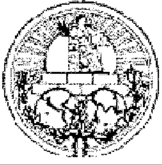

THE 2009 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

BENCH MEMORANDUM FOR JUDGES

THE CASE CONCERNING"OPERATION PROVIDE SHELTER"

Version 3.3

Table of Contents

PART 1: INTRODUCTION 1

I. Purpose of the Bench Memorandum 1

II. Synopsis 1

III. The Legal Issues 3

PART 2: LEGAL ANALYSIS 4

I. Ravisia's Military Presence in Alicanto 4

A. ICJ Jurisdiction 4

B. Ravisia's OPS Intervention 10

C. Ravisia's Continued Presence 16

II. Ravisia's Intelligence on Ethnic Cleansing 19

A. Burden of Proof/Standard of Proof 19

B. Taking "Formal Note" and Drawing Negative Inferences 21

C. Production of Evidence by Ravisia 21

D. Production of Evidence by Secretary-General 23

III. Offensive Radio Broadcasting and Sexual Exploitation 25

A. Radio Broadcasts 25

B. Sexual Exploitation 26

C. Reparations 32

IV. Piccardo Donati's Trial, Sentence, and Asylum 33

A. Due Process Violations 33

B. Death Penalty Under International Law 34

C. Piccardo's Asylum at Camp Tara 39

Appendix A: Basic Materials 44

Appendix B: Timeline 46

Appendix C: Introduction to International Law 49

A. General 49

D. Treaties 49

E. Customary International Law 50

F. General Principles of Law 50

G. Decisions and Publicists 51

H. Burdens of Proof 51

Appendix D: Suggested Questions 52

PART 1: INTRODUCTION

I. Purpose of the Bench Memorandum

The purpose of this bench memorandum is to provide judges in the Jessup Competition with basic factual and legal information to enable evaluation of the written and oral performances of the participating teams. This Bench Memorandum should be read in conjunction with the 2009 Jessup Problem (the "Compromis") and the Corrections and Clarifications to the Compromis. The Compromis was designed to present the competitors with a balanced problem, such that each side has strengths and weaknesses in its case. The Compromis contains a number of legal issues that are relevant to more than one claim for relief, and participants will often need to argue in favor of a rule of law in support of one claim and distinguish the same rule with respect to another claim. Judges should note and question any internal inconsistencies that may arise in a competitor's or team's argument.

This memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis. The state practices and legal authorities are illustrative and not intended to be a comprehensive review of all relevant sources of law. As such, judges should not be surprised when participants present arguments or authorities which are not discussed in this memorandum. This does not suggest that such arguments are not relevant or credible.

II. Synopsis

This year's Compromis focuses on legal issues that arise when members of the international community, either collectively through the United Nations, or individually through unilateral action, intervene in the affairs of a state on humanitarian grounds. Among the many legal issues addressed in this year's Compromis are the following: the prohibition against the use of force; the responsibility to protect; the role of the Security Council in authorizing humanitarian interventions; the fact finding power of the International Court of Justice; the role of the ICJ in matters taken up by the Security Council; restrictions to be applied to humanitarian interventions; international standards of due process; the death penalty under international law; and political asylum.

The dispute at the heart of this year's Jessup Problem involves two states – Alicanto, whose population is composed of two large ethnic groups in tension with one another (the Dasu and Zavaabi); and Ravisia, a former colonial power that establishes a military operation in Alicanto, without the consent of the Alicantan government, in order to prevent what Ravisia characterizes as an impending campaign of ethnic cleansing.

The population of Alicanto is 30% Dasu and 50% Zavaabi. Both groups espouse the Talonnic religion – the Dasu subscribe to a moderate version of the faith, and the Zavaabi to a more orthodox version. The Dasu enjoy a higher standard of living and have historically occupied more influence in government and business.

In the mid 1990's, a Zavaabi political group called the Guardians gained momentum, promoting their aim of reviving the orthodox Talonnic faith and incorporating its tenets into Alicantan law.

In December 2005, the UN Security Council established UNMORPH, a peacekeeping mission in Alicanto with the purpose of maintaining a ceasefire agreement between Alicanto and its neighboring state New Bennu. The two countries had been involved in a conflict over rampant

smuggling of illegal arms and drugs across their shared border. The largest contributor of troops to UNMORPH was Ravisia.

After Alicantans became frustrated with the government's handling of the conflict with New Bennu, the Dasu-led government was turned out of office and emergency elections were called. The election resulted in the installation of a Zavaabi-led government, which put in place Prime Minister Simurg, the leader of the orthodox Zavaabi movement.

During the period of UNMORPH's two and a half year operation, the conduct of the mission's peacekeeping troops came under criticism by human rights observers who discovered a pattern of sexual exploitation by the troops against local young girls.

UNMORPH also came under fire by Alicantan government officials for broadcasting radio programming targeted towards informing local women and children about health, education and human rights. Religious leaders protested, claiming the broadcasts to be offensive and inconsistent with orthodox teachings of the Talonnic faith.

Despite the controversy surrounding these practices, UNMORPH quickly succeeded in achieving its mandated goal. By the end of 2007, the peace between Alicanto and New Bennu was secure and the objectives of UNMORPH had been met. In February 2008, the Security Council passed Resolution 1650, calling for the gradual draw down and termination of UNMORPH by 31 July 2008.

As UNMORPH was nearing the end of its mandate, tensions began to increase between the Dasu and Zavaabi within Alicanto. The Zavaabi-led government rolled out plans to incorporate orthodox Tallonic beliefs into Alicantan law. Initially, members of the Dasu group reacted by protesting. Later on, many Dasu reacted by fleeing the country. Sporadic riots turned into significant violence and NGOs began reporting ethnically charged violence.

On July 3, 2008, the Security Council adopted Resolution 6620, noting its concern about the escalating violence in Alicanto, and urging the government of Alicanto to "to take immediate steps to improve the humanitarian situation."

On July 7, 2008, while traveling to the airport, Prime Minister Simurg was killed in an explosion The assassination was followed by a man hunt for the alleged perpetrator, a Dasu-male named Piccardo Donati. This led to renewed violence between the groups. Six Dasu villages were burned, thousands were killed, tens of thousands of Dasu fled the country, and a weapons cache was discovered.

Ravisia called upon the Security Council and requested that it either (1) renew and expand the UNMORPH mandate; or (2) authorize a collective humanitarian intervention of a group of states led by Ravisia. The Secretary-General submitted a report to the Security Council in which he concluded that a campaign of systematic violence was impending, drawing his conclusions partly on the basis of classified raw intelligence provided by Ravisia. Alicanto demanded access to the intelligence, but the Secretary-General refused to hand it over, citing a promise of confidentiality he made to Ravisia. The President of the Council ruled the demand out of order. After a long debate, resolutions in support of Ravisia's recommended actions failed before the Security Council because two permanent members exercised their veto power.

On July 31, 2008, the Secretary-General terminated UNMORPH as required by Security Council Resolution 1650. Despite this, Ravisian peacekeeping troops remained. The next morning, 600

additional Ravisian troops arrived in Alicanto and the Ravisian Army declared the beginning of "Operation Provide Shelter." Alicanto protested the presence of the Ravisian Army but did not launch any operation to remove OPS troops. Over the next few months, OPS was involved in an average of three operations per week, and effectively extinguished a number of uprisings.

On August 21, the Alicantan government proceeded to a trail in absentia of Piccardo Donati, whom Alicantan authorities had failed to apprehended in the July manhunt. Donati was convicted and sentenced to death for the assassination of Prime Minister Simurg and other crimes. Later, it was discovered that Donati had been granted asylum by Ravisian forces in Alicanto. The Alicantan government demanded that Donati be handed over and that Ravisian forces leave immediately.

On September 17, Alicanto informed Ravisia of its intention to pursue legal action before the International Court of Justice. Alicanto and Ravisia later agreed to submit the dispute to the ICJ by special agreement.

III. The Legal Issues

A. Alicanto has requested that the Court:

1. declare that the occupation of Alicantan territory by Ravisian armed forces since 1 August 2008 has been and continues to be a violation of international law, and order Ravisia to remove its military personnel from Alicanto at once;

2. call upon Ravisia to produce the intelligence that was delivered to the Secretary-General, and if it refuses, deny Ravisia the right to rely on that intelligence directly or indirectly to support the legality of Operation Provide Shelter in international law, or in the alternative, declare that the Secretary General may lawfully hand over the intelligence to Alicanto;

3. determine that, in broadcasting offensive radio programming and sexually exploiting Alicantan children, Ravisian soldiers have committed violations of international law and the cultural and religious integrity of Alicanto, attributable to Ravisia, and order Respondent to make reparations for the injuries to the victims and to Alicanto's social fabric; and

4. order Ravisia immediately to deliver to Alicanto the fugitive Piccardo Donati so that his lawful sentence may be carried out.

B. Ravisia has requested that the Court:

1. declare that the presence of the Ravisian military forces in Alicanto has been and continues to be fully justified under international law;

2. decline to call upon Ravisia to produce its classified intelligence, or in the alternative, decline to afford 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;[1]

3. find that the conduct of Ravisian troops while stationed at Camp Tara did not violate international law, 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 or its citizens warrants reparations; and

4. hold that 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.

PART 2: LEGAL ANALYSIS

I. Ravisia's Military Presence in Alicanto

Does the Court have jurisdiction to determine the legality of the intervention and the authority to order the removal of Ravisian military personnel from Alicanto? Was the OPS intervention of Alicantan territory by Ravisian armed forces since 1 August 2008 a violation of international law? Is the continued presence of Ravisian armed forces a violation of international Law?

This Prayer for Relief arises from Ravisia's OPS military action in Alicanto, purportedly in response to what Ravisia characterizes as an imminent risk of ethnic cleansing. This Prayer for Relief is intended to highlight the tension between one of the primary rules of law–the prohibition against the use of force–and the growing moral and political responsibility of the international community to prevent large scale humanitarian disasters (e.g., genocide, ethnic cleansing).

The main question here is whether there is a basis under international law to justify Ravisia's OPS military action. In addition, the relief sought by Alicanto–the removal of Ravisia's troops from Alicanto's territory–raises various jurisdictional issues regarding the power of the ICJ to consider the question and to grant the remedy sought.

A. ICJ Jurisdiction

Does the Court have jurisdiction to determine the legality of the intervention? Does the court have the authority to order the removal of Ravisian military personnel from Alicanto?

Prior to Ravisia's unilateral OPS intervention in Alicanto, the Security Council passed Resolution 6620, which in relevant part (and using original paragraph numbering):

> (2) Urges Alicanto to take immediate steps to improve the humanitarian situation in the Rocian Plateau and to avert additional widespread suffering;
>
> (5) Reminds all Member States that unrest in Alicanto continues to undermine the stability of the region, and that each of them should remain vigilant and prepared to provide humanitarian assistance and to promote an environment of peace and security; and

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[1] Ravisia does not concede that the Court has the authority to issue a declaration on the legality of the Secretary-General handing over Ravisian intelligence. Ravisia argues, however, that if the Court concludes that it does have such authority, the Court should declare that the Secretary-General may not lawfully hand over the Ravisian intelligence. Clarifications ¶ 7.

(7) *Decides to remain seized of the matter.* [emphasis added]

Subsequently, the Security Council *failed to pass* resolutions authorizing an extension of the mandate of UNMORPH or authorizing action by the regional body, R-FAN (of which Ravisia is a member).

Alicanto will argue that the current dispute is not under consideration by the Security Council and has been brought before the ICJ by consent of the parties, and therefore the ICJ has jurisdiction to decide it as a judicial matter. *Ravisia* will argue that the Court has no authority to entertain this Prayer for Relief since the Security Council has primary responsibility for the maintenance of international peace and security under Chapter VII, and remains seized of this matter, thus making it the only UN organ that may decide whether the security situation in Alicanto is stable enough to order Ravisia's removal. *Ravisia* will argue that a pronouncement by the ICJ on this issue would be tantamount to judicial review of the actions of the Security Council, which is impermissible.

Participants should be prepared to discuss the following issues:

1. ICJ's power of judicial review
2. Matters regarding peace and security
3. Standard of review
4. Remedy sought

1. ICJ's Power of Judicial Review

Does the ICJ have any right of review over the actions of the Security Council?

The UN Charter does not expressly grant the ICJ any right of judicial review over the actions of another UN organ such as the Security Council, the General Assembly or the Secretariat (including the Secretary-General). On the other hand, Article 92 of the UN Charter states that the ICJ is the "principal judicial organ" of the UN.

Alicanto	Ravisia
The right of judicial review exists as a matter of implication from the fact that it is a principal judicial organ, and so the ICJ should have the right to review the validity of the acts of political organs, at least whenever such an act is relevant to a case before the Court.[2]	The states negotiating the UN Charter considered and rejected the inclusion of such a right of review.[3] Article 7 of the UN Charter established six "principle organs of the United Nations: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat." These organs have a "horizontal" relationship in that they are independent bodies which are not subordinate to one another.[4]
In the course of rendering an advisory opinion, the ICJ may be asked to opine upon any question of law, which might	This is a very limited exception and applies only to

[2] Robert F. Kennedy, Note, Libya v. United States: The International Court of Justice and the Power of Judicial Review, 33 VA. J. INT'L L. 899, 913 (1993).

[3] See Report of the Special Subcommittee of Committee IV/2 on the Interpretation of the Charter, U.N. Doc. 750, IV/2/B/1, 13 U.N.C.I.O. Docs. 831, 831-32 (1945).

[4] Michael J. Mathieson, ICJ Review of Security Council Decisions, January 2004, http://www.allbusiness.com/legal/international-law/962047-1.html.

Alicanto	Ravisia
well include the question of the validity or the effect of Security Council decisions.[5]	advisory opinions.[6]
The International Criminal Tribunal for the former Yugoslavia (ICTY) decided it would review the question of whether it had been validly created by the Security Council.[7] It decided that the Security Council's decision was valid and the ICTY had been lawfully created. If a subordinate tribunal can review the Security Council, so can the ICJ.	The ICTY did not consider the question on the basis of some general assertion of a judicial right to review Security Council decisions. Rather, the review was based on the unique situation of the ICTY, which required the ICTY to decide whether it was lawfully created so as to comply with the requirement of fundamental international due process in criminal proceedings.[8] With that one exception, there has been no assertion by a judicial body of a right to review decisions of the Security Council.[9]
However, in the South West Africa Case, the ICJ later went on to evaluate whether a resolution of the Security Council was binding and found that it was binding because it was adopted in conformity with the principles and purposes of the UN Charter. The ICJ thus suggested that it can consider the legal consequences of the action of other UN organs when such consideration is indispensable to the proper disposition of the case.[10] Accordingly, although the ICJ cannot formally review the acts of the Security Council, it may interpret the meaning and application of Security Council resolutions.[11]	The ICJ has expressly indicated that it does not have a general right of judicial review. In the South West Africa Case, the ICJ held "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned [General Assembly and Security Council]."[12]

2. Matters of international peace and security

If the ICJ does have a general right of review, may the ICJ review the action or inaction of the Security Council where the maintenance of international peace and security is involved?

The Security Council must decide under Chapter VII of the UN Charter whether a situation constitutes a threat or breach of the peace or act of aggression, and if so, what measures are to be taken to resolve such a situation.

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[5] See Mathieson, supra note 4.

[6] See Mathieson, supra note 4.

[7] Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ICTY (1995).

[8] See Mathieson, supra note 4.

[9] See Mathieson, supra note 4.

[10] See Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa Case), 1971 I.C.J. 16, 187-116 (21 June).

[11] See Mathieson, supra note 4.

[12] See Advisory Opinion, Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (July 20); Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 45 (June 21).

Even if the ICJ has a power of judicial review, in light of the Security Council's role in maintaining international peace and security, does the ICJ have the power to also rule on matters relating to the maintenance of international peace and security?

