



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

THE 2022 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

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**CASE CONCERNING THE SUTHAN REFERENDUM**

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**THE DEMOCRATIC REPUBLIC OF ANTARA**

APPLICANT

v.

**THE VELAN KINGDOM OF RAVARIA**

RESPONDENT

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**MEMORIAL *for the* APPLICANT**

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## STATEMENT OF JURISDICTION

The Democratic Republic of Antara [“**Antara**”] and the Velan Kingdom of Ravaria [“**Ravaria**”] have agreed to submit their dispute *Concerning the Suthan Referendum* to the International Court of Justice [“**ICJ**”] pursuant to Article 40(1) of the Statute of the ICJ and the Special Agreement signed in The Hague, The Netherlands on 13 September 2021. The Parties have jointly notified the Court on the same date.

In accordance with Article 36 of the Statute of the ICJ and Article 3 of the Special Agreement, the ICJ has jurisdiction to adjudicate all matters submitted to it and both the Parties undertake to consider the judgment as final and binding and execute it in good faith.

## **QUESTIONS PRESENTED**

### **ISSUE A**

WHETHER THE DOCUMENTS OBTAINED IN THE SEARCH OF THE VEHICLE DRIVEN BY MS. WALTERS AND THE RECORDING FROM THE CONCILIATION MEETING OF 30 MAY 2021 ARE ADMISSIBLE AS EVIDENCE IN THESE PROCEEDINGS?

### **ISSUE B**

WHETHER RAVARIA'S CAMPAIGN OF FINANCIAL CONTRIBUTIONS AND THE DISSEMINATION OF MISINFORMATION INTENDING TO INFLUENCE THE OUTCOME OF THE SUTHAN REFERENDUM WERE IN VIOLATION OF INTERNATIONAL LAW?

### **ISSUE C**

WHETHER ANTARA'S ORDER SUSPENDING PROF. LIAM HUNLAND'S PANO ACCOUNT WAS CONSISTENT WITH INTERNATIONAL LAW?

### **ISSUE D**

WHETHER ANTARA'S ACTIONS IN TAKING DOWN THE LUNAR BOTNET, AND THE EFFECTS OF THOSE ACTIONS ON COMPUTERS AND DEVICES IN RAVARIA, WERE CONSISTENT WITH INTERNATIONAL LAW?

## **STATEMENT OF FACTS**

### **BACKGROUND**

The Democratic Republic of Antara [“**Antara**”] and the Velan Kingdom of Ravaria [“**Ravaria**”] are developed nations located in the Benthamian Peninsula.

### **POLITICAL SITUATION OF THE PENINSULA**

In the 18<sup>th</sup> century, the Peninsula was colonized by the Zemin Empire [“**Zemin**”], which divided the Peninsula into Antara, Ravaria and Sutha. In 1949, after the Second World War, Zemin collapsed, resulting in the districts of Antara and Ravaria gaining independence. However, Sutha continued to remain under Zemin rule till 1962. Antara proposed that Sutha be incorporated into its own territory, whereas Ravaria endorsed an independent Sutha.

### **TREATY OF SINGAPORE**

Antara and Ravaria resolved their dispute on the vexing question of Sutha’s independence through the Treaty of Singapore [“**Treaty**”]. According to the Treaty, Sutha would become a province of Antara for at least 25 years and have a locally elected Legislative Council.

The Treaty also provided that in 1987 or anytime thereafter, the Suthan Legislation Council and National Antaran Parliament, by a two-thirds vote of both bodies, could authorize a referendum in Sutha to determine its independence. This resulted in an amendment in Article 119 of the Antaran Constitution which provided for the referendum and a two-year transition period before Suthan independence. The Treaty also provided that the Kuvil Shrine, located in Sutha, could be freely visited by Ravarian pilgrims, and Antara would not disturb peaceful religious activities.

### **SUTHAN INDEPENDENCE PARTY**

The Suthan Independence Party [“**SIP**”] was formed in 1963. Prior to 2009, SIP’s supporters represented between 10 and 20% of the electorate in local and national elections. However, in the last decade, SIP’s popularity increased rapidly.

## **PROFESSOR LIAM HUNLAND**

Professor Liam Hunland [**“Hunland”**] is a citizen of Ravaria and a devout Velan, who has been a permanent resident of Antara since he moved to the Suthan Province in the 1980s. Hunland has long been an advocate for Suthan autonomy and in 2009, he became affiliated with the SIP, and authored the manifesto of the party. Hunland is a professor of Velan Theology at the University of Sutha. He has also established Suthans Against Domination [**“SAD”**], a think tank for promoting Velan culture and Suthan autonomy.

## **SOCIAL MEDIA PLATFORM: PANO**

Owned by the Panopest Corporation, Pano is the most popular online social platform in the Peninsula with an average of 12 million daily users, including 4 million in Antara. By 2019, Hunland’s Pano page acquired over 9 million followers, the third largest contingent in the Peninsula.

## **COVID-19 RESTRICTIONS AND THEIR AFTERMATH**

With the onset of the COVID-19 pandemic in April 2020, Antara introduced Decree No. 20-32 introducing restrictions such as a mask mandate, prohibition of group gatherings, closure of national borders for non-essential purposes and denying Ravarian Velans access to the Kuvil Shrine. Claiming that the restrictions infringed the freedoms of religion and assembly, Hunland criticized the Antaran Government on Pano.

On 12 May 2020, the Internet Law and Security Assembly [**“ILSA”**] reported registration of 180,000 new Pano accounts lacking authenticity and amplifying misinformation concerning Antaran pandemic measures.

## **SUTHAN REFERENDUM PROPOSAL**

With Prime Minister Goldman’s party losing majority in the 2020 parliamentary elections, the new Prime Minister Lubinsky’s coalition, including SIP, promised a popular vote on Suthan independence. On 13 October 2020, the Suthan Legislative Council passed the proposal for Suthan referendum, which was subsequently affirmed by the national Parliament on 22 October 2020.

## **HUNLAND’S SUTHAN REFERENDUM MISINFORMATION**

Hunland attempted to spread misinformation about the Suthan referendum by publicly posting or sharing 800 messages on Pano, many of which were flagged as false by independent observers. He attempted to spread pro-independence misinformation by falsely alleging that the Kuvil Shrine would be converted into an amusement park, expressly indicating that there were no COVID-19 deaths in Sutha, and the government was trying to curb the freedoms of the people through COVID-19 restrictions. His posts indicated that the referendum would not be free and fair, endorsing violence to attain freedom. Subsequently, from 11 January 2021, Pano began flagging Hunland’s posts as false and deceptive, based on user generated reporting.

Hunland staged an outdoor protest gathering 7,500 people, in violation of the COVID-19 restrictions, to encourage people to vote in the referendum. While it is unclear how the violence broke out during the protest, 225 were injured and three people died. Hunland posted that Antaran violence was the fate which awaited people unless they chose independence.

## **SUSPENSION OF HUNLAND’S PANO ACCOUNT**

The Data Protection and Cybersecurity Agency [“**DPCA**”] petitioned before the Lower Antaran Federal Court, calling for the suspension of Hunland’s account under Section 5 of the Protect Antaran Cyberspace Act [“**PACA**”] for spreading misinformation. Hunland was allowed to submit his representations before the Court. On 15 February 2021, the Court passed a suspension order against Pano calling it upon to suspend Hunland’s account for one year [“**the Order**”], which was subsequently extended by six months.

## **THE LUNAR BOTNET TAKEDOWN**

The Lunar Botnet [“**Botnet**”] was involved in spreading misinformation about the Suthan referendum three months preceding the Suthan referendum. The DPCA obtained a court order for the takedown of the Botnet under Section 8 of the PACA, and subsequently discovered that the command-and-control server was located in Antara. Unable to obtain the location about the infected devices, the DPCA remotely hacked the botnet server which removed the web shells from the infected devices, which caused no loss of functionality to the devices. The botnet takedown affected 5,000 infected devices located in Ravaria.

### **SEARCH OF MS. WALTERS' VEHICLE**

On 25 April 2021, the Antaran police arrested Ms. Walters, the wife of a Ravarian diplomat, in an intoxicated state after she hit a pedestrian. On enquiry, she pointed at a briefcase which was seized and opened by the police and the intelligence agency. The briefcase contained records of funding given to SIP and SAD by the Ravarian Embassy for the cause of Suthan independence. There were other documents indicating the operation of the Botnet with Ravaria's approval, launch of propaganda campaigns, and the masking of viral content regarding the Suthan referendum to make it seem as though it had come from indigenous Suthans. Subsequently, the Ravarian Embassy was informed that the documents were photocopied for reasons of national security.

### **STATEMENTS OF THE CONCILIATION PROCEEDINGS**

The Foreign Minister of Zemin brokered an *ad hoc* conciliation meeting between the Attorneys-General of Antara and Ravaria, to discuss potential resolution of disputes. The official transcription of the conciliation proceedings captured an exchange pertaining to the documents found in the briefcase.

Thereafter, the States agreed to refer unresolved disputes to the ICJ. Antara indicated to rely on the photocopied documents from Ms. Walters' briefcase and transcription of the conciliation meeting, to which Ravaria has objected.

### **TREATIES IN FORCE BETWEEN PARTIES**

Antara and Ravaria are parties to the Charter of the United Nations [**“UN Charter”**], the Statute of the International Court of Justice, the International Covenant on Civil and Political Rights [**“ICCPR”**], the International Covenant on Economic, Social and Cultural Rights [**“ICESCR”**], the Council of Europe Convention on Cybercrime [**“Budapest Convention”**], the Vienna Convention on Diplomatic Relations [**“VCDR”**], and the Vienna Convention on the Law of Treaties [**“VCLT”**].

## **SUMMARY OF PLEADINGS**

### **ISSUE A**

The documents obtained in the search of the vehicle driven by Ms. Walters are admissible as they have not been obtained illicitly in violation of the VCDR. The seizure and opening of the briefcase were lawful, as the briefcase could not be differentiated from personal baggage and the diplomatic nature of correspondence could only be ascertained upon inspection. In the interest of national security, inviolability of the briefcase was compromised, justifying the inspection and photocopying of the documents. In any event, in light of the liberal regime of evidence admissibility, and inapplicability of the doctrine of the fruit of the poisonous tree, the documents must be admitted. Further, the recording from the conciliation meeting of 30 May 2021 pertains to surrounding circumstances of negotiations, and is accessible to both parties. Since the recording is not protected by either evidentiary privileges of settlement negotiations, or confidentiality, it is admissible.

