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

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

The Case Concerning Operation Provide Shelter

**THE REPUBLIC OF ALICANTO
APPLICANT**

v

**THE STATE OF RAVISIA
RESPONDENT**

2009

MEMORIAL FOR THE RESPONDENT

TABLE OF CONTENTS

Table of Contents.....	2
Index of Authorities	3
Statement of Jurisdiction.....	13
Statement of Jurisdiction.....	13
STATEMENT OF FACTS	14
QUESTIONS PRESENTED.....	20
SUMMARY OF PLEADINGS.....	21
Pleadings.....	24
I. the presence of RavIsian military forces in alicanto has been and continues to be fully justified under international law.....	24
A. International law recognizes a right of intervention in cases of extreme humanitarian crises	29
II. the court should decline to call upon ravisia to produce its classified information. alternatively, no evidentiary benefit should be afforded to alicanto should ravisia continue to with-hold the information and the secretary-general cannot lawfully hand it over to alicanto.....	36
A. The Court should decline to call upon Ravisia to produce its classified information.....	37
III. THE CONDUCT OF RAVISIAN TROOPS WHILE STATIONED AT CAMP TARA DID NOT VIOLATE INTERNATIONAL LAW, OR THE SOVEREIGNTY AND RELIGIOUS INTEGRITY OF ALICANTO	43
A. The radio broadcasts were expressly authorised.....	43
B. In any event, Ravisia bears no liability for any wrongdoing that may have been committed in the services of the United Nations	50
C. No Alleged injury to Applicant warrants reparations	55
IV. 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	56
A. Alicanto has violated international law and will further violate international law if it were to carry out the death penalty on Piccardo Donati	56
Conclusion and Prayer For Relief.....	62

INDEX OF AUTHORITIES

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STATEMENT OF JURISDICTION

The dispute between the Republic of Alicante and the Commonwealth of Ravisia Concerning “Operation Provide Shelter” has been brought before the International Court of Justice in accordance with Article 40(1) of its Statute by notification of the *Compromis*. This special agreement was concluded by the Parties in Chicago, Illinois, USA, on 30 September 2008 and was notified to the Court on that date. The *Compromis* constitutes a statement of agreed facts but not an agreement to the Court's *ad hoc* jurisdiction. Ravisia has no objection to the admissibility of the matters submitted in the *Compromis* except with respect to the issue concerning the UN Secretary-General, in which case, admissibility is contested.

The Court is respectfully requested to decide the case on the basis of the rules and principles of general international law, as well as any applicable treaties. The Court is also requested to determine the legal consequences, including the rights and obligations of the Parties arising from its judgment on the questions presented in the case.

STATEMENT OF FACTS

The state of Alicanto is a former colony of the State of Ravisia. In 1960, Ravisia formed an association known as R-FAN along with its former colonies and allies aimed at maintaining ties among the sovereign members of the association and promoting democracy.

The population of Alicanto comprises two ethnically distinct groups: the Dasu and the Zavaabi. 30% of the population considers itself to be Dasu, 50% to be Zavaabi, and 15 % to be both. The Dasu have been known to occupy the more powerful positions in business and government, and they enjoy a significantly higher standard of living than the Zavaabi. Though both groups espouse the Talonnic faith, the Zavaabi choose to interpret the faith in a more orthodox manner.

The Zavaabi interprets the Talonnic Holy Book, the Canon to preclude women from participating in public life and to restrict their ability to hold property in their own names. This view also prescribes the death penalty for homicide, blasphemy, adultery and other transgressions against the Talonnic faith. Other interpretations of the Canon consider these provisions to be allegorical. In other Talonnic populations, the death penalty has been abolished and women occupy positions of power.

During the 1990s, the group, ‘Guardians of the Talonnic Faith’ began to attract Zavaabi supporters. The group espoused a return to Talonnic orthodoxy and its incorporation into Alicanto’s legal system. Support for the Guardians began to increase when Alicanto’s

economy began to decline. By 2004 the Guardians held 66 out of the 200 seats in the Alicantan Parliament.

In 2000, tensions broke out along the Rocian Plateau bordering Alicanto and a former colony of Ravisia, New Benu. The tensions were caused by New Benu's attempts to crack down on criminal activities on the Alicantan side of the border in light of Alicanto's complicity.

When the violence in the Plateau escalated, New Benu resorted to air surveillance to track and prevent the movement of illegal goods. In May 2005 a New Benuan surveillance plane was shot down by a surface to air missile killing three crew members and five law enforcement personnel. The bodies were dragged through the villages and local groups in the Plateau claimed responsibility for bringing down the plane. A substantial number of Dasu villagers shuttered their homes, closed their business and fled the Plateau. The response of the Alicantan Government was to deny any support for New Benu, and to protest their incursions into Alicantan airspace.

In June 2005, New Benu initiated a three week air bombing campaign which resulted in the deaths of one hundred civilians, primarily Zavaabi. They cited their frustrations with the inaction of the Alicantan officials. In July when the Government's peace plan met opposition from the Zavaabi population, they were turned out of office and The Guardians were elected. The head of the Guardians Gregory Simurg (Simurg) was named Prime Minister.

Upon taking office, Simurg negotiated a cease fire with New Benu, and requested that the United Nations (UN) deploy a peace-keeping force to the Rocian Plateau and its surrounding area.

On the 8th of December 2007 The Security Council (SC) adopted Resolution 5440, authorizing the United Nations Mission Overseeing the Rocian Plateau and Hinterlands (UNMORPH) to commence operations on February 1, 2006. Ravisia contributed the majority of the troops for the mission. The head of the Ravisian army, General Skylark (Skylark) was named Force Commander. A Status-Of-Forces-agreement (SOFA) was also concluded between the Secretary General (SG) and Alicanto in line with the UN's Model SOFA. The Mission established its headquarters, Camp Tara, in the Rocian Plateau.

In the following year, the mission proved successful. The SC renewed its mandate for an additional six months through to July 31st 2008.

Early in its deployment, UNMORPH had set up a radio station. The content of certain broadcasts were considered by Alicantan officials to be offensive. In the face of protest that these programs were contrary to the Talonnic faith, General Skylark preceded the broadcast with a warning to listeners but refused to alter the content. In October of 2007, a Commission of Inquiry ordered by the Secretary General concluded that UNMORPH personnel of Ravisian nationality had been involved in the sexual exploitation of young Alicantan girls in the Plateau.

Following a Report from UNMORPH detailing its success, the SC issued Resolution 6590 in February 2008, authorizing the withdrawal of UNMORPH to be completed by July 31, 2008. In March, the Alicantan Government passed an ordinance censoring all radio broadcasts of a secular nature. The Dasu Broadcasting Company was shut down. UNMORPH did not comply.

The ordinances sparked riots which lead to hundreds of violent deaths. Thirty-five Dasu were killed by armed police, and others fled fearing for their life. Simurg publicly addressed the nation vowing to *inter alia*, overhaul the unholy judicial code. On June 1, martial law was declared. In response the SC adopted Resolution 6620 urging Alicanto to take steps to correct the situation on the Plateau which was described as ethnic cleansing.

On July 7, Simurg was assassinated in a car bomb explosion. The incident was linked to Piccardo Donati the reputed head of an organization called the Dasu Integrity Front. A nation-wide hunt ensued for Piccardo. Six weeks later, he was tried in absentia and sentenced to death by hanging. Under the new provisions of Alicantan Law the penalty could be imposed without a retrial within 12 years of the Piccardo's apprehension.

On July 22, The President of Ravisia requested an emergency meeting of the SC to consider the situation in Alicanto. She claimed to be in possession of classified data supporting the extension of the UNMORPH mission and the expansion of its mandate to

include the protection of Alicantans from impending ethnic cleansing. Alternatively, she proposed the authorization of collective action.

On July 23, the SC was convened to consider the request of Ravisa's President. Opposition was grounded in the absence of a factual basis warranting intervention; support was grounded on helplessness of Alicanto to prevent the catastrophe. Despite Alicanto's demands for the classified data, it was not provided.

