TEAM 560A

THE 2012 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

Case Concerning the Mai-Tocao Temple

THE REPUBLIC OF APROPHE
APPLICANT

v.

THE FEDERAL REPUBLIC OF RANTANIA
RESPONDENT

SPRING TERM 2012

On Submission to the International Court of Justice
The Peace Palace, The Hague, The Netherlands

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The Republic of Aprophe and the Federal Republic of Rantania appear before the International Court of Justice in accordance with Article 40(1) of its Statute, through submission of a special agreement for resolution of all the differences between them concerning the Mai-Tocao Temple. This Court has jurisdiction over the dispute pursuant to Article 36(1) of its Statute and Article XXV of the Peace Agreement of 1965, as both parties have agreed that this Court will adjudicate the dispute under its ad hoc jurisdiction. The parties concluded this special agreement and Compromis in The Hague, The Netherlands, and jointly notified this Court of their special agreement on September 12, 2011.

QUESTIONS PRESENTED

The Republic of Aprophe respectfully requests the Court to adjudge:

I.

Whether the Court may exercise jurisdiction over all claims in this case, since the Andler government is the rightful government of Aprophe;

II.

Whether Rantania is responsible for the illegal use of force against Aprophe in the context of Operation Uniting for Democracy;

III.

Whether Rantania may permit the execution of the judgment in *Turbando et al v. Republic of Aprophe*, since the exercise of jurisdiction by Rantanian courts violated international law; and

IV.

Whether Aprophe's destruction of a building of the Mai-Tocao Temple violates international law.

STATEMENT OF FACTS

THE MAI-TOCAO TEMPLE

The Mai-Tocao temple complex is located in Aprophian territory, near Aprophe's eastern border with Rantania. Sovereignty over Mai-Tocao was a significant point of contention between Aprophe and Rantania for over 300 years. During the Mai-Tocao War of 1962–1965, Aprophe responded to attacks emanating from within Rantania by occupying Rantanian territory and interning 500 Rantanian villagers in military camps. These internees labored in twelve-hour shifts to provide goods and services to the Aprophian army. In 1965, the two countries negotiated a peace treaty ("the 1965 Treaty"), which committed their ongoing boundary dispute to an arbitral tribunal and provided for the relocation of villagers in the disputed area to their country of choice. The 1965 Treaty also waived all claims on behalf of both states and their citizens for claims arising out of the war. In 1968, the arbitral tribunal awarded the disputed Mai-Tocao temple area to Aprophe. In 1986, Aprophe proposed the inscription of the Mai-Tocao complex onto the World Heritage List. With Rantania's support, the World Heritage Committee added the temple to the list in 1988.

THE *TURBANDO* CASE

In 2001, a Rantanian advocacy group, the International League for Solidarity and Access ("ILSA"), initiated civil litigation against Aprophe to seek compensation for the internment of Rantanian citizens during the Mai-Tocao war. Aprophe's courts dismissed the claims because the applicable statute of limitations had expired. In response, ILSA initiated identical litigation in the Rantanian court system. In *Turbando et al. v. the Republic of Aprophe*, Rantania's Supreme Court affirmed a trial court's dismissal of the claims on the basis of the 1965 Treaty's waiver provision. ILSA then filed a claim against Rantania in the Eastern Nations Court of Human Rights ("the ENCHR"), an entity established by Rantania, Lamarthia, Verland, and Pellegrinia's

ratification of the Eastern Nations Charter of Human Rights ("the Charter") in 1980. The ENCHR held that the 1965 Treaty's waiver provision conflicts with the Charter's provision of a right to remedy and prohibited Rantanian courts from relying on the waiver provision to dismiss ILSA's claims.

Aprophe refused to participate in the proceedings at the ENCHR, asserting a right to foreign sovereign immunity. On December 12, 2009, the trial court ruled on remand that foreign sovereign immunity does not apply in cases that allege violations of peremptory norms of international law. The court awarded each of the sixty plaintiffs damages in amounts ranging between US$75,000 and US$225,000. Aprophe objected on the basis of the 1965 Treaty and customary international law. The Rantanian Ministry of Foreign Affairs obtained a stay of execution in light of judgment's political implications. This stay remained in force until February 15, 2011, when Rantanian President Sue Perego informed ILSA that Rantania would no longer oppose the judgment's execution. The Rantanian courts granted ILSA's motion to lift the stay and seized US$10 million in nondiplomatic Aprophian assets in Rantania.

THE EASTERN NATIONS INTERNATIONAL ORGANIZATION

In 1990, Rantania joined with Lamarthia, Verland, and Pellegrinia to create the Eastern Nations International Organization ("the ENI"), a regional organization devoted to strengthening economic cooperation and mutual ties among its members. In 2000, Aprophian Senator Mig Green won Aprophe's presidential election and began to institute policies designed to secure Aprophe's membership in the ENI. Aprophe acceded to the Charter in 2005 but negotiated an exemption from the ENCHR's compulsory jurisdiction until its attainment of ENI membership.

Green's pro-ENI measures prompted strikes and opposition demonstrations throughout Aprophe. On January 10, 2011, Green's government invoked emergency powers, postponed

upcoming elections, and ordered the Aprophian military to patrol major urban areas to quell the civil unrest three days later.

ESTABLISHMENT OF THE ANDLER GOVERNMENT

General Paige Andler, Chief of Staff of the Aprophian Armed Forces, issued an open letter to President Green on January 15, 2011 in which she characterized his suspension of elections as an attempt to subvert the will of the Aprophian people and refused to undertake the military patrols he requested, which led Green to fire Andler and order her arrest. In support of Andler, Aprophe's armed forces took control of the presidential palace and other governmental installations. Green and his ministers fled during the night to Rantania. The next day, Andler assumed her role as interim president. By January 20, Andler's new government had established control over the Aprophian military, 90% of Aprophe's territory, and 80% of Aprophe's population. Only 800 members of the army's Homeland Brigade and several hundred civilian supporters remained loyal to Green.

President Andler dispatched troops to the two villages where the Green loyalists had established their base. Andler's troops demanded the surrender of the resisting forces and announced their intent to arrest those who did not comply. Minor skirmishes broke out on January 20 when the loyalists refused. Meanwhile, Green sought Rantanian military intervention to re-establish his presidency. On January 22, Rantania proposed and the ENI passed a resolution that called for the restoration of Green as the president of Aprophe. In response, Andler's government denounced the Charter on January 23.

OPERATION UNITING FOR DEMOCRACY

On February 15, 2011, the ENI approved Rantania's proposed activation orders for Operation Uniting for Democracy, an aerial bombardment campaign designed to remove

Andler's government from power. On Feburary 18, the Rantanian Air Force began around-the-clock airstrikes against military and strategic assets in Aprophe. Within one week, the airstrikes had killed 50 Aprophian soldiers and destroyed 12 of 15 military installations in the vicinity of Aprophe's capital city, Marcelux.

To escape the airstrikes, President Andler and her staff fled the Mai-Tocao temple complex. Major-General Otaz Brewscha, a Rantanian Air Force reserve officer and Operation Uniting for Democracy's Force Commander, then announced his intent to launch a ground campaign into Aprophian territory to capture President Andler. In response, President Andler publicly announced that she would destroy a building in the temple complex if Rantania did not cease its military activities.

The following day, the United Nations Security Council issued a unanimous resolution in which it condemned Operation Uniting for Democracy and demanded its immediate cessation. Nevertheless, Rantania continued its aerial bombardment of Aprophe's capital for the next two days. On March 3, in conformity with her earlier statement, President Andler ordered the controlled detonation of explosives in one of the smaller buildings in the temple complex. On March 5, President Perego ordered the immediate grounding of the Rantanian Air Force, which brought Operation Uniting for Democracy to a functional end. Later that day, the ENI formally suspended the operation. President Andler and her staff left the temple complex and returned to Marcelux in the following weeks.

APPLICATION TO THIS COURT

On May 12, 2011, Aprophe filed an application against Rantania with this Court's Registry. Rantania initially refused to consent to the jurisdiction of the Court on the grounds that President Andler did not represent the legitimate government of Aprophe. However, on July 1,

2011, Rantania agreed to engage Aprophe before this Court on the condition that Aprophe withdraw its initial its application and agree to jointly submit all claims the parties might have against one another. Aprophe agreed, and the two states jointly submitted their claims to this Court on September 12, 2011.

SUMMARY OF THE PLEADINGS

FIRST PLEADING

The Court may exercise jurisdiction over all claims in this case because the Andler government is the rightful government of the Republic of Aprophe. A government's effective control of a State's population and territory determines its legitimacy, and President Andler's government exercises effective control over Aprophe. President Green's government is not a legitimate government-in-exile because Andler's government did not secure effective control of Aprophe in an internationally wrongful manner. Limited formal recognition has not deprived Andler's government of legitimacy, because bilateral and collective recognition are political acts that have no legal effect under international law. Lastly, Andler's government is not illegitimate on the basis of any norm of democratic governance, because no such norm has crystallized in customary international law.

