

**IN THE INTERNATIONAL COURT  
OF JUSTICE**



**AT THE PEACE PALACE  
THE HAGUE  
THE CASE CONCERNING “OPERATION PROVIDE SHELTER”**

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**REPUBLIC OF ALICANTO  
(APPLICANT)  
V  
COMMONWEALTH OF RAVISIA  
(RESPONDENT)**

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**MEMORIAL FOR THE RESPONDENT**

**2009 Philip C. Jessup  
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## STATEMENT OF JURISDICTION

The Commonwealth of Ravisia and the Republic of Alicanto have agreed to submit this dispute to the International Court of Justice pursuant to article 40(1) of the Statute of the International Court of Justice ('Statute') and in accordance with the *Compromis* notified to the Court on 15 September 2006. Pursuant to article 36(1) of the Statute, the Court has jurisdiction to decide all matters referred to it for decision.

Ravisia and Alicanto have agreed to act consistently with the Court's decision.

## QUESTIONS PRESENTED

1. Whether the presence of Ravisian troops in Alicantan territory is justifiable under international law.
2. Whether the Court should call upon Ravisia to produce the intelligence delivered to the Secretary-General and, if Ravisia continues to withhold the intelligence, whether Alicanto should be afforded an evidentiary benefit.
3. Whether the Secretary-General may lawfully hand over the intelligence to Alicanto.
4. Whether Ravisian troops' conduct violated international law, and if so to whom is their conduct attributable? Additionally, whether Alicanto is owed reparations for the alleged violations of international law.
5. Whether Piccardo Donati's sentence is lawful, and if so whether Ravisia is under an obligation to return Donati to Alicantan authorities.

## STATEMENT OF FACTS

Alicanto, a former Ravisian colony, is a member of the Ravisian Family of Nations ('R-FAN'), a regional cultural and political association.

### **Cultural and religious make-up**

The Alicantan population is predominantly comprised of Dasu and Zavaabi, who constitute 95% of the population. About 30% of Alicantans consider themselves Dasu, about 50% Zavaabi, and 15% 'both'. Both follow the Talonnic religion and have historically lived harmoniously.

Three distinctions are notable: since Alicantan independence, the Dasu have occupied most of the mid- to upper-level business and government positions; the Zavaabi are typically more orthodox in their Talonnic faith; and the Zavaabi's living-standards are significantly lower.

### **New Benu operations in the Rocian Plateau**

The Alicantan side of the mountainous Rocian Plateau bordering New Benu is largely lawless. Alicantan authorities have repeatedly conceded inability to control the region. A major NGO study in 2000 concluded that the Dasu-led authorities were intentionally turning a blind eye, so as not to provoke the Zavaabi majority.

In early 2005, responding to drug trade and gun violence, New Benu authorities adopted a zero-tolerance policy. Smugglers retaliated, killing many Zavaabi villagers in the crossfire. Leaflets were distributed accusing the Dasu-led New Benu government of deliberately targeting innocent Zavaabis. Tensions prompted many Dasu to flee the Plateau.

In June 2005, New Benu commenced aerial bombardments against suspected smuggling enclaves. The campaign killed mostly Zavaabis.



## **Alicantan Government**

In the 2005 Alicantan elections, the Guardians, an orthodox Talonnic party led by Gregory Simurg, won office with minority party support. In October, Prime Minister Simurg proclaimed a negotiated cease-fire agreement with New Benu.

## **UNMORPH**

On 5 December 2005, in Resolution 5440, the Security Council ('SC'), responding to requests from Alicanto and New Benu, determined a threat to international peace and security in the region and authorised the UN Mission Overseeing the Rocian Plateau and Hinterlands ('UNMORPH'). A status-of-forces agreement ('SOFA') was concluded. Ravisia volunteered the majority of troops and resources to the mission, stationed at Camp Tara. Major-General Skylark of the Ravisian Army was appointed Special Representative and Force Commander of UNMORPH. UNMORPH defused the unrest without significant bloodshed.

## **Broadcasting**

Resolution 5440 underlined the need for UNMORPH's national broadcasting, *inter alia*, to promote progressive development in Alicanto. The programming by UNMORPH included educational and cultural programs from the UN Radio News Service, including rights-based discussion programs for women and youth.

In response to complaints from orthodox religious leaders in the Plateau, warnings in Ravisian and local dialects were introduced before potentially offensive programming.

## **Sexual misconduct**

In October 2007, an NGO reported sexual exploitation by UNMORPH personnel of children in the Plateau. A UN inquiry concluded that peacekeepers had engaged in non-violent sexual

relations with local girls while off-duty and outside Camp Tara, often with payment of money or food.

### **Draw-down of UNMORPH**

On 18 February 2008, Skylark reported that the border area was essentially peaceful and that Alicanto had established an armed police presence and a network of trial courts. She advised the UN that, provided the situation continued improving, it would be possible to withdraw troops and terminate UNMORPH. The next day, the SC issued a resolution calling for the draw-down of troops and termination of UNMORPH by 31 July. By the end of March, almost half of UNMORPH's personnel were withdrawn leaving only Ravisian nationals.

### **Talonnlic censorship**

In March, the Guardian-led local government of the Northeast Province adopted an ordinance implementing Talonnlic law which prohibited secular broadcasts without prior approval. The Dasu Broadcasting Company, which aired programs regardless, was promptly shut down.

Citing Resolution 5440 and the SOFA, Skylark announced that UNMORPH broadcasts would continue and did not require prior approval. Alicantan authorities took no steps to enforce the ordinance against UNMORPH.

### **Ethnic tensions**

The closure of the Dasu Broadcasting Company caused tensions between Dasu and Zavaabi groups throughout the Northeast Province. UNMORPH observers reported that 35 Dasu demonstrators were killed by armed police.

Simurg announced a radical overhaul of the judicial code to incorporate Talonnlic teachings, prompting large-scale Zavaabi celebrations as well as renewed ethnic unrest.

Sporadic riots and significant violence nationwide broke out in the coming weeks. On 1 June, martial law was declared in twelve cities.

### **Reports of imminent ethnic cleansing**

On 22 May, an NGO reported hundreds of violent deaths in the Province. Dasu, fearing persecution, began fleeing *en masse* to New Benu. By 30 June, Dasu numbers in the Province had fallen by 30%. The NGO foresaw ‘ethnic cleansing on a massive scale’. Alicanto denied this threat. On 3 July the SC adopted Resolution 6620 which affirmed that there was a continuing threat to peace and security in Alicanto, and outlined steps to be taken to respond to it.

### **Simurg’s assassination and escalating ethnic conflict**

Simurg and ten staff were killed on 7 July in an airport bombing involving the Dasu Integrity Front. Alicantan authorities commenced searching for the prime suspect, Piccardo Donati. Subsequently, self-proclaimed Zavaabi ‘defense cadres’ claimed responsibility for burning six Dasu villages in the Plateau. NGOs reported a sophisticated weapons cache belonging to radical Zavaabi grouplets. Another NGO reported thousands of fatalities and that tens of thousands of Dasu from across Alicanto were fleeing imminent attack.

On 22 July, Ravisia’s President announced that Ravisia had ‘extremely reliable intelligence’ showing ‘a real and present danger of ethnic cleansing on a massive scale’ in Alicanto. Invoking the responsibility to protect, she called on the SC to extend the UNMORPH mandate or authorise collective action by R-FAN.

The highly classified Ravisian intelligence was provided to the Secretary-General, who committed to not divulge the data and delivered a report to the SC on 23 July. The report affirmed the reliability of Ravisia’s intelligence and concluded that a campaign of systematic violence against Dasu civilians was being planned.

### **Operation Provide Shelter**

On 24 July, the SC declined to extend the UNMORPH mandate. The R-FAN Assembly voted to endorse Ravisian intervention in Alicanto. On 1 August, the day after UNMORPH's termination, Ravisia's Operation Provide Shelter ('OPS') began. Within the week, Camp Tara housed 6,000 Ravisian troops under Skylark's command.

Although Alicanto's new Prime Minister claimed this was an act of war, Alicanto did not mount any military operation to remove OPS troops. OPS troops engaged in an average of three weekly operations, performing police functions including weapons confiscation and quelling riots. Alicantan authorities did nothing to prevent OPS troops from intervening.

### **Alicanto's new Judicial Code**

A new Judicial Code, adopted 15 August 2008, drew criticism from international human rights organizations. Under the Code, property and business titles of hundreds of Dasu were forfeited and made available to Zavaabi citizens, and the death penalty was reinstated for murder.

### **Donati's conviction and sentence**

After announcing that the search for Donati was unsuccessful, Alicantan authorities began a trial *in absentia* under the new Alicantan law. NGOs noted reservations about the trial *in absentia*.

On 1 September, Donati was convicted of murder and sentenced to death by hanging. An unsuccessful appeal was conducted *in absentia*. Under Alicantan law, Donati may be executed without retrial if apprehended within 12 years.

On 17 September, Skylark announced that Donati had been granted refuge at Camp Tara. She announced her intention not to deliver him to Alicanto for execution, refusing to provide further details.

## SUMMARY OF PLEADINGS

### **Declaration A**

Operation Provide Shelter is lawful for three reasons.

First, Ravisia is exercising its right of humanitarian intervention. This is a customary exception to the prohibition on the use of force. The exception can be invoked upon fulfilment of six criteria, all of which Ravisia has met.

Secondly, and in the alternative, Ravisia has an obligation to prevent the imminent genocide in Alicanto. This is a peremptory obligation that arises upon suspicion of a serious risk that genocide will be committed. The obligation is consistent with article 2(4), and engages Ravisia due to Ravisia's unique 'capacity of influence' over Alicanto.

Thirdly, the Security Council ('SC') authorised Operation Provide Shelter ('OPS'). Both resolutions 5440 and 6620 were enacted under Chapter VII and established a means of restoring peace to Alicanto. OPS was one such means.

Ravisia's presence in Alicanto is therefore legal.

