

**THE 2009 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT COMPETITION**

***CASE CONCERNING THE DIFFERENCES CONCERNING “OPERATION PROVIDE
SHELTER”***

IN THE INTERNATIONAL COURT OF JUSTICE

BETWEEN:

REPUBLIC OF ALICANTO

(Applicant)

and

COMMONWEALTH OF RAVISIA

(Respondent)

MEMORIAL FOR THE RESPONDENT

CASE CONCERNING THE DIFFERENCES CONCERNING “OPERATION PROVIDE SHELTER” BETWEEN ALICANTO AND RAVISIA

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STATEMENT OF JURISDICTION

The Republic of Alicanto (“Applicant”) and the Commonwealth of Ravisia (“Respondent”) submit their dispute by Special Agreement dated 30 September 2008, and without reservation, to the International Court of Justice pursuant to Article 40(1) of the *Statute of the International Court of Justice*. The parties have agreed to the contents of the *Compromis*, subject to the *Corrections and Clarifications*. In accordance with Article 36(1) of the Court’s Statute, each party shall accept any Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

QUESTIONS PRESENTED

I

Whether Ravisia is entitled to a declaration that the presence of the Ravisian military forces in Alicanto has been and continues to be fully justified under international law;

II

Whether Ravisia is entitled not to be called upon to produce its classified intelligence;

III

Whether, if the Court does call upon Ravisia to produce its classified intelligence, and Ravisia continues to withhold it, Ravisia is nevertheless entitled to rely on it;

IV

Whether, if the Court concludes that it has the authority to issue a declaration on the legality of the Secretary-General handing over the intelligence to Alicanto, Ravisia is entitled to a declaration that the Secretary-General may not lawfully hand the intelligence over to Alicanto;

V

Whether Ravisia is entitled to a declaration that the conduct of Ravisian troops while stationed at Camp Tara did not violate international law; and whether Ravisia is entitled to a declaration that, in any event, Ravisia bears no liability for any wrongdoing that may have been committed in the service of the United Nations; and whether Ravisia is entitled to a declaration that no alleged injury to Alicanto or its citizens warrants reparations; and

VI

Whether Ravisia is entitled to a declaration that the Alicantan citizen Piccardo Donati need not be handed over to Alicanto.

STATEMENT OF FACTS

The Parties to this dispute are the Republic of Alicanto (“Alicanto”) and the Commonwealth of Ravisia (“Ravisia”). Alicanto’s independence from Ravisia was declared in 1958; however, the two nations have retained cultural ties. Ravisia and Alicanto are part of an association of states called “the Ravisian Family of Allied Nations” (R-FAN).

Alicanto’s population comprises primarily two ethnic groups: the Zavaabi, in the majority, and the Dasu. Both groups are Talonnic, and the Zavaabi are more widely orthodox. The Dasu have enjoyed more privilege since Alicanto’s independence than have the Zavaabi. In an economic downturn in 1995, an orthodox political group calling itself “the Guardians of the Talonnic Way” began to attract a following among Zavaabi.

By 2000, relations between Alicanto and Ravisia were deteriorating. There were also tensions along Alicanto’s border with New Benu on the Rocian Plateau. Local ethnic tensions flared. In June 2005, New Benu initiated an air bombing campaign in the area.

On 22 September 2005, Alicanto elected a minority Guardian government.

On 18 November 2005, Alicanto and New Benu requested that the United Nations deploy a peacekeeping force to the Rocian Plateau. On 8 December 2005, the Security Council authorized the United Nations Mission Overseeing the Rocian Plateau and Hinterlands (UNMORPH).

Citing historical ties to both Alicanto and New Benu, Ravisia volunteered to contribute people and resources to UNMORPH. Major-General Leila Skylark of the Ravisian Army was appointed Force Commander. The Mission established an operating headquarters named Camp Tara in the Rocian Plateau. The Security Council renewed the mandate of UNMORPH through 31 July 2008.

UNMORPH set up a radio station at Camp Tara, which eventually included educational and cultural programs for women and young people concerning reproductive health, access to education, and women's rights. Orthodox religious leaders in the Plateau protested.

In October 2007, the U.N. Secretary-General set up a Commission of Inquiry which concluded that some UNMORPH troops had regularly engaged in non-violent sexual relations with local girls while off duty and outside of Camp Tara. The troops referred to these girls as "prostitutes," and routinely gave them money or food. The Commission reported that the average age of the girls was 16.

On 19 February 2008, the Security Council called for the termination of UNMORPH by 31 July 2008.

In March 2008, the Guardian-led local government of the Northeast Province of Alicanto adopted ordinances implementing Talonnic law.

Ethnic tensions flared throughout the Northeast Province. On 28 April 2008, Alicantan Prime Minister Simurg announced the government's intention to adopt a Talonnic judicial code and noted that "while we will respect the rights of those who have not accepted the True Faith, we cannot tarry in our mission, nor can we accommodate their errant ways."

Further ethnic unrest followed. The medical NGO "Doctors of the World" reported receiving reports of hundreds of violent deaths. Martial law was imposed in Provincial cities. Dasu, claiming to fear imminent persecution, began to flee in large numbers across the Rocian Plateau toward New Benu.

On 3 July, the Security Council urged Alicanto "to take immediate steps to improve the humanitarian situation in the Rocian Plateau."

On 7 July, Prime Minister Simurg and others were killed in an explosion. Police announced that evidence linked the bomb to an organization called the Dasu Integrity Front. Alicantan authorities refused to make the evidence public. Alicantan police named the head of the group, Piccardo Donati, a Dasu Alicantan, their prime suspect.

Ethnic violence escalated in the Plateau. Earth Without Frontiers observers reported that “thousands” had been killed, and that a new wave of tens of thousands of Dasu had fled in apprehension of imminent attack. The organization also reported that they had evidence of a weapons cache in the Plateau; NGOs were unanimous that they belonged to radical Zavaabi grouplets.

On 22 July, the President of Ravisia announced that her government had collected “extremely reliable intelligence” that led her to conclude that there was “a real and present danger of ethnic cleansing on a massive scale about to occur in Alicanto.” The Ravisian President provided raw intelligence, highly classified under Ravisian law, to the Secretary-General.

On July 25, the Security Council voted on two Ravisian Resolutions in an emergency session. Regarding the undisclosed Ravisian intelligence, the Secretary-General declared: “I will not reconsider my position unless and until the International Court of Justice declares that delivering this data is legally permissible.” The Resolution to extend and expand UNMORPH’s mandate was defeated, but the same day, R-FAN endorsed unilateral Ravisian intervention in Alicanto.

On 31 July, the Secretary-General terminated UNMORPH. Major-General Skylark issued a proclamation declaring the beginning of “Operation Provide Shelter” (OPS). By the following

week, 6,000 armed Ravisian troops were present in Camp Tara under the command of Major-General Skylark.

The next day, the new Prime Minister of Alicanto, Carl Phoenix, protested the presence of OPS; however, its requests that the Security Council convene a meeting to discuss the situation were unsuccessful.

On 15 August 2008, the Parliament of Alicanto adopted a new Judicial Code entitled “Talonnian Law for our Times” which included the chapters “On Women’s Rights” and “On the Death Penalty” which were immediately criticized by international human rights organizations.

On 21 August, the Alicantan chief of police reported to the public prosecutor that the manhunt for Piccardo Donati had not succeeded. Under provisions of the new Alicantan law, the prosecution began a trial *in absentia*. Donati was represented by the local public defender. Human rights NGOs noted reservations about the fact that the trial was conducted *in absentia*. On 1 September, the Court declared Donati guilty of eleven counts of murder, and sentenced him to death by hanging. The single appeal was rejected in a written decision.

On 17 September, Major-General Skylark announced that Donati had been granted refuge at Camp Tara since earlier in the month, and that it was her intention not to deliver him to the Alicantan authorities for judicial execution “since I am advised by my legal counsel that to do so would be a violation of international law.”

On 17 September 2008, Prime Minister Phoenix sent a diplomatic note to Ravisia protesting the continued presence of Ravisian troops. The Ravisian Prime Minister replied on 19 September that Ravisia’s presence was driven by its responsibility to help avoid humanitarian disaster, and that “Operation Provide Shelter is legally justified by Alicanto’s failure to comply with Security Council Resolution 6620.”

Both nations are members of the United Nations, and are parties to the Vienna Convention on the Law of Treaties, the International Covenant on Civil and Political Rights, and the United Nations Convention on the Rights of the Child. Both are parties to the Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination Against Women (CEDAW).