SECOND PLEADING

Rantania is responsible for the illegal use of force against Aprophe in the context of Operation Uniting for Democracy. Aprophe's recognition of the ENI's international legal personality is a necessary prerequisite for the ENI's international responsibility. However, Aprophe has not provided the requisite recognition. Further, even if the ENI does possess legal personality, Rantania is still responsible for Operation Uniting for Deomcracy because it exercised effective control over the Rantanian Air Force units that launched the airstrikes. In the alternative, Rantania and the ENI are jointly responsible for the use of force against Aprophe because Rantania was fully involved in the decision-making process regarding all aspects of the aerial operation.

The use of force against Aprophe violated Article 2(4) of the United Nations Charter because it was not authorized by the Security Council, was not a legitimate exercise of the right

to self-defense, and was undertaken without the consent of Aprophe's legitimate government. In the alternative, even if President Green's government was the legitimate government of Aprophe at the time, the use of force was still illegal because President Andler's opposition had already attained belligerent status, which imposed an obligation of neutrality on the international community.

THIRD PLEADING

Since the exercise of jurisdiction by Rantanian courts in *Turbando v. Republic of Aprophe* violated international law, Rantania may not permit its officials to execute the judgment in that case. Rantania waived all claims arising out of the Mai-Tocao War by signing the Peace Agreement of 1965, which contained an explicit waiver clause. The principle of *pacta sunt servanda* obligates Rantania to honor its treaty commitments. The subsequent ratification of the Eastern Nations Charter of Human Rights did not invalidate Rantania's waiver.

Moreover, the doctrine of foreign sovereign immunity requires that Rantania dismiss claims in its national courts that challenge the legality of Aprophe's noncommercial sovereign acts, a category that includes the acts forming the basis of the *Turbando* lawsuit. The Rantanian trial court erred in finding an exception to foreign sovereign immunity for alleged *jus cogens* violations because no such exception has crystallized in customary international law. Further, recognition of such an exception would tie the application of foreign sovereign immunity to the wrongfulness of the sovereign's underlying act, which contradicts the accepted understanding of foreign sovereign immunity as a procedural doctrine. Even if such an exception has crystallized, its application would violate the principle of intertemporality because the hierarchical superiority of *jus cogens* norms was not recognized until after Aprophe's allegedly wrongful acts took place.

FOURTH PLEADING

Aprophe's destruction of a building of the Mai-Tocao Temple did not violate international law. Aprophe's actions did not violate either the Peace Agreement of 1965 or the World Heritage Convention because neither treaty applies to Aprophe's obligations to protect cultural property on its own territory during an armed conflict. Further, Aprophe's actions did not violate customary international law because the prohibition on acts that damage or destroy cultural property also recognizes an exception for imperative military necessity. Aprophe's actions were justified by imperative military necessity because the destruction of the building was intended to and did in fact prevent an unlawful incursion into Aprophe's territory and secure the cessation of an aerial bombardment campaign that had destroyed Aprophe's military infrastructure. No other feasible method for obtaining a similar military advantage existed, as Aprophe had scarce remaining military resources and no reason to believe that any international intervention on its behalf would be forthcoming.

PLEADINGS

I. THE COURT MAY EXERCISE JURISDICTION OVER ALL CLAIMS IN THIS CASE, SINCE THE ANDLER GOVERNMENT IS THE RIGHTFUL GOVERNMENT OF THE REPUBLIC OF APROPHE.

A. President Andler's government is the legitimate government of Aprophe.

1. President Andler's government exercises effective control over Aprophe.

Only a legitimate government may speak for and bind a state in international law.[1] As a result, this Court may only exercise jurisdiction over claims submitted by a state's legitimate government.[2] For over 300 years,[3] "or indeed the past millennium,"[4] an overwhelming majority of courts and highly qualified publicists have recognized that the peoples of the world are represented in the international arena by the governments in effective control of their respective states.[5] Effective control determines legitimacy; a national legal order "begins to be valid as soon

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[1] Jean D'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U J. INT'L L. & POL. 877, 878 (2006).

[2] *See Application of the Convention on the Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.)*, 2007 I.C.J. 1, ¶44; Statute of the International Court of Justice, 59 STAT. 1055 (1945), art. 34(1).

[3] *See, e.g.*, Hersch Lauterpacht, RECOGNITION IN INTERNATIONAL LAW 100 (1947), *quoting* Samuel von Pufendorf, DE JURE NATURAE ET GENTIUM LIBRI (1672), *reprinted and translated in* CLASSICS OF INTERNATIONAL LAW (C.H & W.A. Oldfather eds., 1934).

[4] Stefan Talmon, *Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law*, *in* THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 499–537 (Guy Goodwin-Gill & Stefan Talmon eds., 1999) [hereinafter Talmon, *Government in Exile*], *quoting* Panel, "The Panamanian Revolution: Diplomacy, War and Self-Determination in Panama" (1990) 84 ASIL PROC. 182, 188 (remarks by Tom Farer). *See also* Tom Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT'L L. 503, 510 (1990).

[5] Brad Roth, *Governmental Illegitimacy Revisited: Pro-Democratic Armed Intervention in the Post-Bipolar World*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 481, 482 (1993) [hereinafter Roth, *Illegitimacy Revisited*]. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §205 (1987); L.F.L. Oppenheim, INTERNATIONAL LAW 403, 405 (1905); Talmon, *Government in Exile*, *supra* note 4.

as it has become – on the whole – efficacious; and it ceases to be valid as soon as it loses this efficacy."[6]

International law interprets a successful *coup d'état* as a procedure "by which a national legal order can be changed."[7] According to international law, "[t]he government brought into permanent power by a revolution or a *coup d'etat* is…the legitimate government of the State."[8] So long as the revolutionary government achieves effective control, it becomes the "apparatus of the State, replacing that which existed previously."[9]

To achieve effective control, the new government must establish control over a preponderant number of its people[10] and territory.[11] A bulk of the members of the political society[12] must behave, "by and large, in conformity with the new order."[13] Additional important

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[6] Hans Kelsen, GENERAL THEORY OF LAW AND STATE 220–21 (Anders Wedburg trans., 1961) (1945) [hereinafter Kelsen, GENERAL THEORY].

[7] Talmon, *Government in Exile*, *supra* note 4.

[8] *Id.*

[9] Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 Y.B. INT'L L. COMM., vol. II, pt. 2 [hereinafter ARSIWA], art. 9, comm. 4; *see also* Memorandum from the Secretary-General to the President of the Security Council on the Legal Aspects of the Problem of Representation at the United Nations, U.N. Doc. S/1466 (Mar. 9, 1950) [hereinafter Representation Memorandum].

[10] Restoration of the Lawful Rights of the Royal Government of the National Union of Cambodia in the United Nations, U.N. G.A. Res. 3238 (XXIX) (1974).

[11] Lord Peter Carrington, Address to the House of Lords, 408 Parl. Deb., H.L. 1121–22 (5th ser.) (23 May 1980).

[12] Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 1985 BRIT. Y.B. INT'L L. 189, 193, *quoting Cuculla Arbitration* (1868), *in* MOORE'S INTERNATIONAL ARBITRATIONS 2876–77 (1898).

[13] Kelsen, GENERAL THEORY, *supra* note 6, at 220–21. *See also Asma Jilani v. The Government of Punjab,* (1972) P.L.D.S.C. 139, 179–80 (Pak.); Brad Roth, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 258–59 (2000) [hereinafter Roth, GOVERNMENTAL ILLEGITIMACY], *quoting*

indicia of effective control include whether the regime discharges governmental functions,[14] maintains control over the capital city,[15] and remains within the national territory.[16] If a court is satisfied that a new regime has secured the requisite degree of control, the court cannot "hold that regime to be other than legitimate."[17]

By January 20, 2011, President Andler's government had successfully established control over 80% of Aprophe's population[18] as well as 90% of Aprophe's territory, including the capital city of Marcelux.[19] Shortly after assuming office, Andler's government began to discharge governmental functions by suspending a number of pro-ENI measures that President Green had previously instituted,[20] holding an official press conference,[21] and exercising command over military forces.[22] Further, Andler's government has remained within Aprophe's national territory since assuming control.[23]

By contrast, there is no evidence that President Green maintains control over anywhere

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Draft Resolution 396 (V), U.N. Doc A/AC.38/L.21/Rev.1 annexes (14 December 1950).

