

THE 2011 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE

February Term 2011

The State of Ardenia,

Applicant

v.

The State of Rigalia,

Respondent

The Case Concerning Differences Between the States
Concerning the Zetian Provinces

MEMORIAL FOR THE APPLICANT

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
INDEX OF AUTHORITIES.....	iv
STATEMENT OF JURISDICTION	ix
QUESTIONS PRESENTED	x
STATEMENT OF FACTS	xi
SUMMARY OF PLEADINGS	xvi
PLEADINGS.....	1
I. THE PREDATOR DRONE STRIKES TARGETING ZETIANS IN RIGALIA VIOLATE INTERNATIONAL LAW.	1
A. The tensions between Rigalia and the ZDP did not rise to the level of an armed conflict and therefore human rights law governs the use of Predator drones.....	1
1. The Zetian separatists do not possess sufficient organizational capacity to constitute a party to an armed conflict.	1
2. The tensions between Zetians and Rigalia do not meet the intensity threshold necessary to constitute an armed conflict	3
B. Rigalia’s Predator drone strikes within its territory violate applicable human rights law.....	3
C. Even if the tensions amounted to an armed conflict, Rigalia violated its international obligations under international humanitarian law.....	5
1. Rigalia failed to abide by the principle of distinction.	5
2. Rigalian Predator drone strikes against Zetians were not necessary and proportional	6
3. Rigalian Predator drone strikes caused superfluous harm.	7
II. THE ATTACK ON THE BAKCHAR VALLEY HOSPITAL IS ATTRIBUTABLE TO RIGALIA AND WAS AN UNLAWFUL ACT OF AGGRESSION FOR WHICH RIGALIA IS OBLIGATED TO MAKE REPARATIONS TO ARDENIA.....	8
A. The attack on the Bakchar Valley Hospital is attributable to Rigalia.	8
1. Rigalia is directly responsible for the Bakchar Valley bombing.	8
2. Rigalia is also indirectly responsible for the Bakchar Valley bombing.	9
B. Rigalia’s bombing of the Bakchar Valley hospital was an unlawful use of force amounting to aggression.....	11
C. Rigalia’s bombing of the Bakchar Valley hospital is not justified by self-defense.	12
1. Rigalia cannot claim self-defense because its attack on the Bakchar Valley hospital was not precipitated by an armed attack.....	13
2. Even if the court finds that an armed attack occurred against Rigalia, Rigalia is barred from utilizing the self-defense justification in response to an attack from a non-state actor.....	13

3.	Rigalia’s failure to immediately notify the Security Council estops Rigalia from claiming that the attack is justified by self-defense.	14
D.	Rigalia is obligated to make reparations to Ardenia for the bombing of the Bakchar Valley hospital.....	15
III.	RIGALIA’S MAVAZI BAN VIOLATES THE RIGHTS OF ZETIAN WOMEN AND GIRLS.....	16
A.	The ban lacks legitimate aim and narrow purpose.....	18
B.	Rigalia cannot rely on the margin of appreciation doctrine.....	19
C.	Rigalia cannot rely on the public safety and order exception to Article 18 of the ICCPR.	20
D.	Rigalia’s Mavazi ban is discriminatory.....	22
1.	The Mavazi ban violates the rule that any legislative restriction of expression must be crafted in the interest of creating equality in fact.	22
2.	Rigalia may not rely on CEDAW to justify its discriminatory legislation.	23
IV.	ARDENIA DID NOT VIOLATE THE OECD ANTI-BRIBERY CONVENTION OR THE OECD DECISION ON MNE GUIDELINES.....	24
A.	Rigalia cannot demonstrate the undue influence on a foreign public official in the bidding process, which is necessary for violations of the OECD Convention.	25
1.	There is no undue advantage or injury shown in the bidding process for the Moria Mine contract renewal.	25
2.	The alleged targets of the bribe are not foreign public officials within the meaning of the Convention.....	25
3.	Ardenia justifiably denied the request for mutual legal assistance because it was too broad.	27
B.	Ardenia’s investigation was stopped for permissible reasons of national security.	27
1.	The Prosecutor’s public statement regarding “national security concerns” holds greater validity than statements about national economic interest made in media reports.	28
2.	In state practice, national economic interests necessarily play a role in decisions to pursue investigations into bribery allegations.....	29
C.	Facilitation payments are acceptable under OECD standards, and under agreed upon exceptions in state practice.	29
V.	PRAYER FOR RELIEF.....	31

INDEX OF AUTHORITIES

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Convention on the Elimination of all forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13	3, 23
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U.N. Charter	11, 12, 15, 16

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<i>Armed Activities on the Territory of the Congo</i> (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19).....	13, 14, 15, 16
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<i>Corfu Channel</i> (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 6).....	25
<i>Factory at Chorzów</i> (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 44 (May 25)	15
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Dec. 26, 2010..... 23
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STATEMENT OF JURISDICTION

The State of Ardenia filed this case against the State of Rigalia before the International Court of Justice pursuant to Article 36(2) of the Statute of the Court on May 5, 2010. Both countries are party to the Court's Compulsory jurisdiction, and the parties have submitted a Compromis in order to stipulate the agreed facts of the dispute pursuant to Article 40(1) of the Court's Statute. In preliminary proceedings, Rigalia objected to the Court's jurisdiction on the grounds that Morgania was a necessary third party, under Article 79 of the Rules of Court. By a ruling of 8-7, the Court denied that Morgania was a necessary party, and allowed this case to proceed to the merits phase.

QUESTIONS PRESENTED

The State of Ardenia respectfully asks this Honorable Court:

1. Whether Rigalia's Predator drone strikes in Rigalia and Ardenia violated international law.
2. Whether the attack on the Bakchar Valley hospital violated international law, specifically:
 - a. whether the act is attributable to Rigalia;
 - b. whether the act was an unlawful use of force rising to the level of aggression; and
 - c. whether Rigalia has an obligation to investigate the attack and compensate Ardenia for the harm caused by the attack.
3. Whether Rigalia's Mavazi ban constitutes a violation of international human rights law.
4. Whether Ardenia violated the OECD Anti-Bribery Convention and/or the OECD Decision on MNE Guidelines when it refused to conduct an investigation into corruption allegations.

STATEMENT OF FACTS

THE ZETIAN PROVINCES AND THE ZETIAN DEMOCRATIC PARTY

The dispute before this Court centers on conflicts arising in the Zetian Provinces of the states of Ardenia (Applicant) and Rigalia (Respondent) and the related economic, political, and military actions of Rigalia. The two states share a population of ethnic Zetians - a nomadic people who move between Ardenia's Southern and Rigalia's Northern Provinces (Comp. ¶10). These Provinces are the location of major deposits of Coltan; mining the economically important mineral is the region's major industry.

Ardenia, a decentralized state, permits its ten provinces to control their own legislative policies in most matters (Comp. ¶6). Ardenia's Southern Regions are inhabited by ethnic Zetians, a devout people who practice the Masinto religion and govern themselves through tribal law, which exercises dominion over most areas of their society (Comp. ¶3). Traditionally, Masinto women wear the Mavazi, a head covering that symbolizes their orthodoxy, in all aspects of public life (Comp. ¶3). The central Ardenian authority limits its interference with such religious customs and practices.

The Zetians have been granted dual citizenship by both states (Comp. ¶8). Due to the Rigalian government's anti-Zetian policies, a group known as the Zetian Democratic Party ("ZDP") has been gaining in popularity and now represents more than 75% of Zetians in the Northern Provinces (Comp. ¶9). At the May 5, 2008 Regional Joint Tribal Council Meeting, Zetian leaders of Rigalia's Northern Provinces issued a manifesto calling for increased autonomy for Zetian lands, with the ultimate goals of independence, a larger portion of the coltan mining revenue, and respect for their traditional way of life (Comp. ¶13). Rigalia's President, Teemu Khutai, responded through a nationally televised speech, peppered with ethnically-charged

invectives against Zetians, referring to their societal practices as barbaric, oppressive, and backwards (Comp. ¶14).

THE MAVAZI BAN

Rigalia and Ardenia took different approaches to addressing these tensions. Angered, President Khutai, invoked the Rigalian emergency powers clause, banned organized assembly in public places, and ordered the detention of suspected ZDP members (Comp. ¶16). Ardenian President, Glenda Arwen, stating that she respected Zetian piety, responded to the protests by dedicating substantial funds to Zetian schools and agricultural subsidies to Zetian farmers (Comp. ¶17).

ZDP members called for full independence (Comp. ¶18). In the period from December 2008 to February 2009, violence escalated, resulting in more than 250 casualties (Comp. ¶18). One of the suicide bombers donned a Mavazi as a disguise (Comp. ¶18). In reaction, Rigalia passed legislation that restricted the Zetians' religious rights by banning the wearing of the sacred garment in public places, effectively banning it completely (Comp. ¶¶10,21).

