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THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,

THE HAGUE, THE NETHERLANDS

THE 2012 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

CASE CONCERNING THE MAI-TOCAO TEMPLE

REPUBLIC OF APROPHE

(APPLICANT)

V.

FEDERAL REPUBLIC OF RANTANIA

(RESPONDENT)

MEMORIAL FOR THE APPLICANT

2012

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STATEMENT OF JURISDICTION

The Republic of Aprophe and the Federal Republic of Rantania have agreed to submit the present dispute to the Court for final resolution, by Special Agreement in accordance with Articles 36(1) and 40(1) of the Statute of the Court. As per Article 36, the jurisdiction of the Court comprises all cases that the parties refer to it. Applicant submits to the jurisdiction of the Court.

QUESTIONS PRESENTED

A. Can the Andler government represent the Republic of Aprophe before this Court?

B. Is Rantania responsible for the illegal use of force against Aprophe in the context of Operation Uniting for Democracy?

C. Did the exercise of jurisdiction by the Rantanian Courts in the case of *Turbando, et al., v. The Republic of Aprophe* violate international law?

D. Is Aprophe's destruction of a building of the Mai-Tocao Temple consistent with international law?

STATEMENT OF FACTS

The present dispute concerns the Mai-Tacao Temple ["the Temple"] complex, located on the border of the parties to these proceedings, the Republic of Aprophe ["Aprophe"], the Applicant in these proceedings, and the Federal Republic of Rantania ["Rantania"], the Respondent.

The Temple is of immense cultural significance to both parties. Consequently, several wars were fought over the sovereignty of the Temple. The most recent of these was the Mai-Tocao War of 1962, in which the Aprophian military secured the site around the Temple. In the course of this, about 500 Rantanian peasants were made to provide goods and services to the Aprophian army, in return for three meals a day and lodging in barracks near the labour sites. By 1965, the conflict had reached a stalemate. A Peace Agreement ["1965 Treaty"] was signed between the States, which submitted the boundary dispute to an arbitral tribunal. This awarded the Temple to Aprophe, along with ten kilometres of previously undisputed Rantanian territory. The Temple was inscribed in the World Heritage List in 1988.

The Eastern Nations International Organisation ["ENI"] was formed in 1990 by Rantania, Lamarthia, Verland and Pellegrinia. This was a regional organisation devoted to strengthening cooperation between members, and included a mutual defence pact. This incorporated the Eastern Nations Charter of Human Rights ["EN Charter"] which had been entered into by the same States in 1980.

In 2000, Senator Mig Green ["Green"] was elected President of Aprophe. After the election, the Green government proceeded to carry out measures designed to secure membership of ENI, including acceding to the EN Charter, the weakening of Aprophe's traditionally strong labour unions and the implementation of an open border policy. By 2006, there were a series of protests organised against the Green government.

In 2001, prompted by the documentary "Our Forgotten Workers," the International League for Solidarity and Access ["ILSA"] instituted proceedings against Aprophe in the Aprophian Courts on behalf of 60 former military internees. This case, *Turbando et al* v. *The Republic of Aprophe*, sought compensation from the Aprophian government for the uncompensated labour of the Rantanian peasants. Finding that the claim was barred by limitation in the Aprophian Courts, ILSA instituted similar proceedings before Rantanian Courts on behalf of the internees, alleging forced labour. The Rantanian Courts initially dismissed the claim against Aprophe as being barred by a waiver in the 1965 Treaty. Consequently, in January 2009, ILSA filed a petition against the Eastern Nations Court ["EN Court"], which found that the waiver in the 1965 Treaty would leave the plaintiffs without a remedy. In December 2009, in accordance with the EN Court's decision, the Rantanian trial Court exercised jurisdiction and further held that foreign sovereign immunity did not extend to violations of peremptory norms of international law, and proceeded to award compensation to the plaintiffs. This was denounced by the Aprophian Minister for Foreign Affairs as "*an unacceptable violation of Aprophe's immunity…"*

Further, as a result of the decision in *Turbando*, there were widespread protests against the Green government. In response to the social unrest that followed, Green declared emergency on

January 20, 2011, and postponing elections scheduled for March 2011 by one year. Green also ordered the Aprophian military to begin armed patrols in major urban areas to "prevent and quell civilian unrest." In response to this, Aprophian Chief of Staff General Paige Andler ["Andler"] wrote an open letter to Green, refusing to take up arms against the people of Aprophe. Subsequently, Green ordered her dismissal and arrest on charges of insubordination and sedition. On January 16, 2011, Andler and some soldiers entered the Presidential Palace and other governmental installations in Marcelux, the capital of Aprophe. As Green and his ministers fled to Rantania, Andler declared herself "interim president" of Aprophe.

