

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

**THE 2022 PHILLIP C JESSUP INTERNATIONAL LAW MOOT COURT
COMPETITION**



CASE CONCERNING THE SUTHAN REFERENDUM

APPLICANT

DEMOCRATIC REPUBLIC OF ANTARA

v

VELAN KINGDOM OF RAVARIA

RESPONDENT

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....IV

STATEMENT OF JURISDICTION.....XVI

QUESTIONS PRESENTED XVII

STATEMENT OF FACTS.....XVIII

SUMMARY OF PLEADINGS XXII

PLEADINGS..... 1

I. THE DOCUMENTS OBTAINED IN THE ILLEGAL SEARCH OF WALTERS’S VEHICLE AND THE RECORDING FROM THE CONCILIATION MEETING OF 30 MAY 2021 ARE INADMISSIBLE AS EVIDENCE..... 1

A. THIS COURT HAS THE POWER TO EXCLUDE EVIDENCE 1

B. THE DOCUMENTS WERE ILLEGALLY OBTAINED..... 3

(1) This court can exclude illegally obtained evidence 3

(2) The documents were obtained in violation of diplomatic law 5

C. THE DOCUMENTS ARE PROTECTED BY STATE SECRETS PRIVILEGE..... 8

D. THE RECORDING IS PROTECTED BY SETTLEMENT PRIVILEGE..... 9

II. RAVARIA’S ALLEGED FINANCIAL CONTRIBUTIONS AND CYBER-OPERATIONS IN CONNECTION WITH THE SUTHAN REFERENDUM WERE CONSISTENT WITH INTERNATIONAL LAW..... 11

A. STATE RESPONSIBILITY CANNOT BE ESTABLISHED..... 12

(1) The operation of the Lunar Botnet is not attributable to Ravaria 12

(2) <i>Hunland’s posts are not attributable to Ravaria</i>	13
B. RAVARIA DID NOT UNLAWFULLY INTERFERE IN ANTARA’S INTERNAL AFFAIRS	13
C. RAVARIA DID NOT VIOLATE INTERNATIONAL HUMAN RIGHTS LAW	17
(1) <i>Ravaria did not owe extraterritorial obligations to Antarans</i>	17
(2) <i>Ravaria did not violate the ICCPR</i>	17
(3) <i>Ravaria did not violate the ICESCR</i>	18
III. ANTARA’S ORDER SUSPENDING PROFESSOR HUNLAND’S PANO ACCOUNT IS IN VIOLATION OF INTERNATIONAL LAW, AND ANTARA MUST THEREFORE RESCIND THE ORDER	20
A. RAVARIA HAS STANDING	21
(1) <i>Ravaria can exercise diplomatic protection over Hunland</i>	21
(2) <i>Ravaria can rely on erga omnes partes standing</i>	22
(3) <i>Ravaria can rely on erga omnes standing</i>	23
(4) <i>Ravaria is a specially affected state</i>	24
B. ANTARA VIOLATED INTERNATIONAL HUMAN RIGHTS LAW	24
(1) <i>Antara violated Hunland’s right to freedom of expression</i>	24
(2) <i>Antara violated Hunland’s right of peaceful assembly</i>	27
(3) <i>Antara violated Hunland’s right to freedom of religion</i>	28
C. THIS COURT CAN, AND SHOULD, ORDER RESCISSION	29

IV. ANTARA’S INTERFERENCE WITH COMPUTERS AND DEVICES OPERATING ON RAVARIAN SOIL, RESULTING FROM THE TAKE-DOWN OF THE LUNAR BOTNET, VIOLATED INTERNATIONAL LAW.....	30
A. <i>THERE IS NO ISSUE OF CLEAN HANDS</i>.....	30
B. <i>OPERATION MOONSTROKE VIOLATED INTERNATIONAL LAW</i>.....	31
(1) <i>Antara violated the duty to cooperate</i>	31
(2) <i>Antara violated the Budapest Convention</i>	33
(3) <i>Antara violated Ravaria’s sovereignty</i>	34
(4) <i>Antara violated the principle of non-intervention</i>	35
(5) <i>Antara violated international human rights law</i>	35
(6) <i>Antara abused its rights</i>	37
(7) <i>Antara violated its duty of prevention</i>	38
C. <i>ANTARA CANNOT JUSTIFY ITS CONDUCT</i>.....	39
PRAYER FOR RELIEF.....	40

INDEX OF AUTHORITIES

Treaties, Covenants, and Declarations

Budapest Convention on Cybercrime (2001) ETS 185	33
International Covenant on Civil and Political Rights (1976) 999 UNTS 171	17, 18, 23
International Covenant on Economic, Social, and Cultural Rights (1976) 993 UNTS 3	17, 18
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Statute of the ICJ (1946) 33 UNTS 993.....	2
Treaty on the Functioning of the EU (2012) C326/47	8
UN Charter (1945) 1 UNTS 16.....	4
Vienna Convention on Diplomatic Relations (1961) 500 UNTS 95	5, 6, 7, 16
Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331	7, 16, 33

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HRC, <i>Concluding Observations on Mongolia</i> (2017) CCPR/C/MNG/CO/6.....	18
HRC, <i>General Comment 22</i> (1993) CCPR/C/21/REV.1/ADD.4	23, 28
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UNHRC, <i>Rabat Plan of Action</i> (2013) A/HRC/22/17/ADD.4.....	27
UNHRC, <i>Right to Privacy in the Digital Age</i> (2014) A/HRC/27/37.....	35, 36

UNHRC, <i>Special Rapporteur, Disease Pandemics</i> (2020) A/HRC/44/49	26
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<i>Activities in the Area (Advisory Opinion)</i> (2011) ITLOS Case 17	23
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<i>Ahmadou Sadio Diallo (Preliminary Objections)</i> (2007) ICJ Rep 582.....	21, 22
<i>Armed Activities (Congo)</i> (2005) ICJ Rep 168.....	6, 14
<i>Arrest Warrant</i> (2002) ICJ Rep 3	29
<i>Asylum Case</i> (1949) ICJ Rep 225	19
<i>Ayyash (Documents Published on WikiLeaks)</i> (2015) STL-11-01.....	3
<i>Bayindir v Pakistan</i> (2009) ICSID ARB/03/29	12
<i>Bekzhan v Kazakhstan</i> (2021) CCPR/C/130/D/2661/2015	28
<i>Blaškić (Objection to Subpoenae Duces Tecum)</i> (1996) IT-95-14-PT.....	8
<i>Bodrožić v Serbia and Montenegro</i> (2006) CCPR/C/85/D/1180/2003	26
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<i>Chagos Archipelago (Advisory Opinion)</i> (2019) ICJ Rep 95.....	19
<i>Chorzow Factory</i> (1928) PCIJ Ser A No 17.....	9
<i>CMS v Argentina (Award)</i> (2005) ICSID ARB/01/8.....	39
<i>Coleman v Australia</i> (2003) CCPR/C/87/D/1156/2003	27
<i>Corfu Channel</i> (1949) ICJ Rep 4.....	4, 9, 20
<i>Donoso v Panama</i> (2009) IACtHR Ser C No 193.....	27
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<i>Frontier Dispute</i> (1986) ICJ Rep 554.....	3, 10
<i>Frumkin v Russia</i> (2016) ECtHR 74568/12.....	28
<i>Gabčíkovo-Nagymaros</i> (1997) ICJ Rep 88.....	29, 33, 37, 39
<i>Genocide Convention (The Gambia v Myanmar)</i> (2020) ICJ Rep 3	22
<i>Georgia v Russia (II)</i> (2021) ECtHR 38263/08.....	17
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<i>Hamester v Ghana</i> (2010) ICSID ARB/07/24.....	12
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<i>Libananco v Turkey</i> (2008) ICSID ARB/06/8	4
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<i>Military and Paramilitary Activities in and Against Nicaragua</i> (1986) ICJ Rep 14	12
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<i>Obligation to Prosecute or Extradite</i> (2012) ICJ Rep 422	22, 23
<i>Öcalan v Turkey</i> (2005) 41 EHRR 45	17
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<i>Perincek v Switzerland</i> (2015) ECtHR 27510/08	27
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<i>Tehran Hostages</i> (1980) ICJ Rep 3	3, 5, 13
<i>Territorial Dispute</i> (1994) ICJ Rep 6	33
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<i>Constitution of Brazil</i>	3

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<i>Constitution of Russia</i>	3
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<i>Cybersecurity Law (China)</i>	38
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<i>Evidence Act (India)</i>	8
<i>Fayed v Al-Tajir</i> (1988) QB 712.....	8
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<i>Goodyear v Chiles Power Supply</i> (2003) 332 F.3d 976	9
<i>Information Systems Regulations (UK)</i>	38
<i>International War Crimes Tribunals Act (Australia)</i>	9
<i>International War Crimes Tribunals Act (New Zealand)</i>	9
<i>New Code of Civil Procedure (France)</i>	9
<i>Police and Criminal Evidence Act (UK)</i>	3
<i>R (Bancoult No 3) v Secretary of State</i> (2014) EWCA Civ 708.....	7
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STATEMENT OF JURISDICTION

The Democratic Republic of Antara (“**Antara**”) and the Velan Kingdom of Ravaria (“**Ravaria**”) have consented to submit the dispute to this court, in accordance with Article 40(1) of this court’s statute, by way of *compromis* transmitted to the Registrar on 13 September 2021. Antara and Ravaria have undertaken to accept this court’s decision as final and binding on them and commit to comply with it in its entirety and in good faith.

QUESTIONS PRESENTED

- I. Whether the documents obtained in the search of Walters’s vehicle and the 30 May 2021 recording are inadmissible as evidence in these proceedings;
- II. Whether Ravaria’s alleged financial contributions and cyber-operations in connection with the Suthan referendum were consistent with international law;
- III. Whether Antara’s order suspending Hunland’s Pano account was in violation of international law, and whether Antara must therefore rescind the order; and
- IV. Whether Antara’s interference with computers and devices operating on Ravarian soil, resulting from the decision to take down the Lunar Botnet, was in violation of international law.

STATEMENT OF FACTS

Background

Ravaria, Antara, and Sutha are located in the Benthamian Peninsula, and were historically part of the Zemin Empire between the 18th Century and the Second World War. Geographically, Antara is situated in the north, Ravaria in the south, and Sutha in between. The prevalent religion in the southern part of the Benthamian Peninsula is Vela, a monotheistic religion that encourages community meetings for worship. The Kuvil Shrine, a sacred Velan site, is situated in Sutha, and devoted Velans believe themselves to be under a religious obligation to visit and pray in the Kuvil Shrine at least once during their lifetimes. While a majority in Ravaria, Velans are a minority in Antara, representing approximately one-quarter of the population.

Antara and Ravaria gained independence following the collapse of the Zemin Empire. In 1962, an agreement was reached between Antara, Ravaria, and Zemin under the Treaty of Singapore. The treaty provided that a referendum could be held in or after 1987, to determine whether Sutha wished to remain part of Antara, or become an independent state if the Suthan Legislative Council and Antaran Parliament agreed by a two-third vote. It also stipulated that any Ravarian pilgrims wishing to visit the Kuvil Shrine would be free to do so, and that Antara would also “abstain from any restriction on freedom of worship for those participating in peaceful religious activities” there. Yet, in April 2020, Antara imposed regulations denying Ravarian pilgrims from visiting the shrine and restricted the gathering of groups even for religious purposes, justifying such restrictions on the grounds of COVID-19.

