TEAM 560R

THE 2012 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

Case Concerning the Temple of Mai-Tocao

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 RESPONDENT

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STATEMENT OF JURISDICTION

The Republic of Aprophe ("Aprophe") and the Federal Republic of Rantania ("Rantania") hereby submit the present dispute to the International Court of Justice ("I.C.J.") pursuant to Article 40(1) of the Court's Statute, in accordance with the Compromis for submission to the I.C.J. of the differences concerning the Mai-Tocao Temple, signed in The Hague, The Netherlands, on the twelfth day of September in the year two thousand and eleven. Both States have accepted the jurisdiction of this Court pursuant to Article 36(1) of its Statute and Article XXV of the Peace Agreement of 1965.

QUESTIONS PRESENTED

I. Whether the Andler regime and its representatives can appear before this Court in the name of Aprophe.

II. Whether the use of force against Aprophe in the context of Operation Uniting for Democracy is attributable to Rantania, and whether that use of force was illegal.

III. Whether the exercise of jurisdiction by Rantanian courts in the case of *Turbando, et al., v. The Republic of Aprophe* was consistent with International Law.

IV. Whether Aprophe violated international law by destroying a building of the Temple of Mai-Tocao.

STATEMENT OF FACTS

BACKGROUND

Rantania maintains close diplomatic and trade relations with neighboring countries Lamarthia, Verland, and Pellegrinia. Aprophe is a state on Rantania's immediate west. The Mai-Tocao temple complex, located in Aprophe near the Rantanian-Aprophian border, is a world-renowned cultural site, with a history dating to 2500 BCE. Ancient historians wrote about its significance to multiple cultures. Mai-Tocao attracts over 500,000 tourists annually, and is central to Aprophian and Rantanian cultural heritage. In 1986, Aprophe proposed, with Rantania's strong support, that Mai-Tocao be inscribed on the World Heritage List. This happened in 1988.

In 1962, Aprophe and Rantania engaged in a war over Mai-Tocao and its surrounding territory. During this Mai-Tocao War, the Aprophian army occupied undisputed Rantanian territory, subjecting more than 500 Rantanian peasants – so-called "military internees" – to forced labor without compensation in daily 12-hour shifts.

In 1965, the two states engaged negotiated and concluded a Peace Agreement, which submitted the boundary dispute to arbitration. The arbitral tribunal awarded all disputed territory, including Mai-Tocao, to Aprophe.

In 1980, Rantania, Lamarthia, Verland, and Pellegrinia concluded the Eastern Nations Charter of Human Rights ("Charter"), which established the Eastern Nations Court ("ENC"). In 1990, they created the Eastern Nations International Organization ("ENI") to strengthen their economic and political ties. The constituent treaty contains a mutual defense pact and incorporates the Charter by reference.

In 2000, Aprophian Senator Mig Green was elected President by the largest margin of votes in Aprophe's history. His campaign platform proposed joining the ENI. From 2001 to

2006, Green's government implemented pro-ENI policies to meet preconditions for ENI membership. Aprophe acceded to the Charter in 2005, with an exemption from the ENC's compulsory jurisdiction.

THE *TURBANDO* CASE

In 2001, the International League for Solidarity and Access ("ILSA") instituted proceedings against Aprophe in an Aprophian court on behalf of 60 former military internees, raising claims of forced, uncompensated labor during the Mai-Tocao War. The Supreme Court affirmed the trial court's dismissal of the case due to Aprophe's statute of limitations.

ILSA subsequently instituted similar proceedings in Rantania. The case was initially dismissed based on Article XV in the 1965 Peace Agreement, but the ENC held that Rantania could not rely upon this clause to bar the suit. On remand in 2009, the trial court denied immunity to Aprophe and awarded damages to the plaintiffs. Aprophe did not participate in or appeal these proceedings, but maintained that the Rantanian decision violated Aprophe's sovereign immunity and the Peace Agreement. The trial court granted an indefinite stay of enforcement, reviewable upon either party's petition.

In 2011, ILSA successfully moved to lift the stay, and bailiffs seized US$10,000,000 worth of Aprophe's non-diplomatic property located in Rantania, consistent with Rantanian law. Rantanian judicial authorities currently hold the property.

THE COUP

The Rantanian court's decision in *Turbando* strengthened opposition to Green's pro-ENI policies. However, a poll conducted by Aprophe's Office for National Statistics indicated that a majority of Aprophians approved of Green's policies and pro-ENI efforts.

Green declared his candidacy for a third term. However, on January 10, 2011, following

some civil unrest, he invoked constitutional powers to postpone the elections for one year, and ordered the Aprophian military to begin armed patrols.

On January 15, General Paige Andler, the Aprophian military Chief-of-Staff, wrote an open letter refusing to obey Green's orders. On January 16, armed soldiers loyal to Andler forcibly entered the Presidential Palace and other government installations. President Green and members of his government fled to Rantania. Andler proclaimed herself "interim president" of Aprophe, establishing control over most of the population and the territory.

Two days later, facing widespread and growing opposition to her government, Andler declared a state of emergency and dissolved parliament. She assured Aprophians that their civil rights would be respected and that elections would be called soon. To date, elections have not been called.

Forty Aprophian Ambassadors, including those to the United Nations ("UN") and the Netherlands, renounced Andler and declared allegiance to Green. Approximately 800 members of the National Homeland Brigade remained loyal to Green and established bases in two villages, to which hundreds of Green supporters migrated. Andler ordered over 2,000 heavily-armed members of the Quick Reactionary Forces ("QRF") to confront the Brigade. Small-scale fighting commenced on January 20, continuing over the next three weeks.

Many countries condemned Andler's assault upon the pro-Green units. On January 22, the ENI Council unanimously passed a resolution introduced by Rantania, recognizing Green as the lawful president and condemning Andler's coup. The UN General Assembly adopted a resolution by an overwhelming majority, condemning the coup and urging the Security Council to intervene. All ENI members and 27 other nations formally announced that they would conduct relations only with Green's government. To date, only 14 nations recognize Andler's regime.

Andler denounced the ENI Council resolution as an unjustifiably interference in Aprophe's internal affairs, and the interim foreign affairs minister informed the UN Secretary-General that Aprophe was denouncing the Eastern Nations Charter.

OPERATION UNITING FOR DEMOCRACY

On February 10, the QRF launched artillery strikes against the two villages loyal to Green. One hundred forty people were killed and hundreds were wounded in three days. QRF commanders indicated their immediate intention to enter the villages. Green urged the ENI Council to take steps to "prevent an imminent humanitarian crisis."

The ENI Council unanimously approved "Activation Orders" for air strikes against military assets used to threaten civilians and perpetuate Andler's illegal regime. Rantanian Major-General Brewscha was appointed as Force Commander to make all operational decisions under the direction of the ENI Defense Committee. The ENI launched the operation on February 18, with the Rantanian air force playing a major role, conducting air strikes against verified military installations in Marcelux, Aprophe's capital.

The operation destroyed 12 of 15 military installations near Marcelux and killed 50 Aprophian soldiers, with no civilian casualties and only incidental damage to non-military buildings. A military think-tank reported that the operation effectively destroyed Aprophe's military.

On March 1, the UN Security Council adopted a resolution condemning Operation Uniting for Democracy for failing to provide advance notice pursuant to the UN Charter. The campaign continued until the ENI council formally the operation on March 5.

THE DESTRUCTION OF A MAI-TOCAO BUILDING

On February 27, Andler fled to Mai-Tocao. Brewscha announced that, rather than risking

damage to Mai-Tocao by striking Andler's headquarters there, ENI ground forces would enter Aprophe and capture Andler. Andler publicly threatened to destroy a Mai-Tocao building every other day as long as the ENI operation continued.

When the air strikes continued, Andler blew up a building in Mai-Tocao on March 3, destroying almost half of it. The World Heritage Committee issued a press release calling the destruction "tragic." Rantanian President Perego condemned it a breach of international law and ordered an immediate grounding of Rantania's air force.

SUBMISSION BEFORE THE INTERNATIONAL COURT OF JUSTICE ("I.C.J.")

Without prejudice to Rantania's contention that the Andler regime is illegitimate and cannot represent Aprophe before the Court, both parties jointly submitted the dispute to the I.C.J. – Aprophe as Applicant, Rantania as Respondent.

SUMMARY OF PLEADINGS

ANDLER'S GOVERNMENTAL ILLEGITIMACY

The Andler government cannot represent Aprophe before this Court because Andler is not the legitimate head of state. Only legitimate governments can bind states in contentious international disputes. Andler has not received the international recognition that this Court in *Genocide* held is necessary to gain legitimacy.

Alternatively, Andler violated the Aprophian people's right to participatory governance. If democratic governance has not crystallized as customary international law, then Andler's government is still illegitimate because it does not reflect popular sovereignty. Finally, Andler never established sufficient effective control to garner legitimacy. Even if Andler has effective control, this presumption of legitimacy is rebutted by democratic expression.

