

THE 2009 PHILLIP C JESSUP INTERNATIONAL LAW

MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE AT THE PEACE

PALACE, THE HAGUE, THE NETHERLANDS

CASE CONCERNING OPERATION PROVIDE

SHELTER AND THE DIFFERENCES

ARISING BETWEEN ALICANTO AND

RAVISIA

The Republic of Alicanto

Applicant

v

The Commonwealth of Ravisia

Respondent

MEMORIAL OF THE APPLICANT

As submitted to the Court on 12 January 2009

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STATEMENT OF JURISDICTION

Pursuant to the Joint Notification and Compromis concluded on 30 September 2008, including the Corrections and Clarifications agreed to therein, at Chicago, Illinois, United States of America between the Republic of Alicanto and the Commonwealth of Ravisia (collectively “the Parties”), and in accordance with Article 40(1) of the Statute of the International Court of Justice, the Parties hereby submit to this Court its dispute concerning Operation Provide Shelter and the differences arising between Alicanto and Ravisia

In accordance with Article 2 of the Compromis, the Court is hereby requested to adjudge the dispute in accordance with the rules and principles of international law, including any applicable treaties.

STATEMENT OF FACTS

The Republic of Alicanto (“Alicanto”) gained independence from the Commonwealth of Ravisia (“Ravisia”) in 1958. It subsequently joined the Ravisian Family of Allied Nations (“R-FAN”), a political and cultural association of former Ravisian colonies. Bilaterally, Alicanto and Ravisia have retained strong economic ties.

The Alicantan population comprises two major groups, the Zavaabi and the Dasu. Both espouse the Talonnic faith. However, an orthodox reading of the Talonnic holy book, which is restrictive of women’s rights and requires the death penalty, is embraced more widely by the Zavaabi and the Guardians of the Talonnic Way (“the Guardians”), a political group which has attracted a substantial increase in support since the early 1990s. The Dasu minority, however, has traditionally dominated Alicantan political and economic life.

Alicanto shares its eastern border, mostly on the Rocian Plateau, with New Benu, another former Ravisian colony. Its rough terrain makes effective border control extremely difficult and, in March 2005, lawlessness in the region, including arms and drug trafficking, prompted New Benu to undertake military enforcement action. This was violently retaliated by armed groups and resulted in numerous Zavaabi deaths and aggravated Dasu-Zavaabi tensions on both sides of the border.

In August, Alicanto’s Dasu-led government was forced to resign office. Subsequent emergency elections returned a Guardian-led government under Prime Minister Simurg, who negotiated a cease-fire agreement with New Benu and requested enforcement action by the United Nations. On 8 December, the Security Council

adopted Resolution 5440, creating the United Nations Mission Overseeing the Rocian Plateau and Hinterlands (“UNMORPH”), which began operations on 1 February 2006. The Resolution *inter alia* authorised certain radio transmissions. Ravisia was UNMORPH’s biggest contributor and Ravisian Major-General Skylark was appointed to head the mission, which was based at Camp Tara.

Following allegations of sexual exploitation by UNMORPH soldiers in October 2007, a Commission of Inquiry concluded that Ravisian troops had routinely engaged in non-violent sexual relations with Alicantan girls, while off-duty. It found that the girls, whose average age was sixteen, had engaged in sexual acts out of hunger, fear, poverty, or all three, in return for money or food. Alicantan law prohibits sexual relations with persons aged under sixteen, but does not criminalise prostitution. No Ravisian service members have been charged with sex-related crimes.

On 18 February 2008, Major-General Skylark reported that the Alicanto-New Benu border was now essentially peaceful. The following day, the Security Council adopted Resolution 6590 calling for the gradual drawdown and eventual termination of UNMORPH by 31 July 2008. By the end of March, half of UNMORPH troops had been removed with only Ravisian personnel remaining. Also in March, the government of the Northeast Province adopted an ordinance, based on Talonnic law, requiring approval prior to the transmission of any secular broadcast.

Also in March, the Dasu Broadcasting Company was shut down for failing to comply. UNMORPH broadcasts, whose content was acknowledged as inconsistent with orthodox Talonnic teachings, continued without prior approval. Tensions between the

Dasu and Zavaabi throughout the Northeast Province immediately flared and on 15 April, 35 Dasu protesters were killed by armed police in riots in Melatha. These were described by the Alicantan authorities as out-of-control New Year's Eve celebrations. On 28 April, Prime Minister Simurg announced in his New Year's message that Alicanto would adopt firm measures to combat lawlessness and announced an overhaul of the judicial code to reflect the Talonnic orthodoxy. He declared that Alicanto would brook no compromise in its implementation. Pamphlets containing excerpts from this statement were circulated throughout Alicanto.

According to a medical NGO, Doctors of the World ("DOW"), sporadic riots and violence caused hundreds of deaths throughout Alicanto over the next four weeks. On 1 June, martial law was declared in twelve cities in the Northern provinces and by 30 June, the Dasu population of the Northeast Province had been reduced by 30 per cent because of Dasus fleeing toward New Benu. DOW predicted ethnic cleansing on a massive scale and warned that the lives of fleeing Dasus would be at risk if humanitarian aid was not put in place immediately. On 3 July, Security Council Resolution 6620 urged Alicanto to take immediate steps to improve the humanitarian situation in the Rocian Plateau.

On 7 July, Prime Minister Simurg was killed in an explosion as his car entered airport grounds. Alicantan police began a nationwide manhunt for Piccardo Donati, the head of the Dasu Integrity Front, based on evidence linking the bomb to that organisation. Self-proclaimed Zavaabi "defense cadres" subsequently claimed responsibility for burning six Dasu villages in the Plateau. Earth Without Frontiers, another NGO,

reported that thousands had been killed and that tens of thousands of Dasus from all parts of Alicanto had fled the country.

On 22 July, the Ravisian President requested an emergency Security Council session. Claiming possession of highly classified and extremely reliable evidence, she stated that there was the imminent danger of ethnic cleansing on a massive scale in Alicanto. Raw intelligence data was provided to the Secretary-General who gave assurances not to disclose it, but did state in a report to the Security Council that it appeared to be reliable. At the emergency session, both of Ravisia's proposed resolutions, one extending UNMORPH's mandate and the other authorising collective action by Ravisia and the other R-FAN members to restore order and protect Alicantan citizens were defeated by the exercise of two vetos. In this debate, Alicanto's demand for the Ravisian intelligence was ruled out of order by the Security Council President. The next day, the Secretary-General refused to disclose the intelligence to Alicanto, citing his assurances to Ravisia and stating that he would not reconsider this position unless the International Court of Justice declared this legally permissible. R-FAN members subsequently endorsed Ravisia's unilateral intervention in Alicanto and agreed to admit Dasu refugees.

On 31 July, the Secretary-General announced the termination of UNMORPH. The next morning, Ravisia declared the beginning of Operation Provide Shelter ("OPS") and transferred troops into Camp Tara. Major-General Skylark remained in command. Alicanto's new Prime Minister denounced this as an act of war.

On 15 August, the Alicantan Parliament adopted a new Judicial Code reintroducing the death penalty and limiting the right of women to hold real property or businesses. Subsequent skirmishes in the Northeast Province were extinguished by Ravisia without the support or interference of the Alicantan police. On 28 August, 25 people were reportedly killed by Alicantan police at a demonstration by local women's rights organisations.

On 21 August, after an unsuccessful nationwide manhunt, Piccardo Donati was tried *in absentia*, represented by a distinguished Public Defender. Apart from noted concerns about Donati's absence, human rights NGOs described the trial as consistent with international norms. On 1 September, a panel of three judges declared Donati guilty of eleven counts of murder and sentenced him to death by hanging. If carried out within 12 years, this sentence can be applied without retrial. An appeal brought on his behalf was rejected in a published opinion. On 17 September, Major-General Skylark confirmed reports that Donati was staying at Camp Tara and announced that she would not hand him over to Alicanto for judicial execution.

On 30 September, the parties submitted their dispute to this Court for adjudication.

QUESTIONS PRESENTED

The Republic of Alicanto respectfully asks the Honourable Court:

- I. Whether the occupation of Alicantan territory by Ravisian armed forces since 1 August 2008 violates international law, and whether Ravisia must remove its military personnel from Alicanto at once;
- II. Whether Ravisia is obliged to produce its classified intelligence, and whether, if it refuses, Ravisia can rely on that intelligence before this Court, or in the alternative whether the Secretary- General may lawfully hand over the intelligence to Alicanto;
- III. Whether the conduct of Ravisian soldiers at Camp Tara, including the broadcasting of offensive radio programming and the sexual exploitation of Alicantan children, are violations of international law and of the sovereignty and cultural and religious integrity of Alicanto, attributable to Ravisia, and whether Ravisia must pay reparations to compensate for the injury to Alicanto's social fabric; and
- IV. Whether the Alicantan citizen Picardo Donati must be handed over to Alicanto, where he will be subject to judicial execution, and whether the execution is a violation of international law.

