRC”)<sup>88</sup>, which requires that parties “undertake to protect the child from all forms of sexual exploitation and sexual abuse.”<sup>89</sup> Further, it prohibits the exploitation of children through prostitution.<sup>90</sup>

42. As a result of the CRC<sup>91</sup> and Alicantan Law,<sup>92</sup> Ravisian troops are prohibited from engaging in acts of prostitution with any children under the age of 15. Sexual activities with such children were performed in exchange for food and money provided by Ravisian troops. Prostitution is defined as the “act or practice of engaging in sexual activity for money or its equivalent.”<sup>93</sup> Ravisian soldiers were even so bold as to call these children their “prostitutes.”<sup>94</sup> By engaging in these acts, Ravisian troops have breached an international obligation by virtue of their citizenship of a State co-party of the *CRC*.

III. Sexual exploitation of children under the age of 18 violates international law.

43. The protection of individuals, particularly children, from sexual exploitation is an international obligation.<sup>95</sup> The exchange of food and money or any other benefit within a

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<sup>88</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3.

<sup>89</sup> *Ibid.*, art. 34.

<sup>90</sup> *Ibid.*, art. 34(b).

<sup>91</sup> *Ibid.*, art. 1.

<sup>92</sup> Clarifications at para. 5.

<sup>93</sup> *Black’s Law Dictionary*, 8th ed., s.v. “prostitution”.

<sup>94</sup> *Compromis* at para. 21.

<sup>95</sup> *ICCPR*, *supra* note 67; *Report of the Special Committee on Peacekeeping Operations and its Working Group*, U.N. GAOR, 59<sup>th</sup> Sess., Supp. No. 19, UN Doc A/59/19/Rev.1 (2005), art. 3 [SCPO]; *Res. 1674*, *supra* note 22, art. 30; *Children and Armed Conflict*, SC Res. 1539, UN

coercive environment, for the purposes of sexual exploitation has been identified as inappropriate conduct.<sup>96</sup> It is clear that the sexual exploitation of children, especially by UN staff and peacekeeping troops, can not be tolerated.<sup>97</sup>

44. The UN's Special Committee on Peacekeeping Operations ("SCPO") and its Working Group have emphasized that it is the responsibility of "[m]ember States to take every measure within their purview to prevent sexual exploitation and abuse...by all categories of personnel in United Nations Peacekeeping missions, and to enforce United Nations standards of conduct in this regard."<sup>98</sup> The SCPO supports the broad adoption of standards put forward by the Secretary-General in 2003.<sup>99</sup> The standards prohibit any sexual activity with children, defined as persons under the age of 18, regardless of the age of majority or consent locally.<sup>100</sup> These steps create a

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SCOR, 4948<sup>th</sup> Mtg., UN Doc. S/RES/1539 (2004), art. 10; SC Res. 1325, UN SCOR, 4213<sup>th</sup> Mtg., UN Doc. S/RES/1325 (2000).

<sup>96</sup> Anna Shotton, "A Strategy to Address Sexual Exploitation and Abuse by United Nations Peacekeeping Personnel" (2006) 29 Cornell Int'l L.J. 97 at 97-98 [Shotton]; The Secretary-General, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, U.N. Doc A/59/710 March 24, 2005 at para. 6.

<sup>97</sup> Norms of Conduct for Peacekeeping Personnel, "We are United Nations peacekeepers" online: UN Peacekeeping Operations <[http://www.un.org/Depts/dpko/dpko/Conduct/un\\_in.pdf](http://www.un.org/Depts/dpko/dpko/Conduct/un_in.pdf)> [WAUNPK]; Norms of Conduct for Peacekeeping Personnel, "Ten Rules: Code of Personal Conduct For Blue Helmets" online: UN Peacekeeping Operations <[http://www.un.org/Depts/dpko/dpko/Conduct/ten\\_in.pdf](http://www.un.org/Depts/dpko/dpko/Conduct/ten_in.pdf)>, rule 4.

<sup>98</sup> SCPO, *supra* note 95, art. 3.

<sup>99</sup> *United Nations Secretary-General's Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc. ST/SGB/2003/13 (9 October 2003).