Alternatively, the Green government is a legitimate government-in-exile with the exclusive ability to bind the Aprophian state in these proceedings.

ATTRIBUTABILITY TO RANTANIA AND LEGALITY OF OPERATION UNITING FOR DEMOCRACY

As the Eastern Nations International Organization ("ENI") is an international organization with a separate and independent legal personality, Operation Uniting for Democracy can only be attributable to the ENI and not to Rantania. This is the case whether this Court applies either a test of "ultimate authority and control" or of "effective control."

ENI had "ultimate authority and control" because the operation was commanded by an ENI designated force commander and was directed by the ENI Defense Committee. Furthermore, as Applicant can provide no evidence that Rantania directed, controlled or interfered with any specific conduct of the forces placed at the ENI's disposal, the ENI also had "effective control" of any acts in which the alleged violations occurred.

Even if Rantania is found to be secondarily or concurrently responsible, the subject

matter of this dispute involves the rights and obligations of the ENI, Lamarthia, Verland and Pellegrinia. Therefore, in accordance with the long-held *Monetary Gold* principle, the Court must decline to exercise its jurisdiction.

In any event, the use of force against Aprophe was not internationally wrongful because Aprophe both requested and consented to the use of force. As Mig Green's government was the legitimate government of Aprophe, it was empowered under international law to request foreign military assistance, even absent Security Council authorization.

SOVEREIGN IMMUNITY

Rantania's court lawfully exercised jurisdiction in the case of *Turbando v. Aprophe*, because state practice on immunity does not establish a customary international law prohibition on the lifting of immunity for *jus cogens* violations. The *Lotus* principle permits Rantania to recognize a *jus cogens* exception to immunity in the absence of such a prohibition.

Aprophe violated the *jus cogens* prohibition on forced labor and slavery by subjecting more than 500 Rantanians to forced labor during the Mai-Tocao war. Aprophe has failed to take any step to provide the victims of its illegal acts with any remedy, even fifty years later. The Rantanian court may consider the peremptory nature of the norms violated, as well as Aprophe's failure to provide redress, when denying immunity, particularly in light of the victims' right of access to justice. Because *jus cogens* norms are hierarchically superior to rules on state immunity, they override immunity rules in cases of conflict. Aprophe also waived its sovereign immunity defense by violating a *jus cogens* norm.

DESTRUCTION OF CULTURAL PROPERTY

Since Andler exercised elements of governmental authority after forcing the rightful Green government into exile, her unlawful actions are attributable to Aprophe. Andler's

destruction of a building in Mai-Tocao, an important cultural site, constituted an illegal act of hostility directed against cultural property. Far from discharging its responsibility to protect cultural property in its territory, Aprophe willfully destroyed a building in Mai-Tocao as a political measure to coerce the ENI into ceasing its operation. There is no evidence of imperative military necessity to justify destroying the Mai-Tocao building, particularly because Mai-Tocao is wholly unconnected to the events giving rise to ENI's operation. Furthermore, Andler unlawfully made Mai-Tocao a military objective by entering it and using it as a shield from ENI forces. Thus, even if there was imperative military necessity, Andler contributed to the situation of necessity and cannot be permitted to invoke the defense.

Lastly, the destruction of cultural property was an illegal act of reprisal, prohibited by customary international law without any exception of military necessity.

PLEADINGS

I. THE COURT IS WITHOUT JURISDICTION OVER THE APPLICANT'S CLAIMS, SINCE THE ANDLER REGIME AND ITS REPRESENTATIVES CANNOT APPEAR BEFORE THIS COURT IN THE NAME OF APROPHE

A. This Court should defer to the international community's determination that Andler's government is illegitimate

Only a legitimate government may bind a state in international law.[1] Therefore, this Court may only exercise jurisdiction over claims submitted by the legitimate government of a state.[2] The General Assembly's power to pursue dispute resolution[3] and recommend the codification and progressive development of international law[4] renders that body the most competent international institution to make legitimacy determinations.[5]

In the *Genocide* case, this Court deferred to the General Assembly and the international community in determining that Bosnian president Alija Izetbegovìc was the legitimate representative of the Bosnian government, noting that the Izetbegovìc government had been seated by the General Assembly and had been signatories to international treaties.[6] Likewise, in the *Anastasiou* case, the European Court of Justice deferred to the European Union and its

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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) [hereinafter "D'Aspremont, *Democracy*"].

[2] *See Application of the Convention on the Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.)*, Preliminary Objections, 1996 I.C.J. 1, ¶44 [hereinafter "*Genocide*, Preliminary Objections"]; Statute of the International Court of Justice, 59 STAT. 1055 (1945), art.34(1).

[3] Charter of the United Nations, 1 U.N.T.S. XVI (1945), art.14 [hereinafter "U.N. Charter"].

[4] *Id.*, art.13(a)(1).

[5] BRAD ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 258-9 (2000) [hereinafter "ROTH, ILLEGITIMACY"] . *See also* Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 B.Y.I.L. 189, 199 (1986) [hereinafter "Doswald-Beck"].

[6] *Genocide*, Preliminary Objections.

members' position that the Clerides government was the sole legitimate government of the Republic of Cyprus in finding that only the Clerides government was empowered to issue agricultural certificates.[7] Similarly, courts regularly defer to their executive branches for legitimacy determinations in the domestic context.[8]

Only fourteen countries have recognized Andler's regime.[9] Further, Aprophe's U.N. ambassador has remained loyal to President Green,[10] and there is no indication that the General Assembly's Credentials Committee has considered seating a rival Andler delegation. Moreover, the General Assembly has condemned the Andler regime by an overwhelming majority vote.[11] Through these actions, the international community has affirmatively denied the legitimacy of Andler's regime.

This Court should follow the established practice of courts and defer to the international community's rejection of the legitimacy of Andler's government, which would deprive this Court of jurisdiction to hear Aprophe's claims.

B. Andler's government is illegitimate because it came to power in violation of the principle of political participation

Even if this Court declines to defer to the international community, it should independently determine that Andler's government is illegitimate because it came to power through non-participatory means and is non-democratic.

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[7] Stefan Talmon, *The Cyprus Question before the European Court of Justice*, 12 E.J.I.L. 727, 736 (2001).

[8] LORI DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS 373 (5th ed. 2009) [hereinafter "DAMROSCH"].

[9] Compromis ¶31.

[10] Compromis ¶29.

[11] Compromis ¶33.

In the early 1990's, state practice signaled the emergence of a "right to political participation" or a "right to democratic governance" in international law.[12] Under this norm, governments derive their legitimacy from the extent to which they come to power through participatory political mechanisms.[13] Recent state practice in response to non-democratic coups in Madagascar[14] and Honduras[15] demonstrates that this norm has crystallized in customary international law.[16]

The norm of political participation is rooted in a number of multilateral instruments. Article 25 of the International Covenant on Civil and Political Rights ("ICCPR") provides every citizen with the right to take part in the public affairs of the state,[17] which has been interpreted to provide the right to challenge the government.[18] For example, the European Commission of Human Rights interpreted similar language in the European Convention on Human Rights to

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[12] Gregory Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Thomas Franck, *The Emerging Right to Democratic Governance*, 86 A.J.I.L. 46 (1992) [hereinafter "Franck"].

[13] Franck, 46.

[14] Brad Roth, *Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELBOURNE J. INT'L L. 37, 46 (2010) [hereinafter "Roth, *Coups*"].

[15] G.A. Res. 63/301, U.N. Doc. A/RES/63/301 (2009).

[16] Jean D'Aspremont, *The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks*, 22 E.J.I.L. 549, 569 (2011) [hereinafter "D'Aspremont, *Reply*"]; IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY 176 (2007); Ben Chiagara, *The Right to Democratic Entitlement: Time for Change?,* 8 MEDITERRANEAN J. H.R. 53 (2004).

[17] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), art.25 [hereinafter "ICCPR"]; H.R.C., General Comment 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996); Roland Rich, *Bringing Democracy into International Law*, 12 J. DEMOCRACY 20, 23 (2001) [hereinafter "Rich"].

[18] ROTH, ILLEGITIMACY, 336.

condemn the Greek junta's elimination of political parties.[19] Likewise, the Inter-American Commission on Human Rights interpreted similar language in the American Convention on Human Rights to affirm the citizenry's right to be free from coercion when making electoral decisions.[20]

More specifically, article 1 of the ICCPR grants all people the right to freely determine their political status.[21] This right has been interpreted by many states to require democratic government.[22] Accordingly, states have organized around participatory principles.[23] As of 2000, 106 states had pledged to resist the overthrow of democratic systems.[24] Moreover, non-democratic states now claim legitimacy not by challenging the democratic order but by attempting to credibly claim democratization.[25]

Andler's regime violated the norm of political participation and democratic governance by overthrowing President Green's democratically-elected government in a coup.[26] Although Andler has pledged to hold new elections,[27] she has made no effort to do so. Thus, because Andler's regime came to power in violation of the principles of political participation and

[19] *The Greek Case*, Y.B. EUR. CONV. H.R. 179, 180 (1969).