SUMMARY OF PLEADINGS

Ravisia's military intervention in Alicanto under OPS violated its territorial integrity and thus the peremptory general prohibition on the use of force. This violation cannot be legally justified under either the right of self-defence or the express authority of the Security Council. Moreover, Ravisia cannot justify its invasion of Alicanto by reference to a right of humanitarian intervention. While such a right has on occasion been asserted, such claims do not reflect customary law due to the extent to which they have been contested by the majority of the international community. In the alternative, even if such a customary right has emerged, its criteria are not satisfied, as no peremptory human rights violations have been perpetrated in Alicanto and the intervention was neither a last resort nor a collective action. The burden of proof is on Ravisia to prove the existence of the asserted human rights violations conclusively. Ravisia's intervention therefore was and continues to violate international law. The Court should therefore order Ravisia to cease its wrongful conduct and leave Alicanto immediately.

It follows from the fundamental principle of procedural equality that the Court has the power to request relevant documents from the parties. The parties are also under a duty to cooperate with the Court in the establishment of the facts. The fact that Ravisia's classified intelligence is fundamental to its claims rebuts any presumption as to the legality of its conduct. Additionally, the Secretary-General's report to the Security Council should be given no weight as it amounts to hearsay. The Court should therefore request the production of the classified intelligence, and if Ravisia refuses to comply, should deny it the right to rely on it to justify its intervention. The

Court, moreover, should draw an adverse inference from any non-disclosure by Ravisia to the effect that its intelligence actually undermines its position. Alternatively, the Court should declare that the Secretary-General may lawfully hand over Ravisia's intelligence to Alicanto. This does not conflict with the Court's role as a UN principal organ. Ravisia, through its disclosure of the intelligence to the Secretary-General, is precluded from subsequently insisting on total control over it. The Secretary-General's duty of loyalty to the UN militates further in favour of this proposition.

The sexual abuses perpetrated by Ravisia's soldiers during UNMORPH amount to rape as the girls only consented out of fear arising from the presence of the soldiers. These offences are attributable to Ravisia, as they occurred within its effective control, and are therefore violations of Ravisia's obligations under the SOFA and international law to respect Alicantan laws and regulations, to prevent and punish the exploitative use of children in prostitution and to protect Alicantan women from acts of rape. As Resolution 5440 must be interpreted compatibly with the SOFA, Ravisia cannot, through its State organs, transmit offensive radio broadcasts without prior approval. In any event, Ravisia's continuation of these broadcasts during OPS necessarily violates Alicanto's sovereignty as UNMORPH's mandate has expired. In addition, countermeasures cannot preclude the wrongfulness of the broadcasts as Alicanto is not in breach of any relevant obligations and, in any event, the requisite conditions are not satisfied. Alicanto therefore requests reparations for Ravisia's wrongful conduct.

Ravisia's failure to surrender Piccardo Donati violates Alicanto's sovereign right to exercise enforcement jurisdiction over its territory. Ravisia is also in breach of Resolution 1373 and customary law for providing a terrorist fugitive with a safe haven. Ravisia cannot invoke its obligations under the ICCPR to claim necessity as a circumstance precluding wrongfulness. The ICCPR would not be violated by surrendering Donati as the death sentence was imposed in accordance with Alicantan and international law for an exceptionally serious crime. The reintroduction of the death penalty does not render Donati's sentence unlawful as this was reasonably foreseeable and accessible from Prime Minister Simurg's declared intention to reform the Judicial Code to reflect Talonnic law. Donati has waived his right to be tried in his presence and has also exhausted his right to review. Since he will be executed by hanging once returned, he will not be exposed to cruel, inhuman or degrading treatment that would violate his rights. Ravisia must therefore cease this wrongful act by returning Donati.

PLEADINGS

I. THE COMMONWEALTH OF RAVISIA’S (“RAVISIA”) INTERVENTION IN THE REPUBLIC OF ALICANTO (“ALICANTO”) CONSTITUTES A CONTINUING VIOLATION OF ALICANTO’S SOVEREIGNTY AND INTERNATIONAL LAW.

Notwithstanding its increasing recognition of human rights norms, the sovereign equality of States remains the basic principle of international law.¹ The rule requiring a State’s consent² in respect of any incursion onto its territory is therefore fundamental in international law.

A. RAVISIA HAS VIOLATED ALICANTO’S SOVEREIGNTY.

As the incursion of Ravisian military troops into Alicanto on 31 July 2008 under Operation Provide Shelter (“OPS”) occurred without latter’s consent, Ravisia has violated Alicanto’s sovereignty, which is protected by the United Nations Charter (“the Charter”) and customary law.

1. OPS constitutes a use of force.

Article 2(4) of the Charter requires States to refrain “from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”³ This rule is elaborated by Principle 3 of the 1970 Declaration on Principles of International Law, which prohibits States from intervening, “directly or indirectly, for any reason whatever, in

¹ United Nations Charter [1945] 1 UNTS XVI, Art.2(1); Brownlie, *Principles of Public International Law* [6th edn. Clarendon Press, Oxford 2003], p.287.

² UNGA Res 2625 [1970] UN Doc A/8082, p.121.

³ UN Charter, Art.2(4).

the internal or external affairs of any other State.”⁴ The rule in Article 2(4) is also recognised as customary law⁵ and a *jus cogens* norm.⁶ Its interpretation has not materially changed.

Territorial integrity denotes the inviolability of a State’s physical territory and the proscription of forcible trespassing of any kind⁷ and is infringed by the mere landing of military troops of one State on the territory of another.⁸ Ravisia’s invasion of Alicanto therefore violated Alicanto’s territorial integrity.

2. Ravisia’s use of force was unlawful.

Exceptionally, the Charter provides for the right of States to use force either in self-defence⁹ or upon the Security Council’s exercise of its Chapter VII powers.¹⁰

However, neither exception can be successfully invoked by Ravisia.

⁴ UNGA Res 2131 [1965] UN Doc A/6014. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [*Nicaragua case*], pp.107-8.

⁵ *Nicaragua case ibid.*, para.190; Randelzhofer, ‘Article 2’ in Simma (ed.), *The Charter of the United Nations, A Commentary*’ (Volume I) [2nd edn. Oxford University Press, Oxford 2002], p.112.

⁶ *Nicaragua case*, para.190; UNGA GAOR *Draft Articles on the Law of Treaties*, ‘Report of the International Law Commission’ 18th Session [1966] II ILC Ybk, pp.247-9 & 261.

⁷ McDougal and Feliciano, *The International Law of War*’ [1st edn. Martinus Nijhoff, Dordrecht 1994], p.177. See also *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4 [*Corfu Channel case*], p.34.

⁸ Randelzhofer, *supra* note 5, p.123; Jessup, *A Modern Law of Nations*’ [1st edn. The Macmillan Company, New York 1948], pp.169–70.

⁹ UN Charter, Art.51.

¹⁰ UN Charter, Arts.43-48.

a. *OPS is not a valid exercise of the right to self-defence.*

The inherent right of individual or collective self-defence can only be exercised in response to an actual or threatened armed attack against another State.¹¹ Since no such attack has been suffered by Ravisia, or indeed any other State, the right to self-defence cannot be claimed in the present circumstances.¹²

b. *OPS did not receive Security Council authorisation.*

i. The language of Resolution 6620 betrays Ravisia's claim.

Under Chapter VII of the Charter, the Security Council has the sole authority to determine when a threat to, or breach of, the peace has occurred¹³ and thus to authorise the use of force.¹⁴ The wording of its resolutions are determinative of their content. The Security Council must therefore clearly specify the extent, nature and objective of any sanctioned military action. Absent such clarity, any subsequent use of force will be unlawful.¹⁵ Therefore, there can be no doctrine of implied authority of Security Council resolutions cannot therefore be allowed for as it necessarily entails the distortion of words.¹⁶ The wording of Security Council Resolution 6620¹⁷

¹¹ *Supra* note 9.

¹² *Nicaragua case*, p.105.

¹³ UN Charter, Art.39.

¹⁴ UN Charter, Art.24; Cassese, '*International Law in a Divided World*' [1st edn. Clarendon Press, Oxford 1988], p.215.

¹⁵ De Wet, '*The Chapter VII Powers of the United Nations Security Council*' [1st edn. Hart Publishing, Oxford 2004], p.268-9; *Legal Consequences for States of the Continued Presence of South African Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16, p.35.

¹⁶ Gray, '*International Law and the Use of Force*' [2nd edn. Oxford University Press, Oxford 2000], pp.191-5. See also Lobel & Ratner, '*Bypassing the Security Council*:'

(“Resolution 6620”), however, is substantially weaker than the “all necessary means” formulation traditionally used by the Security Council in resolutions authorising the use of force.¹⁸ The Security Council’s expression of its readiness to consider further measures also indicates that it expected to make further determinations.

ii. Resolution 5440 is not revivable.