On July 31, the SG announced the termination of UNMORPH. The next morning, the Ravisian forces entered Alicanto and proclaimed the commencement of Operation Provide Shelter (OPS). Requests by Alicanto that the SC convene a meeting were unsuccessful.

On August 15, Alicanto adopted a new Judicial Code which *inter alia*, restricted the recording of ownership of real property or businesses in the names of women, unless they occupied their residences or operated their businesses. Petitions were granted to void the titles of Dasu women who had fled and the properties were made available to local Zavaabi. Unrest resurfaced in the North-East province. Reports alleged that Alicantan police did not engage in enforcement activity. However, the latter did not prevent the OPS from quelling the unrest. On September 17, Skylark announced that Piccardo Donati had been granted refuge at Camp Tara.

In light of irresolvable issues, Alicanto and Ravisia have agreed to submit the dispute concerning OPS to the Court for a determination on the questions presented.

QUESTIONS PRESENTED

Ravisia requests that the Court adjudge and declare that:

- i) the presence of the Ravisian military forces in Alicanto has been and continues to be fully justified under international law;
- ii) the Court will not call upon Ravisia to produce its classified intelligence and, alternatively that no evidentiary benefit can be afforded to Alicanto should Ravisia continue to withhold the intelligence and the Secretary-General may not lawfully hand over the intelligence to Alicanto;
- iii) 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 services of the United Nations; and
- iv) 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.

SUMMARY OF PLEADINGS

The presence of Ravisian military forces in Alicanto has been and continues to be fully justified under international law. Alicanto has an affirmative duty to protect its nationals from human rights violations. The state has breached this duty with the result that nationals have been persecuted and subjected to acts of genocide and ethnic cleansing. The actions of Alicanto indicate that the state is unwilling to protect its nationals, or at the very least, is unable to do so. Ravisia, therefore, has a right to intervene in Alicanto for the purpose of protecting Alicantans from further human rights violations. This right exists under customary international law and survived the adoption of the UN Charter. Alternatively, customary law has evolved to recognize a right of humanitarian intervention in light of the dominance being placed on human rights protection. The right of humanitarian intervention is not inconsistent with article 2(4) of the UN Charter and the concept of state sovereignty is not a legitimate justification for denying Ravisia the right of intervention.

The Court should decline to call upon Ravisia to produce its classified intelligence since disclosure could jeopardize the national security of Ravisia. The Court should decline to afford Alicanto any evidentiary benefit should Ravisia continue to withhold the information in question since refusal to do so may be the result of considerations which are unrelated to the issue of liability. Furthermore, the Court does not have jurisdiction to issue a declaration on the legality of the Secretary-General's actions as the Court does not have the power of judicial review. Alternatively, the Secretary-General may not lawfully hand over the information since disclosure of classified intelligence is only accessible to

authorised members of the United Nations. Moreover, the Secretary-General is bound to withhold disclosure by virtue of having given a legally binding undertaking to Ravisia.

The broadcast of certain radio programmes deemed by the Alicantan officials to be offensive was authorized under the mandate of the UNMORPH pursuant to UN Security Resolution 5440. The said broadcasts were also permissible under the provisions of the SOFA signed between the UN SG and Alicanto. Alicanto's censorship of the radio broadcasts is in violation of international law. The radio broadcasts constituted official communication by the UNMORPH which cannot be censored by a host state. The citizens of Alicanto have a right to receive information. Alicanto has breached its obligations under the ICCPR to secure to the people of Alicanto the freedom to impart and receive information and to adopt a religion or belief of their choice.

Alicanto's censorship of the content of radio broadcast was not necessary to protect any of the legitimate aims required under the ICCPR. The content of the radio broadcasts furthered the UN mandate to restore peace and facilitate the progressive development of the Alicantan people. Further, the radio broadcasts were employed as a lawful countermeasure to Alicanto's breach of its obligations and its media incitement.

In any event, the misconduct alleged does not entail the responsibility of Ravisia because the said misconduct is not attributable to Ravisia under international law. At all material times prior to the termination of the UN mandate the Ravisian troops were under the effective control of the UN. Any misconduct alleged to have been committed on the territory of Alicanto while deployed under the auspices of the UNMORPH is therefore attributable to the U.N.

Ravisa is under no obligation to make reparation to Alicanto because it has not committed an internationally wrongful act. Alicanto has violated international law by reintroducing the death penalty into its law. Alicanto will violate both conventional and customary rules of international law if it executes Piccardo Donati. Piccardo Donati has a right of non-*refoulement*, and Alicanto is bound under the prohibition on *refoulement* which is a rule of customary international law.

PLEADINGS

I. THE PRESENCE OF RAVISIAN MILITARY FORCES IN ALICANTO HAS BEEN AND CONTINUES TO BE FULLY JUSTIFIED UNDER INTERNATIONAL LAW

A. Alicanto has a duty to protect its citizens from human rights violations under both conventional and customary international law

Every state has a positive duty to protect its citizens from human rights violations.¹ Alicanto is a signatory to a number of human rights instruments under which it has undertaken to safe-guard the rights of individuals.² The state has thereby agreed to prohibit the advocacy of racial or religious hatred that incites violence³ and also to protect the rights of minorities within its territory.⁴ Alicanto has agreed to ensure the rights of every individual to security of the person⁵ and to sole ownership of property.⁶ The state is

¹ International Commission on Intervention and State Sovereignty (ICISS) “The Responsibility to Protect” (December 2001)

² Compromis ¶53

³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 20

⁴ ICCPR art 27.

⁵ Convention on the Elimination of all forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS. 195) (CERD) art 5 (b).

⁶ CERD art 5 (d)(v).

also under an express obligation to prevent discrimination against women.⁷ These duties contained in treaty law have also passed unto the corpus of customary international law by virtue of the overwhelming number of states that are parties to the respective Conventions. The duty of a state to protect individuals from human rights abuses includes human rights violations that may have been committed by non-state entities.⁸

1. Alicanto has failed to protect its citizens from human rights violations and has thereby breached its obligations under customary and conventional international law

The Applicant has implemented a number of policies in breach of its obligation to protect individuals against human rights abuses. Alicanto has implemented laws restricting freedom of expression and prohibiting married women from freely registering real property in their own names.⁹ The state has also failed to protect the rights of minority

⁷ Convention on the Elimination of all forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3rd September 1981) 1249 UNTS 13 (CEDAW), art 16.

⁸ CEDAW art 2(b) & (e); CEDAW “Violence Against Women”, General Recommendation No.19 p1, UN Doc CEDAW/C/1992/L.1/Add. 15 (1992); See also David Weissbrodt in Monique Castermans-Holleman, Fried van Hoof and Jacqueline Smith, “*Non-State Entities and Human Rights within the Context of the Nation-State in the 21st Century: Human Rights, International Organizations and Foreign Policy*, Kluwer Law International, London 1998)

⁹ Compromis ¶ 25.

groups and has contributed to the existing ethnic tension by making statements inciting violence and racial and religious hatred.¹⁰ This flagrant disregard of basic human rights has led to cataclysmic unrest.¹¹

2. The situation in Alicanto has created a real threat of an imminent humanitarian catastrophe

i) The circumstances existing in Alicanto amount to genocide

The situation in Alicanto amounts to genocide contrary to the Genocide Convention and the customary prohibition on genocide.¹² Genocide includes the act of killing members of an ethnical or religious group as well as the act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.¹³ In the case at bar, thirty-five Dasu demonstrators were killed by armed police in Melatha.¹⁴ Doctors of the World has confirmed that hundreds of violent deaths have

¹⁰ Compromis ¶ 27.

¹¹ Compromis, Appendix III para 4.

¹² Convention on the Prevention and Punishment of the Crime of Genocide, (adopted 9 December 1948, entered into force 12 January 1951) 78 U.N.T.S. 277(Genocide Convention) art 2; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 61 at 23; *Bosnia-Herzegovina v Serbia & Montenegro* General List No 91 [2007] ICJ

¹³ Genocide Convention art 2

¹⁴ Compromis ¶26

taken place in parts of Alicanto and the Dasu minority in the Northeast Province has been reduced by thirty percent.¹⁵ Subsequent to those events, Earth Without Frontiers has reported that “thousands” of Dasus have been killed in the Rocian Plateau.¹⁶ These events clearly reflect acts of genocide within the meaning of the Genocide Convention.