### **ISSUE B**

Ravaria's campaign of influencing the outcome of the Suthan referendum was carried out through the covert financing of SIP and SAD, and dissemination of misinformation. The financial contributions distorted Antarans' free choice and politics in Antara, violating sovereignty. Through these contributions, Ravaria sought to with the Antara's political system and coerce the decision of Suthan autonomy, violating the principle of non-intervention. By undermining the genuineness of the referendum through foreign financing, Ravaria violated the right to self-determination of Suthans. Further, SAD's campaign of dissemination of misinformation is attributable to Ravaria, owing to financial links and planning directions. Ravaria's campaign, by feigning the true source of information, unlawfully interfered with Antara's inherently governmental function, thereby violating sovereignty. By coercively affecting voters' choice through the introduction of false information, Ravaria's campaign violated the principle of non-intervention. Ravaria violated its extraterritorial obligations under the ICCPR to respect human rights, as the campaign interfered with Antarans' rights to freedom of opinion, political participation and self-determination.

### **ISSUE C**

To prevent the spread of election misinformation, Antara suspended Hunland's Pano account under the PACA. Since Hunland is a denizen of Antara having close ties, Ravaria cannot exercise diplomatic protection over him. Moreover, as Hunland does not have genuine links with Ravaria, he is not an effective national. In any case, Antara has not violated its obligations under Articles 19 and 21 of the ICCPR, as the Order is justified under the three-part test. The Order, passed under the PACA, fulfils the test of legality. Further, the Order fulfilled legitimate aims of protecting national security, public order, public health and public safety, and the rights and freedoms of others from Hunland's misinformation. Moreover, the Order was necessary as there was a pressing social need to suspend Hunland's account, which was a proportional restriction. Further, the Order is consistent with Article 20 of the ICCPR, as it prohibits hate speech. The obligation to provide an effective remedy under Article 2(3)(a) of the ICCPR was fulfilled, as judicial remedies were provided, and availed by Hunland.

### **ISSUE D**

Antara conducted Operation Moonstroke to take down the Botnet, to secure the Suthan referendum from misinformation. Operation Moonstroke disabled web shells in infected devices in Ravaria, without causing harm or impairing the functionality of the devices. The Botnet's command-and-control server, located in Antara, was the origin of its malicious activities substantially affecting the Suthan referendum. Consequently, Operation Moonstroke was within Antara's jurisdiction. Moreover, Operation Moonstroke did not violate Ravaria's sovereignty as it did not usurp any exclusive governmental authority. Further, Operation Moonstroke did not violate the principle of non-intervention, as its actions did not attempt to influence Ravaria's internal affairs. Operation Moonstroke did not violate Ravarians' rights to privacy and property. Antara's actions were consistent with the Budapest Convention on transboundary access to data. Alternatively, any wrongfulness of Operation Moonstroke is precluded by the doctrine of necessity. In any case, Ravaria acted in corresponding illegality by facilitating the functioning of the Botnet. As Ravaria has approached this Court with unclean hands, it is precluded from bringing a claim.

## PLEADINGS

### **A. THE DOCUMENTS OBTAINED IN THE SEARCH OF THE VEHICLE DRIVEN BY MS. WALTERS AND THE RECORDING FROM THE CONCILIATION MEETING OF 30 MAY 2021 ARE ADMISSIBLE AS EVIDENCE IN THESE PROCEEDINGS**

This Court has adopted the principle of free admissibility,<sup>1</sup> with no formal rules restricting the admissibility of evidence.<sup>2</sup> In these proceedings, [I] the documents obtained in search of the vehicle driven by Ms. Walters, and [II] the recording from the conciliation meeting of 30 May 2021, are admissible as evidence.

#### **I. THE DOCUMENTS OBTAINED IN THE SEARCH OF THE VEHICLE DRIVEN BY MS. WALTERS ARE ADMISSIBLE**

The documents are admissible since they [1] have not been obtained illicitly in violation of the VCDR, and [2] are not liable to be excluded.

##### **1. The documents have not been obtained illicitly in violation of the VCDR**

The documents have not been illicitly obtained, since the acts of [a] seizure and opening of the briefcase, and [b] photocopying of the documents, are lawful.

##### ***a. The seizure and opening of the briefcase are lawful***

Admittedly, the means of transport of the mission<sup>3</sup> as well as the personal motor vehicle<sup>4</sup> of a diplomat's wife are inviolable.<sup>5</sup> These vehicles carry distinctive 'CD' or 'UN' license plates,

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<sup>1</sup> Statute of the International Court of Justice, Apr. 18, 1946, 33 U.N.T.S. 993, art. 48; Rules of Procedure of the International Court of Justice, 1946 I.C.J. Acts & Docs., art. 57.

<sup>2</sup> ANNA RIDDELL, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 152 (BIICL 2016) [“RIDDELL”].

<sup>3</sup> Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, art. 22(3) [“VCDR”].

<sup>4</sup> VCDR, art. 30(2).

<sup>5</sup> VCDR, art. 37.

which connote their diplomatic character and inviolability in the receiving State.<sup>6</sup> Ms. Walters was driving a rented vehicle,<sup>7</sup> which was neither the mission's means of transport, nor her personal property. Therefore, in the absence of any indications, the duty sergeant could not take cognizance of the inviolability of the vehicle or the driver.

Moreover, the brief arrest of a drunken diplomat is permissible, if necessary to save the lives of others.<sup>8</sup> Further, a diplomatic bag *must* contain external indicia for the identification of its inviolability,<sup>9</sup> and differentiation from ordinary mission property or personal baggage of a diplomatic courier which are not exempt from ordinary searches.<sup>10</sup>

Ms. Walters had committed vehicular homicide under heavy intoxication,<sup>11</sup> which compelled the duty sergeant to briefly arrest her in the interest of others' safety. Ms. Walters neither offered any explanation, nor protested against her arrest. Further, at the time of the seizure and first opening of the briefcase at the crime scene, the duty sergeant did not know that Ms. Walters was a

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<sup>6</sup> Ministry of External Affairs, Government of India, 'Protocol Handbook', [https://meaprotocol.nic.in/new\\_forms/Protocol%20Handbook%202018.pdf](https://meaprotocol.nic.in/new_forms/Protocol%20Handbook%202018.pdf) (2018); Permanent Mission of Switzerland, 'Driving of a "CD" Vehicle', <https://www.eda.admin.ch/missions/mission-onu-geneve/en/home/manual-regime-privileges-and-immunities/introduction/manual-vehicles/driving-cd-vehicle.html>; US Department of State, 'Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities', [https://www.state.gov/wp-content/uploads/2019/09/19-04499-DipConImm\\_v2\\_web.pdf](https://www.state.gov/wp-content/uploads/2019/09/19-04499-DipConImm_v2_web.pdf) (2019); Diplomatic Plates, 'World CD', <http://www.diplomaticplates.com/collectie/diplomatieke-nummerplaten/wereld-cd/>.

<sup>7</sup> *Compromis*, ¶35.

<sup>8</sup> United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Merits, 1980 I.C.J. 3, ¶86; Sanderijn Duquet, *Immunities of Diplomatic and Consular Personnel*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 414 (Tom Ruys ed. 2019).

<sup>9</sup> VCDR, art. 27(4); UNILC, 'Report on the Work of its forty-first session', A/CN.4/SER.A/1989/Add.1 (Part 2) (1989); EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 196 (OUP 2016) [“DENZA”].

<sup>10</sup> VCDR, art. 36(2); LORD GORE-BOOTH, SATOW'S GUIDE TO DIPLOMATIC PRACTICE 117 (1979) [“SATOW”]; Sana Sud, *The Diplomatic Duffle Disparity: A Third World Perspective*, in DIPLOMATIC LAW IN A NEW MILLENNIUM 250 (Paul Behrens ed. 2017); CHARLES CHATTERJEE, INTERNATIONAL LAW AND DIPLOMACY 205 (Routledge 2019) [“CHATTERJEE”].

<sup>11</sup> *Compromis*, ¶35.

diplomat's wife capable of possessing diplomatic correspondence, which could only be established after inspection. In any case, the mere presence of her diplomatic passport in the briefcase could not establish whether it was a diplomatic bag, or her personal bag which was not exempt from search. Therefore, the seizure and opening of the briefcase are lawful.

*b. The inspection and photocopying of documents are lawful*

Treaty obligations can be modified by subsequent practice of States.<sup>12</sup> Even VCDR obligations have, on previous occasions, been modified.<sup>13</sup> For example, the inviolability of the means of transport of diplomatic missions was modified to create an exception for towing of diplomatic cars endangering public safety.<sup>14</sup> Thus, subsequent practice can narrow the meanings of the rights and obligations under the VCDR.<sup>15</sup>

State practice suggests that inviolability of diplomatic bags can be compromised in defence of national security.<sup>16</sup> Nigeria, Sudan and Uganda opened and inspected diplomatic bags during their currency exchanges citing national security and interests.<sup>17</sup> Similarly, the U.S. troops searched Cuban diplomatic bags in Grenada in interest of national security and self-defence.<sup>18</sup> Pakistan also examined the diplomatic bags in the Iraqi Embassy under the apprehension of illegal trade of arms

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<sup>12</sup> IRINA BUGA, MODIFICATION OF TREATIES BY SUBSEQUENT PRACTICE 250-260 (OUP 2018) [“BUGA”].

<sup>13</sup> A v. B, Appeal Judgment, Case No. 4C.140/ 2003, ¶3.5 (CH 2004) (Switz.).

<sup>14</sup> BUGA, 356; UNILC, ‘Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, by Georg Nolte, Special Rapporteur’, A/CN.4/671, 15-16 (2014) [“Nolte”].

<sup>15</sup> Nolte, 15-16.

<sup>16</sup> UK Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to The Abuse of Diplomatic Privileges and Immunities, ¶48 (Review of the Vienna Convention); SATOW, 116; MICHAEL HARDY, MODERN DIPLOMATIC LAW 44 (1968); CHATTERJEE, 282; Rose v. The King, [1947] 3 D.L.R. 618 (Can.) [“Rose”]; Fayed v. Al Tajir, [1988] 1 Q.B. 712, 736 (U.K.).

<sup>17</sup> Adeoye Akinsanya, ‘Reflections on the Inviolability of Diplomatic Premises and Diplomatic Bags’ (1989) 42(3) PAKISTAN HORIZON 98, 107 [“Akinsanya”].

<sup>18</sup> Iain Cameron, ‘First Report of the Foreign Affairs Committee of the House of Commons’ (1985) 34(3) INT’L COMP. L. Q. 610, 612.

by Iraqi diplomats.<sup>19</sup> No differently, Australia pleaded before this Court that diplomatic correspondence may lose its inviolability if used for improper purposes.<sup>20</sup>

The documents revealed Ravaria's plans to divert Embassy funds fuelling secessionist causes, and run a disinformation-driven Lunar Botnet operation in Antara.<sup>21</sup> Since the documents evidenced Ravaria's actions directly jeopardizing Antara's sovereignty and national security, the inspection and photocopying of the documents are justified.

## **2. The documents must be admitted as evidence**

The documents must be admitted by this Court [a] in light of the liberal regime of evidence admissibility. Further, since [b] the doctrine of the fruit of the poisonous tree is not applicable, the Court must admit these documents.