[20] *Mexico Elections Decisions, Cases 9768, 9780, 9828*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/11.77/doc.7/rev.1 (1990), 97, 108.

[21] ICCPR, art.1.

[22] Steven Wheatley, *Democracy in International Law: A European Perspective*, 51 I.C.L.Q. 225, 231 (2002)

[23] Franck, 47.

[24] Rich, 30.

[25] D'Aspermont, *Reply*, 556.

[26] Compromis ¶15.

[27] Compromis ¶28.

democratic governance, it is illegitimate under international law and is not entitled to represent Aprophe before this Court.

C. Andler's government is illegitimate because it has not received the consent of the Aprophian people

If this Court finds that the norms of democratic governance and political participation have not yet crystallized in customary international law, the applicable rule for the determination of a government's legitimacy is popular sovereignty, which has been the governing standard in international law for at least the past century[28] and is supported by multiple General Assembly resolutions and international conventions.[29] Unlike the principles of political participation and democratic governance, popular sovereignty does not require a democratic form of government.[30] However, popular sovereignty requires that every legitimate government enjoy the consent of the governed.[31] While a government's effective control establishes a presumption of legitimacy, that presumption may be rebutted by election results that demonstrate the true political will of the people.[32]

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[28] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 220-21 (Anders Wedburg trans. 1961); Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (1948), art.21 [hereinafter "UDHR"].

[29] UDHR; U.N. Charter, preamble; United Nations Declaration on the Granting of Independence to Colonial Peoples, G.A. Res. 1514, U.N. Doc. A/4684 (1960); ICCPR, arts. 1, 3; International Covenant on Economic, Social, and Cultural Rights, 993 U.N.T.S. 3 (1966), arts. 1, 3.

[30] Roth, ILLEGITIMACY, 150.

[31] *Id*. 142.

[32] Niels Petersen, *The Principle of Democratic Teleology in International Law*, 16 MAX PLANCK INSTITUTE FOR RESEARCH ON COLLECTIVE GOODS 40 (2008) [hereinafter "Petersen"]; D'Aspremont, *Democracy*, 903.

1. Andler's government is not entitled to a presumption of legitimacy because it does not exercise effective control over Aprophe

i. President Green's government exercises effective control over Aprophe

Established governments enjoy a strong presumption of legitimacy in international law.[33] The international community has frequently recognized the legitimacy of established governments even when insurgents control most of a state's territory.[34] Because President Green's government was indisputably the established government of Aprophe before Andler's coup, Andler's regime will not enjoy a presumption of effective control until President Green's government no longer has any "fighting chance" of reclaiming control of the country.[35]

The situation in Aprophe has not reached this point, as Green's forces have not succumbed to persistent attacks by the Andler regime's military.[36] As a result, President Green's government enjoys the presumption of effective control over Aprophe. Therefore, Andler's government is not entitled to any presumption of legitimacy.

ii. In the alternative, neither Andler nor President Green's government exercises effective control over Aprophe

Effective control is not binary, as the Credentials Committee has recognized on multiple occasions. In 1997, when rival governments split control over Cambodia, the Committee declined to seat any delegation until elections resolved the dispute.[37] Similarly, in 2010, the

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[33] Roth, ILLEGITIMACY, 151.

[34] *Id.* 132 (describing continued international recognition of governments in Angola 1975-95, Cambodia 1970-75, Biafra 1967-70, Eritrea 1970s-90s).

[35] HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 348 (1947) [hereinafter "LAUTERPACHT, RECOGNITION"]; ROTH, ILLEGITIMACY, 151.

[36] Compromis ¶30.

[37] ROTH, ILLEGITIMACY, 393.

Committee declined to seat any delegation from Madagascar.[38] In 1994, the Security Council noted that because a power vacuum existed in Somalia, no regime could bind that state in international law.[39]

Andler's ability to control the country decreased dramatically since the coup. Her military was effectively destroyed by February 2011.[40] Meanwhile, President Green's supporters hold territory in northern Aprophe, and it appears as though the Andler regime has lost its ability to dislodge them from their strongholds,[41] indicating that neither government exercises effective control over the country. As a result, Andler's government is not entitled to any presumption of legitimacy based on effective control.

2. In the alternative, popular support for President Green's government rebuts any presumption of legitimacy Andler's government derives from its effective control of Aprophe

Even if Andler's government does maintain effective control over Aprophe, that control merely establishes a rebuttable presumption of legitimacy.[42] Where an election demonstrates the true political will of the people, the election's results rebut that presumption because the consent of the governed determines a government's legitimacy.[43] Exceptions to the effective control doctrine's presumption, including for foreign military intervention and racist minority

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[38] Roth, *Coups*, 46.

[39] *Report of the Commission of Inquiry established pursuant to Security Council resolution 885*, U.N. Doc. S/1994/653 (1994), ¶31.

[40] Compromis ¶¶39-40.

[41] Compromis ¶¶ 34, 38.

[42] ROTH, ILLEGITIMACY, 2, 30; *Mokotso v. King Moshoeshoe II* (1988), 90 I.L.R. 427, 494 (1990) (Lesotho High Ct.).

[43] Petersen, 40; D'Aspremont, *Democracy*, 903.

governments, demonstrate that the underlying test for governmental legitimacy is popular sovereignty.[44]

States in Europe,[45] the African Union,[46] the Americas,[47] and the Commonwealth[48] have explicitly endorsed popular sovereignty as the standard for governmental legitimacy. Democratically-elected governments ousted in *coups d'etat*, such as in Haiti, [49] Liberia,[50] Sierra Leone, [51] Honduras, [52] and Madagascar, [53] have been recognized as the sole legitimate governments of their respective states, despite their lack of effective control. Additionally, where the democratic process has been disregarded, such as in Angola,[54] Cambodia,[55] and Myanmar,[56]

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[44] LAUTERPACHT, RECOGNITION 348; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W. Africa)*, Advisory Opinion, 1971 I.C.J. 16; *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90.

[45] O.S.C.E., *Document for the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact Finding*, 30 I.L.M. 1670 (1991); O.S.C.E., *Document of the Copenhagen Meeting of the Conference on the Human Dimension*, 29 I.L.M. 1305 (1990), art.1(3).

[46] Constitutive Act of the African Union, 2158 U.N.T.S. 3 (2000), arts.3-4.

[47] *Declaration of Santiago on Democracy and Public Trust: A New Commitment to Good Governance for the Americas,* AG/DEC.31 (XXXIII-O/03), OEA/Ser.P/XXXIII-O.2, vol. 1 (2003).

[48] The Commonwealth, *Millbrook Commonwealth Action Programme on the Harare Declaration* (1995).

[49] *Ad Hoc Meeting of Ministers of Foreign Affairs: Support to the Democratic Movement of Haiti*, MRE/RES.2/91, OEA/Ser.F/V.1 (1991); ROTH, ILLEGITIMACY, 372; G.A. Res. 46/7, U.N. Doc. A/RES/46/7 (1991).

[50] S.C. Res. 788, U.N. Doc. S/RES/788 (1992); ROTH, ILLEGITIMACY, 397.

[51] ROTH, ILLEGITIMACY, 406; S.C. Res. 1132, U.N. Doc. S/RES/1132 (1997).

[52] G.A. Res. 63/301, U.N. Doc. A/RES/63/301 (2009).

[53] Roth, *Coups,* 46.

[54] S.C. Res. 811, U.N. Doc. S/RES/811 (1993); S.C. Res. 864, U.N. Doc. S/RES/864 (1993); S.C. Res. 851, U.N. Doc. S/RES/851 (1993).

states have refused to recognize the resultant government.

In 2000, Mig Green was elected President with the largest majority in Aprophian electoral history.[57] The most recent polls indicate that 55% of Aprophians approve of his government and 60% support his efforts to join the ENI.[58] The only groups opposing President Green—labor unions and nationalists—represent special interests whose opinions are not reflective of Aprophian society.[59] By contrast, Andler faced immediate "widespread and growing opposition" when she seized power.[60]

President Green's government enjoys a clear mandate from the Aprophian people, and is thus reflective of popular sovereignty. This rebuts any presumption of legitimacy that Andler's government might have derived from effective control.

3. President Green's government is a legitimate government-in-exile

When a democratic regime is forced into exile, the deposed government retains its legitimacy so long as it fulfills the criteria of a legitimate government-in-exile.[61] State practice in response to anti-democratic coups in Haiti,[62] Sierra Leone,[63] and Honduras[64] demonstrates that

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[55] *Report of the Credentials Committee*, U.N. Doc. A/52/719 (1997), ¶5.