Furthermore, there is a specific intent to destroy the Dasu minority. It has been held that specific intent can be inferred from “the general context of the perpetration of other culpable acts systematically directed against the same group”.¹⁷ The fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can also enable a Court to infer the genocidal intent of a particular act.¹⁸ In the present case, only Dasus have been persecuted. Additionally, it has been held that genocidal intent may be inferred from the general political doctrine which gave rise to the acts in question.¹⁹ The discriminatory killings in Alicanto started immediately after the prime minister’s national broadcast declaring that they would “brook no compromise”, nor would they accommodate the errant ways of those who had not accepted the “True Faith”.²⁰ As such, specific intent to

¹⁵ Compromis ¶29

¹⁶ Compromis ¶33

¹⁷ *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) at523

¹⁸ *Akayesu* (n 17)

¹⁹ *Prosecutor v Mladic and Karadzic*, (Review of the indictments pursuant to Rule 61 of the Rules of procedure and evidence) IT-95-5-R61, (11 July 1996), at. 92 and 94

²⁰ Compromis ¶ 27

commit genocide against the Dasu may also be inferred from the nexus between the broadcast and the subsequent chain of events which followed.

ii) There is ethnic cleansing taking place within Alicanto

Radical Zavaabi groups have undertaken a campaign of atrocity against the Dasu minority. Several Dasu villages in the Rocian Plateau have been burned and thousands of Dasus have been killed.²¹ Tens of thousands of Dasu have fled their homes in fear of an imminent attack and Earth Without Frontiers has reported that there is evidence of a highly sophisticated stash of weapons in the Rocian Plateau.²² Doctors of the World has reported that there is a real prospect of an impending ethnic cleansing²³ and the UN Secretary General has confirmed that “a campaign of systematic violence” is being planned against Dasu civilians.²⁴ Also, intelligence gathered by Ravisia reveal that there is a “real and present danger of ethnic cleansing” that is about to occur in Alicanto.

3. The actions of Alicanto indicate that the state is unwilling and/or unable to protect its citizens from the impending humanitarian catastrophe

The state of Alicanto is incapable of preventing the threatening crisis. It was noted by supporters of the Ravisian Resolutions that “a crisis was imminent and that Alicanto was

²¹ Compromis ¶33

²² Compromis ¶33

²³ Compromis ¶29

²⁴Compromis, Appendix III, ¶10

powerless to prevent it”.²⁵ Also, reports have revealed that Alicantan police have failed to engage in any enforcement activities which would suppress conflicts that broke out in the Northeast Province.²⁶ It was further observed by the UN Secretary General that the only action taken by Alicanto to quell the violence has been the declaration of martial law in two provinces; a measure that has only worsened the situation.²⁷

A. International law recognizes a right of intervention in cases of extreme humanitarian crises

1. Ravisia has a right to intervene in Alicanto under customary international law

It is no longer tenable to assert that international law forbids military intervention whenever a government massacres its own people or a state collapses into anarchy.²⁸ Accordingly, intervention in the interest of humanity is legally permissible where a state violates the fundamental rights of its nationals.²⁹

i. The UN Charter did not abolish the customary right of humanitarian intervention

²⁵ Compromis ¶37

²⁶ Compromis ¶49

²⁷ Compromis ¶49

²⁸ Christopher Greenwood, “*Is There a Right of Humanitarian Intervention?*” The World Today, 49 (2), February 1993, 40.

²⁹ Hersch Lauterpacht (ed) *Oppenheim, International Law*, (8th edn Longmans 1955) at 312-313; See also RJ Vincent, *Human Rights and International Relations* (Cambridge University Press, Cambridge 1986) 127.

The right of humanitarian intervention existed under customary international law prior to the proclamation of the UN Charter. From as early as 1625, it was recognized by Grotius that if a tyrant practices atrocities against his subjects, other states could “take up arms” in protection of the citizens.³⁰ Evidence of state practice is illustrated by the French occupation of Syria in 1860.³¹ The doctrine appears to have been so clearly established under customary international law that only its limit and not its existence was subject to debate.³² The early customary right of humanitarian intervention survived the adoption of the UN Charter. As noted in the Nicaragua case, “customary international law continues to exist and to apply separately from international treaty law, even where the two categories of law have an identical content”.³³ Accordingly, Ravisia’s actions were consistent with customary international law as it existed prior to the proclamation of the UN Charter and as it has continued to exist.

30 Hugo Grotius, *Hugonis Grotii De Jure Belli et Pacis Libri Tres* (JW Parker 1853) 288;

See also Sir Robert Jennings and Sir Arthur Watts, *1 Oppenheim’s International Law* (Longmans & Co 1905), 347

³¹ Simon Chesterman, “*Just War Or Just Peace?: Humanitarian Intervention and International Law*” (Oxford University Press 2003) 32-33

³² Richard Lillich, “Intervention to Protect Human Rights” (1969) 15 McGill Law Journal 205 at 210; JP Fonteyne “The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter” (1974) 4 California Western International Law Journal 203 at 235.

³³ *Nicaragua v US* (Merits) [1986] ICJ 14, 96

ii) *Alternatively, customary international law has evolved to recognise a right of humanitarian intervention*

International law is not a static set of rules but undergoes continuous evolution.³⁴ Accordingly, article 2 (4) did not freeze international law for all time.³⁵ The subsequent practice of states can modify and change an existing rule. In the Nicaragua case, the ICJ held that, “reliance by a state on a novel right or an unprecedented exception to the principle [of non-intervention] might, if shared in principle by other States, tend toward a modification of customary international law”.³⁶

Human rights are increasingly becoming the main concern of the world community. Traditional notions of state sovereignty have given way to the human rights concept of sovereignty of the people.³⁷ Intervention by force might be the only means of enforcing the global humanitarian norms that have evolved.³⁸ Contemporary international law has therefore developed to recognize an independent right of military intervention in the

³⁴ *Barcelona Traction Case (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 at, 33.

³⁵ Anthony D’Amato, “Trashing International Law” (1987) 81 AJIL 101

³⁶ *Nicaragua* (n 33) 207.

³⁷ See Kofi Annan, “Balance State Sovereignty with Individual Sovereignty” (Speech to UNGA on 20 September 1999 http://www.users.lmi.net/wfanca/pp_annan_on_sov.html accessed 3 January 2009

³⁸ Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press 2000) 1

affairs of other states for the purpose of protecting individuals from grave violations of fundamental human rights.³⁹

There have been sufficient examples of humanitarian intervention in the 1990s to confirm the emergence of this principle.⁴⁰ Such examples include ECOWAS's unauthorized intervention in Liberia in 1990.⁴¹ ECOWAS declared that the purpose of the intervention was "to stop the senseless killing of innocent civilian nationals".⁴² Importantly, the intervention evoked "not a peep of censure from either the wider African community of states or the UN".⁴³ In fact, international reaction was generally supportive of ECOWAS⁴⁴ and the Security Council subsequently endorsed the intervention.⁴⁵

39 Bartram Brown, "Humanitarian Intervention at a Crossroads" (2000) 41 William & Mary Law Review 1683, 1686.

40 D Joyner, "The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm" (2002) 13 (3) EJIL 597,602.

41David Wippmann, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Hague, Kluwer Law International 1992) 179.

42 Economic Community of West African States (ECOWAS) Declaration of Heads of State (9th August 1990) UN Doc S/21485

43 Tom Farer, "A Paradigm of Legitimate Intervention" in Damrosch (ed) *Enforcing Restraint: Collective Intervention in Internal Conflicts* (Council on Foreign Relations Press, 1993) 316 , 336.