<sup>100</sup> *Ibid.*

uniform standard for dealing with sexual exploitation by members of a UN peacekeeping force.<sup>101</sup> Ravisia has violated this standard.

*IV. In this case, sexual exploitation can be characterized as rape, which violates a jus cogens norm.*

45. The prevention of rape has crystallized into a jus cogens norm.<sup>102</sup> The international community has developed a broad, humanitarian definition of rape, albeit with slightly different formulations.<sup>103</sup> “Rape is a physical invasion of a sexual nature, committed on a person under circumstances which are coercive...[T]hreats, intimidation, extortion, and ‘other forms of duress which prey on fear or desperation’ may be coercion. Coercion may be inherent in some situations.”<sup>104</sup>

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<sup>101</sup> *Shotton, supra* note 96 at 99.

<sup>102</sup> Simeon P. Sungi, “*Obligatio Erga Omnes* of Rape as a *Jus Cogens* Norm: Examining the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, International Tribunal for Rwanda and the International Criminal Court” (2007) 9 Eur. J.L. Reform 113; *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, UN SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), art. 3(g) [ICTR]; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 827, UN SCOR, 48<sup>th</sup> Sess., UN Doc. S/RES/827 (1993), art. 5 [ICTY].

<sup>103</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90, art. 7(1)(G) [*Rome Statute*]; Mark Ellis, “Breaking the Silence: Rape as an International Crime” (2007) 247 Case W. J. Int’l L. 247 at 240; *Prosecutor v. Furundzija*, IT-95-17/1-T, Judgment (10 December 1998) (ICTY, Trial Chamber) at para. 185; *Prosecutor v. Dragojub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23-T & IT-96-23/1-T, Judgment (22 February 2001) (ICTY, Trial Chamber) at para 128; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment (2 September 1998) (ICTR, Trial Chamber) at para. 598.

<sup>104</sup> Kriangsak Kittichaisaree, *International Criminal Law* (New York: Oxford University Press, 2001) at 112.

46. Although the sexual assaults at issue were not violent, many children were coerced through fear into performing sexual acts.<sup>105</sup> Alicantan children felt compelled to perform these acts out of hunger, poverty, fear of Ravisian troops and fear for their own safety.

*V. Major-General Skylark had an obligation to control the troops under her direction.*

47. Breaches of international obligations arising from omissions are defined in the *ASR*, reflecting customary international law.<sup>106</sup> The failure to maintain control of the troops violates international law. Major-General Skylark was therefore obligated to control the conduct of the troops under her command and to ensure UNMORPH's actions observed Resolution 5440, international law, and the SOFA.<sup>107</sup>

*VI. UNMORPH broadcasting was a breach of an international obligation.*

*i) Ravisian Troops are illegally occupying Alicanto and cannot rely on Resolution 5440 or the SOFA for protection from responsibility.*

48. UNMORPH was terminated as of 31 July 2008. Consequently, Resolution 5440 and the SOFA do not apply. The Ravisian military is violating Alicantan law and infringing on Alicanto's right to freely "choose and develop its political, social, economic and cultural systems."<sup>108</sup> This is a serious violation of the principle of sovereign equality contained in the UN Charter and widely recognized in international law.<sup>109</sup>

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<sup>105</sup> Compromis at para 21.

<sup>106</sup> *ASR*, *supra* note 34, art. 2; *Corfu Channel*, *supra* note 59 at 22-23; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, [1980] I.C.J. Rep. 3 at 31-32.

<sup>107</sup> Compromis, Appendix 1, art. 2; *Draft Model Status-of-Forces Agreement between the United Nations and Host Countries*, UN GAOR, 54<sup>th</sup> Sess., Annex, Agenda Item 76, UN Doc A/45/594 (1990), art. 6 [*SOFA*].

<sup>108</sup> *Friendly Relations*, *supra* note 2.

<sup>109</sup> Brownlie, *supra* note 84 at 290.