[14] *Tinoco Concessions Arbitration (Gr. Brit. v. Costa Rica)*, 1 R.I.A.A. 369, 381–82 (1923), *reprinted in* 18 AM. J. INT'L L. 147 (1924).

[15] Roth, GOVERNMENTAL ILLEGITIMACY, *supra* note 13, at 183–84.

[16] Lauterpacht, *supra* note 3, at 93–94.

[17] *Mokotso v. King Moshoeshoe II*, 90 I.L.R. 427, 519 (Lesotho High Ct. 1988).

[18] Compromis ¶29.

[19] Compromis ¶29.

[20] Compromis ¶27.

[21] Compromis ¶28.

[22] Compromis ¶30.

[23] Compromis ¶¶27, 39, 44.

close to the required preponderance of Aprophe's people.[24] Additionally, Green only maintains control over 10% of Aprophe's territory.[25] Lastly, Green, his ministers, and his parliamentarians have not remained within the national territory.[26]

Because Andler's government exercises effective control over Aprophe and Green's government does not, only Andler's government may represent Aprophe before this Court.

2. **President Green's government is not a legitimate government-in-exile.**

While a government's effective control of a state's population and territory generally determines its legitimacy under international law, there is an "exception to that rule."[27] A government-in-exile may be recognized as a state's legitimate government even when it does not exercise effective control when it is representative, independent, and when the government that does exercise effective control came to power through internationally wrongful means.[28] Nevertheless, "not every international illegality" legitimizes a government-in-exile."[29]

Here, the only category of international illegality that is potentially relevant to the establishment of Andler's government is the violation of a treaty commitment to democratic government. However, although Aprophe signed the Eastern Nations Charter of Human Rights ("the Eastern Nations Charter"), "not every (general) reference to the principle of representative democracy in a treaty or other international instrument will suffice" as the basis for a legal

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[24] Compromis ¶¶1, 26, 27, 29, 34.

[25] Compromis ¶29.

[26] Compromis ¶¶27, 29.

[27] Talmon, *Government in Exile*, *supra* note 4.

[28] *Id.*

[29] *Id.*

commitment.[30] Instead, "rather a specific undertaking by the state that it will only have a democratic government" is necessary.[31] No such specific undertaking appears anywhere in the text of the Eastern Nations Charter.

Instead, Andler's government was brought about by an "internal coup d'état or revolution" that involved "no illegality in terms of international law."[32] As a result, Green's government is not a legitimate government-in-exile.

3. Limited formal international recognition has not deprived President Andler's government of legitimacy.

The principle of numerical preponderance of recognition is inappropriate and legally incorrect as the test for a government's legitimacy.[33] Recognition and nonrecognition continue to be spoken of as mere "political acts"[34] that are not a necessary indication of whether a governmental apparatus bears the legal capacity to assert rights and exercise powers on behalf of the underlying sovereign entity.[35] In fact, many states have announced an end to the practice of declaring a grant or denial of recognition to new governments, claiming thereby to have abolished the practice altogether.[36]

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Representation Memorandum, *supra* note 9.

[34] Roth, GOVERNMENTAL ILLEGITIMACY, *supra* note 13, at 253.

[35] Brad Roth, *Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT'L L. 393, 423 (2010) [hereinafter Roth, *Secessions*].

[36] Roth, GOVERNMENTAL ILLEGITIMACY, *supra* note 13, at 137; *see also* Estrada Doctrine, *in* 25 AM. J. INT'L L. SUPP. 203 (1931); Thomas Galloway, RECOGNITION OF FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES 30 (1969); RESTATEMENT, *supra* note 5, at §203, Reporter's Note 1; Carrington, *supra* note 11, at 1121–22.

Nor is a government's legitimacy dependent on its recognition by the General Assembly of the United Nations. The United Nations Charter "nowhere expressly grants the General Assembly the capacity to make so weighty a determination."[37] While the General Assembly may invoke its inherent authority to "decide on the seating of a delegation to the [General Assembly] itself," it is "implausible that the General Assembly could impose its judgment in such matter on…the International Court of Justice."[38]

An effective but unrecognized government leads an independent political existence and benefits from the rights and duties international law prescribes.[39] Therefore, limited formal international recognition of Andler's government has no bearing on its legitimacy or its capacity to represent Aprophe before this Court.[40]

B. President Andler's government is not illegitimate on the basis of on any norm of democratic governance in customary international law.

The method by which a government achieves or retains power has not ordinarily been thought of as a basis for withholding international legal protections.[41] Nevertheless, in the early 1990's several academics argued that recent state practice suggested that Western-style democracy would become a criterion of lawful government in the near future.[42] Under this

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[37] Roth, GOVERNMENTAL ILLEGITIMACY, *supra* note 13, at 256; Charter of the United Nations (San Francisco 1945), 1 U.N.T.S. XVI, art. 2(4).

[38] Roth, GOVERNMENTAL ILLEGITIMACY, *supra* note 13, at 256–57.

[39] B.R. Bot, NON-RECOGNITION AND TREATY RELATIONS 35 n. 103 (1968); *see also generally* Quincy Wright, *United States Intervention in the Lebanon*, 53 AM. J. INT'L L. 112 (1959).

[40] Compromis ¶31.

[41] Roth, *Illegitimacy Revisited*, *supra* note 5, at 482; *see also Tinoco*, *supra* note 14, at 381–82; RESTATEMENT, *supra* note 5, at §203; *see also Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment*, 1986 I.C.J. 14, ¶263.

[42] Talmon, *Government in Exile*, *supra* note 4.

"emerging right to democratic governance," governments would soon derive their legitimacy not from the extent of their control over population and territory but from the "consent of the governed."[43]

However, proponents of a democratic governance norm have "not been able to adduce much evidence" of its existence in state practice.[44] While the international community did "authoritatively repudiate[]" the 1991 overthrow of Haitian President Jean Bertrand-Aristide and the 1997 overthrow of Sierra Leonean President Ahmad Tejan Kabbah, "the facts on the ground in each case were exceptional," involving the "notorious brutality…of the forces involved in the coup."[45] Additionally, "[t]he tepidness of reactions against subsequent coups – including, ironically, the 2004 ouster of Haiti's Aristide – bolstered the conclusion" that the Haitian and Sierra Leonean crises were outlier cases.[46]

More recent examples of international condemnation of coups in Honduras and Madagascar occurred "against the backdrop of respective regional instruments hostile to unconstitutional changes of government" and were equivocal regardless.[47] Significantly, in recent decades the international community has recognized the legitimacy of governments that came to power through nondemocratic means in Peru, Congo-Brazzaville, the Gambia, Sao

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[43] Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992); *see also* Gregory Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992).

[44] Talmon, *Government in Exile*, *supra* note 4. *See also* Ian Brownlie, THE RULE OF LAW IN INTERNATIONAL AFFAIRS 59–62 (1998); James Crawford, DEMOCRACY IN INTERNATIONAL LAW 21–22 (1993); V.P. Nanda, *The Validity of United States Intervention in Panama under International Law*, 84 AM. J. INT'L L. 494, 499 (1990).

[45] Roth, *Secessions, supra* note 35, at 429.

[46] *Id.* at 430.

[47] *Id.* at 438.

Tome and Principe, and Niger.[48] Moreover, governments that have denied or severely restricted the right to political participation have represented their respective states before this Court on numerous occasions.[49]

Thus, there is still no rule of general or regional customary international law that a government must be democratically elected to be legitimate.[50] As a result, Rantania cannot rely on the existence of any norm of democratic governance in international law to claim that Andler's government is not entitled to represent Aprophe before this Court.

II. RANTANIA IS RESPONSIBLE FOR THE ILLEGAL USE OF FORCE AGAINST APROPHE IN THE CONTEXT OF OPERATION UNITING FOR DEMOCRACY.

A. Rantania is responsible for the use of force against Aprophe.

1. The ENI does not possess independent international legal personality.

Rantania will likely argue that it is not responsible for the illegal use of force against Aprophe in the context of Operation Uniting for Democracy because the airstrikes are attributable to the Eastern Nations International Organization ("ENI"). However, the airstrikes may only be attributed to the ENI instead of Rantania if the ENI possesses an independent international legal personality,[51] which it does not.

As the injured party, Aprophe's recognition is a necessary prerequisite of the ENI's legal

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[48] Talmon, *Government in Exile*, *supra* note 4.

[49] *See, e.g.*, *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria, Eq. Guinea Intervening)*, 2002 I.C.J. 303 [hereinafter *Land Boundary*], where this Court permitted the intervention of Equatorial Guinea despite the fact that "Equatorial Guinea is not an electoral democracy and has never held credible elections," Freedom House, *Map of Freedom in the World: Equatorial Guinea* (Jan. 9, 2012).