44 See generally Christopher Greenwood, "Humanitarian Intervention: The Case of Kosovo" (1999)10 Finnish Ybk Intl Law 141

Another example of state practice is the Allied Forces' intervention in northern Iraq. The UK adopted the view that the act was one of humanitarian intervention and was justified based on an exceptional right to intervene on humanitarian grounds.⁴⁶ The actions in Iraq received widespread international support and very few states challenged the assertion of a right of humanitarian intervention.⁴⁷ Additionally, NATO's 1999 intervention in Kosovo provides further illustration of state practice. The primary justification advanced for the NATO action was humanitarian intervention.⁴⁸ Neither the Security Council nor the General Assembly condemned the act⁴⁹ and the Russian draft resolution which sought to denounce NATO's action as being unlawful was defeated by twelve votes to three.⁵⁰ Consequently, a major application of armed force had taken place without any authorization or condemnation by the Security Council.⁵¹ Furthermore, the overwhelming

45 UNSC Res 788 (19 November 1992).UN Doc S/Res/788

46 See Sir Jeremy Greenstock, Permanent Representative to the UK (Statement at 3988th Meeting of the UN Security Council 24 March 1999) UN Doc S/PV 3988; See also, Memorandum from Tony Aust, British legal counsellor to the Foreign and Commonwealth Office (1992) 63 BYBIL 824, 827.

47 *Greenwood* (n 44).

48 See Statement of the Canadian Representative and Statement of the Netherlands Representative, (Debate in the Security Council 24 March 1999) UN Doc S/ PV 3988;

49 *Greenwood* (n 44).

50 SC Draft Resolution (25 March 1999) UN Doc S/1999/328

51 Dino Kritsiotis, "The Kosovo Crisis and NATO's Application of Armed Force Against the FRY" (2000) 49 (2) ICLQ 330.

majority of states did not condemn the intervention as illegal.⁵² More recently, it has been reaffirmed that military intervention for human protection purposes is warranted where serious and irreparable harm is occurring to humans or is imminently likely to occur.⁵³

For custom to emerge, international law does not require that there should be unanimity in state practice;⁵⁴ and it is not necessary that there should be consistent repetition over time.⁵⁵ There is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.⁵⁶

2. State sovereignty is not a legitimate justification for denying Ravisia the right of humanitarian intervention

The right of humanitarian intervention does not violate the UN Charter and the principles of sovereignty and non-intervention espoused therein. The concept of state

⁵² Antonio Cassese, "A Follow-Up: Forcible Humanitarian Countermeasures and Opinion Necessitatis" (1999) 10 EJIL 791, 792.

⁵³ ICISS (n1)

⁵⁴ *Nicaragua* (n 33)

⁵⁵ *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark*)(1969) ICJ Rep 3

⁵⁶ The Restatement (Third) vol 1 para 102.25.

sovereignty is subject to restrictions and exceptions.⁵⁷ The modern international human rights regime constitutes limitations on the sovereignty of states that have signed on to the respective conventions,⁵⁸ thus representing an erosion of absolute sovereignty. Accordingly, the principle of humanitarian intervention is an exception to the concept of state sovereignty.

Alternatively, the traditional concept of sovereignty is being re-defined.⁵⁹ An oppressive government can no longer violate the most basic tenets of international human rights law and expect to hide behind the mask of sovereignty in order to escape the consequences of its actions.⁶⁰ This view was also advanced by Judge Weeramantry in the Legality of the Use of Force case in which it was asserted that “the concept of sovereignty is no protection against action by the world community to prevent [wide-scale human rights] violations”.⁶¹ Consequently, the concept of sovereignty does not preclude Ravisia from intervening in Alicanto for the purpose of protecting the nationals thereof.

3. Ravisia’s intervention in Alicanto is not inconsistent with article 2(4) of UN Charter

⁵⁷Francis Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Martinus Nijhoff Publishers 1999)17

⁵⁸ *Abiew* (n 57), 63

⁵⁹ Kofi Annan, “Two Concepts of Sovereignty” *The Economist*, 18 September 1999.

⁶⁰ *Greenwood* (n 46), 174

⁶¹ *Yugoslavia v Belgium* (1999) ICJ Rep 124.

Article 2(4) of the UN Charter does not preclude the use of force to prevent human rights violations. The prohibition contained therein is directed at force used against the territorial integrity and political independence of a state.⁶² Territorial integrity refers to the prevention of a permanent loss of a portion of one's territory.⁶³ Force used strictly for the purpose of humanitarian intervention is not force used against the territorial integrity or political independence of the target state.⁶⁴ Furthermore, the use of force on strictly humanitarian grounds is in conformity with the most fundamental peremptory norms of the Charter.⁶⁵ Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is consistent with the purposes of the Charter, it is a distortion to argue that it is precluded by article 2(4).⁶⁶ Consequently, Ravisia is not in breach of the Charter.

II. THE COURT SHOULD DECLINE TO CALL UPON RAVISIA TO PRODUCE ITS CLASSIFIED INFORMATION. ALTERNATIVELY, NO EVIDENTIARY BENEFIT SHOULD BE AFFORDED TO ALICANTO SHOULD RAVISIA

62 Charter of the United Nations (adopted 25 June 1945, entered into force 24 October 1995) 1UNTS 993 art 2 (4).

63 Anthony D'Amato, *International Law: Process and Prospect* (Transnational Publishers 1987)

64 Ulrich Beyerlin, "Humanitarian Intervention" in 3 *Encyclopaedia of Public International Law*, 212 (North Holland Publishing 1982)

65 Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, (2nd ed, Trans-National Publishers Inc 1997)151

66 Richard Lillich (ed), *Humanitarian Intervention and the United Nations*, (University Press of Virginia 1973) 177

**CONTINUE TO WITH-HOLD THE INFORMATION AND THE
SECRETARY-GENERAL CANNOT LAWFULLY HAND IT OVER TO
ALICANTO**

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

Article 49 of the Court's Statute empowers the court to call upon a state to produce certain documents.⁶⁷ However, essential state interests can be jeopardized when sensitive documents are disclosed in a public international procedure.⁶⁸ In the instant case, the documents sought by Alicanto are classified documents,⁶⁹ the disclosure of which could seriously prejudice the national security of Ravisia.

The Court has always exercised great restraint in applying the power contained in Article 49.⁷⁰ In the Bosnia Genocide case, the ICJ decided that it would not accede to the Applicant's request to be provided with certain documents contained in the possession of the Respondent.⁷¹ This was so, notwithstanding the fact that the documents "would have

⁶⁷ Statute of the International Court of Justice (adopted 25 June 1945, entered into force October 24 1945) 15 UNCTIO 355 (ICJ Statute) art 49.

⁶⁸ Herwig Roggemann and Peter Sarcevic (eds), *National Security and International Criminal Justice* (Kluwer Law International 2002)164.

⁶⁹ Compromis ¶ 35.

⁷⁰ Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study of Evidence Before International Tribunals* (The Hague, Kluwer Law International 1996)

⁷¹ *Bosnian Genocide Case (Bosnia & Herzegovina v Serbia & Montenegro)* [2007] ICJ Rep 140.

shed light on the central questions” facing the Court.⁷² Similarly, in the Corfu Channel case, the Court found that “the determination of the national security needs of each state is a fundamental attribute of its sovereignty”.⁷³ Accordingly, the UK was allowed to with-hold documents necessary for the trial on the basis of national security.

The practice of the ICTY⁷⁴ and other criminal tribunals, to request the production of documents should not be adopted by the ICJ. International criminal tribunals were established for the trial of individuals charged with serious international crime.⁷⁵ In order to fulfil this purpose, criminal tribunals may need to request that states produce certain documents.⁷⁶ In contrast, the ICJ is not a court of criminal jurisdiction.⁷⁷ As such, the need for disclosure is not as potent as in the case of criminal tribunals. Consequently, the disclosure practice of criminal tribunals should not be adopted by this Court.

1. The Court may not lawfully compel Ravisia to produce its classified information

⁷² *Bosnian Genocide Case* dissenting opinion of Vice-President Al-Khasawneh (n 71).

⁷³ *Corfu Channel Case (UK v Albania)* [1949] ICJ Rep. 4

⁷⁴ *Prosecutor v Blaskic Case IT-95-14-T*(18 July 1997)

⁷⁵ *Roggemann and Sarcevic* (n 68),64

⁷⁶ *Roggemann and Sarcevic*

⁷⁷ Shabtai Rosenne and Terry Gill, *The World Court: What It Is and How It Works* (BRILL 1989), 37.