In any event, even if the implied authority of Security Council resolutions is allowed for, Security Council Resolution 5440 (“Resolution 5440”) is not revivable as it was directed solely at UNMORPH and has been lawfully terminated by Security Council Resolution 6590.¹⁹

B. RAVISIA’S ACTIONS CANNOT BE JUSTIFIED UNDER A RIGHT OF HUMANITARIAN INTERVENTION.

It is submitted that, under the established rules concerning the formation of rules of customary law, a right of unilateral humanitarian intervention is not presently recognised in international law. Ravisia therefore cannot justify its intervention on solely humanitarian concerns.

Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime’ [1999] 93 AJIL 125, pp.130-4 & 152-3.

¹⁷ UNSC, [2008] UN Doc S/RES/6620.

¹⁸ Quigley, ‘*The “Privatization” of Security Council Enforcement Action: A Threat to Multilateralism*’ [1996] 17 MJIL 249, p. 262. *C.f. inter alia* UNSC Res 5440 [2005] UN Doc S/RES/5440.

¹⁹ UNSC, [2008] UN Doc S/RES/6590.

1. There is no recognised right of humanitarian intervention in international law.

a. There is no established customary right of pure humanitarian intervention.

The *modus operandi* of customary law presupposes state equality and a principle of majoritarianism.²⁰ This comprises State practice, an objective requirement that encompasses any acts from which views about customary law may be inferred,²¹ which (cumulatively) must be settled, widespread and consistent,²² and *opinio juris*, a subjective element that requires State practice to be consciously accepted as law.²³

It is submitted that the instances in which a right of unilateral humanitarian intervention have been claimed over the last half century, in particular, India's 1971 intervention in East Pakistan, Vietnam's 1978 intervention in Kampuchea and Tanzania's 1978 intervention in Uganda, constitute insufficient State practice to amount to a new rule of customary law as each was severely contested by the generality of the international community.²⁴ The absence of *opinio juris* is indicated

²⁰ Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations' [1995-I] 255 Recueil des Cours de l'Académie de Droit International 9, p.49.

²¹ Statute of the ICJ [1945] 1 UNTS 993 [ICJ Statute], Article 38(1)(b); Shaw, 'International Law' [5th edn. Cambridge University Press, Cambridge 2003], p.80.

²² *North Sea Continental Shelf (Federal Republic of Germany v Denmark)* (Merits) [1969] ICJ Rep 3 [North Sea Continental Shelf case], para.77.

²³ ICJ Statute, Article 38(1)(b); See also Oppenheim & Roxburgh, 'International Law: A Treatise' [3rd edn. The Law Book Exchange, London 2005], p.22.

²⁴ UNSC SCOR [4 December 1971] UN Doc S/10416; UNGA Res 2793 [1971] UN Doc A/L.647/Rev.1; UNSC SCOR [11 December 1978] UN Doc S/12962.

by the fact that, notwithstanding variously asserted humanitarian motives, in each case the formal legal justification proffered was self-defence.²⁵

b. No such right has evolved subsequent to the Kosovo intervention.

Alicanto submits that the 1999 military intervention in Kosovo by the North Atlantic Treaty Organization (“NATO”) has not since created a customary rule of pure humanitarian action. Firstly, it did not represent sufficiently settled State practice as it was either condemned or its legality repudiated by a clear majority of the international community.²⁶ Moreover, the emphatic statements of several intervening States that they were not creating precedent²⁷ and the fact that only three intervening States can be construed to have claimed such a right²⁸ strongly point to the absence of *opinio juris*. Similarly, the “responsibility to protect” as articulated by the International Commission on Intervention and State Sovereignty (“ICISS”),²⁹ despite its *prima facie* endorsement at the 2005 World Summit,³⁰ met profound disagreement in the

²⁵ *Ibid.*

²⁶ Group of 77, ‘Declaration of the South Summit’ [2000] <http://www.g77.org/doc/Declaration_G77Summit.htm> accessed 6 January 2009.

²⁷ Deutscher Bundestag, Plenarprotokoll 13/248 [16 October 1998] <<http://dip21.bundestag.de/dip21/btd/13/002/1300248.pdf>> accessed 6 January 2009; US Secretary of State Madeleine Albright, ‘Press Conference with Russian Foreign Minister Igor Ivanov, Singapore’ [26 July 1999] <<http://secretary.state.gov/www/statements/1999/990726b.html>> accessed 6 January 2009.

²⁸ *Legality of Use of Force Case (Yugoslavia v Belgium) (Provisional Measures)* [10 May 1999] ICJ Pleadings (CR 99/15); UNSC SCOR [24 March 1999] UN Doc S/PV.3988, pp.8&11.

²⁹ International Commission on Intervention and State Sovereignty, ‘*The Responsibility to Protect*’ [1st edn. ICISS, Ottawa 2001], para.2.30.

³⁰ UNGA ‘2005 World Summit Outcome’ [20 September 2005] UN Doc A/60/L.1, at paras.138–9.

international community *inter alia* over the question of whether the Security Council has the sole authority to authorise the use of force.³¹ As customary law cannot be formed in a revisionist manner, a pure right of humanitarian intervention has not emerged.³²

2. Assuming that such right exists, its criteria are not satisfied.

If there is a right of humanitarian intervention in international law, its requisite criteria would necessarily include (but not be limited to): the existence or imminence of genocide or crimes against humanity, the exhaustion of all peaceful means of resolving the situation and collective action.³³

- a. *There has been neither a genocide nor crimes against humanity (actual or imminent) in Alicanto.*

Owing to the peremptory nature of the rule in Article 2(4) of the Charter, a right of humanitarian intervention could only exist as a response to human rights violations that were themselves peremptory. Genocide and crimes against humanity are the two material, recognised peremptory human rights norms in international law.³⁴ These

³¹ Government of China, 'Position Paper of the People's Republic of China on the United Nations Reforms' [7 June 2005] <www.china-un.org/eng/smhwj/2005/t199101.htm> accessed 6 January 2009, pp.10–12; Rahman, 'Official Statement at the Informal Meeting of the Plenary of the General Assembly Concerning the Draft Outcome Document' [21 June 2005] <www.un.int/malaysia/NAM/nam210605.html> accessed 6 January 2009.

³² Gray, *supra* note 16, pp.45-9

³³ Stromseth, 'Rethinking Humanitarian Intervention: The Case for Incremental Change' in Holzgrefe & Keohane (eds.), 'Humanitarian Intervention: Ethical, Legal, and Political Dilemmas' [1st edn. Cambridge University Press, Cambridge 2003] p.250 ff.

³⁴ Crawford, 'The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries' [1st edn. Cambridge University Press,

must be established subsequent to 18 February 2008 when Major-General Skylark declared that the pre-existing violence had ceased.

1. Ravisia must discharge a heavy burden of proof in this matter.

It is well-established in customary law that the party asserting a particular fact bears the burden of proving it.³⁵ Ravisia, as the party asserting the existence of evidence justifying its intervention, therefore bears the burden of proof. The standard of proof of such a party turns on the seriousness of the alleged breaches.³⁶ The Court has held that where the offences alleged are of exceptional gravity, they must be proved by the production of fully conclusive evidence.³⁷ While the above rule related to State attributability, it is submitted that where a State undertakes a military intervention, it must demonstrate its asserted justifications by the same standard – conclusively.³⁸

Cambridge 2002], p.188; *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, para.33–4.

³⁵ *Nicaragua case*, para.101; *Request for Interpretation of the Merits of 20 November 1950 in the Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, p.281; *Rights of Nationals of the United States of America in Morocco (France v United States of America)* [1952] ICJ Rep 176, p.191.

³⁶ Kolb, ‘General Principles of Procedural Law’ in Zimmermann & Ors. (ed.), ‘*The Statute of the International Court of Justice: A Commentary*’ [1st edn. Oxford University Press, Oxford 2006] [Zimmermann], p.823, para.53. See also *Mexico City Bombardment Claims (Great Britain v United Mexican States)* [1930] V RIAA 76, p.80.

³⁷ *C.f. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 1 [*Bosnian Genocide case*], para.209; *Corfu Channel case*, p.17.

³⁸ *C.f. Nicaragua case*, p.53; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening)* (Intervention) [1990] ICJ Rep 92, paras.117-8.

In addition, the Court has stated that, in its assessment of evidence, it will treat materials emanating from a single source with caution and will favour contemporaneous evidence from persons with direct knowledge.³⁹ It is submitted that these rules of evidence are applicable to the present circumstances.

2. No crimes against humanity (actual or imminent) have been perpetrated in Alicanto.

Article 7 of the Rome Statute of the International Criminal Court provides that a crime against humanity is the multiple commission *inter alia* of murder or the forcible transfer of population “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁴⁰ The recent increase in criminality in Alicanto has, however, been neither widespread nor systematic. Doctors of the World’s (“DOW”) allegation of violent deaths in the Northeast Province and subsequent prediction of the possibility of future ethnic cleansing in Alicanto are unreliable as they are both substantially based on the evidence of a single source, which has not been independently verified.