[50] Stefan Talmon, *Recognition of States and Governments in International Law*, AZERBAIJAN IN THE WORLD, Nov. 1, 2008, at 7, 9, *available at* http://ada.edu.az/uploads/file/bw/pdf158.pdf.

[51] Draft Articles on the Responsibility of International Organizations, 2011 Y.B. INT'L L. COMM., vol. II, pt. 2 [hereinafter DARIO], art. 2, comm. 10.

personality and hence of its international responsibility.[52] Absent Aprophe's recognition, "with regard to non-member States that do not recognize the organization, member States would have to be held responsible."[53] Aprophe is under no obligation to recognize the ENI, as a state does not have to recognize the legal personality of an organization of which it is not a member or which has few members.[54] Aprophe is not a member of the ENI,[55] and the ENI has only four members: Rantania, Lamarthia, Verland, and Pellegrinia.[56]

Aprophe has never formally recognized the ENI's legal personality. In fact, when Green sought foreign military intervention to overthrow Andler's government, Green initially appealed to Rantania and not to the ENI Council for assistance,[57] suggesting that Aprophe has always viewed the ENI as a "mere association of states" devoid of international legal personality.[58]

Since Aprophe has not recognized the ENI's international legal personality, "the articles on State responsibility…apply."[59] Under Article 4 of the International Law Commission's Articles on State Responsibility, "[t]he conduct of any State organ shall be considered an act of

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[52] Letter from the Director-General of Legal Service of the European Commission, U.N. Doc. A/CN.4/582, sec. II(E) (2006), *quoted in* Giorgio Gaja, Special Rapporteur, Fifth Report on Responsibility of International Organizations, A/CN.4/583 at ¶9 (2007) [hereinafter Gaja, Fifth Report].

[53] Gaja, Fifth Report, *supra* note 52, at ¶9.

[54] RESTATEMENT, *supra* note 5, at §223, comm. E.

[55] Compromis ¶15.

[56] Compromis ¶¶13, 15.

[57] Compromis ¶31.

[58] Jean D'Aspremont, *Abuse of the Legal Personality of International Organizations and the Responsibility of Member States*, 4 INT'L ORG. L. REV. 91, 94 (2007).

[59] Gaja, Fifth Report, *supra* note 52, at ¶9.

that State under international law."[60] Operation Uniting for Democracy was "conducted almost entirely by the Rantanian Air Force,"[61] individual units of which are undeniably organs of the Rantanian state.[62] As a result, Rantania is responsible for the airstrikes the Rantanian Air Force launched against Aprophe.

2. Rantania exercised effective control over Operation Uniting for Democracy.

However, even if the ENI does possess international legal personality, Rantania is still responsible for the use of force against Aprophe because Rantania continued to exercise effective control over the conduct of the Rantanian Air Force.

The conduct of a state organ placed at the disposal of an international organization may still be attributable to the state if the state continues to exercise effective control over the organ's conduct.[63] The "full factual circumstances and particular context" of the relationship between the international organization, the state, and the state organ determine the existence of effective control.[64] Relevant factors include whether the state organs "persist[] in seeking orders from their home authorities,"[65] whether the state instructs its organs to ignore the international

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[60] ARSIWA, *supra* note 9, art. 4

[61] Compromis ¶37.

[62] ARSIWA, *supra* note 9, art. 4, comm. 6.

[63] DARIO, *supra* note 51, art. 7. Although the European Court of Human Rights applied a different standard of "ultimate authority and control" in cases such as *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, 45 E.H.R.R. 10 (G.C. 2 May 2007), the court subsequently applied the effective control test alongside the ultimate authority and control in *Al-Jedda v. United Kingdom*, [GC] No. 27021/08 (E.C.H.R. 2011).

[64] DARIO, *supra* note 51, art. 7, comm. 4.

[65] United Nations Security Council Report of the Commission of Inquiry for UNOSOM II, U.N. Doc. S/1994/653 (1994) [hereinafter UNOSOM II Report], ¶¶243–44.

organization's instructions,[66] whether operations were undertaken outside the international organization's "command and control,"[67] and whether the state retains power over disciplinary and criminal matters.[68]

Rantania exercised effective control over the Rantanian Air Force units participating in Operation Uniting for Democracy by instructing them to ignore the ENI Council's instructions. On February 15, 2011, the ENI Council unanimously approved activation orders calling for around-the-clock air strikes against military and strategic assets in Aprophe.[69] While these orders were still in effect, Rantanian President Perego ordered an immediate grounding of the Rantanian Air Force, before the ENI Council formally suspended Operation Uniting for Democracy.[70] Perego's order ran counter to the ENI's activation orders and thus constituted an operation undertaken outside the ENI's command and control. Additionally, there is no evidence that Rantania has ever ceded control over disciplinary and criminal matters related to its forces to the ENI. As a result, Rantania is responsible for the use of force against Aprophe.

B. <u>In the alternative, Rantania and the ENI are jointly responsible for the use of force against Aprophe.</u>

When an international organization's member states contribute to planning or carrying out military action, that conduct may be simultaneously attributed to the international

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[66] *M.M., D.M., & A.M. v. State of the Netherlands*, *Judgment of 10 September 2008*, Case No. 265615/HA ZA 06-1671 (Neth. Dist. Ct.), ¶4, 8.

[67] *Id.*; *see also* Report of the United Nations Secretary-General, Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations, U.N. Doc. A/51/389 (1996), ¶¶17–18.

[68] DARIO, *supra* note 51, art. 7, comm. 7.

[69] Compromis ¶¶35, 37.

[70] Compromis ¶43.

organization and its members.[71] Operation Allied Force, the 1999 NATO bombing campaign against the territory of the Federal Republic of Yugoslavia, was a "paradigmatic example" of the joint responsibility of an international organization and its member states.[72]

Because NATO member states were fully involved in the decision-making process regarding all aspects of the aerial operation, including the formulation of its political objectives, the establishment of its operational plan, its implementation, and decisions concerning its beginning and end,[73] it would have been a "legal and political anomaly of the first order if the actions of the command structure were not attributable jointly and severally to the member States."[74] In the wake of NATO's accidental bombing of the Chinese embassy in Belgrade, the United Kingdom and Germany acknowledged their joint responsibility by issuing formal apologies to the Chinese government.[75] The United States also acknowledged its responsibility by settling China's claim for damages through bilateral mechanisms.[76]

The structural similarities between NATO's Operation Allied Force and the ENI's Operation Uniting for Democracy are striking. Rantania enunciated the operation's political objectives by introducing a resolution before the ENI Council that called for the "restoration of

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[71] Giorgio Gaja, Special Rapporteur, Second Report on Responsibility of International Organizations, U.N. Doc. A/CN.4/541 (2004) [hereinafter Gaja, Second Report], at ¶6.

[72] *Id.*

[73] Netherlands Minister of Foreign Affairs, Declaration of 18 May 2000, Lower House Debate, *reproduced in* 32 NETH. Y.B. INT'L L. 192, 196 (2001).

[74] Transcript of Oral Proceedings at 16, *Legality of Use of Force (Serb. & Montenegro v U.K.),* Public Sitting of 12 May 1999, C.R. 1999/25 (statement of Ian Brownlie).

[75] *Id.*

[76] Gaja, Second Report, *supra* note 71, at ¶7 n.11.

democracy" in Aprophe[77] and requesting the General Assembly's adoption of a resolution that called for the restoration of Aprophe's "constitutional order."[78] Additionally, Rantania established the operational plan by proposing the ENI airstrike activation orders that the ENI Council eventually approved.[79] Rantania also played an integral role in the operation's implementation, as the airstrikes were conducted almost entirely by the Rantanian Air Force.[80] Most significantly, Rantania was decisive in bringing the operation to an end, as Perego's unilateral decision to ground the Rantanian Air Force functionally terminated the ENI's campaign.[81]

As a result, Rantania and the ENI may be held jointly responsible for the use of force against Aprophe. The ENI's absence from this proceeding does not bar this Court's jurisdiction over Aprophe's claim, as the *Monetary Gold* principle[82] is inapplicable to situations that involve either multiple independent attribution[83] or international organizations.[84]

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[77] Compromis ¶31.

[78] Compromis ¶33.

[79] Compromis ¶35.

[80] Compromis ¶37.

[81] Compromis ¶43.

[82] *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment*, 1954 I.C.J. 19 [hereinafter *Monetary Gold*], at 32.

[83] *Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, Judgment*, 1992 I.C.J. 240, at ¶55.

[84] *Monetary Gold, supra* note 82, at 33; Transcript of Oral Proceedings at 30, *Legality of the Use of Force (Serb. & Montenegro v. U.K.)*, Public Sitting of 23 April 2004, C.R. 2004/23 (statement of Vladimir Djeric).