### **Declaration B**

The Court should decline to call upon Ravisia to produce its classified intelligence because it is not necessary to elucidate either matter in issue. These two matters—the humanitarian emergency and the serious risk of genocide—are independently established by multiple sources. The classified intelligence is thus not determinative. If the Court deems this intelligence necessary, three factors indicate that the Court should decline to exercise its discretion in the present case.

Alternatively, if Ravisia continues to withhold the intelligence, the Court should not afford Alicanto any evidentiary benefit by drawing an adverse inference against Ravisia. The

intelligence is privileged for reasons of national security. Further, in the absence of any contrary evidence proffered by Alicanto, Ravisia has discharged its burden of proof to a sufficient standard.

The Secretary-General may not lawfully hand the classified intelligence over to Alicanto. This is because the Court lacks jurisdiction for two reasons. First, it cannot determine the obligations of the Secretary-General as the UN is an indispensable third party. Secondly, Alicanto lacks standing with respect to the merits of its claim. Alternatively, the Secretary-General may not lawfully hand over the classified intelligence to Alicanto pursuant to a treaty formed between Ravisia and the UN.

### **Declaration C**

Ravisia was not bound at international law to respect Alicantan law prohibiting sexual relations with children under sixteen.

Even if Ravisia was bound at international law to uphold Alicantan laws, the conduct of its troops was so far removed from their general or apparent authority that their conduct must be assimilated to them as private individuals.

Even if the troops' conduct is held to have been within their official capacity, the conduct of the troops is not attributable to Ravisia, as the UN exercised overall authority and effective control of their conduct.

Similarly, the broadcasting does not entail Ravisian responsibility. The broadcasting by Ravisian troops within the UNMORPH force was done on the specific direction of the SC. After the mandate expired, Ravisia was not bound by the Alicantan ordinance to cease broadcasting, as the ordinance was an unlawful restriction of Alicantan citizens' rights to freedom of expression, which is protected by the ICCPR.

Finally, no alleged injury to Alicanto or its citizens warrants reparations as Alicanto has not exhausted the local remedies available to it and, furthermore, the broadcasting has caused no injuries. Finally, and in the alternative, reparations should be limited to curial declaration.

#### **Declaration D**

Piccardo Donati's execution and trial violate international law. Alicanto's retroactive imposition of the death penalty violates both articles 6 and 15 of the ICCPR. Alicanto's reintroduction of capital punishment also violates article 6(2). Donati's trial *in absentia* was unlawful under article 14 of the ICCPR.

Ravisia cannot return Donati because of its obligations under the ICCPR. Ravisia's obligations under the ICCPR extend to Donati. Ravisia, as an abolitionist state, cannot return Donati to Alicanto for execution. Further, and in the alternative, Ravisia cannot return Donati to be executed in light of his unlawful trial and sentence.

No other obligations require Ravisia to return Donati. SC resolution 1373 does not oblige Ravisia to return Donati in violation of his ICCPR rights. Further, Ravisia bears no customary obligation to extradite Donati, and even if it did, Donati's offence was political, therefore there is no obligation to extradite him under customary international law.

## PLEADINGS

### **A. THE PRESENCE OF THE RAVISIAN MILITARY FORCES IN ALICANTO HAS BEEN AND CONTINUES TO BE FULLY JUSTIFIED UNDER INTERNATIONAL LAW.**

Until the expiry of the UNMORPH mandate on 31 July 2008, the presence of Ravisian military forces in Alicanto was justified under Resolution 5440.<sup>1</sup> Ravisia's presence in Alicanto after 31 July is justified for three reasons: first, the humanitarian emergency required intervention; secondly, Ravisia had an obligation to prevent genocide; and thirdly, Resolution 6620 authorised Operation Provide Shelter ('OPS').

#### **I. Ravisia's right of humanitarian intervention justifies OPS.**

(i) *Humanitarian intervention is an exception to the prohibition on the use of force.*

A right of humanitarian intervention has existed at custom since Grotius.<sup>2</sup> Article 2(4) of the *Charter of the United Nations* ('Charter'), interpreted in good faith in its context,<sup>3</sup> does not extinguish this right.

The purpose of article 2(4) is to prohibit the use of force and respect state sovereignty while protecting human rights. Nothing in the *Charter* precludes the use of force to achieve these purposes where UN collective security fails.<sup>4</sup> The contemporary doctrine of humanitarian

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<sup>1</sup> *Compromis*, Appendix I ('S/Res/5440').

<sup>2</sup> Reisman, 'Humanitarian Intervention to Protect the Ibos,' in Lillich (ed) *Humanitarian Intervention and the United Nations* (1973) 167, 179.

<sup>3</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, (in force 27 January 1980) art 31(1) ('VCLT').

<sup>4</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 543-4 (Judge Jennings, dissenting) ('*Nicaragua*'); Asrat, *Prohibition of Force under the UN Charter: A Study of Art.2(4)* (1991), 44-5; Cassese, *International Law in a*



intervention is an exception to this prohibition, recognised by state practice and *opinio juris*.<sup>5</sup> It is available where the following conditions are met:

- (a) There is an imminent threat of humanitarian emergency.<sup>6</sup>

Only the Security Council ('SC'), acting under Chapter VII, and ordering immediate action, may determine that the gravity of an emergency justifies humanitarian intervention.

The SC made such a determination in respect of Alicanto. Resolutions 5440 and 6620 recognised the continuing 'threat to international peace and security' and urged Alicanto to take immediate steps to improve the humanitarian situation.<sup>7</sup>

- (b) The use of force is necessary.<sup>8</sup>

The use of force must be the only practicable means to avert the humanitarian emergency. The affected state must be unable or unwilling to remedy the situation.

The statements of Alicantan officials, NGOs, Ravisian intelligence, and the Secretary-General's observations established Alicanto's inability and unwillingness to fulfil its obligations under Resolution 6620.<sup>9</sup> These failures precipitated 'a real and present danger' of ethnic

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*Divided World* (1986), 229; O'Connell, *International Law*, (2<sup>nd</sup> ed, 1986), 319; Schwarzenberger, 'The Fundamental Principles of International Law' 87 *RCADI* 1955-I, 338.

<sup>5</sup> *VCLT*, n3, art 31(3)(b); *2005 World Summit Outcome*, UN Doc.A/Res/60/1 (2005), [138] ('*2005 Summit Outcome*'); UN SCOR, 54<sup>th</sup> Year, 3988th Meeting, UN Doc.S/PV.3988, (1999), 4(US), 11(UK), 8 (France), 5(Canada), 8 (Netherlands), 7(Gambia).

<sup>6</sup> Greenwood, 'Humanitarian Intervention: the Case of Kosovo' 2002 *FinnYbIL* 141, 171 ('Greenwood').

<sup>7</sup> S/Res/5440; *Compromis*, Appendix II, [1]-[4] ('S/Res/6620')

<sup>8</sup> Greenwood, n6, 171.

<sup>9</sup> *Compromis*, [31], [33]-[34]; Appendix III, [10]-[12].

cleansing, which Alicanto refused to acknowledge.<sup>10</sup> The use of force, therefore, was the only means to avert the humanitarian emergency.

(c) The SC is unable to take action.<sup>11</sup>

The inability of the SC to take action to prevent a humanitarian emergency is established by the exercise or threat of veto power.

Although supported by a majority of members, both Resolutions put before the SC to intervene on humanitarian grounds in Alicanto were defeated by exercise of the veto.<sup>12</sup> It, therefore, was unable to take effective action within Alicanto to prevent the humanitarian emergency.

(d) The intervention is proportionate.<sup>13</sup>

The use of force must be strictly limited in time and scope to the humanitarian aim.<sup>14</sup> OPS is targeted, and does not breach the territorial integrity and political independence of Alicanto.<sup>15</sup>

(e) The authorisation constitutes collective action.<sup>16</sup>

The requirement of collective action is satisfied by the endorsement of R-FAN, the regional association to which Alicanto belongs.

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<sup>10</sup> *Compromis*, [34], [37], [50].

<sup>11</sup> Greenwood, n6, 171.

<sup>12</sup> *Compromis*, [39].

<sup>13</sup> Greenwood, n6, 171.

<sup>14</sup> UK Foreign and Commonwealth Office note to NATO states, 1998. Greenwood, n6, 158.

<sup>15</sup> *Charter of the United Nations*, art 2(4) ('Charter'); *Compromis*, [41], [45]-[46], [51].

<sup>16</sup> *2005 Summit Outcome*, n5, [138]-[139].

(ii) *The ‘Responsibility to Protect’ doctrine does not apply.*

The ‘Responsibility to Protect’ doctrine, which relies on SC authorisation, does not bind Ravisia for two reasons. First, it has no force in law.<sup>17</sup> Lacking sufficient state practice, it is merely *de lege ferenda*, inapplicable to Alicanto.

Secondly, even if the Court were to accept that the doctrine represents custom, its operation is premised upon effective performance of the UN collective security mechanism. It is consistent with the subsisting right of humanitarian intervention, which operates where this collective security mechanism fails.

## **II. Alternatively, OPS is justified by Ravisia’s obligation to prevent genocide in Alicanto.**

(i) *There is a customary obligation to prevent genocide.*

The obligation to prevent genocide, set out in the 1948 *Genocide Convention*,<sup>18</sup> has now crystallized as a *jus cogens* customary norm, demonstrated by virtually uniform state practice and *opinion juris*,<sup>19</sup> from which no derogation is permitted.<sup>20</sup>

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<sup>17</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), [15].

<sup>18</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 26 (in force 12 January 1951) (‘*Genocide Convention*’).

<sup>19</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections)* [1996] ICJ Rep 595, 615 (‘*Bosnian Genocide 1996*’); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Requests for Provisional Measures)* [1993] ICJ Rep 235, 439-40 (‘*Bosnian Genocide 1993*’); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)* [2007] Judgment, ICJ General List No.91 Judge Kreca, separate opinion [101] (‘*Bosnian Genocide 2007*’); Schabas, ‘Genocide and the International Court of Justice: Finally a Duty to Prevent the Crime of Crimes’ (2007) 2(2) *Genocide Studies and Prevention* 101, 122; Schabas, *Genocide in International Law* (2000) 500-502.