Within two days of the coup, the Andler government had established order over the bulk of the Aprophian population and territory. Even as Andler dissolved Parliament, she continually reiterated that "*elections [would] be called soon*" and that civil liberties would be protected. Only two villages in the outlying regions of Aprophe remained outside Andler's control. These were controlled by the National Homeland Brigade ["NHB"], which was loyal to Green. The Andler government ordered the Quick Reactionary Force ['QRF"] to confront the NHB. Only small-scale fighting took place from January 20, 2011.

Meanwhile, Green and his ministers formed a "government in exile" in Rantania, and held talks to intervene to restore that government in Aprophe. At Rantania's initiation, the ENI recognised the Green government. The Green government then proceeded to request intervention in Aprophe from the ENI, in response to artillery strikes carried out by the QRF against the villages with NHB bases. On February 15, 2011, the ENI approved Rantania's proposal for the approval of Activation Orders for Operation Uniting for Democracy ["OUD"]. These permitted air strikes

against Aprophe. Major-General Otaz Brewscha ["Brewscha"], a reserve officer in the Rantanian air force, was appointed Force Commander. The air strikes were carried out almost exclusively by the Rantanian air force, as it was the only ENI member State with significant airborne capability.

Within only days from its commencement on February 18, 2011, the air strikes had destroyed twelve of the fifteen military installations in Aprophe, and had killed fifty Aprophian soldiers. The Sterfel Institute, an independent military think-tank, reported that the Aprophian military could no longer defend itself. Despite this, the attacks air strikes continued. By February 27, 2011, the Andler government fled to the Mai-Tocao National Park. The next day, she announced that since Aprophe could no longer defend itself, she would be forced to destroy part of the Temple in response to the attacks. As the air strikes did not cease even after a Security Council resolution "call[ing] *upon*" ENI member States to end OUD, Andler's staff destroyed a part of one of the buildings in the Mai-Tocao complex. The ENI Council suspended OUD shortly thereafter.

Andler then filed an application before the Registry of the International Court of Justice instituting proceedings against Rantania. Since Rantania did not consent to jurisdiction based on the compromissory clause in the 1965 Treaty, the parties drafted this *Compromis* which is now before this Court.

SUMMARY OF PLEADINGS

A. Only a government that exercises 'effective control' over the state's territory can fulfil international obligations on behalf of the State. Thus, under customary international law, only the Andler government may represent Aprophe before this Court as it exercises effective control over Aprophe's territory and population. Governments lacking effective control cannot represent States solely because they have legitimate origins. Furthermore, since the Andler government has not displayed an unwillingness to comply with international human rights obligations, it cannot be denied the right to represent Aprophe internationally.

B. This Court may exercise jurisdiction over the present claim as ENI is not an indispensible third party to the dispute. The principle of indispensible third parties does not apply to international organisations. In any event, ENI is not a subject of international law. Moreover, the determination of ENI's responsibility is not a *pre-requisite* to the adjudication of the claim against Rantania.

Rantania exercised control over the operational decisions with respect to the conduct of the Rantanian air force in OUD. This satisfies the test of effective control necessary to attribute actions of the air force to Rantania. The test of ultimate authority and control is inapposite in the present claim, and cannot be relied on to avoid attribution to Rantania. Finally, Rantania used ENI in order to circumvent its obligations in international law. As a result, Rantania is responsible for the air strikes in OUD.

Article 2(4) of the UN Charter is a complete prohibition on the use of force irrespective of the motivation behind it. As a result, the air strikes in OUD constitute a violation of Article 2(4), even if they were carried out for humanitarian purposes. Further, intervention in order to restore the Green government is unlawful, as international law does not recognise intervention for the restoration of democracy. Moreover, the Green government could not invite intervention for its restoration. The use of force pursuant to such intervention is unlawful. Finally, customary international law does not States permit a right of unilateral humanitarian intervention. Consequently, Rantania is responsible for the unlawful use of force in OUD.

C. Rantania's exercise of jurisdiction in *Turbando et al. v. The Republic of Aprophe* allowing individuals' claims for forced labour violates international law. In the exercise of their sovereign powers, both Aprophe and Rantania had validly waived individuals' claims under Article XV of the 1965 Treaty. Aprophe can invoke Article XV as the decision of the EN Court invalidating Article XV does not bind Aprophe. Further, the EN Charter's non-retroactive application implies that it cannot regulate the application of Article XV.