THE PREDATOR DRONE PROGRAM

Responding to Rigalian oppression, Zetians began to cross the border into Ardenia (Comp. ¶19). In an effort to mitigate violence and promote peace, President Arwen met with Zetian tribal leaders in January, 2009 (Comp. ¶20). She assured them that their customs would be respected and that Ardenia supported Zetian unification in Rigalia (Comp. ¶20). In consideration of her gesture, the Zetian leaders offered their assurance that Ardenian sovereignty would be respected and Ardenian civilians and government would not be harmed (Comp. ¶20).

Angered by President Arwen's efforts at peace, President Khutai announced on March 22, 2009 that Ardenia was at war with the Zetian secessionist movement and its supporters, whether found in Ardenia or Rigalia (Comp. ¶21). He requested military assistance from President

Sophia Ratko of the technologically sophisticated, industrialized state of Morgania through the use of its Predator drone technology (Comp. ¶¶27, 28). With security and economic interests in mind, President Ratko agreed to deploy Morganian Predator drones on behalf of Rigalia for purposes of combating Zetian terrorists (Comp. ¶27).

The unmanned Predator drones, armed with Hellfire missiles, are launched from Fort Raucus, a Rigalian Air Force base leased by Morgania. The drones are operated by the Morganian army in Morgania (Comp. ¶29). The Morganian operators receive targeting information from Rigalian prisoners, recruited and paid by the Rigalian government as informants (Comp. ¶29). At the urging of the Rigalian Defense Force, controlled by President Khutai, more than 50 strikes were carried out against suspected Zetian separatists, killing an estimated 230 civilians in Rigalia, but only 15 suspected Zetian separatist leaders (Comp. ¶29).

On March 15, 2010, Morgania launched a Predator drone strike in Ardenia (Comp. ¶30). The attack was directed against a single ZDP Leader, Adar Bermal. The attack killed ZDP Bermal, but also struck the Bakchar Valley Hospital, a 300-bed public hospital, next door killing 150 civilians, and maiming 200 more (Comp. ¶30). Ardenia immediately lodged a protest with Rigalia for targeting innocent civilians (Comp. ¶31). Rigalia's defense minister responded that the incident was "a regrettable consequence of Rigalia's fight to defend itself and its people" (Comp. ¶31).

CORRUPTION ALLEGATIONS

The economic relations between Ardenia and Rigalia center around the Coltan mining in Rigalia, run by the state-owned Rigalian Refining Inc. ("RRI"), which is headed by CEO Leo Bikra (Comp. ¶10). However, recent developments surrounding the exploration and development of the Moria Mine, situated in the Rigalian Northern Provinces, under a contract

with the Ardenian state-owned corporation, Mineral Dynamics Incorporated ("MDI"), has strained this relationship.

MDI is active in its community and voluntarily publishes information regarding its donations on its website, the forum in which it revealed that it donated funds to the Zetian Refugee Fund ("ZRF"), a charitable organization whose goals are to supply education and humanitarian assistance to ethnic Zetians (Comp. ¶11). This charity is headed by Clyde Zangara, Leo Bikra's nephew (Comp. ¶11).

The Moria Mine contract was renewed in 2002 (Comp. ¶12). A media report stated that the deal had been partially secured through a promise by MDI to pay \$10 million dollars into a trust account for the ZRF charity (Comp. ¶12). Rigalia believes that such funds may be used for political activities, and there is speculation about tribal council members soliciting promises of payment from MDI (Comp. ¶12).

President Khutai pushed the Ardenian government to ignore its business records protection laws and proceed with an investigation into these allegations (Comp. ¶22). Khutai then called for his Minister of Justice, Charlene Finch, to open an investigation, suspended Leo Bikra, and requested that the OECD Working Group on Bribery in International Business Transactions put pressure on the Ardenian government (Comp. ¶22, 24). This led the Committee for Responsible Business Conduct ("CRBC"), an organization that received 30% of its operating budget from the Rigalian government, to file a complaint with the OECD Council (Comp. ¶26). The Ardenian National Contact Point responded that it was unable to examine the complaint because the alleged actions occurred in Rigalia, the OECD Guidelines for Multinational Enterprises do not apply to Rigalian Refining Inc., and investigations had already been launched in both states (Comp. ¶26).

Ardenia subsequently filed a protest with Rigalia regarding the drone strikes, and referred the accidental missile strike to the U.N. Security Council, which advised the parties to seek a peaceful resolution for this matter. Meanwhile, claims brought by Zetians within the Rigalia courts, contesting the legality of the drone strikes and the Mavazi ban, were dismissed and not subject to appeal (Clarification #5). Thereafter, Ardenia filed this case before the International Court of Justice under its compulsory jurisdiction.

SUMMARY OF PLEADINGS

I. Violence in Rigalia did not rise to the level of an armed conflict because the Zetian secessionist movement did not possess sufficient organizational capacity to constitute an armed group, nor did the tensions rise to the requisite threshold. As such, the conflict is governed by international human rights law. Rigalia's Predator drone strikes, which killed 230 Zetian civilians in Rigalia and killed and wounded 350 in Ardenia, violated human rights law enshrined in Article 6(1) of the International Convention on Civil and Political Rights ("ICCPR"), which guarantees that every human has an inherent right to life, and states may not arbitrarily deprive persons of this right to life. This right is non-derogable even in times of public emergency or threats to national existence.

Even if the conflict did rise to the level necessary to amount to an armed conflict, Rigalia violated the *lex specialis* of international humanitarian law by failing to distinguish between innocent civilians and legitimate military targets in carrying out its Predator drone strikes. Moreover, since the number of innocent civilians killed was twenty-five times the number of targeted Zetian leaders, the strikes violated the international principles of necessity and proportionality, and the prohibition on causing superfluous harm.

II. Though the Predator drone strikes were operated by Morgania, Rigalia is responsible for the bombing of the Bakchar Valley hospital in Ardenia and is obligated to make reparations for the damages under international law. Rigalia requested the strike, allowed its territory to be used to carry out the strike, and Rigalian informants played an integral part in the operation. Moreover, by making official statements to justify rather than

condemning the illegal act, Rigalia endorsed the action and should be held responsible for the harm suffered.

Rigalia's attack on the Bakchar valley hospital was an unjustified act of aggression. Rigalia cannot claim that destruction of this hospital was justified by self-defense, because the requisite elements of necessity and proportionality were not present. Furthermore, Rigalia is foreclosed from asserting self-defense because it did not make the required notification to the Security Council immediately following the attack pursuant to Article 51 of the U.N. Charter.

- III. The freedoms of religion, thought and expression are fundamental principles of international human rights enshrined in the Covenant on Civil and Political Rights and the Convention on the Rights of the Child. Rigalia's Mavazi ban violates these internationally protected rights of Zetian women and girls by usurping their autonomy to participate in their religion and denying their ability to outwardly manifest their faith and culture. Moreover, the ban is illegitimate as it is not narrowly construed or tailored to a particular goal, nor does the aim of the ban fit into the exception for maintaining public order.
- IV. Rigalia's counterclaim that Ardenia has violated the OECD Convention is without merit. The case does not come within the ambit of the OECD convention or guidelines because the targets of the alleged bribery were not "foreign officials." Ardenia, therefore, had no obligation to investigate the alleged acts of bribery; nevertheless, it launched an investigation into the CRBC's claims. When Ardenia faced national security concerns tied to the investigation and the heightened tensions arising from the Rigalian-Zetian hostilities, the state was forced to drop the investigation. Even if the case came within

the OECD Convention, this would have been a permissible action, as the Convention creates an exception for national security concerns. While the OECD does not allow for an exception on national economic interest grounds, the fact remains that overwhelming state practice takes this element into account. Finally, the small facilitation payments made by MDI are not a violation of the OECD Convention or the MNE Guidelines.

PLEADINGS

I. THE PREDATOR DRONE STRIKES TARGETING ZETIANS IN RIGALIA VIOLATE INTERNATIONAL LAW.

- A. The tensions between Rigalia and the ZDP did not rise to the level of an armed conflict and therefore human rights law governs the use of Predator drones.**

International humanitarian law (“IHL”) only applies to armed conflicts.¹ At all other times, only the *lex generalis* of international human rights law (“HRL”) applies. In the present case, tensions between the ZDP and Rigalia did not rise to the level necessary to constitute an armed conflict and thus international human rights law is the applicable standard.