<sup>20</sup> *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the ILC, UN Doc.A/CN.4/L.682 (2006), 123 (‘*Fragmentation Report*’).

(ii) *The obligation to prevent genocide arose when Ravisia learnt of a serious risk.*

The obligation to prevent genocide is owed *erga omnes*,<sup>21</sup> and is not territorially limited.<sup>22</sup> A state's obligation to prevent and the concomitant duty to act arise at the instant that the state learns of, or should have learned of, a serious risk of genocide.<sup>23</sup> Towards this end, it is sufficient that a state reasonably suspects persons of harbouring specific intent 'to destroy, in whole or in part' a particular group.<sup>24</sup> Such intent may be demonstrated by a 'policy or plan',<sup>25</sup> particular acts, the scale of atrocities, localisation, and the deliberate and systematic targeting of a particular group.<sup>26</sup>

Immediately prior to OPS, Ravisia could reasonably suspect that the Zavaabi militants harboured specific intent to destroy 'in whole or in part' the Dasu people.<sup>27</sup> Ravisia had convincing evidence that a 'campaign of systematic violence against Dasu civilians was being planned'.<sup>28</sup> The violence was escalating,<sup>29</sup> and communications of an 'impending coordinated

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<sup>21</sup> *Bosnian Genocide 1996*, n19, 615-616; *Fragmentation Report*, n20, [408]; *Reservations to the Convention on Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23 ('*Reservations*'); *The Crime of Genocide*, GA Res 96, GAOR, 1<sup>st</sup> Sess, UN Doc.A/96 (1946).

<sup>22</sup> *Bosnian Genocide 1996*, n19, 616; *Barcelona Traction, Light and Power Company, Limited (Judgment) (Belgium v Spain)* [1970] ICJ Rep 3, 32 ('*Barcelona Traction*'); *Bosnian Genocide 2007*, n19, [183].

<sup>23</sup> *Bosnian Genocide 2007*, n19 155, [431]; *Bosnian Genocide 2007*, n19 (Judge Keith declaration) [11].

<sup>24</sup> *Bosnian Genocide 2007*, n19, [190].

<sup>25</sup> *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-T, Judgment, 21 May 1999r, [276]; *Prosecutor v Jelusic* ICTY-95-10-A, Judgment, 5 July 2001, ('*Jelusic*') [48].

<sup>26</sup> *Prosecutor v Akayesu* ICTR-96-4-T, Judgment 2 September 1998, [477].

<sup>27</sup> *Genocide Convention*, n18, art 2.

<sup>28</sup> Appendix III, [10].

<sup>29</sup> Appendix III, [7].

attack,<sup>30</sup> as well as an illegal weapons cache, were intercepted.<sup>31</sup> The deaths of thousands of Dasu at the hands of militias,<sup>32</sup> the targeted burning of Dasu villages, and the displacement of tens of thousands of Dasu in apprehension of imminent attack,<sup>33</sup> raised reasonable suspicion that the militants either intended to kill members of the Dasu group,<sup>34</sup> or to inflict ‘conditions of life calculated to bring about [their] physical destruction in whole or in part’.<sup>35</sup>

As in *Bosnian Genocide*, Ravisia’s duty to prevent has been activated by the reasonable suspicion of by, risk of genocide, established by Secretary-General reports,<sup>36</sup> ethnic tension, knowledge of armed forces present in the region, and the ongoing attention of the UN.<sup>37</sup>

(iii) *Use of the term ‘ethnic cleansing’ does not preclude a finding of imminent genocide.*

The term ‘ethnic cleansing’ is often used interchangeably with ‘genocide’.<sup>38</sup> Moreover, ethnic cleansing *per se* may constitute genocide where the necessary specific intent of genocide exists.<sup>39</sup>

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<sup>30</sup> Appendix III, [5].

<sup>31</sup> *Compromis*, [33].

<sup>32</sup> *Compromis*, [29].

<sup>33</sup> *Compromis*, [33].

<sup>34</sup> *Genocide Convention*, n18, art 2(a).

<sup>35</sup> *Genocide Convention*, n18, article 2(c).

<sup>36</sup> *Bosnian Genocide 2007*, n19, [436];

<sup>37</sup> *Bosnian Genocide 2007*, n19, [435]-[438], *Compromis*, [36]; S/Res/6620; Appendix III, [2]-[3].

<sup>38</sup> *Prosecutor v Blagojevic* IT-02-60-T, Judgment, 17 January 2005, [659]-[666]; *The situation in Bosnia and Herzegovina*, GA Res.47/121, GAOR, 91<sup>st</sup> plen.mtg., UN Doc.A/Res/47/121 (1992).

<sup>39</sup> *Bosnia Genocide 2007*, n19, [190]; *Jorgic v Germany*, no.74613/01, ECHR, 12 July 2007, [112]-[113].

Further, in dealing with the obligation to prevent genocide, evidence of a campaign of ‘ethnic cleansing’ can indicate a serious risk of escalation to genocide.

(iv) *The obligation to prevent genocide fell upon Ravisia due to its capacity of influence.*

The obligation to prevent genocide requires states to employ ‘all means reasonably available’ to prevent genocide.<sup>40</sup> The scope of the obligation is proportionate to the state’s capacity of influence over the relevant actors, determined by three parameters: (1) geographical proximity; (2) the strength of political and other links; and (3) the legal limits prescribed by international law.<sup>41</sup>

The obligation to prevent genocide in Alicanto fell upon Ravisia. Ravisia is geographically proximate to Alicanto, as Alicantan refugees have fled to Ravisia.<sup>42</sup> Ravisia and Alicanto share strong political, colonial, religious, economic, and linguistic links.<sup>43</sup> Ravisia is thus in a position of influence over Alicanto unlike any other state.<sup>44</sup>

(v) *The jus cogens obligation to prevent genocide is not limited by article 2(4).*

The obligation to prevent genocide—by employing ‘all means’—and article 2(4) are both *jus cogens* norms. By analogy, the Court should apply the methods of reconciliation used when other equal-ranking rules of international law conflict.<sup>45</sup>

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<sup>40</sup> *Bosnian Genocide 2007*, n19, [430].

<sup>41</sup> *Bosnian Genocide 2007*, n19, [430].

<sup>42</sup> *Compromis*, [40].

<sup>43</sup> *Compromis*, [2]-[4].

<sup>44</sup> *Bosnian Genocide 2007*, n19, [434].

<sup>45</sup> *Fragmentation Report*, n20, 25.

The two norms may be interpreted harmoniously so that their conflict is only apparent, not genuine.<sup>46</sup> Article 2(4) only prohibits use of force in a ‘manner inconsistent with the Purposes of the United Nations’.<sup>47</sup> The obligation to prevent genocide is consistent with the Purposes of the UN, given its object to liberate mankind of the crime.<sup>48</sup>

Alternatively, the specific and long-standing obligation to prevent genocide prevails under the principles of *lex specialis*<sup>49</sup> and *lex posterior*.<sup>50</sup> The duty to prevent genocide should also be preferred as an ‘absolute’ principle, unlike article 2(4) which permits exceptions in self-defence and collective security.<sup>51</sup>

### **III. The SC authorised OPS.**

The SC is empowered to authorise states, or groups of states, to use force.<sup>52</sup> First, by invoking Chapter VII<sup>53</sup> and, secondly, establishing the means desired to remove that threat.<sup>54</sup>

SC resolutions must be considered in the context<sup>55</sup> of the SC’s involvement in the matter so as to appreciate ‘all circumstances that might assist in determining the legal consequences of the

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<sup>46</sup> *Fragmentation Report*, n20, 27.

<sup>47</sup> *Charter*, n15.

<sup>48</sup> *Reservations*, n21, 23.

<sup>49</sup> *Fragmentation Report*, n20, 8.

<sup>50</sup> *Fragmentation Report*, n20, 35-36.

<sup>51</sup> *Charter*, n15, art 51.

<sup>52</sup> *Charter*, n15, arts 25, 42, 53.

<sup>53</sup> Frowein and Krisch, ‘Chapter VII’ in Simma, *The Charter of the United Nations: A Commentary* (2002) 749, 753 (‘Frowein’); *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 167 (‘*Certain Expenses*’).

<sup>54</sup> *Charter*, n15, arts 41-42.

resolution’.<sup>56</sup> Resolutions forming part of a series have ‘combined and cumulative effect’ and must be interpreted together.<sup>57</sup>

(i) *The SC impliedly authorised the use of force.*

Resolutions 5440 and 6620 authorise OPS. Construed together in their context, the two necessary elements are present. First, both resolutions are made under Chapter VII. Resolution 5440, expressly ‘acting under Chapter VII’, authorises the deployment of UNMORPH. Resolution 6620 references Resolution 5440, impliedly reviving Ch VII.<sup>58</sup> Secondly, both determine a ‘threat to international peace and security’ invoking article 39.<sup>59</sup> As the authorisation to use force may be sourced anywhere in Chapter VII,<sup>60</sup> this provides a legal basis which authorises OPS.

Further, the means of removing this threat is the reminder to ‘remain vigilant and prepared to provide humanitarian assistance’.<sup>61</sup> The ordinary meaning of this reminder,<sup>62</sup> interpreted in

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<sup>55</sup> Frowein, n53, 713.

<sup>56</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Advisory Opinion)*, [1971] ICJ Rep 16, 53 (‘Namibia’).

<sup>57</sup> *Namibia*, n56, 51.

<sup>58</sup> *Letter dated 20 March 2003 from the Permanent Representative of the UK to the President of the SC*, UN Doc.S/2003/350 (2003).

<sup>59</sup> *Charter*, n15, art 39; Frowein, n53, 753, *Zambia*, SCOR, 1948<sup>th</sup> mtg UN Doc.S/Res/393 (1976); *Iraq and Kuwait*, SCOR 2938<sup>th</sup> mtg, UN Doc.S/Res/665 (1990); *Eritrea and Ethiopia*, SCOR 3975<sup>th</sup> mtg, UN Doc S/Res/1227 (1999).