[56] G.A. Res. 49/197, U.N. Doc. A/RES/49/197 (1994).

[57] Compromis ¶14.

[58] Compromis ¶23.

[59] Compromis ¶15.

[60] Compromis ¶28.

[61] Edward Collins, Jr. *et al.*, *Regime Legitimation in Instances of Coup-Caused Governments-in-Exile: The Cases of Presidents Makarios and Aristide*, 5 J. INT'L L. & PRAC. 199, 229 (1996).

[62] *Id.*

[63] Karsten Nowrot & Emily Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321

this rule has attained customary status.

President Green's government fulfills all four criteria of a legitimate government-in-exile, exclusively entitled to bind the state in international law.[65] It purports to represent a recognized state, Aprophe;[66] it purports to represent a people, the Aprophian people;[67] it is independent of its host, Rantania;[68] and the government in *de facto* control of the state, Andler's government, is illegitimate because it does not represent the will of the people.[69]

Green's government also satisfies the fourth criterion on alternative grounds.[70] This Court held in *Nicaragua* that it was possible for a government to legally bind itself by treaty to democratic governance.[71] In 2005, Aprophe did so by acceding to the Eastern Nations Charter of Human Rights ("EN Charter"),[72] reaffirming Aprophe's commitment to democracy and undertaking to adopt "legislative or other measures necessary" to ensure personal liberty and

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(1998) [hereinafter "Nowrot"].

[64] G.A. Res. 63/301, U.N. Doc. A/RES/63/301 (2009).

[65] 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 (1999) [hereinafter "Talmon, *Exile*"].

[66] Compromis ¶31.

[67] Compromis ¶23.

[68] Compromis ¶31.

[69] *See* Part I(C)(2) *supra.*

[70] Talmon, *Exile*.

[71] *Military and Paramilitary Activities in and against Nicaragua (Nic. v. U.S.)*, Merits Judgment, 1986 I.C.J. 14. ¶392 [hereinafter "*Nicaragua*"].

[72] Compromis ¶15.

social justice within a democratic framework.[73] By seizing power in violation of Aprophe's treaty commitment to maintain a democratic system of government, Andler's government became an illegitimate in government *in situ*.

As a result, President Green's government fulfills the criteria for a legitimate government-in-exile, and is thus the sole entity entitled to represent Aprophe before this Court.

II. THE USE OF FORCE AGAINST APROPHE IN OPERATION UNITING FOR DEMOCRACY IS NOT ATTRIBUTABLE TO RANTANIA, AND IN ANY EVENT, THAT USE OF FORCE WAS NOT ILLEGAL

A. The use of force is attributable to the Eastern Nations International Organization ("the ENI")

1. The ENI possesses independent international legal personality

International organizations possess legal personality separate from their members, and are responsible for their own acts.[74] In *Reparations*, this Court provided two criteria to determine if an organization has objective international legal personality.[75]

First, the organization's founding states must have intended to imbue the organization with independent legal personality.[76] This is established as the ENI Treaty provides for privileges

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[73] Compromis, Annex II preamble, art.2.

[74] *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 [hereinafter "*Reparations*"]; ANTONIO CASSESE, INTERNATIONAL LAW 135 (2005) [hereinafter "CASSESE, LAW"]; PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 475-479 (2009) [hereinafter "BOWETT"]; MALCOLM SHAW, INTERNATIONAL LAW 260, 1311 (2008) [hereinafter "SHAW"].

[75] *Reparations*, 179, 185; CASSESE, LAW, 137; Draft Articles of Responsibility of International Organizations, Y.B.I.L.C., vol.II (Part Two) (2011), art.2 cmt.¶9 [hereinafter "DARIO"]; Finn Seyersted, *Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend Upon the Conventions Establishing Them?*, 34 NORDISK TIDSKRIFT FOR INTERNATIONAL RET 1 (1964), 99 (1964) [hereinafter "Seyersted, *Objective*"]; SHAW, 1298.

[76] *Reparations*, 179.

and immunities for the organization in member states,[77] creates independent ENI organs,[78] and requires only a simple majority for ENI Council decisions.[79]

Second, the organization must "in fact [be] exercising" independence from its members.[80] This has been demonstrated by the ENI's actions, including its collective decision to take military action[81] and the Eastern Nations Court's ("ENC") reversal of the judgment in the case of *Turbando, et al., v. the Republic of Aprophe* ("*Turbando*"), originally delivered by a trial court in Rantania, one of its member states.[82] Additionally, organizations with structures and attributes similar to those of the ENI, such as the North Atlantic Treaty Organization, are widely considered to possess independent legal personality.[83]

Lastly, even if affirmative recognition of an organization's legal personality by a non-member state is required, Aprophe recognized the ENI's legal personality by acceding to the EN Charter and by taking steps to become an ENI member.[84]

2. Operation Uniting for Democracy was an ENI operation

Rantanian Air Force units were seconded to the ENI for the duration of Operation

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[77] *Id.*; Compromis, Annex III art.84.

[78] *Reparations*, 178; Compromis, Annex III arts.4-5, 62; Seyersted, *Objective*, 99.

[79] Compromis, Annex III art.5; CASSESE, LAW, 137.

[80] *Reparations*, 179.

[81] Compromis ¶¶35-37.

[82] Compromis ¶19, Annex III art.10(2).

[83] *Branno v. Ministry of War*, 22 I.L.R. 756 (1954) (It.); *Mazzanti v. H.A.F.S.E. & Ministry of Def.*, 22 I.L.R. 758 (1954) (It. Flor. Trib.); Jan Klabbers, *The Concept of Legal Personality*, 11 IUS GENTIUM 35, 36 (2005); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 678 (7th ed. 2008) [hereinafter "BROWNLIE"].

[84] Compromis ¶¶14-15; BOWETT, 480.

Uniting for Democracy. The ENI's responsibility for acts undertaken by these units depends on whether it had either "ultimate authority and control" over the operation,[85] or "effective control" over the specific conduct in question.[86] The ENI is responsible for the operation under either standard.

The ENI had ultimate authority and control over the operation because all of the acts committed by the Rantanian Air Force units fell within the ENI's mandate for the operation.[87] Further, the ENI retained operational command and control by directing the operation through its Defense Committee.[88]

The ENI also exercised effective control over the operation.[89] Since the Rantanian Air Force units were seconded to the ENI, Aprophe must show evidence of actual Rantanian orders concerning or interfering with the operation[90] to demonstrate Rantania's responsibility. Aprophe must also prove that Rantania gave "instructions…in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions."[91]

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[85] *Behrami v. France; Saramati v. France, Germany and Norway*, 45 E.H.R.R. 10, 134 (2007) [hereinafter "*Behrami*"]; *Kasumaj v. Greece*, E.C.H.R. 6974/05 (2007); *Gajic v. Germany*, E.C.H.R., 31446/02 (2008); *R (Al-Jedda) v. Secretary of State for Defence*, (2007) U.K.H.L. 58, ¶55 (U.K.).

[86] DARIO, art.7.

[87] *Behrami*, 124-126; Compromis ¶35.

[88] *Behrami*, 139; Compromis ¶¶35-37.

[89] DARIO, art.7.

[90] *Behrami*, 139.

[91] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶400 [hereinafter "*Genocide*, Judgment"]; *Nicaragua*, ¶115.

However, the ENI-designated Force Commander made all operational decisions.[92] There is no evidence that Rantanian organs instructed, guided, or controlled any specific act in respect to any allegedly wrongful acts.[93] Neither the size of Rantania's contribution to the ENI forces nor the Force Commander's nationality permits a contrary conclusion.[94]

Further, Rantania's ability to ground its air force does not signify effective control over the air strikes.[95] International organizations maintain effective control over their operations even when states retain some degree of control over individual units.[96] In United Nations ("UN") peacekeeping operations, troop-contributing nations "always retain the power to withdraw their soldiers at any moment,"[97] but this factor does not free the UN from responsibility for acts the troops commit. Moreover, even after the grounding of the Rantanian Air Force, the suspension of the operation as a whole required action by the ENI Council.[98]

B. The use of force is not attributable to both the ENI and Rantania

1. Rantania is not secondarily or concurrently responsible for Operation Uniting for Democracy

Member states are not concurrently liable for acts attributable to international

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[92] Compromis ¶¶35-37.

[93] FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 411 (1966).

[94] *Behrami*, 91.

[95] *Genocide*, Judgment, ¶400; *Nicaragua*, ¶115; Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 E.J.I.L. 649, 667 (2007); Kjetil Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, 19 E.J.I.L. 510, 516 (2008).

[96] DARIO, art.1 cmt.¶1.