### ***a. The documents must be admitted in light of the liberal regime of evidence admissibility***

This Court has relied on its own *jurisprudence constante* as normatively relevant in evidentiary and procedural issues.<sup>22</sup> In *Corfu Channel*,<sup>23</sup> this Court admitted illicitly obtained evidence; notwithstanding that it was obtained by the UK's minesweeping operation in violation of Albania's sovereignty.<sup>24</sup> Therefore, even if this Court considers the documents to be illicitly obtained, the liberal regime of evidence admissibility allows the documents to be admitted.

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<sup>19</sup> Akinsanya, 107; DENZA, 106.

<sup>20</sup> Counter-Memorial of Australia, Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), <https://www.icj-cij.org/public/files/case-related/156/18702.pdf> (2014).

<sup>21</sup> *Compromis*, ¶37.

<sup>22</sup> Markus Benzing, *Evidentiary Issues*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1237 (Andreas Zimmermann ed. 2012).

<sup>23</sup> *Corfu Channel* (U.K. v. Alb.), Judgement, 1949 I.C.J. 4.

<sup>24</sup> Hugh Thirlway, 'Dilemma or Chimera? Admissibility of Illegally Obtained Evidence in International Adjudication' (1984) 78(3) AM. J. INT'L L. 622, 639; Michael Reisman & Eric

***b. The Doctrine of the Fruit of the Poisonous Tree is not applicable***

This Court need not follow the restrictions placed on admissibility of evidence in municipal courts.<sup>25</sup> In any case, to constitute a general principle and source of law for this Court, a rule must be generally accepted by the principal municipal legal systems.<sup>26</sup> The doctrine of the *fruit of the poisonous tree* is applied only by selective common law jurisdictions in criminal proceedings.<sup>27</sup> In fact, domestic courts have previously admitted evidence which was argued to be obtained in violation of diplomatic inviolability.<sup>28</sup> Therefore, in the absence of uniform application, the doctrine of the fruit of the poisonous tree is inapplicable.

**II. THE RECORDING FROM THE CONCILIATION MEETING OF 30 MAY 2021 IS ADMISSIBLE**

The recording from the conciliation meeting is admissible, as it is not protected by the evidentiary privileges of [1] settlement negotiations, or [2] confidentiality.

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Freedman, ‘The Plaintiff’s Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication’ (1982) 76(4) AM. J. INT’L L. 737, 748.

<sup>25</sup> S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 557 (1965); Marco Roscini, ‘Digital Evidence as a Means of Proof before the International Court of Justice’ (2016) 21(3) J. CONFLICT & SECURITY L. 541, 553.

<sup>26</sup> UNILC, ‘Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur’, A/CN.4/741, ¶27 (2020) [“A/CN.4/741”]; The Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgement, 1970 I.C.J. 3, ¶50.

<sup>27</sup> William Worster, ‘The Effect of Leaked Information on the Rules of International Law’ (2013) 28(2) AM. U. INT’L L. REV. 443, 462.

<sup>28</sup> R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs, (No. 3) [2014] E.W.H.C. Civ. 708, ¶20 (U.K.); Rose, 632.

## 1. The recording is not protected by the evidentiary privilege of settlement negotiations

Although this Court has been reluctant in admitting evidence originating from negotiations,<sup>29</sup> such evidentiary privilege is not absolute.<sup>30</sup> In *Frontier Dispute*, while this Court did not admit the agreements reached by local administrative commanders,<sup>31</sup> the circumstances in which the agreements were concluded were admitted.<sup>32</sup> This Court examined the views and statements of the commanders in terms of delineating the frontier pool to be divided amongst different units.

Similarly, international tribunals have distinguished evidence comprising of general communication between parties during negotiations from those obtained through settlement negotiations.<sup>33</sup> In *Pepsico*, the Iran-US Claims Tribunal admitted a letter, claimed to be written in connection with settlement discussions, as normal business communication between parties.<sup>34</sup>

The conciliation meeting between the Attorneys-General resulted in an agreement settling disputes involving Ms. Walters' arrest for vehicular homicide.<sup>35</sup> The recording from the meeting of 30 May 2021, contains an exchange regarding the search pursuant to Ms. Walters' arrest, which was finally settled between the parties.<sup>36</sup> While the agreement may be protected by the evidentiary privilege, the communication between the Attorneys-General in the recording must be distinguished.

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<sup>29</sup> *Factory at Chorzów* (Ger. v. Pol.), Claim for Indemnity, 1928 P.C.I.J. (Ser. A) No. 17, 51 [“**Chorzów**”]; Territorial Jurisdiction of the International Commission of the River Oder (U.K. v. Pol.), Judgement, 1929 P.C.I.J. (Ser. A) No. 23, 42 [“**River Oder**”].

<sup>30</sup> *Frontier Dispute* (Burk. Faso/Mali), Merits, 1986 I.C.J. 554, ¶149 [“**Frontier Dispute**”]; *South West Africa (Lib. v. S. Afr.)*, Preliminary Objections, 1962 I.C.J. 319, 584 (Diss. Op. Judge Van Wyk); RIDDELL, 155.

<sup>31</sup> *Frontier Dispute*, ¶147.

<sup>32</sup> *Id.* ¶149.

<sup>33</sup> CHITTHARANJAN AMERASINGHE, EVIDENCE IN INTERNATIONAL LITIGATION 176 (Brill 2005).

<sup>34</sup> *Pepsico, Inc. v. Iran and Zamzam Bottling Companies*, (1986) 13 Iran-US CTR 28.

<sup>35</sup> *Compromis*, ¶¶42-43.

<sup>36</sup> *Id.* ¶44.

Therefore, as the recording pertains to surrounding circumstances of negotiations, the evidentiary privilege does not extend to the conversation captured.

## **2. The recording is not protected by the evidentiary privilege of confidentiality**

Unlike domestic law, international law does not recognize any general rule providing for the evidentiary privilege of confidentiality.<sup>37</sup> Although the PCIJ refused to admit confidential documents in the *Damube* and *River Oder* cases,<sup>38</sup> the refusal was not based on their confidential character, but on the basis that such character rendered the documents inaccessible to other parties in the proceedings.<sup>39</sup>

Further, the doctrines of public interest immunity and Crown privilege barring admissibility and securing confidentiality under domestic laws,<sup>40</sup> do not apply under international law.<sup>41</sup> Permitting such privileges would allow States to avoid proper scrutiny of their conduct in light of obligations under international law.<sup>42</sup> Moreover, tribunals have ordered production of confidential evidence, despite States citing national security to claim the evidentiary privilege.<sup>43</sup>

Since there exists no bar on admissibility of confidential evidence under international law, and the recording is available to both the parties, the recording is admissible. Although the conversation captured was between the Attorneys-General,<sup>44</sup> Ravaria cannot claim immunity affording

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<sup>37</sup> Robert Pietrowski, 'Evidence in International Arbitration' (2006) 22(3) ARB. INT'L 373, 405.

<sup>38</sup> Jurisdiction of the European Commission of the Danube, Advisory Opinion, 1927 P.C.I.J. (Ser. B) No. 14, 32; *River Oder*, 41-42.

<sup>39</sup> DURWARD SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 379 (1975).

<sup>40</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Procedural Order No. 2, ICSID Case No. ARB/05/22, 8, 9 (2006).

<sup>41</sup> *Id.*

<sup>42</sup> Audley Sheppard, 'The Approach of Investment Treaty Tribunals to Evidentiary Privileges' (2016) 31(3) ICSID REV. 670, 684.

<sup>43</sup> *Prosecutor v. Tihomir Blaskic*, IT-95-14, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, Trial Chamber, I.C.T.Y., ¶131 (1997).

<sup>44</sup> *Compromis*, ¶¶42-44.

evidentiary privilege before this Court. Therefore, the recording is not protected by the evidentiary privilege of confidentiality.

## **B. RAVARIA’S CAMPAIGN OF FINANCIAL CONTRIBUTIONS AND THE DISSEMINATION OF MISINFORMATION INTENDING TO INFLUENCE THE OUTCOME OF THE SUTHAN REFERENDUM WERE IN VIOLATION OF INTERNATIONAL LAW**

Attempts at covertly influencing truly democratic elections have no claim to legitimacy under international law.<sup>45</sup> Such electoral interference, through political funding or information campaigns, undermines democracy.<sup>46</sup> Ravaria’s campaign of [I] financial contributions, and [II] dissemination of misinformation, were in violation of international law.

### **I. RAVARIA’S FINANCIAL CONTRIBUTIONS WERE IN VIOLATION OF INTERNATIONAL LAW**

Ravaria’s financial contributions to SIP and SAD violated [1] Antara’s sovereignty, [2] the principle of non-intervention, and [3] the right of self-determination.

#### **1. Ravaria’s financial contributions violated Antara’s sovereignty**

Sovereignty encompasses freely choosing political systems,<sup>47</sup> and prohibits foreign participation in elections.<sup>48</sup> Foreign States can distort the free choice of the polity through covert payments, and consequently, the politics of other States.<sup>49</sup>

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<sup>45</sup> Loch Johnson, ‘On Drawing a Bright Line for Covert Operations’ (1992) 86(2) AM. J. INT’L L. 284, 289.

<sup>46</sup> Dov Levin, *Should we Worry about Partisan Electoral Interventions?*, in DEFENDING DEMOCRACIES: COMBATING FOREIGN ELECTION INTERFERENCE IN A DIGITAL AGE 22, 29-32 (Jens Ohlin & Duncan Hollis eds. 2021).

<sup>47</sup> UNGA, ‘Enhancing the effectiveness of the principle of periodic and genuine elections’, A/RES/45/150 (1990).

<sup>48</sup> Zephyr Teachout, ‘Extraterritorial Electioneering and the Globalization of American Elections’ (2009) 27 BERKELEY J. INT’L L. 162, 187.

<sup>49</sup> Lori Damrosch, ‘Politics Across Borders: Non-intervention and Nonforcible Influence over Domestic Affairs’ (1989) 83(1) AM. J. INT’L L. 1, 44 [“**Damrosch**”].

Ravaria's channelling of funds through covert means,<sup>50</sup> undermined the free choice of Antarans, and distorted politics in Antara. Therefore, Ravaria's financial contributions violated Antara's sovereignty.

## **2. Ravaria's financial contributions violated the principle of non-intervention**

The principle of non-intervention prohibits the exercise of indirect political interference<sup>51</sup> through covert and coercive foreign financing.<sup>52</sup> Several States prohibit such funding to avoid influence in their domestic polity.<sup>53</sup>

SIP's rise to prominence<sup>54</sup> and increase in the national vote share<sup>55</sup> coincides with Ravaria's financial contributions dating back five years.<sup>56</sup> These covert contributions disguised under the garb of promoting Velan ideals, were to secure Suthan independence.<sup>57</sup> Therefore, Ravaria interfered with the Antara's political system, and violated the principle of non-intervention.

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<sup>50</sup> *Compromis*, ¶36.

<sup>51</sup> Philip Kunig, *Prohibition of Intervention*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (OUP 2008).