Further, Rantania's denial of immunity from jurisdiction to Aprophe is not justified under the tort exception as the conduct of the Aprophian military does not fall within the scope of this exception. Nor does the violation of *jus cogens* norms justify denial of immunity as there is no conflict between the substantive *jus cogens* violation and the procedural norm of immunity. Customary international law also does not recognise such an exception.

D. The destruction of a building of the Temple does not violate international law.Breach of Article 1 of the 1965 Treaty requires an attack *against* an adversary causing harm to its military operations. Thus, destruction within Aprophe's own territory does not violate Article 1. In any case, the non-performance exception negatives Aprophe's wrongfulness.

Rantania cannot invoke the World Heritage Convention as the Convention does not create an *erga omnes* obligation. In any case, such an obligation does not confer standing to institute proceedings before the Court. In any event, the destruction does not violate the Convention as the Convention is inapplicable during armed conflict.

The non-exhaustion of local remedies precludes Rantania from exercising diplomatic protection for enforcing the rights guaranteed under the ICESCR. In any event, the ICESCR does not apply either during armed conflict or extra-territorially.

Even in the event that the World Heritage Convention and the ICESCR are applicable, international humanitarian law recognises the 'imperative military necessity' to destruction of cultural property during armed conflict. Since this exception justifies the destruction in the present case, Aprophe's act does not violate the World Heritage Convention, ICESCR or customary international law.

PLEADINGS

I. THE ANDLER GOVERNMENT CAN REPRESENT APROPHE BEFORE THIS COURT AS THE RIGHTFUL GOVERNMENT OF APROPHE.

1. The Andler government has come to power in Aprophe through a military *coup d'etat*. Aprophe requests the Court to find that governments with effective control may represent States internationally [A]. Further, the Andler government exercises effective control [B]. Finally, the Andler government does not fall within the exceptions to the effective control principle [C]. Consequently, it may represent Aprophe internationally.

A. Customary international law confers a right of representation on governments exercising effective control.

2. Aprophe submits that a government exercising effective control can represent States internationally [a]. Further, customary international law does not permit governments lacking effective control to represent States solely based on the legitimacy of their origins [b].

a. A government exercising effective control can represent the State internationally.

3. The authority of a government to represent a State internationally stems from its effective control.[1] As demonstrated in *Tinoco*,[2] this is premised on government's control of state machinery, crucial to fulfilling the international obligations of the State. Indeed, a change of government inconsistent with the municipal law of the State cannot, *ipso facto*, negate such

[1] LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 639 (1947); AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 82 (1997) ["AKEHURST"].

[2] Arbitration between Great Britain and Costa Rica, 18(1) AJIL 147, 157 (1924)["Tinoco"].

authority.[3] As a result, customary international law only empowers governments with effective control to represent States.

4. Extensive State practice supports this view.[4] For instance, the GA permitted representation by military governments including Pakistan's Musharraf government [5] and Thailand's Chulanont government.[6] Additionally, the requirement of *opinio juris* is satisfied. In Resolution 2758, the GA referred to the People's Republic of China, which exercised effective control, China's "*legitimate representatives*".[7] Furthermore, the reference to the determination of representation based on "*principles and purposes*" of the Charter in UNGA Resolution 396(V),[8] Aprophe submits that this is not inconsistent with the test of effective control. As Secretary-General Lie observed, the functioning of the UN requires that governments be in control of the machinery of the State, in order to fulfil international obligations.[9] In any event, the existence of widespread and consistent State practice in favour of effective control leads to a *presumption* of *opinio*

[3] Cyprus v. Turkey, Preliminary Objections, App.No.6780 & 6950/75, ¶4.

[4] Genocide Case, Preliminary Objections, 1996 ICJ General List No. 91, Memorial, Bosnia and Herzegovina, 41; Luther v. Sagor [1920] A. 1861; Ratliff, *UN Representation Disputes*, 87 CAL. L. REV. 1207,1226 (1999).

[5] U.N.Doc.A/56/PV.45.

[6] U.N.Doc.A/62/PV.9, 19.

[7] U.N.Doc.A/RES/2758.

[8] U.N.Doc.A/RES/396(V).

[9] U.N.Doc.S/1466.

juris.[10] Aprophe therefore submits that governments with effective control may represent States internationally.

b. Customary international law does not permit representation by governments solely by reason of their constitutional origin.