[97] Venice Commission, *Opinion on human rights in Kosovo: Possible establishment of review mechanisms*, 280/2004, CDL-AD 033, ¶14 (2004).

[98] Compromis ¶43.

organizations with separate legal personality.[99] In the context of a military intervention performed under the aegis of an international organization, conduct is ordinarily not simultaneously attributable to troop-contributing nations.[100] Since at all relevant times Rantanian units acted under the ENI's auspices, the actions of those units correspondingly "ceased to be attributable" to Rantania.[101]

2. In the alternative, the Court lacks jurisdiction as the ENI, Lamarthia, Verland, and Pellegrinia constitute indispensable third parties

Even if Rantania was secondarily or concurrently responsible for the actions of its Air Force, the *Monetary Gold* principle[102] would require that this Court decline to exercise its jurisdiction because any decision on the merits of this dispute would necessarily implicate the rights and obligations of third parties, in this case Lamarthia, Verland, Pellegrinia, and the ENI.[103] The rights, obligations and responsibilities of these parties would form the "very subject matter"[104] and be a "pre-requisite"[105] of any decision concerning wrongfulness on Rantania's

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[99] Rosalyn Higgins, *The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of Their Obligations Towards Third Parties*, 66 Y.B. INST. INT'L L. 249, 257 (1995).

[100] *Behrami*, 139; DARIO, art.7 cmt.¶4 (noting that dual or multiple attribution would "not frequently occur in practice").

[101] *Al-Jedda v. U.K.*, E.C.H.R., 27021/08 (2011), ¶80.

[102] *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., U.S.)*, 1954 I.C.J. 19, ¶32 [hereinafter, "*Monetary Gold*"].

[103] *See* preliminary objections of Portugal (145); France (29-35); Canada (22); Netherlands (¶7.2.17); Belgium (¶533); *and* U.K. (¶6.18) *in the Legality of Use of Force* cases before this Court; Jean D'Aspremont, *Abuse of the Legal Personality of International Organizations and the Responsibility of Member States*, 4 INT'L. ORG. L. REV. 91, 117 (2007).

[104] *Monetary Gold*, ¶32.

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

part, as all relevant acts committed by Rantania's organs were performed pursuant to decisions of the ENI Council.[106]

C. The use of force was not illegal because Aprophe's legitimate government consented to Operation Uniting for Democracy

The prohibition on the use of force contained in article 2(4) of the UN Charter is not absolute.[107] As this Court held in *Nicaragua*, military intervention "at the request of the [host] government" does not violate international law,[108] even absent Security Council authorization.[109]

While only the state's legitimate representative in international law may validly request another state's intervention, [110] President Green's government was the only legitimate government of Aprophe when he requested the ENI's intervention under any of the tests for governmental legitimacy discussed *supra.*[111]

Even if Andler's government exercises effective control over Aprophe today, it had not established effective control before President Green requested Rantania's assistance, as Green's

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[106] Compromis ¶35-37.

[107] PHILIP JESSUP, A MODERN LAW OF NATIONS 162 (1948).

[108] *Nicaragua*, ¶126; *see also* Articles on Responsibility of States for Internationally Wrongful Acts, Y.B.I.L.C., vol.II (Part Two) (2001), art.20 [hereinafter "ARSIWA"]; DARIO, art.20; SHAW, 1313; David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 209 [hereinafter "Wippman"]; G.A. Res. 3314, U.N. Doc. A/RES/3314 (1974), art.3(e); Doswald-Beck, 191.

[109] Jochen Frowein, *Legal Consequences or International Law Enforcement in Case of Security Council Inaction*, *in* THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT: NEW SCENARIOS, NEW LAW 111, 120 (Jost Delbrück ed. 1993).

[110] ARSIWA, art.20 cmts.4-6; Doswald-Beck, 251; *Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/318, 2 Y.B.I.L.C. 3, 36 (1979); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 164 (2001).

[111] *See* Part I *supra.*

government still had a "fighting chance."[112] Even more importantly, since Green's popular support rebuts any presumption of legitimacy Andler could derive from her effective control of Aprophe, any effective control Andler held could not have prevented Green's ability to represent Aprophe, request assistance, or consent to an intervention.[113]

Further, since Green's government was a legitimate government-in-exile, it was empowered to provide valid consent.[114] Substantial state practice supports the capacity of a legitimate government-in-exile to consent to foreign military intervention.[115] For example, even though the transitional government of Somalia had little control over any state territory,[116] it still had the capacity to validly consent to Ethiopia's subsequent military intervention and assistance.[117] Additionally, the Liberian and Sierra Leonean governments-in-exile had the capacity to provide consent to interventions undertaken by the Economic Community of West African States—consent that has been widely recognized as valid.[118] Lastly, years after Haitian

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[112] *See* Part I(C)(1) *supra.*

[113] Georg Nolte, *Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 53, 603 (1993) [hereinafter "Nolte"]; Wippman, 209.

[114] Doswald-Beck, 251 (describing the validity of consent of ineffective regimes in Congo (1960) and Lebanon (1978)); *Genocide*, Preliminary Objections, ¶¶221-22; Matthew Saul, *From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law*, 11 INT'L CMTY. L. REV. 119, 139 (2009) [hereinafter "Saul"]; *see also* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 9 (2007) (noting that oral pronouncements can be legally binding).

[115] Nowrot, 386; Nolte, 603; Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VANDERBILT J. TRANSNAT'L L. 643, 666 (2007).

[116] Saul, 146.

[117] *Id.*; S.C. Res. 2020, U.N. Doc. S/RES/2020 (2011).

[118] S.C. Res. 788, U.N. Doc. S/RES/788 (1992), 2; S.C. Res. 1162, U.N. Doc. S/RES/1162 (1998), ¶2.

President Jean-Bertrand Aristide had lost effective control of Haiti, the Security Council resolution authorizing the use of force to restore his presidency specifically recognized the legitimacy of his government and took special note of his request for foreign military assistance.[119]

Because President Green's government was the sole legitimate government of Aprophe when Green requested the ENI's intervention, his request precluded the operation's wrongfulness.

III. RANTANIAN OFFICIALS MAY EXECUTE THE JUDGMENT IN *TURBANDO* SINCE THE EXERCISE OF JURISDICTION BY RANTANIAN COURTS IN THAT CASE WAS CONSISTENT WITH INTERNATIONAL LAW

The Rantanian trial court's exercise of jurisdiction in *Turbando* was fully consistent with international law, because the court had jurisdiction to hear the case and was entitled to deny the application of foreign sovereign immunity where Aprophe violated peremptory norms of international law and did not compensate the victims.

This Court recognized in *Arrest Warrant* that a state must first demonstrate jurisdiction before the question of immunities becomes relevant.[120] Rantanian courts have jurisdiction to adjudicate the dispute in *Turbando* based on the principle of territoriality,[121] as Aprophe committed the acts giving rise to the claims of the former military internees on Rantanian territory.[122]

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[119] S.C. Res. 940, U.N. Doc. S/RES/940 (1994).

[120] *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3, ¶46 [hereinafter "*Arrest Warrant*"].

[121] SHAW, 579; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §402 (1987) [hereinafter "RESTATEMENT (THIRD)"].

[122] Compromis ¶6.

A. Article XV of the 1965 Peace Agreement did not waive the claims of the Rantanian former military internees

Article XV of the 1965 Peace Agreement purports to waive civil claims by Rantanian nationals against Aprophe.[123] However, the claims of the Rantanian military internees for human rights abuses cannot be waived, because these claims stem from Aprophian violations of *jus cogens* norms.[124] Any treaty that bars compensation claims for a *jus cogens* violation is void pursuant to articles 53 and 64 of the Vienna Convention on the Law of Treaties[125] because it frustrates the very purpose and realization of that peremptory norm.[126]

The *Turbando* claims allege violations of the peremptory prohibitions on forced labor and slavery.[127] In such cases alleging forced labor, the prohibition on barring compensation claims for *jus cogens* violations applies with even greater force, because the absence of due compensation defines the norm's violation in the first place.[128] Thus, a waiver of compensation claims for forced labor would be tantamount to a waiver of the peremptory prohibition on forced labor itself.

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[123] Compromis, Annex I art.XV.

[124] BROWNLIE, 514-16; V.D. DEGAN, SOURCES OF INTERNATIONAL LAW 217, 226 (1997); Gay McDougall, *Report of Special Rapporteur on Contemporary Forms of Slavery*, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998), ¶¶58-60; Karen Parker & Jennifer Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 497, 538 (1994).

[125] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 33 (1969), arts.53, 64 (nullifying treaty provisions that conflict with a peremptory norm of international law, even if the norm attains *jus cogens* status after entry into force of the treaty).

[126] Dinusha Panditaratne, *Rights-Based Approaches to Examining Waiver Clauses in Peace Treaties: Lessons from the Japanese Forced Labor Litigation in Californian Courts*, 28 B.C. INT'L & COMP. L. REV. 299, 315 (2005) [hereinafter "Panditaratne"].