<sup>52</sup> U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Final Report, S. Rep. No. 755, 94th Cong., 2nd Sess., Bk.1; Brad Roth, 'The Enduring Significance of State Sovereignty' (2004) 56 FLA. L. REV. 1017, 1036.

<sup>53</sup> OSCE ODIHR, Guidelines on Political Party Regulation, ¶172 (2011); Edoardo Bressanelli et al., 'Institutions and Foreign Interferences', [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655290/IPOL\\_STU\(2020\)655290\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655290/IPOL_STU(2020)655290_EN.pdf) (2020); European Parliament, Foreign Electoral Interference and Disinformation in National and European Democratic Processes, Resolution of 10 October 2019.

<sup>54</sup> *Compromis*, ¶14.

<sup>55</sup> *Id.* ¶18.

<sup>56</sup> *Id.* ¶36.

<sup>57</sup> *Id.*

### 3. Ravaria's financial contributions violated the right of self-determination

The right of self-determination allows peoples to freely determine their political status without any external interference,<sup>58</sup> encompassing a genuine expression of their will.<sup>59</sup> Therefore, the integrity of elections is essential for self-determination.<sup>60</sup> Foreign financing of political parties undermines the electoral genuineness,<sup>61</sup> and violates the right of self-determination. The Suthan referendum was a means to exercise the right of self-determination for Suthan peoples. Therefore, Ravaria's financial contributions violated their right of self-determination.

Moreover, notwithstanding the absence of a valid domestic law to the contrary, funding foreign political parties may undermine free political choice.<sup>62</sup> Although Ravaria's funding scheme did not violate Antara's domestic campaign finance laws,<sup>63</sup> Ravaria's campaign violated international law.

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<sup>58</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 1(1) [“**ICCPR**”]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 1.; UNGA, ‘Respect for the principles of national sovereignty and non-interference in the internal affairs of States in electoral processes’, A/RES/50/172, ¶1 (1996) [“**A/RES/50/172**”].

<sup>59</sup> Universal Declaration of Human Rights, Dec. 10, 1948, 217A (III), art. 21(3); Nicholas Tsagourias, *Electoral Cyber Interference, Self-Determination and the Principles of Non-intervention in Cyber Space*, in GOVERNING CYBERSPACE: BEHAVIOR, POWER, AND DIPLOMACY 45 (Dennis Broeders et al. eds. 2020).

<sup>60</sup> OHLIN, 90.

<sup>61</sup> UNGA, ‘Respect for the principles of national sovereignty and non-interference in the internal affairs of States in electoral processes as an important element for the promotion and protection of human rights’, A/RES/56/154, ¶6 (2002); A/RES/50/172, ¶5.

<sup>62</sup> Damrosch, 49.

<sup>63</sup> *Compromis*, ¶39.

## II. RAVARIA’S DISSEMINATION OF MISINFORMATION WAS IN VIOLATION OF INTERNATIONAL LAW

Disinformation is false or manipulated information knowingly shared with the intention to cause harm. Contrarily, misinformation is unintentional dissemination of false information.<sup>64</sup> Since in the present case, the misleading information was shared knowingly with the intent to influence the Antaran voters through an orchestrated social media campaign, it constitutes a disinformation campaign.

The campaign carried out by SAD was [1] attributable to Ravaria, and [2] in breach of obligations under international law.

### 1. The campaign was attributable to Ravaria

Actions of non-State actors are attributed to States if the latter exercise *effective control* thereon.<sup>65</sup> However, technical difficulties in proving the identity of cyber operations render this test unsuitable for determining attributability.<sup>66</sup> Previously, cyber operations have been attributed to States through indicia such as the motivated interest of the State, economic and political proximity, communication of planning directions between the executors and the State.<sup>67</sup>

The DDoS attack by Iranian nationals against the U.S. was attributed to Iran due to the executor’s nationality and monetary links with the Islamic Revolutionary Guards.<sup>68</sup> Similarly, the DDoS

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<sup>64</sup> UNHRC, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan’, A/HRC/47/25, ¶84 (2021) [“A/HRC/47/25”].

<sup>65</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. 4, ¶86 [“Nicaragua”].

<sup>66</sup> Scott Shackelford, ‘State Responsibility for Cyber Attacks: Competing Standards for a growing problem’ (2010) CONFERENCE ON CYBER CONFLICT PROCEEDINGS 197, 203.

<sup>67</sup> Peter Stockburger, ‘Control and Capabilities Test: Toward a New *Lex Specialis* Governing State Responsibility for Third Party Cyber Incidents’ (2017) 9TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT.

<sup>68</sup> U.S. v. Ahmad Fathi, Case No. 16 Cr. 48 (S.D.N.Y. 2016) (U.S.); U.S. Attorney’s Office Southern District of New York, ‘Sealed Indictment’, <https://www.justice.gov/usao-sdny/file/835061/download> (2016).

attacks against Estonia were attributed to Russia since they originated from Russian IP addresses, though computers from other countries were also affected.<sup>69</sup> Not differently, interference in the U.S. elections in 2016 was attributed to Russia owing to the disclosed information being relevant to Russian interests and Russian officials allegedly directing the hackers.<sup>70</sup>

The documents obtained in the briefcase evidenced the channelling of €25 million from the Ravarian Embassy to SAD.<sup>71</sup> Ravarian government members specifically approved these funds and the contents of the posts.<sup>72</sup> Further, SAD operated the Botnet with patronage of the Ravarian External Affairs Ministry.<sup>73</sup> Therefore, SAD's campaign was attributable to Ravaria.

## **2. Ravaria's campaign was in breach of obligations under international law**

Ravaria's campaign of dissemination of disinformation violated **[a]** Antara's sovereignty, **[b]** the principle of non-intervention, and **[c]** Ravaria's obligations under the ICCPR.

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<sup>69</sup> Marco Roscini, *Evidentiary Issues in International Disputes Related to State Responsibility for Cyber Operations*, in CYBER WAR 216 (Jens Ohlin et al. eds. 2015).

<sup>70</sup> Director of National Intelligence, 'Joint Statement from the Department of Homeland Security and Office of the Director of National Intelligence on Election Security', <https://www.dni.gov/index.php/newsroom/press-releases/215-press-releases-2016/1423-joint-dhs-odni-election-security-statement> (2016).

<sup>71</sup> *Compromis*, ¶37(a).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* ¶37(c).

*a. Ravaria's campaign violated Antara's sovereignty*

State sovereignty applies in cyberspace.<sup>74</sup> If a cyber operation interferes with an *inherently governmental function*,<sup>75</sup> like holding of elections,<sup>76</sup> it violates sovereignty.<sup>77</sup> Further, social media campaigns, which hide the true source of disinformation, constitute unlawful interference with a State's sovereignty.<sup>78</sup>

The ILSA reported an unusual increase in registration of new Pano accounts which were generating disinformation and criticizing Antara.<sup>79</sup> Pano released a statement indicating the covert nature of the information campaign.<sup>80</sup> Moreover, the documents obtained in the briefcase uncovered Ravaria's plans to feign the true source of information, and implicate it as Suthan or Antaran sources.<sup>81</sup> Through such a campaign, Ravaria interfered with the Suthan referendum, and therefore, violated Antara's sovereignty.

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<sup>74</sup> UNGA, 'Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security', A/70/174, ¶¶27, 28(b) (2015) [**GGE 2015**].

<sup>75</sup> TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 21-22 (Michael Schmitt ed. CUP 2017) [**TALLINN**].

<sup>76</sup> Michael Schmitt, 'Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law' (2018) 19(1) CHIC. J. INT'L L. 30, 45 [**Schmitt 2018**].

<sup>77</sup> TALLINN, 17.

<sup>78</sup> Michael Schmitt, 'Foreign Cyber Interference in Elections' (2021) 97 INT'L L. STUD. 739, 746-747 [**Schmitt 2021**].

<sup>79</sup> *Compromis*, ¶17.

<sup>80</sup> *Id.* ¶24.

<sup>81</sup> *Id.* ¶37(b).

*b. Ravaria's campaign violated the principle of non-intervention*

The principle of non-intervention applies to cyberspace and information technologies.<sup>82</sup> Indirectly affecting election processes undermines State's authority over its *domaine réservé*.<sup>83</sup> Disinformation campaigns influence electorate's attitudes indirectly, and thus influence the State.<sup>84</sup>

In elections, coercion<sup>85</sup> manifests through election of a weak candidate or the weakening of a successful candidate's political base.<sup>86</sup> Introducing false facts coercively affects voters' expression of choice,<sup>87</sup> since it affects freedom to act,<sup>88</sup> and modifies the natural course of events.<sup>89</sup> Further, cyber campaigns for a specific aim, like the election of a particular candidate, are coercive.<sup>90</sup>

Ravaria's campaign consisted of false Pano posts,<sup>91</sup> some of which emerged from inauthentic accounts.<sup>92</sup> The documents from the briefcase indicated this campaign's specific aim of

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<sup>82</sup> GGE 2015, ¶28(b).

<sup>83</sup> TALLINN, 315; UNGA, 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States', A/RES/36/103, ¶II(e)(f) (1981); Schmitt 2018, 49.

<sup>84</sup> Schmitt 2021, 745-748.

<sup>85</sup> Maziar Jamnejad & Michael Wood, 'The Principle of Non-Intervention' (2009) 22 LEIDEN J. INTL L. 345, 381.

<sup>86</sup> Schmitt 2018, 51.

<sup>87</sup> Sean Watts, *Low-Intensity Cyber Operations and the Principle of Non-Intervention*, in CYBER WAR 261 (Jens Ohlin et al. eds. 2015); Björnstjern Baade, 'Fake News and International Law' (2019) 29 EUR. J. INT'L L. 1357, 1364 ["Baade"].

<sup>88</sup> Bonnie Brennen, 'Making Sense of Lies, Deceptive Propaganda, and Fake News' (2017) 32(3) J. MEDIA ETHICS 179, 180; NIKLAS LUHMANN, THE REALITY OF MASS MEDIA 156 (1996).

<sup>89</sup> Annachiara Rotondo & Pierluigi Salvati, 'Fake News, (Dis)Information, and the Principle of Non-intervention', (2019) CYBER DEFENSE REVIEW 209, 211-212; Steven Wheatley, 'Foreign Interference in Elections under the Non-Intervention principle' (2020) 31 DUKE J. COMP. & INT'L L. 161, 195.

<sup>90</sup> Schmitt 2021, 750.

<sup>91</sup> *Compromis*, ¶22.

<sup>92</sup> *Id.* ¶24.

influencing voters towards independence.<sup>93</sup> Therefore, Ravaria’s campaign was coercive, and violated the principle of non-intervention.