SUMMARY OF PLEADINGS

I. Ravisia's actions are legally justified by the principle of humanitarian intervention, an obligation under customary law to protect the human rights of all peoples, and by the obligation to take all measures to prevent genocide. Ravisia has information suggesting that ethnic cleansing is imminent in Alicanto; other peaceful means have been pursued and have failed; circumstances constitute a continuing threat to peace and security; the Security Council may not authorize intervention because of the vetos of permanent members; and Ravisia represents the collective will of the Assembly of R-FAN. These circumstances fulfill the recognized criteria giving rise to the obligation of intervention. Ravisia's actions are also legally justified under Security Council Resolutions 5440 and 6620, which remain in effect because there has been no subsequent resolution repudiating an earlier decision, and because Alicanto has remained non-compliant.

II. The Court should decline to call upon Ravisia to produce its classified intelligence because of Ravisia's claim of national security concerns as the basis for its non-production. Ravisia may continue to rely on the intelligence without producing it because the nonproduced report is corroborated by other evidence in the form of multiple NGO reports and first-hand reports of UNMORPH personnel. The Court does not have the authority to issue a declaration regarding the legality of the Secretary-General handing over the intelligence to Alicanto; the Court has never recognized that it has the power to review the acts of UN political organs during contentious proceedings. If, alternatively, the Court decides it does have that authority, the Court should declare that the Secretary-General may not lawfully hand over the intelligence to Alicanto because the Secretary-General is bound not to do so, by the UN Charter's obligation of good faith.

III. Neither the alleged acts of sexual exploitation by Ravisian soldiers nor the UNMORPH radio broadcasts are attributable to Ravisia. The alleged sexual exploitation of Alicantans by Ravisian soldiers was conduct that exceeded their authority, and was not conducted in their official capacity. Also, there are no circumstances to justify an exception to the generally accepted practice of attributing peacekeeper conduct to the UN. UNMORPH broadcasts are attributable to the UN alone. Ravisian soldiers at Camp Tara did not violate international law. The radio broadcasts were conducted in conformity with international law and the Status of Forces agreement. The sexual misconduct of Ravisian soldiers has not been shown to constitute a violation of international law: UN conduct guidelines do not constitute international law. In any event, no alleged injury to Alicanto or its citizens warrants reparations.

IV. Alicanto's sentencing of Piccardo Donati to death is a violation of international law. The judicial process followed by the Alicantan court and the sentence delivered to Donati violated international human rights law: lack of notification of charges, retrospective application of a penalty, subjecting a person to death by hanging, are violations. Reintroduction of the death penalty after its abolition is likely a violation of international rights law. International law requires Ravisia not to deliver Donati to Alicanto, where he faces a real risk of being subjected death through means that violate conventional international law.

PLEADINGS

I. THE PRESENCE AND ACTIVITIES OF RAVISIAN ARMED FORCES IN ALICANTO ARE INTERNATIONALLY LAWFUL.

A. Ravisia's actions are legally justified as humanitarian intervention.

i. Humanitarian intervention is permissible under international law.

1. Article 2(4) of the *U.N. Charter* codifies the customary prohibition on the use of force.¹ Publicists² have noted that early *Charter* interpretation held the only exceptions to this prohibition were the inherent right to self-defence³ from an armed attack, or authorization by the U.N. Security Council.⁴ However, since the drafting of the *U.N. Charter*, international human rights laws have been codified and have entered into force,⁵ and publicists⁶ and state practice⁷ now recognize a customary obligation for the international community to protect the human rights of all peoples, regardless of state borders.

¹ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 at Article 2(4) [*UN Charter*].

² Oscar Schachter, "The Right of States to Use Armed Force" (1984) 82 Mich. L. Rev. 1620 at 1620; Jeffrey S. Morton, "The Legality of NATO's Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law (2002) 9 ILSA J. Int'l & Comp. L. 75 at 86.

³ Julie Mertus "Reconsidering The legality of Humanitarian Intervention: Lessons from Kosovo" (2000) 41 Wm. & Marv L. Rev 1743 at 1756

⁴ *UN Charter*, *supra* note 1 at Article 51.

⁵ *Universal Declaration of Human Rights*, GA Res. 217 A (III) UN GAOR 3rd Sess., Supp. No.13, UN Doc. A/810 (1948) 71 at 1 [*UDHR*]; *Convention on the Prevention and Punishment of the Crime of Genocide*, GA Res. 260 A (III) UN GAOR, 3rd Sess., U.N. Doc. A/810 (1948) [*Genocide Convention*]; *International Convention on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S 171.

⁶ Ruth Wedgwood "NATO's Campaign in Yugoslavia" (1999) 93 Am. J. Int'l L. 828 at 828; Morton, *supra* note 2 at 87.

⁷ *2005 World Summit Outcome* UN Doc. A/RES/60/1 (2005) at para. 138; SC Res.1647 UN SCOR, 5430th mtg., UN Doc. S/RES/1674 (2006).

2. While Ravisia recognizes that there is in general a customary norm against violating the territorial integrity of another state through the use of force, humanitarian intervention constitutes an exception. This Court has necessarily implied that humanitarian intervention would be legal under proper circumstances,⁸ and state practice⁹ now confirms the emergence of a parallel norm under the Charter system legalizing intervention by a state to stop human rights abuses.

ii. Ravisia's humanitarian intervention is justified under the obligation to prevent genocide.

3. Where states have the ability to take action to prevent a serious breach of international law, the International Law Commission (“I.L.C.”)¹⁰ and publicists¹¹ confirm that they should do so, and in concert with other states. Publicists¹² further affirm that unauthorized intervention is a

⁸ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, [1986] I.C.J. Rep. 14 at para. 268; Christine Gray, *International Law and the Use of Force*, 2nd ed. (Oxford: Oxford University Press, 2004) at 33

⁹ Gray, *ibid.*; UN SCOR, 3988th mtg, 24 March 1999 UN Doc S/PV.3988. <<http://www.uu.nl/uupublish/content/PV-3988.pdf>>; *United Nations Report of the Secretary-General's High Level Panel on Threats, Challenges and Change*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2004) at para. 200 [*High Level*]; Task for on the United Nations, *American Interests and UN Reform: Report of the Task Force on the United Nations*, (Washington, DC: United States Institute of Peace, 2005) at 32 [*American Interests*].

¹⁰ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) at Article 41 note (2), [*Draft Articles commentaries*] online: UN Treaty Collection <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

¹¹ Bruno Simma, “NATO , the UN and the Use of Force: Legal Aspects” (1999) 10 Eur. J. Int’l L. at 2.

¹² Jules Lobel & Michael Ratner, “Bypassing the Security Council: Ambiguous Authorization to Use Force, Cease-Fires and the Iraqi Inspections Regime” (1999) 93 AM. Int’l L. 124 at 136; Thomas M. Franck & Nigel S. Rodley “After Bangladesh: The Law of Humanitarian Intervention by Military Force” (1973) 67 Am. J. Int’l L. 275 at 290.

lawful response where the U.N. Security Council has chosen to remain silent in the face of a serious breach. This Court¹³ and the I.L.C.¹⁴ confirm, and publicists¹⁵ agree, that genocide is a serious breach of an international obligation. The Court has further confirmed that a state is internationally responsible if it “manifestly failed to take all measures to prevent genocide which were within its power.”¹⁶ The Court¹⁷ and the conventional law¹⁸ have affirmed that ethnic cleansing, where serious bodily harm to an ethnic population occurs, constitutes genocide.

4. The Secretary-General has stated, with a high level of certainty that a “campaign of systematic violence”[Appendix III] targeting an ethnic population, or otherwise termed “ethnic cleansing” [*Compromise* ¶35] is being planned in Alicanto. The Secretary-General has further confirmed that, instead of acting to prevent this oncoming crisis, Alicanto’s actions have only increased the sectarian violence, resulting in a breach of its international obligation to prevent genocide. In light of the fact that genocide is a serious breach and the U.N. Security Council has chosen to remain silent in the matter [*Compromis* ¶43], Ravisia’s intervention, under the authority and approval of the Assembly of R-FAN, is a lawful response under its obligation to prevent genocide under international law.

¹³ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, [2006] I.C.J., at para. 64, online: International Court of Justice<<http://www.icj-cij.org/docket/files/126/10435.pdf>>.