Antara’s silencing of Professor Hunland

In the wake of these restrictions, Hunland, a devout Velan, posted messages on the social media platform Pano expressing his dissatisfaction with the Antaran government. Hunland has long been a prominent advocate for Suthan autonomy, having regularly contributed to local and international media. He is also a member of the Suthan Independence Party (“**SIP**”), and established a Sutha-based non-profit foundation, the Suthans Against Domination (“**SAD**”), dedicated to promoting Velan culture and Suthan autonomy. Since his affiliation with the SIP in 2009, the popularity of the party has been increasing, culminating in an authorised referendum for Suthan independence after meeting the required threshold in both the Suthan Legislative Council and Antaran Parliament in October 2020.

Hunland, through the SAD, launched a grassroots campaign to mobilise and register voters, encouraging them to vote in favour of independence through sharing information and opinions through Pano. Some messages were flagged as false by Pano, with users who wished to view these flagged messages being required to click on an additional screen. In a bid to further the cause for Suthan independence, Hunland staged a rally in January 2021 to encourage greater voter participation. Antaran police arrived to break up the rally, but the altercation soon turned violent. Less than a week later, Antara issued a content and user suspension order under its Protect Antaran Cyberspace Act (“**PACA**”), resulting in a one-year suspension of Hunland’s Pano account and removing all his posts from the platform and preventing all individuals, including those outside of Antara, from viewing them.

The silencing of Hunland on Pano deprived the independence movement of a prominent voice, as his Pano following was the third largest in the Peninsula, with Pano being its most popular social media network. Hunland sought to apply to an Antaran federal court for an injunction against the suspension order, but the court rejected the application for lack of standing. His appeal was denied, with no further appeal available under Antaran law. He also brought suit against Pano in Zemin, but this action was summarily dismissed. In October 2021, the judge who issued the order suspending Hunland’s Pano account extended the suspension for another six months, claiming that this was due to “the ongoing criminal investigation relating to the election interference and the botnet, including Hunland’s alleged involvement with these activities”; this extension was not subject to judicial review.

Antara’s interference with Ravarian devices

Despite Antara’s actions against Hunland, the result of the referendum held on 1 March 2021 favoured independence. It was later revealed that Antara had acted unilaterally to take down the Lunar Botnet, which was allegedly connected with the growing spread of misinformation in the weeks leading up to the referendum. Antara had done so by launching “Operation Moonstroke”, which not only disabled the botnet, but also removed the web-shells from devices that were connected to it. Even after discovering that 5,000 of these devices were situated within Ravaria, Antara failed to inform Ravaria of its actions even after Operation Moonstroke had been completed. It was only after *The Sydney Morning Herald* published a news report on the operation, that Antara issued a public statement acknowledging its actions against devices in Ravaria. Rather than cooperating with Ravaria *post hoc* to prevent future intrusions into Ravarian devices, Antara justified its actions by claiming that “territory is irrelevant” to its hacking of these devices.

Ravaria's alleged financial contributions and cyber-operations

Less than two months after the referendum, Antaran police apprehended Emma Walters, wife of Ravarian Ambassador Benny Walters, while on her way home from a SAD gala. It was alleged that she was heavily intoxicated while behind the wheel of a rental vehicle, leading to a collision with a pedestrian. Despite discovering Walters's diplomatic passport in her briefcase during a body search at the scene and taking note of her identity, Antaran police proceeded to arrest her, and charged her with vehicular homicide.

At the police station, the arresting officers handed over Walters's briefcase to the station duty sergeant, but failed to inform him of her identity. The duty sergeant then searched Walters's briefcase while she was asleep, and found documents that allegedly recorded the financial transactions and meetings between the Ravarian Embassy and various Velan religious organisations across Sutha. These documents appeared to suggest that Ambassador Walters knew of the channelling of funds to the SAD and SIP, in support of the cause of Suthan independence. The sergeant delivered the briefcase and its contents to the Antaran Intelligence Agency, which reviewed and made a copy of all the documents in the briefcase. These copies were retained even after the Embassy's protest for the return of the briefcase. Even then, Antara's own investigations into the allegations in the documents revealed that the transactions complied with its domestic campaign finance laws.

As tensions escalated, a conciliation meeting was brokered between the Attorneys-General of Antara and Ravaria. Both parties agreed to create an audio recording of the proceedings to facilitate the preparation of a fully accurate transcript of the meeting. It was agreed that Ravaria would pay an undisclosed sum as compensation to the family of the individual involved in the accident with Walters, and the Ambassador and her would both return to Ravaria.

Discussions continued after the conciliation meeting to resolve remaining differences, leading to a special agreement for parties to refer all matters to this court. However, Antara now intends to admit into evidence the documents it obtained from Ms Walter's briefcase, and the recording of the meeting between the Attorneys-General of Antara and Ravaria. Neither the documents nor the recording had been publicly disclosed.

SUMMARY OF PLEADINGS

I. This court should exclude both the documents obtained in the search of Ms Walters's vehicle and the recording between the Attorneys-General of Antara and Ravaria

This court has the power to exclude evidence, which is recognised by this court's rules and jurisprudence, and also constitutes a general principle of international law. This power should be exercised to exclude the documents because diplomatic law was violated when Walters was arrested, her briefcase searched, and copies of her diplomatic documents made. The documents are also protected by state secrets privilege.

The recording of the conciliation meeting should also be excluded. Since the meeting was held to resolve the diplomatic incident resulting from Antara's seizure of the documents and did result in some agreement being reached on the incident, the recording is protected by settlement privilege and cannot be admitted.

II. Ravaria's alleged financial contributions and cyber-operations did not violate international law

Ravaria is not responsible for any alleged cyber-operations since SAD's operation of the Lunar Botnet and Hunland's posts are not attributable to it. There is insufficient evidence to show that Ravaria had effective control over the botnet or Hunland. Neither was there any approval and acknowledgement of the botnet or Hunland.

Even if attribution can be established, the actions of Ravaria did not reach the threshold of severity required to find a violation of the internal affairs of Antara, be it the principles of non-intervention, sovereignty, or diplomatic interference. Ravaria also did not violate international human rights law, since it did not owe any human rights obligations to Antaran voters, who were outside its jurisdiction. In any event, there was no violation of any ICCPR or ICESCR rights, be it the right to vote, right to freedom of expression, right of self-determination, or right to health. This is because Ravaria's actions did not reach the threshold required to find that any of these rights were violated.

III. Antara violated international law by suspending Professor Hunland's Pano account

Ravaria has standing to bring the claim against Antara, as it can exercise diplomatic protection over Hunland, a Ravarian national. It can also rely on *erga omnes partes* and *erga omnes* standing, or its status as a specially affected state, to bring the claims of human rights violations against Antara.

In suspending Hunland's Pano account, Antara violated Hunland's right to freedom of expression by silencing his political opinions. The PACA, of which Antara's actions was based upon, was not provided by law; further, the suspension was neither necessary nor proportionate. Antara also cannot show that Hunland's speech criticising Antara amounted to incitement.

By restricting Hunland's access to Pano and its functions, Antara violated Hunland's right of peaceful assembly. Antara also violated his right to freedom of religion by restricting Hunland's ability to advocate for Velans to pray in the Kuvil Shrine through Pano. This court should thus order rescission of the suspension since it would not be impossible or disproportionately burdensome to do so.

IV. Antara violated international law by conducting Operation Moonstroke

No issue of clean hands arises to prevent Ravaria from bringing the claim against Antara. Through Operation Moonstroke, Antara violated the customary duty to cooperate with Ravaria and the object and purpose of the Budapest Convention by acting unilaterally and removing web-shells from Ravarian devices. Antara further violated Ravaria's sovereignty and the principle of non-intervention by enforcing the PACA within Ravaria.

Antara also violated the right to privacy of the device owners on Ravarian soil by accessing their devices even though there were less intrusive alternatives available such as sink-holing or a command-and-control server takedown.

Antara's actions, when seen in totality, also amounted to an abuse of rights as it had exercised its rights in an unreasonable manner. That Antara had no knowledge that these devices were in Ravaria's territory is irrelevant since the duty of prevention required Antara to take steps to ensure that its actions would not amount to a violation of international law, but it had not done so. No defences are available to Antara. Specifically, Antara cannot rely on the defence of necessity since there were viable alternatives. Neither did it satisfy the preconditions to invoke countermeasures against Ravaria.

PLEADINGS

I. THE DOCUMENTS OBTAINED IN THE ILLEGAL SEARCH OF WALTERS'S VEHICLE AND THE RECORDING FROM THE CONCILIATION MEETING OF 30 MAY 2021 ARE INADMISSIBLE AS EVIDENCE

While investigating a car accident involving Emma Walters, the wife of Ravaria's ambassador to Antara, Antaran police not only arrested her despite having seen her diplomatic passport, but seized a briefcase she was carrying, made copies of sensitive documents contained therein, and sent them to the Antaran National Intelligence Agency.¹ Walters was either intoxicated or asleep at all material times.² A conciliation meeting was held to resolve the resulting diplomatic fallout, and a recording thereof was delivered to both governments.³ Antara now seeks to adduce the seized documents and the recording as evidence before this court, but it cannot do so as **(A)** this court has the power to exclude evidence, and should exercise its power on the basis that **(B)** the documents were illegally obtained, **(C)** the documents are protected by state secrets privilege, and **(D)** the recording is protected by settlement privilege.

A. THIS COURT HAS THE POWER TO EXCLUDE EVIDENCE

This court's approach to admitting evidence has been described as liberal and permissive, with an aversion to adjudication on technicalities.⁴ However, this does not mean this court does not have the power to exclude evidence.⁵ First, its Rules of Court already recognise that evidence can be

¹ *Compromis*, [35]-[37].

² *Compromis*, [35]-[36].

³ *Compromis*, [42].

⁴ Higgins, *President of the ICJ to the UNGA* (2007), 1-2.

⁵ Cheng, *General Principles of Law* (CUP, 1987), 303.

excluded on various grounds.⁶ These grounds are not exhaustive, as this court has broad discretionary powers to decide on matters of its own procedure, including evidentiary issues.⁷ Secondly, this court can rely on evidentiary rules supplied by any applicable source of international law.⁸ It may therefore draw on general principles of law,⁹ which represent the primary source of evidentiary rules in international law, as a basis to exclude evidence.¹⁰ Thirdly, exclusionary rules are consistent with this court's pronouncements on the importance of ensuring the sound administration of justice.¹¹ To the extent that this court lacks any appellate procedure, it is critical that the court sieves out problematic evidence at an early stage.¹² Respect for sovereign equality requires that this court consider any challenge against the admissibility of evidence,¹³ as Ravaria has reserved the right to make under the Special Agreement.¹⁴ Finally, this court has excluded

⁶ ICJ, *Rules of Court* (1978), Articles 52, 56, 63, 79, 84.

⁷ *Island of Palmas* (1928) 2 RIAA 829, 841; Statute of the ICJ (1946) 33 UNTS 993, Articles 30, 48; Sandifer, *Evidence before International Tribunals* (University Press of Virginia, 1975), 185.