<sup>60</sup> *Certain Expenses*, n53, 167.

<sup>61</sup> S/Res/6620, [5].

<sup>62</sup> *Howrani and four others*, UNAT Judgment No. 4 [1951].



good faith,<sup>63</sup> authorises member states to provide humanitarian assistance. Thus the SC, already seized of the situation under Chapter VII, implicitly authorised OPS.

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<sup>63</sup> Frowein, n53, 713.

**B. DECLINE TO CALL UPON RAVISIA TO PRODUCE ITS CLASSIFIED INTELLIGENCE, OR IN THE ALTERNATIVE, DECLINE TO AFFORD ANY EVIDENTIARY BENEFIT SHOULD RAVISIA CONTINUE TO WITHHOLD THE INTELLIGENCE, AND DECLARE THAT THE SECRETARY-GENERAL MAY NOT LAWFULLY HAND IT OVER TO ALICANTO**

**I. The Court should decline to call upon Ravisia to produce its classified intelligence.**

(i) *The intelligence is not necessary to elucidate any matter in issue.*

The Court has the discretionary power to call upon parties to produce evidence, when necessary to elucidate a matter in issue.<sup>64</sup> Necessity is determined by the availability of alternative probative evidence.<sup>65</sup>

There are two matters in issue. First, whether a situation necessitating humanitarian intervention existed in Alicanto;<sup>66</sup> and second, whether Ravisia had a reasonable suspicion that a serious risk of genocide existed.<sup>67</sup> The classified intelligence is not necessary to elucidate either matter for three reasons.

(a) First, multiple sources independently establish the matters in issue.

SC decisions,<sup>68</sup> reports from NGOs,<sup>69</sup> statements from UNMOPRH observers<sup>70</sup> and Alicantan law enforcement officials<sup>71</sup> independently establish the imminent humanitarian emergency and the suspicion of a serious risk of genocide.

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<sup>64</sup> *Statute of the International Court of Justice* ('Statute'), art 49; *International Court of Justice Rules of Court* (1978), as amended on 29 September 2005, art 62(1).

<sup>65</sup> *Bosnian Genocide 2007*, n19, [206].

<sup>66</sup> See Dec.A(I).

<sup>67</sup> See Dec.A(II).

<sup>68</sup> S/Res/5440; S/Res/6620.

<sup>69</sup> *Compromis*, [10], [29], [33], [40].

This evidence should be accorded probative value<sup>72</sup> because it derives from official, independent bodies;<sup>73</sup> was not specially prepared for this case;<sup>74</sup> and emanates from identified,<sup>75</sup> multiple sources,<sup>76</sup> demonstrating contemporaneous and direct knowledge which has not been challenged by any impartial person.<sup>77</sup>

(b) Secondly, two pieces of alternative evidence diminish the need for the intelligence. First, the Court accepts factual statements made by the SC, such as its recognition of the threat to the peace in Alicanto, as authoritative.<sup>78</sup> Secondly, the Court gives significant weight to statements unfavourable to the person making them.<sup>79</sup> The concession by Alicantan officials that they are unable to end ‘the rampant lawlessness of the region,’ and PM Simurg’s request for UNMORPH,<sup>80</sup> constitute admissions probative of a humanitarian emergency.

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<sup>70</sup> *Compromis*, [26], Appendix III.

<sup>71</sup> *Compromis*, [10], [17].

<sup>72</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] Judgment, ICJ General List No.116, [58]-[9], (‘*Armed Activities*’).

<sup>73</sup> *Bosnian Genocide 2007*, n19, [227].

<sup>74</sup> *Bosnian Genocide 2007*, n19, [213].

<sup>75</sup> *Bosnian Genocide 2007*, n19, [227].

<sup>76</sup> *Oil Platforms (Islamic Republic of Iran v US)* [2003] ICJ Rep 161, 190.

<sup>77</sup> *Armed Activities*, n72, [61].

<sup>78</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 168-171 (‘*Israeli Wall*’); *Armed Activities*, n72, [154].

<sup>79</sup> *Nicaragua*, n4, 41; *Armed Activities*, n72, [61].

<sup>80</sup> *Compromis*, [17].

- (c) Thirdly, the intelligence is not necessary because the Secretary-General's report may be used as a substitute.

The Secretary-General's report addresses both matters in issue—the humanitarian emergency and the reasonable suspicion of a serious risk of genocide—in two different ways.

First, the report may be used for a second-hand hearsay purpose to prove the truth of a humanitarian emergency.<sup>81</sup> The Court treats hearsay evidence as admissible<sup>82</sup> and accords authoritative weight to the evidence of independent bodies,<sup>83</sup> including the Secretary-General.<sup>84</sup> The Court, therefore, should value the Secretary-General's conclusion of a planned 'campaign of systematic violence against [the] Dasu'.<sup>85</sup>

Secondly, even if the Court does not admit the report for its second-hand hearsay purpose, it may still be used for the first-hand hearsay purpose, of proving that Ravisia had a reasonable suspicion of a serious risk of genocide.

(ii) *Alternatively, the Court should decline to exercise its discretion to call upon the evidence.*

The 'burden of evidence' lies upon the parties before the Court.<sup>86</sup> The Court is not obliged to engage in additional fact-finding and consistently declines to call upon classified documents.<sup>87</sup>

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<sup>81</sup> Appendix III, [10].

<sup>82</sup> *Corfu Channel case (UK v Albania)* [1949] ICJ Rep 4, 16-7 ('*Corfu*').

<sup>83</sup> *Charter*, n15, arts 34, 50; *Corfu*, n82, 16.

<sup>84</sup> *Bosnian Genocide 2007*, n19, [228], [436]; *Armed Activities*, n72, [206]; *Israeli Wall*, n78, 141; Judge Buergenthal, separate opinion, 240-245; *Application for Review of Judgment No 333 of the United Nations Administrative Tribunal (Advisory Opinion)* [1987] ICJ 18.

<sup>85</sup> Appendix III, [10].

<sup>86</sup> Kolb, 'General Principles of Procedural Law' in Zimmerman, Tomuschat and Ollers-Frahm, *The Statute of the International Court of Justice: A Commentary* (2006) 793, 818.

<sup>87</sup> *Elaboration of the Rules of Court* [1936] PCIJ (ser.D) No.2 (3d add), 768-9 ('*Elaboration of the Rules*'); *Diversion of Waters from the Meuse Case*, Fourteenth Annual Report, PCIJ, (ser.E)

As Judge Mahiou stated in the *Bosnian Genocide 2007* case,<sup>88</sup> to accede to a request by one party, risks: first, creating the impression that the Court is helping, or compensating for, that party; secondly, infringing upon state sovereignty and ‘increasing distrust’ of the Court; and thirdly, an embarrassing refusal by a respondent state invoking national security. For these three reasons, the Court should decline to exercise its discretion to call upon the confidential intelligence.

**II. In the alternative, the Court should decline to afford Alicanto any evidentiary benefit should Ravisia continue to withhold the intelligence.**

(i) *The Court should not draw an adverse inference against Ravisia.*

The overwhelming practice of the Court is to decline to afford an evidentiary benefit where the withholding party pleads the privilege of national security.<sup>89</sup> This reflects three principles: first, that an adverse inference should only be drawn where the failure to produce documents is unexplained;<sup>90</sup> secondly, that the primacy of national security must be respected;<sup>91</sup> and thirdly, there is a ‘legal presumption...of the regularity and necessity of governmental acts.’<sup>92</sup>

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No.14, 149 (*Meuse*); *US Diplomatic and Consular Staff in Tehran (US v Islamic Republic of Iran) (Provisional Measures)* [1979] ICJ Pleadings 7, 117 (*Tehran Hostages Pleadings*); *Bosnian Genocide 2007*, n19, [206].

<sup>88</sup> *Bosnian Genocide 2007*, n19, Judge Mahiou, dissenting, [58].

<sup>89</sup> *Corfu*, n82, 32; *Meuse*, n87, 14; *Tehran Hostages Pleadings*, n87, 117; *Elaboration of the Rules*, n87, 768-9.

<sup>90</sup> *Ultrasystems Incorporated and Islamic Republic of Iran*, (1983) 2 Iran-US CTR 114, 115 Richard Mosk, concurring.

<sup>91</sup> Rosenne, *Essay on International Law and Practice* (2005) 569, 574.

<sup>92</sup> *Corfu*, n82, Judge Ecer, dissenting, 119-120; *Valentiner Case* (1903) *Venezuelan Arbitrations* 564.

The intelligence relied upon by Ravisia and the Secretary-General is ‘highly classified under Ravisian law’.<sup>93</sup> Highly classified documents constitute official secrets, recognised as privileged.<sup>94</sup> Intelligence gathering has never been condemned by the Court despite opportunity to do so.<sup>95</sup> Accordingly, the court should refrain from drawing any adverse inference against Ravisia.

(ii) *Ravisia may discharge its burden of proof with a prima facie case.*

Ravisia may discharge its burden of proof with a *prima facie* case for two reasons.

First, applying a general principle of international courts and tribunals,<sup>96</sup> the Court must take Ravisia’s evidence as sufficient to maintain its propositions, because Alicanto has not rebutted the evidence, if untrue, by submitting even ‘a scintilla of evidence’<sup>97</sup> about the conditions within its own borders during UNMORPH or OPS.

Secondly, where proof of a fact presents extreme difficulty, a tribunal may be satisfied with less conclusive proof, that is, *prima facie* evidence.<sup>98</sup> The right of humanitarian intervention and the duty to prevent genocide rely, in part, upon assessing the intentions of perpetrators.

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<sup>93</sup> Appendix III, [10]; *Compromis*, [35], [55].

<sup>94</sup> *Elaboration of the Rules*, n87, 768-9.

<sup>95</sup> *US Diplomatic and Consular Staff in Tehran (USA v Islamic Republic of Iran)* [1980] ICJ Rep 3, 38; *Nicaragua*, n4, 123, 136-40.