5. State practice permitting representation by governments lacking effective control is sparse,[11] and does not meet the "*uniform and widespread*" requirement for the formation of customary international law.[12] Indeed, the non-representation of the undemocratic regime in Haiti[13] is regarded as an exception to the general rule of representation.[14] Moreover, *opinio juris* does not support representation by governments lacking effective control. The African Union Act[15] and the Charter of the Organisation of American States[16] embody distinct norms, and do not reflect *opinio juris* sufficient to lead to a conclusion of the existence of custom. Thus, customary

[10] Case No: STL- II -0ll1, ¶199 (Interlocutory decision of 16th February).

[11] Crawford, *Democracy and the Body of International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 115 (Fox & Roth eds., 2000)["Crawford-Democracy"]; Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48(3) ICLQ 545, 572 (1999) ["Murphy"].

[12] North Sea Continental Shelf, 1969 ICJ 3, ¶74.

[13] Crawford-Democracy, 115.

[14] ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 260(2000).

[15] Article 30, CONSTITUTIVE ACT OF THE AFRICAN UNION, 2158 U.N.T.S. 3 (2000).

[16] Article 9, CHARTER OF THE ORGANISATION OF AMERICAN STATES, 119 U.N.T.S. 1609 (1952).

international law does not confer a right of representation by reason of legitimate origin alone. At best, any such rule is *lex ferenda*.[17]

c. Non-recognition by other States does not affect the capacity of the Andler Government to represent Aprophe.

6. Rantania may contend that several States have recognised only the Green government, and consequently, only the Green government may represent Aprophe internationally. However, recognition refers to the willingness of a State to carry on relations with the government of another State.[18] The question in this case refers to the right of a government to represent a State internationally, and not in relations between States.[19] As a result, non-recognition does not affect representation by the Andler government.

B. The Andler Government exercises effective control.

7. The existence of effective control is determined by several factors, including control over the capital and State apparatus.[20] Here, the Andler government controls the Presidential Palace and the government installations in Marcelux, the Aprophian capital. Subsequent to the dissolution of the Aprophian Parliament, it has remained the *only* entity in control of these. Moreover, the ability to maintain public order,[21] and the ability to command obedience of the

[17] Franck, *The Emerging Right to Democratic Governance*, 86(1) AJIL 46, 91(1992) ["Franck"].

[18] TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW 25 (2001).

[19] U.N.Doc.S/1466.

[20] Blix, *Contemporary Aspects of Recognition*,130 RDC 586, 642 (1970) ["Blix"].

[21] Tinoco,154.

majority of a population[22] also leads to the inference of an effective control. In less than a week following the coup, Andler's government had established order over eighty per cent of the population of Aprophe, and about ninety per cent of its territory. The fact that the National Homeland Brigade controlled some parts of Aprophe's territory is not fatal to a finding of effective control.[23] It is therefore submitted that the Andler government exercises effective control over Aprophe.

C. The Andler government has not committed acts sufficient to deny it a right of representation.

8. A government may be denied representation if it has been installed by foreign military intervention, if it denies a people the right to self-determination, or if it remains unwilling to fulfil international human rights obligations.[24] Here, the Andler government has not committed human rights violations [a], nor has it displayed an unwillingness to fulfil its international obligations [b] sufficient to warrant denial of the right of representation.

a. The Andler government has not committed human rights violations sufficient to warrant denial of a right of representation.

9. Governments may be denied the right to represent States if they commit violations of peremptory norms.[25] However, not all violations of human rights warrant the denial of the right

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[22] Blix, 642.

[23] Blix, 641-642.

[24] Talmon, *Who is a Legitimate Government in Exile?*, *in* REALITY OF INTERNATIONAL LAW (1999) ["Talmon"].

[25] Taki, *Effectiveness*, MPEPIL ¶10 (2008).

of representation. Thus, the apartheid government in South Africa was denied the right of representation.[26] However, the military governments of Pakistan,[27] Thailand[28] and Guinea-Bissau[29] were represented in the UN, despite having declared emergency and suspending civil liberties.[30] Here, even as the Andler government declared emergency, it promised that fresh elections would be conducted, and that civil liberties would be protected. Rantania may seek to establish that the deployment of the QRF constituted a violation of human rights sufficient to deny a right of representation. However, Aprophe submits that this was only a lawful exercise of the right of governments to suppress rebellion.[31] Consequently, the Andler government may represent Aprophe internationally.

b. The Andler government has not displayed an unwillingness to fulfil international obligations.