⁸ Brown, *A Common Law of International Adjudication* (OUP, 2007), 85-86.

⁹ ICJ Statute, n7, Article 38(1)(c).

¹⁰ Zimmermann *et al* (eds), *The Statute of the ICJ* (OUP, 2019), 1374.

¹¹ *Legality of the Use of Force (Order)* (1999) ICJ Rep 124, [44]; *Activities Carried Out by Nicaragua in the Border Area (Order)* (2013) ICJ Rep 166, [24].

¹² Wolfrum, Möldner, "Evidence" (2013) Max Planck Encyclopaedia of PIL, [4]; Chen, "Re-Assessing the Evidentiary Regime of the ICJ" (2015) 13(1) International Commentary on Evidence 1, 28.

¹³ Amerasinghe, *Evidence in International Litigation* (Brill, 2005), 167.

¹⁴ *Compromis*, Article 2(b), [45].

evidence before, in cases such as *Frontier Dispute*.¹⁵ The question therefore is whether there are grounds for this court to do the same here.

B. THE DOCUMENTS WERE ILLEGALLY OBTAINED

(1) This court can exclude illegally obtained evidence

International tribunals can exclude illegally obtained evidence even if the evidence is probative or its authenticity undisputed, as these epistemic considerations can be outweighed by non-epistemic considerations in favour of exclusion.¹⁶ This is a general principle of law reflected in the evidence rules of common law¹⁷ and civilian jurisdictions alike.¹⁸ The same can also be seen from the jurisprudence of tribunals involving investor-state¹⁹ and inter-state²⁰ disputes. The closest the ICJ has come to having an opportunity to consider excluding illegally obtained evidence was in *Tehran Hostages*.²¹ There, this court unanimously ordered that diplomatic documents seized by militants from the US embassy in Tehran be immediately placed in the hands of the protecting power,

¹⁵ (1986) ICJ Rep 554, [147].

¹⁶ *EDF v Romania (Procedural Order No 3)* (2008) ICSID ARB/05/13, [47]; *Ayyash (Documents Published on Wikileaks)* (2015) STL-11-01, [9].

¹⁷ *Sun v US* (1963) 371 US 471; *Uniform Evidence Act (Australia)*, Section 138; *Constitution of Kenya*, Article 50(4); *Police and Criminal Evidence Act (UK)*, Section 78.

¹⁸ *Constitution of Brazil*, Article 5(56); *Constitution of Greece*, Article 19(3); *Constitution of Russia*, Article 50(2); *Civil Procedure Act (Spain)*, Article 287(2).

¹⁹ *Methanex v US (Award)* (2005) UNCITRAL, [54]; *EDF v Romania*, n16, [48].

²⁰ *Chagos Arbitration (Award)* (2015) PCA 2011-03, [542].

²¹ (1980) ICJ Rep 3, [95].

Switzerland, implying that such documents would be inadmissible.²² This interpretation aligns with how international tribunals consider the preservation of the integrity of proceedings to be a ground for excluding evidence.²³ It also aligns with states' obligations to settle disputes peacefully²⁴ and in good faith,²⁵ by discouraging resort to illegal self-help remedies to collect evidence.²⁶ By excluding illegally obtained evidence, this court ensures that neither side enjoys an unfair advantage over the other.²⁷

Although this court was also confronted with illegally obtained evidence in *Corfu Channel*,²⁸ that decision does not show that this court cannot exclude such evidence – Albania simply did not argue that the UK's unauthorised minesweeping operations to gather evidence should render the evidence inadmissible.²⁹ Additionally, the principle of *ex injuria non jus oritur*, which bars actors from benefitting from their wrongful actions,³⁰ has been observed to prevent states guilty of illegal

²² Reisman, Freedman, “The Plaintiff’s Dilemma” (1982) 76(4) AJIL 737, 751.

²³ ICTR, *Rules of Procedure and Evidence* (1995) ITR/3/REV.1, Rule 95; Rome Statute (2001) 2187 UNTS 3, Article 69(7)(b); *Methanex*, n19, [59].

²⁴ UN Charter (1945) 1 UNTS 16, Articles 2(3), 33.

²⁵ *Nuclear Tests* (1974) ICJ Rep 253, [46]; *Libananco v Turkey* (2008) ICSID ARB/06/8, [79], [82].

²⁶ Thirlway, “Admissibility of Illegally Obtained Evidence in International Adjudication” (1984) 78 AJIL 633, 641.

²⁷ Fallah, “The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals” (2020) 19 Law and Practice of International Courts and Tribunals 147, 156.

²⁸ (1949) ICJ Rep 4.

²⁹ Zimmermann *et al* (eds), n10, 1381.

³⁰ *Kosovo (Advisory Opinion)* (2010) ICJ Rep 141, [132] (Separate Opinion, Judge Trindade).

conduct from benefitting from the admission of evidence obtained therefrom.³¹ There is no compelling reason why this principle is inapplicable in ICJ proceedings.³²

(2) *The documents were obtained in violation of diplomatic law*

Illegalities were committed when Antara seized Walters's briefcase because both her person and the documents were inviolable. First, as a state party³³ to the Vienna Convention on Diplomatic Relations ("VCDR"),³⁴ Antara is prohibited from arresting, detaining, or exercising its criminal jurisdiction over diplomats of sending states.³⁵ This is so even if the diplomats have engaged in criminal offences.³⁶ The appropriate course of action when this happens is that upon establishing their identity as diplomats, states must release them and provide alternative arrangements for their safe transport home.³⁷ Because the VCDR is unequivocal in extending the aforesaid immunities to spouses of diplomats,³⁸ the documents would have been obtained illegally since Antara knew that Walters had a diplomatic passport, but nonetheless proceeded to arrest her, detain her, charge her,

³¹ Kazazi, *Burden of Proof and Related Issues* (Brill, 1996), 206; Worster, "The Effect of Leaked Information on the Rules of International Law" (2013) American University ILR 443, 447.

³² Amerasinghe, n13, 179.

³³ *Compromis*, [46].

³⁴ (1961) 500 UNTS 95.

³⁵ *Ibid*, Articles 29, 31; *Tehran Hostages*, n21, [79]; *R (Charles) v Secretary of State* (2021) HRLR 3, 132.

³⁶ Roberts, *Satow's Diplomatic Practice* (OUP, 2016), [14.5].

³⁷ Denza, *Commentary on the VCDR* (OUP, 2016), 223; *ibid*, [14.5].

³⁸ VCDR, n34, Article 37; Denza, *ibid*, 319.

and seize her documents.³⁹ Antara cannot point to how only the arresting officers, and not the duty sergeant, knew that Walters had diplomatic immunity.⁴⁰ While the arresting officers may have been negligent in failing to inform the duty sergeant of Walters's diplomatic status,⁴¹ the onus remained on Antara to ensure that Walters was processed as a diplomat, and to hold this omission against Ravaria would turn the notion of good faith investigations on its head.⁴²

Secondly, the VCDR confers inviolability on archives and documents of the mission,⁴³ official correspondence of the mission,⁴⁴ and personal property of the diplomat and family members.⁴⁵ Even if the documents are unidentified by any official marking or taken outside the mission, seizing, retaining, or even merely screening them violates the VCDR.⁴⁶ The documents contained in Walters's briefcase constitute diplomatic correspondence belonging to Ravaria's embassy, yet Antara not only seized and screened them, but made and retained photocopies.⁴⁷

It is not open to Antara to argue that a document's inviolability does not extend to its inadmissibility. The Vienna Convention on the Law of Treaties mandates that treaty terms shall

³⁹ *Compromis*, [35]-[38].

⁴⁰ *Clarifications*, [6].

⁴¹ *Compromis*, [36].

⁴² *US v Leon* (1984) 468 US 897, 919; *R v Harrison* (2009) 2 SCR 494, [22].

⁴³ VCDR, n34, Article 24.

⁴⁴ *Ibid*, Article 27(2).

⁴⁵ *Ibid*, Articles 30, 36(2).

⁴⁶ *Ethiopia's Claim (Partial Award)* (2005) 26 RIAA 407, [44]; *Armed Activities (Congo)* (2005) ICJ Rep 168, [343]; Denza, n37, 160, 229.

⁴⁷ *Compromis*, [36]-[41].

be interpreted in accordance with their ordinary meaning.⁴⁸ The ordinary meaning of “inviolable” is that the object concerned must be kept “sacredly free”.⁴⁹ This is sufficiently broad to preclude admissibility before judicial proceedings as evidence, and is not limited to protection from search and seizure.⁵⁰ The object and purpose of the VCDR must also be considered,⁵¹ which is to ensure the efficient performance of the functions of diplomatic missions.⁵² This supports a reading of inviolability as excluding admission of diplomatic communications, since protecting the privacy of such communications is necessary if diplomats are to communicate freely when representing the interests of their state.⁵³ This explains why this court in *Application of the Interim Accord* did not rely on references to illegally obtained diplomatic cables cited by counsel in oral proceedings.⁵⁴ The PCA⁵⁵ and ICSID⁵⁶ have likewise declined to rely on leaked diplomatic communications. Cases that have admitted such communications can be distinguished, in that either the illegality was committed by a third party and the information was in the public domain,⁵⁷ or the claim was

⁴⁸ (1969) 1155 UNTS 331, Article 31(1).

⁴⁹ *Oxford Dictionary of English* (OUP, 2010).

⁵⁰ Cooper *et al* (eds), *The Oxford Handbook of Modern Diplomacy* (OUP, 2013), [28.4.5.1]; Denza, n37, 158-159; *R (Bancoult No 3) v Secretary of State* (2018) UKSC 3, [20].

⁵¹ VCLT, n48, Article 31(1).

⁵² VCDR, n34, Preamble; *R (Bancoult No 3) v Secretary of State* (2014) EWCA Civ 708, [64].

⁵³ Behrens, *Diplomatic Law in a New Millennium* (OUP, 2017), 223.

⁵⁴ (2011) CR 2011/6, 30, 57; *ibid*, 226.

⁵⁵ *Chagos Arbitration*, n20, [542].

⁵⁶ Behrens, n53, 226.

⁵⁷ Roberts, n36, [13.32]; *Bancoult*, n50, [20].

made by citizens against their own states.⁵⁸ None of these situations apply. Antara is itself responsible for violating diplomatic law in procuring the documents, and the documents have never been publicly disclosed.⁵⁹ If anything, these facts work against Antara.⁶⁰

C. THE DOCUMENTS ARE PROTECTED BY STATE SECRETS PRIVILEGE

Evidence implicating state secrets is privileged owing to a state's sovereign right to the confidentiality of its own secrets.⁶¹ This privilege, which is a general principle of law derived from the legal systems of a representative majority of states,⁶² including common law⁶³ and civilian jurisdictions,⁶⁴ and also reflected in international conventions⁶⁵ and judgements of international tribunals,⁶⁶ exists because the danger to the state's sovereign interests from disclosure outweighs

⁵⁸ *Fayed v Al-Tajir* (1988) QB 712, 736.

⁵⁹ *Clarifications*, [7].

⁶⁰ *Persia International Bank v Council* (2013) CJEU T-493/10, [95].