*c. Ravaria’s campaign violated its obligations under the ICCPR*

Ravaria’s campaign violated its obligations under the ICCPR, since [i] Ravaria owed extraterritorial human rights obligations to Antaran peoples, and [ii] violated their human rights under the ICCPR.

i. Ravaria owed extraterritorial human rights obligations to Antaran peoples

A State owes human rights obligations to all individuals within its jurisdiction, even if not situated within its physical territory.<sup>94</sup>

(a) Ravaria owed extraterritorial obligation to respect human rights

The negative obligation to respect human rights<sup>95</sup> is extraterritorial in character without any qualification of *effective control* over territory or individuals.<sup>96</sup> Thus, States must refrain from acts violating individuals’ rights in another State.<sup>97</sup> Therefore, Ravaria had the negative obligation to respect human rights guaranteed under the ICCPR.

(b) Ravaria exercised jurisdiction over the rights of the Antaran peoples

Admittedly, human rights obligations are owed extraterritorially if States exercise *effective control* over a foreign territory or individuals.<sup>98</sup> This test is unsuitable in cyberspace as tangible control

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<sup>93</sup> *Compromis*, ¶37(c).

<sup>94</sup> ICCPR, art. 2(1); *Armed Activities on the Territory of the Congo (D.R.C. v. Uganda)*, Judgement, 2005 I.C.J. 168, ¶216.

<sup>95</sup> MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 211 (OUP 2011) [“MILANOVIC”].

<sup>96</sup> *Id.*

<sup>97</sup> MILANOVIC, 18.

<sup>98</sup> TALLINN, 312.

cannot be envisaged.<sup>99</sup> Consequently, States do exercise jurisdiction by interfering with rights of foreigners through interception of digital infrastructure.<sup>100</sup>

Ravaria's actions of designing pro-independence propaganda, deciding procedure to automatically register Pano accounts,<sup>101</sup> yielded requisite control over the digital communications. Therefore, Ravaria exercised jurisdiction over Antarans' rights.

ii. Ravaria violated human rights of Antaran peoples

Disinformation destroys peoples' trust in democratic institutions.<sup>102</sup> Ravaria orchestrated a disinformation campaign violating Antarans' human rights, including the rights to **[a]** freedom of opinion, **[b]** political participation, and **[c]** self-determination.

**(a) Ravaria violated right to freedom of opinion**

Freedom of opinion is absolute; and thus, manipulation of people's opinions constitutes a violation.<sup>103</sup> This right deserves heightened protection during referenda.<sup>104</sup> A manipulative

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<sup>99</sup> Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29(2) EUR. J. INT'L L. 581, 589.

<sup>100</sup> Ido Kilovaty, *Cybersecurity Abroad: Election Interference and the Extraterritoriality of Human Rights Treaty Obligations*, in DEFENDING DEMOCRACIES: COMBATING FOREIGN ELECTION INTERFERENCE IN A DIGITAL AGE (Claire Finkelstein et al. eds. 2021).

<sup>101</sup> *Compromis*, ¶37.

<sup>102</sup> A/HRC/47/25, ¶84.

<sup>103</sup> ICCPR, art. 19(1); UNHRC, 'CCPR General Comment No. 34: Article 19 (Freedom of Opinion and Expression)', CCPR/C/GC/34, ¶9 (2011) ["GC 34"].

<sup>104</sup> Harold Hongju Koh et al., 'The Oxford Statement on International Law Protections Against Foreign Electoral Interference Through Digital Means', <https://gcils.org/wp-content/uploads/2020/10/The-Oxford-Statement-on-International-Law-Protections-against-Foreign-Electoral-Interference-through-Digital-Means.pdf> (2020).

interference with this right takes place through disinformation,<sup>105</sup> incorrect labelling,<sup>106</sup> selective display of information,<sup>107</sup> and targeted repetition of information.<sup>108</sup>

Ravaria disseminated disinformation about Antara's policies for Suthans, such as the imposition of martial law,<sup>109</sup> through fake accounts masked as authentic,<sup>110</sup> flooding Pano with pro-independence messages.<sup>111</sup> Therefore, the Ravaria's campaign manipulatively interfered with and violated the freedom of opinion of Antarans.

**(b) Ravaria violated the right to political participation**

The right to participate in genuine elections<sup>112</sup> entails to be free from undue or manipulative interferences.<sup>113</sup> Political microtargeting curtails ideological freedom by exploiting thought patterns, incentivizing a particular action.<sup>114</sup> Further, disinformation campaigns taint the genuineness of peoples' will and violate their right to participate in elections.<sup>115</sup>

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<sup>105</sup> Baade, 1363.

<sup>106</sup> UN Secretary General, 'The Freedom of Thought: Note by the Secretary-General', A/76/380, ¶36 (2021) ["A/76/380"].

<sup>107</sup> *Id.* ¶67.

<sup>108</sup> UN Secretary General, 'Cultural Rights: Note by the Secretary-General', A/39/286, ¶28, 32 (2014) ["A/39/286"]; UN Secretary General, 'Promotion and protection of the right to freedom of opinion and expression', A/73/348, ¶12 (2018).

<sup>109</sup> *Compromis*, ¶17.

<sup>110</sup> *Id.* ¶37.

<sup>111</sup> *Id.*

<sup>112</sup> ICCPR, art. 25(b).

<sup>113</sup> UNHRC, 'General Comment No. 25: Article 19 (The right to participate in public affairs, voting rights and the right to equal access to public services)', CCPR/C/21/Rev.1/Add.7, ¶19 (1996) ["GC 25"].

<sup>114</sup> A/76/380, ¶¶73, 75; A/39/286, ¶30; Sandra Matz et al., 'Psychological targeting as an effective approach to digital mass persuasion' (2017) 114(48) PROC. NAT'L ACAD. SCI. 12714, 12719.

<sup>115</sup> HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 83 (OUP 2019); Carme Colomina et al., 'The Impact of Disinformation on Democratic Processes and Human Rights in the World',

180,000 new Pano accounts were created<sup>116</sup> for targeting Antarans in favour of independence. Ravaria overwhelmingly supported SAD with around €25 million, thrice more than that of other such organizations.<sup>117</sup> In lieu of pro-independence propaganda, the space for making a free choice during election was erased. Therefore, Ravaria violated the right to political participation.

**(c) Ravaria violated the right of self-determination**

Disinformation and identity falsification taint the genuineness of the peoples' expression of their will, thereby violating their right to self-determination.<sup>118</sup>

The decision of choosing independence manifests the right to self-government and self-determination of Antaran peoples. Therefore, by interfering in the referendum through disinformation, Ravaria violated the right of self-determination.

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[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653635/EXPO\\_STU\(2021\)653635\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653635/EXPO_STU(2021)653635_EN.pdf) (2019).

<sup>116</sup> *Compromis*, ¶17.

<sup>117</sup> *Id.* ¶¶22, 37.

<sup>118</sup> OHLIN, 101-102; Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, in MODERN LAW OF SELF-DETERMINATION 101 (Christian Tomuschat ed. 1992).

## **C. ANTARA’S ORDER SUSPENDING PROF. LIAM HUNLAND’S PANO ACCOUNT WAS CONSISTENT WITH INTERNATIONAL LAW**

The freedoms of expression and assembly are not absolute rights, and are subject to restrictions under the ICCPR.<sup>119</sup> Ravaria lacks standing before this Court as [I] it cannot exercise diplomatic protection over Hunland. In any event, [III] the Order suspending Hunland’s account was consistent with the ICCPR.

### **I. RAVARIA CANNOT EXERCISE DIPLOMATIC PROTECTION OVER HUNLAND**

Ravaria cannot exercise diplomatic protection as [1] the test of effective nationality is appropriate to ascertain Hunland’s nationality, and [2] Hunland has tenuous relations with Ravaria.

#### **1. The test of Effective Nationality is appropriate to ascertain Hunland’s nationality**

A State must establish effective nationality or a genuine link with its national to exercise diplomatic protection.<sup>120</sup> The test may be used in instances where there are tenuous relations or no genuine links between a natural person and their State of nationality.<sup>121</sup> This interpretation has been recognized in State practice,<sup>122</sup> especially for denizens, who are long-term alien-citizens holding permanent residencies in other States.<sup>123</sup> Even in instances of singular nationality, the test of effective nationality maybe employed.<sup>124</sup> Therefore, this Court may apply the test of effective nationality, as Hunland has no genuine link with Ravaria, and is a denizen of Antara.

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<sup>119</sup> ICCPR, arts. 19(3), 21.

<sup>120</sup> *Nottebohm (Liech. v. Guat.)*, Merits, 1955 I.C.J. 3, 24 [“**Nottebohm**”].

<sup>121</sup> UNILC, ‘First Report on Diplomatic Protection by John R. Dugard, Special Rapporteur’, A/CN.4/506, ¶¶146-154 (2000).

<sup>122</sup> *Iran v. USA*, (1984) 5 Iran-US CTR 251, ¶¶47-49.

<sup>123</sup> Maximilian K., ‘Subject, Citizen, Nationality and Permanent Allegiance’ (1946) 56(1) YALE L. J. 58, 68.

<sup>124</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (2002); European Commission, *Investor Citizenship and Residence Schemes in the European Union*, 5 (2019); European Commission, ‘Investor Citizenship Schemes: European Commission opens

## 2. Hunland has tenuous relations with Ravaria

Mere citizenship would not amount to effective nationality.<sup>125</sup> In *Nottebohm*<sup>126</sup> and the *Mergé Case*,<sup>127</sup> it was held that without habitual residence, business operations, *etc.*, a State cannot exercise diplomatic protection, even over its national.

Hunland has been residing in Antara since the 1980s,<sup>128</sup> and is a tenured professor at the University of Sutha.<sup>129</sup> Moreover, he has been politically active as a member of SIP,<sup>130</sup> and founder of SAD, which promotes Suthan autonomy and Velan culture in Antara.<sup>131</sup> His residential, professional, and political interests have existed in Antara for almost 40 years. With such interest existing in Antara, and no evidence of any genuine links between Ravaria and Hunland, effective nationality cannot be established by Ravaria.

In any case, a State of tenuous nationality cannot confer diplomatic protection over its national *vis-à-vis* another State with which such national enjoys close ties.<sup>132</sup> Similarly, Hunland may not, on a blanket basis, be denied diplomatic protection. However, he may be denied protection only *vis-à-vis* Antara, on account of his tenuous relations with Ravaria, and close ties with Antara. Therefore, Ravaria cannot exercise diplomatic protection over Hunland.

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infringements against Cyprus and Malta for “selling” EU citizenship’, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1925](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925) (2020).

<sup>125</sup> *Mergé Case*, Decision No. 55, UNIRAA 247 (1955) [“**Mergé**”].

<sup>126</sup> *Nottebohm*, 172.

<sup>127</sup> *Mergé*, 248.

<sup>128</sup> *Compromis*, ¶13.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* ¶14.

<sup>131</sup> *Id.* ¶16.

<sup>132</sup> *Nottebohm*, 26.

## II. THE ORDER IS CONSISTENT WITH THE ICCPR

Actions of parties or facts occurring after the submission of the dispute to the Court are inadmissible.<sup>133</sup> The Order suspending Hunland’s account for one year was subsequently, in October 2021,<sup>134</sup> extended by six months, for the investigation into Hunland’s involvement in election interference and the Botnet. The extension order is inadmissible as it was issued beyond 13 September 2021, the critical date of these proceedings.