C. Rantania's use of force against Aprophe violated international law.

1. Aprophe's legitimate government did not consent to Rantania's use of force.

Subject to several narrow exceptions, Article 2(4) of the United Nations Charter prohibits member states from using force against the territorial integrity of other states.[85] Rantania has no colorable claim that the Security Council authorized its conduct[86] or that it suffered an armed attack that would trigger its right to self-defense.[87] As a result, the essential test to establish the legality of Rantania's military intervention in Aprophe's territory is whether Rantania obtained the valid consent of Aprophe's legitimate government.[88]

As discussed *supra*, a government's legitimacy is derived from its effective control over the state. Therefore, only the government in effective control of the state can grant valid consent to foreign military intervention.[89] Here, Andler's government had established control over a preponderant percentage of Aprophe's population and territory by January 20, 2011,[90] but Green did not request Rantania's military assistance until after that date.[91] As a result, by the time

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[85] U.N. Charter, *supra* note 37, art. 2(4).

[86] *Id.*, art. 39; Compromis ¶41.

[87] U.N. Charter, *supra* note 37, art. 51; *see also* Bruno Simma, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 794 (2d ed. 2002).

[88] Doswald-Beck, *supra* note 12, at 191; *see also* Oppenheim, *supra* note 5, at 305; David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209 (1996); Definition of Aggression, U.N. G.A. Res. 3314 (XXIX) (1974), art. 3(e); ARSIWA, *supra* note 9, art. 20.

[89] Seeking the consent of the *de facto* Somali authorities for the deployment of United Nations forces was the "usual practice" of the Security Council in relation to the United Nations Mission in Somalia and "was in conformity with traditional United Nations peace-keeping practice." UNOSOM II Report, *supra* note 65, at ¶¶34, 35.

[90] Compromis ¶¶29, 30.

[91] Compromis ¶31.

Green requested Rantania's military assistance, Green was no longer capable of providing Rantania with valid consent to its military intervention.

2. Rantania's use of force violated the Aprophian people's right to self-determination and the principle of nonintervention in the affairs of other states.

Even if Green's government was the legitimate government of Aprophe when Green requested Rantania's military assistance, Rantania's use of force was still illegal because Andler's opposition movement had attained belligerent status before Green's request.

Once an opposition faction attains belligerent status, that status imposes an obligation of neutrality on the international community and thereby "render[s] it unlawful for foreign states to provide war material to either side of the civil conflict, notwithstanding requests of the recognized government for assistance."[92] This is the usual view in customary international law,[93] supported by significant state practice.[94] The rule is grounded in the principles of the self-determination of peoples and nonintervention in the internal affairs of other states.[95]

Before Green requested Rantania's assistance, Andler's government had already satisfied the criteria for belligerent status.[96] Civil war and general hostilities were established by the clash

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[92] Roth, GOVERNMENTAL ILLEGITIMACY, *supra* note 13, at 177.

[93] *Id.* at 177 n.148. *See also* Lauterpacht, *supra* note 3, at 176.

[94] *See, e.g.*, Roth, GOVERNMENTAL ILLEGITIMACY, *supra* note 13, at 289 (describing the General Assembly's 104-18-18 vote in The Situation in Afghanistan and Its Implications for International Peace and Security, U.N. G.A. Res. ES-6/2 (1980) demanding Soviet withdrawal from Afghanistan notwithstanding the Afghan government's assertion that it had invited Soviet assistance on the grounds that the Muslim nationalist guerillas opposed to the government had attained belligerent status).

[95] *See* Ian Brownlie, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 208 n.90, 327 (1963).

[96] Lauterpacht, *supra* note 3, at 176.

between 2,000 members of Aprophe's Quick Reactionary Forces and 800 members of the Homeland Brigade.[97] Andler's government had established administration over 90% of Aprophe's territory, a substantial part.[98] Further, there is no evidence that Aprophe's military forces, acting under Andler's responsible command, have not observed the rules of warfare.

As a result, even if Green's government was the legitimate government of Aprophe when Green requested Rantania's assistance, Rantania's use of force against Aprophe in the context of Operation Uniting for Democracy was still illegal.

III. SINCE THE EXERCISE OF JURISDICTION BY RANTANIAN COURTS VIOLATED INTERNATIONAL LAW, THE JUDGMENT AGAINST APROPHE'S PROPERTY CANNOT BE ENFORCED.

A. Rantania waived all claims against Aprophe arising out of the Mai-Tocao War.

1. Rantania waived both its international claims and individual claims by Rantanian nationals.

Article XV of the Peace Agreement of 1965 ("the 1965 Treaty") embodies a broad waiver by each party "on its own behalf and on behalf of its citizens" of "all claims against the other or the other's citizens arising out of the conflict which began in August 1962."[99] The unambiguous and comprehensive language of the waiver requires that ordinary meaning be given to its text.[100] The waiver clearly encompasses claims on behalf of the state as well as claims on behalf of its citizens. In addition, the fact that it waives claims "against...the [other state]'s

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[97] Compromis ¶¶30, 34.

[98] Compromis ¶29.

[99] The Peace Agreement of 1965, Compromis, Annex I [hereinafter 1965 Treaty], art. XV.

[100] Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 331 [hereinafter VCLT], art. 31.

citizens" clearly indicates the parties' intention to waive individual claims in national courts.[101]

A sovereign state enjoys the fundamental authority to waive such claims,[102] an authority Rantania exercised when it signed the 1965 Treaty. Consequently, the Rantanian judgment that permitted the claims to proceed violated Rantania's obligation to honor its agreements.[103]

2. The subsequent ratification of the Eastern Nations Charter of Human Rights did not invalidate Rantania's waiver.

i. The Eastern Nations Court of Human Rights had no authority to determine the validity of Rantania's waiver.

As a preliminary matter, Aprophe challenges the authority of the Eastern Nations Court of Human Rights ("the Eastern Nations Court") to determine the validity of Rantania's waiver under the 1965 Treaty. Article XXV of the treaty specifies that disputes over the interpretation or application of its provisions shall be submitted to the jurisdiction of this Court for decision.[104] Consequently, it remains for this Court and this Court alone to determine the validity of Rantania's waiver.

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[101] 1965 Treaty, *supra* note 99, art. XV.

[102] *See, e.g.*, Malcolm Shaw, INTERNATIONAL LAW 258 (6th ed. 2008); Henry Kelsen, *Opinion Concerning the Claims of the Italian Owners of the Ship* Fausto, 37 AUS. J. PUB. INT'L L. 1 (1986); A.D. McNair, THE LEGAL EFFECTS OF WAR 391 (3d ed. 1948). For examples of treaties evincing such waivers, see Treaty of Peace with Bulgaria (Paris 1947), 46 U.N.T.S. 21 [hereinafter Bulgarian Peace Treaty], art. 29; Treaty of Peace with Hungary (Paris 1947), 46 U.N.T.S. 135 [hereinafter Hungarian Peace Treaty], art. 32; Treaty of Peace with Italy (Paris 1947), 49 U.N.T.S. 3 [hereinafter Italian Peace Treaty], art. 76; Treaty of Peace with Roumania (Paris 1947), 42 U.N.T.S. 3 [hereinafter Romanian Peace Treaty], art. 28(4); Convention on the Settlement of Matters Arising out of the War and the Occupation (Bonn 1952), 332 U.N.T.S. 219 [hereinafter Bonn Settlement Convention], ch. 6, art. 1; Treaty of Peace with Japan (San Francisco 1951), 136 U.N.T.S. 45 [hereinafter San Francisco Treaty], art. 19(a).

[103] VCLT, *supra* note 100, art. 26.

[104] 1965 Treaty, *supra* note 99, art. XXV.

ii. Rantania's waiver did not violate the Eastern Nations Charter.

The Eastern Nations Court incorrectly determined that Rantania's waiver violated the Eastern Nations Charter of Human Rights ("the Charter") for two reasons. First, Article 28 of the Vienna Convention on the Law of Treaties ("the VCLT") clearly specifies that a treaty does not bind parties with respect to acts or occurrences that occurred before its ratification.[105] Here, the act that gave rise to the dispute was Rantania's waiver.[106] Although the case was filed in the Rantanian courts after Rantania ratified the Charter, the waiver occurred fifteen years prior to the Charter's ratification.[107] Thus, because Rantania waived its claims before it had an obligation to provide a remedy in its national court system, its waiver did not violate the Charter.

Second, Rantania's waiver does not actually impair the right to remedy embodied in Article 13 of the Charter. The European Court of Human Rights has noted that "[t]he right of access to the courts…is not absolute, but may be subject to limitations."[108] Both international and national courts have repeatedly approved the use of claim waivers to settle significant regional and global conflicts.[109] The language of these waivers is substantially similar to the language contained in Article XV of the 1965 Treaty.[110] Therefore, Rantania's waiver constituted a valid

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[105] VCLT, *supra* note 100, art. 28.