Alicanto	Ravisia
	The Security Council has ultimate responsibility for maintaining international peace and security under Chapter VII of the UN Charter. The measures adopted with respect to a state by the Security Council under Chapter VII prevail over any other international obligations.[13]
	The Charter clearly gives authority only to the Security Council to make such decisions regarding international peace and security. These are decisions that are essentially political, factual, and discretionary in character, and not easily subject to judicial standards. In the exercise of Chapter VII functions by the Council in crisis situations, there is a definite need for rapid decisions that are authoritative, that will be taken by all parties as being final and binding, and that they cannot hope to reverse through some other process. Otherwise, the effectiveness of the Council in such crisis situations would be seriously compromised. This leads to the conclusion that, even if there were a general right of judicial review over Council decisions, it is unlikely that the Charter really contemplated that there would be judicial review of decisions by the Council under Chapter VII.[14]
In the Lockerbie Case, Libya requested measures in direct conflict with two resolutions of the Security Council under Chapter VII. The Court avoided answering the question of the court's power to review Security Council resolutions. However, because the ICJ assumed jurisdiction to hear the Lockerbie Case on the merits despite the existing Security Council resolutions, the Court implied that it had the authority to hear an argument that a Security Council decision under Chapter VII violated international law.	However, in a dissenting opinion to the Lockerbie Case, Judge Schwebel stated: [T]he Court ... is particularly without power to overrule or undercut decisions of the Security Council made by it in pursuance of its authority under Articles 39, 41 and 42 of the Charter to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to decide upon responsive measures to be taken to maintain or restore international peace and security.
In the Tehran Hostages Case, the ICJ was asked to address a situation where the SC was "actively seized of the matter." The ICJ held: Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its	

[13] United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 ICJ 40.

[14] See Mathieson, supra note 4.

Alicanto	Ravisia
functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.	
The SC's exercise of authority over this situation in resolution 6620 does not preclude the ICJ from ordering Ravisia's removal. In fact, ordering such removal would be consistent with the SC's later decision not to authorize Ravisia's intervention. The fact that the SC decided to remain seized of the matter does not affect the jurisdiction of the ICJ over similar issues that may be properly raised before the Court. In any case, resolution 6620, was not made under Chapter VII, unlike Security Council Resolution 5440.	The Security Council, which decided to remain seized of this matter, is the only UN organ that can order the removal of its presence from Alicanto. An ICJ order calling for it to leave Alicanto would be inconsistent with SC resolution 6620, which invites the international community's involvement. As long as Alicanto fails to comply with the resolution by failing to improve the humanitarian situation in its country, the ICJ should not order the removal of Ravisia, which is the only entity ensuring that there will be no additional widespread suffering. Security Council Resolution 6620 recalls Resolution 5440 and is clearly connected to it

3. Standards of judicial review

If a right of review regarding matters of international peace and security exists, what is the standard of review for such decisions?

Even if the ICJ has judicial review powers over actions by the Security Council in relation to the maintenance of international peace and security, the issue arises as to the standards the ICJ should apply.

Alicanto	Ravisia
There is no question of validity here, only a question of the meaning of the Security Council's resolutions.	In advisory opinion cases, the ICJ has already said that there would be a presumption of validity attached to decisions made by the major political organs.[15] In relation to Chapter VII resolutions, that would be reinforced by the factors mentioned above-that the decisions in question really involve political judgments, essentially matters of political discretion, and, in fact, it would be difficult to find definitive standards by which the Court could review decisions of the Council on such matters.
In any case, the relevant resolution is 6620, which is not expressed to be made under Chapter VII.	Security Council Resolution 6620 recalls Resolution 5440 and is clearly connected to it.

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[15] See Advisory Opinion, Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (July 20); Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 45 (June 21).

4. Remedy

Does the International Court of Justice have authority to call upon Ravisia to remove its military personnel from Alicanto?

Alicanto will argue that the Court has the authority to order the removal of a state from another state's territory. *Alicanto* will argue that the Court should exercise such authority in this case because the continued presence of Ravisian forces in Alicanto is an unauthorized and illegitimate use of force.

The ICJ is authorized to decide "the nature and extent of the reparation to be made for the breach of an international obligation" under Article 36 (2)(d) of the ICJ statute. In the absence of specific guidelines concerning remedies, the approach developed by the Court should be found in its case-law. Commentators note that, in this sphere, the ICJ has extensively applied general principles of procedural law.[16]

According to Article 30 of the Articles on State Responsibility, the state responsible for an international wrongful act has a duty to cease the act if it continues. The benchmark case on remedies is *Factory at Chorzow*, where the ICJ's predecessor, the Permanent Court of International Justice (PCIJ), held:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals is that reparations must, as far as possible, wipe out all of the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[17]

Alicanto	Ravisia
Once it concludes that Ravisia's intervention and continued presence is wrongful, the Court has the authority to order the removal of Ravisian forces from Alicantan territory. Supporting ICJ case law: • Nicaragua v. USA (holding that the US "is under a duty immediately to cease and refrain from all such acts as may constitute breaches of the foregoing legal obligations") • Temple Case (holding that "Thailand is under an obligation to withdraw any military or police forces" from the Temple) • Cameroon v. Nigeria (obligating both parties to withdraw their military, police, and administration from the affected areas "expeditiously and without condition")	

[16] I. Brownlie, Remedies in International Law / 50 Years .

[17] Factory at Chorzow, Merits, 1928, P.C.I.J., Series A, No. 17, p. 47.

Alicanto	Ravisia
The Court should exercise its authority in this case because the first and most appropriate remedy for Ravisia's unlawful use of force and illegal presence in Alicanto is to order Ravisia to leave Alicantan territory.	

B. Ravisia's OPS Intervention

Was Ravisia's OPS intervention a violation of international law?

Alicanto will argue that Ravisia's OPS intervention was an unlawful use of force, in violation of Article 2(4) of the UN Charter that was not justified under any emerging norm of humanitarian intervention. *Ravisia* will counter that it's OPS intervention was in furtherance of its responsibility to protect Alicantans from an impending ethnic cleansing, and that international law recognizes its right to militarily intervene for humanitarian reasons when the state at issue is unwilling or unable to protect its own people from ethnic cleansing.

Participants should be prepared to discuss the following issues:

1. General prohibition against the use of force
2. Emerging norm permitting humanitarian interventions
    (a) Right to humanitarian intervention/Responsibility to protect
    (b) Collective vs. unilateral action
    (c) Restrictions on humanitarian interventions

1. Prohibition against the Use of Force

Article 2(4) of the UN Charter provides that "all Members . . . shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[18]

The UN Charter recognizes only two exceptions to this prohibition against the use of force: First, Article 51 affirms the right of a state to use force in self-defense in the case of an armed attack. Second, under its Chapter VII powers, the Security Council may authorize the use of force in the territory of a Member State in order "to maintain or restore international peace and security." UN Charter, Art. 42.

In this case, Ravisia's troops were originally part of UNMORPH, a UN peacekeeping mission authorized by the Security Council to maintain a ceasefire between Alicanto and its neighboring country New Bennu. By the end of March 2008, the original purpose of the mission had been achieved and only Ravisian troops remained as part of UNMORPH. On 31 July 2008, the peacekeeping mandate expired and the Secretary General announced the termination of UNMORPH. However, the Ravisian forces stayed and Ravisia brought in 6,000 additional troops. Thereafter, Ravisia's continued military presence on Alicanto's territory was not lawful unless justified under some other rule of international law.

[18]See also Simma, The Charter of the United Nations: A Commentary, 123 (2002) (prohibition includes any use of armed force, even small and temporary operations that do not result in any deprivation of territory).

In this case, there will be argument over Ravisia's conduct in retaining a troop presence in Alicanto after the expiration of the UNMORPH mandate, and Ravisia's sending of further troops and equipment into Alicanto.

Ravisia's attempt to justify OPS as necessary to avoid impending ethnic cleansing in Alicanto, is an example of what some scholars have described as a "humanitarian intervention". Significant disagreement exists regarding whether there is any legal foundation for treating "humanitarian interventions" as an exception to the prohibition against the use of force.

2. Humanitarian Intervention

(a) Right to Humanitarian Intervention/Responsibility to Protect

Since the 1648 Treaty of Westphalia, the foundational principle of international law has been the sovereignty of states. Article 2(1) of the UN Charter states that the UN is based on the principle of the sovereign equality of all its members. This principle of sovereignty incorporates the prevailing norm of non-intervention, which prohibits states from violating the territorial integrity or interfering in the internal affairs of another state. As noted above, this prohibition specifically covers the use of force, under Article 2(4) of the UN Charter.

The existence of a right to intervene in the affairs of another state on humanitarian grounds, as an exception to this prevailing norm of non-intervention, is the subject of much debate among international legal scholars.

No treaty or decision of an international tribunal explicitly recognizes a right to humanitarian intervention. However, a growing number of scholars and UN bodies are acknowledging the emerging principle of the "Responsibility to Protect" (R2P), which provides that (1) states have the primary responsibility to protect their people, and (2) when a state fails to live up to its responsibility, the international community may intervene. Sources supporting the R2P principle include:

- United Nations Report of the Secretary-General's High Level Panel on Threats, Challenges and Change, A/59/565 (2 December 2004). This report recognizes and

  > "endorse[s] the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide or other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."

- 2005 World Summit Outcome, UN Doc. A/60/L.1 (Sept. 20, 2005)

  > "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity."

  > "We are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations

as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity."

- Report of the International Commission on Intervention and State Sovereignty (2001) – This report recognizes a responsibility to protect persons from certain humanitarian disasters (genocide, war crimes, ethnic cleansing, and crimes against humanity), and argues that, when a population is suffering serious harm as a result of a state's failure to act, the norm of non-intervention yields to the responsibility to protect.
- UN Security Council Resolution 1706. This resolution cites and applies the R2P principle in the specific situation of Darfur, but in doing so explicitly "invites the consent" of the Sudanese government.

Ravisia is likely to assert that the right to humanitarian intervention has developed into a rule of customary international law. However, Ravisia bears a heavy burden of establishing the existence of that right.[19] Ravisia will face a tough challenge in demonstrating state practice and evidence of *opinion juris*.

(b) Collective vs. Unilateral Right

Many who recognize a right to humanitarian intervention only recognize the right when it is being exercised collectively. They reject the idea that a state may unilaterally intervene in another state's affairs for humanitarian reasons.[20]

Among those who argue in favor of a collective right, some maintain that collective action can only be taken through the UN Security Council. Under this view, the right to humanitarian intervention is not a new exception to the prohibition against the use of force, but rather one manifestation of the Security Council's Chapter VII authority "to maintain or restore international peace and security."[21]

Others, however, argue that a humanitarian intervention can be accomplished through collective action by a regional security organization (e.g., NATO's humanitarian intervention in Kosovo), or in some cases, by unilateral action of another state. Proponents of this view cite the limited ability of the Security Council to act in highly controversial situations due to its political nature and the veto power of its permanent members, and thus argue that Security Council inaction should not prevent a regional security organization or an interested state from taking action to prevent a humanitarian crisis.

[19]See Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276-77 (Nov. 30).

[20]See The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty (2001); see also 2005 World Summit Outcome, U.N. Doc. A/60/L.1 (Sept. 20, 2005) (suggesting that "relevant regional organizations" may be involved in action to protect populations from genocide, war crimes, ethnic cleansing, and other crimes against humanity).

[21]UN Charter, Art. 42.

(c) Restrictions on Humanitarian Interventions

Advocates of the R2P principle articulate stringent requirements that must be met before a military intervention may take place on humanitarian grounds (See, e.g., Report of the International Commission on Intervention and State Sovereignty).

(1) Just Cause

Humanitarian intervention can only be justified in cases where a state is failing to protect its population from large scale atrocities such as genocide, war crimes, ethnic cleansing, and crimes against humanity.[22] In the present case, the atrocity that Ravisia claims is the justification for the intervention is ethnic cleansing. Ethnic cleansing loosely refers to the persecution through imprisonment, expulsion, or killing of members of an ethnic minority by an ethnic majority in order to achieve ethnic homogeneity in a majority-controlled territory. No legal definition of ethnic cleansing appears in any international treaties or instruments.

(2) Right Intention

The primary purpose of a lawful humanitarian intervention must be to halt or avert human suffering. The intervening state must not have ulterior motives or have a bias for or against any groups involved in the human suffering.

(3) Necessity (Last Resort)

A military intervention for humanitarian reasons must occur only as a last resort.[23] "Every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored."[24]

(4) Proportionality

A humanitarian intervention should generally comply with the doctrine of proportionality. This broadly accepted legal doctrine arose as a *jus ad bello* standard in defining the concept of a just war and is enshrined as a condition for the exercise of legitimate self-defense in Art. 51 UN Charter. To comply with this doctrine, a state engaged in armed conflict must ensure that the incidental harm caused to civilians or civilian property by its military actions is proportional and not excessive in relation to the concrete and direct military objective.[25] Additionally, the state must ensure that any derogations from international human rights law (IHRL) during the course of its military operations are proportionate in the sense of being the least intrusive way to achieve the desired result.[26]

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[22]See 2005 World Summit Outcome, U.N. Doc. A/60/L.1 (Sept. 20, 2005).

[23]See 2005 World Summit Outcome, U.N. Doc. A/60/L.1 (Sept. 20, 2005) (indicating that if a State fails to prevent ethnic cleansing within its own borders, the international community will "take collective action, in a timely and decisive manner, through the Security Council, in accordance with [Chapter VII]").

[24]ICISS Report at 36.

[25]ICJ Advisory Opinion on the Legality of Use and Threat of Use of Nuclear Weapons.

[26]ICJ Advisory Opinion on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory.

While the principle of proportionality is applicable to different areas of international law, it has not received universal recognition in cases of occupation and humanitarian intervention. Nevertheless, those who support the R2P principle identify proportionality as a key requirement of any humanitarian intervention. "The scale, duration, and intensity of the planned intervention should be the minimum necessary to secure the humanitarian objective in question."[27]

(5) Reasonable Prospects

Any proposed humanitarian intervention must also be reasonably calculated to succeed. "Military action can only be justified if it stands a reasonable chance of success."[28]

(6) International Humanitarian Law

Finally, humanitarian interventions which amount to military actions are subject to the precepts of international humanitarian law (ILH), also known as "the law of war." Most of the principles of IHL can be found in the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.

Alicanto	**Ravisia**
Prohibition against Use of Force Ravisia has violated Article 2(4) by keeping its peacekeeping troops in Alicanto and bringing in more troops for OPS after UNMORPH's mandate expired. Alicanto will further argue that neither of the exceptions to Article 2(4) apply: Ravisia was not acting in self-defense and the UN did not renew UNMORPH's mandate or authorize a unilateral intervention by Ravisia.	*Prohibition against Use of Force* Ravisia was permitted to use force in self-defense because the humanitarian crisis in the Rocian Plateau threatened regional security. This would not be a strong argument since there is no factual predicate to indicate that the security interests of Ravisia were threatened.
Right to Humanitarian Intervention A right to humanitarian intervention does not exist in customary international law. Even if a norm is emerging, it has not yet crystallized into a binding rule of international law. There is a wealth of state practice rejecting the R2P principle. A recent example includes statements made by China and Russia in 2006 during the Security Council's debate on Resolution 1706 regarding the expansion of a UN peacekeeping mission in Dafur. In expressing tepid support for the principles embodied in the resolution, both China and Russia, who abstained from the vote, emphasized that any action taken in Darfur be done only "with the consent of the Sudanese Government," thus emphasizing the importance of the principle of sovereignty. Many other countries, however, condemned the NATO strikes as unlawful.	*Right to Humanitarian Intervention* OPS is justified as a humanitarian intervention to prevent the ethnic cleansing of Dasu by Zavaabi. A right to humanitarian intervention is supported by various state practice and legal authorities. One example is the ICJ case filed by Yugoslavia against various countries in connection with their participation in the NATO air strikes in Kosovo. In this case, Belgium asserted the doctrine of humanitarian intervention as justification for these strikes. The United Kingdom and the Netherlands also claimed that these strikes were permissible under international law.
Collective Action	*Collective Action*

[27]ICISS Report at 37.