Common Article 3 of the Geneva Conventions and Additional Protocol II set forth general criteria to use in determining the existence of an armed conflict.² Drawing from these criteria, international jurisprudence focuses on two key elements: (1) the organization of the parties to a conflict; and (2) the intensity of the conflict.³

1. The Zetian separatists do not possess sufficient organizational capacity to constitute a party to an armed conflict.

¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 2004 I.C.J. 136, ¶¶95,105 (July 9) [hereinafter *Palestinian Wall*].

² Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; *See also* Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, art. 1(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; *See also* COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, CONVENTION IV 49-50 (Jean Pictet, ed.)(1958)(describing the scope of application for Common Article 3).

³ Rome Statute of the International Criminal Court art. 8(2)(f), July 17 1998, UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 9 [hereinafter ICC Statute]; *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶70 (Oct. 2, 1995) [hereinafter *Tadic Defense*];

A group must possess sufficient organizational capacity in order to be a party to an armed conflict.⁴ Drawing upon the framework of the Geneva Conventions, courts have focused on the following incidia of organizational capacity: existence of headquarters; designated zones of operation; the ability to procure, transport and distribute arms;⁵ a demonstrable hierarchy;⁶ and capacity to coordinate its actions.⁷

There is no evidence to suggest that the Zetian separatists possess the requisite organizational elements. Rigalia cannot impute the pre-existing structure of the ZDP and the Zetian social hierarchy to the amorphous rebel group that Rigalia claims to be fighting. President Khutai has not specified with who Rigalia is at war; rather he simply claimed to wage war against an amorphous collection of individuals which he described as the “Zetian secessionist movement and its supporters.”⁸ As demonstrated by the facts and by Khutai’s statements, the Zetian secessionist movement and the ZDP are separate entities.⁹

The societal organization of Zetians and the structure of the ZDP cannot be used in an attempt to show that the Zetian secessionists possess sufficient organizational capacity to be a party to an armed conflict. As noted in the Goldstone Report, a state cannot simply attribute one

⁴ GC III, *supra* note 2, at art. 4(2); ICC Statute, *supra* note 3, at art. 8(2)(f); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Judgment) ¶¶618-621 (Sept. 2, 1998) [hereinafter *Akayesu*].

⁵*Prosecutor v. Fatmir Limaj*, Case No. IT-03-66-T, Judgment, ¶90 (Nov. 30, 2005)[hereinafter *Limaj*].

⁶ *Id.* at ¶110.

⁷ *Id.* at ¶108.

⁸ Compromis ¶21 [hereinafter *Comp.*].

⁹ *Comp.* ¶¶9,21.

organization's structure or militant qualities to another simply because both share the same nationality, race, or location.¹⁰

2. The tensions between Zetians and Rigalia do not meet the intensity threshold necessary to constitute an armed conflict

In order to constitute an armed conflict, fighting between armed groups must exceed the intensity of mere “internal disturbances and tensions, such as riots, isolated and sporadic attacks of violence or other acts of a similar nature.”¹¹ International tribunals have considered factors including seriousness of attacks, increase of attacks over time, and an increase in mobilization and distribution of weapons among both parties.¹² Additionally, most courts have held that tensions must exist for a prolonged period of time before hostilities can be classified as an armed conflict.¹³

The facts of this case do not indicate a demonstrable pattern of increased or even sustained attacks, either geographically or temporally. In fact, the Zetian attacks only spanned a three-month period.¹⁴ As such, the present conflict resembles a short-lived internal disturbance that does not meet the intensity threshold required by Common Article 3.

B. Rigalia's Predator drone strikes within its territory violate applicable human rights law.

¹⁰ Human Rts. Council, *Human Rights in Palestine and Other Occupied Arab Territories*, ¶34, U.N. Doc. A/HRC/12/48 (Sep. 15, 2009) [hereinafter Goldstone Report].

¹¹ Protocol II, *supra* note 2, at art. 1(2); *see also* ICC Statute, *supra* note 3, at art. (8)(2)(f).

¹² *Limaj*, *supra* note 5, at ¶90. *See also* *Prosecutor v. Boskoski and Tarculovski*, Case No. IT-04-82-T, Judgment, ¶¶177-78,193 (July 10, 2008), *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶566 (July 15, 1999) [hereinafter *Tadic* Judgment].

¹³ *Tadic* Defense, *supra* note 3, at ¶70; *See also* ICC Statute, *supra* note 3, art. 8(2); *Akayesu*, *supra* note 4, at ¶¶618-621.

¹⁴ Comp. ¶18.

Rigalia's use of Predator drones must comport with human rights law, because it is not engaged in an armed conflict with the ZDP.¹⁵ As such, Rigalia is obligated to abide by the International Convention on Civil and Political Rights ("ICCPR"), which expressly guarantees every human being's inherent right to life, and forbids the arbitrary deprivation of human life.¹⁶ These rights are non-derogable even in times of public emergency or national security.¹⁷

Rigalian attacks both in Rigalia and Ardenia killed hundreds of innocent Zetian Ardenians,¹⁸ arbitrarily depriving them of their lives, in direct violation of the ICCPR and customary international law.¹⁹ Rigalia may attempt to claim that the ICCPR does not apply to acts outside of its territory. However, this contention must be rejected as this Court has established that the ICCPR applies "in respect of acts done by a state in the exercise of its jurisdiction outside of its own territory."²⁰

¹⁵ International Covenant on Civil and Political Rights art. 4, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

¹⁶ *Id.* at art. 6(1) (declaring "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

¹⁷ *Id.* at art 4(1).

¹⁸ Comp. ¶¶29-30.

¹⁹ *Palestinian Wall*, *supra* note 1, ¶8. *See also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, 12 Aug. 1949, 75 U.N.T.S. 31[hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 51, 12 Aug. 1949, 75 U.N.T.S. 85[hereinafter GC II]; Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 147, 12 Aug, 1949, 75 U.N.T.S. 287[hereinafter GC IV]; GC III, *supra* note 2, at art. 130.

²⁰ *Palestinian Wall*, *supra* note 1, at ¶111; *See also Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 1996 I.C.J. 226,¶25 (July 8) [hereinafter *Nuclear Weapons Advisory Opinion*]; Goldstone Report, *supra* note 10, at ¶298.

C. Even if the tensions amounted to an armed conflict, Rigalia violated its international obligations under international humanitarian law.

Rigalian drone strikes violated applicable *lex specialis* of non-international armed conflicts enshrined in Common Article 3 and Additional Protocol II to the Geneva Conventions, as well as customary international law.²¹ Under IHL, Rigalia's Predator drone strikes must comply with four elements: (1) the attack must distinguish between civilian and military targets; (2) the attack must be necessary; (3) the attack must be proportional; and, (4) the attack must not cause superfluous harm.

1. Rigalia failed to abide by the principle of distinction.

Parties to an armed conflict must distinguish between civilians and combatants.²² Therefore, even if the Zetian secessionist movement were an armed party to a conflict, Rigalia has an obligation to make distinctions between civilians and legitimate military targets. Rigalia failed to determine whether the targets of its Predator drone strikes were members of an organized group participating in hostilities or whether they were innocent civilians.²³ Instead,

²¹ Protocol II, *supra* note 2. See also GC III, *supra* note 2; *Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts (Taormina Declaration)*, Apr. 7, 1990, 30 INT'L REV. OF THE RED CROSS 383-403.

²² Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; See also *Nuclear Weapons Advisory Opinion*, *supra* note 20, at ¶78 (declaring that the principle of distinction is one of the "cardinal principles contained in the texts constituting the fabric of humanitarian law."); Protocol on Prohibitions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 art. 3(7), 3 May, 1996, 2048 U.N.T.S. 93 (1996).

²³ Int'l Comm. of the Red Cross, *ICRC Interpretive Guidance on Direct Participation in Hostilities*, 90 INT'L REV. RED CROSS 991 (Dec. 2008); H CJ 769/02 Pub. Comm. against Torture in Israel v. Gov't of Israel [2005].

Rigalia indiscriminately carried out attacks against “supporters” of the Zetian movement,²⁴ be they civilian or otherwise, in clear violation of international law and the principle of distinction.

2. Rigalian Predator drone strikes against Zetians were not necessary and proportional

Under the principal of military necessity, states may use force only to the extent necessary, and are prohibited from destruction of property and life unless “imperatively demanded by the necessities of war,”²⁵ for which there is no equivalent alternative.²⁶ Rigalia’s Predator drone program was a manifest violation of this principle, as the circumstances did not necessitate the use of such force. Rigalia made no attempt to utilize less destructive means of force to suppress Zetian attacks, and instead chose to wage a lethal campaign to achieve ends that could likely have been attained through the non-lethal means that Ardenia implemented on its side of the border.