⁶¹ Zimmermann *et al* (eds), n10, 1379.

⁶² Mosk, Ginsburg, "Evidentiary Privileges in International Arbitration" (2013) 50(2) ICLQ 345, 381.

⁶³ *Evidence Act (India)*, Section 123; *Duncan v Laird* (1942) AC 624, 643; *Al-Haramain v Bush* (2007) 507 F.3d 1190, 1196.

⁶⁴ *Bundesverfassungsgerichts* (1981) 2 BvR 215/81; *Corte Costituzionale* (2009) 106/2009.

⁶⁵ Rome Statute, n23, Article 72; Treaty on the Functioning of the EU (2012) C326/47, Article 346(1)(a).

⁶⁶ *Blaškić (Objection to Subpoenae Duces Tecum)* (1996) IT-95-14-PT, [149]; *EC-Seal Products* (2013) WT/DS400/6, [2.2], [3.4].

any interest of truthful fact-finding.⁶⁷ This court’s jurisprudence, including that of its predecessor,⁶⁸ coheres with this orthodoxy: in one case, it restricted foreign access to confidential documents, even when the contents had already been inadvertently disclosed;⁶⁹ in another, it refused to draw an adverse inference when a party had refused to produce evidence that would have implicated state secrets.⁷⁰ As the documents obtained from Walters’s briefcase were marked “top secret” and concerned Ravarian foreign relations strategies,⁷¹ they constitute privileged state secrets⁷² and are inadmissible.

D. THE RECORDING IS PROTECTED BY SETTLEMENT PRIVILEGE

The inadmissibility of statements from settlement negotiations is a well-established ground of exclusion as recognised by states⁷³ and international tribunals including the PCIJ,⁷⁴ WTO,⁷⁵ and

⁶⁷ *International War Crimes Tribunals Act (Australia)*, Section 26(3); *International War Crimes Tribunals Act (New Zealand)*, Section 57(a); *El-Masri v Tenet* (2006) 437 F.Supp.2d 530, 541.

⁶⁸ *Territorial Jurisdiction of the International Commission of the River Oder* (1929) PCIJ Ser A No 23, 41.

⁶⁹ *Seizure and Detention of Certain Documents and Data* (2014) ICJ Rep 147, [55].

⁷⁰ *Corfu Channel*, n28, 32; *Bosnian Genocide* (2007) ICJ Rep 43, [205]-[206].

⁷¹ *Compromis*, [37].

⁷² Riddell, Plant, *Evidence before the ICJ* (BIICL, 2009), 206.

⁷³ *Goodyear v Chiles Power Supply* (2003) 332 F.3d 976, 981; *New Code of Civil Procedure (France)*, Article 131-14; *September v CMI Business Enterprise* (2018) ZACC 4, [62].

⁷⁴ *Chorzow Factory* (1928) PCIJ Ser A No 17, 51.

⁷⁵ *US-Poultry (China)* (2010) WT/DS392/R, [7.35]-[7.36].

Iran-US Claims Tribunal.⁷⁶ Settlement privilege is predicated on the need to facilitate the candid flow of information between states, which is necessary for negotiations to be effective.⁷⁷ Meetings need not be expressly designed as settlement negotiations for such privilege to apply – just as mediation meetings before third-party neutrals are protected,⁷⁸ so are similarly constituted conciliation meetings,⁷⁹ as reflected in many states’ endorsement of the harmonisation of rules between both modes of dispute settlement.⁸⁰

The recording was the product of a conciliation meeting brokered by the Foreign Minister of Zemin aimed at resolving the diplomatic incident resulting from Antara’s seizure of the documents, and the meeting did result in some agreement being reached on matters concerning Walters.⁸¹ The candid sharing of information pursuant to this objective would not have been possible without the assurance that it would not be used in a way prejudicial to either party. While consent by the other party would allow for the admission of statements in negotiations,⁸² Ravaria never furnished such consent.

⁷⁶ *Mobil Oil v Iran* (1987) 16 Iran-US CTR 3, [162].

⁷⁷ *Frontier Dispute*, n15, [73].

⁷⁸ *Maritime Delimitation and Territorial Questions* (1994) ICJ Rep 112, [40].

⁷⁹ Berger, “The Settlement Privilege” (2008) 24(2) *Arbitration International* 265, 272.

⁸⁰ UNGA, *Model Law (International Commercial Mediation)* (2019) A/RES/73/199.

⁸¹ *Compromis*, [42]-[43].

⁸² *Jurisdiction of the EC of the Danube* (1927) PCIJ Ser B No 14, 32.

II. RAVARIA’S ALLEGED FINANCIAL CONTRIBUTIONS AND CYBER-OPERATIONS IN CONNECTION WITH THE SUTHAN REFERENDUM WERE CONSISTENT WITH INTERNATIONAL LAW

Ravaria has always had strong ties to Sutha. Both states were historically part of the Zemin Empire and connected by the Velan faith, the state religion of Ravaria.⁸³ While Sutha had been incorporated into Antaran territory as provided for by the Treaty of Singapore, this was a provisional arrangement as Sutha was not self-sufficient upon the collapse of the Zemin Empire.⁸⁴ The treaty also provided for the option to hold a referendum to determine Sutha’s independence, and guaranteed Ravarian pilgrims the right to visit the Kuvil Shrine.⁸⁵ However, exercising this right was made impossible in April 2020 when Antara closed the borders to Ravaria, and Antara even arrested Velans who gathered peacefully at the shrine to express their faith.⁸⁶ With the referendum having concluded in favour of independence,⁸⁷ Antara now claims Ravaria has violated international law by attempting to influence its outcome through financial contributions to pro-independence organisations and disseminating misinformation, but **(A)** state responsibility cannot be established for Hunland and SAD’s actions. In any event, **(B)** Ravaria did not unlawfully interfere in Antara’s internal affairs, or **(C)** violate international human rights law.

⁸³ *Compromis*, [2], [5].

⁸⁴ *Compromis*, [4].

⁸⁵ *Compromis*, [6]-[8].

⁸⁶ *Compromis*, [15].

⁸⁷ *Compromis*, [30].

A. STATE RESPONSIBILITY CANNOT BE ESTABLISHED

(1) The operation of the Lunar Botnet is not attributable to Ravaria

Acts committed by a non-state entity can only be attributed to the state where the entity is acting under its effective control,⁸⁸ which may be established from the state directing the specific act in question.⁸⁹ The threshold to find effective control is a high one, as illustrated by this court's decision in *Nicaragua*, where the US' financing, organising, training, equipping, and planning of operations of the *contras* were insufficient to attribute their actions to the US.⁹⁰

The Lunar Botnet was operated by the Suthans against Domination (“SAD”), a non-profit think tank.⁹¹ As the documents illegally obtained from Walters and the recording from the conciliation meeting are inadmissible as argued, there is no basis to find that Ravaria even knew of SAD's operation of the Lunar Botnet, let alone that it had effective control over it. In any event, all the documents show is that Ravaria had authorised the use of embassy funds to support pro-independence efforts, and the Ravarian External Affairs Ministry had approved of SAD operating the botnet from a server within SAD's headquarters.⁹² There is no evidence that Ravaria had sanctioned specific acts of spreading misinformation, equipped SAD with the botnet, or assisted in planning its operations. Additionally, while the acts of a private entity may be attributed to a state if the state acknowledges and adopts those acts as its own, mere endorsement of the acts does not suffice for this purpose unless it is repeated, explicit, and emanates from an official statement

⁸⁸ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) A/56/10, Article 8; *Bosnian Genocide*, n70, [398].

⁸⁹ *Bayindir v Pakistan (Award)* (2009) ICSID ARB/03/29, [125]; *Hamester v Ghana* (2010) ICSID ARB/07/24, [179].

⁹⁰ *Military and Paramilitary Activities in and Against Nicaragua* (1986) ICJ Rep 14, [115].

⁹¹ *Compromis*, [16], [37].

⁹² *Compromis*, [37].

or decree.⁹³ The mere “approval” of SAD’s operation of the Lunar Botnet⁹⁴ fails to meet this high threshold.

(2) *Hunland’s posts are not attributable to Ravaria*

There is also no evidence to show that Hunland was under Ravaria’s effective control. Beyond sharing the same political goal of Suthan independence,⁹⁵ Ravaria did not have direct links with him. The documents obtained from Walters also do not show that Hunland was privy to the Ravarian Intelligence Service’s plan to initiate a pro-independence campaign and promote his presidential candidacy.⁹⁶ Ravaria has also not acknowledged or adopted Hunland’s acts. When Hunland was accused of posting misinformation on Pano, all Ravaria did was to say that the suspension order issued against him was incompatible with democratic values and fundamental rights.⁹⁷ This statement would not even amount to an endorsement of his conduct.

B. RAVARIA DID NOT UNLAWFULLY INTERFERE IN ANTARA’S INTERNAL AFFAIRS

Even assuming state responsibility can be established, Ravaria’s acts are not unlawful since there is widespread recognition that states can exert political influence and persuasion beyond their borders unless they reach a certain degree of severity.⁹⁸ The acts here are not sufficiently severe.

⁹³ *Tehran Hostages*, n21, [73]-[74]; *Makuchyan v Azerbaijan* (2020) ECtHR 17247/13, [110]-[120].

⁹⁴ *Compromis*, [37c].

⁹⁵ *Compromis*, [5], [14].

⁹⁶ *Compromis*, [37d].

⁹⁷ *Compromis*, [29].

⁹⁸ Damrosch, “Non-Intervention and Nonforcible Influence over Domestic Affairs” (1989) 83(1) AJIL 1, 2; Hollis, Ohlin, *Defending Democracies* (OUP, 2021), 233-234.

First, Antara cannot argue that Ravaria has violated the principle of non-intervention under international custom, which prohibits a state from using coercive means to intervene in matters lying in another state's *domaine réservé*.⁹⁹ For an act to amount to coercion, it must effectively deprive the target state of control over matters in its sovereign prerogative through pressures that cannot be reasonably resisted.¹⁰⁰ While there has been some state practice suggesting that electoral manipulation via disrupting vote-counts would amount to coercion,¹⁰¹ the same cannot be said of mere election propaganda and lack of transparency.¹⁰² This was observed in respect of alleged cyber-interference during the 2016 US Presidential Election, which involved the impersonation of US citizens on social media by foreign agents to amplify particular political narratives.¹⁰³

Additionally, at all material times, Antara retained control over its sovereign prerogative to regulate foreign funding to political parties, but simply chose not to exercise this control because its domestic campaign finance laws did not prohibit foreign funding.¹⁰⁴ Thus, even if Ravaria is found responsible for financing the SAD and operating the Lunar Botnet, this would not reach the requisite level of coercion. Antara and its electorate were free to form their own opinions

⁹⁹ *Armed Activities (Congo)*, n46, [161]-[165].

¹⁰⁰ Jamnejad, Wood, "The Principle of Non-Intervention" (2009) 22(2) *Leiden JIL* 345, 348; Schmitt (ed), *Tallinn Manual 2.0* (CUP, 2017), 317.

¹⁰¹ The UK, *Cyber and International Law in the 21st Century* (2018).

¹⁰² Ramírez, Bauzá, *Security in the Global Commons and Beyond* (Springer, 2021), 146-147.