[106] *See Certain Property (Liech. v. Ger.), Preliminary Objections, Judgment*, 2005 I.C.J. 6, ¶50.

[107] Compromis ¶¶7, 10.

[108] *Prince Hans-Adam II of Liechtenstein v. Federal Republic of Germany*, [GC] no. 42527/98 (E.C.H.R. 2001), ¶44.

[109] *See, e.g., id.* at ¶59; Case 2 BvR 1981/97, 36 ARCHIV DES VÖLKERRECHTS 198 (Ger. 1998), ¶12; *Shimoda et al. v. The State*, 355 HANREI JIHO 17 (Japan Dist. Ct.), *translated in* 8 JAP. ANN. INT'L L. 231 (1964), ¶5(4); *Deutsch v. Turner Corp.*, 324 F.3D 692 (U.S. Ct. App. 2003); *In re WWII Era Forced Labor Litig.*, 114 F. SUPP. 2D 939 (U.S. Dist. Ct. 2000); *Burger-Fischer v. Degussa AG*, 65 F. SUPP. 2D 248 (U.S. Dist. Ct. 1999).

[110] *Compare* 1965 Treaty, *supra* note 99, art. XV *with* Bulgarian Peace Treaty, *supra* note 102,

limitation on Article 13's right of access to the courts.

iii. Even if Rantania's waiver violated the Eastern Nations Charter, that violation did not invalidate Rantania's waiver.

Even if the Eastern Nations Court correctly decided that Rantania's waiver violated the Charter,[111] that violation could not have invalidated Rantania's waiver because Article 34 of the VCLT prohibits a treaty from creating or abolishing obligations and rights of nonparty states.[112] Further, Aprophe's subsequent accession to the Eastern Nations Charter does not abrogate its right to sovereign immunity in foreign national courts, as the Charter only imposes an obligation on states to provide a right to remedy "to all persons subject to their jurisdiction."[113] The principle of *pacta sunt servanda* requires that Rantania uphold the waiver of claims it represented to Aprophe through its ratification of the 1965 Treaty.[114]

B. Rantania's exercise of jurisdiction violates the principle of foreign sovereign immunity.

The universally recognized principle of foreign sovereign immunity[115] is grounded in the maxim of *par in parem non habet imperium*,[116] which has consistently guided the refusal of

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art. 29; Hungarian Peace Treaty, *supra* note 102, art. 32; Italian Peace Treaty, *supra* note 102, art. 76; Romanian Peace Treaty, *supra* note 102, art. 28(4); Bonn Settlement Convention, *supra* note 102, ch. 6, art. 1; *and* San Francisco Treaty, *supra* note 102, art. 19(a).

[111] Compromis ¶19.

[112] VCLT, *supra* note 100, art. 34.

[113] Eastern Nations Charter of Human Rights (1980), Compromis, Annex II, art. 1.

[114] VCLT, *supra* note 100, art. 26.

[115] *See, e.g.*, *Underhill v. Hernandez*, 168 U.S. 250 (1897); *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812); *The Parlement belge*, (1880) L.R. PROB. DIV. 197 (Eng. Ct. App.); Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 326 (6th ed. 2003) [hereinafter Brownlie, PRINCIPLES]; Antonio Cassese, INTERNATIONAL LAW 100 (2d ed. 2005); Shaw, *supra* note 102, at 701.

[116] Gamal Moursi Badr, STATE IMMUNITY: AN ANALYTIC AND PROGNOSTIC VIEW 89 (1984)

sovereign states to subject their equals to the jurisdiction of their national courts.[117] Unless Rantania can demonstrate the existence of an applicable exemption to the rule,[118] its exercise of jurisdiction and enforcement of its judgment against Aprophian property violates Aprophe's rights as a sovereign nation.[119]

1. Aprophe's detention of the military internees was a noncommercial act protected by foreign sovereign immunity.

International law has adopted a theory of restrictive, rather than absolute, foreign sovereign immunity.[120] Under restrictive immunity, the exercise of jurisdiction over a state's commercial acts (*acta jure gestionis*) does not infringe on the state's sovereign status, because the state engages in those acts in its capacity as a private commercial entity.[121] By contrast, the

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(quoting Bartolus, TRACTATUS REPRESSALIUM, Questio 1/3, para. 10 (1354)).

[117] *See, e.g.*, *Special Representative of the Vatican v. Pieciukiewicz,* 78 I.L.R. 120, 121 (It. 1982); *S. v. British Treasury*, 24 I.L.R. 223, 224–25 (Pol. 1948). *See also* Oppenheim, *supra* note 3, at §126; Sompong Sucharitkul, *Immunities of Foreign States Before National Authorities*, 149 RECEUIL DES COURS 87, 117 (1976).

[118] *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment*, 1984 I.C.J. 392, ¶101.

[119] *See The Schooner Exchange*, *supra* note 115, at 136; Brownlie, PRINCIPLES, *supra* note 115, at 323, 325, 326; Cassese, *supra* note 115, at 100, 102; Shaw, *supra* note 102, at 697, 701; *Prosecutor v. Blaskic, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, IT-95-14 (I.C.T.Y. 1997).

[120] *See, e.g.*, *Dralle v. Republic of Czechoslovakia*, 17 I.L.R. 155 (Aus. 1950); Dep't of State (U.S.), Tate Letter, 26 DEP'T OF STATE BULLETIN 984 (U.S. 1952); *Claims Against the Empire of Iran*, 45 I.L.R. 57, 80 (Ger. 1963); Brownlie, PRINCIPLES, *supra* note 115, at 328 (citing decisions by national courts in Austria, Belgium, Canada, Denmark, Egypt, France, Germany, Greece, Ireland, Italy, Lebanon, the Netherlands, New Zealand, Pakistan, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and the United States); Cassese, *supra* note 115, at 100; Shaw, *supra* note 102, at 704; Richard Falk, THE ROLE OF DOMESTIC COURT IN THE INTERNATIONAL LEGAL ORDER 140–41 (1964).

[121] *See, e.g.*, *I Congreso del Partido* [1983] 1 A.C. 244, 307 (U.K.H.L.); Cassese, *supra* note 115, at 100; Shaw, *supra* note 102, at 708.

exercise of jurisdiction over all other state acts (*acta jure imperii*) remains absolutely barred, because the state engages in those acts in its capacity as a sovereign entity.[122] While the specific contours of the doctrine of restrictive immunity remain poorly defined,[123] one scholar has noted that courts generally distinguish between sovereign and commercial acts based on their underlying nature or function.[124]

Despite this indeterminacy, the acts of a state's armed forces in conducting military operations are overwhelmingly recognized as *acta jure imperii*.[125] Under either a nature or function analysis, the military internment of Rantanian citizens was a quintessentially sovereign military act that Aprophe committed for the purpose of furthering an armed conflict.[126] Even if Aprophe derived some attenuated commercial benefit from the labor of the internees, the internment itself required Aprophe to act in its sovereign capacity to bring its coercive force to bear.

Moreover, Aprophe could not have been acting as a private entity engaged in trade,[127]

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[122] *See, e.g.*, Cassese, *supra* note 115, 100; Shaw, *supra* note 102, 708.

[123] *See, e.g.*, *Holland v. Lampen-Wolfe* [2000] 1 W.L.R. 1573, 1577 (U.K.H.L.); *United States v. The Public Service Alliance of Canada (Re Canada Labour Code)*, 94 I.L.R. 264, 278 (Can. 1992); *Reid v. Republic of Nauru*, 101 I.L.R. 193, 195–96 (Austl. Vict. Sup. Ct. 1993); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2D 1385, 1393 (U.S. Ct. App. 1985); *Isbrandtsen Tankers v. Republic of India*, 446 F.2D 1198, 1200 (U.S. Ct. App. 1971); Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 267–70 (1982); James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 1983 BRIT. Y.B. INT'L L. 75.

[124] Cassese, *supra* note 115, at 101.

[125] *See, e.g.*, *McElhinney v. Ireland*, [GC] No. 31253/96 (E.C.H.R. 2001), ¶6; *Ferrini v. Federal Republic of Germany*, 128 I.L.R. 658 (It. 2004), ¶7; Cassese, *supra* note 115, at 101.

[126] Compromis ¶6.

[127] United Nations Convention on Jurisdictional Immunities of States and Their Property, 44 I.L.M. 801 (2005) (not yet in force) (adopted by the General Assembly, 5 March 2004, U.N.

because a private entity could not have engaged in the military actions that Aprophe undertook during the Mai-Tocao War.[128] Consequently, Aprophe acted in its capacity as sovereign and is therefore entitled to immunity from civil suits in foreign national courts.