The use of force must also be proportional with respect to the expected military advantage.²⁷ IHL prohibits launching attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which

²⁴ Comp. ¶¶21,29

²⁵ The Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23(g), 18 October 1907, 1 Bevans 577, available at <http://www.unhcr.org/refworld/docid/4374cae64.html>. See also ICC Statute, *supra* note 3, at art. 8(2)(b)iv); GC IV, *supra* note 19, at art. 53.

²⁶ Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict art 6(1), March 26, 1999, 2253 U.N.T.S 172 (1999).

²⁷ *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392, ¶¶176,194 (Nov. 26) [hereinafter *Nicaragua*]; See also *Nuclear Weapons Advisory Opinion*, *supra* note 20, at ¶¶30,41,.

would be excessive in relation to the concrete and direct military advantage anticipated.”²⁸ Rigalia’s Predator drone strikes, which killed or injured 230 civilians in Rigalia and 350 in Ardenia, caused disproportionate harm in relation to the military advantage to be attained, violating the customary international law principle of proportionality.

3. Rigalian Predator drone strikes caused superfluous harm.

It is a principle of customary international law, recognized by this court in the *Nuclear Weapons Case*, that a state does not have unfettered freedom in its choice of weapons and may not use weapons that cause disproportionate injury or unnecessary suffering.²⁹ As this Court stated, “[s]tates must never. . . use weapons that are incapable of distinguishing between civilian and military targets.”³⁰

Though there is no quantified threshold for what constitutes superfluous harm, the dispositive element is that Rigalia continued to use Predator drones over a prolonged period, despite the fact that the weapons were causing excessive harm to civilians, in clear contravention of the obligation to respect the principle of distinction as a matter of common sense and good faith.³¹ For every death of a suspected Zetian leader, more than 25 civilians were killed, and

²⁸ Protocol I, *supra* note 22, at art. 51(5)(b). *See also* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *supra* note 27, at art. 3(3)(c); ICC Statute, *supra* note 3, art. 8(2)(b)(iv).

²⁹ Protocol I, *supra* note 20, at art. 58(3)(b); *See also Nuclear Weapons Advisory Opinion*, *supra* note 25, ¶78-79.

³⁰ *Nuclear Weapons Advisory Opinion*, *supra* note 20, at ¶78 (French judgment)(mentioning the prohibition of superfluous harm: “*il ne faut pas causer des maux superflus aux combattants*”).

³¹ INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1997 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶2199 (Yves Sandoz et al., eds.) (1987).

many more wounded.³² Either the Predator drones are incapable of distinguishing between military and civilian targets and are therefore illegal pursuant to *Nuclear Weapons*, or the Predator drones are capable of such distinction, and Rigalia willfully targeted innocent Zetian civilians in violation of IHL.³³ In either scenario, Rigalia has violated international law.

II. THE ATTACK ON THE BAKCHAR VALLEY HOSPITAL IS ATTRIBUTABLE TO RIGALIA AND WAS AN UNLAWFUL ACT OF AGGRESSION FOR WHICH IT IS OBLIGATED TO MAKE REPARATIONS.

A. The attack on the Bakchar Valley Hospital is attributable to Rigalia.

1. Rigalia is directly responsible for the Bakchar Valley bombing.

Although Morgania controlled the Drones, Rigalia is directly responsible for the attack on the Bakchar Valley hospital because: (1) Rigalian reconnaissance personnel directly participated in the operation; and (2) Rigalia subsequently adopted the attack. Per the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, relevant portions of which this Court has determined to be customary international law,³⁴ when actors are organs of a state, conduct of these actors is directly

³² Comp. ¶¶29,30.

³³ *Nuclear Weapons Advisory Opinion*, *supra* note 20, at 564 (separate opinion of Judge Koroma) (“humanitarian law does prohibit the use of certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary and superfluous harm caused to combatants”).

³⁴ *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), 1997 I.C.J. 7, ¶¶47-49 (Sept. 25) [hereinafter *Gabčíkovo-Nagymaros*]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 138, ¶385 (Feb. 26). Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

attributable to that state.³⁵ Rigalia is directly liable for the attack on the Bakchar Valley hospital because the informants who conducted the reconnaissance for the Morganian Drone attack were paid agents of Rigalia that played an integral part in the operation.³⁶ Rigalian agents did not merely aid or assist Morgania, but were in effect co-perpetrators in the internationally wrongful act.³⁷

Furthermore, the Predator drone strikes are directly attributable to Rigalia because the act was “adopted” by Rigalia per Article 11 of the ILC Draft Articles.³⁸ This court in the *Iran Hostages* case recognized that conduct can be attributed to a state upon “endorsement by those authorities of the situation thus created.”³⁹ This endorsement need not be express; rather, simply failing to condemn an illegal action can attribute that action to a state.⁴⁰ Yet, Rigalia went further than mere failure to condemn the attacks. Rigalia endorsed the egregious attack on the Bakchar Valley hospital when the Rigalian defense minister proclaimed that the killing of hundreds of innocent civilians in Ardenia was “a regrettable consequence of Rigalia’s fight to defend itself and its people.”⁴¹

2. Rigalia is also indirectly responsible for the Bakchar Valley bombing.

³⁵ Int’l L. Comm’n, *Draft articles on Responsibility of States for Internationally Wrongfully Acts with commentaries* art. 2(2), Y.B.INT’L L.COMM’N (2001) [hereinafter ILC Draft Articles].

³⁶ Comp. ¶29.

³⁷ ILC Draft Articles, *supra* note 35, at arts.16(1),19(4).

³⁸ *Id.* at art. 11.

³⁹ *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, ¶9 (May 24) [hereinafter *Iran Hostages*].

⁴⁰ ILC Draft Articles, *supra* note 35, at art. 11. *See also Iran Hostages*, *supra* note 39, at ¶74.

⁴¹ Comp. ¶31.

Internationally wrongful conduct may be attributed to a state where the state offers assistance to another state for the commission of an internationally wrongful act.⁴² In particular, a state breaches its international obligations by permitting the use of its territory by another state to carry out an armed attack against a third state.⁴³

In 1986, the U.N. called on states “to refrain from extending any assistance or facilities for perpetrating acts of aggression.”⁴⁴ This resolution admonished the United Kingdom for its joint responsibility in the 1986 bombing of Tripoli, when it allowed several of its air force bases to be used to launch U.S. planes which carried out attacks on Libyan targets.⁴⁵ Similarly, Rigalia permitted Morgania to launch strikes against Ardenia from a base within Rigalia and is therefore at least jointly responsible for the attacks.⁴⁶

Moreover, Rigalia is indirectly liable for the bombing of the Bakchar Valley hospital because of the operational support it provided Morgania in carrying out the Predator drone strike.⁴⁷ This Court in *Nicaragua* found that a state is liable for the internationally wrongful acts

⁴² ILC Draft Articles, *supra* note 35, at art.16.

⁴³ ILC Draft Articles, *supra* note 35, at art. 16(8). *See also* 20 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 663–664 (Aug. 1960); Rosalyn Higgins, President, Int’l Court of Justice, Speech during the 59th session of the Int’l L. Comm’n (July 7, 2007), *available at* <http://www.icj-cij.org/presscom/files/9/13919.pdf>.

⁴⁴ G.A. Res. 41/38 art.3, U.N. Doc. A/RES/41/38 (Nov. 20, 1986).

⁴⁵ *Id.*

⁴⁶ Comp. ¶28.

⁴⁷ Comp. ¶29.

committed by another party when the former provides aid or assistance to the latter, even if such acts are not specifically directed by the assisting party.⁴⁸

B. Rigalia’s bombing of the Bakchar Valley hospital was an unlawful use of force amounting to aggression.

The U.N. General Assembly’s 1974 definition of aggression, and the International Criminal Court’s (“ICC”) Assembly of State Parties’ adoption of that definition in 2010, provide a basic framework for determining whether an act of aggression has been committed.⁴⁹ U.N. General Assembly Resolution 3314 establishes in no uncertain terms that “[t]he first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression;” this includes “[b]ombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.”⁵⁰ When a state fails to adhere to the conduct required to assert a right to self-defense, the state is prohibited from engaging in invasion, attack, bombardment, or use of any weapon against the territory of another state.⁵¹

In assessing whether Rigalia’s attack on the Bakchar Valley hospital constitutes an act of aggression this court should consider that: (1) force was used against the territory of another state;⁵² (2) there was a violation of the *jus cogens* norm of non-intervention;⁵³ (3) the force was

⁴⁸ *Nicaragua*, *supra* note 27, at ¶292(3); *See also* ILC Draft Articles, *supra* note 35, art. 16.

⁴⁹ U.N. Charter art. 2(4); Kampala Special Working Group on the Crime of Aggression, *The Crime of Aggression*, annex 2, art. 8, 13th plen. mtg, June 8-11, 2010, U.N. Doc. RC/Res.6(June 11, 2010) [hereinafter *Kampala Definition*].