*ii) If Resolution 5440 and the SOFA are found to apply they do not authorize the broadcast.*

49. Resolution 5440 and the SOFA support the use of radio transmission equipment to further UNMORPH objectives. However, these documents do not allow the Ravisian Army to broadcast as it sees fit. The SOFA permits the use of radio-transmission equipment “for the performance of its task”.<sup>110</sup> This authorization is granted solely for communication, not indoctrination.<sup>111</sup>

50. The use of radio-transmission equipment to disseminate information that is contrary to Alicantan religion, culture and law does not fall under any of the categories established in the SOFA<sup>112</sup> or Resolution 5440<sup>113</sup>. Alicanto has a history of embracing the Talonnic faith and developing its political, cultural, legal and social system in line with its teachings.<sup>114</sup> The UN Charter<sup>115</sup>, UN declarations<sup>116</sup> and customary international law<sup>117</sup> all support Alicanto’s right as a sovereign nation to determine its own political, cultural, legal and social positions. As such, UNMORPH/OPS cannot rely on Resolution 5440 or the SOFA to remove responsibility for violating Alicantan law.

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<sup>110</sup> *SOFA*, *supra* note 107, art. 10.

<sup>111</sup> *Ibid.*, art. 11.

<sup>112</sup> *SOFA*, *supra* note 107, arts. 10, 11.

<sup>113</sup> *Compromis*, Appendix 1, art. 6.

<sup>114</sup> *Compromis* at para. 53.

<sup>115</sup> *Charter*, *supra* note 1, art. 2(1).

<sup>116</sup> *Friendly Relations*, *supra* note 2; *Res 2131*, *supra* note 2, art. 1, 5.

<sup>117</sup> *Brownlie*, *supra* note 84 at 18, 287-289.

51. The SOFA obligates all UNMORPH troops to observe local Alicantan laws and “...refrain from any action or activity incompatible with the impartial nature of their duties or inconsistent with the spirit of the present arrangement.”<sup>118</sup> It also specifically places responsibility on Major-General Skylark to take all appropriate measures to ensure these obligations are met.<sup>119</sup> Major-General Skylark’s decision to disregard Alicantan law and continue broadcasting without approval is a breach of this international obligation.

### **3. The enumerated acts are attributable to Ravisia.**

52. To engage State responsibility, the breach of the international obligation must be attributable to the State.<sup>120</sup> Articles 4 through 10 of the *ASR* deal specifically with attribution and are supported by customary international law.<sup>121</sup> When this law is applied to the facts, it is clear that the breaches outlined above are attributable to Ravisia.

#### *I. Under UNMORPH, Ravisian Troops were organs of Ravisia.*

53. “The conduct of any State organ shall be considered an act of that State under international law.”<sup>122</sup> To satisfy this test it must be demonstrated that the Ravisian troops, under UNMORPH were organs of Ravisia and that they were acting as such when the acts were

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<sup>118</sup> *SOFA*, *supra* note 107, art. 6

<sup>119</sup> *Ibid.*

<sup>120</sup> *ASR*, *supra* note 34, art. 2.

<sup>121</sup> *The Claims of Rosa Gelbrunk and the “Salvador Commercial Company”, et al* (El Salvador v. United States), vol XV, [1902] R.I.A.A. 455 at 477; *B. E. Chattin (United States.) v. United Mexican States*, vol IV, [1927] R.I.A.A. 282 at 285-286; *Dispute Concerning the Interpretation of Article 79 of the Treaty of Peace*, vol XIII, [1955] R.I.A.A. 389 at 438; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, [1999] I.C.J. Rep. 62 at 87; *Bosnia*, *supra* note 58.

<sup>122</sup> *ASR*, *supra* note 34, art. 4.

committed.<sup>123</sup> A State's military forces are considered to be organs of State for the purposes of State responsibility since the government exercises regular authority over them.<sup>124</sup> Under the SOFA, it is clear that State actors, as part of a multilateral initiative, remain independent actors of their home countries.<sup>125</sup> Therefore, it is the home country's responsibility to ensure their troops conduct does not violate international laws.

II. The Troops were acting in their official capacity.

54. The fact that the troops committed these acts while "off-duty" outside of Camp Tara is irrelevant. Under the UN codes of conduct for peacekeepers, troops must always act in a manner corresponding to their ongoing role.<sup>126</sup> This is still crucial given the vulnerable nature populations peacekeepers often protect. If State responsibility cannot be triggered by off-duty conduct, the host State is left to police the entire peacekeeping force. Even in the most advanced State, monitoring the conduct of thousands of armed troops is an enormous undertaking. Therefore, at best this policy magnifies conflict. At worst, vulnerable populations are left at the mercy of their supposed protectors.