The Court lacks the power to compel the production of documents.⁷⁸ Unlike national courts, the ICJ has no procedure by which one party can compel the disclosure of evidence by the other since compelled disclosure is inconsistent with the nature of sovereignty.⁷⁹ Additionally, Ravisia has no legal obligation to produce the documents.⁸⁰ Accordingly, should the Court request that Ravisia produce its classified intelligence, it has no further power to compel disclosure.

2. Alternatively, the Court should decline to afford Alicanto any evidentiary benefit should Ravisia continue to with-hold classified intelligence

The statute of the Court provides that it shall take formal note of any refusal regarding production of documents.⁸¹ However, this provision ought not to be interpreted as permitting the Court to draw adverse inferences.⁸² Refusal to disclose evidence may be the result of considerations that are entirely neutral with respect to the issue of liability.⁸³

⁷⁸ Kazazi (n 70),308.

⁷⁹Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995); *Corfu Channel Case* (n 73)

⁸⁰ Ruth Teitelbaum, “Recent Fact-Finding Developments at the ICJ” in *The Law and Practice of International Courts and Tribunals* 6 (2007) 119, 133

⁸¹ Statute of the ICJ (n 67) art 49.

⁸² Andreas Zimmermann and others, *The Statute of the International Court of Justice – A Commentary* (Oxford University Press 2006) 1106

⁸³ William Schabas, “Fair Trials and National Security Evidence” 4(1 *International Commentary on Evidence* 2005

As such, the Court should not readily draw an adverse inference against Ravisia should the state refuse to produce its classified intelligence. In practice, the Court has always been prudent in applying the provision contained in Article 49.⁸⁴ In the Corfu Channel case, the UK declined to produce certain documents requested by the Court. The ICJ held that it could not “draw from this refusal to produce the orders any conclusions differing from those to which the actual event gave rise”.⁸⁵ Consequently, no adverse inference was drawn against the UK. More recently, in the Bosnia Genocide case, the Court held that it “had not failed to note the Applicant’s suggestion that the Court may be free to draw its own conclusions”⁸⁶ where the respondent had failed to produce certain documents. However, as indicated in the dissenting opinions, the Court did not draw a negative inference against the Respondent.⁸⁷ The decisions of the Court demonstrate that the Court has no power to draw adverse inferences, or in the alternative, that if such a power exists, the Court will not exercise it in practice. Accordingly, this Court should refuse to grant Alicanto any evidentiary benefit should Ravisia decline to disclose classified information.

B. The Court has no jurisdiction to issue a declaration on the legality of the Secretary-General handing over Ravisian intelligence

⁸⁴ *Kazazi* (n 70); *Teitelbaum* (n 80) 131

⁸⁵ *Corfu Channel Case* (n 73)

⁸⁶ *Bosnian Genocide Case* (n 71) 6.

⁸⁷ *Bosnian Genocide Case* (n 71) Dissenting opinion of Judge ad hoc Mahiou, 56-63.

Only states may be parties before the Court.⁸⁸ A case cannot be brought by or against a non-state entity.⁸⁹ The UN Secretariat is a non-state entity.⁹⁰ As such, the Court is not competent to resolve disputes concerning states and the Secretary-General. Furthermore, the ICJ is not a constitutional court; it was not given the power of judicial review over the actions taken by international organizations.⁹¹ As such, the Court has no jurisdiction to issue a declaration on the legality of the Secretary-General's actions. Moreover, the decision of the Court has no binding force except between the parties to the dispute.⁹² As such, its decisions cannot produce direct legal effects in terms of the nullification of any act or omission of an international organization.⁹³ Consequently, the Court has no jurisdiction to issue a declaration concerning the legality of the Secretary-General's refusal to hand over classified intelligence to Alicanto.

C. Alternatively, the Secretary-General may not lawfully hand over the intelligence to Alicanto

88 ICJ Statute (n 67)art 34.

89 Hugh Thirlway, "The International Court of Justice" in Malcolm Evans, *International Law* at 568, (2nd. ed Oxford 2003).

90 *UN Charter* (n 62) art 7.

91 *Rosenne and Gill* (n 77); *Certain Expenses of the United Nations Case* (Advisory Opinion) [1962 ICJ Rep 168.

92 ICJ Statute (n 67) art 59 ; *Thirlway* (n 89)580.

93 Kaiyan Kaikobad, *The ICJ and Judicial Review: A Study of the Court's Powers with Respect to Judgments of the ILO and UN Administrative Tribunals*, (The Hague, Kluwer Law International 2000) 45-46.

1. Disclosure of classified intelligence is restricted to authorized members of the UN

The information being sought is classified information. Classified information that is in the possession of the UN Secretariat is only accessible to authorized staff members.⁹⁴ Furthermore, it is stipulated that the operation of the UN is premised on the principles of openness and transparency “except insofar as the nature of the information concerned is deemed confidential”.⁹⁵ This implies that the possession of confidential information is a legitimate exception to the general approach of transparency. Accordingly, the Secretary-General may not lawfully hand over classified information to Alicanto.

2. Alternatively, the Secretary-General is bound by a legal undertaking

The Secretary-General has made a binding legal undertaking that he would not divulge the intelligence received from Ravisia.⁹⁶ This declaration constitutes a legal undertaking which is binding on the Secretary-General. In the Eastern Greenland dispute case, the court found that an oral declaration made by the Norwegian Foreign Minister on behalf of his government - in response to a request by the representative of Denmark - on a question within his competence was binding upon Norway like any other contractual obligation.⁹⁷ Similarly, in the Nuclear Tests Cases, the Court held that it had “no doubt”

⁹⁴ Secretary-General Bulletin ‘ Information Sensitivity and Classification Handling ‘ (Secretary General Bulletin) (2007) UN Doc ST/SGB/2007 s 3.2(d)

⁹⁵ *Secretary General Bulletin* (n 94) section 1.1

⁹⁶ *Compromis* ¶ 38

⁹⁷ *Legal Status of Eastern Greenland Case: (Norway v Denmark)* (1933) PCIJ Rep Ser A/B No 53 at 71

that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations.⁹⁸ In the instant case, the Secretary-General has given an undertaking to Ravisia on the issue of maintaining confidentiality.⁹⁹ This is a matter which is within the competence of the Secretary-General.¹⁰⁰ As such, this declaration constitutes a legal undertaking by which the Secretary-General is bound to uphold. Consequently, the Secretary-General cannot lawfully hand over the intelligence to Alicanto.

III. THE CONDUCT OF RAVISIAN TROOPS WHILE STATIONED AT CAMP TARA DID NOT VIOLATE INTERNATIONAL LAW, OR THE SOVEREIGNTY AND RELIGIOUS INTEGRITY OF ALICANTO

A. The radio broadcasts were expressly authorised

The broadcast of radio communication by Ravisian soldiers from the operating headquarters of Camp Tara was authorized under the UNMORPH mandate¹⁰¹ to *inter alia*, encourage the progressive development of the various communities in Alicanto. Specific provisions of the Status of Forces Agreement (SOFA) concluded between the UN Secretary General and Alicanto¹⁰² also authorized such radio broadcasts. There is no rule of conventional or customary international law prohibiting UNMORPH from airing radio broadcasts containing programmes which conflict with the religious teachings and

⁹⁸ *Australia v France; New Zealand v France* (1974) ICJ Rep 253, 457

⁹⁹ Compromis ¶38

¹⁰⁰ *Secretary-General Bulletin* (n 94) section 6.1

¹⁰¹ Compromis Appendix I ¶ 6

¹⁰² Model Status-of-Forces Agreement for Peacekeeping Operations Report of the Secretary General (SOFA) A/45/594, 9 October 1990 art 4: s 10 & 11

ordinances of Alicanto¹⁰³ where the content of such programmes come under UNMORPH's mandate.¹⁰⁴ This is supported by the acts of several Western governments and NGO's who funded radio stations that broadcast messages of peace and reconciliation in the aftermath of the crisis in Bosnia.¹⁰⁵

1. Alicanto's censorship of the radio broadcasts is in violation of international law

The UNMORPHS's radio broadcasts constituted official communication under the Convention on the Privileges and Immunities of the United Nations¹⁰⁶ and cannot therefore be lawfully controlled or circumscribed¹⁰⁷ by the Government of Alicanto.¹⁰⁸ The term 'official communication' as used in the Convention is not defined, and ought therefore to be interpreted in the context of the treaty in accordance with its object and purpose.¹⁰⁹ The object and purpose of the treaty can be derived from its preamble which refers to the privileges and immunities being necessary for the fulfillment of the UN's

¹⁰³ John L Martin 'International Propaganda' *New York Times*, (August 9, 1949) 11

¹⁰⁴ Compromis Appendix I ¶ 4

¹⁰⁵ Charlotte Eager, C. 'Desperately Seeking Bosnia's Truth: Ship-board pirate radio station Radio Brod offers music, news and relief for Bosnian refugees' *Observer* (London) (Sept. 19, 1993) 17.