⁵⁰ Resolution on the Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 142 (Dec. 14, 1974) [hereinafter *1974 Definition*]

⁵¹ UN Charter art. 2(a)-(b).

⁵² *1974 Definition*, *supra* note 50, at art. 1.

of a sufficient character, gravity, and scale to constitute an armed attack;⁵⁴ and (4) the act was not a mistake but was committed with the intent to violate another state's sovereignty guaranteed by the U.N. Charter and customary international law.⁵⁵ The attack on the Bakchar Valley hospital was a clear violation of Ardenian sovereignty. Moreover, Rigalia's bombing of the hospital, which resulted in 350 casualties, is manifestly of sufficient gravity. Conducting hostilities against a medical facility whether during an armed conflict or in peace time, is of the gravity that would amount to an armed attack.⁵⁶ Finally, while blowing up the hospital might have been a mistake, Rigalia does not deny that it acted with the intent to conduct a military strike within Ardenia's border.

C. Rigalia's bombing of the Bakchar Valley hospital is not justified by self-defense.

In order to lawfully use force in another state's territory, a state invoking self-defense must satisfy three criteria: (1) it must show that it suffered attacks of sufficient gravity to constitute an armed attack;⁵⁷ (2) The armed attack must have been perpetrated by a state;⁵⁸ and (3) the state's use of self-defense must conform to the customary principles of necessity and

⁵³ U.N. Charter art. 2, para. 7. *See also* Declaration on the inadmissibility of intervention in the domestic affairs of the States and the protection of their independence and sovereignty, G.A. Res. 2131, U.N. GAOR 20th Sess., Supp. No 14, U.N. Doc. A/6014, at 11 (1966).

⁵⁴ Kampala Definition, *supra* note 49.

⁵⁵ U.N. Charter art. 2(4); *see Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶266 (Dec. 19) [hereinafter *Armed Activities*].

⁵⁶ GC I, *supra* note 19, at art. 19; GC IV, *supra* note 22, at art. 18; Protocol I, *supra* note 22, at art. 12; Protocol II, *supra* note 2, at art. 11(1).

⁵⁷ U.N. Charter art. 51; *see also Nicaragua*, *supra* note 27, at ¶195.

⁵⁸ U.N. Charter art. 51.

proportionality.⁵⁹ Rigalia's use of force does not satisfy these criteria; thus its claim that it is justified in the bombing of the Bakchar Valley hospital by self-defense is without merit.

1. Rigalia cannot claim self-defense because its attack on the Bakchar Valley hospital was not precipitated by an armed attack.

The exercise of the right of self-defense is subject to a state having been the victim of an armed attack.⁶⁰ Armed attacks are classified as the gravest use of force and must be distinguished from other lesser uses of force.⁶¹ This Court in *Oil Platforms* found that a series of minor attacks did not cumulatively give rise to the justification of self-defense.⁶² Rigalia suffered no armed attack which would give rise to the right of self-defense.

2. Even if the court finds that an armed attack occurred against Rigalia, Rigalia is barred from utilizing the self-defense justification in response to an attack from a non-state actor.

This Court has rejected the claims of states that have attempted to justify their use of violence against non-state actors as self-defense.⁶³ In *Palestinian Wall*, this Court held that states are not justified in using self-defense if they are not attacked by another state.⁶⁴ Further, in *Armed Activities* this Court found that Uganda's claim to self-defense was unjustified because the attacks which gave rise to the claim did not emanate from another state, nor were they

⁵⁹ *Nicaragua*, *supra* note 27, at ¶¶54-55,60; *see also Nuclear Weapons Advisory Opinion*, *supra* note 20, at ¶245.

⁶⁰ *Nicaragua*, *supra* note 27, at ¶195..

⁶¹ *Id.* at ¶191.

⁶² *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, ¶64 (Nov. 6).

⁶³ *Palestinian Wall*, *supra* note 11, at ¶¶139-41; *See also Nicaragua*, *supra* note 27, at ¶195

⁶⁴ *Palestinian Wall*, *supra* note 1, at ¶¶139-41;

undertaken on behalf of another state.⁶⁵ Similarly, in this case, Rigalia used armed force in Ardenia against and in response to attacks by non-state actors in the absence of evidence that their acts were controlled or directed by any state.

Rigalia may attempt to argue that the U.N. Security Council resolution affirming the U.S. use of force in Afghanistan in response to attacks by al-Qaeda⁶⁶ has altered this rule.⁶⁷ This assertion, however, must be rejected, as it overlooks the fact that U.N. approval of the U.S. invasion of Afghanistan in response to an attack by non-state actors (al-Qaeda) was predicated on the assumption, based on evidence provided by the United Kingdom,⁶⁸ that the Taliban government of Afghanistan was intimately implicated in the acts of al-Qaeda, as a single jointly-criminal entity.⁶⁹ Thus, there was not alteration of international law; rather, the same underlying principles were applied and still apply: a state may be justified in using self-defense *only* when the acts of non-state actors are imputable to a foreign state.⁷⁰ Rigalia makes no claim that the terrorist attacks are imputable to Ardenia, nor is there a sufficient nexus between ZDP activities and Ardenia.

3. Rigalia's failure to immediately notify the Security Council estops Rigalia from claiming that the attack is justified by self-defense.

⁶⁵ *Armed Activities*, *supra* note 55, at ¶¶145-46.

⁶⁶ S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

⁶⁷ Michael P. Scharf, *Seizing the 'Grotian Moment'*, 43 CORNELL INT'L L.J. 439 (2010).

⁶⁸ Elena Katselli & Sangeeta Shah, *September 11 and the UK Response*, 52 Int'l & Comp. L.Q. 245-255 (2003).

⁶⁹ S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

⁷⁰ *Palestinian Wall*, *supra* note 1, at ¶¶6,139.

Article 51 of the UN Charter requires states resorting to the use of force in self-defense to immediately report to the Security Council.⁷¹ The Charter's notice requirement serves the purpose of informing the Security Council of the specific justifications for the use of force, thus enabling the council to gauge whether the military action was necessary and proportional.⁷² This Court held in *Armed Activities* that, because Uganda failed to immediately notify the Security Council of its military actions in the Congo, Uganda was prohibited from relying on the doctrine of self-defense to justify its use of force.⁷³ Similarly, Rigalia's failure to provide the required immediate notice to the Security Council disqualifies it from relying on self-defense as justification for its armed attack.

D. Rigalia is obligated to make reparations to Ardenia for the bombing of the Bakchar Valley hospital.

States that commit an internationally wrongful act are obligated to make full reparation for the injury caused by the act.⁷⁴ Because the Predator drone strikes are attributable to Rigalia and the harm suffered was a product of an internationally wrongful act, Rigalia must make reparations to account for all of the consequences of the illegal act, both material and moral.⁷⁵ As was the case in *Armed Activities*, Rigalia is bound to make reparations for the harm it caused

⁷¹ U.N. Charter art. 51.

⁷² *Id.*

⁷³ *Armed Activities*, *supra* note 55, at ¶145.

⁷⁴ ILC Draft Articles, *supra* note 35, at art. 31. *See generally* *Factory at Chorzów* (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 44 (May 25).

⁷⁵ *Factory at Chorzów* (Ger. v. Pol.), Jurisdiction, 1927 P.C.I.J. (ser. A) No. 9 (July 26); *Factory at Chorzów* (Ger. v. Pol.), Merits, 1928 P.C.I.J. (ser. A) No. 13 (Dec. 16). *See also* *Rainbow Warrior* (N.Z. v. Fr.), 20 R.I.A.A. 215, ¶110 (1990).

through the perpetration of an internationally wrongful act.⁷⁶ Ardenia need not provide a precise monetary sum at this time; rather, the Court can appoint a special expert to determine the monetary award or require the parties to negotiate the award in good faith.⁷⁷

III. RIGALIA'S MAVAZI BAN VIOLATES THE RIGHTS OF ZETIAN WOMEN AND GIRLS.

The Rigalian law banning Zetian women from wearing the Mavazi, a sacred religious headcovering, contravenes articles 2, 18 and 19 of the ICCPR which sets forth the rights to freedom of religious belief⁷⁸ and expression.⁷⁹ External manifestations of religion, such as wearing headcoverings for religious purposes, have also been granted protection under the authoritative interpretations of the International Human Rights Committee and the case law of the European Court of Human Rights.⁸⁰ In its general commentary on the ICCPR, the Human Rights Committee stressed that where religious symbols place emphasis on female modesty and humility as the Mavazi does, these symbols are protected by the international human rights principles contained in the ICCPR.⁸¹

⁷⁶ *Armed Activities*, *supra* note 55, at ¶259; *Gabčíkovo-Nagymaros*, *supra* note 34, at ¶152. *See also Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. , ¶119 (Mar. 31).