3. There has been no genocide in Alicanto.

The Convention on the Prevention and Punishment of the Crime of Genocide⁴¹ defines genocide as *inter alia* the killing of members of a protected group or deliberately inflicting on a group conditions of life calculated to bring about its

³⁹ *Nicaragua case*, at para.64; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2002] ICJ Rep, para.61.

⁴⁰ [1998] 2187 UNTS 90.

⁴¹ [1948] 78 UNTS 277.

physical destruction, “with intent to destroy it in whole or in part.”⁴² It is submitted that DOW’s prediction of the possibility of ethnic cleansing has nil value in this context as the specific intent of genocide, as distinct from the mere expulsion of a group,⁴³ is attributable neither to Alicanto through its enforcement action,⁴⁴ nor to any non-state actor. The violence that has occurred in Alicanto, including the deaths of 35 Dasu protesters in Melatha, were tragic but isolated incidents and do not constitute a manifest pattern Dasu-targeted abuses.⁴⁵ Additionally, it is contended that the relative inactivity of Ravisian troops throughout the period of its intervention points to the success of the Alicantan authorities in dealing with the disturbances in its Northern Provinces.

b. Military action by Ravisia was not a last resort.

Ravisia did not pursue any peaceful alternatives to military action in Alicanto. These could have included targeted economic sanctions, diplomatic sanctions and action to suspend or expel Alicanto from the Ravisian Family of Allied Nations (“R-FAN”). It is submitted that the extent of the political, educational and economic ties fostered by membership of R-FAN point to the likely success of such measures.

⁴² *Ibid.*, Art.2.

⁴³ Schabas, ‘*Genocide in International Law: The Crime of Crimes*’ [1st edn Cambridge University Press, Cambridge 2000], pp.189-201.

⁴⁴ Articles on State Responsibility for Internationally Wrongful Acts UNGA Res 56/83, UN GAOR 56th Sess., Annex, Agenda Item 162, [2001] UN Doc A/RES/56/83 [ARSIWA], Arts.4&8.

⁴⁵ *C.f. Prosecutor v Radislav Krstić* ICTY-98-33-T [2001], para.682.

c. *Ravisia's intervention is not collective.*

Ravisia's military action was and continues to be unilateral.⁴⁶ It involves solely Ravisian troops operating under solely Ravisian command structures. Indeed, despite their relative proximity to Alicanto, no member of R-FAN has provided military, financial or even logistical support.⁴⁷

C. RAVISIA MUST CEASE ITS INTERNATIONALLY WRONGFUL ACT.

It follows Ravisia is therefore under an obligation in international law to cease this wrongful act and leave Alicantan territory immediately.⁴⁸

II. RAVISIA SHOULD BE CALLED UPON TO PRODUCE ITS CLASSIFIED INTELLIGENCE AND, IF IT REFUSES, SHOULD BE DENIED THE RIGHT TO RELY ON IT. ALTERNATIVELY, THE COURT SHOULD DECLARE THAT THE SECRETARY-GENERAL MAY LAWFULLY HAND OVER THE INTELLIGENCE TO ALICANTO.

A. THE COURT SHOULD CALL UPON RAVISIA TO PRODUCE ITS CLASSIFIED INTELLIGENCE.

1. The Court has a general power to request the production of evidence.

The Statute of the Court and the Rules of the Court authorise the Court to call upon the parties to produce any such documents or explanations as it considers necessary for the elucidation of any aspect of the matters in issue.⁴⁹ This general power, which

⁴⁶ *Supra* note 33, p.251.

⁴⁷ *C.f. Nicaragua* case, para.115.

⁴⁸ ARSIWA, Art.30.

⁴⁹ ICJ Statute, Art.49; Rules of the ICJ, Art.62.

may be exercised at the parties' request,⁵⁰ derives from the principle of the proper administration of justice and operates to ensure that the Court has access to all relevant evidence prior to reaching a decision.⁵¹

2. Ravisia's failure to cooperate in the establishment of material facts undermines the parties' procedural equality.

The equality of the State parties to a dispute is the basic principle of proceedings before the Court.⁵² The Court is thus under a continuing duty to ensure the equality of arms of litigating parties.⁵³ In addition, the corollary principle of cooperation, which also flows from the parties' duty of good faith,⁵⁴ requires State parties to cooperate with the Court in the establishment of the relevant facts⁵⁵ *inter alia* by disclosing their

⁵⁰ *Bosnian Genocide* case, para.44.

⁵¹ Rosenne, *The Law and Practice of the International Court, 1920-1996* [Martinus Nijhoff, The Hague 1997] [Rosenne], p.1080; Sandifer, *Evidence before International Tribunals* [University Press of Virginia, Charlottesville 1975] [Sandifer], pp. 1-2; Torres Bernárdez, in Zimmermann, p.1096, para.68.

⁵² *Nicaragua* case, para.31; Kolb, in Zimmermann, p.799, para.9.

⁵³ Kolb, in Zimmermann, p.800, paras.11-12.

⁵⁴ Kolb, in Zimmermann, p.831, para.65.

⁵⁵ UNGA GAOR *Model Draft Rules on Arbitral Procedure*, 'Report of the International Law Commission' 10th Session [1958] II ILC Ybk, Art.21; Amerasinghe, *Evidence in International Litigation* [1st edn. Martinus Nijhoff, Leiden 2005], p.205.

best evidence.⁵⁶ These principles necessarily entail the parties' and the Court's access to all relevant documents.⁵⁷

Alicanto submits that, given the absence of probative open evidence for the alleged peremptory human rights violations in Alicanto,⁵⁸ the withheld Intelligence Report, as the only other basis upon which its intervention can be justified, is of fundamental importance to Ravisia's case and puts Alicanto at a severe procedural disadvantage.

In addition, the fact that Ravisia claims that the Intelligence Report contains material prejudicial to its national security does not detract from the parties' duty to collaborate.⁵⁹ On this basis, the Court has reasoned that the non-disclosure of a classified document that is of primary significance to the legality of the withholding State's conduct will rebut any *presumptio juris* as to its legality.⁶⁰

3. The Secretary-General has not engaged in adequate fact-finding.

The Court has accepted the fact-finding of other organisations where the persons directly involved in the dispute have been tested by cross-examination and it is

⁵⁶ *Anglo-Norwegian Fisheries case (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep 116; Cheng, 'General Principles of Law as Applied by International Courts and Tribunals' [1st edn. Cambridge University Press, Cambridge 2006], p.320.

⁵⁷ HRC *Paul Perterer v Austria* Communication No. 1015/2001 [2004] UN Doc CCPR/C/81/D/1015/2001, p.20; Inter-American Commission on Human Rights, 'Report on Terrorism and Human Rights' [22 October 2002] OEA/Ser.L/V/II.116, Doc.5 rev.1 corr., para.238.

⁵⁸ Memorial I(B)(2)(a); *C.f. Bosnian Genocide case*, para.206.

⁵⁹ *Bosnian Genocide case*, para.206.

⁶⁰ *Corfu Channel (UK v Albania)* (Merits) Judge Ecer, Dissenting Opinion [1949] ICJ Rep 115, p.129.

evidenced by extensive documentation.⁶¹ However, in the present case, the Secretary-General has not engaged in any fact-finding of his own. By his own admission, he is unable to confirm the veracity of the Intelligence Report's findings. The Secretary-General's Report can therefore amount to no more than hearsay evidence and therefore cannot be given any weight.⁶²

It is therefore requested that the Court calls upon Ravisia to convey its classified Intelligence Report to Alicanto with immediate effect.

B. RAVISIA, IF IT REFUSES TO PRODUCE ITS INTELLIGENCE, SHOULD BE DENIED RIGHT TO RELY ON IT TO SUPPORT LEGALITY OF ITS INTERVENTION.

1. Ravisia, if it refuses to comply, should not be allowed to rely on the classified intelligence.

The ICJ Statute authorises the Court to take "formal note" of any refusal to comply with a request for evidence.⁶³ Moreover, pursuant to Article 56(4) of the Rules, no reference may be made during the oral proceedings to the contents of any document which has not been produced, unless the document is part of a publication that is readily available. It is therefore submitted that if Ravisia fails to provide Alicanto and the Court with copies of the full text of the Intelligence Report it should not be allowed to rely on it.

⁶¹ *Bosnian Genocide* case, para.214.

⁶² *Corfu Channel* case, p.369.

⁶³ ICJ Statute, Art.49(2).