<sup>96</sup> *Asylum Case (Columbia v Peru)* [1950] ICJ Rep 226, 326-7, Judge Read, dissenting (‘Asylum’); *De Lemos Case (UK v Venezuela)*, 1903, Ralston’s Rep (1904) 3019, 3021; *Brun Case (France v Venezuela)*, French-Venezuelan Mixed-Claims Commission, 1902, Ralston’s Rep (1906) 5, 225; *Janin v Etat Allemand (Franco-German Mixed Tribunal)* 1 Recueil des Decisions 774 (1922); *Kling Case* (1930), Mexico-US General Claims Commission 1923, *Opinions of Commission 1929*, 36, 49.

<sup>97</sup> *Asylum*, n96, 326-7, Judge Read, dissenting.

<sup>98</sup> *Corfu*, n82, 18; *Lynch Case* (1929), British-Mexican Claims Commission 1926, *Decisions & Opinions of Commission*, 20, 21.

Although these intentions may be inferred from various acts,<sup>99</sup> by their nature they are difficult to prove and thus the Court should be satisfied with the proof provided by Ravisia, even if not conclusive.

### **III. The Secretary-General may not lawfully hand the classified intelligence over to Alicanto.**

- (i) *The Court lacks jurisdiction to determine the obligations of the Secretary General as the UN constitutes an indispensable third party.*

Where the subject matter of a dispute involves the rights and obligations of a third party, the Court must decline to exercise its jurisdiction.<sup>100</sup> This principle extends to organisations with international legal personality,<sup>101</sup> such as the UN.<sup>102</sup> Alternatively, if this principle does not extend to international organisations generally, it does extend to the UN specifically which has a unique means of consenting to the Court's jurisdiction, by requesting an advisory opinion.<sup>103</sup> To allow states to unilaterally obtain a ruling upon the legal rights and obligations of the UN would undermine the specific controls and limits implied in the advisory opinion mechanism.<sup>104</sup>

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<sup>99</sup> *Jelusic*, n25, [48].

<sup>100</sup> *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and US)* [1954] ICJ Rep 19, 32 ('*Monetary Gold*').

<sup>101</sup> *Legality of Use of Force (Yugoslavia v Portugal) (Preliminary Objections)*, 'Preliminary Objections of the Portuguese Republic' [2004] ICJ Written Pleadings, 43-44; *Legality of Use of Force (Yugoslavia v Portugal)* (Verbatim Records), 22 April 2004, ICJ Court Records 2004/18 12-14; *Legality of Use of Force (Yugoslavia v France) (Preliminary Objections)*, 'Preliminary Objections of the French Republic' [2004] ICJ Written Pleadings, 38; *Legality of Use of Force (Yugoslavia v Italy) (Preliminary Objections)*, 'Preliminary Objections of the Italian Republic' [2004] ICJ Written Pleadings, 51.

<sup>102</sup> *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179 ('*Reparations*').

<sup>103</sup> *Charter*, n15, art 96.

<sup>104</sup> *Statute*, n64, 65-8.

Determining the legal rights and obligations of the UN would form the ‘very subject-matter’ of the instant decision.<sup>105</sup> It is a pre-requisite.<sup>106</sup> The Court must decline jurisdiction.

(ii) *Alternatively, Alicanto lacks standing with respect to the merits of their claim*

Alicanto lacks a sufficient<sup>107</sup> legal right or interest to have standing as a claimant.<sup>108</sup> Alicanto has no direct legal interest in the rights and obligations of the Secretary-General. Similar to the *South West Africa* case, the true object of the Applicant’s claim is merely to obtain a declaratory judgement to bring it to the attention of the ‘appropriate political organs.’ This constitutes an advisory opinion, which cannot be obtained by states.<sup>109</sup>

(iii) *If the Court does hold that the Applicant has standing, the Secretary-General may not lawfully hand over the intelligence to Alicanto pursuant to a treaty between Ravisia and the UN.*

The UN, as an international legal person, may conclude treaties.<sup>110</sup> A treaty may be oral<sup>111</sup> and informal in nature.<sup>112</sup> It will be binding where the consent of the organisation has been expressed

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<sup>105</sup> *Monetary Gold*, n100, 32.

<sup>106</sup> *Certain Phosphate Lands in Nauru (Preliminary Objections)* [1992] ICJ Rep 240, 261-2.

<sup>107</sup> *Barcelona Traction*, n22, 36; *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 22, 32-34 (‘*South West Africa*’).

<sup>108</sup> *South West Africa*, n107, 32-34.

<sup>109</sup> *South West Africa*, n107, 33.

<sup>110</sup> *Reparations*, n102, 179.

<sup>111</sup> *Legal Status of Eastern Greenland*, [1933] PCIJ (Ser.A/B) No.53, 22, 71 (‘*Eastern Greenland*’).

<sup>112</sup> Karunatileke, ‘Essai d’une classification des accords conclus par les Organisations internationales entre elles ou avec des Etats’, (1971) 75 *RGIP* 17, 36.



in accordance with its internal rules.<sup>113</sup> However, where consent is expressed in contravention of these rules, the treaty will not be invalidated unless the violation was manifest and concerned a rule of fundamental importance.<sup>114</sup>

The Secretary-General had competence to bind the UN in a confidentiality agreement.<sup>115</sup> This competence derives from three sources.

First, the Secretary-General may deal in confidence with member states on behalf of the UN.<sup>116</sup> This is implied from his 'good offices' role pursuant to his functions under article 99.<sup>117</sup>

Secondly, the SC has authorised the Secretary-General to keep it closely informed of the situation in Alicanto.<sup>118</sup>

Thirdly, where the power to conclude a specific form of treaty is not vested either expressly or impliedly in any other organ, the Secretary-General retains the residual authority to conclude such agreements.<sup>119</sup> The power to receive confidential information is not expressly or impliedly vested in any other organ.

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<sup>113</sup> *Vienna Convention on the Law of Treaties between States and International Organisations*, opened for signature 21 March 1986, (1986) 25 ILM 543, art 7 (not in force) ('VCLTSIO').

<sup>114</sup> VCLTSIO, n113, art 46.

<sup>115</sup> *Compromis*, [38].

<sup>116</sup> United Nations Preparatory Commission, PC/20 (23 December 1945) s2B, [16], [19].

<sup>117</sup> *Reparations*, n102, 182; Murty, *International Law of Diplomacy* (1989) 158; *Competence of the International Labour Organisation to regulate incidentally the personal work of the employer (Advisory Opinion)* [1926] PCIJ (ser.B) No.13, 18.

<sup>118</sup> S/Res/5440, [7]; S/Res/6620, [6].

<sup>119</sup> Fitzmaurice, 'The Law and Procedure of the International Court of Justice,' (1952) 29 *BYbIL* 1, 13.

Alternatively, if the Secretary-General has expressed the consent of the UN in violation of its internal rules regarding competence, the violation is not sufficiently manifest as to extinguish the Secretary-General's ostensible competence and would not be evident to another party acting in good faith.<sup>120</sup> No clear or explicit provision of the *Charter* excludes the competence of the Secretary-General.<sup>121</sup> The Court has been unwilling to look beyond the ostensible authority of an agent where the subject matter has been within their apparent 'province'.<sup>122</sup>

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<sup>120</sup> 'Report of the International Law Commission on the work of its thirty-fourth session' (1982) *YbILC*, vol II(2), 52, UN Doc.A/CN.4/SER.A/1982/Add.1(Part 2).

<sup>121</sup> *Attorney-General of Israel v Kamiar* (1968) 44 ILR 197, 268.

<sup>122</sup> *Eastern Greenland*, n111, 71.

**C. FIND THAT THE CONDUCT OF RAVISIAN TROOPS WHILST STATIONED AT CAMP TARA DID NOT VIOLATE INTERNATIONAL LAW, AND THAT, IN ANY EVENT, RAVISIA BEARS NO LIABILITY FOR ANY WRONGDOING THAT MAY HAVE BEEN COMMITTED IN THE SERVICE OF THE UNITED NATIONS, AND THAT NO ALLEGED INJURY TO ALICANTO OR ITS CITIZENS WARRANTS REPARATIONS**

Alicantan laws prohibiting sex with minors or requiring broadcasting licenses cannot bind Ravisia at international law. Neither the status-of-forces agreement ('SOFA') nor Resolution 5440 make these domestic obligations international. Furthermore, the broadcasting ordinance cannot bind Ravisia because it violates international human rights law. Alternatively, any unlawful conduct by the troops cannot be attributable to Ravisia, since the conduct comprised private—not official—acts, or because the troops were under the overall authority or effective control of the UN. Since there is neither breach nor attribution, Ravisia cannot owe any reparations.

**I. Ravisia is not responsible for the sexual exploitation.**

*(i) Ravisia is a third party to the SOFA and is not bound by it.*

Any obligation to respect local law contained in the SOFA<sup>123</sup> does not bind Ravisia. The SOFA was concluded between Alicanto and the Secretary-General. As a third party, Ravisia cannot bear obligations under the SOFA absent written consent.<sup>124</sup>

*(ii) Resolution 5440 does not extend the SOFA to Ravisia.*

While member states are obliged to accept and carry out decisions of the SC,<sup>125</sup> the direction to conclude the SOFA is addressed only to the UN and Alicanto.<sup>126</sup> Nothing in the Resolution directs Ravisia to be bound by the SOFA.

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<sup>123</sup> *Model status-of-forces agreement*, UN Doc.A/45/594 (1990), Annex, [6] ('SOFA').

<sup>124</sup> *VCLT*, n3, art 35.

(iii) *Since troops were acting in their private capacity, their conduct is not attributable to Ravisia.*

The ordinary rule of attribution is that the acts of state organs, such as members of armed forces, are attributable to the state.<sup>127</sup> However, where an organ acts *ultra vires*, its conduct will only be attributable to a state if it occurred within the general scope of actual or apparent authority.<sup>128</sup>

UNMORPH troops were deployed pursuant to a limited peace-keeping mandate.<sup>129</sup> The troops' sexual misconduct occurred while they were off-duty,<sup>130</sup> and was so far beyond the scope of their official functions and authority that these acts must be assimilated to that of private individuals.<sup>131</sup> Their conduct cannot be attributed to Ravisia.