[28]ICISS Report at 37.

Alicanto	Ravisia
Even if a right to humanitarian intervention exists, it cannot be exercised unilaterally by Ravisia, but rather must be exercised collectively by the Security Council, which decided in this case not to act when it failed to renew UNMORPH's mandate on July 24, 2008.	The right to humanitarian intervention can be exercised unilaterally by a single state or collectively by a group of states. The veto by two permanent members of Security Council of the motion to reauthorize UNMORPH does not preclude it and the other members of R-FAN from intervening in Alicanto to prevent ethnic cleansing. The failure of the United Nations to properly intervene to stop the genocide in Rwanda and to address the current situation in Darfur demonstrates that the UN should not be the only organization vested with the right to humanitarian intervention.
Just Cause Even if a right of unilateral humanitarian intervention exists, no intervention was justified in this case. Alicanto was not failing to protect its citizens from genocide, war crimes, ethnic cleansing, or crimes against humanity. The evidence supporting Ravisia's claims of ethnic cleansing is not reliable and does not meet the high standard required to prove that there was an impending humanitarian catastrophe that would justify the breach of its sovereignty.	*Just Cause* Ravisia will argue that it was acting to prevent imminent ethnic cleansing in the Roccian Plateau. Evidence of the impending catastrophe was plentiful. There were reports of massive killings of Dasu and evidence of attacks against them by Zavaabi.[29] The Alicantan government proved that it was unwilling and unable to protect its Dasu citizens from the impending ethnic cleansing.
Right Intention (Impartiality) Ravisia, as a former colonial master, whose companies maintain strong commercial interests in Alicanto, had ulterior motives for OPS. Through OPS, Ravisia is seeking to (1) undermine the newly-instituted and Talonic-inspired Alicantan judicial code, (2) protect Ravisian commercial interests in Alicanto, and (3) support the Dasu minority in opposition to the Zavaabi minority. These unbiased and selfish interests disqualify Ravisia from having the right to intervene in this case.	*Right Intention (Impartiality)* Ravisia was acting solely in the best interests of all Alicantan citizens, both Dasu and Zavaabi, in preventing ethnic cleansing. There was near unanimous authorization of the mission by R-FAN and a close vote by the Security Council. Ravisia had only humanitarian motives, which were shared by members of the international community, and by the R-FAN family of nations in particular.
Necessity (Last Resort) There were other non-military ways to prevent the ethnic cleansing which Ravisia claims was imminent. Ravisia did not consult with the Alicantan government about its concerns and did not fairly pursue all diplomatic options before launching OPS.	*Necessity (Last Resort)* Ravisia had intelligence suggesting that ethnic cleansing was imminent and that Alicanto was unable or unwilling to prevent it. The Alicantan only acted to exacerbate the situation by implementing controversial laws that prompted more violence between ethnic groups. Ravisia may invoke the Bosnian Genocide Case,[30] in which the ICJ held that the FRY had a responsibility (and failed to meet its responsibility) "to employ all means reasonably available to it" to prevent the Srebrenica massacres given its special influence and control over the area where the violence took place, and the strength of its

[29]Compromis ¶33.

[30]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ.

Alicanto	Ravisia
	political, military and financial links to the perpetrators. The duty to prevent genocide is triggered when the State learns of the serious risk of genocide. Ravisia will draw an analogy and claim that its responsibility to protect Alicantans was triggered when it learned of the impending campaign of ethnic cleansing. Ravisia's connection to and presence in Alicanto will bolster the analogy.
Proportionality Ravisia's OPS intervention, which involved thousands of military troops and the unlawful occupation of Alicantan territory, was not a proportionate measure.	*Proportionality* Ravisia will argue that it has narrowly focused its OPS operations on preventing ethnic cleansing by policing the Rocian Plateau and by breaking up riots in the Northeast Province. Ravisia will also point to the low number of casualties and the fact that OPS troops have not been significantly involved in military activity or violence.

C. Ravisia's Continued Presence

Is Ravisia's continued presence in Alicanto a violation of international law?

Once teams have addressed whether Ravisia's military intervention was justified, the next step is to consider the lawfulness of Ravisia's continued presence on Alicanto's territory. There are broadly two approaches to evaluating this issue:

1. *Alicanto* may argue that, if Ravisia's military intervention was unlawful in the first place (see Section B above), Ravisia's continued presence will constitute a "belligerent occupation" – that is, a situation where the control and authority over a territory passes to a hostile army – and Ravisia's continued presence does not comply with the rules governing belligerent occupation;

2. *Alicanto* may argue *additionally or solely* that if Ravisia's military intervention was justified –most plausibly under the doctrine of humanitarian intervention–Ravisia nevertheless cannot justify its continued presence in light of the restrictions that apply to humanitarian interventions.

1. Belligerent occupation

Some Alicanto teams may attempt to raise the belligerent occupation argument against Ravisia. If they do, they will need to rely on the relevant Laws of War which govern belligerent occupation. The relevant Laws of War have largely been codified in the Hague Conventions of 1907, and supplemented by the Fourth Geneva Convention of 1949. Alicanto will need to establish the relevant provisions are rules of customary international law, since neither Alicanto nor Ravisia is a party to the relevant treaties.

However, although the argument that Ravisia's presence amounts to a belligerent occupation is legitimate, there are few facts in the Compromis to support that the relevant rules have been breached. Sophisticated teams will realize that they are better to avoid raising this argument, and focus their attention elsewhere. Judges may want steer the argument away from any discussion of belligerent occupation and the Laws of War.

2. Relevant Restrictions on Humanitarian Interventions

Alicanto will argue that Ravisia's continued presence is a violation of international law because intervention is no longer necessary and because Ravisia's force size and conduct in Alicanto are disproportionate to the alleged threat. *Ravisia* will argue that their continued presence is necessary in order to establish peace and security and to remove the threat of ethnic cleansing.

The teams will attempt to repeat their analysis about Ravisia's compliance with the standards or requirements for valid humanitarian interventions. This time, the arguments need to address the slightly different issues which arise in relation to Ravisia's *continued presence* (as opposed to the right to intervene in the first place).

See above for a discussion of the meaning of the relevant restrictions. But note that the requirements of "just cause" and "reasonable prospects" are not really relevant to evaluating Ravisia's right to remain on Alicanto's territory for humanitarian reasons.

Alicanto	Ravisia
The continued presence of Ravisian troops on its territory constitutes an unjustified violation of its sovereignty under Art. 2 (4) of the UN Charter.[31]	In continuing its presence in Alicanto, Ravisia is acting in accordance with UN Security Council Resolution 6620 and with its responsibility to protect the people of Alicanto, which includes the responsibility to rebuild. Ravisia has complied with the restrictions of humanitarian interventions, which requires, among other things, necessity and proportionality.
Consent The continued occupation of Ravisia for humanitarian reasons would only be legitimate with the consent of the Alicantan government, which is clearly missing in this case. Ravisia has not permission from Alicanto to remain on its territory. Alicanto point to the fact that the UN, even in the humanitarian crisis in Darfur, invited the consent of the government of Darfur.	*Consent* Alicanto has closed its eyes to the tensions, and is clearly not going to consent to humanitarian assistance even though it is still required.
Necessity Ravisia's continued presence is no longer necessary as there is no longer a grave or imminent peril of ethnic cleansing. Ravisia's continued presence is not the only or the least intrusive means of maintaining a stable environment without the threat of ethnic cleansing. The UN is the more appropriate entity to decide how the ongoing situation in Alicanto should be handled.	*Necessity* There were no other effective means for safeguarding the interests of Alicantans under the current circumstances, given the unwillingness of the Alicantan government to protect its people and the paralysis of the Security Council, which is politically divided on the present case. Ravisia's presence is necessary to restore order in Alicanto. Although a government exists, it is not effectively meeting its responsibility to protect the people of Alicanto. The Alicantan Parlimant's recent adoption of orthodox Talonnic laws, which discriminate against Dasu women, serves as evidence that the government is aggravating, not improving, the situation, thereby requiring the ongoing presence of Ravisian troops to

[31]See also General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states.

Alicanto	Ravisia
	prevent ethnic tensions from erupting.
Proportionality Ravisia's continued presence is not proportionate because "the scale, duration, and intensity of the [continued] intervention" is not "the minimum necessary to secure the humanitarian objective in question".[32] Many months have passed since OPS began and there is no evidence of a continuing threat (if there was ever a threat). Ravisia cannot justify keeping the same number of troops, doing the same things, as they were at the beginning of OPS. Alicanto may point to examples of more proportionate measures that should be taken: • offering humanitarian assistance without a continued physical presence • requesting the Security Council to suggest measures (e.g., agreeing to adopt sanctions against the Alicantan government if they fail to act to protect its people) • referring the issue to the UN Peacebuilding Commission as the competent UN body for legitimate multilateral consultations on post-conflict reconstruction and institution-building • establishing a more limited Ravisian military presence in a buffer zone in Alicanto which would allow for the normal functioning of the rest of the state	*Proportionality* Ravisia's continued presence in Alicanto has been and remains proportionate. Through this presence, Ravisia has achieved its goals of managing easing ethnic tensions without any large-scale violence. However, although the situation appears to have improved, the facts do not justify a reduction in the number of troops, or a reduction in the scale of operations. Absent action by the government or the UN to secure the removal of the risk of further violence, the current level of Ravisian activity and troops will remain necessary and therefore proportionate.
Right Intentions The continuing offensive radio programming and recent sexual exploitation of local girls reflect that Ravisia has no regard for the people of Alicanto, and that their presence is not one of right intentions.	
Security Council There is no legal authorization for Ravisia's continued presence in SC Resolution 6620, citing in particular para. 5, which calls only for "humanitarian assistance" to be provided if the unrest continues as opposed to humanitarian intervention.	*Security Council* SC Resolution 6620 authorizes its continued presence by calling upon member states to be prepared "to promote an environment of peace and security" and that its continued presence is necessary to prevent instability in the region.
	Examples of Occupations As an example, the Coalition Provisional Authority in Iraq is not under UN auspices. The occupation was later endorsed by SC Resolution 1483, which authorized occupation "until an internationally recognized, representative government is established." Ravisia will

[32] As support, Alicanto may cite to the Nicaragua Case and Congo v. Uganda, the ICJ found disproportionate interference in the internal affairs of the applicant states. Alicanto may also give the recent example of the continued Russian presence in Georgia, which lasted only one month but was broadly criticized by a number of states as disproportionate.

Alicanto	Ravisia
	argue that its presence has a similar objective, that it must continue, and that it will be proportionate until its attainment.

II. Ravisia's Intelligence on Ethnic Cleansing

Ravisia says that it has what its President calls "extremely reliable intelligence" that "a real and present danger of ethnic cleansing on a massive scale [was] about to occur in Alicanto." It relied on this intelligence in its unsuccessful attempt to seek Security Council resolutions to extend the mandate of UNMORPH or authorise collective action by R-FAN, and later to justify its unilateral intervention. Despite the importance of this intelligence, only the UN Secretary-General has seen this intelligence, which in turn was relied on for the Secretary-General's report to the Security Council.

In these circumstances, it is understandable that Alicanto wants to see Ravisia's intelligence and to have the chance to address or rebut it, or alternatively to deny Ravisia the opportunity of relying on the intelligence to justify its actions.

Alicanto would need to get the intelligence from either Ravisia or the UN Secretary-General. However, there are difficult questions of whether there are any legal means for Alicanto to get what it wants through the ICJ. Should the International Court of Justice call upon Ravisia to produce the intelligence delivered to the Secretary-General? What is the consequence if Ravisia fails to produce the evidence if so called upon? Can the International Court of Justice declare that the Secretary-General may lawfully hand over the evidence to Alicanto?

A. Burden of Proof/Standard of Proof

It is a general principle of law that the party making an affirmation of fact has the burden of proving such fact (actori incumbit probatio).[33] In this particular case, the Secretary General relied on intelligence provided by Ravisia in making conclusions about impending ethnic may relies on its own intelligence and the conclusions of the Secretary General, conclusions which are based on the same intelligence. Ravisis

The ICJ has maintained a high standard of proof to prove charges of "exceptional gravity against a State."[34] Such charges require "evidence that is fully conclusive."[35] However, the ICJ has also

[33] Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, 1984 ICJ 437 ("[I]t is the litigant seeking to establish a fact who bears the burden of proving it"). *See also*, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 ICJ 204 ("On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it.").

[34] Corfu Channel Case (UK v Albania), Merits, 1949 ICJ 4, 17.

[35] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment 2007 ICJ 209.

maintained that in cases when one party has exclusive control of the evidence, the other party may have "more liberal recourse" to facts and circumstantial evidence.[36]

Teams have to address the issue of who bears the burden of proof in respect to the legality of Ravisia's presence and conduct within Alicanto's territory. Teams must also identify the standard of proof that is required, and should address, in particular, whether the conclusions of the Secretary General are sufficient in themselves to prove a justification for Ravisia's intervention, or whether the raw intelligence data is required in order for the Court to make any finding. Failing the disclosure of such data, the value of other evidence should be discussed in order to discharge this burden.

Alicanto	Ravisia
Ravisia has the burden of establishing that its OPS intervention, which violated the sovereignty of Alicanto, was justified under international law.	Ravisia meets its burden of proof through the presentation of the Secretary General's report[37] as well as the fact that its own intelligence reports that "a real and present danger of ethnic cleansing on a massive scale"[38] was threatened.
In order to properly rebut Ravisia's factual claims about the impending ethnic cleansing, Alicanto is entitled to have access to the raw intelligence data that prompted these conclusions.	The raw intelligence may not be provided due to national security issues.
Ravisia has the burden of proof because it has control over the only available raw evidence affirming the real risk of large-scale ethnic cleansing. Ravisia has control because the only other entity possessing the evidence (UN Secretary General) is under a duty of confidentiality not to release the raw intelligence data.	
Since Ravisia refuses to produce the intelligence data, the Court should deny Ravisia the right to rely on that intelligence directly or indirectly to support the legality of Operation Provide Shelter.	Ravisia can rely instead on other evidence on the impending ethnic cleansing without seeing the raw intelligence upon which the SG drew the same conclusions: • Doctors of the World report of hundreds of deaths in Northeast Province and prospect of "ethnic cleansing on a massive scale"[39] • Declaration of martial law[40] • Flow of refugees fearing imminent persecution[41] • SC Resolution 6620 ("confirmed reports of new violence"; "continuing violence"; "threat of impending large-scale human suffering")[42]

[36] Corfu Channel Case (UK v Albania), Merits, 1949 ICJ 4, 18 ("[T]he victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence [...] It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.").

[37] SG's Report, Compromis, Appendix III, ¶10.

[38] Compromis ¶34.

[39] Compromis ¶29.

[40] Compromis ¶29.

[41] Compromis ¶29.

[42] Compromis, Appendix II, ¶29.

Alicanto	Ravisia
	• Assassination of Prime Minister Simurg[43] • Burning of six Dasu villages[44] • Earth Without Frontiers report of thousands of deaths and new wave of tens of thousands of Dasu refugees[45] • Earth Without Frontiers report of Zavaabi weapons cache[46]

B. Taking "Formal Note" and Drawing Negative Inferences

Article 49 of the Statute of the Court expressly provides that "Formal note shall be taken of any refusal" by a State to produce evidence which has been requested by the ICJ. The ICJ has also maintained that in cases when one party has exclusive control of the evidence, the other party may have "more liberal recourse" to facts and circumstantial evidence.