2. The Court should draw an adverse inference from Ravisia’s refusal to comply.

Where a party withholds essential evidence in its possession or control, the Court may assume that the evidence withheld would expose circumstances unfavourable to its position.⁶⁴ It is submitted that as the Intelligence Report is central to Ravisia’s claims, which are not buttressed by the open evidence, Ravisia’s non-disclosure naturally yields itself conclusions detrimental to Ravisia.⁶⁵ It is therefore requested that the Court draws an adverse inference from Ravisia’s concealment of its primary intelligence data to the effect that it actually undermines its case.

C. IN THE ALTERNATIVE, THE COURT SHOULD DECLARE THAT THE SECRETARY-GENERAL MAY LAWFULLY HAND OVER THE INTELLIGENCE TO ALICANTO.

1. The Court is competent to make the requested declaration.

- a. The requested declaration forms part of the legal dispute between the Parties.*

The Court’s contentious jurisdiction, which the Parties have accepted by special agreement pursuant to Article 40(1) of the ICJ Statute, enables it, by virtue of Article 94(1) of the Charter, to make binding determinations by adjudication on legal disputes between States.⁶⁶ A legal dispute is defined as a “disagreement on a point of law or

⁶⁴ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962) (Second Phase) Judge Jessup, Separate Opinion, [1970] ICJ Rep 161, para.97.*

⁶⁵ *C.f. Corfu Channel case, p.18.*

⁶⁶ Tomuschat, in Zimmermann, p.596, para.7.

fact, a conflict of legal views or interests between two persons”⁶⁷ that is “capable of being settled by the application of principles and rules of international law.”⁶⁸ The Parties’ disagreement as to whether the Court can and should declare that the Secretary-General may lawfully hand over Ravisia’s intelligence to Alicanto constitutes such a legal dispute on which the Court can adjudicate.

b. The Monetary Gold principle does not apply in the present case.

The principle articulated in the *Monetary Gold* case⁶⁹ precludes the Court from entertaining the merits of a case where “the very subject-matter of the Court’s decision”⁷⁰ would require an incidental assessment of the conduct of a State who is not party to the proceedings.⁷¹ This principle is derived from the consensual basis of the Court’s jurisdiction⁷² but does not apply as regards the conduct of UN organs, however, as the UN is not a State.

⁶⁷ *The Mavrommatis Palestine Concessions (Greece v UK)* (Jurisdiction) [1924] PCIJ Series A No. 2, pp.6&11.

⁶⁸ *Border and Transborder Armed Actions (Nicaragua v Honduras)* (Jurisdiction and Admissibility) [1988] ICJ Rep 69, para.52.

⁶⁹ *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States of America)* (Preliminary Question) [1954] ICJ Rep 19 [*Monetary Gold* case], p.32-3.

⁷⁰ *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para.28.

⁷¹ *Supra* note 68.

⁷² *Ibid.* See also UNGA GAOR (Provisional Version) 51st Session [15 October 1996] UN Doc A/51/PV.34, p.4; Tomuschat, in Zimmermann, pp.602 ff., paras.19 ff.

2. The Court should make the requested declaration on the merits.

- a. The Court is under a duty to ensure Alicanto's access to the intelligence.*

It follows from the Court's role as the principal judicial organ of the UN that its primary function is to administer justice properly.⁷³ This requires it to afford Alicanto the opportunity to see and give its account of the intelligence relied upon by Ravisia to justify its intervention.

The Court must therefore exercise its powers insofar as possible to ensure the proper administration of justice, namely to ensure that Alicanto has access to the said intelligence. Article 34(2) of the ICJ Statute confers a power on the Court to "request of public international organizations information relevant to cases before it."⁷⁴ Accordingly, the Court can request the Secretary-General, the UN's chief executive, to furnish information before it in order to equip the Court to ensure its access to all relevant evidence prior to reaching a decision.⁷⁵ It would therefore be contrary to the object and purpose of Article 34(2) to decline to declare that the Secretary-General may achieve the same purpose by handing over the same intelligence to Alicanto,⁷⁶ especially because evidence handed over to the Court directly needs to be communicated to Alicanto either way.⁷⁷

⁷³ ICJ Statute, Arts.38(1)&65; UN Charter, Arts.92 ff.; Kolb, in Zimmermann, p.806, para.22; Rosenne, pp.138-40.

⁷⁴ Rules of the ICJ, Art.69(4).

⁷⁵ Rosenne, p.1080; Sandifer, pp.1-2; Torres Bernárdez, in Zimmermann, p.1096, para.68.

⁷⁶ Vienna Convention on the Law of Treaties [1969] 1155 UNTS 331, Art.18.

⁷⁷ ICJ Statute, Art. 43(4); Rules of the ICJ, Arts.52(1)&56.

This point is reinforced by the fact that in refusing to hand over the intelligence, Ravisia has acted contrary to the obligation of good faith under Article 2(2) of the Charter not to frustrate the proper administration of justice by the Court by supplying the best evidence available.⁷⁸ It is submitted that Ravisia's argument that the Secretary-General should be prevented from handing over the documents in question to Alicanto necessarily contravenes this duty.⁷⁹

b. *This duty does not conflict with the Court's role as a principal organ of the UN.*

Such an exercise of the Court's powers does not conflict with the Court's role as a principal organ of the UN which demands that it safeguards the principles and purposes of the UN such as the sovereignty equality of States.⁸⁰ While this principle might preclude the Court from *compelling* a State party to produce documents or supply information under Article 49(1) of the ICJ Statute, it does not prevent the Court from declaring that the Secretary-General may lawfully hand over the Ravisian intelligence to Alicanto. By voluntarily handing over the intelligence to the Secretary-General directly, Ravisia has conceded its total control over the intelligence and must bear the consequences of that decision, namely that it is now subject to the rights and duties governing the Secretary's General office.

⁷⁸ UNGA Res 2625, *supra* note 2; Kolb, in Zimmermann, pp.830-1, para.64; Zoller, 'La Bonne Foi En Droit International Public' [1st edn. Pedone, Paris 1977], pp.147&151.

⁷⁹ Kolb, in Zimmermann, p. 834, para.71; Cheng, *supra* note 56, p.121.

⁸⁰ *Legality of Use of Force Case (Yugoslavia v Belgium)* (Provisional Measures) [1999] ICJ Rep 124, para. 18; *Aerial Incident of 27 July 1955 (Israel v Bulgaria)* (Preliminary Objections) [1959] ICJ Rep 127, p.142; Rosenne, pp.106, 108 & 111; Mosler & Oellers-Frahm, 'Art. 92' in Simma, *supra* note 5, pp.1151-2.

The Secretary-General's duty of loyalty to the Organisation further demands that he produces documents requested by the Court pursuant to Article 34(2) of the ICJ Statute.⁸¹

Thus the only conclusion that can be drawn from the fact that Ravisia nevertheless proceeded to hand over the intelligence to the Secretary-General is that Ravisia impliedly accepted that the Secretary-General may hand it over to the Court which is, as shown above,⁸² no different for present purposes from him handing it over to Alicanto.

The fact that this Court cannot compel Ravisia to hand over the intelligence to Alicanto directly has thus no bearing on the Secretary-General's ability to do so because by handing it over to him Ravisia has impliedly accepted that he may do so.

III. RAVISIA SHOULD BE CALLED UPON TO MAKE REPARATION FOR THE INJURIES RESULTING FROM THE BROADCASTING OF OFFENSIVE RADIO PROGRAMMING AND THE SEXUAL EXPLOITATION OF ALICANTAN CHILDREN, WHICH VIOLATED INTERNATIONAL LAW AND THE CULTURAL AND RELIGIOUS INTEGRITY OF ALICANTO.

According to the International Law Commission's ("ILC") ARSIWA articles, an internationally wrongful act is a breach of international law that is attributable to the State.⁸³ In relevant part, these represent rules of customary law.

⁸¹ Rosenne, p.112; Schwarzenberger, *'International Law As Applied By International Courts And Tribunals'* [Volume III - Stevens, London 1976], pp.350-3.

⁸² Memorial II(C)(2)(a).

⁸³ ARSIWA, Art.2.

A. RAVISIA IS RESPONSIBLE FOR THE SEXUAL EXPLOITATION OF ALICANTAN CHILDREN BY RAVISIAN SOLDIERS DURING UNMORPH.

1. Ravisia's soldiers breached international law.

Article 6 of the Status of Forces Agreement between Alicanto and the UN (“SOFA”) states that the members of UNMORPH “shall respect all local laws and regulations.”⁸⁴ Alicantan law prohibits sexual relations between adults and those under the age of sixteen. The Commission of Inquiry’s findings of substantial occurrences of precisely such relations therefore amount to a finding of violations of the SOFA and thus international law.

Additionally, Article 2 of the Convention on the Rights of the Child,⁸⁵ requires State parties to safeguard the rights under the Convention of all children within their jurisdiction. The vicinity of Camp Tara, where the abuses took place, was under UNMORPH’s effective control and thus their jurisdiction for the purposes of the Convention;⁸⁶ Ravisian troops must therefore uphold the Convention rights of Alicantan children, defined by Article 1 as being those aged under eighteen. The failure to prevent and punish “the exploitative use of children in prostitution” constitutes a violation of Article 34.