10. An unwillingness to comply with international obligations may serve as a ground to deny a government the right of representation.[32] This is evidenced in consistent and flagrant violations

[26] U.N.Doc.A/RES/506; D'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 NYU L. J. 877, 905 (2007).

[27] U.N.Doc.A/56/PV.45.

[28] U.N.Doc.A/62/PV.9, 19.

[29] U.N.Doc.S/PV.4834.

[30] Pongsudhirak, *Thailand Since The Coup*, 19(4) J.DEMOCRACY 140, 146(2008); Roth, *Despots Masquerading as Democrats*, 1(1) J.H.RTS.PRAC 140, 155 (2009).

[31] Congo, 2005 ICJ 168, ¶¶45-6.

[32] Talmon; Magiera, *Governments*, MPEPIL ¶18 (2011).

of international law. For instance, the GA denied representation to the government of South Africa as apartheid constituted a *flagrant* violation of the obligations under the UN Charter.[33] Similarly, the Taliban was denied representation, as it used the territory of Afghanistan for terrorism, despite several binding SC resolutions.[34] In the present case, the Andler government has assured the conduct of elections, and has promised that civil liberties would be protected. This indicates a commitment to democracy and to international human rights obligations.[35] Further, the Andler government has signed the present Compromis, indicating its willingness to comply with the international obligation of peaceful dispute resolution.[36] Thus, Aprophe submits that the Andler government has not displayed an unwillingness to comply with international obligations. As a result, Aprophe requests the Court to find that the Andler government may represent it internationally.

II. RANTANIA IS RESPONSIBLE FOR THE UNLAWFUL USE OF FORCE IN OPERATION UNITING FOR DEMOCRACY.

11. Pursuant to ENI's Activation Orders, a force comprising primarily the Rantanian air-force carried out air strikes in Aprophe. Aprophe requests the Court to find that it may exercise jurisdiction over the present claim as the ENI is not an indispensible third party to the proceedings. [A]. Further, the use of force in OUD was unlawful [B]. Finally, the use of force in OUD is attributable to Rantania [C].

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[33] U.N.Doc.A/RES/506.

[34] Wolfrum & Phillip, *The Status of the Taliban*, MAX PLANCK YBUNL 561, 581-2(2002).

[35] U.N.Doc.S/PV.4834.

[36] SIMMA, UN CHARTER: A COMMENTARY 183 (2002) ["SIMMA"]; U.N.Doc.A/Res/506(VI).

A. This Court can exercise jurisdiction over the question of responsibility for the use of force.

12. According to the Court in *Monetary Gold*,[37] this Court cannot exercise jurisdiction where a third party's interests form the subject-matter of the dispute. Aprophe submits that this principle in *Monetary Gold* does not apply to international organisations [a]. In any event, ENI is not a subject of international law as it does not possess separate legal personality [b]. Even if ENI possesses separate legal personality, the adjudication of ENI's responsibility is not a pre-requisite to the adjudication of the present claim [c].

a. The principle of indispensible parties does not apply to international organisations.

13. Since only States may be parties before the Court, applying the *Monetary Gold* principle will have the effect of depriving the Court of jurisdiction in every case involving an international organisation. This could not have been the intention of Article 34,[38] as it would permit States to abuse the process of the Court by acting through international organisations. While Rantania may contend that *Macedonia*[39] implicitly applied the *Monetary Gold* principle to international organisations, Aprophe submits that the Court did not consider this question in that case. As a result, the *Monetary Gold* principle is inapplicable in this case.

b. In any event, ENI is not a subject of international law

[37] Monetary Gold, 1954 ICJ 19, 32.

[38] ZIMMERMAN ET AL, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, A COMMENTARY 604(2005).

[39] FYRM v. Greece, 2009 ICJ 19, 32.

14. The intention of the founding member-States determines whether an international organisation possesses legal personality.[40] This may be discerned by an examination of whether the functions of the IO necessitate an inference of legal personality.[41] ENI was established to promote economic cooperation in the region, and to take collective action. These do not necessitate an inference of the organisation's separate legal personality.[42] Moreover, the provisions of the ENI Treaty also do not establish ENI's legal personality. Such an inference must be implied from the provisions of the treaty as a whole.[43] Despite providing for privileges and immunities, as well as for separate organs, the ENI treaty does not contain a provision obligating members to carry out decisions of the ENI. This suggests a lack of personality.[44]

c. In any event, ENI is not an indispensible third party to the proceedings.