⁷⁷ Statute of the International Court of Justice art. 50, June 26, 1945, 3 Bevens 1179; *see Armed Activities*, *supra* note 55, at ¶261; *Gabčíkovo-Nagymaros*, *supra* note 34, at ¶83.

⁷⁸ ICCPR, *supra* note 15, at art. 18.

⁷⁹ *Id.* at art. 19.

⁸⁰ *Id.*; *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 462, ¶83 (Feb. 15). *See also* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; International Covenant on Economic, Social, and Cultural Rights, 933 U.N.T.S. 3, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966)[hereinafter ICESCR].

⁸¹ Human Rights Comm., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Comment 22: Art. 18(4), 48th Sess., U.N. Doc. HRI/GEN/1/Rev.1. (1994)[hereinafter General Comment 22] *reprinted in* SARAH JOSEPH

In *Dahlab v. Switzerland*, the European Court of Human Rights examined a narrow restriction on public school teachers wearing a Muslim headscarf. There, the Court articulated that such principles of freedom of thought, expression and religion were foundational to a democratic society and that the protection of those rights was at the core of the Convention's aims.⁸² In another case, Belgium's Hasselt Civil Court overturned a ban on the patka, a head covering of the Sikh faith, stating that such a ban was incompatible with ideals of religious tolerance and freedom.⁸³ With respect to the one country (France), whose recently expanded ban on Muslim head coverings is as broad as Rigalia's Mavazi ban, experts have opined that it is unlikely to withstand constitutional challenge or European Court scrutiny.⁸⁴

The Rigalian Mavazi ban also violates Articles 14 and 15 of the Convention on the Rights of the Child ("CRC"), which grant children the same rights as adults in terms of practicing their religions, adhering to their faiths and embracing their cultures.⁸⁵ In accordance with Zetian cultural and religious traditions, at the age of 14, a Zetian girl is supposed to have the ability to don the Mavazi and become a woman in the eyes of her people.⁸⁶ Under Rigalia's ban,

ET. AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 502 (2d ed. 2004).

⁸² General Comment 22, *supra* note 81.

⁸³ *Belgian Court Overturns Ban on Sikh Headcoverings in School*, SikhNet, July 2, 2008, available at <http://www.sikhnet.com/daily-news/belgian-court-overturns-ban-on-sikh-headcovering-in-school>.

⁸⁴ *Questions and Answers on Restrictions on Religious Dress and Symbols in Europe*, HUMAN RIGHTS WATCH, Dec. 21, 2010, available at <http://www.hrw.org/en/news/2010/12/20/questions-and-answers-restrictions-religious-dress-and-symbols-europe>.

⁸⁵ CRC, *supra* note 81, at arts. 13,14.

⁸⁶ Comp. ¶3.

this traditional rite of passage has been barred, impacting both the religious and social expression rights of Zetian children.⁸⁷

Under the ICCPR and the CRC, limitations on an individual's religious expression are only permissible if they meet the following test: (1) the limitation must be prescribed by law;⁸⁸ (2) it must have a legitimate aim and narrow purpose;⁸⁹ and (3) the restriction must be necessary to protect public safety, order, health, morals, or the rights of others.⁹⁰ While the ban has been codified by the Rigalian legislature,⁹¹ neither of the latter two elements has been met.

A. The ban lacks legitimate aim and narrow purpose.

Rigalia passed the ban as a piece of reactionary legislation, rather than a legitimate attempt at mitigating public disorder. The ban was adopted immediately following President Khutai's declaration of war with the Zetian secessionist movement, by a vote of 275-25; only ethnic Zetians were in the dissenting minority.⁹² This context suggests a piece of legislation lacking a legitimate aim.

Rigalia may attempt to argue that this ban has a narrow purpose. However, where bans on head coverings have been upheld, the bans were much more narrowly tailored than the broad

⁸⁷ *Id.*

⁸⁸ *R (on the application of SB) v Governors of Denbigh High School*, [2005] EWCA Civ 199; *Dogru v. France*, App. No. 27058/05, 49 Eur. H.R. Rep. 8 (2008); *Sahin v. Turkey*, App. No. 44774/98, 2005-XI Eur. H.R. Rep. 173 (Nov. 10); *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993).

⁸⁹ *Dogru v. France*, *supra* note 88.

⁹⁰ ICCPR, *supra* note 15, at art. 18(3).

⁹¹ Comp. ¶21.

⁹² *Id.*

Rigalian ban.⁹³ In *Karaduman v. Turkey*, for example, a young woman was asked to remove a headscarf for purposes of taking a university identification photograph.⁹⁴ She was not prohibited from wearing the headscarf generally. There, the European Court of Human Rights focused its decision on the voluntary nature of her attendance at that particular university.⁹⁵ Rigalia's ban, in contrast, is broad and general; it bars women from wearing the Mavazi in public without exception.⁹⁶ As the European Court explained in *Dogru v. France*, such a broad ban goes too far. There the court stated that France had the burden to show that its ban on Muslim headscarves from public schools was appropriately limited, justified and tied closely to the purposes for which it was intended.⁹⁷ The European Court reiterated its commitment to secularism, but focused on the narrow scope of the ban in question. Here, Rigalia has articulated neither a legitimate aim for its ban, nor has it shown that the ban is limited and tailored to a particular goal that falls within the narrow exception of the ICCPR.

B. Rigalia cannot rely on the margin of appreciation doctrine.

Rigalia may attempt to assert that this Court should adopt a deferential approach to its legislation under the margin of appreciation doctrine, which has only been applied by the

⁹³ See, e.g., *United States v. Board of Education for the School District of Philadelphia* (where the secular appearance of state-funded schools was at issue), *Hudoyberganova v. Uzbekistan*, UN Doc CCPR/C/82/D/931/2000 (18 January 2005) (where the Human Rights Committee found a violation of Article 18(2) regarding a broad ban of Islamic headscarves).

⁹⁴ *Karaduman v. Turkey*, *supra* note 88.

⁹⁵ *R (on the application of SB) v Governors of Denbigh High School*, *supra* note 88 (held that a school, as an extension of the state, would have to show reasons to prohibit religious dress); *Sahin v. Turkey*, *supra* note 88 (held that the need for prohibiting the wearing of the headscarf in a university setting was specific enough to justify the law).

⁹⁶ Comp. ¶16.

⁹⁷ *Dogru v. France*, *supra* note 88.

European Court of Human Rights.⁹⁸ While the European Convention has been used as a model for interpreting the ICCPR, the margin of appreciation has not been used outside of the European context.⁹⁹ Even if this Court were to entertain applying this doctrine for the first time, such an application would not go so far as legitimizing the Mavazi ban. The European Court of Human Rights recognized the limits to the margin of appreciation doctrine, stressing that a state, in striking a balance between the collectively-oriented needs of the state and the needs of the individual, could not disregard human rights concerns.¹⁰⁰

C. Rigalia cannot rely on the public safety and order exception to Article 18 of the ICCPR.

While Rigalia has experienced unrest in the Zetian provinces and finds it necessary to respond to the secessionist threats from the Zetian Democratic Party, this does not justify violating international human rights conventions.¹⁰¹ The basic human rights of the Zetian women cannot be usurped due to an alleged national necessity.¹⁰² The ICCPR expressly permits some narrow exceptions to the freedom of religious belief, but only to protect public safety, order, health, or morals or to ensure the protection of others' rights and freedoms.¹⁰³ National security must not be confused with ensuring public order, especially in times of declared

⁹⁸ George Letsas, *Two Concepts of the Margin of Appreciation Doctrine*, 26 OXFORD J. L. STUDIES 705 (2006); Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 INT'L & COMP. L.Q. 638-50 (1999).

⁹⁹ Letsas, *supra* note 98, at 705.

¹⁰⁰ *Sahin v. Turkey*, *supra* note 88.

¹⁰¹ Comp. ¶6.

¹⁰² General Comment 22, *supra* note 81, at ¶1 ("The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.")

¹⁰³ ICCPR, *supra* note 15, at art. 18(3).

emergency.¹⁰⁴ In interpreting these limitations, the Human Rights Committee declared in General Comment 22 that “[p]aragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds . . . such as national security.”¹⁰⁵ Therefore, Rigalia cannot justify its illegal Mavazi ban on national security grounds.