In this case, the raw intelligence data on which the Secretary General based his report and upon which Ravisia justified the presence of its armed forces in Alicanto's territory is entirely under the control of Ravisia and remains highly classified. [47]

Alicanto	Ravisia
Alicanto will argue that the Court should take formal note if Ravisia refuses the information. Alicanto will argue that by "taking formal note", the Court should deny Ravisia's right to rely on evidence to support the legality of OPS if it refuses to produce such data. Alicanto will also argue that by "taking formal note," the Court should make negative inferences (about the lack of evidence of ethnic cleansing) based on Ravisia's failure to produce the intelligence data.[48]	Ravisia will argue that the Court may not draw negative inferences if Ravisia does not produce the intelligence data since there is a legitimate reason for refusing to produce such data (national security). Ravisia may also reply that since the legality of OPS does not depend on its intelligence data but on certain facts which are known to the Court, the Court may not draw any such inferences from Ravisia's failure to produce such evidence.[49]

C. Production of Evidence by Ravisia

Should the International Court of Justice call upon Ravisia to produce the intelligence delivered to the Secretary-General? What is the consequence if Ravisia fails to produce evidence if so called upon?

[43] Compromis ¶32.

[44] Compromis ¶33.

[45] Compromis ¶33.

[46] Compromis ¶33.

[47] Compromis ¶35.

[48] Parker v. United Mexican States, 21 AJIL 174, 177 (1927) (failure to produce evidence "unexplained" may be taken into account when reaching a decision).

[49] Corfu Channel Case (UK v Albania), Merits, 1949 ICJ 4, 32 (the Court states it cannot draw any inferences which differ from its conclusions from analysing the facts of the case even though the UK declined to produce evidence requested by the Court citing naval secrecy).

Alicanto will argue that the Court may and should order Ravisia to produce the intelligence data notwithstanding its highly classified status. Alicanto will further argue that Ravisia should not be allowed to rely on the intelligence to support its claims in this case if it fails to produce evidence such evidence. *Ravisia* may counter that the Court should not request it to disclose the confidential intelligence data, but that if requested, Ravisia is excused from producing such data without consequence since it would be contrary to its essential interests.

Article 49 of the ICJ Statute states:

> The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

This rule provides that the Court may request a party to produce evidence. It does not, however, empower the Court to compel a party to produce evidence. Thus, while the ICJ does have authority to call upon Ravisia to produce the raw intelligence, Ravisia may refuse.[50]

Rule 62(1) of the Rules of Court provides:

> The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may *consider to be necessary* for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose. (emphasis added).

This rule reinforces the authority of the Court to request evidence. By using the words "to be necessary", the rule also suggests that the ICJ is more likely to request the production of evidence when such evidence is integral to the resolution of the case.

Alicanto	Ravisia
The overriding interest of justice requires the Court to assert that Ravisia has a duty to produce the intelligence data and to request that Ravisia produce the evidence in satisfaction of that duty.[51] The raw intelligence was integral to the case and that the Court has to avail itself of all possible evidence and resources available to it under its Statute and Rules in order to make its finding.[52]	

[50] Application of the Convention on the Prevention and Punishment of the Crime of Genocide Bosnia and Herzegovina v. Serbia and Montenegro, Merits (Diss. op. Mahiou), ICJ 2007 (stating that there is no obligation concerning cooperation in evidentiary maters in the Statute or Rules of the Court and that any such cooperation is an act of good faith by the relevant party). There has been a historical reluctance to empower the Court with fact-finding authority that would be in tension with state sovereignty. When revising the Rules of the PCIJ of 1936, the Second Committee questioned whether it was "possible to say anything [in the Statute or Rules of Court] about the duty of a party to produce all relevant information in its possession." The Second Committee considered best to refrain from affirming the existence of a duty to produce all relevant information in the possession of the parties since sometimes "governments must claim to exercise occasionally the right to refuse to produce a document on the ground of public interest, and of that interest it claims to be the sole judge" concluding that "the matter will have to be regulated in the future by a convention."

[51] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), New Application: 1962, Preliminary Objections (Sep. op. Bustamante), 1964 ICJ 78, 80 ("I naturally accept that in each case the onus of proof is placed on one of the parties, but it is also true that the overriding interests of justice give the Court the faculty of taking such steps as are possible to induce the parties to clarify what is not sufficiently clear.").

[52] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits (Diss. op. Mahiou), ICJ 2007.

Alicanto	Ravisia
Necessity The Secretary General's report to the Security Council was based precisely on Ravisia's raw intelligence data and that such data is necessary for the Court to analyse the legal basis for Operation Provide Shelter. The evidentiary value of the NGO reports and Secretary General's report, both which rely on secondhand evidence, are minimal compared to the raw intelligence data held by Ravisia.	*Necessity* The intelligence data is not necessary for the Court since there are other sources of information available for this purpose, including the NGO reports and the Secretary General's report that ethnic cleansing was an imminent risk.
National Security The ICJ has the authority to call upon a party to produce classified documents. Example: • In the Corfu Channel Case, the Court requested the UK to produce evidence which the UK considered classified.[53]	*National Security* Ravisia should not be asked to produce the "highly classified" raw intelligence based on national security grounds. Such a request by the Court would infringe Ravisia's sovereignty since it would be asking Ravisia to produce information that should not to be disclosed for danger of harming its national interests.
	Court's Impartiality Any request by the Court to produce evidence contravenes the Court's impartiality since by doing so, it would actively be helping Alicanto to meet its burden of proof. Further, Ravisia may argue that the Court's request breaches its freedom to determine what evidence to produce.
Confidentiality of the information Alicanto may argue that under Article 26, there is no obligation binding the Court or its Registrar to publish the intelligence data and that further, the Court can order measures towards the protection of Ravisia's intelligence data. Ravisia would have no basis to refuse producing such data since the Court can maintain its confidentiality.	*Confidentiality of the information* Ravisia may reply that under Article 26(1)(i) provides that the Registrar shall be responsible for the publication of "the Court's judgments, advisory opinions and orders, the pleadings and statements, and minutes of public sittings in cases, and of such other documents as the Court may direct to be published".

D. Production of Evidence by Secretary-General

Can and should the International Court of Justice declare that the Secretary-General may lawfully hand over the evidence to Alicanto?

Ravisia will argue that the ICJ does not have jurisdiction to issue an opinion on the legality of the Secretary-General's actions and that doing so would undermine the independence and the confidentiality required of the office of the Secretariat. *Ravisia* will also argue that the intelligence is unnecessary to decide the case since it has already satisfied its burden of proving that the OPS intervention was justified. *Alicanto* will argue that the evidence is integral to the case and that the

[53] Corfu Channel Case (UK v Albania), Merits, 1949 ICJ 4, 32.

ICJ may and should declare that the Secretary-General may lawfully hand over the information to Alicanto.

It is important to note that Alicanto has requested only a conclusion of law about the legality of the Secretary-General handing over evidence. The question presented here is not whether the Court may order the Secretary-General to hand over the information. Many teams may argue this latter stronger position; however, they would do so at their own peril since it would be an untenable argument and a careless reading of the Compromis.

Participants should be prepared to discuss:

1. Jurisdiction
2. Confidentiality in the Secretary-General's Office

1. Jurisdiction

Alicanto	Ravisia
Alicanto will argue that the ICJ may decide any matter concerning the dispute that the parties have brought to its attention, and thus jurisdiction exists since Alicanto has raised the issue of the legality of the SG's actions with respect to the evidence withheld by Ravisia.	Ravisia will argue that the ICJ may not issue a legal conclusion on this matter since the proper mechanism to be utilized by a UN entity for submitting a legal question to the court is through the request for an advisory opinion, which triggers the Court's jurisdiction under article 65 of the ICJ Statute. Since the Secretary-General did not formally request an advisory opinion, no jurisdiction exists.
Alicanto may refer to the Advisory Opinion in "Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights" (Advisory Opinion of 29 April 1999) [the Cumaraswamy Case], which shows that the Court can and is willing to opine on the authority of the Secretary-General and the exercise of his/her powers (see paras 47 to 56 of the opinion).	

2. Confidentiality of the Secretary-General's Office

The United Nations has recognized since its inception that the Secretary-General's office must be able to cloak its activities in some level of confidentiality because it is "the confidant of many governments."[54] The office of the Secretariat has promulgated internal rules for the handling of classified information. These rules provide that the UN "shall give due regard to expectations of confidentiality" and "shall seek the prior consent" when it declassifies information from an outside source.[55]

Alicanto	Ravisia
While internal procedures frown upon the disclosure of classified information, international law does not prohibit the Secretary-General from handing the intelligence data over to Alicanto. The court should therefore conclude that the SG can hand over the evidence.	The Court should conclude that the Secretary-General may not disclose the information since it would undermine the confidentiality required of the office of the Secretariat.

[54] G.A. Res. 11 (24 Jan. 1946).

[55] UN Secretary-General's Bulletin on "Information sensitivity, classification and handling", U.N. DOC ST/SGB/2007/6 (12 Feb 2007).

III. Offensive Radio Broadcasting and Sexual Exploitation

Were the radio broadcasts a violation of international law? Were the acts of sexual exploitation a violation of international law? Is Ravisia responsible for the acts? Should the International Court of Justice order Ravisia to make reparations?

A. Radio Broadcasts

Were the radio broadcasts a violation of international law? Is Ravisia responsible for the acts?

Participants should be prepared to discuss:

1. Radio Broadcasts During UNMORPH
2. Radio Broadcasts After UNMORPH

1. Radio Broadcasts During UNMORPH

The thrust of both sides' arguments will be the meaning of paragraphs 5 and 6 of UN Security Council Resolution 5440 (2005).

The operative provision of the resolution is paragraph 5, which indicates that the Model Status-of-Forces Agreement of 9 October 1990 will apply in the absence of a negotiated status-of-forces agreement for UNMORPH between Alicanto and the UN Secretary-General. Under Model Status-of-Forces Agreement paragraph 46, "[a]ll members of the United Nations peace-keeping operation . . . shall be immune from legal process in respect to words spoken or written and all acts performed by them in their official capacity."

Alicanto	Ravisia
The radio broadcasts are outside the scope of UNMORPH's mandate. The content is not covered by UN Security Council Resolution 5440, which "[u]nderlines the need for UNMORPH to have at its disposal an effective public information capacity, including radio transmission facilities of local and national reach, to promote understanding of the peace process and the role of UNMORPH among affected parties, to disseminate information regarding the security situation in the region, and to encourage the progressive development of the various communities in Alicanto." Alicanto will have to reason from the facts how the broadcasts fall outside of this rather broad provision. Alicanto will face an additional hurdle of arguing why Model Status-of-Forces Agreement paragraph 46 does not apply. To do so, they will have to argue that the immunity is only for acts UNMORPH did in its official capacity. To do so, however, will mean combining the two separate clauses in the paragraph's key sentence and ignoring the fact they are set-off from each other by the grammatical conjunction "and." Assuming they are rhetorically gifted enough to subvert the remedial elements of English grammar, Alicanto will have had to have been successful in offering a convincing argument for why the official uses of radio broadcasts laid out in UN Security Council Resolution 5440 do not apply.	All radio broadcasts produced by UNMORPH clearly fall within the scope of "words spoken or written" in paragraph 46 of the Model Status-of-Forces Agreement. Since this clause is independent of the subsequent one providing immunization for "all acts performed by them in their official capacity," Ravisia will argue that this protection is absolute and not subject to further inquiry over whether or not the broadcasts were conducted in its official capacity. Alicanto may avail itself of the argument that paragraph 6 of Security Council Resolution 5540 allows UNMORPH to use radio broadcasts to "encourage the progressive development of the various communities in Alicanto." Similar to the opposite argument for Alicanto, Ravisia will have to give a convincing factual argument that the UNMORPH broadcasts fall within the scope of this provision.

2. Radio Broadcasts After UNMORPH

A separate issue which may arise concerns radio broadcasts which were allegedly conducted by Ravisia after the termination of UNMORPH. For this issue, the Model Status-of-Forces Agreement immunity does not apply, nor does UN Security Council Resolution 5540.

Since there is no defined law on radio broadcasts during unilateral peacekeeping operations, Alicanto will likely argue that they violated its domestic laws. This is distinct, however, from violating any internationally recognized law.

Alicanto	Ravisia
Alicanto's assertion that the broadcasts continued was never rebutted by Ravisia. Since there is no internationally recognized law related to the radio broadcasts per se, Alicanto will need to make the radio broadcasts part and parcel of its larger argument against the violation of its territorial sovereignty. The broadcasts are in violation with local laws requiring prior provincial approval of all secular broadcasts. As such, the broadcasts are further evidence of Ravisia's unjustified intervention and that its conduct has gone beyond the scope of mere humanitarian intervention.	The facts are unclear as to whether or not the UNMORPH radio broadcasts continue. Their continuance is merely asserted in the diplomatic note of 17 September 2008. Ravisia can argue that no evidence exists that the broadcasts were continued, let alone that they were the ones responsible for them. Even if there were evidence that the broadcasts continued, the broadcasts violated no internationally recognized law and the Court should therefore deny this part of Alicanto's prayer for relief.

B. Sexual Exploitation

Were the acts of sexual exploitation a violation of international law? Is Ravisia responsible for the acts?

Alicanto will argue that *Ravisia* has violated its obligations under the United Nations Convention on the Rights of the Child (UNCRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and/or the International Covenant on Civil and Political Rights (ICCPR).

A three-part analysis must be applied to determine whether *Ravisia* is liable for a violation of any of its treaty obligations:

1. Does the relevant treaty bind Ravisia extraterritorially?
2. Is the alleged violation attributable to Ravisia?
3. Has a violation occurred?

Students may also argue the existence of customary international human rights (IHR) and international humanitarian law (IHL) obligations. In this case, they must prove the existence of a customary IHR or IHL obligation and a breach attributable to Ravisia. In the case of IHL, the team must additionally show establish that customary IHL – arguably applicable during war, armed conflict, belligerent occupation, or state of emergency – is *applicable* in this case before evaluating whether any of its various standards of treatment have been violated. Many guidelines and bulletins have been promulgated by the UN Secretary-General that govern the conduct of peacekeeping troops. Teams should take care to explain the legal relevance of these sources under the rubric of Article 38(1) of the ICJ Statute.

1. Do Ravisia's treaty obligations apply extraterritorially?

Alicanto must show, first and foremost, that Ravisia's obligations under a relevant treaty extend to the area where the alleged violation of its obligations occurred. Article 29 of the VCLT states that "[u]nless a different intention appears from the treaty of is otherwise established, a treaty is binding upon each party in respect of its entire territory." Most human rights treaties (such as UNCRC) include an article that defines the scope of the treaty. However, some human rights treaties (such as CEDAW), are silent on the issue of their scope.

Alicanto	Ravisia
Treaties with article defining scope (e.g., UNCRC): Ravisia's obligations under the UNCRC apply extraterritorially and extend to Alicantan children. UNCRC Art. 2(1) obliges state parties to "respect and ensure the rights set forth in the present Convention to each child within their jurisdiction...." In Delia Saldias de Lopez v. Uruguay, the Human Rights Committee opined that under Art. 2(1) of the ICCPR, which obliges state parties to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction," a state may be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State. The Committee held: "It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." Likewise, it would be unconscionable for Art. 2(1) of the UNCRC to permit Ravisian agents to perpetrate violations in Alicanto which they could not perpetrate on Ravisian territory.	*Treaties with article defining scope (e.g., UNCRC):* Ravisia's obligations under the UNCRC do not apply extraterritorially and therefore do not extend to Alicantan children. The term "jurisdiction" in Art 2(1) of the UNCRC should be interpreted just as the European Court of Human Rights ("ECHR") interprets this term with respect to Art. 1 of the European Convention on Human Rights, which defines that treaty's scope. The ECHR interpreted "jurisdiction" as a "strictly territorial concept" in Bankovic et al. v. Belgium *and sixteen other high contracting parties*. The Court held that because high contracting parties to the European Convention carried out attacks outside of their territories in the Federal Republic of Yugoslavia, the complaint was inadmissible '*racione loci*.' The ECHR similarly held that the large-scale Turkish military operations in northern Iraq were insufficient to establish Turkish jurisdiction to which its obligations under the European Convention would extend. The Grand Chamber of the ECHR interpreted "jurisdiction" more liberally in Loizidou v. Turkey, finding that Turkey had exercised effective overall control over the TRNC (the *de facto* Republic of Northern Cyprus), and therefore Turkey was responsible for the TRNC's policies and Turkey's jurisdiction extended to people affected by those policies. In this case, however, the UN has exclusive authority and control over Camp Tara,[56] and is responsible for UNMORPH's policies, while Ravisia is not.
Treaties without article defining scope (e.g., CEDAW): In General Recommendation No. 19, the CEDAW Committee opined: "Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures."[57] The absence of an article limiting the treaty's scope, taken together with Committee Recommendations that anticipate the need for specific protective and punitive measures in armed conflicts and occupied territories, indicates an "otherwise established" intention that state parties to CEDAW have extraterritorial obligations in occupied territories, such Camp Tara, which	*Treaties without article defining scope (e.g., CEDAW):* CEDAW does not have an article defining its scope. Since no "different intention appears from the treaty," it is binding upon each party in respect only of its entire territory, in accordance with Article 29 of the VCLT. *Racione loci*, CEDAW does not bind Ravisia abroad.