¹⁰⁶ Convention on the Privileges and Immunities of the United Nations (Convention on Privileges) (adopted 13 February, 1946) art 6

¹⁰⁷ Compromis ¶ 17

¹⁰⁸ *Convention on Privileges* (n 106) art 3

¹⁰⁹ *Convention on Privileges* art 31 (2)

mandate¹¹⁰. Official communications can therefore be interpreted to refer to content deemed by the UNMORPH to be in furtherance of its mandate¹¹¹ which is to restore peace and security to the Alicantan people and to contribute to their progressive development.

The attempt by the Alicantan Government to censor the content of UNMORPH's radio broadcast also contravened the SOFA¹¹² which affords the peacekeeping operation unrestricted communication by radio within the host country.

To the extent that section 11(b) of the SOFA confers rights upon UNMORPH which conflict with the corresponding provision in the SOFA requiring peacekeeping operations to respect the local laws of the host state¹¹³, the rule *lex specialis derogat legi generali* [A provision governing a specific subject matter is not overridden by a law which only governs general matters] ought to apply. This maxim is a generally accepted technique of interpretation and conflict resolution in international law¹¹⁴.

i) The citizens of Alicanto have a right to receive information under international law

¹¹⁰ Preamble to the *Convention on Privileges*

¹¹¹ *Compromis* (n 104)

¹¹² SOFA art 4 :s 11 (b)

¹¹³ SOFA art 4: s 6

¹¹⁴ See *Beagle Channel Arbitration (Argentina v Chile)* ILR 52 [1979] 141, paras 36,38 and 39 ; *Brannigan and McBride v The United Kingdom, (Judgment)* ECHR Series A (1993) No. 258, 57 -76.; ILC, Report of the International Law Commission: 58th S' (1 May - 9 June and 3 July - 11 August 2006) United Nations Publications, 2006

Further, the restriction on the content of radio broadcasts to which the Alicantan people may be exposed impairs their freedom to seek, receive and impart information;¹¹⁵ to be free from coercion and to adopt a religion or belief of their choice.¹¹⁶ These guarantees are not absolute and may be subject to legitimate restrictions provided that a three part test is met.¹¹⁷ The restrictions must be prescribed by law, they must protect a legitimate aim identified in the Articles, and must be proportionate to achieving this aim.¹¹⁸ Whilst the first rung of this test may have been met, Alicanto is unable to justify that the censorship protects any of the recognized legitimate aims.¹¹⁹

This, accordingly, constitutes a violation of Alicanto's obligations under the ICCPR.¹²⁰ In the early 1950's the United Nations Economic and Social Council's Sub-Committee on Freedom of Information and the Press condemned the Soviet Union for "deliberately interfering with the reception by the people of the USSR of certain radio signals originating beyond the territory of the USSR. The Sub-Committee declared that this type of interference was "a violation of the accepted principles of freedom of information, and

¹¹⁵ International Covenant on Civil and Political Rights (ICCPR) (adopted December 16 1966, entered into force March 1976) 99 U.N.T.S 171 art 19(2)

¹¹⁶ ICCPR art 18(2)

¹¹⁷ ICCPR arts 13(3) & 19 (3);

¹¹⁸ ICCPR (n 115)

¹¹⁹ *Süreker v Turkey (No 2)* (App. 2452 22 /94) ECHR 8th July 1999

¹²⁰ ICCR art 2(1)

condemned all measures of this nature.¹²¹ As stated by the United Nations Human Rights Committee: “Because of the development of the modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.”¹²²

Major General Skylark was therefore not obligated to alter the content of the programs or seek permission to broadcast programs regarded by Alicantan officials as secular. In her capacity as the Special Representative to the Secretary General of the UN, and Force Commander of the Mission she was bound to uphold the principles of human rights over the municipal laws of the state of Alicanto.¹²³

ii) The content of the radio broadcasts furthered UNMORPH's mandate

The UN Security Council Resolution 167¹²⁴ reaffirmed that, where appropriate, UN peacekeeping and other relevant missions should provide for the dissemination of information about international humanitarian, human rights and refugee law and the application of relevant Security Council resolutions. Resolution 5440 was adopted to allow UNMORPH to contribute to the successful completion of the peace process in the

¹²¹ J MetzL. ‘*Rwandan Genocide and the Law of Radio Jamming*’ 91 Am. J. Int’l L. 628 (1997)

¹²² Commentaries on Article 19 of the ICCPR, (adopted by the HRC at its 461st meeting on 27 July 1983) UN Doc. A/38/40,109

¹²³ See ILC International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts: art 32

¹²⁴ UNSC Res 167 (28 April 2006) UN Doc S/RES/167, 17

Rocian Plateau.¹²⁵ UNMORPH considered communication of basic civil rights guaranteed to Alicantan women and young people under the ICCPR as integral to the progressive development of the Alicantan women and young people and therefore central to the peace process. This is consistent with the method of using radio communication to harness peace employed by Vatican Radio and other outlets.¹²⁶

iii) The radio broadcasts were employed as a lawful countermeasure to Alicanto's breach of its obligations and its media incitement

The Draft Articles¹²⁷ recognize the right of an international organization to adopt proportionate¹²⁸ countermeasures against a state who has failed to comply with its obligations under international law.¹²⁹ Such countermeasures should however be

¹²⁵ Compromis, Appendix I

¹²⁶See Marilyn Matelski, "Vatican Radio: Propagation by the Airways" (Greenwood Publishing 1995)

¹²⁷ Georgio Gaja, UNGA Sixth Committee 'Report on Responsibility of International Organizations' (Sixth Committee Report) 1 April 2008) UN Doc A/CN.4/597

¹²⁸ *Sixth Committee Report* (n 127) ASR art 54 ; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ 7

¹²⁹ *Sixth Committee Report* n 127) See ASR art 52; Statements of Denmark on behalf of the five Nordic countries (A/C.6/62/SR.18, para. 101), Japan A/C.6/62/SR.19, para. 100), the Netherlands (A/C.6/62/SR.20, para. 40) and Belgium (A/C.6/62/SR.21, para. 91).

restricted to those that are within the limits of the organization's mandate.¹³⁰ These provisions mirror rules of customary international law¹³¹ contained in the ILC's Draft Articles on State Responsibility.

UNMORPH was entitled through its mandate to employ radio communication as a counter to Alicanto's breaches of its obligations under the ICCPR and its incitement¹³² of the Alicantan people through the use of similar media.¹³³ These Alicantan Prime Minister's messages threatened international peace, and to this extent UNMORPH had the right to take steps to counter it. Both the Security Council and the International Community have noted¹³⁴ the fragility of the situation which prevails in the Rocian Plateau – one that is attributable to the Zavaabi led Government's campaign to quell discordant views regarding the Talonnoc faith.¹³⁵ It has been recognized that countering

¹³⁰ Statement of the Russian Federation (A/C.6/62/SR.21), para. 71).Switzerland (A/C.6/62/SR.21), para. 86)

¹³¹ D.J. Harris, *Cases and Materials on International Law* (6th ed Sweet and Maxwell 2004), 504

¹³² Robert Edwin Hersztein, *The War that Hitler Won: the Most Infamous Propaganda Campaign in History* (1978); Francois J. H, *Incitement and The Media: Responsibility of and for the Media in the Conflicts of the Former Yugoslavia* (Human Rights Centre, University of Essex), Papers in the Theory and Practice of Human Rights No.3, 1993)

¹³³ Compromis ¶ 27

¹³⁴ Compromis Appendix II;III

¹³⁵ Compromis, Appendix III: ¶ 1

such incendiary communications¹³⁶ and pronouncements systematically, using information warfare can be a lawful and effective technique toward securing human right.¹³⁷

The use of radio communication to educate Alicantans about their civil rights and reproductive health was calculated to reassure and restore peace and security to the Alicantan people whilst Alicanto was on the brink of a crisis. The programmes were broadcast to counter the promulgation of strict orthodox Talonnic teachings which incited the population of Alicanto to riot and unrest.