15. The *Monetary Gold* principle only applies where the determination of the third party's rights is a pre-requisite to the adjudication of the claim before the Court.[45] It cannot deprive the Court of jurisdiction where the responsibility of the parties may be determined *independent* of the third

[40] BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 476 (2009).

[41] Reparation, 1949 ICJ 174, 178-9.

[42] BOTHE, OSCE IN THE MAINTENANCE OF PEACE AND SECURITY 198 (1997).

[43] AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANISATIONS 78(2005).

[44] Reparations, 178-9; Reuterswiird, *The Legal Nature of International Organizations*, 49 NORDISK TIDSSKRIFT INT'L REV.14, 15-22 (1980).

[45] East Timor, 1995 ICJ 90, ¶ 30.

party.[46] The present claim concerns the responsibility of Rantania for its own conduct, and not that of ENI. The attribution of the acts of the Rantanian air force to the ENI is only a question of *fact*, and not of the legal rights of ENI.[47] As a result, Rantania's responsibility for the acts of its air force, and the degree of control exercised by Rantania may be ascertained without affecting the legal rights of ENI.[48]

16. Further, the *Monetary Gold* principle was intended to apply only where the third party's interests formed the subject-matter of the claim, such that any decision would, in effect, bind the third party despite the protection provided under Article 59.[49] Such decision would defeat the protection provided under Article 59 of the Court's Statute. A determination of Rantania's responsibility for the circumvention of its obligations through ENI would not have this effect. Even if the Court were to arrive at a conclusion of ENI's responsibility, the enforcement of the award would not bind the ENI. Consequently, the *Monetary Gold* principle does not preclude the exercise of jurisdiction in the present case.

B. <u>The use of force in OUD is unlawful.</u>

17. Aprophe requests the Court to find that the air strikes constitute a violation of Article 2(4) of the UN Charter [a]. Further, intervention directed at the restoration of the Green government is unlawful [b]. Moreover, the air strikes were not carried out as a lawful exercise of the right of humanitarian intervention [c].

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[46] Nauru, 1992 ICJ 240, ¶55; Oil Platforms, 2003 ICJ 161 (Judge Simma Sep.Op.), ¶¶ 82-3.

[47] Larsen/Hawaiian Kingdom Arbitration, 119 ILR (2001) 566, ¶11.24.

[48] Nuhanović v. The Netherlands, ILDC 1742 (NL 2011), ¶ 5.8.

[49] East Timor, (Judge Weeramantry Diss.Op.), 156-7.

a. The air strikes carried out in the course of OUD violate Article 2(4).

18. Article 2(4) of the UN Charter proscribes all use of force, irrespective of the motivation behind it.[50] This is supported by the *travaux*, as the text of Article 2(4) at the Dumbarton Oakes Conference read as a complete prohibition on the use of force[51] and the expression "*territorial integrity and political independence*" was inserted to provide a safeguard to small States.[52] Indeed, even as the Drafting Committee accepted an Australian amendment proposing the insertion of this phrase, it clarified that "*the unilateral use of force …is not authorized or admitted*."[53] The rejection of the New Zealand amendment proposing a narrower view of Article 2(4) bolsters this position.[54] In any event, custom that has developed alongside the Charter supports a wide interpretation of Article 2(4).[55]

19. Further, the view that humanitarian intervention is not "*inconsistent with the purposes of the UN*" is untenable as the maintenance of peace overrides all other obligations in international

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[50] Corfu Channel, 1949 ICJ 4, 109; Arechaga, *International Law in the Past Third of a Century*, 159 RDC 1, 9(1978) ["Arechaga"].

[51] BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 266 (1963) ["BROWNLIE II"].

[52] Brownlie, *General Course on Public International* Law, 255 RDC 9,199 (1995); Arechaga, 91.

[53] Lachs, *The Development and General Trends of International Law in Our Time*, 169 RDC 9, 324(1980).

[54] BROWNLIE II 266.

[55] GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS 68–9 (1st edn., 1946); GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS 51-2 (2nd edn.,1969).

law.[56]Although Articles 55 and 56 obligate member-States to promote human rights, they do not authorise the use of force for this end. Indeed, the use of the term *promotion*, and not *protection* of human rights was intended to avoid raising "*hopes going beyond what the United Nations could successfully accomplish*."[57] Moreover, the right of unilateral humanitarian intervention is at odds with the SC's monopoly over the use of force under the Charter.[58] Thus any use of force, even in humanitarian intervention, is inconsistent with the purposes of the UN.[59] Therefore, Aprophe submits that OUD was a violation of Article 2(4).

b. Intervention directed at the restoration of the Green government is unlawful.