[56] Model SOFA, Art. 16.

[57] CEDAW Committee, General Recommendation No. 19, *Violence against women*, para. 16 (11th Session, 1992).

Alicanto	Ravisia
UNMORPH occupied in Alicanto. The unconscionablity argument discussed above in relation to treaties that have an article defining their scope also applies to treaties that do not have an article defining their scope, such as CEDAW.	

Currently, the Rocian Plateau may be considered an "extraterritorial pocket" or other class of occupied territory under the effective overall control of Ravisia. This is comparable to the control exercised by Turkey in northern Cyprus and by Russia in Transdnjestria (Dniester Moldavian Republic). As such, Alicanto may argue that the Rocian Plateau presently falls within Ravisia's jurisdiction, therefore Ravisia's IHR treaty obligations and IHL customary international law obligations extend to the Rocian Plateau. However, the sex exploitation by Ravisian troops occurred *prior* to Ravisia's effective overall control of the Plateau. Therefore, if Alicanto chooses to argue that Ravisia's treaty and customary legal obligations now extend to the Rocian Plateau only because Ravisia now has effective overall control over the area, Alicanto will have to meet the more difficult burden of proving that a violation of these treaty obligations occurred during Operation Provide Shelter (once its obligations were triggered). There is little factual support that any positive violations occurred during OPS; however teams may attempt to argue that Ravisia violated a legal obligation to prevent or punish certain conduct (see Part 3). These teams should take care to establish that Ravisia has an obligation to prevent future misconduct because Ravisia is aware of credible reports of its troops' past misconduct during UNMORPH, or that there is an obligation to punish certain past conduct even thought that conduct was not attributable to the state and did not amount to an international law violation when committed.

2. Is Ravisia liable for the conduct of its troops during UNMORPH?

(a) Attribution: Effective Control Test and Scope of the UNMORPH Mandate

The International Law Commission's Commentary on Article 5 of the Draft Articles on State Responsibility notes that when an organ of a state is placed at the disposal of an international organization, the organ's conduct may be attributable only to the receiving organization.

However, the ILC has also said that a different rule applies with respect to military contingents placed at the disposal of the UN for peacekeeping operations, since the lending state retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation, the problem arises whether a specific conduct of the lent organ has to be attributed to the receiving organization or to the lending state.

The ILC has concluded that "when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question."

Alicanto	Ravisia
Effective Control Test Ravisia retained disciplinary powers and criminal jurisdiction over the members of the Ravisian contingent of UNMORPH, therefore it had effective control over the conduct in question, and the conduct of its troops is attributable to Ravisia. The SOFA states that "Military	*Effective Control Test* The Ravisian troops during UNMORPH were under the direction and control of the UN, acting with its consent, on its authority, and for its purposes. The District Court in the Hague held in Mustafic and Nuhanovic that acts of Dutch troops in Srebrenica committed under the

Alicanto	Ravisia
members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in [the host country or territory]." In Attorney General v. Nissan, the UK House of Lords noted that "Although national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces continued, therefore, to be soldiers of Her Majesty. Members of the United Nations force were subject to the exclusive jurisdiction of their respective national state in respect of any criminal offences committed by them in Cyprus."[58]	UNPROFOR Chapter VII Security Council mandate should be attributed to the United Nations exclusively, and not the Dutch State. The Netherlands could not be held to have breached its treaty obligations under the Genocide Convention or Geneva Conventions because no actions – and therefore no violations – were attributable to the Netherlands. The ECtHR also ruled in A. Behrami and B. Behrami vs. France and Saramati vs. France, Germany and Norway that the conduct of foreign troops in Kosovo was attributable to the United Nations. No conduct was attributable to the high contacting parties of the ECHR, therefore they were not found to have violated their treaty obligations.
Scope of the UNMORPH Mandate The *ultra vires* acts of Ravisian troops are *ipso facto* outside the scope of the UNMORPH mandate, and are therefore not attributable to the UN. In Saramati vs. France, the ECtHR concluded that the KFOR contingent was exercising *lawfully delegated* Chapter VII powers of the UN Security Council so that the impugned action was, in principle, "attributable" to the UN. Mustafic and Nuhanovic are likewise distinguishable: In dicta, the District Court in the Hague in noted that personal, off-duty behavior of troops would be governed by Dutch national law, rather than international law, thus suggesting that off-duty acts would be attributable to the Dutch State, rather than the UN Further evidence that the acts were not performed in the troops' official capacity is that the troops were off duty and outside Camp Tara when the acts were committed.	Scope of the UNMORPH Mandate Article 46 of the SOFA, which states that "all members of the United Nations peace-keeping operation ... shall be immune from legal process in respect of ... all acts performed by them in their official capacity" suggests that *ultra vires* acts, or acts alleged to be unlawful, may be committed in troops' official capacity while effecting a UN peace-keeping mandate.

3. Has a violation occurred?

(a) By attributable act, has Ravisia violated its treaty obligations?

The factual support for the proposition that Ravisian soldiers committed acts of sexual exploitation of Alicantan children during the time Ravisian troops were stationed as UNMORPH personnel is strong,[59] whereas the factual support that such acts occurred during the time Ravisian troops were stationed under Operation Provide Shelter is weak.[60] The analysis should therefore shift to whether Ravisia is liable for any omissions during the course of OPS related to its troops' conduct.

[58] All England Law Reports (1969), vol. 1, p. 646.

[59] During UNMORPH, in October 2007, a human rights NGO called the International Legal Standards Alliance reported a pattern of sexual exploitation by UNMORPH personnel against young girls in the Plateau. The Secretary-General set up a Commission of Inquiry which concluded that a number of UNMORPH peacekeeping 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 found that the average age of the girls was 16, with some as young as 13, and that they had engaged in sexual acts out of hunger, fear, poverty, or all three. The Commission of Inquiry concluded that UNMORPH troops of Ravisian nationality were substantially involved in the sexual exploitation of local Alicantan girls on Alicantan territory in the vicinity of Camp Tara. (¶ 21)

[60] On 17 September, 2008, Prime Minister Phoenix stated in a diplomatic note to his counterpart in Ravisia: "... your armed forces, far from protecting the rights of the people of Alicanto, have meddled in our sovereign affairs, have corrupted the morals of our women and

CEDAW

Article 6 of CEDAW[61] requires state parties to "take measures to suppress all forms of traffic in women and exploitation of the prostitution of women." While article 10 alone makes reference to "women and girls," rather than just women, CEDAW Committee General Recommendation No. 19 interprets "women," as defined under Article 6, as "including young girls."[62] CEDAW Art. 21(1) authorizes the Committee to "make suggestions and general recommendations." Although the Committee can formulate general analyses of the Convention's substantive provisions, it has no power to authoritatively interpret them.[63]

UNCRC

Article one of the United Nations Convention on the Rights of the Child ("UNCRC") states: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Alicantan law has always prohibited adults from engaging in sexual relations with individuals 15 years of age or younger.[64] The Commission of Inquiry established by the Secretary-General found that the average age of girls that engaged in non-violent sexual relations with UNMORPH troops was 16, some as young as 13.[65] Article 34 of the UNCRC requires state parties to "undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, state parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; ...."

Alicanto	**Ravisia**
CEDAW In accordance with CEDAW Committee General Recommendation No. 19, young girls in Alicanto are protected under Article 6 of CEDAW. The troops' sexual relations with these girls constitutes exploitation of the prostitution of women. Both Alicanto and Ravisia will need to rely on the *travaux preparatoire* to the CEDAW instrument to argue the meaning of "exploitation of the	*CEDAW* The troops' conduct does not constitute "exploitation of the prostitution of women," and in any event, such exploitation is not defined within the treaty text of CEDAW.

young people, have undermined the integrity of our religious faith...." It is unclear whether Prime Minister Phoenix is referring to troop conduct during UMORPH, OPS, or both. On 19 September, the Ravisian Prime Minister replied: "I am ... pleased to report that there have been no credible accusations of sexual exploitation by OPS troops." It is unclear from this statement whether any accusations, credible or otherwise, were made during OPS.

[61] *Note:* Although Alicanto appended a Declaration to its instrument of ratification of CEDAW, an interpretive declaration by a State as to its understanding of a matter covered by a treaty or its interpretation of a particular provision - unlike a reservation - merely clarifies a State's position and does not purport to exclude or modify the legal effect of a treaty. Therefore, Alicanto's legal obligations toward Ravisia with respect to the treaty are not altered by virtue of this declaration. Neither are Ravisia's obligations toward Alicanto altered.

[62] "Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence." CEDAW Committee, General Recommendation No. 19, *Violence against women*, para. 15 (11th Session, 1992).

[63] Minor, Julie A., Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination against Women, 24 Ga. J. Intl & Comp. L. Vol. 24:137, 150 (1994).

[64] Clarifications ¶5.

[65] Compromis ¶21.

prostitution of women" for the purpose of Article 6.	
UNCRC Under Alicantan law, applicable to Alicantan children, the girl victims identified by the Commission of Inquiry as being 15 years of age or younger are children as defined under Article 1 of the UNCRC. The exchange of money and food for sexual relations with the children, who engaged in sexual acts out of hunger, fear, poverty, or a combination of these three, constitutes "inducement or coercion of a child to engage in unlawful sexual activity" as defined under Article 34(a) of the UNCRC. In any event, the "prostitution" relationship understood by the UNMORPH troops constitutes "exploitative use of children in prostitution" as defined under Article 34(b) of the UNCRC.	*UNCRC* Because the evidentiary support during UNMORPH that would rise to the level of a UNCRC violation is strong, Ravisia will likely rely on its arguments that the UNCRC does not apply extraterritorially, and that the actions of Ravisian troops during UNMORPH are not attributable to Ravisia.

(b) By attributable omission, has Ravisia violated its treaty obligations?

The Clarifications to the Compromis state that "Ravisian Military Authorities report that no charges for sex-related crimes have been brought against any Ravisian service member stationed at Camp Tara."[66] Alicanto may argue that Ravisia is obligated to endeavor to prevent and punish troop misconduct based on international agreements to which Ravisia is party, customary international legal norms, or general principles of international law.

Alicanto	Ravisia
SOFA Obligations Article 48 of the Model SOFA states that Secretary-General of the United Nations will obtain assurances from Governments of participating States that they will be prepared to exercise jurisdiction with respect to crimes or offences which may be committed by members of their national contingents serving with the Peace-Keeping operation." Although the Compromis is silent as to whether such assurances were obtained, it is reasonable to assume that the Secretary-General followed through with his obligations under paragraph 48 of the Model SOFA. Ravisia new of the Commission of Inquiry's findings and yet failed to bring charges against any Ravisian troops for their conduct while stationed at Camp Tara. Therefore, Ravisia breached its obligation to protect Alicantan children under its jurisdiction from all forms of sexual exploitation and sexual abuse, as defined under Article 34 of the UNCRC, by failing to bring charges for sex-related crimes against Ravisian service members stationed at Camp Tara.	*SOFA Obligations* There is no evidence in the Compromis that Ravisia and the UN Secretary-General came to an agreement that Ravisia would be prepared to exercise its jurisdiction with respect to allegations of its troops' misconduct. Further, there is no duty to prosecute attendant Ravisia's obligations under UNCRC or CEDAW.
Revised Model MOU The immunity provided in paragraphs 15 and 27 of the SOFA supports the need to attribute troop conduct to a	*Revised Model MOU* The revised Model Memorandum of Understanding (MOU) is not binding upon Ravisia. The revised MOU has

[66] Clarifications ¶4.

Alicanto	Ravisia
responsible party that will be actionable. The General Assembly has recognized this by supporting the development of a revised Model Memorandum of Understanding between the UN and troop contributing countries. The revised MOU states that the troop contributing Government, as it enjoys exclusive jurisdiction in respect of any crimes or offenses that might be committed by its troops, "shall exercise jurisdiction with respect to such crimes or offenses ... [and] further assures the United Nations that it shall exercise such disciplinary jurisdiction as might be necessary to all other acts of misconduct committed ...."	not been adopted and annexed to the current Model MOU. Finally, the Compromis does not indicate that any MOU exists between Ravisia and the UN with respect to its contribution of troops to UNMORPH.

C. Reparations

Should the International Court of Justice order Ravisia to make reparations?

When considering the question of reparation, keep in mind that this is a matter of *civil*, not *criminal*, accountability. It is also important to keep in mind the distinction between acts committed *during* UNMORPH and *after* UNMORPH.

1. During UNMORPH

Alicanto	Ravisia
Applicant Alicanto will have to argue against the facts that Ravisia, even when carrying out its operations as part of UNMORPH, should not be seen as part of UNMORPH for the purposes of these proceedings. This will be difficult given the language of the UN Security Council Resolutions. Alicanto will want to do this since it would place the burden of reparations on the shoulders of Ravisia and not the UN itself. They will therefore have to show that the Ravisian troops, when operating under the guise of UNMORPH, were in fact not under UN command or control.	Ravisia will likely argue that the sexual acts between its soldiers and Alicantan females was consensual and not exploitive. They will argue that even if they were exploitive, their soldiers were acting at the time under UN command and control, and that the UN, not Ravisia, is therefore responsible for paying reparations.

2. After UNMORPH

There is ambiguity in the facts over whether or not sexual exploitation was occurring after the termination of UNMORPH and the continued unilateral peacekeeping operation of Ravisia.

Alicanto	Ravisia
With respect to reparations for damage to social fabric, Applicant Alicanto will have to creatively set forth a means of reliably measuring damages for an amorphous concept. Under the often-cited Chorzow Factory Case, "[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation." Alicanto will have to unpack this statement to identify just what Ravisia was breaching. They may choose to link this to their argument over the larger breach of their territorial sovereignty rather than narrow-in on this specific breach alone.	Ravisia will argue that there is no clear way to define "social fabric" and that even if there were, there exists no international obligation for them to respect it per se. They may also argue that even if they were found to have damaged Alicanto's "social fabric," there exists no reliable means to measure the damage and thus reparations are inappropriate.

IV. Piccardo Donati's Trial, Sentence, and Asylum

Under international law, may Ravisia provide asylum to Piccardo Donati at Camp Tara? If not, should the court order Ravisia to hand Donati over to Alicanto? Did Alicanto violate international law by convicting Donati after a trial in absentia and applying a punishment that was harsher than the maximum allowable under Alicantan law at the time the crime was committed? Should the Court's analysis on the legality of Donati's asylum be affected by evolving norms against the death penalty or by Ravisia's position as an abolitionist state?

After a manhunt for Piccardo Donati failed, Alicanto tried and convicted Donati in absentia and sentenced him to death for the assassination of Prime Minister Simurg (and other crimes). At the time of the assassination, the death penalty was not a legal sentence, but by the time of the trial, capital punishment had been reinstituted in Alicanto. Ravisia later announced that it had granted asylum to Donati at Camp Tara, and that it will not deliver Donati to Alicanto because to do so would violate international law.