Further, Rigalia cannot meet the requirements of the narrow Article 18 exception for the “protect[ion of] public safety.”¹⁰⁶ In order for a state party to meet this exception by passing legislation that restricts the external manifestation of a religious belief, the party must show that such a restriction meets the threshold established in General Comment 22.¹⁰⁷ While Rigalia attempts to assert that it carried out the Mavazi ban for purposes of public order and safety in a time of emergency, it can point to only a single instance of an extremist using the Mavazi to conceal his identity while carrying out an act of terrorism, and has never specified the number of casualties, if any, from this incident.¹⁰⁸ This was a solitary event, and cannot justify a broad and sweeping ban of the religious garment. In order for this Court to legitimize the ban, Rigalia bears the burden to show that there is a “sufficient justification” for the law, or that there is an “objective and reasonable justification” for the ban.¹⁰⁹ Here, there is no evidence that the ban

¹⁰⁴Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U.J. INT’L L. & POL. 437 (2008).

¹⁰⁵ Human Rights Comm., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, General Comment 18: Art. 22, 48th Sess., U.N. Doc. HRI/GEN/1/Rev.1. (1994) in JOSEPH, *supra* note 81.

¹⁰⁶ICCPR, *supra* note 15, at art. 18(3); General Comment 22, *supra* note 81, at ¶1.

¹⁰⁷ General Comment 22, *supra* note 82.

¹⁰⁸ Comp. ¶16.

¹⁰⁹ *Mauritian Women’s Case*, HRC Resn. 9.35, UN Doc. A/36/40, at 134, 36 U.N. GAOR, Supp. (No. 40)(1981); *Belgian Linguistics*, (1979-1980) 6 Eur. H.R. Rep. (ser. A) at 252 (1968).

has decreased terrorist activity in the region, nor that it actively protects any fundamental rights of Rigalians.¹¹⁰ Furthermore, the affirmative defense of necessity as a justification for breaching human rights has been overruled time and time again, as human rights law continues to apply even in states of emergency.¹¹¹

D. Rigalia's Mavazi ban is discriminatory.

1. The Mavazi ban violates the rule that any legislative restriction of expression must be crafted in the interest of creating equality in fact.

Under Article 2 of the ICCPR, states party to the Covenant shall not infringe on the rights of an individual to practice his or her religion, partake in his or her culture, or discriminate against an individual based on his or her religion, sex or social status.¹¹² While the Mavazi ban appears neutral on its face, its effect is discriminatory as it is felt only by Zetian women practicing Masinto, who wear the Mavazi as an external manifestation of their internal devotion to their religion, their tribe, and their culture.¹¹³

The Rigalian government did not ban any other forms of religious attire at the time that it banned the Mavazi or at any point thereafter; elimination of the Mavazi from public life was the sole purpose of the legislation, as President Khutai stated publicly.¹¹⁴ Consequently, the only ill-affected members of society were Zetian-Masinto women. If the goal was actually to enhance

¹¹⁰ Comp. ¶28.

¹¹¹ Judgments of the Israel Supreme Court, *Israeli General Security Service, GSS's Methods of Interrogation: Fighting Terrorism Within the Law*, 34, available at http://www.jewishvirtuallibrary.org/jsourc/Politics/terrorirm_law.pdf.

¹¹² ICCPR, *supra* note 15, at art 2(1).

¹¹³ Comp. ¶3; *see generally* W. MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW (1983)(describing the distinction between belief in the forum internum and manifestations in the forum externum.).

¹¹⁴ Comp. ¶21.

public order and safety, the Rigalian legislature would have banned other garments that have been used in the course of terrorist attacks, such as burqas,¹¹⁵ niqabs,¹¹⁶ or even ski masks.¹¹⁷

2. Rigalia may not rely on CEDAW to justify its discriminatory legislation.

The Court should not accept Rigalia's claim that the Mavazi ban furthers the purposes of CEDAW. According to Articles 26 and 31 of the Vienna Convention on the Law of Treaties, all international obligations must be interpreted in good faith and in the context in which they were intended and with their specific goals and purposes in mind.¹¹⁸ International obligations must be interpreted in light of all other applicable international treaty obligations as well.¹¹⁹ The objectives of CEDAW are to equalize standards for men and women, not to force women to conform to secular dress codes.¹²⁰ If Rigalia's interpretation of the Convention is upheld, CEDAW would be turned on its head to remove the decision-making abilities of women, at a time when human rights courts around the world are upholding a woman's right to wear symbols

¹¹⁵Zeeshan Haider, *Pakistan Suicide Bomber was woman covered in Burqa*, REUTERS.COM, Dec. 26, 2010, available at <http://www.reuters.com/article/idUSTRE6BP10P20101226>.

¹¹⁶Daniel Pipes, *Lion's Den: Niqabs and Burqas: The Veiled Threat Continues*, JERUSALEM POST, Sept. 1, 2009, available at <http://www.jpost.com/Opinion/Columnists/Article.aspx?id=153585>.

¹¹⁷Thomas Sheehan, *Italy: Behind the Ski Mask*, N.Y. REV. BOOKS, Aug. 16, 1979, available at <http://www.nybooks.com/articles/archives/1979/aug/16/italy-behind-the-ski-mask/> (ski masks were used to disguise identity by groups such as the Italian Red Brigades terrorist organization, in the 1970's).

¹¹⁸Vienna Convention on the Law of Treaties art. 26,31, May 23, 1969, 1155 U.N.T.S. 331 (1969)[hereinafter VCLT].

¹¹⁹*Id.*

¹²⁰Convention on the Elimination of all forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

of her faith.¹²¹ Although women may be subjected to tribal penalties in the Northern Provinces for not wearing the Mavazi, the choice to express their religious beliefs must be protected by Rigalia.¹²² It is not the role of the state to prescribe permissible religious expression.¹²³

Moreover, in contrast to Rigalia's professed objective, the elimination of the Mavazi from public life further burdens Zetian women. Anthropologists have examined this issue as it applies to Muslim women and have found that the wearing of religious garments is a reassurance to the wearer that she is demonstrating the norms and values of her culture, as well as actively participating in it.¹²⁴ Similarly, sociological studies have confirmed that the linkage between religious attire and the connection a woman feels to her culture confers a sense of liberation rather than oppression.¹²⁵ The wearing of a head covering for a devout woman should not be confused with a lack of legal agency.¹²⁶ The adherence to her religion and tradition, as well as the expression thereof, is a guaranteed human right that should not be removed by Rigalian legislators presuming to act on her behalf.¹²⁷

IV. ARDENIA DID NOT VIOLATE THE OECD ANTI-BRIBERY CONVENTION OR THE OECD DECISION ON MNE GUIDELINES.

¹²¹ *Sahin v. Turkey*, *supra* note 88; *Karaduman v. Turkey*, *supra* note 88; *Dogru v. France*, *supra* note 88; *Dahlab v. Swizerland*, *supra* note 80.

¹²² International Covenant on Economic, Social, and Cultural Rights, 933 U.N.T.S. 3, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966)[hereinafter ICESCR].

¹²³ *Id* at art. 1, ¶3.

¹²⁴ *Id*.

¹²⁵ Muhammad Khalid Masud, *Dress Matters: Change and Continuity in the Dress Practices of Bosnian Muslim Refugee Women*, 19(1) GENDER & SOCIETY 44, 45 (2005).

¹²⁶ *Id*.

¹²⁷ ICCPR, *supra* note 15, at art. 2(1)-(2).

As an preliminary matter, Ardenia notes that Rigalia has the burden of proof on all aspects of this counter-claim.¹²⁸

A. Rigalia cannot demonstrate the undue influence on a foreign public official in the bidding process, which is necessary for violations of the OECD Convention.

1. There is no undue advantage or injury shown in the bidding process for the Moria Mine contract renewal.

In order for a violation to fall within the scope of the OECD Anti-Bribery Convention, it must amount to gaining an “undue pecuniary or other advantage” in a bidding process.¹²⁹ The OECD Guidelines for Multinational Enterprises are concerned with acts of bribery in terms of how these acts create unfairness and undue advantage in global markets.¹³⁰ Here, the prerequisite for applying the Convention and the Guidelines is absent, as Rigalia has failed to demonstrate that the renewal of the Contract constituted an undue advantage or injury. Rigalia, itself, suffered no direct injury in this bidding process, and thus lacks standing to bring this claim under the OECD Convention. Further, no aggrieved Rigalian party has come forward alleging financial injury, so there is no national for whom Rigalia may espouse a claim. Therefore, there is no injury for Rigalia to assert before this Court.

2. The alleged targets of the bribe are not foreign public officials within the meaning of the Convention.

¹²⁸ *Oil Platforms*, *supra* note 62, at 214; *see also Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 6).

¹²⁹ Organization for Economic Cooperation and Development(OECD), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 1¶1, Nov. 21, 1997 *available at* <http://www.oecd.org/dataoecd/4/18/38028044.pdf>[hereinafter Anti-Bribery Convention].