¹⁴ *Draft Articles commentary*, *supra* note 10 at Article 40 note (4).

¹⁵ Morton, *supra* note 2 at 98

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] I.C.J. Rep. 91 at para.430 [*Bosnia*].

¹⁷ *Ibid.* at para.190.

¹⁸ *Genocide Convention*, *supra* note 5.

iii. In the alternative, even in the absence of an obligation to prevent genocide, the circumstances justify humanitarian intervention.

5. Publicists¹⁹ and state practice²⁰ suggest various criteria under which intervention into the affairs of another state would be permitted: (1) there should be a compelling and urgent threat of widespread loss of human life; (2) intervention should only be used as the last alternative after all other peaceful and diplomatic means have been exhausted, or the U.N. Security Council has identified actions taken by the government as a threat to peace and security; (3) the Security Council has been found to be unable to take coercive action to prevent the loss of life because of a permanent member veto; (4) intervention is limited in time and scope, and is directed strictly at averting the disaster; (5) the action is collective or ensures that it is not tied directly to the interests of the acting state.

6. Ravisia does meet the criteria for justified humanitarian intervention. Ravisia does possess information of an impending ethnic cleansing [*Compromise* ¶35 Appendix III]; (2) all other peaceful means of resolution have been pursued and, according to the Secretary-General, have failed [Appendix III], and the Security Council continues to affirm that “the unresolved situation in Alicanto constitutes a continuing threat to peace and security” [Appendix II]; (3) the Security Council has been prevented from taking further action because of the resolution vetoed by two permanent members of the council in a minority opinion [*Compromis* ¶39]; (4) Ravisia’s actions have been limited to the same mandate as UNMORPH and there is no evidence of

¹⁹ Anthony Cassese, “*Ix Iniuria Ius Oritur: Are we moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*” (1999) 10 Eur. J. Int’l L. 23 at 24; Morton, *supra* note 2 at 96; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, (Oxford: Oxford University Press, 2001) at 229.

²⁰ Geoffrey Marston (ed.), “United Kingdom materials on international law 2000” (2001) 71 Brit.Y.B.Int’l.L. , 517 at 646; SC Res. 794, UN SCOR, 3145th mtg. UN Doc. S/RES/794 (1992) at para 2; Mertus, *supra* note 3 at 1780.

Ravisia acting in any capacity other than the prevention of violence; and (5) Ravisia represents the collective will of the Assembly of R-FAN [*Compromis* ¶39].

B. Ravisia's actions are legally justified under Security Council Resolutions 5440 and 6620.

7. Under Chapter VII of the *U.N. Charter* the Security Council may authorize the use of force against another state.²¹ Publicists²² confirm that, once a U.N. Security Council resolution has been passed, it remains in effect until a subsequent resolution has repudiated the earlier decision, and state practice²³ verifies that a U.N. Security Council resolution authorizing the use of force remains valid while the target state remains non-compliant. Publicists²⁴ have also confirmed that a Security Council resolution authorizing the use of force continues until the hostilities have ended and a permanent cease-fire is in place. Moreover, where the U.N. Security Council has declared that a threat to the international peace and security exists, as well as the risk of impending human suffering, state practice²⁵ demonstrates that a previous U.N. Security Council Chapter VII authorization for the use of force may be renewed or implied *de novo*.

²¹ *UN Charter*, *supra* note 1 at Article 39.

²² David Malone (ed.) *The UN Security Council: From the Cold War to the 21st Century* (London: Lynne Rienner Publishers, 2004) at 143.

²³ Chesterman, *supra* note 19 at 200; Geoffrey Marston (ed.), "United Kingdom materials on international law 1992" (1993) 63 *Brit. Y.B.Int'l.L.*, 615 at 827.

²⁴ Lobel & Ratner, *supra* note 12 at 146.

²⁵ SC Press Release 6659 SC 3989th mtg, (26 March 1999); Geoffrey Marston (ed.), "United Kingdom materials on international law 1992" *supra* note 23 at 646; NATO Secretary-General Dr. Javier Solana, Press conference at NATO HQ in Brussels, (October 13, 1998) online: NATO <<http://www.nato.int/docu/speech/1998/s981013b.htm>>; Lord's Hansard: (17 March 2003) (Lord Goldsmith written answers) online: Publications and Records <<http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030317/text/30317w01.htm>>; Austl., *Commonwealth Memorandum of Advice on the Use of Force Against Iraq, provided by the Attorney General's Department and the Department of Foreign Affairs and Trade*, (March 18, 2003) online: Prime Minister of Australia John Howard,

8. In passing Resolution 5540 the Security Council authorized the use of force against Alicanto “to protect civilians under imminent threat of physical violence” [Appendix I]. While the Security Council terminated UNMORPH with Resolution 6590 [*Compromis ¶24*], under Resolution 6620 the Security Council affirmed that the situation in Alicanto remains unresolved, and threatens large-scale human suffering, and is a threat to the “peace and security in the region”[Appendix II]. In carrying out *Operation Provide Shelter*, Ravisia is lawfully acting under the continued humanitarian mandate set out in previous Chapter VII Security Council resolutions.

C. Ravisia’s actions are justified as a lawful regional agency activity under Chapter VIII of the U.N. Charter.

9. Chapter VIII of the U.N. Charter confers a distinct and robust role for regional agencies and arrangements in the resolution of local disputes,²⁶ only explicitly limiting this unique role in the area of enforcement action. Publicists²⁷ and state practice²⁸ confirm that an organization created for general regional development, dealing with a matter involving international peace and security, qualifies as a regional arrangement under Chapter VIII. Furthermore, publicists²⁹ and U.N. Security Council practice³⁰ agree that a regional organization may establish

<<http://pandora.nla.gov.au/pan/10052/20060321-0000/www.pm.gov.au/iraq/displayNewsContent4acc.html?refx=96>>.

²⁶ *UN Charter*, *supra* note 1 at Article 52, 53, 54; Monica Hakimi “To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization” (2007) 40 *Vand. J. Transnat’l L* 643 at 649.

²⁷ Hakimi, *ibid.* at 651.

²⁸ *Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992: An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping*, 17 June 1992 UN Doc. A/47/277 - S/24111 at para. 61.

²⁹ Gray, *supra* note 8 at 294.

peacekeeping forces and undertake peacekeeping action in the territory of another state, in the name of the regional organization, without Security Council authorization. State practice³¹ also confirms that peacekeeping may involve monitoring and verifying a cease-fire or efforts to restore peace, security and stability to an area.

10. R-FAN, as an association of states dedicated to cultural and democratic development [*Compromis* ¶2], qualifies as a regional organization under Chapter VIII of the *U.N. Charter*. Ravisian troops, under the authority of R-FAN [*Compromis* ¶40], have undertaken to continue the peacekeeping mandate, which is described and approved, in Security Council Resolution 5440 as using “all necessary means to carry out its mandate...to ensure respect of the cease-fire agreement” [Appendix I]. As a regional organization engaged in a peacekeeping effort under the Chapter VIII of the *U.N. Charter* Ravisia’s actions in Alicanto are legally justified.

II. THE COURT SHOULD DECLINE TO CALL UPON RAVISIA TO PRODUCE ITS INTELLIGENCE, OR IN THE ALTERNATIVE, THE COURT SHOULD ALLOW RAVISIA TO RELY ON THE INTELLIGENCE SHOULD RAVISIA CONTINUE TO WITHOLD THE INTELLIGENCE; AND THE COURT SHOULD DELCARE THAT THE SECRETARY-GENERAL MAY NOT LAWFULLY HAND THE INTELLIGENCE OVER TO ALICANTO.

A. The Court should decline to call upon Ravisia to produce its classified intelligence.

11. The *Statute* of the Court indicates that the Court may call on but not compel the parties before it to produce evidence;³² therefore, the factual framework of a case is determined by the

³⁰ SC Res. 788 UN SCOR, 47th Sess. 3138th mtg. UN Doc. S/RES/788 (1992); SC Rec. 1564 UN SCOR, 5040th mtg. UN Doc. S/RES/1564 (2004).

³¹ *High Level*, *supra* note 9 at para. 212; *American Interests*, *supra* note 9 at 88.