III. Whether the troops acted beyond their official capacity is irrelevant.

55. Article 7 of the *ASR* contemplates situations in which organs of State, acting in their official capacity, nevertheless engage in activities that are beyond their authority. Breaches of

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<sup>123</sup> *The "Moses Case"*, Moore, *International Arbitrations*, vol. III (1871) 3127 at 3129; *Claims of Italian Nationals Resident in Peru*, vol. XV, [1901] R.I.A.A. 395 at 399; Martin Dixon, *Textbook on International Law* 6<sup>th</sup> ed. (New York: Oxford, 2007) at 248 [Dixon].

<sup>124</sup> *Congo*, *supra* note 3 at para. 213.

<sup>125</sup> *SOFA*, *supra* note 107, art. 47(b); James Crawford, "Holding International Organizations and Their Members to Account" (Fifth Steinkraus-Cohen International Law Lecture, delivered at the School of Oriental and African Studies at the University of London, 15 March 2007) at para. 20.

<sup>126</sup> *WAUNPK*, *supra* note 97.

international obligations are still acts of the State “even if [the act] exceeds its authority or contravenes instructions.”<sup>127</sup> Article 7 applies even if the offending country disowns the act.<sup>128</sup>

#### **D. ORDER RAVISIA TO IMMEDIATELY DELIVER THE FUGITIVE DONATI.**

##### **1. Ravisia has no standing to exercise jurisdiction on Alicantan territory.**

###### *I. The dissolution of UNMORPH removed any legal authority for Ravisian troops to remain in Alicanto.*

56. Customary international law provides that a State cannot exercise its jurisdiction outside the boundaries of its territory.<sup>129</sup> Consequently a State has “absolute power and authority over all persons, property and events occurring within its territory.”<sup>130</sup> No international power can exercise enforcement jurisdiction in the territory of another State.<sup>131</sup>

57. Ravisia has no right to continue to be present on Alicantan land after the dissolution of UNMORPH. The land Ravisian troops are occupying is Alicantan. Ravisia has made no claim to extend its territory, nor would international law permit such an action.<sup>132</sup> Therefore, Ravisian military troops are attempting to exercise Ravisian jurisdiction in an illegal manner.

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<sup>127</sup> *ASR*, *supra* note 34, art. 7.

<sup>128</sup> “Star and Herald” controversy, *Moore, Digest*, vol. VI 775; James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), art.7 com. 2.

<sup>129</sup> *S.S. Lotus (France v. Turkey)* (1927) P.C.I.J. (Ser. A.) No. 10 at 18-19 [Lotus]; Hugh M. Kindred et al., eds., *International Law, Chiefly as Interpreted and Applied in Canada*, 7th Ed. (Toronto: Emond Montgomery Publications, 2006) at 547; *Brownlie, supra* note 84 at 297, 299; Malcolm N. Shaw, *International Law, 4<sup>th</sup> Ed.* (Cambridge: Cambridge University Press, 1997) at 452-453.

<sup>130</sup> *Dixon, supra* note 123 at 143.

<sup>131</sup> *Dixon, supra* note 123 at 144; *Charter, supra* note 1, Art. 2(7).

<sup>132</sup> *Charter, supra* note 1, art. 2(4).

II. Ravisia has no jurisdiction over Donati under the SOFA or Resolution 5440.

58. If a finding is made that Ravisia is justified in remaining at Camp Tara and the SOFA applies, SOFA Article 16 specifically provides that Camp Tara remains Alicantan territory. This removes any claim of Ravisian territorial jurisdiction.<sup>133</sup> There is no authorization under the SOFA or Resolution 5440 to interfere with matters exclusively within Alicanto's domestic jurisdiction.