¹³⁰ Comm. on Int’l Investment and Multinat’l Enterprises, OECD, *The OECD Declaration and Decision on International Investment and Multinational Enterprises: Basic Texts*, annex 1, OECD Doc. DAFFE/IME(2000)20, Nov. 9, 2000 [hereinafter MNE Guidelines].

Both the Convention and Guidelines apply only to the bribing of “foreign” public officials, and do not address purely domestic acts of bribery.¹³¹ In the present case, all of the alleged acts occurred within Ardenia: MDI allegedly paid the bribe to the Zetian Refugees Fund (“ZRF”), an Ardenian charity, in the name of Clyde Zangara, who lives in Ardenian territory.¹³² While Rigalia alleges that Leo Bikra was the ultimate target of these bribes, the standard of active bribery means that only the alleged affirmative actions of MDI may be evaluated.¹³³

Furthermore, the Guidelines and Convention only apply to the bribery of foreign “public officials.” The ZRF is a private charity, not a government entity.¹³⁴ Clyde Zangara, in turn, is an agent of a non-governmental organization and not a public official.¹³⁵ Any money donated to the fund, or to Clyde Zangara, therefore, does not constitute a payment to a public official. While Rigalia claims that the target of the bribe was Leo Bikra, RRI’s Director General, the MNE Guidelines may be triggered only when a public official exercises “sovereign authority.”¹³⁶ In the present case, there is no evidence that Leo Bikra exercises any such authority; he is merely a state-appointed head of a business entity.¹³⁷ Consequently, neither the OECD Convention nor the MNE Guidelines are applicable in this case.

¹³¹ *Id.*

¹³² Comp. ¶11.

¹³³ THE OECD CONVENTION ON BRIBERY: A COMMENTARY 96 (Mark Pieth et al., eds., 2007)[hereinafter PIETH COMMENTARY]at 247.

¹³⁴ Comp. ¶11.

¹³⁵ PIETH COMMENTARY, *supra* note 133, at 70.

¹³⁶ *Id.*

¹³⁷ Comp. ¶11.

3. Ardenia justifiably denied the request for mutual legal assistance because it was too broad.

Requests for mutual legal assistance (“MLA”) must be “for the purpose of criminal investigation in proceedings brought by a party concerning offenses within the scope of the Convention.”¹³⁸ Since MDI’s alleged actions do not fall within the scope of the Convention, the MLA request was invalid. Assuming, *arguendo*, that the Court feels that the allegations do fall within the scope of the Convention, the documents requested would still not be accessible, as the request is too broad. Ardenia may provide access only to MDI’s bank records under the OECD Convention, as the scope of the investigation is MDI’s conduct in allegedly bribing RRI;¹³⁹ Rigalia’s request for correspondence between ZRF and members of the tribal councils goes beyond that scope. Further, Ardenia law bars access to these documents.¹⁴⁰ While Article 9(3) does not permit noncompliance on the basis of bank secrecy, nothing in the record suggests that is the motivation for the Ardenian law.¹⁴¹ Finally, Ardenia has not denied the request, but instead has responded as best it can, putting Rigalia on notice of the issues with its domestic law, and explaining that it is attempting to comply in good faith with its international obligations.¹⁴² Therefore, Ardenia’s response was not in fact a breach of the OECD Convention.¹⁴³

B. Ardenia’s investigation was stopped for permissible reasons of national security.

¹³⁸ Anti-Bribery Convention, *supra* note 129, at art. 9.

¹³⁹ *Id.*

¹⁴⁰ Comp. ¶24.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Comp. ¶¶23,24.

Article 5 of the OECD Convention grants broad prosecutorial discretion to domestic jurisdictions, limiting that discretion only in instances of national economic interest, foreign relations impacts, and where the identity of the parties influence the decision. Relying on standards of treaty interpretation,¹⁴⁴ this means that it is permissible for a country to halt investigations into bribery allegations for purposes of national security.¹⁴⁵

1. The Prosecutor’s public statement regarding “national security concerns” holds greater validity than statements about national economic interest made in media reports.

In June of 2009 Prosecutor Strong announced that the Ardenian investigation into the bribery allegations was terminated due to national security concerns.¹⁴⁶ Under this Court’s jurisprudence in the *Iran Hostages* case, highly placed government officials, such as Prosecutor Strong, may give the “seal of government approval” in their public statements.¹⁴⁷ While Rigalia may try to assert that Prosecutor Strong’s public statement must be subordinated to President Arwen’s suggestion that national economic interest may also have played a role in the decision not to prosecute,¹⁴⁸ such an interpretation would be improper. President Arwen’s comment to the news outlet was not an official public statement on the investigation and should not be read as such.

¹⁴⁴ VCLT, *supra* note 118, at art. 31.

¹⁴⁵ Anti-Bribery Convention, *supra* note 129, at art. 5. See *R (on the application of Corner House Research and others) v. Director of the Serious Frauds Office*, [2008] U.K.H.L. 60 (H.L) (*appeal taken from Admin.*); Rose-Ackerman & Billa, *supra* note 104.

¹⁴⁶ Comp. ¶25.

¹⁴⁷ *Iran Hostages*, *supra* note 39, at ¶73; see also *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 473, 474-5 (Dec. 20).

¹⁴⁸ Comp. ¶25.

2. In state practice, national economic interests necessarily play a role in decisions to pursue investigations into bribery allegations.

Even if the Court were to focus on President Arwen’s suggestion that national economic interests played a role in the decision not to prosecute MDI, this should not amount to a violation of Article 5 of the OECD Convention.¹⁴⁹ “National economic interest” should be interpreted in light of state practice.¹⁵⁰ Thirty-two other state parties have either implemented domestic statutory exceptions to Article 5 of the OECD Convention, or consistently fail to prosecute claims where national economic interests would be injured.¹⁵¹ In light of state practice in Ardenia’s favor, and the lack of international case law on the topic,¹⁵² the Court should not enforce the prohibition of relying on “national economic interest” against Ardenia.

C. Facilitation payments are acceptable under OECD standards, and under agreed upon exceptions in state practice.

While the OECD Convention bars bribery of foreign public officials, it left an exception for facilitation payments.¹⁵³ These payments are those which induce lawful actions by public officials and do not rely on a discretionary decision of the official. MDI’s conduct as it pertains to “small facilitation payments” is not in conflict with the OECD Convention.¹⁵⁴ Consistent with

¹⁴⁹ Anti-Bribery Convention, *supra* note 131, at art. 5.

¹⁵⁰ VCLT, *supra* note 118, at art. 31.

¹⁵¹ TRANSPARENCY INT’L, FOREIGN BRIBERY AND OECD COUNTRIES: A HOLLOW COMMITMENT? PROGRESS REPORT 2009, available at http://www.transparency.org/news_room/in_focus/2009/oecd_pr_2009 [hereinafter TI REPORT].

¹⁵² *Id.*

¹⁵³ *Id.* (noting that only four states actively prosecute); Anti-Bribery Convention *supra* note 131, at art. 1; PIETH COMMENTARY, *supra* note 131, at xxx (reprinting the OECD Commentary on the Anti-Bribery Convention, ¶9).

¹⁵⁴ PIETH COMMENTARY, *supra* note 153, at xxx.

Comment 9, an authoritative interpretation of the OECD Convention, Ardenia has created an exception, within its legislation regarding bribery offenses, for "small facilitation payments."¹⁵⁵ There is no violation of Ardenia's OECD obligations in this area, as the payments are designed only to allow passage for coltan reserves from the Moria Mine to Rigaliaville, and requires no discretion from the tribal councils.

Rigalia cannot claim that Ardenia's facilitation payments are incongruous with customary international law. While some states have narrowed exceptions for facilitation payments and the OECD frowns upon the use of these payments, exception still exists in the OECD Convention and the large majority of states in the world continue to permit facilitation payments.¹⁵⁶

¹⁵⁵ Comp. ¶38

¹⁵⁶ TI REPORT, *supra* note 151.

V. PRAYER FOR RELIEF

For the reasons stated above, Ardenia respectfully requests that this Court:

1. DECLARE that Rigalia's Predator drone strikes are illegal under international law, ORDER their immediate cessation, and ORDER that Rigalia make reparations for the harm the attacks caused;
2. DECLARE that Rigalia's attack on the Bakchar Valley hospital was an unlawful use of force rising to the level of aggression and ORDER Rigalia to make reparations for the harm caused thereby;
3. DECLARE that Rigalia's ban of the Mavazi constitutes a violation of international human rights law; and
4. DECLARE that Ardenia's discontinuation of its investigation into the payments over the Moria Mine, its refusal to provide Rigalia the requested bank records, and its small facilitation payments did not constitute a violation of its OECD obligations.

Respectfully submitted,

Agents for Applicant