³² *Statute of the International Court of Justice*, 26 June 1945, Article 49. [*Statute*]

facts the parties contest and evidence they provide.³³ The *Statute* of the Court and its Rules provide no guiding criteria for the decision to call on a party to produce evidence, which indicates that the decision is at the discretion of the Court.³⁴ The Court has recognized that the territorial exclusivity of one party over the evidence does not shift the burden of proof, however, such circumstances may allow for a lower standard of proof to be applied.³⁵ Further, publicists have indicated that only an unjustified refusal by a party to produce documents may be viewed as a violation of the good faith obligation to cooperate with the Court.³⁶ For example the Court has chosen not to call upon the parties to produce documents where the non-producing state has withheld documents in the face of the claim of “military secrecy.”³⁷ This suggests that the Court accepts assertions of privilege based on national security as conclusive as a basis for non-production.

12. Since the basis of Ravisia’s claim against Alicanto occurred within the exclusive territory of Alicanto, a lower standard of proof may be utilized by the Court in order to establish the claim of the presence of the danger of ethnic cleansing [*Compromis* ¶ 34]. Therefore, the Court should not call-upon Ravisia to produce its intelligence in order to make a fair determination.

³³ 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 L & Pol. 13 at 18.

³⁴ Chester Brown, *A Common Law of International Adjudication* (Oxford: Oxford University Press, 2007) at 106.

³⁵ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, [1949] I.C.J Rep. 4 at 18[*Corfu Channel*].

³⁶ Mojtaba Kazazi, *Burden of Proof and Related Issues. A Study of Evidence before International Tribunals* (The Hague: Kluwer Law International, 1996) at 230.

³⁷ *Bosnia*, *supra* note 16 at 205.

Additionally, Ravisia has withheld evidence on the basis of national security concerns regarding the protection of its intelligence sources [*Compromis* ¶ 51] and, because the Court accepts such assertions of privilege as conclusive basis for non-production, should not call upon Ravisia to produce its classified intelligence.

B. The Court should allow Ravisia to continue to rely on its classified intelligence to support the legality of Operation Provide Shelter without producing it.

13. The *Statute* of the Court indicates that the Court may take ‘formal note’ of a party’s refusal to produce evidence when called upon to do so by the Court.³⁸ While it has been indicated that it may be possible for a ‘formal note’ to be interpreted as an adverse inference,³⁹ this is not always the case. In fact, the principle allowing states to withhold documents on the basis of national security concerns may indeed constitute a general principle of law which is “virtually universal”, and is therefore applicable in this Court.⁴⁰ The principle of privilege is also reflected in the Statutes of other international tribunals through express provisions which recognize claims of privilege based on confidentiality⁴¹ and sensitive national security information.⁴² Finally the principle has been recognized in this Court’s practice, when the Court accepted the claim of ‘naval secrecy’ as justification in refusing to draw an adverse inference

³⁸ *Statute, supra* note 32, art. 49.

³⁹ Alan. Redfern and Martin. Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn, 1999) (London: Sweet &Maxwell, 1999) at 317-318; Brown, *supra* note 34 at 108.

⁴⁰ Richard M. Mosk & Tom Ginsburg, “Evidentiary Privileges in International Arbitration” (2001) 50 *Int’l & Comp. L.Q.* 345 at 378.

⁴¹ The Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A /conf.183/9th, arts. 69(5).

⁴² Rules of Procedure and Evidence of the ICTY, 13 June 2006, IT/32/Rev.38, Art. 54 bis.

from the non-production documents.⁴³ This practice suggests that the Court recognizes absolute privilege in such circumstances, and accepts the assertion of privilege as conclusive in itself, though it may also make a subjective determination of the good faith of the claim.⁴⁴

14. The absence of express provisions in *the Statute* of the Court or its Rules concerning the weighing of evidence indicates that the Court has discretion in weighing unproduced evidence, similarly as when weighing other forms of evidence. The Court has established principles regarding the weighing of evidence, including its preference for contemporaneous evidence from persons with direct knowledge.⁴⁵ When weighing reports from official or independent bodies that give accounts of relevant facts, the Court considers the source of the evidence, the process in which the evidence was gathered, and the character of the evidence.⁴⁶

15. The Court should refuse to draw an adverse inference from Ravisia's non-production of its intelligence as they have withheld the documents on the basis of national security concerns in the form of the protection of its intelligence sources [*Compromis* ¶ 51]. Additionally, there is no evidence that the non-production of this intelligence has been made in bad faith. Further, Ravisia's intelligence is corroborated by multiple NGO reports and first hand reports of UNMORPH personnel. Similarly, the Report of the Secretary-General suggests that the unproduced intelligence should be deemed reliable as evidence, therefore Ravisia should be allowed to continue to rely on it.

⁴³ *Corfu Channel*, *supra* note 35 at 32.

⁴⁴ Mosk & Ginsburg, *supra* note 40 at 384.

⁴⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)*, Merits, [1986] I.C.J. Rep. 14 at para. 64.

⁴⁶ *Bosnia*, *supra* note 16 at para. 227.

C. The Court does not have the authority to issue a declaration regarding the legality of the Secretary-General handing over the intelligence to Alicanto, in the alternative the Court should declare that the Secretary-General may not lawfully hand-over the intelligence to Alicanto.

i. The Secretary-General does not have the authority to issue a declaration regarding the legality of the Secretary-General the intelligence over to Alicanto.

16. While it is accepted that the organs of the UN are subject to the rule of law, both the Charter of the United Nations and the Statute of this Court are silent concerning the authority of the Court to review the legality of acts of UN political organs.⁴⁷ Publicists have pointed out that express provisions concerning such a power of review were purposefully excluded from the Charter during its drafting.⁴⁸ The Court itself has explicitly stated that generally it does not have such a power of review.⁴⁹ Furthermore, the Court has not explicitly recognized that it has the authority to review the acts of UN organs during contentious proceedings, as indicated by its refusal to potentially put itself in direct conflict with such organs through a determination of the legality of their acts.⁵⁰ Publicists,⁵¹ and jurists⁵² have interpreted this refusal as an indication

⁴⁷ Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague: Kluwer Law International, 2003) at 299.

⁴⁸ Ken Roberts, "Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review" (1995) 7 PACE INT'L L. Rev. 28 at 289-293; Amr, *supra* note 47 at 301.

⁴⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, [1971] I.C.J. Rep. 16 at para 89.

⁵⁰ *Northern Cameroons* (Cameroon v. United Kingdom), [1963] I.C.J. Rep. 15 at 32; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Provisional Measures)* (Libyan Arab Jamahiriya v. United Kingdom), [1992] I.C.J. Rep. 3; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Provisional Measures)* (Bosnia v. Herzegovina), [1993] I.C.J. Rep. 3; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Preliminary Objections)* (Libyan Arab Jamahiriya v. United Kingdom), [1998] I.C.J. Rep. 9.

that it does not in fact have the authority to perform such actions; the fact that the *Statute* of the Court allows states only to act as parties before the Court has been similarly interpreted.⁵³

Finally, the structure of the *Charter*, which accords discretionary decision-making power to the political organs of the UN to fulfill their roles and functions, also suggests that the Court is unsuited to provide a supervisory function.⁵⁴

17. The Court is not authorized to make a declaration concerning the legality of the Secretary-General handing the intelligence over to Alicanto because it has not been established that the Court has the authority to make a declaration regarding the legality of acts of UN political organs.

ii. In the alternative, the Court should declare that the Secretary-General may not lawfully hand-over the intelligence to Alicanto.

18. The Court,⁵⁵ international tribunals,⁵⁶ publicists,⁵⁷ and the *Charter* itself have established that the political organs of the UN are governed by the purposes and principles of the UN

⁵¹ Nigel White, "To Review or not to Review? The Lockerbie Cases Before the World Court", (1999) 12 LJIL 402 at 417.

⁵² *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Provisional Measures)* (Libyan Arab Jamahiriya v. United Kingdom), [1998] I.C.J. Rep. 9 (Op. Diss. Schwebel) at 166 [(*Lockerbie (Provisional Measures)*) (Op. Diss. Schwebel)].

⁵³ Jose E. Alvarez, "Judging the Security Council" (1996) 50 Am. J. Int'l L. 1 at 5.

⁵⁴ *Ibid.* at 17; *Lockerbie (Provisional Measures)* (Op. Diss. Schwebel), *supra* note 52 at 164.

⁵⁵ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, [1948] I.C.J. Rep. 58 at 64.

⁵⁶ *Prosecutor v. Tadic*, IT-94-1-T, Opinion and Judgement (2 October 1995) at para. 28 (International Criminal Tribunal for the Former Yugoslavia Appellate Chamber), (Amr, *supra* note 47 at 286).