**2. If Ravisia is found to have some claim of jurisdiction, Alicanto's claim of jurisdiction is preeminent.**

I. Alicanto's claim of jurisdiction is supported by customary international law, the SOFA and Resolution 5440.

59. Under customary international law a State has full jurisdiction over matters connected to its territory.<sup>134</sup> Jurisdiction may also be derived from the nationality of the criminal<sup>135</sup> or the nationality of the victim.<sup>136</sup> Given that Donati is an Alicantan national, Prime Minister Simurg was an Alicantan national, the murders were committed in Alicanto and universal jurisdiction does not apply, Alicanto has a superior claim.

60. Resolution 5440 Article 4 states that UNMORPH's protective capacity with regard to civilians must be performed without prejudice to the responsibility of the Alicantan

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<sup>133</sup> *ASR*, *supra* note 34, art. 16.

<sup>134</sup> See *supra* note 129.

<sup>135</sup> *Nottebohm Case (Liechtenstein v. Guatemala)*, [1955] I.C.J. Rep. 4.

<sup>136</sup> *Lotus*, *supra* note 129.

government.<sup>137</sup> The SOFA does not make any attempt to unduly encroach on Alicantan sovereignty and, in fact, encourages troops to respect Alicanto's jurisdiction.<sup>138</sup>

*II. Res judicata and ne bis in idem preclude any other nation from trying Donati for his crimes.*

61. *Res judicata* is well-established in international law and this Court has supported the principle.<sup>139</sup> The criminal law extension of this principle is *ne bis in idem*, or the rule against double jeopardy.<sup>140</sup> The rule against double jeopardy protects individuals from being tried again for a matter that has already been decided according to the process.<sup>141</sup> The rule against double jeopardy is present in many different areas of international criminal law<sup>142</sup> and is included in the *ICCPR*.<sup>143</sup> By refusing to hand over Donati, Ravisia is allowing him to escape liability for the cold-blooded murder of 11 persons, including a head of State.

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<sup>137</sup> Compromis, Appendix 1, art. 4.

<sup>138</sup> *SOFA*, *supra* note 107, art. 6, 16.

<sup>139</sup> *Effect of Awards of the U.N. Administrative Tribunal* [1954], I.C. J. Rep. 53 at 59.

<sup>140</sup> Gerald Conway "Ne bis Idem in International Law" (2003) 3:3: Int'l Crim. L. Rev. 217 at 217.

<sup>141</sup> *Ibid.* at 217- 220.

<sup>142</sup> *Rome Statute*, *supra* note 103, art 20; *ICTY*, *supra* note 102, art. 10; *ICTR*, *supra* note 102, art. 9; (*Harvard*) *Draft Convention on Jurisdiction with Respect to Crime*, 29 A.J.I.L. 437 (1935), art. 13; *American Convention on Human Rights*, 1969, 1144 U.N.T.S. 123, art. 8(4).

<sup>143</sup> *ICCPR*, *supra* note 67, art. 14(7).

### 3. There are no reasons in international law not to extradite in this situation.

#### I. The absence of an extradition treaty does not create a right to refuse extradition.

62. There is no general principle of international law forbidding the surrender of a fugitive in the absence of an extradition treaty.<sup>144</sup> The practice is familiar in international law and general principles have been developed that can be applied in the absence of an extradition treaty.<sup>145</sup>

63. The international community supports extradition in principle. In the spirit of cooperation and collaboration aiming to stem criminal activities internationally, the UN<sup>146</sup>, the International Law Commission<sup>147</sup> and legal scholars<sup>148</sup> have considered the subject and encouraged progressive development of the area. The UN Model Extradition Treaty encourages countries to cooperate in bringing international fugitives to justice.<sup>149</sup>

#### II. The Alicantan legislation relied upon is legitimate.

64. The doctrine of *nullum crimen sine lege*, (“NCSL”) provides that there can be no crime and no punishment without prescribed law. It applies broadly in international law.<sup>150</sup> These

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<sup>144</sup> *Brownlie, supra* note 84 at 313.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Model Treaty on Extradition*, UN GAOR, 45<sup>th</sup> Sess., 68<sup>th</sup> Plen. Mtg., Annex, UN Doc A/RES/45/116 (1990), preamble [*MTE*].

<sup>147</sup> Report of the International Law Commission, 56<sup>th</sup> session (3 May-4 June and 5 July -6 August 2004), A/59/10 Annex.