(iv) *Alternatively, even if the exploitation was within the troops' official capacity, attribution flows to the UN, not Ravisia.*

On either a test of 'overall authority', or 'effective control', the conduct of UNMORPH troops is attributable to the UN.

**Overall authority:** The conduct of troops forming part of a SC-authorized operation is attributable to the UN where the SC exercises overall authority over that operation.<sup>132</sup> The SC

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<sup>125</sup> *Charter*, n15, art 25.

<sup>126</sup> S/Res/5440, [5].

<sup>127</sup> *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the ILC, Fifty-Third Session, UN GAOR, 56<sup>th</sup> sess, Supp. No.10, UN Doc.A/56/10(2001), art 4 ('ASR').

<sup>128</sup> *Caire (France v Mexico)* (1929) 5 RIAA 516.

<sup>129</sup> S/Res/5440, [4].

<sup>130</sup> *Compromis*, [21].

<sup>131</sup> ASR, n127, art 4.

<sup>132</sup> *Behrami and Behrami v France; Saramati v France, Germany and Norway* (2007) 45 EHRR 10 [134] ('Behrami').

tasked UNMORPH's Commander with ensuring that the peacekeepers observed local law.<sup>133</sup> Furthermore, the Commander reported on developments in the Rocian Plateau to the SC,<sup>134</sup> demonstrating the SC's overall authority.

**Effective control:** Alternatively, the conduct of a state organ placed at the disposal of an international organisation is attributable to that organisation if it 'exercises effective control over [that] conduct.'<sup>135</sup> Effective control is a question of fact.<sup>136</sup>

Applying this test, attribution flows to the UN. The UN defined the peacekeepers' mandate, determined its facilities,<sup>137</sup> and controlled the size of the force.<sup>138</sup> In contrast to *Al-Jedda*, where the multinational military operation was established at the behest of states,<sup>139</sup> UNMORPH was created by the UN. After the sexual exploitation was reported, it was the UN, not Ravisia, which investigated the misconduct, demonstrating its capacity to act to control the force.<sup>140</sup> Therefore the UN, and not Ravisia, exercised effective control over the conduct of UNMORPH troops.

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<sup>133</sup> SOFA, n123, [6].

<sup>134</sup> *Compromis*, [23].

<sup>135</sup> *Responsibility of International Organizations*, Report of the ILC, Fifty-Sixth Session, UN GAOR, 59<sup>th</sup> sess, Supp. No.10, UN Doc.A/59/10, 109(2004), art 5 ('*DARIO*'); Gaja, *Second Report on Responsibility of International Organizations*, UN Doc.A/CN.4/541(2004), [41] ('Gaja').

<sup>136</sup> Gaja, n135, [41].

<sup>137</sup> S/Res/5440, [1], [6].

<sup>138</sup> S/Res/5440, [3]; *Compromis*, [24].

<sup>139</sup> *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332, [24].

<sup>140</sup> *Compromis*, [17].

## II. The broadcasting does not entail Ravisian responsibility.

(i) *Ravisia is not obliged to obey the broadcasting ordinance.*

As established above, Ravisia has no international obligation to observe local law. In any event, there was no ordinance prohibiting unauthorised broadcasting until March 2008.

(ii) *Alternatively, Resolution 5440 authorised the broadcasting.*

Resolution 5440 ‘underlines the need’ to make secular broadcasts.<sup>141</sup> This SC decision constitutes sufficient authority for the broadcasts and overrides any other inconsistent obligations.<sup>142</sup>

(iii) *In the further alternative, even if Ravisia is bound to obey Alicantan law, it is not bound by the broadcasting ordinance because it breaches the right to receive information.*

Under the International Covenant on Civil and Political Rights (‘ICCPR’),<sup>143</sup> Alicanto must ensure Alicantan citizens’ right to freely receive information of all kinds.<sup>144</sup> Any restrictions on this right must be provided for by law, and be necessary to achieve the purposes in article 19(3).<sup>145</sup>

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<sup>141</sup> S/Res/5440, [6].

<sup>142</sup> *Charter*, n15, arts 25, 103; *Fragmentation Report*, n20, 169.

<sup>143</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (in force 23 March 1976), art 19(3) (‘ICCPR’).

<sup>144</sup> *ICCPR*, n143, art 19(2); *Gauthier v Canada*, UN Doc CCPR/C/65/D/633/95 (1999).

<sup>145</sup> *ICCPR*, n143, art 19(3).

(a) The restriction on the right is not ‘provided by law’.

Restrictions must be established by an act of *national* parliament or be a norm of the common law.<sup>146</sup> The *local* government ordinance falls below this standard.

(b) The restriction is not necessary for any article 19(3) purpose.

Restrictions will only be lawful if they are necessary for the respect of the rights of others, or for the protection of public order or public morals.<sup>147</sup> The ordinance is not necessary for any of these purposes.

**Respect of rights:** The broadcasts are accompanied by culturally-sensitive warnings and are in no way coercive. Accordingly, the ordinance is not necessary to respect the right to freedom from coercion as to religious belief,<sup>148</sup> or the freedom of parents to direct their children’s religious education.<sup>149</sup> To the contrary, the ordinance disproportionately favours Talonnic broadcasting, violating parents’ religious choice.

**Public order:** Public order refers to the effective functioning of society,<sup>150</sup> and includes prohibitions on free expression that incite crime or endanger safety.<sup>151</sup> The blanket restriction on all secular programming is not sufficiently focused on content likely to disrupt society to be

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<sup>146</sup> *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984), [15] (‘*Siracusa Principles*’); *Faurisson v France*, UN Doc.CCPR/C/58/D/550/1993(1996).

<sup>147</sup> *ICCPR*, n143, art 19(3).

<sup>148</sup> *ICCPR*, n143, art 18(2).

<sup>149</sup> *ICCPR*, n143, art 18(4).

<sup>150</sup> *Siracusa Principles*, n146, [5].

<sup>151</sup> *Baban v Australia*, UN Doc.CCPR/C/78/D/1014/2001 (2003).

necessary. Moreover, applying the law has led to a riot and fatalities, indicating that it is counterproductive to public order.<sup>152</sup>

**Public morals:** The “public morality” of Alicanto is difficult to define due to the varying levels of orthodoxy<sup>153</sup> amongst the Dasu and Zavaabi.<sup>154</sup> In this context, no government can define with certainty what constitutes the public morality of Alicanto. The *provincial* government is not qualified to adjudicate on *national* morality, especially since it reflects only one denomination.<sup>155</sup>

(iv) *In the further alternative, the broadcasting is not attributable to Ravisia because the UN authorised it.*

Even if the broadcasting was unlawful, it is not attributable to Ravisia. The UN exercised both overall authority<sup>156</sup> and effective control<sup>157</sup> over the broadcasting. The broadcasts occur at the UN’s directive<sup>158</sup> and their content is drawn from the UN Radio News Service.<sup>159</sup> The radio transmissions are attributable to the UN, not Ravisia.

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<sup>152</sup> *Compromis*, [25].

<sup>153</sup> *Compromis*, [6].

<sup>154</sup> *Compromis*, [5].

<sup>155</sup> *Hertzberg v Finland*, (61/1979) UN Doc.CCPR/C/15/D (1982), [10.3].

<sup>156</sup> *Behrami*, n132, [134].

<sup>157</sup> *DARIO*, n135, art 5.

<sup>158</sup> S/Res/5440, [6].

<sup>159</sup> *Compromis*, [20].



(v) *In addition, the broadcasting by OPS does not breach international law.*

Any alleged Ravisian obligation to obey Alicantan law under the SOFA would lapse on the termination of UNMORPH. From 1 August, the OPS broadcasts do not entail international responsibility.

### **III. Ravisia did not owe extraterritorial human rights obligations with regard to sexual exploitation.**

States have international human rights law obligations to protect children from sexual exploitation,<sup>160</sup> however, they only extend to children within the state's jurisdiction.<sup>161</sup> Jurisdiction is preponderantly territorial, but may be exercised extraterritorially through effective control over foreign territory or authority over individuals.<sup>162</sup>

First, effective extraterritorial control by Ravisia is not established. This Court has found effective extraterritorial control only in situations of military occupation.<sup>163</sup> The finding of control in the case of 30,000 Turkish troops in Northern Cyprus can also be distinguished<sup>164</sup> – fewer than 2,000 peacekeepers were in Alicanto, with Alicantan consent and a strictly limited

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<sup>160</sup> *ICCPR*, n143, art 24(1); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (in force 2 September 1990), art 34 ('*CRC*').

<sup>161</sup> *ICCPR*, n143, art 2(1); *CRC*, n160, art 2(1).

<sup>162</sup> Human Rights Committee, *General Comment No.31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13(2004), [10].

<sup>163</sup> *Israeli Wall*, n78, 180-181; *Armed Activities*, n72, [216].

<sup>164</sup> *Loizidou v Turkey (Merits)* (1996) 23 EHRR 513; *Cyprus v Turkey*, (2002) 35 EHRR 30, [76]-[77].

mandate.<sup>165</sup> Moreover, Alicanto maintains public powers in the region, terminating unlawful broadcasting and implementing martial law.<sup>166</sup>

Secondly, Ravisia does not have jurisdiction through authority over individuals in Alicanto. Non-violent sexual offences are distinguishable from the coercive use of state power, such as arrest,<sup>167</sup> detention<sup>168</sup> or military force, which establishes this type of jurisdiction.<sup>169</sup> Incidental encounters and transitory presence are insufficient.<sup>170</sup>

#### **IV. Further, no alleged injury to Alicanto or its citizens warrants reparations.**

Ravisia is not liable for reparations absent any international wrong. Even if Ravisia had acted unlawfully, no reparations are warranted because first, Alicanto lacks standing and secondly, the broadcasting caused no damage.