⁵⁷ Amr, *supra* note 47 at 281-285.

Charter and by UN internal rules of procedure. The duty to fulfill obligations in good faith exists as a principle in the Charter which extends to the organization generally,⁵⁸ and has been recognized by the Court as a principle of international law.⁵⁹ The Secretary-General's Bulletin ST/SGB/2007/6 establishes internal procedural rules which govern the Secretary-General's handling of confidential information entrusted to the United Nations by third parties.⁶⁰ The Bulletin allows for such information to be deemed sensitive when delivered "under an expectation of confidentiality,"⁶¹ or when disclosure is "likely to endanger the safety or security of any individual,"⁶² among other criteria. Sensitive information may be deemed classified where "disclosure may be detrimental to the Operations of the United Nations and the welfare and safety of third parties, or where to do so would violate the UN's legal obligations."⁶³ The Secretary-General is authorized to de-classify classified information at any time,⁶⁴ but shall give due regard to expectations of confidentiality of the outside source, and where appropriate seek the prior consent of the outside source.⁶⁵

⁵⁸ *UN Charter*, *supra* note 1 at Article 2(2).

⁵⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, [1998] I.C.J. Rep. 275 at 296.

⁶⁰ *Secretary-General's bulletin on information sensitivity classification and handling*, United Nations Secretariat, UN Doc. ST/SGB/2007/6 (2007) at s.1.2(a) [*Bulletin*].

⁶¹ *Ibid.*, s.1.2(a).

⁶² *Ibid.*, s.1.2(b).

⁶³ *Ibid.*, s.1.3.

⁶⁴ *Ibid.*, s.4.2; *Administrative Instruction: Guidelines Concerning the Classification and Declassification of the Records and Archives of the Secretary-General*, United Nations Secretariat, UN Doc. ST/AI/326 (1984) 1 at 4.

⁶⁵ *Bulletin*, *supra* note 60 at s.4.4.

19. The Ravisian intelligence received by the Secretary-General should be deemed classified under the Bulletin because Ravisia has claimed that disclosure would put Ravisia's intelligence sources at risk [*Compromis* ¶ 51]. In light of Ravisia's very high expectations of confidentiality, and its lack of consent for disclosure, declassification of the intelligence would effectively violate the relevant sections of the Bulletin. Additionally, the Secretary-General acknowledged that he had "given his word" [*Compromis* ¶ 38] to Ravisia to keep its intelligence confidential, which is an obligation which must be fulfilled in good faith. Therefore the Court should declare that handing the intelligence over to Alicanto would not be lawful, because the intelligence may not be declassified without violating the principle of good faith contained in the Secretary-General's Bulletin and in the UN *Charter* itself.

III. RAVISIAN SOLDIERS AT CAMP TARA DID NOT VIOLATE INTERNATIONAL LAW, THEIR ACTIONS AS PART OF THE UNMORPH MISSION ARE NOT ATTRIBUTABLE TO RAVISIA, AND THE ALLEGED INJURIES TO ALICANTO AND ITS CITIZENS ARE NOT COMPENSABLE BY WAY OF REPARATIONS.

A. Neither the alleged acts of sexual exploitation nor the UNMORPH radio broadcasts are attributable to Ravisia.

20. The Draft Articles on State Responsibility⁶⁶ (ASR) have been largely accepted as customary international law.⁶⁷ While they indicate that the conduct of a state organ (such as a state's military⁶⁸) is generally attributable to the state,⁶⁹ exceptions are provided. In situations

⁶⁶ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, UN GAOR, 56th Sess., Supp. No.10, UN Doc. A/56/10 (2001) [*ASR*].

⁶⁷ Kjetil M. Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test" (2008) 19 E.J.I.L. 509 at 517 [*Attribution of Conduct*].

⁶⁸ See e.g. *Thomas H. Youmans (U.S.A.) v. United Mexican States* (1926), 4 R.I.A.A. 110, (U.S.-Mexico General Claims Commission) [*Youmans*].

⁶⁹ *ASR*, *supra* note 66, art. 4.

where the organ exceeds its authority, its actions are only attributable to the state if it is acting in its official “capacity”,⁷⁰ or “under colour of authority”.⁷¹ Conduct that is removed from the official function of the organ, however, is not attributable to the state; it is, instead, considered private conduct attributable only to the individual.⁷²

21. There are additional factors to consider when a state organ is on loan to an International Organization (IO). While the ASR explicitly avoids discussing the responsibility of IOs,⁷³ its commentary reads, “if a state seconds officials to an international organization so that they act as organs... of the organization, their conduct will be attributable to the organization, *not the sending state*”⁷⁴ (emphasis added). Peacekeeping forces are subsidiary organs of the UN.⁷⁵ Article 5 of the Draft Articles on the Responsibility of International Organizations (DARIO) indicates that the conduct of a state-organ placed at the disposal of an IO will be attributed to the IO provided it has “effective control over [the] conduct” in question.⁷⁶ Other than in exceptional

⁷⁰ *Ibid.*, art. 7.

⁷¹ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), online: UN Treaty Collection <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> at 42 [*ASR with Commentaries*].

⁷² *ASR with Commentaries*, *supra* note 71 at 46; *Francisco Mallen (United Mexican States) v. U.S.A* (1927), 4 R.I.A.A. 173, (U.S.-Mexico General Claims Commission) at para. 4.

⁷³ *ASR*, *supra* note 66, art. 57.

⁷⁴ *ASR with Commentaries*, *supra* note 71 at 142.

⁷⁵ International Law Commission, Special Rapporteur, *Second Report on Responsibility of International Organizations*, UN Doc. A/CN.4/541 at para. 35 [*DARIO Commentary*].

⁷⁶ International Law Commission, *Responsibility of International Organizations – Titles and texts of the draft articles 4,5, 6 and 7 adopted by the Drafting Committee*, UN Doc. A/CN.4/L.648 (2004), art. 5 [*DARIO*].

circumstances (ex. a contingent's consistent failure to follow UN orders without first confirming them with their home state),⁷⁷ the UN accepts *exclusive* attribution of peacekeeper conduct.⁷⁸ It is generally accepted that peacekeepers do not act as agents of their home state, but instead represent the UN.⁷⁹

22. Dual attribution of conduct (i.e. to both an IO *and* a state) may be possible.⁸⁰ However, this appears to be the exception, not the rule. In the *Behrami v. France*,⁸¹ for example, once the European Court of Human Rights (ECHR) had determined that the conduct at issue was attributable to the UN, it immediately concluded that the case fell outside of its jurisdiction. The ECHR treated it as a foregone conclusion that there could be no state-attribution once attribution to the UN had been found.

23. The alleged sexual exploitation of Alicantans by Ravisian soldiers qualifies as conduct that exceeds authority or contravenes instructions. Given this, the only way these actions might be attributable to Ravisia is if the individuals involved were somehow acting under colour of authority or in their official capacity. Sexual activity is “so removed from the scope of [a soldier's] official functions that it should be assimilated to [conduct of a] private individual, not attribut[ed] to the State.”⁸² Unlike a soldier who uses military force when not authorized to do

⁷⁷ *Ibid.* at para. 40.

⁷⁸ *Ibid.* at paras. 35-36.

⁷⁹ *Attribution of Conduct*, *supra* note 67 at 512.

⁸⁰ *DARIO Commentary*, *supra* note 76 at para. 6.

⁸¹ *Behrami v. France*, no. 71412/01, [2007] 45 E.H.R.R. SE10 (E.C.H.R.).

⁸² *ASR with Commentaries*, *supra* note 71 at 46.

so, a soldier who engages in sexual activities does not invoke any part of their official function in carrying out their actions. This is especially true here: the soldiers involved were acting off duty and outside of Camp Tara [*Compromis* ¶21].

24. Even if the sexual activity was, somehow, carried out in an official capacity, the conduct could not be attributed to Ravisia. Ravisia's soldiers were on loan to the UN. There is nothing to indicate that the UN had anything less than effective control over its peacekeeper's conduct.

While Ravisia retained ultimate jurisdiction in criminal matters relating to its soldiers, the UN Special Representative still had effective day-to-day control over ensuring the maintenance of discipline.⁸³ There is no reason to deviate from the generally accepted practice of attributing peacekeeper conduct to the UN and not to the troop's home state.