2. Rantania's trial court erred in finding an exception to foreign sovereign immunity for alleged *jus cogens* violations.

The Rantanian trial court based its denial of foreign sovereign immunity on the grounds that "immunity does not extend to violations of peremptory norms of international law."[129] However, the court's judgment was erroneous for two distinct reasons. First, customary international law does not recognize an exception to foreign sovereign immunity for alleged *jus cogens* violations. Second, the existence of such an exception would contradict the accepted understanding of the doctrine as a jurisdictional rather than a substantive determination.

i. Customary international law does not recognize an exception to foreign sovereign immunity for jus cogens *violations.*

Rantania must demonstrate that state practice supporting the existence of an exception to foreign sovereign immunity for alleged *jus cogens* violations is "both extensive and virtually uniform."[130] Additionally, Rantania must establish corresponding *opinio juris*, defined as "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law

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Doc. A/59/22), arts. 10–11, 13–17; European Convention on State Immunity (Basel 1972), C.E.T.S. No. 074 (1972), arts. 4–12; Foreign Sovereign Immunities Act, Act No. 196 of 1985 (Austl.), §§11–12, 14–20; Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602–1611 (U.S.), art. 1605(a)(2)–(4), (6); State Immunities Act, R.S.C., 1985, c. S-18 (Can.), §§5, 7–8; State Immunities Act, 1978 c. 33, pt. I (U.K.), §§2–4, 6–11.

[128] Compromis ¶¶5–7.

[129] Compromis ¶20.

[130] *North Sea Continental Shelf Cases, Judgment*, 1969 I.C.J. 3, ¶74 [hereinafter *Continental Shelf*]; *see also* Cassese, *supra* note 115, at 162.

requiring it."[131] Rantania cannot satisfy either requirement.

As of the date of this Memorial's submission, the only state that recognizes the exception's existence is Italy.[132] Commenting on the Italian Court of Cassation's decision to recognize the exception, the British House of Lords stated that the decision "cannot…be treated as an accurate statement of international law as generally understood."[133] Germany has also stated its disagreement with Italy's decision in proceedings before this Court.[134] Further, the continued validity of the Court of Cassation's judgment was called into question on its own terms shortly after it was issued. The judgment relied in part on the decision of the Greek Areios Pagos in the *Distomo Massacre Case*.[135] However, the Greek Special Supreme Court, hierarchically superior to the Areios Pagos, reversed this decision two years later, specifically rejecting the existence of the exception.[136]

The European Court of Human Rights has also ruled that a grant of foreign sovereign immunity in a case alleging torture does not violate the right of access to courts provided by the European Convention on Human Rights.[137] The court relied on an International Law Commission working group report, which found that state practice categorically rejects the

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[131] *Continental Shelf, supra* note 130, at ¶77.

[132] *Ferrini*, *supra* note 125, at ¶¶9.1, 12.

[133] *Jones v. The Kingdom of Saudi Arabia*, [2006] U.K.H.L. 26, at ¶22.

[134] *Jurisdictional Immunities of States (Ger. v. It.), Order of 29 April 2009*, 2009 I.C.J. 137.

[135] *Distomo Massacre Case (Prefecture of Voiotia v. Federal Republic of Germany),* 129 I.L.R. 513 (Gr. 2000).

[136] *Margellos and Others v. Federal Republic of Germany*, 129 I.L.R. 525, 532 (Gr. 2002).

[137] *Al-Adsani v. The United Kingdom*, [GC] No. 35763/97 (E.C.H.R. 2001) [hereinafter *Al-Adsani* (ECHR)], ¶67.

existence of an exception from immunity for violations of human rights norms.[138] Not only does Rantania lack evidence of widespread and uniform state practice and *opinio juris*, but the state practice and *opinio juris* of the international community run directly counter to its assertions.

ii. Because foreign sovereign immunity is a jurisdictional doctrine, its application is unrelated to the wrongfulness of the underlying act.

In *Arrest Warrant*, this Court held that there is no exception to the doctrine of diplomatic immunity for situations in which a state official has been accused of crimes under international law,[139] because jurisdictional immunities are "procedural in nature," entirely separate from the substantive questions of law underlying criminal responsibility.[140] As the Court emphasized, "*immunity* from jurisdiction…does not mean that [state officials] enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity."[141] The Court listed several ways in which officials may still be subject to prosecution despite the application of diplomatic immunity, including prosecution in their own national courts or international criminal courts or if their own state waived their immunity.[142]

The Court's discussion of the jurisdictional nature of diplomatic immunity is equally applicable in the context of foreign sovereign immunity. The principle of foreign sovereign immunity does not and should not rely on the degree of wrongfulness of the underlying act for its

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[138] *Id.*, at ¶23. *See also, e.g.*, *Al-Adsani v. State of Kuwait,* 100 I.L.R. 465, 471 (U.K. Ct. App. 1996); *Controller and Auditor General v. Sir Roger Davidson,* 2 N.Z.L.R. 278, 290 (N.Z. Ct. App. 1996); *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428 (1989); *Saudi Arabia v. Nelson*, 100 I.L.R. 544 (U.S. 1993).

[139] *The Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, *Judgment*, 2002 I.C.J. 3, ¶58.

[140] *Id.* at ¶¶59, 60.

[141] *Id.* at ¶60.

[142] *Id.* at ¶61.

application.[143] Such reliance would threaten the fundamental principle of the sovereign equality of states, as well as international law's critical interest in preserving comity between the states of the international system.[144]

Rantania's obligation to dismiss the suit against Aprophe is grounded in the universally accepted principle that national courts are not competent to pass judgment on the sovereign acts of other states.[145] Even assuming *arguendo* that Aprophe's conduct violated a *jus cogens* norm, the underlying wrongfulness of its conduct does not change the fact that the Rantanian trial court was not competent to adjudicate the dispute.[146]

3. In the alternative, Aprophe's detention of the military internees occurred before international law recognized the hierarchical superiority of *jus cogens* norms.

Application of the exception for alleged *jus cogens* violations necessarily depends on the supremacy of *jus cogens* norms over the customary international law doctrine of foreign sovereign immunity.[147] However, because the principle of intertemporality mandates that a juridical fact be determined under the law as it existed at the time the act in question occurred,[148] the hierarchical superiority of *jus cogens* norms must have been recognized in international law at the time Aprophe's allegedly wrongful acts took place in order for Rantania to invoke the

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[143] *See id.* at ¶59. *See also Al-Adsani* (ECHR), *supra* note 137, at ¶48; *Jones*, *supra* note 133, at ¶28.

[144] *The Schooner Exchange*, *supra* note 115, at 136.

[145] *See, e.g.*, Brownlie, PRINCIPLES, *supra* note 115, at 324; Cassese, *supra* note 115, at 99; Shaw, *supra* note 102, at 699.

[146] *See, e.g.*, *Jones*, *supra* note 133, at ¶28; Hazel Fox, THE LAW OF STATE IMMUNITY 525 (2004).

[147] *Ferrini*, *supra* note 125, at ¶¶8, 9.1; *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3)*, [1999] 2 ALL E.R. 97 (U.K.H.L.), 278.

[148] *See, e.g.*, *Islands of Palmas case (Neth. v. U.S.)*, 2 R.I.A.A. 829, 845 (Perm. Ct. Arb. 1928); *Land Boundary*, *supra* note 49, at ¶205.

exception.

Formal recognition of the hierarchical superiority of *jus cogens* norms did not occur until 1969 in the Vienna Convention on the Law of Treaties.[149] Since Aprophe's acts occurred prior to 1969,[150] the *jus cogens* norms governing its conduct could not have possessed hierarchical superiority over foreign sovereign immunity at that time. Thus, even if the exception cited by the Rantanian trial court exists today, it is inapplicable to this case.

IV. APROPHE'S DESTRUCTION OF A BUILDING OF THE MAI-TOCAO TEMPLE DID NOT VIOLATE INTERNATIONAL LAW.

A. Aprophe's destruction of a building of the Mai-Tocao temple complex did not violate the 1965 Treaty or the World Heritage Convention.

Rantania has asserted that Aprophe's destruction of a building of the Mai-Tocao temple complex constituted a violation of both the 1965 Treaty and the Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention").[151] However, Aprophe's actions did not violate either of these treaties.

None of the provisions of the 1965 Treaty address the protection of cultural property generally or the Mai-Tocao Temple specifically.[152] While the World Heritage Convention does directly address the issue, the only explicit obligation it imposes is the requirement that states avoid military action that could damage cultural property in the territory of other states.[153] In fact, the Convention recognizes that the state in which the property is located retains primary

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[149] VCLT, *supra* note 100, art. 53.