¹⁰³ Watts, "International Law and Proposed US Responses to the DNC Hack" (2016) <<https://www.justsecurity.org/33558/international-law-proposed-u-s-responses-d-n-c-hack>> (accessed 10 January 2022).

¹⁰⁴ *Compromis*, [39].

concerning the information propagated on Pano, and Antara was able to resist and carefully dismiss the effect of any misinformation whose dissemination might be attributed to Ravaria.¹⁰⁵

Secondly, Antara cannot argue that there has been any violation of its sovereignty, which is only established if an act has caused physical damage in another state or usurped a state's exercise of inherently governmental functions.¹⁰⁶ The claim by Antara's Data Protection and Cybersecurity Agency ("DPCA") that the takedown of the botnet was necessary to prevent "possibly irreparable harm"¹⁰⁷ does not amount to objective evidence, let alone evidence that provides a "clear and precise picture" of the facts, as is required for such a claim to succeed before this court.¹⁰⁸ There was also no usurpation of any inherently governmental function because in respect of elections, only acts such as the blocking of access to essential election information disseminated by the government, or the disruption or hacking of vote tallying equipment, would reach the gravity required.¹⁰⁹ Spreading misinformation or providing financial support to political parties would not.¹¹⁰

¹⁰⁵ *Compromis*, [17], [23], [26].

¹⁰⁶ *Tallinn Manual*, n100, 20-22; Schmitt, "Autonomous Cyber Capabilities" (2020) 96 ILS 549, 557.

¹⁰⁷ *Compromis*, [33].

¹⁰⁸ *Land and Maritime Boundary* (2002) ICJ Rep 303, [322]; Higgins, *Themes and Theories* (OUP, 2009), 1101.

¹⁰⁹ Schmitt, "Foreign Cyber Interference in Elections" (2021) 97 ILS 739, 753.

¹¹⁰ NATO Cooperative Cyber Defence Centre, "Election Interference" <https://cyberlaw.ccdcoe.org/wiki/Scenario_01:_Election_interference> (accessed 10 January 2022).

Finally, while the VCDR prohibits diplomats from interfering in the internal affairs of the receiving state,¹¹¹ the *travaux préparatoires* confirms that this prohibition applies only to comments made or actions undertaken in the diplomat's personal capacity.¹¹² As Ambassador Walters was acting under the instructions of Ravaria,¹¹³ his channelling of the embassy funds is not prohibited under this rule. Even assuming the prohibition applies, it does not extend to foreign political financing. State practice in applying the treaty is relevant to the interpretation of the treaty obligation,¹¹⁴ and shows that many states including Austria, Denmark, Germany, and New Zealand continue to allow foreign states to provide financial support to local political actors for reasons such as strengthening ties with ideologically similar political parties and promoting similar political structures with neighbouring states.¹¹⁵ Any funding Ravaria might have provided to SAD would simply be no more than permissible financial support of ideological allies. In any event, human rights obligations are permissive *lex specialis* rules which take priority over any prohibition against diplomatic interference under the VCDR.¹¹⁶ Any funding which might have been provided was only aimed at furthering the rights of Suthans, including the right to freedom of religion and right to vote which were impaired by Antara's restrictions.¹¹⁷

¹¹¹ VCDR, n34, Article 41(1).

¹¹² ILC, *Yearbook, Volume I* (1957) A/CN.4/SER.A/1957/1, 147; Denza, n37, 377.

¹¹³ *Compromis*, [37].

¹¹⁴ VCLT, n48, Article 31(3)(b).

¹¹⁵ Damrosch, n98, 27; IDEA, "Is There a Ban on Donations from Foreign Interests to Political Parties?" (2021) <<https://www.idea.int/data-tools/question-view/527>> (accessed 10 January 2022).

¹¹⁶ Roberts, n36, [14.54]; Behrens, "Diplomatic Funding under International Law" (2017) 39(3) *Houston JIL* 645, 674, 693.

¹¹⁷ *Compromis*, [8], [22], [25].

C. RAVARIA DID NOT VIOLATE INTERNATIONAL HUMAN RIGHTS LAW

(1) Ravaria did not owe extraterritorial obligations to Antarans

Ravaria is party¹¹⁸ to the International Covenant on Civil and Political Rights (“**ICCPR**”)¹¹⁹ and International Covenant on Economic, Social, and Cultural Rights (“**ICESCR**”).¹²⁰ However, states only owe human rights obligations to individuals subject to their jurisdiction.¹²¹ This is because jurisdiction is primarily territorial, and can only be extended if states exercise effective control over another state’s territory, or its individuals where there are isolated and specific acts of control involving an element of proximity.¹²² This is a high threshold to meet, and examples include the military occupation of a territory and individuals being subject to military force, respectively.¹²³ Any alleged misinformation campaign neither created effective control over Antaran territory nor targeted specific Antarans to bring them under such control.

(2) Ravaria did not violate the ICCPR

Even assuming the ICCPR applies, Ravaria did not violate it. While the Human Rights Committee (“**HRC**”), the chief interpretive body of the ICCPR whose interpretations are accorded great weight,¹²⁴ has stated that the ICCPR provides for a right to vote without manipulative

¹¹⁸ *Compromis*, [46].

¹¹⁹ (1976) 999 UNTS 171.

¹²⁰ (1976) 993 UNTS 3.

¹²¹ *The Wall (Advisory Opinion)* (2004) ICJ Rep 136, [111]-[112]; HRC, *General Comment 31* (2004) CCPR/C/21/REV.1/ADD.13, [10].

¹²² *The Wall*, *ibid*, [111]-[112]; *Georgia v Russia (II)* (2021) ECtHR 38263/08, [132]-[133].

¹²³ *Öcalan v Turkey* (2005) 41 EHRR 45, [91]; *Georgia*, *ibid*, [130]-[132].

¹²⁴ *Ahmadou Sadio Diallo* (2010) ICJ Rep 639, [66].

interference,¹²⁵ the contemporary examples given as to what amounts to such interference, be it gerrymandering, unfair election regulations, or perpetuating voter fraud,¹²⁶ are all acts distinct from, and graver than, the misinformation campaign alleged by Antara. If anything, Article 19(2) of the ICCPR guarantees the right to seek, receive, and impart information of all kinds.¹²⁷ This includes potential misinformation, even if propagated during an election.¹²⁸ This is consistent with the ideal of the marketplace of ideas, which is premised on the belief that the most defensible version of truth only emerges when opposing ideas are permitted to compete in the public sphere.¹²⁹ The fact that the Antaran government and independent observers were able to dispute the alleged misinformation on Pano¹³⁰ reinforces the conclusion that it should not be lightly assumed that Antarans were incapable of discernment when exercising their freedom of expression and right to vote.

(3) *Ravaria did not violate the ICESCR*

Likewise, Antara cannot argue that Ravaria has violated the right of self-determination protected in the ICESCR and ICCPR,¹³¹ which entails the right of a people to choose their own political

¹²⁵ HRC, *General Comment 25* (1996) CCPR/C/21/REV.1/ADD.7, [19].

¹²⁶ HRC, *Concluding Observations on Mongolia* (2017) CCPR/C/MNG/CO/6, [39]; HRC, *Concluding Observations on Bahrain* (2018) CCPR/C/BHR/CO/1, [63].

¹²⁷ HRC, *General Comment 34* (2011) CCPR/C/GC/34, [11].

¹²⁸ UNHRC, *Special Rapporteur, Promotion and Protection of the Right to Freedom of Opinion and Expression* (2021) A/HRC/47/25, [47].

¹²⁹ *Gertz v Welch* (1974) 418 US 323, 339.

¹³⁰ *Compromis*, [17], [23].

¹³¹ ICESCR, n119, Article 1; ICCPR, n120, Article 1.

regime.¹³² It is striking that this right has only been successfully invoked in cases involving decolonisation or foreign occupation,¹³³ and has never been applied outside these contexts.¹³⁴ In any event, the content of the obligation to respect self-determination has never been defined with sufficient specificity, with no international consensus on whether it applies to cyber-interferences with elections.¹³⁵ Unless Antara can prove that self-determination extends to these circumstances,¹³⁶ any alleged financial contribution or misinformation campaign on Ravaria's part cannot amount to a violation of this right.

Antara also cannot argue that Ravaria violated the right to health under Article 12 of the ICESCR. This right is violated if states deliberately misrepresent vital information necessary for the protection of health or the effective implementation of health policies.¹³⁷ But because the right to health is a "fundamental human right indispensable for the exercise of other rights"¹³⁸ and is inextricably linked with the right to life,¹³⁹ any claim of a violation is a charge of exceptional

¹³² Cassese, *Self-Determination of Peoples* (CUP, 1995), 137.

¹³³ *The Wall*, n121, [122]; *Chagos Archipelago (Advisory Opinion)* (2019) ICJ Rep 95, [177].

¹³⁴ UNGA, *Declaration on the Inadmissibility of Intervention and Interference* (1981) A/36/103, 80; Francisco, *Self-Determination and Humanitarian Secession* (Springer, 2017), 19; Schmitt, "Cyber Election Meddling in the Grey Zones of International Law" (2018) 19(1) *Chicago JIL* 30, 55-56.

¹³⁵ Hollis, Ohlin, n98, 192.

¹³⁶ *Asylum Case* (1949) ICJ Rep 225, 276.

¹³⁷ CESCR, *General Comment 14* (2000) E/C.12/2000/4, [50]; *Special Rapporteur*, n128, [49].

¹³⁸ *GC 14*, *ibid*, [1].

¹³⁹ HRC, *General Comment 36* (2018) CCPR/C/GC/36, [26].

gravity and must be proven by conclusive evidence.¹⁴⁰ Although an NGO claimed there were Pano accounts generating misinformation about Antara's pandemic regulations,¹⁴¹ there is no conclusive evidence linking these accounts to Ravaria. There is also no conclusive evidence that either the misinformation, or Hunland's claims that no COVID-19 deaths had occurred in Sutha,¹⁴² had or was likely to lead to any loss of life.

III. ANTARA'S ORDER SUSPENDING PROFESSOR HUNLAND'S PANO ACCOUNT IS IN VIOLATION OF INTERNATIONAL LAW, AND ANTARA MUST THEREFORE RESCIND THE ORDER

Hunland, a respected Velan scholar with the third-largest Pano following in the Benthamian Peninsula, was widely regarded as an outspoken champion of the Suthan independence movement, and a vocal critic of the Antaran government.¹⁴³ Yet, days before the Suthan referendum was held, Antara issued a year-long suspension order under its Protect Antaran Cyberspace Act ("PACA") against him and also removed all his posts worldwide on the basis that he had posted inaccurate and misleading material on Pano.¹⁴⁴ This cut Hunland off from his sizable Pano following, at a time when physical rallies and other forms of political organisation were difficult, if not impossible, owing to Antara's COVID-19 social gathering restrictions.¹⁴⁵ The suspension was later extended by six months, without the possibility of judicial review.¹⁴⁶ Antara's order should

¹⁴⁰ *Corfu Channel*, n28, 17.

¹⁴¹ *Compromis*, [17].

¹⁴² *Compromis*, [23].

¹⁴³ *Compromis*, [13]-[16].

¹⁴⁴ *Compromis*, [14], [18], [21], [26]; *Clarifications*, [10].