On the one hand, Alicanto has violated its international obligations under the ICCPR with respect to Donati's due process rights by convicting Donati after a trial in absentia and by applying ex post facto the penalty of death. On the other hand, Ravisia has violated Alicanto's sovereign authority by interfering with Alicanto's legal process and the right to punish its own citizens. Thus, it would appear that both sides are in the wrong, Alicanto because it has and intends to violate Donati's human rights, and Ravisia because it wants to grant sanctuary to a fugitive on a military base on Alicanto's territory.

Since both parties are in the wrong, the analysis calls for a balancing of the two states' interests (as well as Donati's).

This prayer for relief has an added layer of complexity because it involves the death penalty — perhaps the most controversial and severe punishment that exists. As Justice Thurgood Marshall of the United States Supreme Court famously stated, "Death is different." Although the death penalty is not yet a per se violation of international law, the growing trend toward abolition among the states and the UN's noted disfavor of the punishment certainly assist Ravisia's claims as to the legality of Donati's asylum at Camp Tara. If the crime had been theft and the punishment one year in prison, the due process offenses, although clear violations under international law, would not go far to justify Ravisia's interference in the legal process in Alicanto. Thus, although the simple question of the death penalty's legality under international law does not, on its own, resolve this prayer for relief, it is an important part of the analysis. Both Alicanto and Ravisia should argue whether the death penalty's growing disfavor in international law alters this Court's balance of the due process and sovereignty issues in play.

A. Due Process Violations

Did Alicanto violate international law by convicting Donati after a trial in absentia and applying a punishment that was harsher than the maximum allowable under Alicantan law at the time the crime was committed?

Participants should be prepared to discuss:

1. Trials in Absentia
2. Ex Post Facto Application of Death Penalty

The second section of Article 6 of the ICCPR states:

> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes *in accordance with the law in force at the time* of the commission of the crime and not contrary to the provisions of the present Covenant. . .

Among the various guarantees to a fair trial set out in the ICCPR, Article 14 states:

> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>   ...
>   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;

Article 15 of the ICCPR states:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

In the current case, Donati's trial and death sentence are clear violations of the above provisions of the ICCPR. At the time of Prime Minister Simurg's assassination, the death penalty was not a legal punishment in Alicanto. It had been abolished in 1947 and was not reinstated until after the assassination just prior to Donati's trial. Donati's sentence thus violates article 6 and article 15 of the ICCPR. The sentence also violates article 14 since it was rendered after a trial in absentia.

Teams should identify the relevant provisions of the ICCPR and how they have been violated. However, teams should not spend too much time discussing this straightforward analysis. Teams should quickly illustrate the violations and then move on to the more vital question of whether Ravisia may grant asylum to Donati because these violations have occurred and are in the context of the death penalty. (see sections below)

B. Death Penalty Under International Law

Should the Court's analysis on the legality of Donati's asylum be affected by evolving norms against the death penalty or by Ravisia's position as an abolitionist state?

Alicanto will argue that capital punishment is a valid penalty under international law. Alicanto will further argue that trends against the death penalty in the international community, including Ravisia's position as an abolitionist state, are not binding international law, and thus do not grant Ravisia the right to provide asylum to the fugitive Donati. *Ravisia* will argue that international law prohibits Donati's execution and therefore prohibits handing Donati over to those who will execute him. Alternatively, *Ravisia* will argue that the exercise of the death penalty must be carried out only in special circumstances, and that an execution of Donati would be a violation of international law in light of the due process violations that Alicanto has committed against him, thus affording Ravisia the right to give Donati asylum at Camp Tara.

Participants should be prepared to discuss the following issues:

1. Application of international law
2. Capital punishment under international law
3. Capital punishment in Alicanto

1. Application of international law

Alicanto	Ravisia
Capital punishment is a purely domestic affair,[67] and is not a proper subject for the Court to decide.	Capital punishment invokes the application of international human rights law, and is therefore not just a matter of domestic legal process.

2. Capital punishment under international law

The major sources of international law do not provide a definitive answer on the legality of capital punishment.

Treaties regarding the death penalty

Alicanto and Ravisia are not parties to any treaty that obligates its signatories to abolish the death penalty. Specifically, they are not parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR),[68] which was the first universal treaty to abolish capital punishment.[69]

Alicanto and Ravisia are parties to the ICCPR, which anticipates the application of the death penalty. Article 6 provides the right to life, but also sets out that death sentences may be imposed only for the most serious crimes pursuant to a competent final judgment. Some scholars have argued that Article 7's prohibition against inhuman treatment or punishment is applicable to the death penalty.

Customary international law

The status of the death penalty according to customary international law (CIL) turns on whether there is widespread acceptance among states that capital punishment is unlawful and whether opinio juris, a sense of legal obligation to abolish the death penalty, exists.

According to a recent Amnesty International report, 93 states have abolished the death penalty for all crimes, and over two thirds of states (137) have abolished the death penalty in law or in practice. Of the 60 retentionist countries, only 24 are known to have carried out executions in 2007.[70]

Various human rights instruments are aimed at abolishing the death penalty. The Universal

[67]See art. 2 §7, UN Charter (UN may not intervene in matters that are within states' domestic jurisdictions); art. 80, Rome Stat. (unavailability of death penalty in the ICC does not affect the application by States of penalties provided by its national law).

[68]Compromis ¶53.

[69]Art. I. Second Optional Protocol to the ICCPR.

[70][Amnesty International Report, October 2008]

Declaration of Human Rights (UDHR) was adopted in 1948, and is generally accepted as CIL. Article 3 provides that "everyone has the right to life, liberty, and security of person." The UDHR makes no mention of the retention or abolition of the death penalty. This silence has been characterized as a reflection of a goal of abolition.

Over 40 years ago, the UN General Assembly noted that there is a worldwide tendency toward a "considerable reduction in the number and categories of offences for which capital punishment might be imposed." G.A. Res. 2393 (XXIII) (1968). In 1971, the G.A. reiterated that in order to fully guarantee the right to life in UDHR article 3, "the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries." G.A. Res. 2857 (XXVI) (1971). Recently, the G.A. called for a moratorium on executions for all states that maintain the death penalty, stating that the death penalty "undermines human dignity." G.A. Res. 62/149 (26 Feb. 2008).

Judicial decisions provide some insight as to whether the death penalty is prohibited by CIL. The European Court of Human Rights (ECHR) considered the imposition of the death penalty in Öcalan v. Turkey, App. No. 46221/99 (2005).[71] Because Turkey abolished the death penalty prior to this decision, the ECHR did not reach the issue of whether it violates international law. The ECHR noted that it views capital punishment in peacetime as an unacceptable punishment that is no longer permissible. But because there were still a large number of states yet to ratify a protocol abolishing the death penalty in all circumstances, the ECHR would not find that the death penalty is regarded as inhuman and degrading treatment.

The Öcalan decision reflects the ECHR's landmark decision fourteen years earlier in Soering v. U.K.,[72] in which the ECHR held that the death penalty was not a per se inhuman punishment, because it's Convention, much like article 6 of the ICCPR, allows the death penalty in certain circumstances.

Many commentators believe that within the European Human Rights system a "per se rule is developing against extradition of a suspect who potentially will face capital punishment."[73]

It is also noteworthy that the UN excluded the death penalty from the punishments available to the International Criminal Tribunals for the former Yugoslavia (G.A. Res. 827, 25 May 1993) and for

[71]"In 1998 Syria expelled Turkish national, Abdullah Öcalan. Prior to this expulsion, Syria had protected Öcalan for years from Turkish prosecution for his leadership of the Kurdistan Workers' Party (PKK). Öcalan traveled from Greece to Russia to Italy. The latter refused Turkey's extradition request since Öcalan faced a real risk of being sentenced to death. The Turkish Government eventually caught him in Kenya on February 15, 1999. His abduction, blindfolding, and lack of access to legal assistance led the European Court of Human Rights to rule that the death sentence imposed by the Ankara State Security Court and upheld by the Court of Cassation violated the ECHR." Elizabeth Burleson, "Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence," 68 Albany Law Review 909 (2005).

[72]"In Soering v. United Kingdom, the European Court of Human Rights held that the United States would expose Soering to a real risk of torture in violation of the European Convention on Human Rights (ECHR). The European Court of Human Rights based this decision on the length of time that Soering was likely to spend on death row in Virginia; the mounting anxiety of awaiting execution; and on Soering's youth and mental state at the time of the offense. While subsequent decisions around the world have not always followed Soering, a growing body of case law provides a warning to States that still use the death penalty that their extradition treaties may not be upheld without assurances that capital punishment will not be imposed." Elizabeth Burleson, "Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence," 68 Albany Law Review 909 (2005).

[73] Elizabeth Burleson, "Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence," 68 Albany Law Review 909 (2005).

Rwanda (G.A. Res. 955, 8 November 1994). The Rome Statute of the International Criminal Court, adopted on 17 July 1998, also excludes the death penalty as a possible punishment.

One scholar on the death penalty in international law has noted:

> Given the enormous and rapid progress in the development of international norms respecting the death penalty since the end of the Second World War, the general acceptance of abolition and its elevation to a customary norm of international law, perhaps even a norm of jus cogens, may be envisaged in the not too distant future. This progressive restriction has been crowned, in recent years, by the emergence of a norm that effectively abolishes the death penalty. Although still far from enjoying universal acceptance, its very existence testifies to its significance.[74]

Alicanto	**Ravisia**
International law does not provide a wholesale prohibition of capital punishment, not under any applicable treaties in this case or under customary international law.	The imposition of the death penalty denies the right to life, and constitutes a cruel and inhuman punishment, and as such, is a violation of international law. It is the "ultimate, irreversible denial of human rights."
ICCPR Article 6 of the ICCPR (right to life) recognizes that the death penalty is legitimate in some circumstances and is thus outside the scope of application article 6. Treaties must be read as a whole, and that the recognition of capital punishment as an exception to article 6's right to life also applies implicitly to article 7's prohibition of inhuman treatment.	*ICCPR* Article 6 of the ICCPR considers the regrettable existence of the death penalty a temporary compromise, which is ultimately incompatible with the right to life. Article 7's prohibition of inhuman treatment also prohibits the death penalty.
CIL There is no customary norm against the death penalty. State practice is not consistent and nowhere near universal. Two-thirds of all states is a large portion of the international community, but the 93 states that have completely abolished the death penalty is still less than 50% of all states. There is no evidence that the abolition trend is due to opinio juris. It may instead be evolving out of moral, ethical, or political pressure. Calls for the immediate abolition of the death penalty in the drafting of the UDHR were controversial and ultimately not adopted. Any trend toward abolition is of recent origin and simply has not reached the point of widespread acceptance necessary to create a rule binding all nations.	*CIL* There is widespread and growing abolition of the death penalty by states and by regional treaties as evidence of CIL (93 states have officially abolished the death penalty; two-thirds of states have abolishedthe death penalty in law or practice).[75] The trend in international law is unmistakably towards universal abolition.

[74]William A. Schabas, The Abolition of the Death Penalty in International Law 20 (3d ed. 2002).

[75]See Protocol No. 6, European Convention for the Protection of Human Rights and Fundamental Freedoms (April 1983); Protocol to the American Convention on Human Rights to Abolish the Death Penalty (June 1990). Alicanto's neighbors subscribe to a general policy of abolition — R-FAN members abolished the death penalty in 1982. Clarification 6.

3. Capital punishment in Alicanto

Alicanto	Ravisia
The details of this case favor the legality of Donati's death sentence: Donati is an Alicantan with a criminal record who was convicted of eleven counts of murder and sentenced to death by hanging after a trial that observing NGOs found was consistent with governing international norms.	The due process violations that occurred in this case make Ravisia's arguments against the legality of Donati's death sentence even more persuasive.
Previous Abolition Alicanto will likely find it difficult to get around this argument. It might maintain that capital punishment is simply a domestic issue, and thus should not be an issue for the ICJ. Alternatively, it might assert that the new government was simply reinstating capital punishment as part of long held Talonnic beliefs, and that abolition was at odds with the fundamental tenets of the faith. (See persistent objector and cultural relativism arguments below.)	*Previous Abolition* Even if international law does not wholly prohibit capital punishment, it is certainly prohibited in application against Donati because the death penalty was abolished in Alicanto at the time when Donati allegedly committed his crimes.[76] While article 6 of the ICCPR permits the death penalty, it does so specifically with the introduction that it applies to "countries which have not abolished the death penalty." Ravisia will argue that § 2 must be strictly construed as prohibiting reinstatement of the death penalty to be consistent with the ICCPR goal of abolition.
Persistent Objector Alicanto is a persistent objector to the abolition of capital punishment.[77] Talonnic law has always mandated the death sentence for certain crimes. Since the early 1990s, the Guardians have attempted to incorporate the Canon's orthodox principles into the Alicantan legal system.[78]	*Persistent Objector* Whether or not the persistent objector doctrine exists, it is inapplicable here. Alicanto's objections are too new, given the long period of abolition and the only recent reinstatement of the capital punishment.
Cultural Relativism The imposition of capital punishment is part of a longstanding tenet of its faith, and that the principle of cultural relativism prevents international law from requiring it to abolish the death penalty. An orthodox reading of the Canon requires death sentences for those who commit homicide.[79]	*Cultural Relativism* Capital punishment is not a tenet of all who practice the Talonnic faith. Other readings of the same text interpret these provisions of the Canon as allegorical. Several countries with majority Talonnic populations have abolished the death penalty.
Due Process Ravisia has no authority to act as the enforcer of international due process norms in Alicanto, especially since Ravisia's presence in Alicanto is unjustified. Moreover, Ravisia's interference in the legal process of	*Due Process* Ravisia will argue that if ever permissible, the death penalty must be carried out only when all rights of due process have been afforded. Ravisia will argue that although the death penalty may not be a per se violation

[76]Compromis ¶32, 44; Clarification ¶6.

[77]A state that persistently objects to the creation of a norm is exempt from its requirements. Fisheries (U.K. v. Norway), 1951 I.C.J. 116 (Dec. 18). At least one scholar, however, has noted that the persistent objector doctrine is mere dicta. Antonio Cassese, International Law 163 (2d ed. 2005).

[78]Compromis ¶7.

[79]Compromis ¶8.

Alicanto	Ravisia
Alicanto is not within the scope of their humanitarian intervention.	of international law, the application of the death penalty in the face of due process violations is a violation of international law. Ravisia will argue that imposition of the death penalty following an unfair trial is a breach not only of procedural norms but also of the right to life itself. (see section above for substantive discussion of the due process violations)

C. Piccardo's Asylum at Camp Tara

Under international law, may Ravisia provide asylum to Piccardo Donati?

Alicanto will argue that Ravisia is obligated to surrender Piccardo Donati to Alicanto because Donati and the crime he committed are within the sovereign jurisdiction of Alicanto. *Ravisia* will argue that it must protect Piccardo Donati from international human rights violations and may thus grant diplomatic asylum to him at Camp Tara.

Participants should be prepared to discuss the following issues:

1. Diplomatic Asylum
    (a) Customary International Law
    (b) Legality of Ravisia's Presence
2. Ravisia's obligations under international human rights law to protect Donati
    (a) Extraterritorial application of the ICCPR
    (b) Breaches of the ICCPR

1. Diplomatic Asylum

As a preliminary point, every decision by a state to grant diplomatic asylum within the territory of another state has to be predicated upon an established legal basis.[80] Here, in the absence of any relevant agreement or treaty between Ravisia and Alicanto, Ravisia will have to show that there is an applicable custom that allows it to grant diplomatic asylum to Piccardo Donati.

(a) Customary International Law

Does Customary International Law recognize a right to diplomatic asylum?

Alicanto	Ravisia
There is no customary international law recognizing a general right to grant diplomatic asylum.[81]	*Abundant State Practice* In history, there are numerous examples of states granting diplomatic asylum to various types of refugees. Examples: • UK to Mr. Bing in Ghana in 1966;

[80] The Asylum Case (Colombia and Peru), 1950 ICJ 274.