25. UNMORPH's public information and communications strategy at Camp Tara, similarly, had little to do with Ravisia. Although the broadcast facilities were staffed by Ravisian soldiers, the soldiers were acting in their capacity as UN peacekeepers, not as agents of Ravisia. The broadcast mandate came directly from the UN Security Council,⁸⁴ with operational decisions being made by the Secretary General's Special Representative. The UNMORPH broadcasts are attributable to the UN alone.

B. Ravisian soldiers at Camp Tara did not violate international law.

i. The radio broadcasts were conducted in conformity with international law.

26. Article 17 of the *UN Convention on the Rights of the Child (UNCRC)* creates an obligation on state parties to ensure children have access to information from a diversity of

⁸³ *Model Status-of-Forces Agreement For Peace-keeping Operations*, UN GAOR, 45th Sess., Annex, Agenda Item 76, UN Doc. A/45/594 (1990) at paras. 40, 46 [*SOFA*].

⁸⁴ *SC RES 5440*, *supra* note 89 at para. 6.

sources.⁸⁵ Article 17(a) specifically indicates that states are obligated to “encourage the mass media to disseminate information and material of social and cultural benefit to the child.”⁸⁶ Although Article 17(e) does encourage the development of guidelines for the protection of children from material that is “injurious to [their] well-being”,⁸⁷ the preparatory work associated with this clause suggests it was not intended to authorize wide ranging censorship.⁸⁸

27. The *International Convention on Civil and Political Rights (ICCPR)* states that “the law shall prohibit any discrimination” based on gender.⁸⁹ The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) prohibits discrimination against women in general,⁹⁰ and specifically with respect to their participation in public life⁹¹ and their ability to conclude contracts and administer property.⁹²

⁸⁵ *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 44, art. 17 [UNCRC].

⁸⁶ *Ibid.*, art 17(a).

⁸⁷ *Ibid.*, art 17(e).

⁸⁸ Thomas Hammarberg, “Children, the UN Convention and the Media” (1997) 5 Int’l J. Child. Rts. 243 at 254-255.

⁸⁹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 26 [ICCPR].

⁹⁰ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13, art. 2 [CEDAW].

⁹¹ *Ibid.*, art. 7.

⁹² *Ibid.*, art. 15.2.

28. The UN had the authority, under their Status-of-Forces Agreement (SOFA) with Alicanto, to install and operate radio stations in the region.⁹³ In fact, the UN considers public information capabilities to be an “operational necessity” when it comes to peacekeeping.⁹⁴ Further, Security Council Resolution 5440 specifically authorized UNMORPH to establish a public information capacity and use it to encourage “progressive development” of the various communities of Alicanto.⁹⁵ In broadcasting programs dealing with reproductive health, access to education, and women’s rights [*Compromis* ¶20], the UN was fulfilling its mandate.

29. While the SOFA states that peacekeepers will respect all local laws,⁹⁶ officials⁹⁷ and publicists⁹⁸ indicate that the fulfillment of a UN peacekeeping mission’s mandate takes precedence over local laws when the two come into conflict. As such, although the North-East Province of Alicanto had implemented an ordinance requiring secular radio broadcasts to be approved [*Compromis* ¶25], UNMORPH did not need to jeopardize its mission mandate in order to adhere to it.

⁹³ *SOFA*, *supra* note 83 at para. 11.

⁹⁴ Shira Loewenberg, “United Nations Media Strategy: Recommendations for Improvement in Peacekeeping Operations” (2006) United Nations Peacekeeping Best Practices Section, Department of Peacekeeping Operations, online: <<http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/UN%20Media%20FINAL%2014%20August%202006.pdf>> at 5.

⁹⁵ *SC RES 5440*, *supra* note 84 at para. 6.

⁹⁶ *SOFA*, *supra* note 83 at para. 6.

⁹⁷ Walter Dorn, “Tools of the Trade? Monitoring and Surveillance Tehcnologies in UN Peacekeeping” (2007) UN Peacekeeping Best Practices Section, Department of Peacekeeping Operations, online: <http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/ToolsOfTheTrade_DPKO_Dorn_10Sept2007.pdf> at 5.

⁹⁸ Dieter Fleck, *The Handbook of the Law of Visiting Forces* (New York: Oxford University Press, 2001) at 506.

30. Furthermore, both Ravisia and Alicanto had an obligation under the UNCRC to encourage exactly the type of content that UNMORPH was broadcasting. To claim that programming aimed at providing women and children with information regarding access to education, reproductive health, and women’s rights is somehow “injurious”⁹⁹ to a child’s “well-being”¹⁰⁰ borders on absurdity. Even if Article 17(e) were to apply, it only encourages the development of content *guidelines*; it does not constitute a broad licence to censor all radio communications. To suggest that the broadcasts violated local cultural morals is similarly questionable. While it is true that the broadcasts were inconsistent with certain orthodox Talonnic teachings, these teachings were at odds with the obligations of Alicanto and Ravisia under international law. The broadcasts were inconsistent with the orthodox Talonnic notions that women should be precluded from public life and prohibited from holding property. Both Ravisia and Alicanto have obligations under the ICCPR and CEDAW to ensure that exactly the opposite types of beliefs are fostered.

ii. The sexual misconduct of Ravisian soldiers has not been shown to constitute a violation of international law.

31. While Article 34 of the UNCRC¹⁰¹ requires state parties to protect children from sexual exploitation and abuse, it does not define either ‘sexual exploitation’ or ‘sexual abuse’. It does, however, specify that state parties must take measures to prevent both “the inducement or coercion of a child to engage in any *unlawful sexual activity*”¹⁰² (emphasis added), and “the exploitative use of children in prostitution or other *unlawful sexual practices*” (emphasis

⁹⁹ *UNCRC*, *supra* note 85, art. 17(e).

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, art. 34.

¹⁰² *Ibid.*, art. 34(a).

added).¹⁰³ The scope of a state's potential obligations can be further gauged by considering the report of the Group of Legal Experts appointed by the UN Secretary General in 2006 to make recommendations regarding the accountability of UN staff and personnel on peacekeeping missions.¹⁰⁴ They indicated that only "rape and acts of sexual violence" and "sexual offenses involving children" by UN officials should be considered criminal acts.¹⁰⁵ Both the requirements under conventional law as well as these recommendations are far more permissive than the various UN conduct guidelines.¹⁰⁶ The guidelines do not represent international law, and are not binding upon states.¹⁰⁷

32. Furthermore, troop-contributing countries retain exclusive jurisdiction over prosecuting criminal matters related to their troops.¹⁰⁸ This allows contributing states to conduct their own investigations and follow their own methods and procedures in order to assess criminal culpability. This ability is especially important given that UN investigations into sexual abuse and exploitation have been described by contributing states as unfair, insufficient and non-

¹⁰³ *Ibid.*, art. 34(b).

¹⁰⁴ *Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations*, UN GAOR, 60th Sess., UN Doc. A/60/980 (2006).

¹⁰⁵ *Ibid.* at 32.

¹⁰⁶ U.N. Department of Peacekeeping Operations, "Ten Rules: Code of Personal Conduct for Blue Helmets", online: <http://www.un.org/Depts/dpko/dpko/Conduct/ten_in.pdf>; U.N. Department of Peacekeeping Operations, "We are United Nations Peacekeepers", online: <http://www.un.org/Depts/dpko/dpko/Conduct/un_in.pdf>.

¹⁰⁷ Anthony Miller, "Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations" (2006) 39 *Cornell Int'l L.J.* 71 at 82.

¹⁰⁸ *SOPA*, *supra* note 90 at para. 47(b).

transparent.¹⁰⁹ A report of the Secretary-General released in 2006 indicated that the UN's investigatory process was a continuing area of concern.¹¹⁰

33. It has not been shown that any of Ravisia's soldiers were involved in coercing or inducing a child to engage in unlawful sexual practices. Sexual activity with individuals over the age of 15 is permitted under Alicantan law [*Clarifications* ¶5]. The average age of the Alicantans involved was found to be 16 [*Compromis* ¶21]; thus making the average encounter legal. While it is true that some of the Alicantans involved were reported to be as young as 13 [*Compromis* ¶21], the inquiry did not link Ravisian soldiers with these outlier incidents. Likewise, the inquiry did not associate Ravisian soldiers with instances of prostitution. As such, even if the findings are presumed to be accurate, they do not show that Ravisia's soldiers breached international obligations under the UNCRC. By the same token, it has not been shown that the acts of Ravisian soldiers ran afoul of the sexual crimes proposed by the Group of Legal Experts. Neither rape nor acts of sexual violence were reported [*Compromis* ¶21]. In any event, UN investigations into sexual abuses are notoriously unreliable. Ravisia retains exclusive authority with respect to pursuing charges against members of its military: no charges for sex-related crimes have been brought against any Ravisian peacekeepers [*Clarifications* ¶4].