The presence of Ravisian soldiers therefore created a coercive environment in which the girls only consented to sex out of necessity and as a result of fear, hunger and/or

⁸⁴ UNGA ‘Report of the Secretary General: Model Status of Forces Agreement for Peacekeeping Operations’ [1990] UN Doc A/45/594.

⁸⁵ [1989] 1577 UNTS 3 [Child Convention].

⁸⁶ *Bankovic v Belgium* (App. No. 52207/99) [2007] 44 EHRR SE5, para.69.

poverty.⁸⁷ It is submitted that since such coercive circumstances negate consent, the sexual acts complained of amount to rape.⁸⁸ Ravisia has therefore breached its duty to protect children from “sexual abuse.”⁸⁹

Acts of rape committed by Ravisian peacekeepers are also in breach of their duty under customary law to protect female civilians from rape in situations of international conflict.⁹⁰

2. This breach of international law is attributable to Ravisia.

a. The breach incurs international responsibility.

In the case of *Caire (France) v United Mexican States*,⁹¹ it was held that the attribution of the *ultra vires* conduct of State officials to a State was only excluded when the act had no connection with their official function. However, such a connection exists in the present case as the status of the peacekeepers has been abused in the commission of the acts. Furthermore, Article 91 of Additional Protocol I states that a State shall be responsible for “all acts committed by persons forming part of its

⁸⁷ UN Special Rapporteur of the Working Group on Contemporary Forms of Slavery in his *Final Report on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict* UNCHR [1998] UN Doc E/CN.4/Sub.2/1998/13; *The Prosecutor v Jean Paul Akayesu* (Judgment), ICTR-96-4-T [1998], para.688.

⁸⁸ Elements of Crimes [2002] UN Doc PCNICC/2000/1/Add.2, Art.8(2)(b)(xxii)-1.

⁸⁹ Child Convention, Art.19.

⁹⁰ Geneva Convention Relative to the Protection of Civilians in Time of War [1949] 75 UNTS 287, Art.27(2); Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) [1977] 1125 UNTS 3 [Additional Protocol I], Art.76(1). See also UNSC Resolution 1674 [2006] UN Doc S/RES/1674, para.20; Secretary-General’s Bulletin [19 October 2003] UN Doc ST/SGB/2003/13.

⁹¹ [1929] V RIAA 516, p.531.

armed forces.” Since these rules represent customary law, Ravisia is directly responsible for the acts complained of. Ravisia’s responsibility is also derived from its failure to comply with its customary duty to prevent and punish the acts.⁹²

b. The breach does not incur the responsibility of the UN alone.

It is submitted that all acts complained of were and remain attributable to Ravisia. Unlike in the case of *Behrami v France*,⁹³ the Ravisian acts involved no failure of a UN mission to perform its mandate, but fell outside of UNMORPH’s mandate. Conduct is thus not attributable to the UN on a basis of “ultimate authority and control,”⁹⁴ but only where the UN retained effective control over the specific conduct. This is evidenced in Article 5 of the Draft Articles of Responsibility of International Organizations.⁹⁵ The commentary to the Article indicates that the “effective control” test is to have the same meaning⁹⁶ as it does in Article 8 ARSIWA as interpreted by the Court in the *Nicaragua* case.⁹⁷

⁹² *Velásquez-Rodríguez v Honduras* (Merits) Inter-American Court of Human Rights Series C No. 4 [1988], para.174.

⁹³ (App. No. 71412/01) [2007] 45 EHRR SE10.

⁹⁴ *Ibid.*, para.133.

⁹⁵ UNGA GAOR *Report of the ILC*, 61st session [2006] UN Doc A/61/10 [DARIO], p.252.

⁹⁶ ILC Commentary on Draft Articles 4-7 of Responsibility of International Organisations UNGA GAOR *Report of the ILC*, 59th session [2004] UN Doc A/59/10, p.110.

⁹⁷ *Nicaragua* case, para.115. See also, Larsen, ‘*Attribution of Conduct in Peace Operations: the “Ultimate Authority and Control” Test*’ [2008] 19 EURJIL 509 [Larsen], at pp.515&525. See also *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 [*Al-Jedda* case], para.22.

The UN did not exercise effective control over the relevant conduct of Ravisian soldiers as it is not responsible for the discipline of peacekeepers, especially not in their off-duty conduct.⁹⁸ Article 7 *ter* of the Draft Model Memorandum of Understanding⁹⁹ also explicitly vests responsibility for troop discipline in the commander of the national contingent. Additionally, the fact that Article 47(b) of the SOFA grants exclusive jurisdiction for criminal acts of troops to their State of origin is further evidence that the UN do not exercise effective control over the relevant acts.

In the alternative, even if the acts are attributable to the UN, nothing in international law precludes dual attribution in the present circumstances.¹⁰⁰

B. RAVISIA IS RESPONSIBLE FOR THE UNLAWFUL BROADCASTING OF OFFENSIVE RADIO PROGRAMMING DURING UNMORPH.

1. The broadcasts were a breach of international law.

By failing to comply with the Alicantan legal requirement of approval prior to the broadcast of such material, Ravisia's soldiers have violated Article 6 of the SOFA.

Moreover, in the event of any conflict between the SOFA and Resolution 5440's¹⁰¹ authorisation of UNMORPH's broadcasts for the encouragement of "progressive development," such authorisation is precluded in the present case by the presence of the SOFA. As the SOFA determines the operation of the Resolution, it is submitted that the principle of interpretation of conflicting obligations enshrined in Article 30(3)

⁹⁸ 1986 Memorandum from the UN Office of Legal Affairs [1986] UNJY 300.

⁹⁹ UNGA, Annex, [2007] UN Doc A/61/19.

¹⁰⁰ Crawford, *supra* note 33, p.103. See also Larsen, *supra* note 97, p.517.

¹⁰¹ *Supra* note 18.

of the Vienna Convention on the Law of Treaties¹⁰² indicates that the Resolution must be interpreted in a manner consistent with the SOFA. It follows that the Resolution cannot authorise the broadcasts and thus that Ravisia's soldiers are not exempted from their breach of the SOFA.

Moreover, Ravisia's soldiers were acting outside of their mandate and so, in broadcasting the offensive programs, failed to comply with the duty of non-intervention in the domestic affairs of another State.¹⁰³

2. This breach of international law is attributable to Ravisia.

The radio station was operated solely by Ravisian soldiers acting under orders from their superiors. The breach is therefore not attributable to the soldiers in their private capacity, but to the Ravisian army and by extension to the Ravisian State.¹⁰⁴ As Ravisia has exceeded its powers and violated the SOFA, the UN cannot have exercised effective control over these actions and thus the breach of international law is attributable to Ravisia.

3. There are no circumstances precluding wrongfulness.

It is submitted that there are no circumstances precluding the wrongfulness of this breach of international law. In particular the requirements for a justified

¹⁰² *Supra* note 76.

¹⁰³ Memorial I(A)(1).

¹⁰⁴ ARSIWA, Art.4; See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, para.62.

countermeasure as set out by Articles 49 and 52 ARSIWA and representative of customary law¹⁰⁵ have not been met.

Article 49 ARSIWA requires that countermeasures can only be taken in response to an internationally wrongful act committed by another State. The teachings of the Talonnic faith are consistent with Alicanto's obligations under the Child Convention and the Convention on the Elimination of All Forms of Discrimination Against Women¹⁰⁶ as interpreted under the declaration transmitted by Alicanto upon ratification in June 2006.¹⁰⁷ Therefore, Alicanto is not in breach of any relevant international obligations.

In any event, Article 49 only provides for countermeasures where taken in order to induce the target State to comply with its obligation to cease its wrongful conduct. Ravisia has failed to do so. This is further evidenced by Ravisia's failure to call upon Alicanto to fulfil the disputed obligations prior to taking such measures, contrary to Article 52.

Since the conditions for a justified countermeasure have not been met, it follows that Ravisia is responsible for the unlawful broadcasting in breach of international law that are attributable to it.

¹⁰⁵ *Gabčíkovo-Nagymaros Project case (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, para.83-4.

¹⁰⁶ [1979] 1249 UNTS 13.

¹⁰⁷ Brems, *'Human Rights: 'Universality or Diversity'* [1st edn. Martinus Nijhoff, The Hague 2001], pp.267-8; HRC 'Record of the Consideration of the Report Submitted by Egypt under Article 40 ICCPR' [23 October 2002] UN Doc CCPR/C/SR.2048, para.11.