[81] Ian Brownlie, *Principles of Public International Law*, 7th Ed, 2008 [*Brownlie*], at 357; Sir Robert Jennings, ed., Oppenheim's International Law, 9th Ed, 1992 [*Oppenheim*], at § 495

Alicanto	Ravisia
	• Sweden and a number of other states to hundreds of refugees in Cuba after the coup in 1973; • France to hundreds of refugees in Phnom Penh in April 1975 • USA to Professor Fang Lizhi, a leading dissident, and his wife in Beijing after the Tiananmen massacre in 1989.[82]
Opinio Juris While there are many instances in which states have granted diplomatic asylum to refugees, states have also been quick to denounce this practice. Example: • United States has policy to not grant asylum at its embassies or at other installations within the territorial jurisdiction of a foreign state.[83]	*Opinio Juris* Latin American states generally recognize the right to grant diplomatic asylum. However, this is markedly different from general international practice and is unlikely to be sufficient to support an argument for an international custom. At best, it supports the proposition that there exists a regional custom among Latin American states as embodied in the Convention on Diplomatic Asylum by the Organisation of American States.
The Asylum Case In the Asylum Case, the ICJ addressed the legality of Colombia's grant of asylum to an accused Peruvian at the Colombian Embassy in Peru. Ultimately, the ICJ found that the grant of asylum was illegal on the basis of its interpretation of a treaty between the two countries. However, in its decision, the ICJ held that the practice of granting asylum in Latin America is an exception, thus implying that CIL does not recognize a right to grant asylum.[84]	*The Asylum Case* Even if Ravisia's grant of asylum must cease, it is under no obligation to surrender Donati to Alicanto. In the Haya de la Torre Case, regarding the same set of facts and ruled on after the Asylum Case, the ICJ concluded that while the asylum must cease, Colombia was under no obligation to bring this about by surrendering the refugee to the Peruvian authorities: "There is no contradiction between these two findings, since surrender is not the only way of terminating asylum." Such an obligation would "render positive assistance to these authorities in their prosecution of a political refugee [that] far exceeds the [Court's] findings."

(b) Legality of Ravisia's Presence

Given the controversial presence of Ravisia in Alicanto, may Ravisia diplomatic asylum be granted to Piccardo Donati in Camp Tara?

Alicanto	Ravisia
Legality of Ravisia's Presence Diplomatic Asylum may not be granted since Ravisia's presence in Alicanto at Camp Tara is not justified by the Responsibility to Protect doctrine and therefore illegal.	*Legality of Ravisia's Presence* Ravisia's intervention in Alicanto is justified on humanitarian grounds, and is therefore legal and permits Ravisia to grant diplomatic asylum.
Scope of Ravisia's Legitimate Presence	*Scope of Ravisia's Legitimate Presence*

[82] See *Oppenheim* at 1084, fn 11.

[83] Marian L Nash, *U.S. Practice in International Law* [1981], 75 Am. J. Int'l. L 142 [*Nash*], at 142.

[84] The Asylum Case (Colombia and Peru) 1950 ICJ 274.

Alicanto	Ravisia
Further, even if Ravisia's presence was lawful, providing diplomatic asylum to Piccardo Donati was outside Ravisia's stated mandate of preventing ethnic cleansing. It is unlikely that a state acting in fulfillment of its responsibility to protect would also be similarly empowered to undertake acts that were not in response to the failures of the host state that predicated its interference in the first place or to act where there has not been some other similarly egregious breach of international humanitarian law that would trigger a state's responsibility to protect. Here, the alleged breach of international law is with regards to the prohibition against arbitrary action and punishment that is retroactive and inhumane. While these may constitute infringements of Piccardo Donati's civil and political rights, they do not amount to sufficiently egregious breaches of international humanitarian law that would trigger a state's responsibility to protect.	Ravisia cannot ignore its international obligations to respect the human rights of Alicantans citizens while it conducts its humanitarian operation in Alicanto. This includes Ravisia's obligations to Piccardo Donati and his rights to life and due process.
Host State Consent The right of diplomatic asylum may be exercised only when the presence of the protecting state has been specifically agreed to by the host state (such as in the case of an embassy/legation).	*Host State Consent* The right to grant diplomatic asylum is not dependent on the consent of the host state, but rather on the broader notion of the legitimacy of the asylum grantor's presence, which in this case has been shown through Ravisia's argument that it's presence was justified on humanitarian grounds.

2. Ravisia's obligations under international human rights law to protect Donati

(a) Ravisia's extraterritorial obligations under the ICCPR

Article 2(1) of the ICCPR provides that a state's ICCPR responsibility is limited to "persons subject to a state's jurisdiction and within its territory". The effect of this is that state Parties are required to ensure the implementation of ICCPR rights within their sovereign territory and within territories over which they have effective control.[85] For instance, the Human Rights Commission has stated that Israel's obligations under the ICCPR extend to person within the Occupied Territories in the West Bank and Gaza.[86] Here, Camp Tara is within the effective control of Ravisia. Therefore, a strong argument may be made that Ravisia is obligated to protect Piccardo Donati's rights under the ICCPR.

However, agents for Ravisia must be very careful to adopt a consistent argument with respect to its extraterritorial obligations under human right treaties. By arguing here that Ravisia's ICCPR obligations reach to Camp Tara, where it is exercising control, Ravisia may be exposing itself to the same extraterritorial application of other human rights treaties, like CEDAW, which may cause difficulty for Ravisia on the third Prayer for Relief relating to Ravisia's responsibility with respect to the sexual exploitation by Ravisian of local Alicantan girls

[85] Sarah Joseph; Jenny Schultz; Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed, 2004, at para 4.11; HRC Draft General Comment 31, at para 9.

[86] (2003) UN doc. CCPR/CO/78/ISR.

(b) Breaches of Piccardo Donati's rights under the ICCPR

Article 2 of the ICCPR, which requires state parties to respect and ensure the covenant rights for all persons in their territory and all persons under their control, also entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory where the necessary and foreseeable consequence of the extradition, deportation, or expulsion is a breach of that person's rights under the ICCPR.[87] The Human Rights Committee, the body of independent experts that monitors implementation of the ICCPR, has stated that this obligation not to extradite arises where there is a substantial risk of irreparable harm to the individual. Examples of irreparable harm include breaches of Articles 6 (right to life) and 7 (prohibition against cruel, inhuman and degrading punishment) of the ICCPR.[88]

Alicanto	Ravisia
Article 6 – Right to Life Ravisia may not rely on its abolition of the death penalty as a justification for refusing to hand over Donati since Ravisia's practice with respect to the death penalty does not, on its own, make the death penalty illegal or relieve Ravisia of its duty not to interfere in the internal affairs of another state.	*Article 6 – Right to Life* Ravisia is bound under Article 6(1) to respect the "inherent right to life" of every individual "within its territory and subject to its jurisdiction." A state is not required to extradite a person to face a punishment contrary to international law.[89] Because Ravisia has abolished the death penalty, it may refuse to extradite anyone to a jurisdiction where there is a risk that the death penalty will be carried out. Even though Article 6(2) allows state parties to the ICCPR to continue to implement the death penalty, it is arguable that the two articles are to be interpreted independently. Furthermore, Article 31(1) of the VCLT requires that treaties should be given their ordinary meaning. Reading Article 6(2), separately from Article 6(1), the former creates an exception specifically for countries in which the death penalty has not been abolished. Therefore, the exception to the general rule articulated in Article 6(1) does not apply to Ravisia because the death penalty has been abolished in its jurisdiction.[90]
Article 7 – Prohibition against cruel, inhuman and degrading punishment	Article 7 – Prohibition against cruel, inhuman and degrading punishment

[87] Human Rights Committee Draft General Comment 31, at para 10.

[88] *Id.*

[89] Soering v. U.K., 161 Eur. Ct. H.R. (ser. A) (1989).

[90] The Human Rights Committee, established under the ICCPR, in Judge v. Canada held that the exception to the right to life, set forth in Article 6(2), does not apply to countries that have abolished the death penalty. Therefore, countries that have abolished the death penalty are under an obligation not to expose a person to the real risk of its application. Individuals are exposed to a real risk if it may be reasonably anticipated that they will be sentenced to death. The court was influenced by the broadening international consensus in favour of abolishing the death penalty, and reiterated the need to interpret the Covenant as a "living instrument." Alicanto may counter argue that the approach in Judge was divergent from a series of prior rulings, for example, Kindler v Canada. In Kindler, the HRC held that Canada did not violate its obligations under Article 6 of the ICCPR by extraditing a person to the US without assurance that the death penalty would not be imposed. The HRC held that Article 6(1) must be read together with Article 6(2), which does not prohibit the imposition of the death penalty for the most serious crimes.

Article 14 – Right to Fair Trial	Article 14 – Right to Fair Trial
Article 15 – Prohibition against Retroactive Criminal Laws	Article 15 – Prohibition against Retroactive Criminal Laws

APPENDICES

Appendix A: Basic Materials

The following is a list of Basic Materials that were provided to teams as a starting point for research. Teams are encouraged to conduct their own research beyond the sources listed below. Teams are also warned that inclusion of any particular text in the Basic Materials does not entail that the content of the text reflects current prevailing theory or practice or that it is necessarily applicable to the facts of the Compromis.

First Batch

Statute of the International Court of Justice

Charter of the United Nations

Vienna Convention on the Law of Treaties

International Covenant on Civil and Political Rights

United Nations Convention on the Rights of the Child

Convention on the Elimination of All Forms of Racial Discrimination

Convention on the Elimination of All Forms of Discrimination Against Women

United Nations Model Status of Forces Agreement

United Nations Security Council Resolution 1706 (2006)

Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session

Second Batch

Rules of the International Court of Justice

United Nations Security Council Resolution 1706, S/RES/1706 (2006)

Meeting Record Associated with United Nations Security Council Resolution 1706, S/PV.5519 (2006)

United Nations General Assembly Resolution 62/149, Moratorium on the Use of the Death Penalty, A/RES/62/149 (26 February 2008)

United Nations General Assembly Report of the Special Committee on Peacekeeping Operations and its Working Group, A/61/19 (Part III) (11 June 2007)

United Nations Secretary-General's Bulletin on Information Sensitivity, Classification and Handling, ST/SGB/2007/6 (12 February 2007)

United Nations Report of the Secretary-General's High Level Panel on Threats, Challenges and Change, A/59/565 (2 December 2004)

Colombia v. Peru, Case Concerning Haya de la Torre, International Court of Justice (13 June 1951)

Case Concerning The Military And Paramilitary Activities In And Against Nicaragua (Nicaragua v. United States of America), Judgment on the Merits, International Court of Justice (27 June 1986)

Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), International Court of Justice (19 December 2005)

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice (26 February 2007)

Soering v. United Kingdom, European Court of Human Rights (7 July 1989)

THE RESPONSIBILITY TO PROTECT, Report of the International Commission on Intervention and State Sovereignty (2001)

Elizabeth F. Defeis, *U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity*, 7 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 185 (2008)

William A. Schabas, *International Law & the Abolition of the Death Penalty*, 55 WASHINGTON & LEE LAW REVIEW 797 (1998)

Kerry Tetzlaff, *Humanitarian Intervention Post Kosovo: Does a Right to Humanitarian Intervention Exist in Customary International Law After Kosovo? If Not, Is There a Trend Towards the Creation of a Right to Humanitarian Internation**al** in Customary International Law?*, THE NEW ZEALAND POSTGRADUATE E-JOURNAL, Issue 4

Appendix B: Timeline

For Generations	Alicantan people comprise two major groups: the Dasu and the Zavaabi. Both groups espouse the Talonnic Faith. Alicanto and the neighboring State of New Bennu share a border on the Rocian Plateau, a mountainous area notorious for harboring smugglers and illegal arms traffickers on the Alicantan side, settled mostly by Zavaabi.
Before the mid-1950's	Alicanto and neighboring States are Ravisian colonies.
During the mid-1950's	All Ravisian colonies, including Alicanto, become independent nations.
1960	Ravisia forms Ravisian Family of Allied Nations ("R-FAN"), an association of its old colonies and other allies.
1982	Members of R-FAN, including Alicanto, abolish the Death Penalty.
Early 1990's	An emergent Alicantan political party, the Guardians of the Talonnic Way ("the Guardians"), begins to attract a substantial following among Zavaabi who seek a return to Talonnic Orthodoxy.
Between 1996 & 2004	The Guardians' representation in Parliament increases from 3 to 66 members.
2000	An NGO concludes in a major study that Alicantan authorities are intentionally turning a blind eye to criminal activities in the Rocian Plateau, fearing that ethnic tension would result if the Dasu-dominated national government took action in a majority-Zavaabi region.
By 2005	New Bennu authorities report that drug trade and gun violence in the Rocian Plateau has reached epidemic proportions. New Bennu military begins air surveillance of the Rocian Plateau to track and prevent the movement of illegal goods across its border.
Sometime between March and May 2005 (no specific date)	Battles break out between New Bennu military and smugglers on both sides of border, many Zavaabi villagers are caught in the crossfire; leaflets are widely distributed among Zavaabis of the Rocian Plateau claiming New Bennu purposely targeting Zavaabi civilians.
Sometime after May 2005 (no specific date)	Alicantan government denies allegations of supporting New Bennu's border enforcement activities and protests New Bennu's "unauthorized incursions" into Alicantan airspace.
July 2005	Government of Alicanto presents a plan for negotiated settlement with New Bennu to Parliament. Subsequent turmoil results in a vote of no confidence.
August 2005	Government of Alicanto is turned out of office; emergency elections are called.
22 September 2005	Guardians are the largest party elected to Parliament. Guardian leader Gregory Simurg is named Prime Minister of Alicanto.
October 2005	Prime Minister Simurg proclaims successful negotiation of a new cease-fire agreement with New Bennu.
18 November 2005	Prime Ministers of Alicanto and New Bennu request the UN to deploy a peacekeeping force to the Rocian Plateau and its surrounding area.
8 December 2005	UN Security Council unanimously adopts Resolution 5440, affirming support of the cease fire and authorizing the United Nations Mission Overseeing the Rocian Plateau and Hinterlands ("UNMORPH"). Ravisia is the single largest contributor of personnel and resources to UNMORPH. UN Secretary-General appoints Major-General Leila Skylark of the Ravisian Army to head UNMORPH as Special Representative and Force Commander. UNMORPH establishes Camp Tara, its operating headquarters in the Rocian Plateau. Ravisia concludes a SOFA with the UN Secretary-General.
1 February 2006	UNMORPH begins operations.
Early in its deployment	UNMORPH sets up radio station at Camp Tara, staffed entirely by Ravisian members of UNMORPH.