[150] Compromis ¶6.

[151] Compromis ¶43.

[152] 1965 Treaty, *supra* note 99.

[153] Convention Concerning the Protection of the World Cultural and Natural Heritage (The Hague 1972), 1037 U.N.T.S. 151, art. 6, cl. 3.

authority to dictate both the property's recognition as "cultural" and to administer its uses.[154]

As neither treaty is applicable, the pertinent rules are those contained in the Hague Convention for the Protection of Cultural Property ("the Hague Convention").[155] Although neither Aprophe nor Rantania is a party to the Hague Convention,[156] its principles have been generally recognized as reflective of customary international law.[157]

B. Aprophe's partial destruction of one building in the Mai-Tocao temple complex did not violate customary international law.

The Hague Convention generally prohibits acts that damage or destroy cultural property.[158] However, customary international law recognizes an exception for acts that arise out of imperative military necessity.[159] One test for imperative military necessity is whether "another

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[154] *Id.,* art. 11.

[155] Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague 1954), 249 U.N.T.S. 240 [hereinafter Hague Convention].

[156] Compromis ¶47.

[157] *See, e.g.*, *Prosecutor v. Tadic, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal*, IT-94-1 (I.C.T.Y. 1995), §98, 127; United Nations Economic, Scientific, and Cultural Organization (UNESCO), 27 C/Resolution 3.5 (13 November 1993); Frédéric de Mulinen, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES §§97, 219, 225 (I.C.R.C. 1987) [hereinafter I.C.R.C. HANDBOOK].

[158] Hague Convention, *supra* note 155, art. 4(1).

[159] *See, e.g.*, *id.*, art. 4(2); I.C.R.C. HANDBOOK, *supra* note 157, at §§97, 219, 225. See also, for example, the following sources of state practice, compiled in Rule 38 of International Committee of the Red Cross, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE, *available at* http://www.icrc.org/customary-ihl/eng/docs/home [hereinafter I.C.R.C. DATABASE]: Reservations and statements of understanding upon ratification of the 1977 Additional Protocol 1 (Can.), §9; Teaching Manual (Côte d'Ivoire), bk. III, vol. 1, at 49–50; Commanders' Manual (Croat.), §§13–14, 62; Soldiers' Manual (Ger.), 8; Military Manual (Isr.), 49; LOAC Manual (It.), §§13–14, 62; LOAC Manual (Kenya), 9; Military Manual (Neth.), §§0527–0528; Military Manual (Switz.), arts. 53, 54.

feasible method for obtaining a similar military advantage" existed.[160] A state that invokes military necessity may use "only that degree and kind of force" required "to achieve the legitimate purpose of the conflict."[161] The imperative military necessity standard was designed to avoid imposing inflexible and unrealistic requirements on military commanders in the field while affording substantial deference to their judgment.[162]

On February 27, 2011, ongoing Rantanian airstrikes in and around Marcelux forced President Andler and her staff to flee from the capital to the Mai-Tocao temple complex.[163] As demonstrated by subsequent facts, the complex was likely the only location in Aprophe that would ensure the safety of President Andler and her government.[164] On February 28, Major-General Brewscha announced the imminent invasion of Aprophian territory by ENI ground

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[160] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (The Hague 1999), 2253 U.N.T.S. 172 [hereinafter Second Hague Protocol], art. 6(b).

[161] Nils Melzer, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL LAW (I.C.R.C. 2009) [hereinafter Melzer, INTERPRETIVE GUIDANCE] (quoting Ministry of Defence, THE MANUAL OF THE LAW OF ARMED CONFLICT §2.2 (U.K. 2004)). *See also, e.g.*, North Atlantic Treaty Organization, GLOSSARY OF TERMS AND DEFINITIONS (AAP-6V 2008), at 2-M-6; Dep't of the Army, FIELD MANUAL 27-10, at §3 (U.S. 1956); Dep't of the Navy, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, at §5.3.1 (U.S. 2007); Ministry of Defence, MANUEL DE DROIT DES CONFLITS ARMÉS 86 f. (Fr. 2001); Federal Ministry of Defence, TRISERVICE MANUAL ZDV 15/2: HUMANITARIAN LAW IN ARMED CONFLICTS §130 (Ger. 1992); Swiss Army, REGULATIONS 51.007/IV, BASES LÉGALES DU COMPORTEMENT À L'ENGAGEMENT §160 (2005); LIEBER CODE, GENERAL ORDERS NO. 100 (U.S. 1863), art. 4.

[162] *See* Melzer, INTERPRETIVE GUIDANCE, *supra* note 161, at 80; Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 INT'L L. & POL. 831, 903 (2010).

[163] Compromis ¶39.

[164] Compromis ¶39.

forces.[165] Shortly thereafter, in an effort to clear Aprophe's airspace and secure its borders, President Andler announced her intention to destroy one building in the Mai-Tocao Temple if Rantania did not terminate its military activities.[166]

Nevertheless, in direct opposition to the Security Council's condemnation of Operation Uniting for Democracy on March 1, the Rantanian Air Force continued to bombard Aprophe's capital city.[167] On March 3, in order to prevent further death, destruction, and even more egregious violations of Aprophe's sovereignty, President Andler ordered the partial destruction of one of the smaller buildings in the complex.

The building's partial destruction afforded Aprophe with substantial and definite military advantages,[168] as it was intended to and did in fact prevent an unlawful incursion into Aprophe's territory and secure the cessation of an aerial bombardment campaign that had destroyed

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[165] Compromis ¶39.

[166] Compromis ¶40.

[167] Compromis ¶¶41–42.

[168] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) (Geneva 1977), 1125 U.N.T.S. 3 [hereinafter AP I], art. 52(2); Second Hague Protocol, *supra* note 160, art. 1(f); Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign (I.C.T.Y. 2000) at §§35, 42, *available at* http://www.icty.org/x/file/Press/nato061300.pdf; *Prosecutor v. Galic, Trial Chamber, Judgment,* IT-98-29 (I.C.T.Y. 2003), §51; I.C.R.C. HANDBOOK, *supra* note 157, §55. For examples of state practice, see statements of the military manuals of the following states, compiled in the I.C.R.C. DATABASE, *supra* note 159, Rule 8: Law of War Manual (Arg.), §§4.02(2), 4.19; LOAC Manual (Austl.), §§5.27–5.29; Law of War Manual (Belg.), 27; Instructor's Manual (Cameroon), §§352.12, 412.12; LOAC Manual (Can.), §406; LOAC Manual (Fr.), 90; Military Manual (Ger.), §442; Military Manual (Isr.), 23–24; IHL Manual (It.), vol. I, §12; LOAC Manual (Kenya), 11; Military Manual (Neth.), §§0225, 0508–0512; IHL Manual (Russ.), §1; LOAC Manual (S. Afr.), 24(d)(iii); IHL Manual (Swed.), §3.2.1.5; IHL Manual (Ukr.), §1.2.45; LOAC Manual (U.K.), §§5.4.1, 5.4.4; Naval Handbook (U.S.), §8.1.1.

Aprophe's military infrastructure and killed 50 Aprophian soldiers.[169] Moreover, no other feasible method for obtaining a similar military advantage existed. Aprophe had scarce remaining military resources with which to defend itself.[170] Additionally, Aprophe had no reason to believe that any international intervention on its behalf would be forthcoming, as the Security Council refrained from invoking Chapter VII of the United Nations Charter in its condemnation of Rantania's actions.[171]

Further, President Andler used only that degree and kind of force required to achieve a legitimate purpose: the protection of Aprophe's territorial integrity and political independence. President Andler ordered a controlled detonation that destroyed less than one half of one of the smaller buildings in the complex and did not damage any additional cultural property once it became clear that the military conflict had concluded.

Consequently, Aprophe's partial destruction of one building in the Mai-Tocao Temple complex satisfied the requirements of imperative military necessity and therefore did not violate customary international law.

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[169] Compromis ¶38.

[170] Compromis ¶38.

[171] Compromis ¶41.

PRAYER FOR RELIEF

The Republic of Aprophe respectfully requests this Court to declare:

I.

The Court may exercise jurisdiction over all claims in this case, because the Andler government is the rightful government of Aprophe;

II.

Rantania is responsible for the illegal use of force against Aprophe in the context of Operation Uniting for Democracy;

III.

Rantania may not permit its officials to execute the judgment in *Turbando et al v. Republic of Aprophe*, because the exercise of jurisdiction by Rantanian courts violated international law; and

IV.

Aprophe's destruction of a building of the Mai-Tocao Temple did not violate international law.

Respectfully submitted,

Agents of the Government of the Republic of Aprophe