B. In any event, Ravisia bears no liability for any wrongdoing that may have been committed in the services of the United Nations

1. Neither the alleged sexual misconduct nor the radio broadcasts is attributable to Ravisia

Ravisia maintains that the radio broadcasts did not violate international law. If it is determined that the radio broadcasts violated international law, the Court should find in the alternative that such conduct does not entail the international responsibility of Ravisia because it is not attributable to Ravisia under international law¹³⁸. Ravisia further asserts

¹³⁶ Compromis ¶27

¹³⁷ A Kuperman. ‘The Other Lesson of Rwanda: Mediators Sometimes Do More Damage than Good’ SAIS Review - Volume 16, Number 1, (Winter-Spring Johns Hopkins University Press, 1996), pp. 221-240

¹³⁸ ASR art 2 (a); App. No. 71412/01 *Agim Behrami and Bekir Behrami v. France*, and App. No. 78166/01 *Ruzhdi Saramati v. France, Germany and Norway*, Grand Chamber decision of 2 May 2007 (*Behrami/Saramati*)

that even if the Court determines that the alleged sexual misconduct violated international law, it should hold that such conduct cannot be attributed to Ravisia.

Where a public body of one state is made available to another state in order to implement aspects of the latter state's authoritative power, then the actions of that body or entity are imputed to the receiving state.¹³⁹ This rule applies by analogy to instances where executive agencies [such as the armed forces] of a state are made available to International Legal Organizations (ILO's) that possess legal personality in international law. In the Draft Articles on Responsibility of International Organizations,¹⁴⁰ draft article 5 sets out a corresponding principle attributing conduct in similar instances to the international organizations. It provides 'The conduct of an organ of a state or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law as an act of the latter organisation if the organisation exercises *effective control* over that conduct.'¹⁴¹ [emphasis mine]

¹³⁹ ASR art 6.

¹⁴⁰ See Official Records of the General Assembly. Fifty-ninth Session, Supplement No. 10 (A/59/10), at paras 64-72

¹⁴¹ See ILC :Report of the International Law Commission, General Assembly Official Records, 56th session, Supplement No. 10 A/59/10 (2004) ; Report of the Special Rapporteur on the Responsibility of International Organisations, (2 April 2004) UN Doc A/CN.4/541,

2. The United Nations exercised effective control over the conduct of Ravisian troops at all material times prior to the termination of the UNMORPH and whilst they were stationed in the territory of Alicanto

The question of attribution in the context of the contribution of troops to the UN for peacekeeping is admittedly problematic.¹⁴² It is recognized that the TCC does retain some control by way of its disciplinary powers and criminal jurisdiction over its troops.¹⁴³

It is submitted nonetheless that the UN rather than Ravisia exercised effective control over the conduct of the Ravisian troops for the following reasons: The Ravisian troops were at all material times a cohesive force acting under the operational command of General Skylark as Special Representative to the Secretary General and Force Commander. General Skylark was in turn acting under the terms of the UNMORPH mandate and Resolution 5440. The troops were not at any time acting under national command. There is nothing to suggest that there was any logistic, strategic or operational cooperation between General Skylark and the Ravisian Government – it was not a joint operation. The entire peacekeeping operation benefitted through the SOFA from certain privileges and immunities granted to the United Nations and its subsidiary organs under the Convention on the Privileges and Immunities of the UN.¹⁴⁴

¹⁴² See the ILC Commentary on Draft Articles on the Responsibility of International Organizations (DARIO)

¹⁴³ DARIO (n 142)

¹⁴⁴ SOFA, arts 3 & 4 (15)

The setting up of a radio station to communicate on a local and national level was authorized under UNMORPH's Resolution 5440, as well the SOFA. The State of Ravisia was not a party to the SOFA, and was not authorized to play any role in the peacekeeping operation under the Resolution. In the aftermath of the NGO's findings on sexual misconduct the UN Secretary General set up a Commission of Inquiry without any reference to the Ravisian authorities.¹⁴⁵ In respect of the sexual misconduct, any argument that this was a personal act of the peacekeeper that was not supported or authorized by the United Nations, or that was expressly prohibited by the UN Peacekeepers Code of Conduct does not absolve the UN of liability.¹⁴⁶

The UN Legal Counsel stated that "As a subsidiary organ of the UN an act of a peacekeeping force is, in principle imputable to the organization, and if committed in violation of an international obligation entails the international responsibility of the organization and its liability in compensation."¹⁴⁷ The responsibility for the actions of the Ravisian troops therefore rests on the UN to whom the Ravisian troops were seconded for service under UNMORPH. The UN has in practice assumed responsibility for damage

¹⁴⁵ Compromis ¶21

¹⁴⁶ DARIO art 7; *Ireland v. the United Kingdom*, (Judgment) ECHR 18 January 1978, at para. 159. See also *Ilacu and others v. Moldova and Russia*, (Judgment) ECHR 8 July 2004, at para. 319

¹⁴⁷ Unpublished letter from the UN Legal Counsel to the Director of the UN Office of Legal Affairs (of 3 February 2004), in Kjetil Mujezinović Larsen, *Attribution Of Conduct In Peace Operations: The 'Ultimate Authority And Control' Test* 19 EJIL 509

caused by military forces during peace operations, ostensibly on the same legal basis¹⁴⁸. This, along with the decisions of several international courts and the opinion of jurists seem to suggest a uniformed view that the UN ought not to be absolved in these instances.¹⁴⁹ This view is consistent with principles enunciated in the European Court of

Human Rights' in the cases of *Behrami* and *Seramati*.¹⁵⁰

3. Ravisia did not subsequently acknowledge or adopt the actions of its troops

Conduct unaffiliated with a state may subsequently be attributed to a state if it acknowledges and adopts such actions ex-post facto¹⁵¹. The International Law Commission's Articles on State Responsibility which codifies customary law recognize both the "control" and the "acknowledgment" bases for state responsibility¹⁵². Ravisia was not given the opportunity to take any steps to respond to the allegations of

¹⁴⁸ See The Special Rapporteur's Second Report on Responsibility of International Organizations (2004). A/CN.4/541, at paras 34 ff; See *Larsen* (n 147)

¹⁴⁹ Elizabeth F. Defeis, U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity, 7 Washington University Global Studies Law Review 185 (2008) ; See also Peck, 'The U.N. and the Laws of War: How can the World's Peacekeepers Be Held Accountable?' 21 Syracuse J Int'l L & Com. (1995) 283, at 293

¹⁵⁰ *Behrami/Saramati* (n 138)

¹⁵¹ *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, [1980] ICJ 3, 19

¹⁵² See James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press 2002).

misconduct of its troops. Ravisia's complicity arising from its failure to prosecute the troops in circumstances such as these is insufficient to constitute an adoption or acknowledgement of the actions of its troops. Adoption or acknowledgement requires clear, unequivocal and explicit ratification and adoption of the misconduct, which cannot be proven by Alicanto.¹⁵³

C. No Alleged injury to Applicant warrants reparations

The state of Ravisia is under no obligation to make reparation to Alicanto for any alleged injury to its social fabric. Reparations are the legal consequence of an internationally wrongful act.¹⁵⁴ There is an international wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law, and constitutes a breach of an international obligation of the State.¹⁵⁵ As stated in the foregoing assertions, the state of Ravisia has not committed an internationally wrongful act and is therefore not liable to make reparations.¹⁵⁶