¹⁴⁵ *Compromis*, [15].

¹⁴⁶ *Clarifications*, [3].

be rescinded as (A) Ravaria has standing, (B) Antara violated international human rights law, and (C) this court can, and should, grant rescission.

A. RAVARIA HAS STANDING

(1) Ravaria can exercise diplomatic protection over Hunland

Although Hunland has spent his professional and political life in Sutha since the 1980s, he remains a Ravarian citizen.¹⁴⁷ Since the state of nationality is entitled to exercise diplomatic protection over its citizens,¹⁴⁸ Ravaria can bring this claim on behalf of Hunland. Antara cannot rely on this court's decision in *Nottebohm*¹⁴⁹ to argue that Hunland no longer possessed an effective or genuine connection with Antara. First, the question of a person's effective or genuine connection with a state only arises when that person has multiple nationalities,¹⁵⁰ which is not the case here. Secondly, *Nottebohm* involved a German-born national residing in Guatemala naturalised as a Liechtenstein citizen despite only staying there for weeks. It was unsurprising that this court held that such tenuous links would preclude Liechtenstein from exercising diplomatic protection.¹⁵¹ The facts here are again quite different.

As regards the requirement for a national to exhaust local remedies before diplomatic protection can be availed, this is neither an absolute nor inflexible rule and much depends on the context.¹⁵²

¹⁴⁷ *Compromis*, [13].

¹⁴⁸ ILC, *Draft Articles on Diplomatic Protection* (2006) A/61/10, Article 3.

¹⁴⁹ (1955) ICJ Rep 4.

¹⁵⁰ DADP, n148, Article 6.

¹⁵¹ *Nottebohm*, n149, 25.

¹⁵² *Ahmadou Sadio Diallo (Preliminary Objections)* (2007) ICJ Rep 582, [44].

The DPCA filed a 74-page petition for Hunland to be suspended on 5 February 2021.¹⁵³ Hunland responded by submitting a written statement on why his use of Pano was protected by international law, but the Antaran court issued a judgment on 15 February, asserting that Hunland had “no right to spread lies or to incite bloodshed”.¹⁵⁴ Hunland then attempted to file a suit in Zemin, where Pano was incorporated, but his claim was summarily dismissed.¹⁵⁵ When he applied to an Antaran federal court for an injunction against the suspension, the court held that he had no standing.¹⁵⁶ This was upheld by the final appellate court.¹⁵⁷ As the local remedies requirement presupposes the reasonable possibility of effective redress,¹⁵⁸ in the circumstances, Hunland did his part.

(2) *Ravaria can rely on erga omnes partes standing*

Both Antara and Ravaria are parties to the ICCPR.¹⁵⁹ Standing can therefore be granted on an *erga omnes partes* basis.¹⁶⁰ According to the HRC, each party to the ICCPR has a legal interest in ensuring other states parties perform their treaty obligations;¹⁶¹ this is all the more so with respect

¹⁵³ *Compromis*, [26].

¹⁵⁴ *Compromis*, [27].

¹⁵⁵ *Compromis*, [11], [28].

¹⁵⁶ *Compromis*, [28].

¹⁵⁷ *Clarifications*, [2],

¹⁵⁸ *Diallo (Preliminary Objections)*, n152, [44].

¹⁵⁹ *Compromis*, [46].

¹⁶⁰ *Obligation to Prosecute or Extradite* (2012) ICJ Rep 422, [68]; *The State of Palestine against Israel* (2019) CERD/C/100/5, [3.33]; *Genocide Convention (The Gambia v Myanmar)* (2020) ICJ Rep 3, [41].

¹⁶¹ *GC 31*, n121, [2].

to core obligations such as the freedom of expression, religion, and assembly,¹⁶² which, as argued below,¹⁶³ are violated here. That the object and purpose of the ICCPR is to secure the “ideal of free human beings enjoying civil and political freedom”¹⁶⁴ reinforces this conclusion.¹⁶⁵ The existence of an optional inter-state mechanism for complaints before the HRC also does not diminish the interest of one state party in another’s discharge of their obligations, as this mechanism is not the only method by which this interest can be asserted.¹⁶⁶

(3) *Ravaria can rely on erga omnes standing*

Standing can also be established *erga omnes* with respect to obligations that are important and communitarian, or inherently detached from the interests of individual states; examples include the freedom of expression, religion, and assembly.¹⁶⁷ The adoption of this principle is reflected in the jurisprudence of various international tribunals.¹⁶⁸ It is also reflected by the practice of states

¹⁶² HRC, *General Comment 22* (1993) CCPR/C/21/REV.1/ADD.4, [1]; *GC 34*, n127, [2]; HRC, *General Comment 37* (2020) CCPR/C/GC/37, [2].

¹⁶³ *Memorial*, III.B.

¹⁶⁴ ICCPR, n119, Preamble.

¹⁶⁵ *Obligation to Prosecute*, n160, [68].

¹⁶⁶ *GC 31*, n121, [2].

¹⁶⁷ *GC 22*, n162, [1]; *GC 34*, n127, [2]; *GC 37*, n162, [1].

¹⁶⁸ *Activities in the Area (Advisory Opinion)* (2011) ITLOS 17, [179]-[180]; *Whaling in the Antarctic* (2014) ICJ Rep 226.

in commencing claims on an *erga omnes* basis, even where states have a special interest in the dispute which might serve as an alternative basis for standing.¹⁶⁹

(4) *Ravaria is a specially affected state*

States have standing to bring claims based on obligations owed to all parties where they have a special interest in the matter that is legal, concrete, and personal.¹⁷⁰ Ravaria has a legal interest in whether Antara has violated its obligations under the ICCPR. It also has a concrete and personal interest, as Hunland is a Ravarian whom it has the right to protect.¹⁷¹

B. ANTARA VIOLATED INTERNATIONAL HUMAN RIGHTS LAW

(1) *Antara violated Hunland's right to freedom of expression*

State interferences with the freedom of expression protected by Article 19 of the ICCPR can only be justified if they are provided by law, necessary, and proportionate.¹⁷² An interference fulfils the legality requirement only if the law prescribing it is precise enough to allow individuals to regulate their conduct and delineate the bounds of executive power so as to guard against unfettered discretion.¹⁷³ Section 5 of the PACA – the basis of Hunland's suspension¹⁷⁴ – fails this test because

¹⁶⁹ Memorial of Portugal, *East Timor* (1991), [8.13]; Memorial of the Marshall Islands, *Cessation of the Nuclear Arms Race and Nuclear Disarmament* (2015), [26]-[28]; Application Instituting Proceedings, *Genocide Convention (The Gambia v Myanmar)* (2019), [121]-[127].

¹⁷⁰ ARSIWA, n88, Article 42; *Legality of the Use of Force* (2004) ICJ Rep 279, [64] (Separate Opinion, Judge Kreća).

¹⁷¹ OHCHR, *Declaration on Human Rights Defenders* (1998) A/RES/53/144.

¹⁷² GC 34, n127, [22].

¹⁷³ *Ibid*, [25].

¹⁷⁴ *Compromis*, [26].

while it defines “election misinformation” to mean false or misleading allegations, it provides no guidance on how these allegations would be determined. Similarly worded legislation has been criticised on this basis.¹⁷⁵ Antara cannot argue that Sub-section (3), which provides that a suspension order may be issued if necessary to protect “national security, public order, or public safety”, makes the legislation more precise. Similar terms in the domestic legislation of China, France, Kenya, and Spain, have been criticised for conferring unfettered discretion upon the authorities.¹⁷⁶ Additionally, the extension of Hunland’s suspension is not legal as it is neither provided for in Section 5, nor contains adequate safeguards in the form of judicial review.¹⁷⁷

Antara also cannot show how the suspension was necessary or proportionate. First, although Antara claimed that Hunland’s posts propagated falsehoods and were likely to incite imminent violence,¹⁷⁸ this does not withstand scrutiny. The post on 22 November about the number of COVID deaths could not be demonstrably proven true or false, given the vastly different methodologies in calculating COVID deaths.¹⁷⁹ The post on 8 December about ending Antaran oppression was firmly in the realm of opinion, rather than fact. The post on 4 November claiming that there were plans to turn the Kuvil Shrine into an amusement park was not directly refuted by the Interior Minister – all the picture showed was that he could not have had a secret meeting in

¹⁷⁵ OHCHR, “Joint Declaration on Freedom of Expression and ‘Fake News’” (2017) <<https://www.osce.org/fom/302796?download=true>> (accessed 10 January 2022), [2(a)]; *Special Rapporteur*, n128, [54].

¹⁷⁶ UNGA, *Promotion and Protection of the Right to Freedom of Opinion and Expression* (2016) A/71/373, [13]-[14].

¹⁷⁷ *Clarifications*, [3].

¹⁷⁸ *Compromis*, [26]-[27].

¹⁷⁹ WHO, “Estimating Mortality from COVID-19” <<https://www.who.int/news-room/commentaries/detail/estimating-mortality-from-covid-19>> (accessed 10 January 2022).

Antara on 20 July.¹⁸⁰ As for the post depicting police brutality, this was simply counter-asserted by Pano as inauthentic, with no particularisation whatsoever – the sole established fact was that it was only when the Antaran police tried to break up his rally on 31 January that injuries and deaths ensued.¹⁸¹

Secondly, Article 19 of the ICCPR protects all forms of expression, including those that might be offensive or false,¹⁸² and speech by political figures have always been afforded greater protection rather than subject to greater restriction.¹⁸³ This is why purported regulation of misinformation during elections must not be done at the expense of chilling political debate and suppressing alternative perspectives.¹⁸⁴ Instead of suspending Hunland and deleting all his posts worldwide, Antara could have applied for a takedown of posts thought to be problematic.¹⁸⁵ There was also no need to suspend the account for a year when the referendum would conclude within two weeks of the order.¹⁸⁶

Finally, while Antara should restrict speech that advocates hatred constituting incitement to violence under Article 20(2) of the ICCPR, the requisite thresholds have not been met. Antara

¹⁸⁰ *Compromis*, [23].

¹⁸¹ *Compromis*, [25].

¹⁸² *Special Rapporteur*, n128, [9]-[38].

¹⁸³ *Canese v Paraguay* (2004) IACtHR Ser C No 111, [103]; *Bodrožić v Serbia and Montenegro* (2006) CCPR/C/85/D/1180/2003, [7.2]; *Good v Botswana* (2010) ACHPR 313/05, [198]; *ibid*, [42].

¹⁸⁴ UNHRC, *Special Rapporteur, Disease Pandemics* (2020) A/HRC/44/49, [18]; *Special Rapporteur*, n128, [42]-[54].

¹⁸⁵ *Compromis*, Annex 1.

¹⁸⁶ *Compromis*, [27], [31].

must show that Hunland clearly intended to incite hostility,¹⁸⁷ and although calling for violence against specific communities will meet this threshold,¹⁸⁸ Hunland was merely questioning the motives behind Antara's pandemic regulations which blocked Velan adherents from accessing their sacred shrine.¹⁸⁹ Antara must also show that there was a likelihood of hostility from the speech.¹⁹⁰ However, in pre-election debates, highly charged language against incumbent governments is often interpreted by international tribunals as legitimate expressions of dissatisfaction, rather than incitements to violence.¹⁹¹ Hunland's call to "take the situation into our own hands" and that "Antara will not give up our beautiful land without a fight"¹⁹² should not be treated differently.