[127] *See* Part III(B)(2)(i) *infra*.

[128] Panditaratne, 316.

Furthermore, Aprophe has not provided any alternative means of redressing its violations. Enforcement of Article XV with respect to Aprophe's violations of *jus cogens* norms would therefore leave the former military internees without any compensation whatsoever. As a result, Article XV cannot and does not waive the *Turbando* plaintiffs' forced labor claims.

B. Sovereign immunity does not bar the claims of the former military internees

Although a customary international norm of sovereign immunity exists, it does not always entail exact prescriptions on how domestic courts must give effect to this norm.[129] As an area of international law that developed principally from judicial state practice,[130] state practice has been too inconsistent in their applications of immunity to establish rules more specific than a general recognition of immunity and a broad set of circumstances where it applies.[131] States may thus apply immunity within these broad limits set by international law, in accordance with the *Lotus* principle.[132] In light of factors particular to the *Turbando* case, the Rantanian court did not violate any international standard requiring the application of sovereign immunity.

1. Rantania is entitled to apply sovereign immunity consistently with developments in international law

There is no express international prohibition on denying sovereign immunity for violations of *jus cogens* norms. Regional and domestic judicial decisions that have found that no obligation to lift immunity for *jus cogens* violations existed in international law, never held that

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[129] CASSESE, LAW, 104; BROWNLIE, 330.

[130] *Report of the ILC on the work of its thirty-second session*, U.N. Doc. A/35/10, 143 (1980) [hereinafter "*ILC Report, 1980*"].

[131] CASSESE, LAW, 104; BROWNLIE, 330.

[132] *Case of the S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (Ser.A) No.10, ¶46.

states were prohibited from denying immunity under such circumstances.[133] In the absence of any such prohibition, Rantania may apply rules on sovereign immunity with due regard to developments in international human rights law, avoiding an "artificial, unjust, and archaic" result.[134]

The sovereign immunity doctrine is an exception to the dominant principle of territorial jurisdiction,[135] developed to encourage international comity.[136] Therefore, there is no inherent right of state immunity.[137] Practical considerations guide domestic courts in their immunity analyses, balancing sovereign equality against factors such as the rights of their own citizens.[138] This allows national courts to apply sovereign immunity in a manner that better reflects evolving inter-state relationships.[139]

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[133] *See, e.g., Al-Adsani v. U.K.*, E.C.H.R., 35763/97 (2001), ¶61 [hereinafter "*Al-Adsani*"]; *Kalogeropoulou v. Greece*, E.C.H.R., 50021/00 (2002). Since Aprophe's forced labor violations were committed in Rantania, the *Bouzari* judgment may also be distinguished as it upheld state immunity for *jus cogens* violations committed "outside the forum state." *See Bouzari v. Iran*, 220 O.A.C. 1, ¶¶93-95 (2004) (Can. Ont. Ct. App.).

[134] Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 B.Y.I.L. 220, 221 (1951) [hereinafter "Lauterpacht, *Immunities*"].

[135] Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 RECUEIL DES COURS 113, 215 (1980) [hereinafter "Sinclair"]; BROWNLIE, 321; Lauterpacht, *Immunities*, 229; GAMAL MOURSI BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 11 (1984).

[136] *ILC Report, 1980*, ¶58; *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812) (U.S. Sup.Ct.); *Austria v. Altmann*, 541 U.S. 677 (2004) (U.S.); *Buck v. Attorney-General* [1965] Ch. 745, 770-71 (U.K. Ct. App.).

[137] Lee Caplan, *State Immunity, Human Rights and Jus Cogens*, 97 A.J.I.L 741, 771 (2003); Sinclair, 215 ("one does not start from an assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified").

[138] *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (1984) (U.S. Ct. App.).

[139] *Arrest Warrant, Joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal*, ¶72.

For example, states were able to respond to the growing participation of governments in commercial transactions with private persons by restricting the doctrine of immunity, which had hitherto been absolute,[140] and distinguishing between sovereign acts and commercial acts.[141] As tort law developed, states have also denied sovereign immunity for tortious acts committed by foreign states in the prosecuting state's territory.[142] Recently, the U.S. created a terrorism exception to immunity in civil suits, reflecting growing concerns over the threat of terrorism.[143] These examples demonstrate that national court decisions and legislation, guided by considerations of comity, drive the progressive development of the international law governing immunities. Therefore, since no inherent right of state immunity exists for *jus cogens* violations, Rantania is entitled to consider the growing importance of human rights in international law and deny immunity to Aprophe.[144]

2. Factors support Rantania's denial of immunity in *Turbando*

It is significant that Aprophe has not provided redress for the victims of the Aprophian

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[140] BROWNLIE, 327-29; SHAW, 701; DAMROSCH, 859; Sinclair, 210-13.

[141] *I Congreso del Partido* [1983] A.C. 244, 267 (U.K.); *Claims Against the Empire of Iran*, 45 I.L.R. 57, 80 (1963) (Ger.); *U.S. v. Public Service Alliance of Canada (Re Canada Labour Code)*, 94 I.L.R. 264, 278 (1992) (Can.); *Reid v. Republic of Nauru*, 101 I.L.R. 193, 195-96 (1993) (Austl. Vict. Sup. Ct.); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1393 (1985) (U.S. Ct. App.).

[142] Christoph Schreuer, *Some Recent Developments on the Law of State Immunity*, 2 COMP. L. Y.B. 215 (1978); Convention on the Jurisdictional Immunities of States and their Property, U.N. Doc. A/RES/59/38 Annex (2004), art.12; European Convention on State Immunity, 11 I.L.M. 470 (1972), art.11; U.K. State Immunity Act, 17 I.L.M. 1123 (1978), §5; U.S. Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(5) [hereinafter "FSIA"]; *Prefecture of Voiotia v. Germany*, Case 11/2000 (2000) (Gr.) (applying the tort exception to immunity to proceedings for war damage).

[143] FSIA, §1605A.

[144] Compromis ¶20.

military's forced labor crimes. Since the purpose of immunity is not to grant impunity,[145] state immunity affords an opportunity for the defendant state to provide the remedies itself to comply with international norms.[146] It cannot be abused to bar access to justice in the context of *jus cogens* violations.[147]

The Inter-American Court of Human Rights has recognized access to justice as a peremptory norm when the substantive rights violated were also *jus cogens*.[148] The International Criminal Tribunal for the former Yugoslavia ("ICTY") has also recognized the possibility that victims of *jus cogens* violations could bring civil claims before foreign states' courts.[149] Further, Rantania is obliged to provide redress for the former military internees, particularly since Aprophe has not done so, under article 13 of the EN Charter, as the ENC held in its January 2009 judgment.[150]

i. Sovereign immunity may be lifted for Aprophe's violations of the jus cogens *prohibition on forced labor*

During the Mai-Tocao War, "more than 500 Rantanian peasants were forced to labor" for the Aprophian army in daily 12-hour shifts.[151] This treatment constituted forced labor,[152] a

[145] *Arrest Warrant*, ¶60.

[146] Hazel Fox, *State Immunity and the International Crime of Torture*, 2 E.H.R.L.R. 142 (2006) [hereinafter "Fox"].

[147] Redress Trust, *Immunity v. Accountability* (2005), 43.

[148] *Goiburú v. Paraguay*, Inter-Am. Ct. H.R., Merits Judgment, Series C-153 (2006), ¶131.

[149] *Prosecutor v. Furundžija*, Trial Judgment, IT-95-17/1-T (1998), ¶155.

[150] Compromis ¶19, Annex II art.13.

[151] Compromis ¶6.

[152] Convention Concerning Forced or Compulsory Labour, 39 U.N.T.S. 55 (1970) , art.2.1 [hereinafter "Forced Labour Convention"].

modern variant of slavery and a *jus cogens* violation.[153] The definition of slavery contained in the 1926 Slavery Convention,[154] supplemented by the 1930 Forced Labour Convention and the 1956 Supplementary Convention on Slavery,[155] includes forced labor. Thus, the *Turbando* claims arise out of violations of the *jus cogens* prohibition on slave labor.[156]

The presence of *jus cogens* norms violations in *Turbando* has important consequences. Under article 41 of the Articles on State Responsibility (ASR), states are obliged to not recognize a situation created by serious breaches of peremptory norms as lawful.[157]

Moreover, the peremptory nature of Aprophe's breach takes primacy over rules on sovereign immunity in cases of conflict. There is a normative conflict between sovereign immunity and violations of peremptory norms because the invocation of immunity will impede the latter's enforceability.[158] To dismiss the *Turbando* case on sovereign immunity grounds would deprive the former military internees of their only available means of redress for their

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[153] ILO, *Forced Labour in Myanmar (Burma)* (1998), ¶538; *Ferrini v. Germany*, n.5044 (2004) (It.) [hereinafter "*Ferrini*"]; *John Doe I v. Unocal Corp*., 395 F.3d 932 (2002) (U.S. Ct. App.). *See also* UDHR; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S. 280 (1945), art.6 (making forced labor a war crime); BROWNLIE, 515; Theodor Meron, *On a Hierarchy of International Human Rights*, 80 A.J.I.L. 1 (1986); Sarah Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 26-27 (2001) (reading the prohibition against slavery to include the prohibition against forced labor).