During UNMORPH	Radio programming expands to include educational and cultural programs from the UN Radio News Service, which discuss reproductive health, access to education, and women's rights. Much of the content is generally acknowledged as inconsistent with orthodox teachings of the Talonnic faith.
During UNMORPH	Radio station draws protests from religious leaders in Rocian Plateau. Major-General Skylark orders warnings to precede potentially offensive programming, but refuses to alter the content of the programs.
2006 and into 2007	UNMORPH defuses the border dispute without significant further bloodshed.
October 2007	An NGO reports a pattern of sexual exploitation by UNMORPH personnel against young girls in the Plateau. UN Secretary-General establishes a Commission of Inquiry, which concludes that UNMORPH troops regularly engaged in non-violent sexual relations with local girls while off duty and outside of Camp Tara.
December 2007	Prime Minister Simurg calls for UNMORPH to be shut down, arguing that its peacekeeping mandate has been completed and that its conduct is becoming unacceptably offensive.
19 February 2008	UN Security Council issues Resolution 6590 calling for gradual draw-down of troops and conclusion of UNMORPH mission by 31 July 2008.
March 2008	Guardian-led local government of the Northeast Province of Alicanto adopts ordinances implementing Talonnic laws, which require married women to obtain husbands' consent to register property in their own names and prior approval from provincial authorities of all secular broadcast transmissions. Major-General Skylark announces that UNMORPH will continue to broadcast without applying for approval.
Immediately after announcement	Tensions flare between Dasu and Zavaabi throughout Northeast Province; riots break out in Dasu neighborhoods of Melatha, the Province's largest town.
28 April 2008	Alicantan national government moves quickly to restore order. Prime Minister Simurg announces his intention to overhaul the "ungodly" judicial code and adopt firm measures to combat lawlessness. He calls upon the Secretary-General to reiterate UNMORPH's commitment to leave Alicanto no later than 31 July 2008.
28 April 2008 through 26 May 2008	Sporadic riots and reports of significant violence throughout Alicanto, especially in Northeast Province.
1 June 2008	Martial law is declared in eight largest cities of Northeast Province and four cities in Northwest Province.
Sometime after 1 June	Dasu in Northeast Province begin to flee across the Rocian Plateau toward New Bennu in large numbers, fearing imminent persecution.
3 July 2008	UN Security Council adopts Resolution 6620, concerned about reports of new violence leading to massive refugee flow, insists Alicanto allow immediate access by international humanitarian organizations.
4 July 2008	Alicantan representative to the UN submits a memorandum to the Secretary-General and the President of Security Council, emphatically rejecting allegations that ethnic cleansing is contemplated or imminent.
7 July 2008	Prime Minister Simurg and ten others are killed in an explosion en route to the airport. Police announce evidence linking the bomb to the Dasu Integrity Front ("DIF"), refuse to make the evidence public.
Sometime after 7 July 2008 (no specific date)	Police begin nationwide manhunt for DIF leader Piccardo Donati, spawning Zavaabi defense cadres that claim responsibility for burning six Dasu villages in the Rocian Plateau. An NGO reports thousands killed and a new wave of Dasu from all parts of Alicanto fleeing their homes in apprehension of imminent attack. NGO also reports evidence of a weapons cache in the Plateau, which it believes it was smuggled into Alicanto by radical Zavaabi.

22 July 2008	Ravisian President declares a real and present danger of ethnic cleansing on massive scale about to occur in Alicanto and requests an emergency session of Security Council to debate two Ravisian Resolutions: 1) withdraw its decision to shut down UNMORPH by 31 July and expand mandate to protect Alicantans from impending ethnic cleansing, or 2) authorize collective action by Ravisia and R-FAN to restore order in Alicanto. Ravisian President provides highly-classified raw intelligence to UN Secretary-General and declares that if Security Council will not authorize the proposed intervention, Ravisia will itself honor the responsibility to protect.
23 July 2008, after first day of debate	UN Secretary-General delivers a report to the Security Council cataloguing tension and violence between the Dasu and Zavaabi since March 2008.
During debate	Alicantan Representative to the UN protests the proposed intervention and the consideration of Ravisian intelligence that was not disclosed publicly. Her demand that the data be provided is ruled out of order by Security Council President. Secretary-General declares that he gave his word to Ravisian President that the data would not be divulged and he will not revoke his promise.
25 July 2008	President of the Security Council calls for a vote, and both Resolutions are defeated. Assembly of R-FAN convenes this same day and votes to endorse unilateral Ravisian intervention, with Alicanto casting the only negative vote.
31 July 2008	UN Secretary-General announces termination of UNMORPH.
1 August 2008, morning	Ravisian special forces and supplies arrive at Camp Tara. The Commanding General of the Ravisian Army declares the beginning of Operation Provide Shelter ("OPS").
2 August 2008	New Alicantan Prime Minister Carl Phoenix sends a letter to the Ravisian President calling the invasion a violation of sovereignty and an act of war.
15 August 2008	Alicantan Parliament adopts new Judicial Code, "Talonnic Law of our Times." Chapters "On Women's Rights" and "On the Death Penalty", which reintroduces capital punishment, draw criticism from international human rights organizations.
21 August 2008	Alicantan chief of police reports to the public prosecutor that the manhunt was unsuccessful in locating Piccardo Donati. Alicantan prosecutor begins trial *in absentia* under provisions of new Alicantan law.
1 September 2008	A panel of judges returns verdict declaring Donati guilty of murders, sentences him to death by hanging. An appeal is taken and rejected in published opinion.
By 15 September 2008	Hundreds of petitions are presented to provincial officials seeking to void property titles of Dasu women who fled Alicanto; nearly all petitions are granted, and the properties are made available to local Zavaabi.
17 September 2008	Major-General Skylark confirms reports that Piccardo Donati has been granted refuge at Camp Tara and announces intention not to deliver him to Alicantan authorities for judicial execution. Prime Minister Phoenix sends a message to the Ravisian President announcing Alicanto's intent to pursue legal action against Ravisia before ICJ.
19 September 2008	Ravisian President agrees to make a joint submission to the ICJ.
30 September 2008	Alicanto and Ravisia submit a written application to the ICJ Registrar together with the Compromis.

Appendix C: Introduction to International Law

This section is an introduction to public international law for judges who might not have professional experience or training in the field. There are important distinctions between international law and most domestic legal systems. The most significant for the moot judge is the rigid definition of what sources of law are acceptable before the Court.

A. General

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

(a) treaties or conventions to which the contesting States are parties;

(b) international custom, as evidence of a general practice accepted as law;

(c) general principles of law recognized by civilized nations;

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

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

Judges from common-law systems should note the status of precedent. Article 59 of the ICJ Statute states that decisions of the Court are binding *only on the parties to the case*, and are without formal effect as precedent. In practice, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(1)(d). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those evaluations in later decisions.

Resolutions of the United Nations General Assembly are not, of themselves, binding upon the Court. Although Resolutions may be evidence of customary international law, the General Assembly is not analogous to a domestic legislature.

D. Treaties

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty. Rules regarding treaty procedure and interpretation are defined in the Vienna Convention on the Law of Treaties.

Article 26 of the VCLT sets out the fundamental principle relating to treaties, *pacta sunt servanda*, which provides, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Once a State becomes a party to a treaty, it is bound by that treaty.

Article 34 of the VCLT adds that a treaty does not create rights or obligations for State that are not parties to the treaty. However, even if a State is not party to a treaty, the treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this "back-door" means by which a treaty may become binding on non-parties. The ICJ has also recognized this possibility in the F.R.G. v. Denmark, North Sea Continental Shelf Cases, 1969. Judges should be aware, however,

that situations arise where some provisions of a treaty – for example, many provisions of the International Covenant on Civil and Political Rights -- may reflect or codify customary international law, while other parts do not.

E. Customary International Law

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has binding force of law because the community of states treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a state whether or not it has affirmatively assented to that rule.

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

"State practice" is the objective element, and simply means a sufficient number of states behaving in a regular and repeated manner consistent with the customary norm. Evidence of state practice may include a codifying treaty, if a sufficient number of states sign, ratify, and accede. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create "regional customary international law" or whether the practice of particularly affected states, *e.g.* in the area of space law, can create custom that binds other states, although the ICJ has acknowledged the possibility.

Opinio juris is the psychological or subjective element of customary international law. It requires that the state action in question be taken out of a sense of legal obligation, as opposed to mere expediency. Put another way, *opinio juris*, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it." MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

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

In the North Sea Continental Shelf Cases, the ICJ stated that the party asserting a rule of customary international law bears the burden of proving it meets both requirements.

F. General Principles of Law

The third source of international law consists of "general principles of law." Such principles are gap-filler provisions, utilized by the ICJ in reference to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature (e.g., burden of proof and admissibility of evidence). Many others, such as waiver, estoppel, unclean hands, necessity, and *force majeure,* may sound familiar to a common-law practitioner as equitable doctrines. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited general principles of international law.

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

G. Decisions and Publicists

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

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

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

H. Burdens of Proof

In the Corfu Channel Case, the ICJ set out the burdens of proof applicable to cases before it. The Applicant normally carries the burden of proof with respect to factual allegations contained in its claim by a preponderance of the evidence. The burden falls on the Respondent with respect to factual allegations contained in a cross-claim. U.K. v. Albania, 1949.

Appendix D: Suggested Questions

International Law Generally

1. Is there any priority or hierarchy of the sources of international law mentioned in Art. 38 of the ICJ Statute?

2. What is customary international law? What are the elements of customary international law?

3. When asserting a state's obligation under customary international law:

   A. Where can we find evidence of relevant state practice?

   B. What is *opinio juris*? How is it proven?

4. Is the ICJ bound by its prior decisions?

5. What are *travaux preparatoires*? When are the records of the drafting and negotiations of a treaty relevant?

6. What specific remedies is the Applicant/Respondent seeking? Is the ICJ permitted by its Statute to grant those remedies?

7. What is the basis of standing for the party seeking relief?

8. What is the standard of proof with respect to this issue? Which party bears the burden of proof?

9. If this Court determines that the lack of factual certainty allows multiple, conflicting inferences, what should this Court do then?

10. If a state has conflicting obligations under two treaties (or under a treaty on the one hand and customary international law on the other), which obligation controls? What principles does the Court use to determine which obligation controls?

OPS intervention

1. Was Operation Provide Shelter a humanitarian intervention operation? If so, what international rule justifies such intervention?

2. Which international norm takes precedence: the prohibition against the use of force or obligation to protect persons against grave human rights abuses?

3. Can the responsibility to protect be legitimately exercised without the authorization of the UN Security Council? If so under what conditions?

4. Is there a link between the responsibility to protect and collective self-defence?

5. Can a nation-state engage in unilateral humanitarian intervention under the UN Charter?

6. Is there a customary rule permitting unilateral humanitarian intervention? If so, what is the evidence establishing such custom?

7. Isn't the responsibility to protect a moral and political notion rather than a legal obligation? Can you give any examples of state practice applying it?

Ravisia's Continued Presence

1. Do actions in exercise of the responsibility to protect have to be necessary and proportionate?

2. Why was it necessary to continue the presence of the troops once UNMORPH's aim was achieved? Was this proportionate?

3. What is the UN practice in similar situations of humanitarian intervention, particularly with regard to continued presence of troops?

4. How long did Russian troops stay in Georgia and what was the reaction of the international community towards this continued presence?

5. Are you aware of any state practice of humanitarian intervention without SC authorization and of how long the presence continued?

ICJ Authority to Order Removal

1. What specific remedies is the Applicant seeking? Is the ICJ permitted by its Statute to grant those remedies?

2. Can a judgment of the Court call for specific action? What is the force of such a call to action?

3. In what circumstances would the ICJ be entitled to order a country to withdraw its forces from a certain territory?

4. Is concurrent jurisdiction between the Security Council and the ICJ possible by virtue of the UN Charter and the ICJ Statute?

5. Can the ICJ issue an order which contradicts binding resolutions of the Security Council?

6. Does the ICJ have the power to exercise judicial review in respect of SC resolutions?

7. Has the ICJ ever addressed the question of its competence in relation to the Security Council?

ICJ Fact Finding

1. Does the ICJ have the authority to order a state party to produce evidence?

2. Does calling upon a state to produce evidence conflict with the principle of state sovereignty?

3. May a state party to a procedure excuse itself from producing evidence based on "national security" grounds?

4. May the ICJ treat evidence produced by a state party as secret or confidential?

5. May the ICJ draw any inferences, negative or otherwise, from a party's refusal to produce requested evidence?

6. Would such an inference fall under the ICJ's power to take "formal note" of any refusal to produce evidence as provided in Article 49 of the Statute? What is meant by the term "formal note"?

7. Is there an obligation to produce evidence when there are other arguments or means to discharge such party's burden of proof?

8. Would a request by the Court calling upon a state to produce intelligence set a dangerous precedent by prompting states to refuse to accept the Court's jurisdiction in the future?

Secretary-General and the Ravisian Intelligence

1. Does this Court have the power to ask the Secretary-General to produce evidence?

2. Must this court first receive a request for an advisory opinion before it may issue a legal conclusion regarding the legality of an act by the Secretary-General?

3. Is it sufficient for this court to simply draw an adverse inference against Ravisia if the Secretary-General does not produce the evidence? May the court draw such an inference?

4. Would this court's declaration that the Secretary General may legally hand over the intelligence information overturn the strong presumption of confidentiality inherent in the office of the Secretariat?

5. May this court simply defer to the findings of the Security Council and the Secretariat, rather than require independent review of classified intelligence documents?

6. Are evidentiary rulings and requiring production of evidence "matters of procedure" and therefore a power expressly delegated to the Court under Article 48 of the Statute of the ICJ?

Radio Broadcasts

1. Which local laws and international treaties govern the radio broadcasts at Camp Tara? If they are inconsistent, which prevails?

2. Is the fact that the "offensive radio programming" was preceded by a disclaimer relevant? Why or why not?

3. Do primarily Western notions of "free speech" apply in an international context? If so, on what basis?

4. Are the radio broadcasts protected by other international norms or rules, especially in light of the fact they sought to promote certain social goals with regard to women?

5. Given that the radio programming was initially carried out during UNMORPH, and the broadcasts included programs from the UN Radio News Service, how can Ravisia be held liable for any violation of international law related to these broadcasts?

6. What rules of conduct are UN peacekeepers supposed to follow when engaged in their missions? Do these rules shift following the end of their mandate?

7. Focusing only on their behavior after the end of the UN mandate, which international legal rules ought to govern?

Sexual Exploitation

1. Did any laws of war apply during UNMORPH?

2. Do any laws of war apply to Ravisia's occupation of Camp Tara?

3. Are the Geneva Conventions relevant even though Ravisia and Alicanto are not parties to the Geneva Conventions?

4. Does Ravisia have any obligations under the Convention on the Rights of the Child to prevent or punish misconduct of its military forces?

5. Does Ravisia have any obligations under the Convention on the Elimination of all forms of Discrimination Against Women to prevent or punish misconduct of its military forces?

6. Is Ravisia liable for the misconduct of the Ravisian troops during UNMORPH?

7. Did any of Ravisia's treaty obligations extend to the Rocian Plateau when Ravisian troops were there as part of UNMORPH?

8. Have Ravisia's treaty obligations changed now that Camp Tara is occupied only by Ravisian troops?

Reparations

1. In the absence of an official UN organ or legal instrument to handle reparations claims for peacekeepers that violate the "social fabric" of a state they are deployed to, on what basis are reparations being sought?

2. Are there alternative bases upon which Alicanto can seek reparations for the behavior of Ravisian soldiers while they were operating under the UN mandate?

3. What distinction, if any, ought the court to draw between the Ravisian soldiers' conduct before and after the expiration of the UN Security Council mandate?

4. Why shouldn't the UN pay the reparations if the alleged violations took place under its oversight of the operation?

5. How do you measure “injury . . . to social fabric”? On what basis do you make the measurement?

6. Is there any case out of the ICJ or another international tribunal that recognizes and compensates “injury . . . to social fabric”?

Trials in Absentia/Retroactively Harsher Punishment

1. Are there international standards of due process?

2. Did Piccardo Donati’s trial and sentence comport with these standards?

3. How are rights of due process enforced? Under the ICCPR? Under customary international law? Can you provide an example of a domestic court or international tribunal finding that a state has violated due process rights?

4. What is the remedy when a due process violation occurs? To what extent can the ICJ order a remedy that would interfere with the legal process of the violating state?

Death Penalty

1. What evidence of customary international law supports the claim that capital punishment violates international law?

2. Would Alicanto violate any legally binding documents/treaties by carrying out Piccardo Donati’s sentence?

3. How does Alicanto’s ban of the death penalty between 1947 and August 2008 affect Alicanto’s ability to argue that it has the right to carry out the execution of Piccardo Donati?

4. Does the imposition of the death penalty violate the standard prohibition in international legal documents against cruel, inhuman, and degrading treatment?

5. Even if the death penalty is not a per se violation of international law, would the imposition of the death penalty in this particular case, where due process violations have occurred, be a violation of international law?

Providing Asylum to Donati

1. Does Ravisia have obligations with respect to the rights of Piccardo Donati? What is the source of those obligations?

2. May a state provide political asylum to an individual outside of its territorial jurisdiction?

3. To what extent may an occupying state interfere in the legal process of its host state?