(i) *Local remedies have not been exhausted.*

For a state to exercise diplomatic protection on behalf of injured nationals, local remedies must first be exhausted.<sup>171</sup> This will occur when the claim has been pursued as far as possible before the competent tribunals without success.<sup>172</sup>

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<sup>165</sup> S/Res/5440, [3]-[4].

<sup>166</sup> *Compromis*, [25], [29].

<sup>167</sup> *Öcalan v Turkey* (2005) 41 EHRR 45, [91].

<sup>168</sup> *Coard v US* (1999) IACHR No.109/99, [37].

<sup>169</sup> *Alejandre v Cuba* (1999) IACHR No.86/99, [25].

<sup>170</sup> *R (Al-Skeini) v Secretary of State for Defence (Redress Trust Intervening)* [2008] 1 AC 153.

<sup>171</sup> *Interhandel (Switzerland v. US) (Preliminary Objections)* [1959] ICJ Rep 6, 27.

<sup>172</sup> *Elletronica Sicula SpA (US v Italy)* [1989] ICJ Rep 15, [59]; *Mavrommatis Palestine Concessions (Greece v UK)* [1924] PCIJ (ser A) No.2, 12.

To settle disputes between Alicanto and peacekeepers, two competent tribunals are available: the standing claims commission under the SOFA,<sup>173</sup> or the local claims review boards administered by the UN, typically utilised by host states.<sup>174</sup> These claims boards distribute compensation to persons injured during a UN peacekeeping operation, and then recover the sum from any responsible troop-contributing country.<sup>175</sup> Given the victims' failure to pursue a claim locally, Alicanto lacks standing to pursue a claim of diplomatic protection.<sup>176</sup>

(ii) *The broadcasting has caused no injury.*

In the context of widespread crime on the Rocian Plateau and abdication of Alicantan law enforcement,<sup>177</sup> damage to social fabric is too remote<sup>178</sup> to be causally linked to the broadcasting.

Furthermore, the broadcasts encouraged the progressive development of Alicantan communities, giving them access to information on fundamental rights.<sup>179</sup>

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<sup>173</sup> SOFA, n123, [51].

<sup>174</sup> *Financing of the United Nations Protection Force*, Report of the Secretary-General, UN Doc.A/51/389(1996), 7.

<sup>175</sup> *Financing of the United Nations Peacekeeping Operations*, Report of the Secretary-General, UN Doc.A/51/903(1997), 5.

<sup>176</sup> Amrallah, 'The International Responsibility of the UN for the Activities Carried out by UN Peacekeeping Forces' (1976) 32 *Revue Egyptienne de Droit International* 57, 76.

<sup>177</sup> *Compromis*, [11], [29], [45].

<sup>178</sup> *ASR*, n127, 93.

<sup>179</sup> S/Res/5440, [5].

(iii) *Alternatively, reparations must be reduced or withheld because of contributory negligence.* Alicanto took no steps to enforce the ordinance.<sup>180</sup> This failure to mitigate the alleged damage means that reparations should be reduced or withheld because of contributory negligence.<sup>181</sup> Alicanto cannot claim for damage that was avoidable.<sup>182</sup>

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<sup>180</sup> *Compromis*, [25].

<sup>181</sup> *ASR*, n127, art 39.

<sup>182</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 55.

(iv) *In the further alternative, reparation should be limited to curial declaration.*

Restitution and compensation are not possible as the damage cannot be undone<sup>183</sup> and moral affront to a state is not compensable.<sup>184</sup> Curial declaration is a significant sanction and should suffice as reparation.<sup>185</sup>

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<sup>183</sup> *ASR*, n127, art 35.

<sup>184</sup> *ASR*, n127, 99.

<sup>185</sup> *Difference Between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 Between the Two States and which Related to the Problems Arising from the Rainbow Warrior Affair* (1990) 20 UNRIAA 217, 273.

**D. THE ALICANTAN CITIZEN PICCARDO DONATI NEED NOT BE HANDED OVER TO ALICANTO, WHERE HE WILL BE SUBJECTED TO JUDICIAL EXECUTION IN VIOLATION OF INTERNATIONAL LAW.**

The application of capital punishment for Donati's offences is contrary to international law because, first, Alicanto cannot retroactively apply the heavier penalty of death, secondly, Alicanto cannot reintroduce capital punishment, and thirdly, Donati's trial *in absentia* was contrary to his fair trial rights. On any of these bases, Ravisia need not return Donati, and there is no alternative obligation under the SC Resolution 1373 or in the customary law of extradition.

**I. Donati's execution and trial are contrary to international law.**

(i) *Alicanto's retroactive imposition of the death penalty violates article 6 of the ICCPR.*

Article 6(2) of the ICCPR states that 'sentence of death may be imposed only for the most serious crimes in accordance with the law *in force at the time of the commission of the crime*',<sup>186</sup> which permits no exceptions for retroactive application.<sup>187</sup> Donati's offence occurred on 7 July 2008.<sup>188</sup> Alicanto violated article 6(2) by reintroducing capital punishment on 15 August,<sup>189</sup> and retroactively applying it to Donati.

(ii) *Alicanto's retroactive imposition of the death penalty is also in violation of article 15.*

Article 15(1) of the ICCPR states, 'a heavier penalty [shall not] be imposed than the one that was applicable at the time when the criminal offence was committed.'<sup>190</sup> Donati's execution violates

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<sup>186</sup> *ICCPR*, n143, art 6(2) [emphasis added].

<sup>187</sup> *ICCPR*, n143, art 6(2).

<sup>188</sup> *Compromis*, [32].

<sup>189</sup> *Compromis*, [44].

<sup>190</sup> *ICCPR*, n143, art 15(1).

this article, as capital punishment – the ultimate punishment – is a heavier penalty than the penalty existing at the time of his offence.

An exception to article 15(1) exists if the retroactive sentence is pursuant to an offence which at the time was criminal under customary international law.<sup>191</sup> Alicanto may seek to interpret Donati's crimes as terrorism and thereby avail themselves of this exception. This fails in fact and law, because Donati was not convicted of terrorism,<sup>192</sup> and terrorism does not exist as a crime under customary international law.<sup>193</sup> Treaties for the suppression of terrorism, which Ravisia and Alicanto are not a party to, do not codify or crystallise terrorism as a customary international law crime.<sup>194</sup> Instead, states have been unable to agree upon a sufficiently clear definition of terrorism at customary international law.<sup>195</sup>

*(iii) Alicanto's reintroduction of capital punishment violates article 6(2) of the ICCPR.*

Alicanto's reintroduction of capital punishment on 15 August 2008 after its abolition in 1982 was unlawful.<sup>196</sup> Article 6(2) of the ICCPR, interpreted in its ordinary meaning and in light of its

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<sup>191</sup> *ICCPR*, n143, art 15(2).

<sup>192</sup> *Compromis*, [48].

<sup>193</sup> Higgins, 'The general international law of terrorism' in Higgins and Flory (eds), *Terrorism and International Law* (1997) 13 13-28, ('Higgins').

<sup>194</sup> *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 256, (in force 23 May 2001); *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, (2000) 39 ILM 270 (in force 10 April 2002); *International Convention for the Suppression of Acts of Nuclear Terrorism*, opened for signature 14 September 2005, (2005) 44 ILM 825, (in force 7 July 2007).

<sup>195</sup> Higgins, n193, 13-28.

<sup>196</sup> *Compromis*, [44]; *Clarifications*, [6].

object and purpose,<sup>197</sup> impliedly prohibits the reintroduction of capital punishment. Article 6(2) states, ‘[i]n countries which have not abolished the death penalty, sentence of death may be imposed...’.<sup>198</sup> The ordinary meaning of these words demonstrates that the right of judicial execution only applies for states that have not abolished the death penalty. Accordingly, once abolished their right expires.

The object and purpose of article 6 is the abolition of capital punishment as evidenced by article 6(6) which states, ‘[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present ICCPR.’<sup>199</sup> Further, the *travaux préparatoires* confirm<sup>200</sup> that the purpose and object of article 6 is to promote and pursue the abolition of capital punishment and that the exception within article 6(2) merely acknowledges that capital punishment existed in some states at the time of drafting.<sup>201</sup> The implied prohibition on the reintroduction has also been accepted by several Members of the HRC, the authentic interpreter of the ICCPR.<sup>202</sup> Therefore, Alicanto intention to execute Donati is in breach of the ICCPR.

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<sup>197</sup> *VCLT*, n3, art 31(1).

<sup>198</sup> *ICCPR*, n143, art 6(2).

<sup>199</sup> *ICCPR*, n143, art 6(6).

<sup>200</sup> *VCLT*, n3, art 32.

<sup>201</sup> Commission on Human Rights, 6<sup>th</sup> Session (1950), UN Docs.E/CN.4/SR.93, 9 (USSR), 12 (France); E/CN.4/SR.310,10 (Uruguay); E/CN.4/SR.311, 3 (Sweden).

<sup>202</sup> *Kindler v Canada*, UN Doc.CCPR/C/48/D/470/1991 (1993), (Members Wennergren, Lallah, Pocar, Chanut, Urbina, dissenting) (‘*Kindler*’); *Cox v Canada*, UN Doc.CCPR/C/52/D/539/1993 (1994) (Members Urbina, Pocar, Chanut, Lallah and Wennergren, dissenting); *Judge v Canada*, UN Doc.CCPR/C/78/829/1998 (2003) (‘*Judge*’).



(iv) *Donati's trial in absentia was unlawful under article 14 of the ICCPR.*

Article 14(3)(d) provides for the right of an accused to be tried in their presence in the determination of any criminal charge against them.<sup>203</sup> For a trial *in absentia* to be lawful the accused must be duly notified of the date and place of their trial and their presence requested.<sup>204</sup> It cannot be assumed that the accused was informed of the proceedings against them.<sup>205</sup> Only subsequent entitlement to a retrial can remedy this breach.<sup>206</sup>

Alicanto failed to notify Donati of any of the details of the proceedings against him. Donati's knowledge of these proceedings cannot be presumed. As Donati's trial *in absentia* was unlawful other rights dependent upon Donati's presence have by necessary intendment been violated. These include Donati's right to be informed of the charge,<sup>207</sup> prepare the defence,<sup>208</sup> select counsel<sup>209</sup> and examine witnesses<sup>210</sup>. Finally, since Donati is not entitled to a retrial within twelve years of his sentence being pronounced, the breach cannot be remedied.<sup>211</sup>

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<sup>203</sup> *ICCPR*, n143, art 14(3)(d).