(2) *Antara violated Hunland's right of peaceful assembly*

Article 21 of the ICCPR protects the right of peaceful assembly, which extends to online assemblies.¹⁹³ This right is closely linked to the freedom of expression, as assemblies often serve expressive purposes.¹⁹⁴ Although the suspension targeted Hunland's posts, it also prevented his use of all of Pano's other features, including its messaging and livestreaming functions, and the

¹⁸⁷ UNHRC, *Rabat Plan of Action* (2013) A/HRC/22/17/ADD.4, [18], [22].

¹⁸⁸ *Rabbae v The Netherlands* (2007) CCPR/C/117/D/2124/2011, [10.4]; *Perincek v Switzerland* (2015) ECtHR 27510/08, [196].

¹⁸⁹ *Compromis*, [15]-[16].

¹⁹⁰ *Rabat Plan*, n187, [29].

¹⁹¹ *Coleman v Australia* (2003) CCPR/C/87/D/1156/2003, [7.3]; *Donoso v Panama* (2009) IACtHR Ser C No 193, [121].

¹⁹² *Compromis*, [23].

¹⁹³ *GC 37*, n162, [6].

¹⁹⁴ *Ibid*, [4].

creation of private groups.¹⁹⁵ Antara cannot justify restricting Hunland’s rights on the basis that violence had occurred at his rally. Antara’s own actions in breaking up the rally contributed to the outbreak of violence,¹⁹⁶ and further constituted a violation of its obligation to refrain from dispersing assemblies outside of exceptional cases.¹⁹⁷ That the rally contravened Antara’s pandemic regulations does not place participants outside the scope of protection afforded by Article 21.¹⁹⁸ By suspending his account, Antara prevented Hunland from meaningfully exercising his right to assembly even as the country was voting on something as important as an independence referendum.

(3) *Antara violated Hunland’s right to freedom of religion*

Where expressions amount to manifestations of religious beliefs in Article 18(3),¹⁹⁹ restrictions can only be imposed if prescribed by law and necessary.²⁰⁰ By suspending Hunland’s Pano account when physical gatherings had been restricted, Antara deprived him of a vital avenue to share his Velan beliefs online, and to attend online community meetings with other Velans in accordance with their religious practice.²⁰¹ With the manifestation of religious belief being closely intertwined

¹⁹⁵ *Compromis*, [11].

¹⁹⁶ *Compromis*, [25].

¹⁹⁷ *GC 37*, n162, [96].

¹⁹⁸ *Frumkin v Russia* (2016) ECtHR 74568/12, [97]; *ibid*, [16].

¹⁹⁹ *GC 22*, n162, [4].

²⁰⁰ *Bekzhan v Kazakhstan* (2021) CCPR/C/130/D/2661/2015, [9.6].

²⁰¹ *Compromis*, [2], [15], [22]-[23].

with the freedom of expression,²⁰² the suspension order was similarly an impermissible violation of Hunland's right to manifest his religious beliefs.

C. THIS COURT CAN, AND SHOULD, ORDER RESCISSION

Under international custom, states that have suffered an international wrong are entitled to restitution as a form of reparation for injury, if re-establishing the situation which existed before the commission of the wrongful act is not materially impossible, or disproportionately burdensome on the wrongdoing state as compared to compensation.²⁰³ Antara would not be visited with these burdens if the suspension is lifted. Additionally, the rescission of a judicial measure that is inconsistent with a state's international law obligations is a form of restitution²⁰⁴ which this court can and has granted.²⁰⁵ And while Ravaria and Antara have agreed to negotiate on the modalities for the execution of this court's judgment,²⁰⁶ this does not preclude this court from ordering rescission. In *Gabčíkovo-Nagymaros*, where a similar provision was included in that *compromis*, this court still found that compensation was owed by Hungary.²⁰⁷

²⁰² *Ross v Canada* (2000) CCPR/C/70/D/736/1997, [11.8].

²⁰³ ARSIWA, n88, Article 35; *Pulp Mills* (2010) ICJ Rep 14, [273].

²⁰⁴ ARSIWA, *ibid*, Article 35, [5].

²⁰⁵ *Arrest Warrant* (2002) ICJ Rep 3, [78].

²⁰⁶ *Compromis*, Annex 1, Section 5(1)(b).

²⁰⁷ (1997) ICJ Rep 88, [2], [155].

IV. ANTARA'S INTERFERENCE WITH COMPUTERS AND DEVICES OPERATING ON RAVARIAN SOIL, RESULTING FROM THE TAKE-DOWN OF THE LUNAR BOTNET, VIOLATED INTERNATIONAL LAW

After Antara learned of the Lunar Botnet, the DPCA, a state organ established under Antaran law, secretly launched Operation Moonstroke to hack the botnet's server remotely.²⁰⁸ This hack, which involved Antara's removal of web-shells, affected 5,000 computers and devices in Ravarian territory and an unknown number in other states, but consistent with its plan to disable the botnet unilaterally, Antara did not inform Ravaria about this intrusion.²⁰⁹ It was only when a newspaper reported the hack a month later that Antara was compelled to publicly acknowledge the operation, and even then, it claimed that it was justified to do so because "territory is irrelevant on the internet highways".²¹⁰ Although Antara alleges that Ravaria is responsible for the botnet's operation, (A) no issue of clean hands arises to bar Ravaria from claiming that (B) Operation Moonstroke violated international law, and (C) Antara cannot justify its conduct.

A. THERE IS NO ISSUE OF CLEAN HANDS

The doctrine of clean hands – which if successfully invoked can bar a claim – remains a contentious one at international law.²¹¹ This court has consistently declined to apply it, despite having had opportunities to do so.²¹² But even if the doctrine is part of international law, it would only bar the bringing of a claim by a party engaged in continual non-performance of an identical

²⁰⁸ *Compromis*, [12], [32].

²⁰⁹ *Compromis*, [32]-[34].

²¹⁰ *Compromis*, [33].

²¹¹ ILC, *Second Report on State Responsibility* (1999) A/CN.4/498/ADD.2, 83; *Veteran Petroleum v Russia* (2014) PCA 2005-05/AA228, [1358].

²¹² *Oil Platforms* (2003) ICJ Rep 161, [100]; *Iranian Assets (Preliminary Objections)* (2019) ICJ Rep 7, [122].

or reciprocal obligation.²¹³ As any Ravarian action which might give rise to an alleged breach of international law has ceased,²¹⁴ this fundamental requirement of the doctrine is not fulfilled.

B. OPERATION MOONSTROKE VIOLATED INTERNATIONAL LAW

(1) Antara violated the duty to cooperate

Article 1(3) of the UN Charter enshrines the principle of “international cooperation in solving international problems”. Flowing from this principle is the customary duty to cooperate.²¹⁵ Though originally applied in the contexts of environmental law and human rights, this duty now exists in cyberspace, and requires states to collaborate with other states who might be affected by transboundary cyberattacks when taking action against them.²¹⁶ This can be seen from widespread and consistent practice in inter-state cooperation when taking down transborder botnets, such as the Emotet,²¹⁷ Rammit,²¹⁸ and Simda botnets.²¹⁹ *Opinio juris* may be derived from affirmations of

²¹³ *Iranian Assets*, *ibid*, [6] (Separate Opinion, Judge Brower).

²¹⁴ *Compromis*, [32].

²¹⁵ Simma *et al* (eds), *The UN Charter* (OUP, 2012), 109.

²¹⁶ Viñuales, *The UN Friendly Relations Declaration at 50* (CUP, 2020), 115-120.

²¹⁷ US DOJ, “Emotet Botnet Disrupted in International Cyber Operation” (2021) <<https://www.justice.gov/opa/pr/emotet-botnet-disrupted-international-cyber-operation>> (accessed 10 January 2022).

²¹⁸ Europol, “Botnet Taken Down Through International Law Enforcement Cooperation” (2015) <<https://www.europol.europa.eu/newsroom/news/botnet-taken-down-through-international-law-enforcement-cooperation>> (accessed 10 January 2022).

²¹⁹ Interpol, “Interpol Coordinates Global Operation to Take Down Simda Botnet” (2015) <<https://www.interpol.int/en/News-and-Events/News/2015/INTERPOL-coordinates-global-operation-to-take-down-Simda-botnet>> (accessed 10 January 2022).

inter-state cooperation in cyberspace made by states such as China,²²⁰ Estonia,²²¹ Finland,²²² and Russia.²²³ This need for cooperation stems from the fact that botnets are complex and require comprehensive analysis and cooperation from all affected states, and it is only by “cooperating that the states concerned can jointly manage the risks of damage”,²²⁴ without infringing upon the sovereignty of other states.²²⁵ Thus, although the Lunar Botnet’s command-and-control server was discovered to be in Antara,²²⁶ given the potential effects of a takedown operation on devices in Ravaria, Antara was obligated to collaborate with Ravaria in taking down the botnet. Even if Antara was not aware of any infected devices beyond its borders,²²⁷ it should have first taken steps to locate these devices before seeking assistance from the states in which they were located.²²⁸ Yet, Antara did not attempt to locate these devices, let alone cooperate or even contact Ravaria at any point.

²²⁰ China, *International Strategy of Cooperation on Cyberspace* (2015), Chapter IV.

²²¹ UNGA, *Compendium on How International Law Applies to the Use of Information and Communications Technologies* (2021) A/76/136, 26.

²²² Finland, *International Law and Cyberspace* (2020), 1.

²²³ UNGA, n221, 79-80.

²²⁴ *Pulp Mills*, n203, [77].

²²⁵ US Department of Commerce, *Promoting Stakeholder Action Against Botnets* (2017), 2.

²²⁶ *Compromis*, [32].

²²⁷ *Clarifications*, [5].

²²⁸ Ghappour, “Searching Places Unknown” (2017) 69 *Stanford LR* 1075.

(2) *Antara violated the Budapest Convention*

Article 31 of the Budapest Convention,²²⁹ which binds Antara and Ravaria,²³⁰ provides that one party may request another party to search or similarly access, seize or similarly secure, and disclose data it seeks but which is stored in a system located within that other party's territory. While this provision is framed permissively, states must perform a treaty in good faith,²³¹ and apply it in a way which realises its object and purpose.²³² The object and purpose of the Budapest Convention, as derived from its preamble,²³³ is to “deter action directed against the confidentiality, integrity and availability of computer systems, networks and computer data” and to “foster international cooperation between states”. This would require, and not merely permit, cooperation in cases where trans-border access to data is sought.

This interpretation is buttressed by the surrounding context of the treaty, to which recourse must be had in interpreting its terms.²³⁴ States are only permitted trans-border access to data without authorisation of another party in the two situations listed in Article 32, neither of which apply here. Proposals to expand Article 32 to permit unilateral trans-border access “in exigent or other circumstances” were roundly rejected by a majority of the conference, owing to concerns over privacy and data protection.²³⁵ States parties are also required under Article 23 to cooperate with

²²⁹ (2001) ETS 185.

²³⁰ *Compromis*, [46].

²³¹ VCLT, n48, Article 26.