C. In any event, no alleged injury to Alicanto or its citizens warrants reparations.

34. Although Article 31 of the ILC's ASR indicates that a "responsible State is under an obligation to make full reparation for injur[ies] caused by [its] internationally wrongful act[s]",

¹⁰⁹ *A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations*, UN GAOR, 59th Sess., Annex, Agenda Item 77, UN Doc. A/59/710 (2005) at para. 28.

¹¹⁰ *Comprehensive report prepared pursuant to General Assembly resolution 59/296 on sexual exploitation and sexual abuse, including policy development, implementation and full justification of proposed capacity on personnel*, UN GAOR, 60th Sess., Annex, Agenda Item 136, UN Doc. A/60/862 (2006).

¹¹¹ this obligation is not without its limits. First, if the injury caused is purely speculative, it is excluded.¹¹² The *Trail Smelter* arbitral decision, for example, indicates that damage of an uncertain nature does not warrant reparation.¹¹³ Reparations regarding abstract concerns are also specifically excluded.¹¹⁴ A further limitation is that a “sufficient causal link” between the breach of the international obligation and the resulting damage is required in order to give rise to the duty to make reparations.¹¹⁵ One final relevant limitation is that reparations cannot be punitive in nature.¹¹⁶

35. There is a virtual absence of interstate cases in the area of human rights law.¹¹⁷ The interstate cases that have touched upon human rights violations either haven’t pinpointed what reparations should be¹¹⁸ or, if they do, they have simply considered the Court’s declaratory judgment to be sufficient reparation.¹¹⁹

36. Alicanto claims that Ravisia must “make reparations for the injuries to the victims” of the alleged violations [*Compromis* ¶54(c)]. Even in the event that Ravisia were found to be

¹¹¹ *ASR*, *supra* note 66, art. 31.

¹¹² Dinah Shelton, “Righting Wrongs: Reparations in the Articles on State Responsibility” (2002) 96 *Am. J. Int’l L.* 833 at 846 [*Righting Wrongs*].

¹¹³ *Trail Smelter* (1938, 1941), 3 R.I.A.A. 1905 (U.S.-Mexico General Claims Commission) [Youmans].

¹¹⁴ *ASR with Commentaries*, *supra* note 71 at 91.

¹¹⁵ *Ibid.* at 93.

¹¹⁶ *Ibid.* at 70, 78.

¹¹⁷ *Righting Wrongs*, *supra* note 112 at 834.

¹¹⁸ *Case concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] I.C.J. Rep. 116 at para. 259-260.

¹¹⁹ *Bosnia*, *supra* note 16 at para. 463.

internationally responsible for breaching obligations, the damage alleged (i.e. “injuries to the victims”) is so unspecific that no obligation to make reparations can reasonably attach. First, it is unclear which alleged breach is being discussed: the broadcast, or the sexual activity. Since it is not apparent how a person can be victimized by a radio broadcast, it might be assumed that the claim refers to injuries suffered by Alicantans involved in the alleged sexual activity. Even so, the specific damage is not stated. Without a specified damage, there is no way to determine whether there is a valid claim for reparations; reparations might be excluded, for example, on the grounds that the damage is speculative, or perhaps because no causal link between the damage and the breach has been shown. Even if a specific damage were located, the history of interstate jurisprudence involving human rights makes the imposition of an obligation to make reparations questionable.

37. Alicanto also claims that Ravisia should “make reparations for the injuries... to Alicanto’s social fabric” [*Compromis* ¶54(c)]. Here, the damage claimed (i.e. to the “social fabric” of Alicanto) is so speculative and abstract that it can’t possibly be used as a basis for imposing a duty to make reparations.

IV. RAVISIA IS NOT REQUIRED TO DELIVER PICCARDO DONATI TO ALICANTAN AUTHORITIES.

A. Alicanto’s sentencing of Piccardo Donati to death represents a violation of international human rights law.

i. The judicial process followed by the Alicantan courts violated international human rights law.

38. Under the *ICCPR*, an accused has the right to be present for trial.¹²⁰ Publicists¹²¹ and international tribunals¹²² have confirmed that this right can be derogated from if it is necessary in

¹²⁰ *ICCPR*, *supra* note 89.

the interest of justice so long as no other rights are breached. For example, it has been found that a trial *in absentia* is lawful if the accused had notification of the charges and was given an opportunity, following conviction, for a “fresh determination of the merits of the charge”.¹²³ Publicists¹²⁴ and international tribunals¹²⁵ affirm that in a capital punishment case, procedural safeguards must be strictly adhered to: any derogation is a violation of customary international law.

39. There is no evidence indicating that Donati, who was tried in absentia, knew of the charges against him. Further, Alicantan law does not provide for a retrial prior to the carrying out of sentence [*Compromis* ¶48]. The judicial procedure used to convict Donati violated international law.

ii. The sentence passed by the Alicantan courts violates international human rights law.

a. Retrospective application of a penalty is a violation of international human rights law.

¹²¹ Geert-Jan Alexander Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings* (The Netherlands: Kluwer BV, 2005) at 86; Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) at 402.

¹²² UN Human Rights Committee, *Dieter Wolf v. Panama*, Communication No. 289/1988, U.N. Doc. CCPR/C/44/D/289/1988 (1992) at para.; UN Human Rights Committee, *Daniel Monguya Mbenge v. Zaire*, Communication No. 16/1977, U.N. Doc. CCPR/C/OP/2 (1990) at para. 14.1

¹²³ *Colozza v. Italy*, (1985), A89 E.C.H.R. 7 E.H.R.R. 516 at para. 30.

¹²⁴ William A. Schabas, “International Law, The United States of America and Capital Punishment” (2007) 31 *Suffolk Transnat’l L. Rev.* 377 at para. 382 [Schabas, “International Law, the United States”]; William Schabas, “International Law and Abolition of the Death Penalty” (1998) 55 *Wash. & Lee L. Rev.* 797 at 812 [Schabas, “International Law and Abolition”]; Ved Nanda, “Bases for Refusing International Extradition Requests – Capital Punishment and Torture” (1999) 23 *Fordham Int’l L.J.* 1369 at 1384.

¹²⁵ UN Human Rights Committee, *Peart v. Jamaica*, Communications Nos. 464/1991 & 482/1991, U.N. Doc. CCPR/C/54/D/464/1991 & 482/1991 (1995) at para. 3.9; *Carlton Reid v. Jamaica*, Communication No. 250/1987, U.N. Doc. CCPR/C/39/D/250/1987 (1990) at para. 6.5.

40. Article 6(2) of the *ICCPR* indicates that the sentence of death can only be imposed according to the law in force “at the time of the commission of the crime”.¹²⁶ Similarly, Article 11(2) of the *Universal Declaration of Human Rights (UDHR)* prohibits the imposition of a heavier penalty “than the one that was applicable at the time the penal offence was committed.”¹²⁷ The *UDHR* represents customary international law.¹²⁸ The crime attributed to Donati occurred over a month before Alicanto re-introduced the death penalty [*Compromis* ¶32, 44]. As such, Alicanto’s sentencing of Donati to death [*Compromis* ¶48] is a violation of its obligations under human rights law.

b. Subjecting a person to death-by-hanging is a violation of international human rights law.

41. Article 7 of the *ICCPR* states that no one shall be subjected to “cruel, inhuman or degrading treatment or punishment.”¹²⁹ An identical provision can be found in the *UDHR*.¹³⁰ Although the death penalty itself may not yet be considered cruel, inhuman or degrading under international law,¹³¹ certain methods of execution are.¹³² The UN Committee on Human Rights (UNCHR), which oversees compliance with the *ICCPR*,¹³³ has indicated death sentences “must

¹²⁶ *ICCPR*, *supra* note 89 at 6(2).

¹²⁷ *UDHR*, *supra* note 5 at 11(2).

¹²⁸ Schabas, “International Law, the United States”, *supra* note 124 at 382.

¹²⁹ *ICCPR*, *supra* note 89, art. 7.

¹³⁰ *UDHR*, *supra* note 5, art 5.

¹³¹ UN Human Rights Committee, *Kindler v. Canada*, Communication No. 470/1991, UN Doc. CCPR/C/48/D/470/1991 (1993), 98 I.L.R. 426 (1994) at 446 [*Kindler*].