<sup>148</sup> *Brownlie, supra* note 84 at 313.

<sup>149</sup> *MTE, supra* note 146 preamble.

<sup>150</sup> *UDHR, supra* note 67, art. 11(2); *Rome Statute, supra* note 103, art. 22; S. Lamb, “*Nullum crimen, nulla poena sine lege* in International Criminal Law” in Antonio Cassese et al., eds., *The Rome Statute of the International Criminal Court: A Comment* (Oxford: Oxford University Press, 2002) 733 at 735-742.

principles are enumerated in Article 15 of the *International Covenant on Civil and Political Rights* (“ICCPR”),<sup>151</sup> to which Alicanto is a party.

65. The legislation enacted under the title of “Talonnio Law for our Times” was a valid exercise of Alicanto’s legislative power. The law relating to trials *in absentia* was only an alteration of procedural matters. It did not create a substantive offense, nor did it materially change the nature of an existing offense or penalty. As such, it is applicable in all circumstances when enacted and the doctrine of non-retroactivity is not applicable.

66. Application of the law’s chapter entitled “*On the Death Penalty*” to the Donati trial allows for the use of capital punishment in a manner that does not violate the principle of *NCSL*. Legislating the use of capital punishment in homicide cases simply clarifies the existence of a punishment that has existed for decades. The codification of laws that previously existed as a matter of custom is a process that has built much of the world’s legal system and does not violate the non-retroactivity principle of criminal penalties.<sup>152</sup>

*III. Donati’s trial in absentia was not carried out in a matter that violates any international or Alicantan laws.*

67. Trials *in absentia* have been allowed by international law in many different circumstances. Article 22 of the Statute of the Special Tribunal for Lebanon (“STL”)<sup>153</sup> and Article 12 of the Nuremberg Charter<sup>154</sup> both explicitly allow for trials to be conducted *in*

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<sup>151</sup> *ICCPR*, *supra* note 67, art. 15.

<sup>152</sup> Silvia D’Ascoli, “Sentencing of Contempt of Court in International Criminal Justice: An Unforeseen Problem Concerning Sentencing and Penalties” (2007) 5:3 *Journal of International Criminal Justice* 735 at 735.

<sup>153</sup> *Statute for the Special Tribunal for Lebanon*, UN SCOR, 5685<sup>th</sup> Mtg., Annex, UN Doc S/RES/1757 (2007), art. 22.

<sup>154</sup> *Statute for the International Military Tribunal (Nuremberg Charter)*, 8 August 1945, 82 *U.N.T.S.* 279, art. 12.

*absentia*. Article 14 of the *ICCPR*<sup>155</sup> does not preclude the fair and reasonable use of legislation allowing for trials *in absentia*. The UN Secretary-General specifically considered the operation of the *ICCPR* when developing the Statute for the STL and proceeded to endorse the inclusion despite this.<sup>156</sup>

68. Article 23 of the STL sets out the criteria needed to ensure the fairness of a trial *in absentia*. First, all reasonable steps must be taken to make the accused aware of the indictment. This can include the publication of the indictment in the media or communication to the State of residence or nationality.<sup>157</sup> Alicantan authorities made every reasonable effort to locate Donati to allow him to be present at his own trial and to direct his own defence proceedings. Police reports publicly identified Donati as the prime suspect in the murders and he was the subject of a massive six-week nationwide manhunt.

69. Second, the accused must designate defence counsel or, if the accused refuses or fails to do so, the court may appoint counsel.<sup>158</sup> Donati had every opportunity to conduct his own defence. When it became clear that the accused would not be designating defence counsel, the court selected an experienced trial lawyer to conduct the defence on his behalf. Human rights NGOs monitored the trial closely and reported that it was conducted in accordance international

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<sup>155</sup> *ICCPR*, *supra* note 67, art. 14.

<sup>156</sup> Cecile Aptel, “Some Innovations in the Statute of the Special Tribunal for Lebanon” (2007) 5 *Journal of International Criminal Justice*, 1107 at 1121.

<sup>157</sup> *Ibid.*, art. 23.