The Order, interfering with Hunland’s rights under Articles 19 and 21 of the ICCPR, is justified, under [1] the three part test, and [2] Article 20 of the ICCPR. Further, [3] the Order is consistent with Articles 19 and 21 in conjunction with Article 2 of the ICCPR.

### 1. The Order is justified under the three part test

The Order is justified under the three part test as it [1] satisfies the test of legality, [2] pursues legitimate aims, and [3] is necessary in a democratic society.

#### *a. The Order satisfies the test of legality*

The test of legality requires the restriction on freedoms to be sufficiently precise so as to allow citizens to foresee when their actions will constitute an offence and regulate their conduct.<sup>135</sup> The PACA clearly defines what constitutes “*election misinformation*”<sup>136</sup> and a “*content takedown and user suspension order*”,<sup>137</sup> taking into account *national security, public order or public safety* of the nation,<sup>138</sup> similar to the safeguards prescribed under laws of other States.<sup>139</sup>

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<sup>133</sup> Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Preliminary Objections, 1998 I.C.J. 3, ¶¶42-44.

<sup>134</sup> *Clarifications*, ¶3.

<sup>135</sup> GC 34, ¶25; *Kruslin v. France*, App. No. 11801/85, ¶30, ECtHR (1990).

<sup>136</sup> *Compromis*, Annex 1, s.5(1)(b).

<sup>137</sup> *Id.* s.5(1)(d).

<sup>138</sup> *Id.* s.5.

<sup>139</sup> Network Enforcement Act, 2017 (Ger.); Law No. 2018-1202 (Fr.).

In any case, unless a legislation provides for unfettered discretion, absolute certainty is not required, and it can be necessarily vague to accommodate the pace of changing times.<sup>140</sup> However, no such discretion is provided under the PACA, as there is a detailed judicial procedure prescribed to be followed before ordering for suspension. Thus, the Order satisfies the test of legality.

***b. The Order pursues legitimate aims***

Articles 19 and 21 of ICCPR expressly provide for legitimate aims in pursuance of which freedoms may be limited.<sup>141</sup> The Order restricting Hunland’s rights pursued the legitimate aims of [i] national security, [ii] public order, [iii] public health and public safety, and [iv] protection of rights and freedoms of others.<sup>142</sup>

***i. The Order is justified for the protection of national security***

A threat of use of force<sup>143</sup> or incitement of violence by extremist measures, which threaten the territorial integrity or political independence of a State, constitute a legitimate ground for interference with the right to the freedom of expression.<sup>144</sup> The European Court of Human Rights, in *Okçuoğlu*, noted that the restrictions on sensitive statements made on the Kurdish region, with high degree of circulation, were in the interests of Turkish national security.<sup>145</sup>

Hunland’s posts stated that it was the “*time to fight back*”, “*take the situation into our own hands*” and offer “*a fight*”,<sup>146</sup> calling for violence and separatism based on the Velan religion and sensitive

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<sup>140</sup> Müller v. Switzerland, App. No. 10737/84, ¶29, ECtHR (1988).

<sup>141</sup> SARAH JOSEPH AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 34 (OUP 2013).

<sup>142</sup> ICCPR, arts. 19(3)(a), 21.

<sup>143</sup> UNHRC, ‘Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Abid Hussain’, E/CN.4/1999/64 (1999).

<sup>144</sup> UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism’, A/HRC/13/37, ¶16 (2009); Uzun v. Germany, App. No. 35623/05, ¶77, ECtHR (2010).

<sup>145</sup> Okçuoğlu v. Turkey, App. No. 24246/94, ¶56, ECtHR (1999).

<sup>146</sup> *Compromis*, ¶23(c).

Suthan independence. His Pano following of 9 million people<sup>147</sup> provided wide circulation of such posts. Therefore, considering his following and wide circulation of his posts, the Order was justified to protect Antaran national security.

ii. The Order is justified for the protection of public order

Restraint on the freedom of expression can be justified for the prevention of disorder.<sup>148</sup> Maintenance of public order lies in the *functioning of society*.<sup>149</sup>

Hunland encouraged 7,500 Suthans to attend an outdoor rally, in violation of the COVID-19 restrictions.<sup>150</sup> Although the reason for the outbreak of violence during the protest was unclear, Hunland falsely attributed it to the Antaran Government.<sup>151</sup> He disseminated disinformation by reposting a photograph of the police beating a woman, calling it an “*Antaran Campaign to silence the voice of Velans*”, which was flagged by Pano as inauthentic.<sup>152</sup> Hunland’s posts sought to dismantle the functioning of society and create disorder. Therefore, the Order is justified for the protection of public order.

iii. The Order is justified for the protection of public health and public safety

Restraints on the freedoms of speech and assembly are permitted on account of public health and public safety respectively.<sup>153</sup> If a health threat threatens the safety of persons, it may constitute a

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<sup>147</sup> *Compromis*, ¶13.

<sup>148</sup> *Surek v. Turkey*, App. No. 26682/95, ¶50, ECtHR (1999).

<sup>149</sup> UN ECOSOC, ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’, E/CN.4/1985/4, ¶22 (1984) [“**Siracusa**”].

<sup>150</sup> *Compromis*, ¶25.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> ICCPR, arts. 19, 21.

threat to public safety.<sup>154</sup> The World Health Organization has indicated that the spread of pandemic disinformation rumours causes a threat to public safety.<sup>155</sup>

Hunland falsely claimed that Antara's COVID-19 restrictions were imposed to curb the rights of the Velans, and that Suthan independence was the only answer.<sup>156</sup> On 22 November 2020, he stated that he had "*proof*" that no COVID deaths had taken place since June 2020.<sup>157</sup> He also encouraged people to stage an outdoor rally in breach of the COVID-19 restrictions. His posts encouraged the public to flout the restrictions, creating a threat to public safety. Therefore, the Order is justified for the protection of public health and public safety.

iv. The Order is justified for the protection of the rights and freedoms of others

Disinformation affects rights of citizens under Article 25 of the ICCPR, as it erodes the public's confidence in the electoral and democratic system.<sup>158</sup> Opinion makers are obligated to refrain from abusing their power at the expense of others by providing incorrect information.<sup>159</sup> The UN Special Rapporteur noted that President Trump's attempts to erode voter confidence in the postal-ballot system through the spread of disinformation during the 2020 U.S. presidential elections undermined voter confidence and voter participation.<sup>160</sup>

Similarly, with over 9 million Pano followers, and an elevated political status, the false information spread by Hunland was likely to be construed as credible, interfering with Antarans' right to be

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<sup>154</sup> MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS CCPR COMMENTARY 492 (N.P. Engel 2005) ["**NOWAK**"]; Siracusa, ¶¶25, 33.

<sup>155</sup> *Id.*; WORLD HEALTH ORGANIZATION, MANAGING EPIDEMICS: KEY FACTS ABOUT MAJOR DEADLY DISEASES 34 (WHO 2018).

<sup>156</sup> *Compromis*, ¶23(b).

<sup>157</sup> *Id.*

<sup>158</sup> GC 25, ¶20.

<sup>159</sup> NOWAK, 462.

<sup>160</sup> A/HRC/47/25, ¶24.

informed of public affairs. Therefore, the Order is justified for the protection of the rights and freedoms of others

*c. The Order is necessary in a democratic society*

The Order is necessary in a democratic society as [i] there is a pressing social need, and [ii] the restriction is proportional.

*i. There is a pressing social need*

To establish a pressing social need, there must be a *real risk* of harm to the legitimate aims.<sup>161</sup> Social media sites often mimic echo chambers,<sup>162</sup> since algorithms of these sites provide users consuming disinformation with similar content. In the absence of alternative information,<sup>163</sup> users tend to believe the information supporting their views.<sup>164</sup> Further, harm resulting from the spread of disinformation on social media is more detrimental, because such information can be disseminated rapidly and widely, and continue to persist online.<sup>165</sup> Given the *invasive and powerful impact* of social media,<sup>166</sup> restricting disinformation is permissible.<sup>167</sup>

Hunland's past actions of spreading disinformation without any substantiation or evidence,<sup>168</sup> establish his tendency and ability to disseminate disinformation, likely to threaten the integrity of the referendum. Hunland's account was directly involved in spreading disinformation, with 63%

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<sup>161</sup> GC 34, ¶35; *Hak-Chul Shin v. Republic of Korea*, CCPR/C/80/D/926/2000, ¶7.3, HRC (2004).

<sup>162</sup> Konrad Nicklewicz, 'Weeding Out Fake News: An Approach to Social Media Regulation' (2017) 16 *EUROPEAN VIEW* 335 ["**Nicklewickz**"]; Roheeni Saxena, 'The Social Media "Echo Chamber" Is Real', <https://arstechnica.com/science/2017/03/the-social-media-echo-chamber-is-real/> (2017).

<sup>163</sup> Nicklewicz, 243.

<sup>164</sup> *Id.*; Michael Beam et al., 'Facebook News and (de)Polarization: Reinforcing Spirals in the 2016 US Election' (2018) 21 *INFORMATION COMMUNICATION AND SOCIETY* 1.

<sup>165</sup> *Delfi AS v. Estonia*, App. No 64569/09, ¶133, ECtHR (2015).

<sup>166</sup> *Murphy v. Ireland*, App. No. 44179/98, ¶74, ECtHR (2003).

<sup>167</sup> *NOWAK*, 228.

<sup>168</sup> *Compromis*, ¶23.

of his posts being flagged by Pano.<sup>169</sup> Therefore, there exists a pressing social need to prevent the harm of Hunland's dissemination of disinformation.

ii. The restriction is proportional

The nature and severity of a restriction<sup>170</sup> must be proportionate.<sup>171</sup> As each State is uniquely positioned to respond to different situations where expression threatens the integrity of the State,<sup>172</sup> a State enjoys a margin of appreciation in deciding the least restrictive, yet relevant and sufficient means, in the circumstances of the case.<sup>173</sup>

At the time when Hunland's Pano account was suspended, the Suthan referendum had not taken place.<sup>174</sup> Irreparable harm could have been caused through Hunland's disinformation in case of a probable result of no-independence. Therefore, the restriction imposed under the Order is proportional.

Moreover, numerous States have made provisions for the suspension of social media accounts for expansive time periods.<sup>175</sup> Since the two year transition period<sup>176</sup> is not complete, the results of the Suthan referendum have not attained finality. Hunland's presence on Pano could thus threaten

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<sup>169</sup> *Id.* ¶24.

<sup>170</sup> *Ceylan v. Turkey*, App. No. 23556/94, ¶37, ECtHR (1999); *Tammer v. Estonia*, App. No. 41205/98, ¶69, ECtHR (2001).