<sup>204</sup> *Mbenge v Zaire*, (16/1977) UN Doc.40 A/38/40 (1983), [14.1].

<sup>205</sup> *Maleki v Italy*, UN Doc.CCPR/C/66/D/699/1996 (1999), [9.4] ('*Maleki*').

<sup>206</sup> *Maleki*, n205, [9.5].

<sup>207</sup> *ICCPR*, n143, art 14(3)(a).

<sup>208</sup> *ICCPR*, n143, art 14(3)(b).

<sup>209</sup> *ICCPR*, n143, art 14(3)(d).

<sup>210</sup> *ICCPR*, n143, art 14(3)(e).

<sup>211</sup> *Compromis*, [48].

(v) *The prohibition on trial in absentia is non-derogable as it was a death penalty case.*

Article 6 is non-derogable.<sup>212</sup> Article 6(2) states that the death penalty cannot be imposed 'contrary to the provisions of the present Covenant'.<sup>213</sup> Actions contrary to article 14, from which states can otherwise derogate,<sup>214</sup> are therefore rendered non-derogable in capital punishment cases.<sup>215</sup> Therefore, Alicanto could not derogate from article 14.

(vi) *Further and in the alternative, if derogation was possible it was not permissible in these circumstances.*

Derogation under article 4 in the case of a public emergency threatening the life of the nation requires, first, an official proclamation of that emergency, and secondly, that the derogation be limited to the extent strictly required.<sup>216</sup>

(a) There was no official proclamation of a public emergency.

The requirement of an official proclamation is a *condition sine qua non*.<sup>217</sup> A detailed declaration by the relevant minister of the existence of a public emergency and the government's intention to derogate has been held to be sufficient.<sup>218</sup>

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<sup>212</sup> ICCPR, n143, art 4(2).

<sup>213</sup> ICCPR, n143, art 6(2).

<sup>214</sup> ICCPR, n143, art 4.

<sup>215</sup> Schabas, *The Abolition of the Death Penalty in International Law* (3<sup>rd</sup> ed, 2002) 113.

<sup>216</sup> ICCPR, n143, art 4(1).

<sup>217</sup> Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 80.

<sup>218</sup> *Brannigan and McBride v UK* (1994) 17 EHRR 21.

Alicanto could not have lawfully derogated from the prohibition on trial *in absentia* as Alicanto never declared the existence of a public emergency nor its intention to derogate from the ICCPR.

(b) The derogation was not to the extent strictly required.

A state can only derogate to the extent required by the exigencies of the public emergency.<sup>219</sup> Alicanto has denied Donati the right to be tried in person for both his original hearing and appeal, and for any future appeal since, even if he comes within Alicantan custody within the next twelve years, he has no right to a retrial. Such a significant curtailment of fundamental fair trial rights for a merely symbolic conviction is not strictly required in the circumstances.

**II. Ravisia cannot return Donati because of its obligations under the ICCPR.**

(i) *Ravisia's obligations under the ICCPR extend to Donati.*

The ICCPR applies to all exercises of state jurisdiction. This Court has approved the decision in *Lopez*<sup>220</sup> which considered that extraterritorial arrest and detention is sufficient for state jurisdiction.<sup>221</sup> By analogy to *Lopez*, although Ravisia does not exercise extraterritorial jurisdiction outside Camp Tara, Ravisia's custody of Donati in a military brig is sufficient to extend the ICCPR to Donati.<sup>222</sup>

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<sup>219</sup> ICCPR, n143, art 4(1).

<sup>220</sup> *Lopez Burgos v Uruguay* (52/1979), UN Doc.CCPR/C/OP/1 (1981).

<sup>221</sup> *Israeli Wall*, n78, 179.

<sup>222</sup> *Compromis*, [49].

(ii) *Ravisia, an abolitionist state, cannot return Donati to Alicanto to be executed.*

It has been established in *Judge* that a state which has abolished capital punishment cannot deport a person to another state where they will be executed.<sup>223</sup> The exception in article 6(2) which permits execution applies only to countries which have not abolished the death penalty. Ravisia, having abolished capital punishment in 1947 is therefore bound under article 6(1) to protect the inherent right to life of all persons within its jurisdiction, and cannot return Donati for execution.

(iii) *Further and in the alternative, Ravisia cannot return Donati to be executed in light of his unlawful trial and sentence.*

A state party to the ICCPR cannot extradite a person within its jurisdiction where there is a real risk that that person's rights under the ICCPR will be violated in another jurisdiction.<sup>224</sup> As previously established, Donati's rights have been violated by Alicanto's reinstatement and retroactive application of capital punishment and his trial *in absentia*. Ravisia cannot return Donati to face unlawful execution in Alicanto.

### **III. No other obligations require Ravisia to return Donati.**

(i) *SC Resolution 1373 does not oblige Ravisia to return Donati.*

Alicanto may seek to argue that SC Resolution 1373 obliges Ravisia to return Donati. Resolution 1373 requires states to '[d]eny safe haven to those who finance, plan, support, or commit terrorist acts'.<sup>225</sup> However, Resolution 1373 does not oblige Ravisia to return Donati because, first,

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<sup>223</sup> *Judge*, n202, [10.6].

<sup>224</sup> *Kindler*, n202, [14.6].

<sup>225</sup> *Threats to International Peace and Security caused by Terrorist Acts*, SC Res 1373, UN SCOR, 45<sup>th</sup> sess, 4385<sup>th</sup> mtg, UN Doc.S/Res/1373(2001), [2(c)].

Resolution 1373 does apply to Donati, and secondly, it does not negate Ravisia's human rights obligations.

(a) Resolution 1373 does not apply to Donati.

Resolution 1373 does not define 'terrorist acts'. In the absence of a definition, Resolution 1373 can only refer to acts that treaty or customary international law class as 'terrorism'. As established above, Donati's offence is not 'terrorism' under customary international law and neither Ravisia nor Alicanto are parties to any treaty for its suppression. Ravisia therefore is not obliged by Resolution 1373 to return Donati.

(b) Further and in the alternative, Resolution 1373 does not negate Ravisia's human rights obligations under the ICCPR.

Nothing in Resolution 1373 would require Ravisia to return Donati to Alicanto, in breach of its obligations under the ICCPR. The presumption when interpreting Resolution 1373 is that the SC did not intend to act contrary to the UN's purposes and principles, one of which is to achieve cooperation in promoting respect for human rights.<sup>226</sup> This is confirmed by Resolutions 1456<sup>227</sup> and 1624,<sup>228</sup> which reference and reaffirm Resolution 1373 and stress that states must uphold their human rights obligations when complying with Resolution 1373.

Therefore, Ravisia in light of its obligations under the ICCPR is not obliged by Resolution 1373 to return Donati.

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<sup>226</sup> *Charter*, n15, art 1(3).

<sup>227</sup> *Combating Terrorism*, SC Res 1456, UN SCOR, 4688<sup>th</sup> mtg, UN Doc.S/Res/1456(2003), [6].

<sup>228</sup> *Threats to International Peace and Security*, SC Res 1624, UN SCOR, 5261<sup>st</sup> mtg, UN Doc.S/Res/1624(2005), [4].

(ii) *Ravisia bears no customary obligation to extradite Donati.*

There is no obligation at customary international law for a state to extradite or prosecute an offender within its jurisdiction.<sup>229</sup>

In the absence of an extradition treaty between Ravisia and Alicanto there is no customary obligation for Ravisia to return Donati for execution.

(iii) *Further and in the alternative, as Donati's offence was political there is no obligation to extradite him under customary international law.*

If the Court accepts that there is a customary obligation to extradite, then that obligation does not apply where the crimes concerned were 'incidental to and formed part of political disturbances'.<sup>230</sup> An offence is 'political' if a close nexus exists between the violence and the political object of forcing a regime to resign or change its policies.<sup>231</sup> However, the political motive becomes irrelevant where it is likely to involve killing or injuring members of the public.<sup>232</sup>

Donati's attack on PM Simurg was political. As the leader of the Dasu Integrity Front,<sup>233</sup> Donati was reported to have planned a 'dramatic demonstration of Dasu solidarity'.<sup>234</sup> In attacking the head of state, the putative objective was to change the Guardian Government or its

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<sup>229</sup> Shearer, *Extradition in International Law* (1971) 24.

<sup>230</sup> *Re Castioni* [1891] 1 QB 149, 166.

<sup>231</sup> *T v Secretary of State* 107 ILR 552 ('T').

<sup>232</sup> *T*, n231.

<sup>233</sup> *Compromis*, [32].

<sup>234</sup> *Compromis*, [47].

policies. Moreover, the attack was directed at or likely to kill members of the public as it was specifically targeted and the casualties were limited to Simurg and his entourage.<sup>235</sup>

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<sup>235</sup> *Compromis*, [32].

## **PRAYER FOR RELIEF**

The Respondent requests that the Court adjudge and declare that:

- A. The presence of Ravisian forces in Alicanto has been and continues to be justified under international law;
- B. The Court will decline to call upon Ravisia to produce its intelligence, or in the alternative, decline to afford Alicanto any evidentiary benefit should Ravisia continue to withhold the intelligence, and declare that the Secretary-General may not deliver it to Alicanto;
- C. The conduct of Ravisian troops at Camp Tara did not violate international law, and that, in any event, Ravisia bears no liability for any wrongdoing committed in the service of the UN, and that no reparations are warranted; and
- D. Piccardo Donati need not be delivered to Alicanto, where he will be unlawfully executed.