<sup>158</sup> *Ibid.*

norms and that the Public Defender did a commendable job of defending Donati both at trial and on appeal.<sup>159</sup>

IV. Opposition to capital punishment is not sufficient grounds to refuse extradition.

70. “The issue of capital punishment is for each and every member State to decide.”<sup>160</sup> There is no question that the death penalty is a serious penalty to face. However, it is appropriate when balanced against some crimes.<sup>161</sup>

71. UN member States that have abolished the death penalty have done so of their own free will and not as a result of an international legal obligation.<sup>162</sup> More than one hundred countries still have capital punishment as an available sentence<sup>163</sup> including three permanent members of the Security Council.<sup>164</sup>

72. The UN General Assembly’s moratorium on the death penalty allows for use of the death penalty provided it is implemented in a way that meets the international standards<sup>165</sup> put forward

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<sup>159</sup> Compromis at para. 48.

<sup>160</sup> UN Secretary-General Ban Ki-Moon, Encounter with the UN Press Corps (2 January 2007) online: Office of the Spokesperson for the Secretary-General <<http://www.un.org/apps/sg/offthecuff.asp?nid=964>>.

<sup>161</sup> *ICCPR*, *supra* note 67, art. 6.

<sup>162</sup> *Moratorium on the Use of the Death Penalty*, UN GAOR, 62d Sess., Annex, Agenda Item 70(b), UN Doc. A/Res/62/149, preamble [*Moratorium*].

<sup>163</sup> “Abolitionist and Retentionist Countries,” online: Amnesty International <<http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>>.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Moratorium*, *supra* note 162, art. 2(a).

by the Economic and Social Council in Resolution 1984/50.<sup>166</sup> The moratorium also calls upon member States to “progressively restrict the use of the death penalty”<sup>167</sup> and asks “States which have abolished the death penalty not to reintroduce it”.<sup>168</sup>

73. Alicanto meets the standards required by Resolution 1984/50. Recognizing the gravity of the sentence, Alicanto provided the safeguards and protection required under international law.<sup>169</sup> Alicanto has never formally abolished the death penalty. The death penalty has always existed under Talonnic law and Alicanto has the right to codify the punishment as a matter of national sovereignty.<sup>170</sup>

74. As a former colony Alicanto cannot be held accountable for decisions made under Ravisian colonial rule. Alicanto had to apply for membership to the United Nations<sup>171</sup> as such Alicanto is not bound by the decisions or law of its predecessor in this respect.<sup>172</sup> Therefore Alicanto is not in violation of any international standard on the death penalty.

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<sup>166</sup> *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ECOSOC Resolution 1984/50, UN ECOSOCOR, (1984).

<sup>167</sup> *Moratorium*, *supra* note 162, art. 2(c).

<sup>168</sup> *Ibid.*, art. 3.

<sup>169</sup> *Compromis* at para. 48.

<sup>170</sup> *Charter*, *supra* note 1, art. 1(2), *Western Sahara* (Advisory Opinion), [1975] I.C.J. Rep. 12; *East Timor Case (Portugal v. Australia)*, [1995] I.C.J. Rep. 90.

<sup>171</sup> *Brownlie*, *supra* note 84 at 637.

<sup>172</sup> *Ibid.*

## **PRAYER FOR RELIEF**

For the foregoing reasons the Applicant respectfully requests that this honourable Court:

- (A) Declare that the occupation of Alicantan territory by Ravisian armed forces has been and continues to be a violation of international law and order Ravisia to remove its military personal from Alicanto;
- (B) Order Ravisia to produce the intelligence that was delivered to the UN Secretary-General, deny Ravisia the right to rely on that intelligence directly or indirectly to support the legality of OPS in international law and declare that the Secretary-General may lawfully hand over the intelligence to Alicanto;
- (C) Declare that the broadcasting of offensive radio programming and the sexual exploitation of Alicantan children by Ravisian soldiers are violations of international law and of the cultural and religious integrity of Alicanto, attributable to Ravisia, and order the Respondent to make reparations for the injuries to the victims and to Alicanto's social fabric;
- (D) Order Ravisia immediately to deliver the fugitive Piccardo Donati to Alicanto so that his lawful sentence may be carried out.