<sup>171</sup> GC 34, ¶¶22, 33, 34; *Balsytė-Lideikienė v. Lithuania*, App. No. 72596/01, ¶76, ECtHR (2008).

<sup>172</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010) (U.S.).

<sup>173</sup> *Van Hulst v. Netherlands*, CCPR/C/82/D/903/1999, ¶7.10, HRC (2004); *Toonen v. Australia*, CCPR/C/50/D/488/1992, ¶8.3, HRC (1994).

<sup>174</sup> *Compromis*, ¶27.

<sup>175</sup> *LG Frankfurt am Main*, 2-03O-182/18 (2018) (Ger.); *OLG München*, 18W-858/18 (2018) (Ger.); *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637 (India).

<sup>176</sup> *Id.* ¶9.

smooth transition and ongoing investigations. Therefore, the extension order, issued in light of pending investigation into Hunland's involvement in election interference,<sup>177</sup> is proportional.

## **2. The Order is justified under Article 20 of the ICCPR**

States must prohibit any internal or external advocacy of national or religious hatred inciting hostility or violence.<sup>178</sup> Public figures can affect the behaviour of people and incite violence with their speech.<sup>179</sup> Hence, racist speeches of political leaders promoting hatred are prohibited.<sup>180</sup>

Hunland, being a prominent politician,<sup>181</sup> reposted that: "*We did not end the tyranny of Zemin colonial rule to be subjected to oppression by Antara... Antara will not give up on our beautiful land without a fight, and we will give them one!*",<sup>182</sup> advocating for national hatred towards Antara likely to incite violence. Therefore, the Order is justified under Article 20.

## **3. The Order is consistent with Articles 19 and 21 in conjunction with Article 2 of the ICCPR**

A State's obligation to ensure effective remedy<sup>183</sup> is fulfilled if it provides for effective judicial processes, in comparison to political or administrative remedies, such as pardons.<sup>184</sup> Moreover,

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<sup>177</sup> *Clarifications*, ¶3.

<sup>178</sup> UNCHR, 'General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)', HRI/GEN/1/Rev.9, ¶2 (1983).

<sup>179</sup> James Piazza, 'Why words matter: Political violence increases when politicians use inflammatory language', <https://scroll.in/article/974436/why-words-matter-political-violence-increases-when-politicians-use-inflammatory-language> (2020).

<sup>180</sup> *J.R.T. and the W.G. Party v. Canada*, CCPR/C/OP/2/25, ¶8(c), HRC (1984); *Glimmerveen v. The Netherlands*, App. No. 8348/78, 196, ECtHR (1982).

<sup>181</sup> *Compromis*, ¶¶13, 14.

<sup>182</sup> *Id.* ¶23(c).

<sup>183</sup> ICCPR, art. 2(3)(a).

<sup>184</sup> Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in THE INTERNATIONAL BILL OF RIGHTS 311 (Henkin ed. 1981); *Nallararatnam Singarasa v. Sri Lanka*, CCPR/C/81/D/1033/2001, ¶6.4, HRC (2004).

the effectiveness of a remedy does not depend on a favourable outcome for a claimant,<sup>185</sup> such as in cases of insufficiently founded complaints.<sup>186</sup>

The Order was duly passed by a federal court after hearing Hunland.<sup>187</sup> Hunland's injunction application was rejected for lack of standing,<sup>188</sup> indicating that it was insufficiently founded. Therefore, the Order is consistent with Article 2 of the ICCPR.

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<sup>185</sup> *Österreichische Schaffung v. Austria*, App. No. 39534/07, ¶54, ECtHR (2013); *Elvira Dmitriyeva v. Russia*, App. No. 60921/17, ¶58, ECtHR (2019).

<sup>186</sup> *A.W.P. v. Denmark*, CCPR/C/109/D/1879/2009, ¶6.5, HRC (2013).

<sup>187</sup> *Compromis*, Annex 1, s.5(1)(d).

<sup>188</sup> *Id.* ¶28.

#### **D. ANTARA’S ACTIONS IN TAKING DOWN THE LUNAR BOTNET, AND THE EFFECTS OF THOSE ACTIONS ON COMPUTERS AND DEVICES IN RAVARIA, WERE CONSISTENT WITH INTERNATIONAL LAW**

Cybercrime poses a threat to a State’s integrity.<sup>189</sup> Operation Moonstroke was conducted to take down the Botnet, and secure the Suthan referendum from foreign interference. [I] Antara had jurisdiction to conduct Operation Moonstroke, and it was not an act of extraterritorial enforcement. Further, [III] the extraterritorial effects of Operation Moonstroke were consistent with international law. *Alternatively*, [III] Antara’s wrongfulness is precluded by the doctrine of necessity. In any event, [IV] Ravaria is precluded from raising a claim as it has approached this Court with unclean hands.

#### **I. ANTARA HAD JURISDICTION TO CONDUCT OPERATION MOONSTROKE AND IT WAS NOT AN ACT OF EXTRATERRITORIAL ENFORCEMENT**

Extraterritorial enforcement refers to the exercise of power by a State on another State’s territory.<sup>190</sup> In cyberspace, States can exercise territorial jurisdiction over activities originating, or having a substantial effect, in their territory.<sup>191</sup> This position is supported by widespread State practice.<sup>192</sup>

Command-and-control servers initiate malicious activity by sending commands and controlling infected devices.<sup>193</sup> The Lunar Botnet’s command-and-control server, located in Antara,<sup>194</sup> was the origin of the malicious activity, and sent commands to infected Ravarian devices to spread

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<sup>189</sup> Convention on Cybercrime, (2001) ETS. No. 185, prmb1 [“**Budapest Convention**”].

<sup>190</sup> Mireille Hildebrandt, ‘Extraterritorial Jurisdiction To Enforce In Cyberspace? Bodin, Schmitt, Grotius In Cyberspace’ (2013) 63(2) U. TORONTO L. J. 196, 199.

<sup>191</sup> TALLINN, 55.

<sup>192</sup> Betsy Rosenblatt, ‘Principles of Jurisdiction’, <https://cyber.harvard.edu/property99/domain/Betsy.html> (2001); Data Security Law, 2021, art. 2 (China); Federal Law No. 187-FZ, 2013 (Russ.).

<sup>193</sup> Ramneek Puri, ‘Bots and Botnets: An Overview’ (2003) TECH. REP. SANS INSTITUTE 1, 12 [“**Puri**”].

<sup>194</sup> *Compromis*, ¶32.

disinformation, affecting voter opinion in relation to the Suthan referendum. Since the Botnet's activity originated, and had substantial effect, in Antaran territory, Antara could establish territoriality over the takedown.

Further, State practice supports the establishment of territoriality over takedown of international botnet networks originating from or having a substantial effect in specific countries. For instance, the Europol attempted to take down the Trickbot Botnet, infecting devices across 149 countries.<sup>195</sup> The U.S. and five other States took down the Emonet Botnet, infecting over 50 States,<sup>196</sup> and China took down the Mozi Botnet, infecting devices in 24 countries.<sup>197</sup>

Operation Moonstroke was deployed and completed in the Botnet's command-and-control server, in Antaran territory, which was linked to infected devices in Ravaria. There was no deployment of cyber operations in Ravaria. Therefore, Operation Moonstroke was not an act of extraterritorial enforcement.

## **II. THE EXTRATERRITORIAL EFFECTS OF OPERATION MOONSTROKE WERE CONSISTENT WITH INTERNATIONAL LAW**

The effects of Operation Moonstroke were not violative of [1] Ravaria's sovereignty, [2] the principle of non-intervention, or [3] the human rights of Ravarians. Moreover, [4] Operation Moonstroke was consistent with the Budapest Convention.

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<sup>195</sup> Raman Ladutska et al., 'When Old Friends Meet Again: Why Emotet Chose Trickbot For Rebirth?', <https://research.checkpoint.com/2021/when-old-friends-meet-again-why-emotet-chose-trickbot-for-rebirth/> (2021).

<sup>196</sup> U.S. Department of Justice, Emotet Botnet Disrupted in International Cyber Operation, Press Release 21-104 (2021).

<sup>197</sup> Elastic Security Intelligence & Analytics Team, 'Collecting And Operationalizing Threat Data From The Mozi Botnet', <https://www.elastic.co/blog/collecting-and-operationalizing-threat-data-from-the-mozi-botnet> (2021).

## 1. Operation Moonstroke did not violate Ravaria's sovereignty

States exercise sovereignty over cyber activities within their territorial jurisdiction.<sup>198</sup> Since cyberspace has no defined boundaries, a violation of a State's cyber sovereignty requires the operation to be *manifest in the cyber infrastructure* within State's territory.<sup>199</sup> There must be a sufficient degree of infringement, through damage or loss of functionality; or usurpation of inherently governmental functions.<sup>200</sup> Operation Moonstroke neither caused any damage nor loss of functionality to the devices situated in Ravaria.<sup>201</sup>

The usurpation of inherently governmental functions entails the foreign State's exercise of authority over matters exclusively reserved for the State.<sup>202</sup> Operation Moonstroke did not impair any exclusive authority of Ravaria to conduct its governmental functions, as Antara itself had the jurisdiction to disable the Botnet's Ravarian network.

In any case, cyber networks are pervasively interconnected and de-territorialized, and an impact on a network in one State may have unintended penetration in another State.<sup>203</sup> As evident from several State policies including Germany,<sup>204</sup> Netherlands,<sup>205</sup> and China,<sup>206</sup> and scholarly

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<sup>198</sup> TALLINN, 11; UNGA, 'Official Compendium of Voluntary National Contributions of how International Law applies to Information and Communications Technology', A/76/136, 34 (2021). [“UNGA Compendium”].

<sup>199</sup> TALLINN, 55.

<sup>200</sup> TALLINN, 21-22; UNGA Compendium, 33.

<sup>201</sup> *Clarifications*, ¶4.

<sup>202</sup> TALLINN, 21-22.

<sup>203</sup> Jinghan Zeng et al., 'China's Solution to Global Cyber Governance: Unpacking the Domestic Discourse of Internet Sovereignty' (2017) 45(3) POLITICS & POLICY 432, 448.

<sup>204</sup> UNGA Compendium, 32.

<sup>205</sup> Minister of Foreign Affairs, Netherlands, Appendix: International Law in Cyberspace, 2 (2019).

<sup>206</sup> International Strategy of Cooperation on Cyberspace, 2017, ¶¶2-3 (China).

opinion,<sup>207</sup> mere incursions into another State's network are not an exercise of authority that impair government functionality.

Antara's command-and-control server was interconnected with devices in Ravaria. Operation Moonstroke resulted in a mere incidental incursion in these devices, causing no harm.<sup>208</sup> Therefore, Operation Moonstroke did not violate Ravaria's sovereignty.

## **2. Operation Moonstroke did not violate the principle of non-intervention**

States must not intervene in the internal affairs of other States through coercive measures over their *domaine reserve* with the aim of influencing their decisions.<sup>209</sup> Cyber operations such as the Stuxnet attack, which sought the modification of Iran's nuclear plan,<sup>210</sup> and the 2007 attack in Estonia, which intended to prevent the relocation of the Soviet-era from Tallinn,<sup>211</sup> were considered to be coercive.