[154] Convention to Suppress the Slave Trade and Slavery, 60 L.N.T.S. 253 (1926), art.1.1.

[155] Forced Labour Convention, art.2.1; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 266 U.N.T.S. 3 (1956), art.1.

[156] *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶¶33-34 [hereinafter "*Barcelona Traction*"]; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996); RESTATEMENT (THIRD), §702.

[157] ARSIWA, art.41(2).

[158] Alexander Orakhelashvili, *State Immunity and the Hierarchy of Norms: Why the House of Lords Got It Wrong*, 18 E.J.I.L. 955, 957 (2007).

suffering.[159] Since the rules on state immunity conflict with a hierarchically higher *jus cogens* norm, the procedural bar of immunity must be lifted.[160] This *jus cogens* exception to immunity was applied by the Italian Supreme Court in *Ferrini*,[161] and has found support among members of this Court,[162] national judges,[163] and academics.[164]

Besides, Aprophe impliedly waived its immunity defense by violating a *jus cogens* norm. Aprophe cannot claim the privilege of immunity for acts that violate *jus cogens* prohibitions, because international law does not and cannot bestow immunity for acts it has universally criminalized.[165]

Therefore, the Rantanian court correctly recognized that the acts underlying the *Turbando* claims were *jus cogens* violations that allowed the court to deny immunity and lawfully exercise

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[159] The military internees' claims have already been brought before Aprophian courts, but were dismissed in 2002. Compromis ¶17.

[160] *Al-Adsani, Joint dissenting opinion of Judges Rozakis, Caflisch, Costa, Wildhaber, Cabral Barreto and Vajic*, ¶3.

[161] *Ferrini*, ¶¶9, 9.1, *affirmed in Italy v. Milde*, n.1072 (2009) (It.).

[162] *See, e.g., Arrest Warrant, Dissenting opinion of Judge Al-Khasawneh*, ¶7; *id., Dissenting opinion of Judge* ad hoc *Van den Wyngaert*, 157-159.

[163] *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, [2000] A.C. 147, 278 (U.K.); *Lozano v. Italy*, n.31171/2008 (2009), §6 (It.).

[164] Fox, 152; Andrea Bianchi, *Denying State Immunity to Violations of Human Rights*, 46 AUST. J. PUB. & INT'L L. 195 (1994) [hereinafter "Bianchi"]; Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 E.J.I.L. 94 (2004); Kate Parlett, *Immunity in Civil Proceedings for Torture: The Emerging Exception*, 1 E.H.R.L.R. 49, 51 (2006); Robert Taylor, *Pinochet, Confusion, and Justice: The Denial of Immunity in U.S. Courts to Alleged Torturers Who Are Former Heads of State*, 24 T. JEFFERSON L. REV. 101, 114 (2001).

[165] Bianchi, 240.

jurisdiction.[166] This interpretation of immunity reflects the growing importance of international human rights law in the conduct of inter-state relations.

IV. APROPHE VIOLATED INTERNATIONAL LAW BY DESTROYING A BUILDING OF THE TEMPLE OF MAI-TOCAO

The Mai-Tocao temple complex is undisputedly a site of "outstanding universal value."[167] It is one of the most famous religious and archaeological sites in the world, attracting over 500,000 tourists annually.[168] Mai-Tocao was recognized by ancient historians as having tremendous significance to various cultures and is central to Aprophian and Rantanian cultural heritage.[169] Mai-Tocao was added to the World Heritage List in 1988,[170] reflecting the international community's recognition of its universal value.[171] Far from complying with its duty to protect the Mai-Tocao site,[172] Aprophe breached international law by destroying one of its buildings.

Three preliminary matters relating to attribution, standing, and applicable international law must be addressed before considering Aprophe's substantive violations. First, while Andler's regime is illegitimate and cannot represent Aprophe before this Court, its internationally wrongful acts[173] can still be attributed to Aprophe under article 9 of the ASR[174] because Andler

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[166] Compromis ¶20.

[167] Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 151 (1972), art.1 [hereinafter "WHC"].

[168] Compromis ¶3.

[169] *Id.*

[170] Compromis ¶12.

[171] WHC, art.11.

[172] WHC, art.4.

[173] Compromis ¶¶39-42.

exercised elements of Aprophe's governmental authority by *inter alia* suspending Green's policies and dissolving parliament in the absence of the official authorities, as Aprophe's legitimate government was illegally deposed by Andler's coup.[175]

Additionally, Respondent has standing to invoke Aprophe's state responsibility for Andler's destruction of cultural property, because these acts violated rules that are binding *erga omnes* and owed to the international community as a whole.[176] Therefore, under article 48 of the ASR, Respondent may invoke Aprophe's responsibility for breaching the *erga omnes* prohibition on destruction of cultural property.[177]

Regarding the applicable legal norms, Respondent acknowledges that Aprophe is not a signatory to several conventions applicable to this area of law, including the 1954 Hague Convention for the Protection of Cultural Property ("Hague Convention")[178] and the Additional Protocols to the 1949 Geneva Conventions ("Additional Protocol I" and "Additional Protocol II").[179] Nonetheless, all the rules forbidding the destruction of cultural property in these treaties

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[174] ARSIWA, art.9.

[175] Compromis ¶¶27-28.

[176] *Separate Opinion of Judge Cançado Trindade, Request for interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thai.)*, Order on Provisional Measures, General List No.151 (2011), ¶93; WHC, preamble; Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 E.J.I.L. 9, 13 (2011); Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 E.J.I.L. 619, 634 (2003); Roger O'Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, 53 I.C.L.Q. 189, 190 (2004).

[177] ARSIWA, art.48(1); *Barcelona Traction*, 33.

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

[179] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977) [hereinafter "AP I"]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the

have been widely recognized as international custom, including the fundamental principles of respect for cultural property set out in article 4 of the Hague Convention[180] and the protection of cultural objects and places of worship set out in article 53 of Additional Protocol I.[181]

A. The destruction of the building was an act of hostility directed against cultural property

Customary international law prohibits states from making cultural property the object of attack.[182] Andler's destruction of a Mai-Tocao building[183] violated international law as an act of hostility directed against cultural property, prohibited by article 4(1) of the Hague Convention. Article 53(a) of Additional Protocol I also applies to prohibit acts of hostility directed against Mai-Tocao, because Mai-Tocao constitutes the "cultural or spiritual heritage of peoples."[184] This provision applies any object "whose value transcends geographical boundaries, and which are

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Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609 (1977).

[180] UNESCO, General Conference 27/C/Res.3.5 (1993), preamble; *Annotated Supplement to the US Naval Handbook* (1997), §5.4.2 (accepting the binding nature of the Hague Convention, even though the U.S. is not a party); *Prosecutor v. Tadić*, Decision on Motion for Interlocutory Appeal Jurisdiction, IT-94-1-AR72 (1995), ¶98; *Prosecutor v. Brdjanin*, Trial Judgment, IT-99-36-T (2004), ¶595 ("[i]nstitutions dedicated to religion are protected… under customary international law"); *Partial Award: Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22*, 43 I.L.M. 1249 (2004); David Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349 (1993).

[181] Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, *in* HUMANITARIAN LAW OF ARMED CONFLICT, CHALLENGES AHEAD, ESSAYS IN HONOR OF FRITS KALSHOVEN 93, 110 (Astrid Delissen & Gerard Tanja eds., 1991). A similar provision is contained in art.16 of Additional Protocol II.

[182] Hague Convention, art.4(1); AP I, art.53(a); ICRC, Customary International Humanitarian Law Database, rule 38B [hereinafter "ICRC, Database"].

[183] Compromis ¶42.

[184] AP I, art.53(a).

unique in character and are intimately associated with the history and culture of a people."[185] Mai-Tocao is such an object. The Rantanian president's statement in 1988, citing Mai-Tocao as part of the region's "proudly shared history and culture,"[186] acknowledged its importance beyond Aprophe's borders. Mai-Tocao is also intimately associated with the history and culture of Aprophians and Rantanians, possessing religious significance dating thousands of years to 2000 BCE.[187]

States have condemned attacks against cultural property as contravening international humanitarian law[188] and banned such attacks in their legislation.[189] The ICTY has also held individuals criminally responsible for destroying cultural property, declaring such attacks to be

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[185] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL.1 (2005), ¶2064 [hereinafter "HENCKAERTS & DOSWALD-BECK"], *cited with approval in Prosecutor v. Kordić and Cerkez*, Appeal Judgment, IT-95-14/2-A (2004), ¶91.