20. Rantania may seek to establish a right to intervene in order to restore governance by a democratically elected government in Aprophe. However, the right to democratic governance has not crystallised into customary international law.[60] Further, international law does not does not permit the use of force for the restoration of democracy.[61] Frequently cited instances of pro-democratic intervention, including Grenada (1983), Panama (1989) and Sierra Leone (1997)

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[56] Cassese, *Ex Injuria Ius Oritur*,10(1) EJIL 23, 24(1999).

[57] Simon, *Contemporary Legality of Unilateral Humanitarian Intervention*, 24 CAL. W.INT'L L.J. 117, 134(1993).

[58] Villani, *The Security Council's Authorisation of Enforcement Action by Regional Organisations*, MAX PLANCK YBUNL 535, 552(2002).

[59] Arechaga, 91.

[60] Franck, 91.

[61] Nanda, *U.S. Forces in Panama*, 84 AJIL 494, 500(1990) ["Nanda"].

have been widely condemned as unlawful.[62] As a result, Rantania cannot claim a right of pro-democratic intervention.

21. Aprophe further submits that the use of force on Green's invitation remained unlawful. States have an inalienable right against intervention directed at imposing a political system.[63] It is well-settled that States cannot intervene at the invitation of the constitutional government in a civil war, as it is uncertain whether this government retains in effective control, and hence, the right to represent a State.[64] Indeed, where a government retains effective control, it cannot invite intervention even against civil strife.[65] Aprophe submits that, *a fortiori*, that intervention at the invitation of a deposed government is unlawful. In particular, such intervention is unlawful where it is directed at the restoration of that government.

c. Humanitarian intervention is unlawful under customary international law.

22. Customary international law does not authorize intervention for the protection of human rights.[66] Practice suggesting the existence of such a right must refer to humanitarian

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[62] U.N.Doc.S/1997/958; U.N.Doc.A/RES/44/240; U.N.Doc.A/RES/38/7.

[63] U.N.Doc.A/RES/2625; Nicaragua, 1986 ICJ 14, ¶¶191-2.

[64] SIMMA, 121.

[65] Nolte, *Intervention by Invitation*, MPEPIL ¶6; Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BYIL189, 214-221(1985); *Resolution on the Principle of Non-Intervention in Civil Wars*, 56 INS. INT'L L. 544(1975); U.N.Doc.A/Res/38/7; U.N.Doc.S/16077/REV.1.

[66] Rodley, *Human Rights and Humanitarian Intervention*,38(2) ICLQ 321, 327(1980); CASSESE, INTERNATIONAL LAW 374 (2005).

considerations as humanitarian intervention must *solely* be for humanitarian motives.[67] Contrary to this, the interventions in Dominican Republic (1965), Stanleyville (1965) and Cambodia (1978) were for the protection of the nationals of the intervening States.[68] The interventions in Sierra Leone (1997) and Bangladesh (1971) have been regarded as being politically motivated.[69] State practice, therefore, does not support the right of humanitarian intervention.

23. *Opinio juris* with respect to humanitarian intervention is also insufficient.[70] Although some NATO States referred to the intervention in Kosovo as a lawful exercise of the right of humanitarian intervention,[71] several others doubted the legality of the operation.[72] Moreover, the US did not rely on the right of humanitarian intervention, but on SC Resolution 1199 to justify the operation.[73] Additionally, Germany and Belgium cautioned that Kosovo was *sui generis*, and

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[67] Joyner, *Responsibility to Protect*, 47 VA. J. INT'L L. 693, 713(2007); Brownlie & Apperly, *Kosovo Crisis Inquiry*,49(4) ICLQ 878, 904(2000) ["Brownlie-III"].

[68] Terry, *Rethinking Humanitarian Intervention After Kosovo*, ARMY L. 36, 42(2004) ["Terry"].

[69] GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 33 (2008); Schachter, *In Defense of International Rules on the Use of Force*, 53 U.CHI.L.REV. 144(1986).

[70] Corten, *Human Rights and Collective Security*, *in* HUMAN RIGHTS, INTERVENTION AND THE USE OF FORCE 88, 102(2008).

[71] Brownlie-III.

[72] Cassese, *A Follow-up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EJIL 791, 792(1999). ["Cassese Follow-Up"].