Operation Moonstroke merely sought to disable the Botnet's command-and-control server located in Antara.<sup>212</sup> Operation Moonstroke did not influence Ravaria's decisions in matters of internal affairs. Therefore, Operation Moonstroke was not coercive, and did not violate the principle of non-intervention.

## **3. Operation Moonstroke did not violate human rights of Ravarians**

Operation Moonstroke did not violate the human rights of Ravarians, as it did not interfere with their rights to **[a]** privacy, and **[b]** property.

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<sup>207</sup> Harriet Moynihan, 'The Application of International Law to State Cyberattacks Sovereignty and Non-Intervention', (2019) CHATHAM HOUSE 1, 17; TALLINN, 20.

<sup>208</sup> *Clarifications*, ¶4.

<sup>209</sup> Nicaragua, ¶205.

<sup>210</sup> Terry Gill, *Non-intervention in the Cyber Context*, in PEACETIME REGIME FOR STATE ACTIVITIES IN CYBERSPACE 234 (Katharina Ziolkowski ed. 2013); FRANÇOIS DELERUE, CYBER OPERATIONS AND INTERNATIONAL LAW 241 (CUP 2020).

<sup>211</sup> *Id.*

<sup>212</sup> *Compromis*, ¶32.

***a. Operation Moonstroke did not violate the right to privacy of Ravarians***

Monitoring, interception, or collection of personal communications constitutes a violation of privacy.<sup>213</sup> However, Operation Moonstroke neither intercepted nor collected any information from the infected devices, and merely disabled their web shells.<sup>214</sup> Therefore, Operation Moonstroke did not violate the right to privacy.

***b. Operation Moonstroke did not violate the property rights of Ravarians***

The right to property is neither codified as a human right,<sup>215</sup> nor does it possess mandatory legal character<sup>216</sup> as a universal right.<sup>217</sup> To constitute a general principle of law, it must be generally accepted by municipal legal systems.<sup>218</sup> The right to property has received active opposition for classification as a human right.<sup>219</sup> Moreover, the right has been recognized in varying degrees, based on domestic obligations, and not as a principle of law.<sup>220</sup> Therefore, Antara is not obligated, under a treaty or otherwise, to respect the right to property.

In any case, the right to property is violated when owner is unable to enjoy possession,<sup>221</sup> causing interference with the use and intended control of the property.<sup>222</sup> Operation Moonstroke neither

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<sup>213</sup> *Malone v. United Kingdom*, App. No. 8691/79, ¶¶63-64, ECtHR (1984); UNHRC, ‘Report on the Right to Privacy in The Digital Age’, A/HRC/27/37, ¶19 (2014).

<sup>214</sup> *Compromis*, ¶32.

<sup>215</sup> LOUIS HENKIN ET AL., *HUMAN RIGHTS* 217 (2nd ed. 2009)

<sup>216</sup> Independent Expert Report, ‘The Right of Everyone to Own Property Alone as Well as in Association with Others’, E/CN.4/1994/19, 90 (1993).

<sup>217</sup> *Id.*

<sup>218</sup> A/CN.4/741, ¶27.

<sup>219</sup> UN ECOSOC, ‘Draft International Covenant on Human Rights & Measures for Implementation: USSR – Amendment to the draft resolution of the United States’, E/CN.4/614 (1951).

<sup>220</sup> Council of Europe, *The Right to Property*, Handbook No. 4, 25 (2001).

<sup>221</sup> *Stratis Andreadis v. Greece*, App. No. 13427/87, ¶58, ECtHR (1994).

<sup>222</sup> *Id.*

took control of, nor caused loss of functionality to, devices in Ravaria.<sup>223</sup> Therefore, Operation Moonstroke did not violate the property rights of Ravarians.

#### **4. Operation Moonstroke was consistent with the Budapest Convention**

Under the Budapest Convention, States are obligated to obtain the consent of a person whose data would be accessed in a transboundary operation.<sup>224</sup> The Convention is silent on instances where the location of a device is unknown to the State conducting cyber operations.<sup>225</sup> However, the interpretation of the drafters to the Convention clarifies its inapplicability to such situations.<sup>226</sup> Antara was unaware of the location of the infected devices.<sup>227</sup> Therefore, Operation Moonstroke was consistent with the Budapest Convention.

### **III. ALTERNATIVELY, THE WRONGFULNESS OF OPERATION MOONSTROKE IS PRECLUDED BY THE DOCTRINE OF NECESSITY**

Under customary international law,<sup>228</sup> States are not responsible for wrongful actions conducted out of necessity.<sup>229</sup> This defence applies to cyber operations,<sup>230</sup> and has widespread State acceptance.<sup>231</sup> The wrongfulness of Operation Moonstroke, if any, is precluded, as it was [1] conducted to safeguard Antara's essential interests from grave and imminent peril, and [2] the only

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<sup>223</sup> *Clarifications*, ¶¶4-5.

<sup>224</sup> Budapest Convention, art. 32(b).

<sup>225</sup> Council of Europe, Explanatory Report to the Convention on Cybercrime, ¶294 (2001).

<sup>226</sup> Council of Europe, Guidance Note 3, No. T-CY (2013)7E, 3 (2014).

<sup>227</sup> *Clarifications*, ¶5.

<sup>228</sup> *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, Judgment, 1997 I.C.J. 7, ¶51 [“**Gabčíkovo**”].

<sup>229</sup> G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, art. 25 (2002) [“**ARSIWA**”].

<sup>230</sup> TALLINN, 135.

<sup>231</sup> Ministry of Defence of France, International Law Applied to Operations in Cyberspace, 8 (2019); UNGA Compendium, 38, 48.

course of action available to Antara. Further, [3] Operation Moonstroke did not seriously impair any of Ravaria's essential interests.

**1. Operation Moonstroke was conducted to safeguard Antara's essential interests from grave and imminent peril**

To invoke necessity, a State's essential interest must be in grave and imminent peril.<sup>232</sup> Essential interests are those that hold vital importance<sup>233</sup> for the State and its people, such as the regulation of road-traffic, banking and securities.<sup>234</sup> The Suthan referendum constituted Antara's essential interest, as it was important to Antara's polity and people.

The peril must be objectively established in proximity with such interests.<sup>235</sup> The Botnet posed a grave danger to the Suthan referendum as it was involved in circulating disinformation likely to impact the outcome,<sup>236</sup> thus, proximate to threatening the voter opinion. Therefore, Operation Moonstroke was conducted to safeguard Antara's essential interests from grave and imminent peril.

**2. Operation Moonstroke was the only course of action available to Antara**

To invoke necessity, the act must be the only means available to safeguard the essential interest.<sup>237</sup> The physical disablement of the command-and-control server was not possible since Antara did not know its precise location.<sup>238</sup> Moreover, prior to Operation Moonstroke, Antara could not have known the transboundary location of the infected devices, since botnets actively mask their

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<sup>232</sup> UNILC, 'Report on the Work of its Fifty-Third Session', A/56/10, 80 (2001) ["DARSIWA"].

<sup>233</sup> TALLINN, 135-136.

<sup>234</sup> DARSIWA, 83.

<sup>235</sup> Von Pezold v. Zimbabwe, ICSID Case No. ARB/10/25, ¶631 (2015); Gabčíkovo, ¶54.

<sup>236</sup> *Compromis*, ¶31.

<sup>237</sup> ARSIWA, art. 25(1)(a); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J.136, ¶140.

<sup>238</sup> *Compromis*, ¶32.

servers' identities.<sup>239</sup> Consequently, obtaining consent of the owners of the devices was not possible.

The Suthan referendum was scheduled for 1 March 2021, less than one week from the date of the Botnet takedown. Therefore, given the paucity of time, Operation Moonstroke was the only course of action available to Antara to safeguard its essential interest.

### **3. Operation Moonstroke did not impair any of Ravaria's essential interests**

An act of necessity must not impair any essential interest of another State to which an obligation exists.<sup>240</sup> This condition does not apply if the essential interest of the State invoking necessity outweighs an assessment of competing interests.<sup>241</sup>

Since no harm was caused to Ravaria's cyber functionality,<sup>242</sup> no essential interest of Ravaria was impaired. In any case, Antara's essential interests of preventing influence in the Suthan referendum outweighs any Ravarian essential interest.

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<sup>239</sup> Puri, 12; Reto Baumann & Christian Plattner, White Paper: Honeypots (Swiss Federal Institute of Technology 2002); *Clarifications*, ¶5.

<sup>240</sup> DARSIIWA, 84.

<sup>241</sup> *Id.* 83; Gabčíkovo, ¶58.

<sup>242</sup> *Clarifications*, ¶4.

#### **IV. IN ANY EVENT, RAVARIA IS PRECLUDED FROM RAISING A CLAIM AS IT HAS APPROACHED THIS COURT WITH UNCLEAN HANDS**

States approaching a Court for redressal must not have any corresponding illegalities.<sup>243</sup> This doctrine of clean hands is of fundamental importance, and has been regarded by this Court,<sup>244</sup> the PCIJ,<sup>245</sup> and by jurists,<sup>246</sup> as an important aspect of dispute settlement.

By operating the Botnet and facilitating the spread of disinformation, violating Antara's sovereignty and the principle of non-intervention, Ravaria acted with corresponding illegality. Therefore, Ravaria is precluded from raising a claim as it has approached this Court with unclean hands.

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<sup>243</sup> UNILC, 'Fifth Report on Diplomatic Protection by John Dugard, Special Rapporteur on Diplomatic Protection', A/CN.4/538, ¶¶2-4 (2004).

<sup>244</sup> Nicaragua, ¶272 (Diss. Op. Judge Schwebel); Arrest Warrant of 11 April of 2000 (D.R.C. v. Belg.), 2002 I.C.J. 3, ¶35 (Diss. Op. Judge Wyngaert).

<sup>245</sup> The Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (Ser. A/B) No. 70.

<sup>246</sup> GERALD FITZMAURICE, THE GENERAL PRINCIPLES OF INTERNATIONAL LAW, CONSIDERED FROM THE STANDPOINT OF THE RULE OF LAW 119 (1957).

**PRAYER FOR RELIEF**

Antara respectfully requests this Court to adjudge and declare that:

1. The documents obtained in the search of the vehicle driven by Ms. Walters and the recording from the conciliation meeting of 30 May 2021 are admissible as evidence in these proceedings;
2. Ravaria's campaign of financial contributions and the dissemination of misinformation intending to influence the outcome of the Suthan referendum were in violation of international law;
3. Antara's order suspending Prof. Liam Hunland's Pano account was consistent with international law; and
4. Antara's actions in taking down the Lunar Botnet, and the effects of those actions on computers and devices in Ravaria, were consistent with international law.

Respectfully submitted,

**AGENTS FOR THE APPLICANT**