C. RAVISIA IS RESPONSIBLE FOR THE UNLAWFUL BROADCASTING OF OFFENSIVE RADIO PROGRAMMING DURING OPS.

Any unlawful broadcasting occurring in Alicanto subsequent to the termination of UNMORPH is necessarily attributable to Ravisia.¹⁰⁸ As Ravisia's broadcasting has persisted during OPS, it is in continuing breach of international law. In any event, since Ravisia cannot derive any rights from its unlawful occupation, the broadcasting and its inference with Alicanto's internal matters necessarily violate Article 2 of the Charter. Moreover, there are no circumstances that preclude the wrongfulness Ravisia's breach.¹⁰⁹

D. RAVISIA MUST MAKE REPARATIONS FOR THESE INTERNATIONALLY WRONGFUL ACTS.

It is well-established in customary law that a State must cease and make full reparation for any wrongful act that engages its responsibility.¹¹⁰ In the present case, full reparation requires Ravisia to make restitution for its failure to punish the perpetrators of the sexual abuse¹¹¹ and to cease broadcasting without Alicanton approval.¹¹² Article 36 ARSIWA requires compensation for the injury suffered by the

¹⁰⁸ Memorial III(B)(2).

¹⁰⁹ Memorial III(B)(3).

¹¹⁰ ARSIWA, Art.30-1.

¹¹¹ ARSIWA, Art.35.

¹¹² *Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A No. 17, p.48; See also ARSIWA, Arts.29&30. See also Gray, '*Judicial Remedies in International Law*' [1st edn. Clarendon Press, Oxford 1987] [*Judicial Remedies in International Law*], pp.95 ff.

victims of the sexual exploitation and to meet the costs of repairing the damage suffered by Alicanto as a result of the unlawful broadcasts.¹¹³

IV. RAVISIA SHOULD IMMEDIATELY DELIVER THE FUGITIVE PICCARDO DONATI SO THAT HIS LAWFUL SENTENCE MAY BE CARRIED OUT.

A. RAVISIA'S FAILURE TO RETURN DONATI IS AN INTERNATIONALLY WRONGFUL ACT.

1. Ravisia continues to violate Alicanto's sovereignty by preventing Alicanto from exercising enforcement jurisdiction in its own territory.

a. Alicanto is exclusively entitled to exercise enforcement jurisdiction in its own territory.

A State's "title to exercise jurisdiction rests in its sovereignty."¹¹⁴ This right cannot be exercised "if to do so would conflict with the rights of the state having territorial jurisdiction."¹¹⁵ In this sense, enforcement jurisdiction is exclusive to the territorial state. Since Camp Tara is located entirely within Alicanto, Alicanto is exclusively entitled to exercise enforcement jurisdiction over it.

This entitlement cannot be defeated by an assertion of *de facto* control¹¹⁶ by Ravisian troops as Ravisia cannot derive any rights from its unlawful intervention¹¹⁷ and the

¹¹³ *The Lusitania case (US v Germany)* [1923] VII RIAA 32 (Sales No. 1956.V.5), p.40. See generally *Judicial Remedies in International Law*, p.77 ff.

¹¹⁴ *Case of the S.S. "Lotus" (France v Turkey)* (Judgment) [1927] PCIJ Rep Series A No. 10, p.19.

¹¹⁵ Oppenheim, '*International Law*' (Jennings & Watts eds.) [9th edn. Longman, London 1992] [Oppenheim], p.458.

¹¹⁶ *R (on the application of Al-Saadoon) v Secretary of State for Defence* [2008] EWHC 3098 (Admin), para.66.

right to exercise jurisdiction attaches to Alicanto's territorial sovereignty which is inviolable in international law.¹¹⁸

b. Ravisia continues to unlawfully interfere with this sovereign right.

By admitting Donati to Camp Tara, Ravisia effectively withdrew him from the jurisdiction of the territorial State, Alicanto, which constitutes an intervention in matters which are exclusively within Alicanto's competence,¹¹⁹ namely the execution of a criminal sentence imposed by its courts. Therefore, Ravisia's continuing refusal to deliver Donati to Alicanto amounts to a continuing violation of Alicanto's sovereignty.

2. In any event, Ravisia continues to violate international law by harbouring a terrorist.

a. Ravisia is in breach of its obligations under Resolution 1373.

By granting Donati refuge in Camp Tara, Ravisia is in continuing breach of its obligations under Security Council Resolution 1373¹²⁰ ("Resolution 1373") which "decides" that all States shall deny safe haven to those who commit terrorist acts.

i. Donati has committed a terrorist act.

For the purposes of the Resolution, terrorist acts include those acts outlawed in various international anti-terrorism conventions.¹²¹ For instance, Article 2(1) of the

¹¹⁷ Memorial III(C).

¹¹⁸ Oppenheim, *supra* note 115, p.700.

¹¹⁹ *Asylum* case, *supra* note 35, p.274.

¹²⁰ UNSC, [2001] UN Doc S/RES/1373, para.2(c).

International Convention for the Suppression of Terrorist Bombings¹²² (“Terrorist Bombings Convention”) prohibits detonating explosive devices *inter alia* in a place of public use or a State or government facility. By bombing Prime Minister Simurg’s car as he entered the airport grounds, Donati has committed the above offences among others.¹²³ Since terrorism is thus defined by conduct and not by motive, the question of Donati’s political motivation is irrelevant.¹²⁴

ii. Ravisia is providing safe haven for terrorists.

By admitting Donati to Camp Tara, Ravisia has facilitated his evasion of criminal responsibility which amounts to providing safe haven to terrorists contrary to Paragraph 2(c).

Even if Ravisia has not breached its obligations by admitting Donati, it has done so by granting him refuge in Camp Tara without ensuring that he is brought to justice by either surrendering him to a country that is willing to prosecute or by handing him over to its prosecution authorities as required by Paragraph 2(e). Since Ravisia has not done either, it is providing safe haven to terrorists contrary to Paragraph 2(c).

¹²¹ *Ibid.*, Preamble. See also ‘UN Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change’ [2004] UN Doc A/59/565, para.164; UNSC President’s Statement of 22 November 1989 UN Doc S/20988; UNSC Res 1189 [1998] UN Doc S/RES/1189.

¹²² [1997] 2149 UNTS 256.

¹²³ See also Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents [1973] 1035 UNTS 167, Arts.2(1)(a)&(b); Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation [1971] 974 UNTS 177, Art.1*bis* as amended by Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation [1988] ICAO Doc 9518, Art.2(1).

¹²⁴ Resolution 1373, para.3(g).

- b. *Ravisia is in breach of its obligations under customary law to surrender or prosecute fugitive terrorists.*

The principle *aut dedere, aut judicare* (surrender or prosecute) requires States to surrender or prosecute perpetrators of certain crimes.¹²⁵ Alicanto submits that this obligation has attained customary status as regards perpetrators of terrorist acts. The requirements of State practice and *opinio juris* are met as indicated by the 171 State parties to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the 166 State parties to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation as amended by the Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation and the 160 State parties to Terrorist Bombings Convention. This points to a virtually universal acceptance of this obligation, which is also supported by national and international courts.¹²⁶ Ravisia's failure to surrender or prosecute Donati therefore also breaches its obligations under customary law.

B. THERE ARE NO CIRCUMSTANCES PRECLUDING THE WRONGFULNESS OF THIS ACT.

Assuming, for present purposes, that conflicting obligations under human rights treaties, such as the International Covenant on Civil and Political Rights,¹²⁷ are

¹²⁵ Bassiouni & Wise, *'Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law'* [1st edn. Martinus Nijhoff, Dordrecht 1995], p.xii.

¹²⁶ *Goiburay et al. v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 153 [2006], para.132; *Auto n° 8/2008 correspondiente al Procedimiento de Extradición 1/2007 del Juzgado Central de Instrucción n° 2 Seguido a Instancias de las Autoridades de la República Argentina contra Doña Maria Estela Martínez Cartas* [2008] Audiencia Nacional Sala De Lo Penal, Seccion Segunda (Spanish National Court), p.14.

¹²⁷ [1966] 999 UNTS 171 [ICCPR].

essential interests that may be invoked as giving rise to a situation of necessity precluding the wrongfulness of this breach,¹²⁸ it is submitted that Ravisia cannot rely on such a defence.

1. Ravisia cannot invoke necessity on the grounds of human rights obligations owed to Piccardo Donati.

If the Court accepts that Alicanto is entitled to exercise territorial jurisdiction over Donati, Ravisia's human rights obligations may give rise to a situation of necessity only where it is clear that Alicanto "intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity"¹²⁹ or a comparable level of harm. Donati will be subjected to no such harm.

With regard to its obligations under Resolution 1373, Ravisia cannot claim necessity to comply with its ICCPR obligations because the former obligations exclude this possibility.¹³⁰ The Resolution prevails, by virtue of Article 103 of the Charter, over any other conflicting international obligations.¹³¹ Moreover, Ravisia has contributed to this situation of necessity¹³² by intervening in Alicantan territory; but for its unlawful presence, no potential conflict of obligations would have arisen. Further still, Ravisia may not invoke necessity because to do so would allow it to impair

¹²⁸ ARSIWA, Art.25.