²³² *Gabčíkovo-Nagymaros*, n207, [142].

²³³ *Territorial Dispute* (1994) ICJ Rep 6, [52].

²³⁴ VCLT, n48, Article 31(1).

²³⁵ NATO Cooperative Cyber Defence Centre, “Transborder Data Access” (2019) <<https://ccdcoe.org/incyber-articles/transborder-data-access-quo-vadis-council-of-europe/>> (accessed 10 January 2022).

each other “to the widest extent possible”. Article 31, read together with its object and purpose, thus obligated Antara to request Ravaria’s assistance with a view to removing the web-shells. While Antara may claim ignorance of the location of infected devices at the time of Operation Moonstroke, it would turn this duty on its head if states could escape liability through its own omission. By unilaterally hacking into devices in Ravarian soil without cooperating, or even informing Ravaria, Antara failed to apply the treaty in a reasonable manner, contrary to its object and purpose.

(3) *Antara violated Ravaria’s sovereignty*

Under international custom, cyber-infrastructure and devices located within a state’s territory would be protected by that state’s sovereignty from intrusion.²³⁶ As argued above,²³⁷ such intrusions would include the usurpation of another state’s inherently governmental functions. The paradigmatic example provided by the Tallinn Manual, the product of a comprehensive multilateral effort to reflect *lex lata*,²³⁸ is when another state enforces its own cyberspace laws in that state, which qualifies as usurpation of an inherently governmental function.²³⁹ The prohibition of extraterritorial law enforcement is also established in international custom, as recognised by this court.²⁴⁰ By enforcing its jurisdiction through hacking 5,000 computers and devices in

²³⁶ *Tallinn Manual*, n100, 12; Watts, Richard, “Baseline Territorial Sovereignty and Cyberspace” (2018) 22(3) *Lewis & Clark LR* 771, 818.

²³⁷ *Memorial*, II.B.

²³⁸ *Tallinn Manual*, n100, 4.

²³⁹ *Ibid*, 22.

²⁴⁰ *SS Lotus* (1927) PCIJ Ser A No 10, 18-19; Crawford, *Brownlie’s Principles of International Law* (OUP, 2019), 462-468.

Ravaria's territory and removing the web-shells from them without consent from Ravaria,²⁴¹ Antara has violated Ravaria's territorial sovereignty.

(4) *Antara violated the principle of non-intervention*

As argued above,²⁴² the principle of non-intervention prohibits a state from using coercive means to interfere in another state's exercise of its sovereign prerogative in respect of its internal affairs; this includes measures regulating cyber-infrastructure, cyber-activities, or persons engaged therein within its territory.²⁴³ Cyber-operations such as undermining the communications network of a state's security services amount to coercion if they force the state to involuntarily act or refrain from acting as it otherwise would.²⁴⁴ Antara's act of enforcing its jurisdiction by hacking 5,000 Ravarian computers and devices prevented Ravaria from exercising its own prerogative to regulate such devices within its territory. It also prevented individual Ravarian citizens from freely choosing whether to grant Antara access to their devices.

(5) *Antara violated international human rights law*

Under Article 17 of the ICCPR, states are obligated to respect the right to privacy. As argued above,²⁴⁵ obligations under the ICCPR apply extraterritorially to individuals within their effective control. The paradigmatic situation of such control, as highlighted by the UN High Commissioner for Human Rights, is where a state directly taps and has control over their data,²⁴⁶ which was the

²⁴¹ *Compromis*, [33].

²⁴² *Memorial*, II.B.

²⁴³ *Tallinn Manual*, n100, 13.

²⁴⁴ UNGA, *Friendly Relations Declaration* (1970) A/RES/2625(XXV), Preamble, Article 3; *ibid*, 315-317.

²⁴⁵ *Memorial*, II.C(1).

²⁴⁶ UNHRC, *Right to Privacy in the Digital Age* (2014) A/HRC/27/37, [34].

case here, as Antara had directly accessed the devices and had control over the web-shells. As Antara's accessing of Ravarian computers and devices constitutes an interference with the right to privacy because of the vast amounts of metadata stored within such devices, giving Antara the opportunity to analyse the behaviour of Ravarians,²⁴⁷ the question is whether, like the other rights mentioned above,²⁴⁸ such interference fulfils the requirements of legality, necessity, and proportionality.²⁴⁹

Antara cannot fulfil the legality requirement because in the context of unauthorised access to data, safeguards must be built into the relevant legislation, such as notifying the affected individuals,²⁵⁰ but Antara only admitted to the removal of web-shells from Ravarian computers and devices after Operation Moonstroke was exposed in a newspaper report.²⁵¹ Antara also cannot fulfil the proportionality requirement because less intrusive alternatives existed, such as sink-holing, which involves redirecting the botnet's communication from the original server to a new server and preventing infected devices from receiving new commands,²⁵² or a command-and-control server takedown, where the server would be disconnected from the internet.²⁵³ Such measures have proven efficient and effective, and are commonly used to address botnets domestically and

²⁴⁷ UNHRC, *Special Rapporteur, Right to Privacy* (2017) A/HRC/34/60, [25].

²⁴⁸ *Memorial*, III.B.

²⁴⁹ UNHRC, n246, [21].

²⁵⁰ *Ibid*, [40].

²⁵¹ *Compromis*, [31]-[33].

²⁵² Tiirmaa-Klaar *et al*, *Botnets* (Springer, 2013), [5.2.1].

²⁵³ *Ibid*, [5.2.3].

internationally.²⁵⁴ The server takedown option would have been particularly viable, considering the DPCA knew that the command-and-control server was located in Antara.²⁵⁵

(6) *Antara abused its rights*

An extension of the principle of good faith,²⁵⁶ the doctrine of abuse of rights requires that states exercise their rights reasonably and do not harm another state or impinge upon another state's ability to exercise their rights,²⁵⁷ which may include intrusions into privacy.²⁵⁸ As argued, even if the hacking of 5,000 Ravarian computers and devices as part of taking down the Lunar Botnet was an exercise of Antara's sovereignty, in impinging on Ravaria's right to exercise sovereignty over devices on Ravaria's territory and causing injury by intruding into the privacy of its citizens, Antara abused its rights.

²⁵⁴ Hogben (ed), *Botnets* (EU Agency for Cybersecurity, 2011), 56-57; US Senate Judiciary Subcommittee on Crime and Terrorism, "In Taking Down Botnets" (2014) <<https://www.govinfo.gov/content/pkg/CHRG-113shrg28403/html/CHRG-113shrg28403.htm>> (accessed 10 January 2022); Cimpanu, "Microsoft and Industry Partners Seize Key Domain" (2020) <<https://www.zdnet.com/article/microsoft-and-industry-partners-seize-key-domain-used-in-solarwinds-hack/>> (accessed 10 January 2022).

²⁵⁵ *Compromis*, [32].

²⁵⁶ Byers, "Abuse of Rights" (2002) 47 McGill LJ 389, 411; Kiss, "Abuse of Rights" (2006) Max Planck Encyclopaedia of PIL, [5].

²⁵⁷ *German Interests in Polish Upper Silesia* (1926) PCIJ Ser A No 7, 37-38; *US-Shrimp* (1998) WT/DS58/AB/R, [156]-[158]; *Gabčíkovo-Nagymaros*, n207, 95 (Separate Opinion, Judge Weeramantry).

²⁵⁸ ARSIWA, n88, 31, 91-92.

(7) *Antara violated its duty of prevention*

The duty of prevention requires states not to knowingly allow their territory to be used to commit acts contrary to the rights of other states.²⁵⁹ This customary norm arises from widespread and consistent state practice – states such as China,²⁶⁰ Japan,²⁶¹ the UK,²⁶² and the US²⁶³ have implemented domestic laws and policies aimed at preventing potentially harmful cyber-operations extraterritorially. The requisite *opinio juris* has manifested in public governmental statements that general rules of international law apply to cyberspace, including the duty of prevention, made by states including Australia, France, Japan, the Netherlands, the UK, and the US.²⁶⁴ Even if the DPCA did not know that there were any infected devices outside Antara,²⁶⁵ Antara is responsible for failing to take steps to prevent Operation Moonstroke from affecting Ravarian devices, which, as argued, violated international law.

²⁵⁹ *Pulp Mills*, n203, [101].

²⁶⁰ *Cybersecurity Law (China)*, Article 21(3), 51.

²⁶¹ Japan, *Cybersecurity Strategy* (2018), 22-23.

²⁶² *Information Systems Regulations (UK)*, Section 5(2)(a).

²⁶³ US Cybersecurity and Infrastructure Security Agency, “Alert: Technical Approaches to Uncovering and Remediating Malicious Activity” (2020) <<https://us-cert.cisa.gov/ncas/alerts/aa20-245a>> (accessed 10 January 2022).

²⁶⁴ Coco, Dias, “Cyber Due Diligence” (2021) 32(3) EJIL 771, 779.

²⁶⁵ *Clarifications*, [5].

C. *ANTARA CANNOT JUSTIFY ITS CONDUCT*

No defences are open to Antara to justify its conduct. As regards necessity, it can only be relied on in extraordinary circumstances.²⁶⁶ Specifically, Antara must be able to show that Operation Moonstroke was the only way for it to safeguard an essential interest against a peril that was both imminent and grave.²⁶⁷ However, the hacking of Ravarian computers and devices was not the only means by which Antara might have safeguarded its electoral integrity. As argued, measures like sink-holing or a command-and-control server takedown would have been viable alternatives – as was the possibility of cooperating with Ravaria pursuant to its obligations under the Budapest Convention and international custom.

As regards countermeasures, they can only be taken in response against a state responsible for an internationally wrongful act, must be proportionate to any injury suffered, and cannot violate fundamental human rights.²⁶⁸ Antara fulfils none of these conditions. First, as argued above,²⁶⁹ Ravaria has not violated any international obligations. Secondly, as argued, viable alternatives to hacking existed. Thirdly, if Operation Moonstroke did indeed violate the right to privacy of Ravarians, this would constitute a violation of fundamental human rights. In any event, there are procedures that must be adhered to before invoking countermeasures, such as calling on the other state to fulfil its obligations, or providing prior notification of the countermeasures.²⁷⁰ Antara did neither.

²⁶⁶ *CMS v Argentina (Award)* (2005) ICSID ARB/01/8, [317]; *LG&E v Argentina (Liability)* (2007) ICSID ARB/02/1, [246]-[261].

²⁶⁷ *Gabčíkovo-Nagymaros*, n207, [50]-[51].

²⁶⁸ ARSIWA, n88, Article 49.

²⁶⁹ *Memorial*, II.

²⁷⁰ ARSIWA, n88, Article 51.

PRAYER FOR RELIEF

Ravaria respectfully requests this court adjudge and declare:

- I. The documents obtained in the illegal search of Walters's vehicle and the recording from the conciliation meeting of 30 May 2021 are inadmissible as evidence;
- II. Ravaria's alleged financial contributions and cyber-operations in connection with the Suthan referendum were consistent with international law;
- III. Antara's order suspending Hunland's Pano account violated international law, and Antara must therefore rescind the order; and
- IV. Antara's interference with computers and devices operating on Ravarian soil, resulting from the take down of the Lunar Botnet, violated international law.