¹⁵³ Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts- International Law Commission, UN Doc A/56/ 10 (2001), pp 121-122 ; T Becker, *Rethinking the Rules of State Responsibility*. Oxford. Hart Publishing, p 17 ; See also *Iran Hostages Case* (n 151)

¹⁵⁴ ASR art 28

¹⁵⁵ ASR art 2

¹⁵⁶ *Chorzów Factory*, (Germany v Poland) [1928] PCIJ (ser. A) No.17 (September 13 1928)

IV. 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

A. Alicanto has violated international law and will further violate international law if it were to carry out the death penalty on Piccardo Donati

Alicanto has breached customary international law by reintroducing the death penalty into the laws of its state¹⁵⁷. Article 6 of the ICCPR points to the abolition of the death penalty as a human rights objective and implies that states that have already abolished the death penalty may not reintroduce it. Several multilateral treaties and the work of the Law Commission affirm that there is a uniformed view among states that the reintroduction of the death penalty into the laws of a state violates international humanitarian and human rights law. The American Convention for instance, affirms explicitly that states may not reintroduce capital punishment once they have abolished it.¹⁵⁸

If Alicanto were to carry out the death penalty on Piccardo Donati it would derogate from its obligations under both conventional and customary rules of international law relating to the right to life, and the prohibition against cruel, inhumane and degrading punishment. It is clear from the *travaux préparatoires* of the Universal Declaration of Human Rights that the death penalty was considered to be fundamentally incompatible with the

¹⁵⁷ ICCPR art 6 ; See Report of the Human Rights Committee, *Kindler v. Canada* (No. 470/1991), U.N. GAOR, Hum. Rts. Comm., 48th Sess., U.N. Doc. CCPR/C/48/D/470/1991 (1993) (Wennergren, dissenting)

¹⁵⁸ William A. Schabas, *International Law & the Abolition of the Death Penalty*, 55 Washington & Lee Law Review 797 (1998)

protection of the right to life, and that its abolition, although not immediately realizable, should be the “common standard of achievement” of the Member States of the United Nations. This uniformed view is also demonstrated by several UN General Assembly and Economic and Social Council resolutions.¹⁵⁹

Though the ICCPR does not directly prohibit capital punishment, it recognizes that a state which carries out the death penalty in the absence of the observance of strict and rigorous procedural rules as to a fair trial, as is guaranteed under Article of the said treaty derogates from an individual’s right to life¹⁶⁰. The trial of Piccardo Donati ‘*in absentia*’ 6 weeks after a manhunt was launched for his arrest and apprehension was also a violation of his right to a fair trial¹⁶¹ and a derogation from Alicanto’s obligations under the ICCPR.

The trial of Piccardo Donati was not fair for the reasons that he was not given sufficient notice of the trial, or afforded the opportunity to hear the charges against him. Further, he was not given the opportunity to instruct counsel on his behalf, or to give evidence in his

¹⁵⁹ G.A. Res. 2393, U.N. GAOR, 23d Sess., Supp. No. 18, at 41-42, U.N. Doc. A/7218 (1969); see also United Nations, Economic and Social Council, Report of the Secretary General, Capital Punishment, 44th Sess., Agenda Item 13, § 11, at 4, U.N. Doc. E/5242 (1973) *Ibid*.

¹⁶⁰ ICCPR art 14

¹⁶¹ *Van Geyseghem v Belgium* [GC], no. 26103/95, 27, ECHR 1999-I and *Bozano v France* Judgment of 8 December 1986, Series A No. 111, 23 ; *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, p. 14 ECHR.

defence. Under Alicantan law may be executed without a retrial if he is apprehended within 12 months of the pronouncement of his sentence. *Piccardo Donati has a right of non refoulement whilst under the protection of the Ravisian forces*

According to the jurisprudence established by the European Court of Human Rights, expelling a foreign national may constitute a violation of the ECHR, if as a result of conversion or deportation, the person in question stands a real risk of becoming subject to torture or other inhuman treatment¹⁶². Both Ravisia and Alicanto are legally bound by a similar prohibition in the ICCPR.¹⁶³

Piccardo Donati also has a right of non refoulement, which is a rule of customary international law.¹⁶⁴ In this regard, UNHCR notes, *inter alia*, the practice of non-signatory States hosting large numbers of refugees, often in mass influx situations.

In the exercise of its supervisory function the UNHCR has closely followed the practice of Governments in relation to the application of the principle of *non-refoulement*, both by

¹⁶² *Soering v. the United Kingdom* 11 ECHR. (ser. A) (1989)

¹⁶³ ICCPR art 7.

¹⁶⁴ See: UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany. <<http://www.unhcr.org/home/RSDLEGAL/437b6db64.html>>, last accessed on December 30, 2008); UNHCR, *Note on the Principle of Non-Refoulement* (EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures)

States Party to the 1951 Convention and/or 1967 Protocol and by States which have not adhered to either instrument. In UNHCR's experience, States have overwhelmingly indicated that they accept the principle of non-*refoulement* as binding, as demonstrated, *inter alia*, in numerous instances where States have responded to UNHCR's representations by providing explanations or justifications of cases of actual or intended refoulement, thus implicitly confirming their acceptance of the principle.¹⁶⁵

The ICJ in the *Asylum Case*¹⁶⁶ found that diplomatic asylum can be legitimately granted in cases of the imminence and persistence of a danger, and that when so granted it was not a matter of law but a matter of humanitarian action: to protect political offenders against the violence and disorderly action of irresponsible sections of the population... and against any measures of manifestly extra-legal character which a government might take or attempt to take against its political opponents.¹⁶⁷

The relevant issue is therefore whether Mr. Donati was subject to imminent danger and risk in Alicanto, whether from the population at large or from agencies of the government. Piccardo Donati is of Dasu origin and is the reputed head of a Dasu support organization. In the current social climate of Alicanto there is sufficient evidence to suggest that persons of Dasu heritage face imminent persecution. The fact that Mr Donati overtly supports Dasu teachings as opposed to those of the Zavaabi majority and the Zavaabi-backed Alicantan government also demonstrates that he faces imminent risk.

¹⁶⁵ UNHCR Note (n 166)

¹⁶⁶ *Asylum Case* (1950) ICJ Rep 266 at 274

¹⁶⁷ 282-3,284

Mr. Donati sought refuge in Camp Tara which was under occupation by Ravisian troops. In these circumstances he had a right of non-*refoulement* to face death in Alicanto. The fundamental humanitarian principle of non-*refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.¹⁶⁸ Lauterpatch suggests that this principle of non-*refoulement* will apply in the specific circumstances of this case, where the refugee or asylum seeker is within his country of origin but has nevertheless sought the protection in the diplomatic mission of another State or comes under the protection of the armed forces of another State engaged in a peacekeeping or other role in the country of origin.¹⁶⁹ In such circumstances, the learned author asserts that the protecting State is subject to the prohibition on *refoulement* and the refugee – to a right of non-*refoulement*.

¹⁶⁸ UNHCR Executive Committee ‘Selected Conclusions on International Protection’ No.6 (XXVIII 1977)

¹⁶⁹ E. Lauterpacht and D. Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003), 87, paras 76-86; See also UK House of Lords, *R. v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others*, 9 Dec. 2004, [2004] UKHL 55.

CONCLUSION AND PRAYER FOR RELIEF

The State of Ravisia requests that this Honourable Court adjudge and:

- 1) **DECLARE** that the presence of Ravisian military forces in Alicanto is fully justified under customary international law;
- 2) **DECLINE** to call upon Ravisia to produce its classified intelligence and to refuse Alicanto any evidentiary benefit should Ravisia continue to withhold the intelligence and **DECLARE** that the Secretary-General may not lawfully hand it over to Alicanto;
- 3) **DECLARE** that Ravisia's conduct at Camp Tara was entirely lawful and that Ravisia bears no liability for any wrong-doing that may have been committed in the services of the United Nations; and
- 4) **DECLARE** that Piccardo Donati need not be handed over to Alicanto where he will be subjected to judicial execution in violation of conventional and customary international law.

Respectfully submitted,

Team 418R

AGENTS OF THE STATE OF ROTANIA