[186] Compromis ¶12.

[187] Compromis ¶3.

[188] *See* the practice of Cape Verde (*cited in* ICRC, Customary International Humanitarian Law: Practice, Vol.II, §181); China (§183); Croatia (§185); France (§192); Germany (§194); Iran (§202); Pakistan (§215); United Arab Emirates (§219) [hereinafter "ICRC, Practice"]; S.C. Res. 1265, U.N. Doc. S/RES/1265 (1999), ¶2; G.A. Res. 47/147, U.N. Doc. A/RES/47/147 (1992), preamble; G.A. Res. 49/196, U.N. Doc. A/RES/49/196 (1994), preamble; G.A. Res. 50/193, U.N. Doc. A/RES/50/193 (1995), preamble; UNESCO, General Conference 27/C/Res.4.8 (1993), ¶¶1-2; U.N. Commission on Human Rights, Res. 1998/70 (1998), ¶¶2(g), 5(h); UNESCO, Press Release No. 2001-27 (2001); UNESCO, Press Release No. 2001-38 (2001) (denouncing attacks on cultural property in the former Yugoslavia, Afghanistan, and Korea).

[189] *See* the legislation of Argentina (*cited in* ICRC, Practice, §105); Australia (§109); Azerbaijan (§110); Bosnia and Herzegovina (§113); Bulgaria (§114); Canada (§117); Chile (§118); China (§119); Colombia (§120); Congo (§122); Croatia (§124); Dominican Republic (§128); Estonia (§130); Germany (§132); Italy (§135); Kyrgyzstan (§138); Mali (§142); Mexico (§143); Netherlands (§§144-45); New Zealand (§147); Nicaragua (§148); Paraguay (§152); Peru (§153); Poland (§154); Romania (§155); Russian Federation (§156); Slovenia (§158); Spain (§160); United Kingdom (§167); United States (§168); Uruguay (§169); Venezuela (§170).

particularly serious violations of international humanitarian law.[190]

It is irrelevant that the bombing of the Mai-Tocao building did not cause more extensive damage.[191] International law prohibiting the destruction of cultural property does not require a minimum threshold of damage.[192] The Draft Code of Crimes against the Peace and Security of Mankind included wilful attacks on cultural property as "exceptionally serious war crimes," without referencing any result requirement.[193] In 2007, UNESCO condemned a mortar attack of a World Heritage site in Kosovo even though the site sustained only minor damage and no one was wounded.[194]

1. No imperative military necessity existed to justify the building's destruction

Since the Mai-Tocao complex constitutes the cultural and spiritual heritage of peoples, the destruction of a building therein in violation of article 53(a) of Additional Protocol I cannot be excused on the basis of imperative military necessity.

Neither can Aprophe invoke the defense of imperative military necessity contained in article 4(2) of the Hague Convention,[195] because there is no evidence in the Compromis to show that such necessity existed. Andler's actions were political measures intended to coerce political

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[190] *Prosecutor v. Jović*, Sentencing Judgment, IT-01-42/1-S (2004), ¶53 [hereinafter "*Jović*"]; *Prosecutor v. Strugar*, Trial Judgment, IT-01-42-T (2005).

[191] Compromis ¶42.

[192] *Jović*, ¶50; HENCKAERTS & DOSWALD-BECK, ¶2070.

[193] *Report of the ILC on the work of its forty-third session*, U.N. Doc. A/46/10 (1991), art.22(2)(f).

[194] "UNESCO condemns attack against World Heritage site in Kosovo," Kuwait News Agency, April 6, 2007.

[195] Hague Convention, art.4(2).

decision-makers, and are not the result of a military decision to obtain a military advantage.[196] Furthermore, imperative military necessity requires the cultural property to have first been converted into a military objective, and that no feasible alternative to obtain a similar military advantage existed.[197] Applicant bears the burden of establishing these preconditions,[198] which were not met. For example, military necessity does not permit the use of cultural property as a shield from attack.[199] The Mai-Tocao temple also never became a military objective for Andler, as Major-General Brewscha had already announced that ENI forces would not attack the site.[200] Thus, no military advantage would be gained from its destruction.[201] In fact, by fleeing to Mai-Tocao to escape impending capture by ENI forces,[202] Andler turned Mai-Tocao into a military objective for ENI forces by deliberately operating from within a cultural site in violation of the customary prohibition on using cultural property for purposes likely to expose it to destruction or

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[196] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 86 (2004).

[197] Second Protocol to the Hague Convention, 38 I.L.M. 769 (1999), art.6(a).

[198] *Temple of Preah Vihear (Cambodia v. Thai.)*, Merits Judgment, 1962 I.C.J. 6, 15-16 (stating that the burden of proof in respect of each claim lies on the party asserting it).

[199] *See* the military manual of Israel (*cited in* ICRC, Practice, §308); U.S. Department of Defense, *Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O: The Role of the Law of War*, 31 I.L.M. 624 (1992); U.S., *Manual for Military Commissions* (2007), §6(10) (criminalizing the use of protected property as a shield); O.S.C.E. Spillover Monitoring Mission to Skopje, Press Release, Aug. 7, 2001; Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 B.U. INT'L L.J. 39, 87-88 (2010).

[200] Compromis ¶39.

[201] AP I, art.52(2) (defining "military objective" as an object that makes an effective contribution to military action and whose destruction offers a definite military advantage).

[202] Compromis ¶39.

damage, contained in article 4(1) of the Hague Convention[203] and set forth in numerous military manuals of states,[204] including those not party to the Convention.[205] Therefore, since Andler made Mai-Tocao a military objective, she contributed to the situation of necessity and thus cannot rely upon the exception.[206]

B. The destruction of the Mai-Tocao building was an illegal act of reprisal

Reprisals are acts of self-help committed in response to a perceived violation of international law to compel the offending state to cease its actions.[207] Andler destroyed a building in Mai-Tocao to stop what she characterized as the ENI's "unlawful military operation."[208] Therefore, that destruction constitutes a reprisal against cultural property, prohibited in customary rules described in the Hague Convention and Additional Protocol I.[209] This prohibition is accepted throughout the international community,[210] including by states not

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[203] Hague Convention, art.4(1); ICRC, Database, rule 39.

[204] *See* the military manuals of Argentina (cited in ICRC, Practice, §301); Australia (§302); Canada (§§303-4); Croatia (§305); Germany (§§306-7); Israel (§308); Italy (§§309-10); Netherlands (§§312-13); Nigeria (§316); Russian Federation (§317); South Africa (§318); Spain (§319); Sweden (§320); Switzerland (§§321-22).

[205] *See* the military manuals of Kenya (*cited in id.*, §311); New Zealand (§314); United States (§324-29).

[206] ARSIWA, art.25; *Gabčíkovo-Nagymaros Project (Hung. v. Slovk.)*, 1997 I.C.J. 7, ¶52.

[207] BROWNLIE, 466; PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW, 351 (7th ed. 1997); SHAW, 1023.

[208] Compromis ¶40.

[209] Hague Convention, art.4(4); AP I, art.53(c); ICRC, Database, rule 147.

[210] *See* the practice of Argentina (*cited in* ICRC, Practice, §§960, 991); Australia (§§961-62); Azerbaijan (§992); Belgium (§963); Burkina Faso (§965); Cameroon (§966); Canada (§967); Colombia (§993); Congo (§968); Croatia (§969); France (§§970-71); Germany (§§972-74); Hungary (§975); Indonesia (§976); Italy (§§977, 994); Netherlands (§§979-80); New Zealand (§981); Spain (§§982, 995); Sweden (§983); Switzerland (§§984, 996).

party to the Hague Convention.[211] Therefore, Andler's act of reprisal violates the prohibition on reprisals against cultural property, which does not permit any military necessity exception.

[211] *See* the practice of Benin (*cited in id.*, §964); Kenya (§978); Togo (§985); United States (§§987-989).

PRAYER FOR RELIEF

The Federal Republic of Rantania respectfully requests this Honorable Court to adjudge and declare that:

1. The Andler regime and its representatives appear in the name of the Republic of Aprophe before this Court, and thus the Court has no jurisdiction over the Applicant's claims.

2. The use of force against Aprophe in the context of Operation Uniting for Democracy is not attributable to Rantania, and in any event, that use of force was not illegal.

3. The exercise of jurisdiction by Rantanian courts in the case of *Turbando, et al., v. The Republic of Aprophe* was consistent with International Law, and therefore Rantanian officials may execute the judgment in that case.

4. Aprophe violated International Law by destroying a building of the Temple of Mai-Tocao.

Respectfully submitted,

AGENTS FOR RANTANIA