¹²⁹ *R (B and Others) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, para.88.

¹³⁰ ARSIWA, Art.25(2)(a).

¹³¹ *Al-Jedda* case, *supra* note 97, paras.35&39.

¹³² ARSIWA, Art.25(2)(b).

Alicanto and the wider international community's essential interest in seeing terrorists brought to justice.¹³³

2. In any event, those obligations will not be breached.

a. There will be no violation of Donati's right to life.

States not party to the Second Optional Protocol to ICCPR¹³⁴ may, by virtue of Article 6 ICCPR, issue a death sentence for "the most serious of crimes". The fact that 95 States currently retain the death penalty in law is further evidence that the sentence is not in itself prohibited in customary law.¹³⁵ Therefore, Alicanto is permitted under international law to issue a death sentence for crimes as serious as Donati's.

Ravisia is not prevented from surrendering Donati to Alicanto by its abolitionist status in relation to the death penalty. While the Human Rights Committee ("HRC") in the case of *Judge v Canada*,¹³⁶ interpreted Article 6 ICCPR as preventing extradition in circumstances in which there is the real risk that the death penalty will be applied, this interpretation has not attained the status of customary law; it has not subsequently been reflected by widespread, consistent or settled State practice.¹³⁷ Moreover, such an interpretation is incorrect as Article 6 merely sets out the limitations on the use of the death penalty and does not exclude the possibility of extradition from an

¹³³ ARSIWA, Art.25(1)(b).

¹³⁴ [1989] 1642 UNTS 414.

¹³⁵ Amnesty International, '*Abolitionist and Retentionist Countries*' <<http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>> accessed 6 January 2009.

¹³⁶ HRC, Communication No. 829/1998 [2003] UN Doc CCPR/C/78/D/829/1998, para.10.4.

¹³⁷ *Supra* note 22.

abolitionist State to a retentionist State. The Committee's errant interpretation also exceeded its mandate.¹³⁸

b. There is no violation of the prohibition on retroactive punishment.

Article 15 ICCPR allows for the punishment of offences and application of penalties prescribed by law. The European Court of Human Rights ("ECtHR") in *SW v UK* has interpreted the near-identical Article 7 ECHR¹³⁹ as requiring a law or penalty to be both foreseeable and accessible to be non-retroactive.¹⁴⁰ It is submitted that the same principle applies to the present circumstances. The change in Alicanto's legal system was foreseeable at the time Donati's offence was committed due to Prime Minister Simurg's declared intentions, as demonstrated in his New Year's Message of 28 April 2008. The substance of the change was also accessible since it was to conform with the Talonnic Canon. Therefore, the death penalty, as applied to Donati, does not violate Article 15.

c. There is no violation of the right to a fair trial.

Although Article 14(3)(d) ICCPR appears to prohibit trials *in absentia*, its interpretation was modified by the HRC in *Mbenge v Zaire*.¹⁴¹ This reflects a customary norm evidenced *inter alia* by the Committee's reaffirmation in General

¹³⁸ Optional Protocol to ICCPR [1966] 999 UNTS 302, Art.1.

¹³⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] 213 UNTS 220.

¹⁴⁰ (App. No. 20166/92) [1996] 21 EHRR 363, para.45. See also *Sunday Times v UK* (A/30) [1979-80] 2 EHRR 245, para.49.

¹⁴¹ HRC, Communication No. 16/1977 [1983] UN Doc CCPR/C/18/D/16/1977, para.14.1.

Comment 32¹⁴² that trials *in absentia* are compatible with ICCPR “if the necessary steps are taken to summon persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.”¹⁴³ The summons need not even have reached Donati; it suffices that Alicanto took the necessary steps to bring it to his attention which it has done in its nationwide manhunt. By failing to surrender himself to the authorities, Donati has thus waived his right to be present at the trial. Therefore, there were justified reasons for trial *in absentia* in the present case, which human rights NGOs have said was in all other aspects fair.

Article 14(5) ICCPR states that those convicted of a crime have the right to have their conviction and sentence “reviewed by a higher tribunal”. The HRC has indicated that this provision does not necessarily require a full retrial. So long as the court can conduct an evaluation of the evidence presented at first instance,¹⁴⁴ a right to one review will suffice.¹⁴⁵ Since Donati was allowed such an appeal by a higher tribunal there is no violation of Article 14(5) if no retrial is given.

¹⁴² HRC, [2007] UN Doc CCPR/C/GC/32.

¹⁴³ *Ibid.*, para.36.

¹⁴⁴ HRC *Rolando v Philippines* Communication No. 1110/2002 [2004] UN Doc CCPR/C/82/D/1110/2002, para.4.5; HRC *Juma v Australia* Communication No. 984/2001 [2003] UN Doc CCPR/C/78/D/984/2001, para.7.5; HRC *Perera v Australia* Communication No. 536/1993 [1995] UN Doc CCPR/C/53/D/536/1993, para.6.4. See also HRC General Comment 32, para.48.

¹⁴⁵ HRC *Rouse v Philippines* Communication No. 1089/2002 [2005] UN Doc CCPR/C/84/D/1089/2002, para.7.6.

d. *There would be no violation of the right not to be subjected to cruel, inhuman or degrading treatment.*

Although the ECtHR has held that in certain circumstances, confinement on death row amounts to inhuman and degrading treatment,¹⁴⁶ the situation concerning Donati can be distinguished as he will not be exposed to an extended period of confinement prior to his execution. There would be no violation of Article 7 ICCPR as because his appeal has already been heard, Donati will not be exposed to the “death row phenomenon.”¹⁴⁷

The act of judicial hanging is also consistent with Article 7 ICCPR. This proposition is supported by State practice. For instance, Bangladesh, Botswana, China, Iran, Iraq, Japan, Kuwait, Pakistan, Singapore, Somali, Sudan and Syria all used hanging as an official method of execution as recently as 2007.¹⁴⁸ The death penalty “must be carried out in such a way as to cause the least possible physical and mental suffering.”¹⁴⁹ Hanging renders the convicted person unconscious within a matter of seconds.¹⁵⁰ It therefore does not cause intended, prolonged suffering or unnecessary pain.¹⁵¹ The possibility of pain resulting from an accident during the procedure does not amount to an “objectively intolerable risk of harm” which would render the

¹⁴⁶ *Soering v UK* (App. No. 14038/88) [1989] 11 EHRR 439, para.111.

¹⁴⁷ *Ibid.*

¹⁴⁸ Capital Punishment UK, ‘*Overview of the Death Penalty Worldwide in 2007*’ <<http://www.capitalpunishmentuk.org/overview.html>> accessed 6 January 2009.

¹⁴⁹ HRC General Comment 20 [1992] UN Doc CCPR/C/GC/20.

¹⁵⁰ *Campbell v Wood* 18 F.3d 662 (United States Court of Appeal 9th Cir.), *cert. denied*, 114 S. Ct. 2125 [1994], para.118 ff.

¹⁵¹ HRC *Ng v Canada* Communication No. 469/1991 [1994] UN Doc CCPR/C/49/D/469/1991, para.16.3. See also Kelly, ‘*Cheating Justice by Cheating Death*’ [2003] 20 Ariz. J. Int’l & Comp. L. 491, p.23.

execution cruel and unusual.¹⁵² Therefore, the risk of strangulation in hanging does not violate Article 7 ICCPR.

C. RAVISIA MUST CEASE THIS WRONGFUL ACT AND RETURN DONATI.

Therefore, Ravisia must cease and make reparation for this continuing wrongful act,¹⁵³ meaning it must return Donati to Alicanto.

¹⁵² *Baze, et al v Rees, et al*, 553 US, 128 S. Ct. 1520 [2008], p.11 Opinion of Roberts, C.J. and p.15 Opinion of Scalia, J. and Thomas, J.

¹⁵³ ARSIWA, Arts.30(a)&31.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Republic of Alicanto respectfully requests the Honourable Court to adjudge and declare as follows:

1. That the occupation of Alicantan territory by Ravisian armed forces since 1 August 2008 has been and continues to be a violation of international law, and order Ravisia to remove its military personnel from Alicanto at once;
2. That Ravisia need produce the intelligence delivered to the Secretary-General, and if it refuses, deny Ravisia the right to rely on that intelligence directly or indirectly to support the legality of Operation Provide Shelter in international law, or in the alternative, declare that the Secretary General may lawfully hand over the intelligence to Alicanto;
3. That the conduct of Ravisian soldiers at Camp Tara, including the broadcasting of offensive radio programming and the sexual exploitation of Alicantan children, are violations of international law and of the sovereignty and cultural and religious integrity of Alicanto, attributable to Ravisia, and order Respondent to pay reparations to compensate for the injury to Alicanto's social fabric; and
4. That Ravisia deliver to Alicanto the fugitive Piccardo Donati so that his lawful sentence may be carried out.

All of which is Respectfully Submitted