¹³² Schabas, “International Law and Abolition”, *supra* note 124 at 811.

¹³³ Nanda, *supra* note 124 at 1379.

be carried out in such a way as to cause the least possible physical and mental suffering.”¹³⁴ It has decided that death by gas-asphyxiation is a violation of Article 7 because it may take over 10 minutes.¹³⁵ Reports have indicated that hanging may take as much as 20 minutes.¹³⁶

42. Alicanto sentenced Donati to death by hanging [*Compromis* ¶48]. Hanging appears to be less humane than death by gas asphyxiation. Thus, Donati’s death sentence represents a breach of Alicanto’s obligations under human rights law.

c. Reintroducing the death penalty after its abolition is likely a violation of international human rights law.

43. A recent General Assembly resolution explicitly called upon states that have abolished the death penalty not to reintroduce it.¹³⁷ Publicists¹³⁸ and jurists¹³⁹ suggest that the wording of Article 6(2) of the *ICCPR* already prohibits states that have abolished the death penalty from reintroducing it. If these publicists are correct, Alicanto’s reintroduction of the death sentence [*Compromis* ¶44] constitutes a violation of human rights law. The validity of Donati’s death sentence is suspect.

¹³⁴ UN Human Rights Committee, *Ng v. Canada*, Communication No. 469/1991, UN Doc. CCPR/C/49/D/469/1991 (1994), 98 I.L.R. 473 (1994) at 503 [*Ng*].

¹³⁵ *Ibid.* at 504.

¹³⁶ Great Britain Royal Commission on Capital Punishment, *Report of the Royal Commission on Capital Punishment, 1949-1953*, Report. London: H.M.S.O., 1953) at para. 714.

¹³⁷ *Moratorium on the use of the death penalty*, GA Res. 149, UN GAOR, 62d Sess., UN Doc. A/RES/62/149 (2008).

¹³⁸ Schabas, “International Law and Abolition”, *supra* note 124 at 804.

¹³⁹ *Kindler*, *supra* note 131 (Wnnergren, dissenting).

B. As such, international law requires Ravisia not to deliver Piccardo Donati to Alicantan authorities.

44. A state grants non-territorial asylum when it provides a person refuge from the enforcement jurisdiction of another state, inside that other state's borders (ex. in an embassy or military camp).¹⁴⁰ Although the validity of this type of asylum is not broadly recognized under customary international law,¹⁴¹ state practice demonstrates,¹⁴² and international tribunals¹⁴³ and publicists¹⁴⁴ have confirmed, that it *may* be recognized in specific cases, based on humanitarian concerns. This Court has indicated that so long as a "legal basis is established in each particular case," non-territorial asylum is permissible.¹⁴⁵

45. International tribunals¹⁴⁶ and publicists¹⁴⁷ have gone beyond this and have indicated that human rights law imposes an *obligation* on states not to deliver refugees. Tribunals have found an obligation not to extradite a person who faces a real risk of being subjected to inhuman or

¹⁴⁰ Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff Publishers, 1971) at 205.

¹⁴¹ Susanne Riveles, "Diplomatic Asylum as a Human Right: The Case of the Durban Six" (1989) 11 Hum. Rts. Q. 139 at 150; Angela Rossitto, "Diplomatic Asylum in the United States and Latin America: A Comparative Analysis" (1987) 13 Brook. J. Int'l L. 111 at 111; *Asylum Case (Columbia v. Peru)*, [1950] ICJ Rep. 266 [*Asylum Case*].

¹⁴² *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 165 L.N.T.S. 19 at Article 3; Riveles, *supra* note 141 at 148.

¹⁴³ *Kindler*, *supra* note 131; *Ng*, *supra* note 134.

¹⁴⁴ Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff Publishers, 1971) at 206.

¹⁴⁵ *Asylum Case*, *supra* note 141 at 275.

¹⁴⁶ *Soering v. United Kingdom* (1989), 161 E.C.H.R. (Ser. A), 98 I.L.R. 270 [*Soering*]; *Kindler*, *supra* note 131; *Ng*, *supra* note 134.

¹⁴⁷ Riveles, *supra* note 141 at 142.

degrading treatment in the requesting state.¹⁴⁸ The UNCHR has determined that a similar obligation attaches in respect of refugees who are exposed to a real risk of being sentenced to death through means that contravene Article 6(2) of the *ICCPR*.¹⁴⁹ It indicated that the lack of a fair hearing under Article 14, for example, would be enough to find an obligation not to extradite.¹⁵⁰ As evidence of state practice, section 3(f) of the *Model Treaty on Extradition* indicates that a state is obligated not to extradite if there is a real risk of cruel, inhuman or degrading treatment, or if the minimum guarantees regarding criminal proceedings, as outlined in Article 14 of the *ICCPR*, have not been met.¹⁵¹ Although these obligations routinely arise in the context of extradition, they aren't tied to extradition: they are based on the state's own obligations under human rights law.¹⁵²

46. Ravisia has granted Donati refuge in Camp Tara [*Compromis* ¶49]. Since Camp Tara is located in Alicanto, Ravisia is granting Donati a form of non-territorial asylum. Although asylum of this kind is generally not accepted, there are cases – specifically where the refugee's human rights are at stake where it is permissible. Donati's sentence amounts to a violation of human rights law: he did not receive a fair trial [*Pleadings* ¶1,2], he received a harsher sentence than the one in force at the time of the crime [*Pleadings* ¶3], the method of execution prescribed is cruel and inhuman [*Pleadings* ¶4,5], and the death penalty, itself, is invalid [*Pleadings* ¶6].

¹⁴⁸ *Soering*, *supra* note 146; *Ng*, *supra* note 134.

¹⁴⁹ *Kindler*, *supra* note 131.

¹⁵⁰ *Soering*, *supra* note 146 at 113.

¹⁵¹ *Model Treaty on Extradition*, GA Res. 45/116, annex, 45 U.N. GAOR Supp. No. 49A U.N. Doc. A/45/49 (1990) at Article 3(f).

¹⁵² *Kindler*, *supra* note 131; *Nanda*, *supra* note 124 at 1379.

Given these concerns, Ravisia would be in violation of human rights law if it handed Donati over to Alicanto. Ravisia is obligated not to deliver Donati to Alicantan authorities.

C. In any event, Ravisia is not obligated to deliver Piccardo Donati to Alicantan authorities.

47. In cases where a state has improperly granted non-territorial asylum, this Court has found that termination is the appropriate remedy.¹⁵³ However, there are many ways to terminate asylum: delivery of the refugee to territorial authorities is only one option.¹⁵⁴ This Court has stated that it is not part of its judicial function to choose between the various options since such a choice “could not be based on legal considerations, but only on considerations of practicability or political expediency.”¹⁵⁵ Imposing a positive obligation to deliver would be tantamount to assisting “authorities in their prosecution of a political refugee... [and would] far exceed” what is necessary to terminate asylum.¹⁵⁶ As such, even if it was decided that Ravisia’s grant of refuge to Piccardo Donati was in violation of international law, delivery of Donati to Alicantan authorities would not be required.

PRAYER FOR RELIEF

For the foregoing reasons, the Respondent, Ravisia, respectfully requests that this honourable Court DECLARE that:

- a) The presence of the Ravisian military forces in Alicanto has been and continues to be fully justified under international law;

¹⁵³ *Asylum Case*, *supra* note 141.

¹⁵⁴ *Haya De La Torre Case (Columbia v. Peru)* [1951], I.C.J. Rep. 71 [*Haya*].

¹⁵⁵ *Ibid.*; *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, [1963] I.C.J. Rep 15 at 58.

¹⁵⁶ *Haya*, *supra* note 154 at 81

- b) Ravisia is entitled not to be called on to produce its classified intelligence, or in the alternative, if the Court does call upon Ravisia to produce its classified intelligence, and Ravisia continues to withhold it, that Ravisia is nevertheless entitled to rely on it; and that the Secretary-General may not lawfully hand it over to Alicanto;
- c) Ravisia's conduct at Camp Tara at all times has been entirely lawful, and that in any event Ravisia bears no liability for any wrongdoing that may have been committed in the service of the United Nations, and that no alleged injury to Alicanto is compensable by way of reparations; and
- d) The Alicantan citizen Piccardo Donati need not be handed over to Alicanto, where he will be subjected to judicial execution in violation of international law.