[73] Terry, 42.

not to be regarded as forming precedent.[74] Indeed, even the World Summit Outcome on the Responsibility to Protect only permits intervention on authorisation of the SC.[75]

24. Furthermore, given that implicit authorisation under Article 53 must be unequivocal,[76] Rantania cannot rely on the SC Resolution of 1 March 2011 condemning OUD as implicitly authorising OUD. Indeed, the airstrikes in OUD were carried out without the authorisation of the SC, as required by Article 53 and as such, violate international law.[77]

C. <u>The use of force in OUD is attributable to Rantania.</u>

25. Aprophe submits that Rantania is responsible for the use of force in OUD as it exercised effective control over the conduct of the Rantanian air force [a]. The test of ultimate authority and control is inapposite in this case [b]. In any event, Rantania used ENI as a means of circumventing its obligations in international law [c].

a. <u>*Rantania exercised effective control over the conduct of the Rantanian air force.*</u>

26. Under customary international law, the conduct of a State organ placed at the disposal of an international organisation is attributable to the entity exercising effective control.[78] Aprophe

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[74] Cassese Follow-Up, 793.

[75] U.N.Doc.A/60/L.1, 31.

[76] Gray, *From Unity to Polarisation*, 13(1) EJIL 1, 7(2002).

[77] Akehurst, *Enforcement Action by Regional Agencies with Special Reference to the OAS*, 42 BYIL 175, 220(1969).

[78] Article 7, ILC Draft Articles on Responsibility of International Organisations (2011) ["DARIO"]; U.N.Doc.A/51/389, ¶18; Gaja, Second Report, U.N.Doc.A/CN.4/541["Second Report"],¶40; U.N.Doc.A/C.6/59/SR.21,¶21,32,39; Al-Jedda v. UK, App.No.27021/08,¶84.

submits that Rantania exercised effective control over the conduct of the air strikes. Here, the Rantanian air force had been placed at the disposal of ENI. However, as it had not been *fully seconded* to ENI, the powers retained by Rantania are determinative of effective control.[79] In particular, since the air strikes were carried out "*almost exclusively*" by the Rantanian air force, the withdrawal of the forces would have a crippling effect on the operation.[80] As a result, the retention of the power of withdrawal strongly suggests Rantania's effective control.[81] In fact, the withdrawal of the Rantanian air force possibly resulted in the suspension of OUD. This is bolstered by Brewscha's position as Force Commander, as well as reserve officer in the Rantanian air force, which suggests that some directions may have been issued by Rantania.[82] In any event, Article 48, DARIO provides for multiple attribution where command and control over an organ is shared by several entities. The ability of Rantania to influence the conduct of OUD suggests shared command and control, leading to multiple attribution.[83] While Rantania may contend that effective control requires the issuance of specific directions in relation to individual

[79] Commentary on Draft Articles on Responsibility of International Organisations, 28 ¶7; Larsen, *Attribution of Conduct in Peace Operations*, 19 EJIL 509(2008).

[80] Seyersted, *United Nations Forces*, 37 BYIL 351, 384(1961).

[81] Dannenbaum, *Translating the Standard of Effective Control into a system of Effective Accountability*, 51(1) HARV. J.INT'L L. 133, 150(2010).

[82] Mustafiü v. Netherlands, LJN:BR5386, ¶5.18.

[83] HIRSCH, RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS TOWARDS THIRD PARTIES 66 (1995).

acts,[84] Aprophe submits that this is inapplicable in the present case. The test in *Nicaragua* is inapposite in relation to organs which comprise an organised, hierarchical structure,[85] and the acts of the organ are directed at achieving a purpose identical to that of the controlling entity.[86]

b. *The test of ultimate authority and control does not apply.*

27. The ultimate authority and control test, which seeks to attribute acts to international organisations on the ground that they were delegated by the organisation,[87] is inapposite. *First*, the Court in *Behrami* relied on the test of delegation applied in the context of State responsibility in order to attribute actions to the UN. However, international organisations are not analogous to States, and delegation of responsibility by an international organisation does not of itself serve as a ground for attribution.[88] *Secondly*, the decision in *Behrami* turned on the exercise of effective control by the UN over the territory of Kosovo[89] and on the UN retaining the primary responsibility for the maintenance of international peace and security.[90] *Finally*, the decision in

[84] Nicaragua, ¶115.

[85] Prosecutor v. Tadic, IT-94-1-A, (Judge Shahabuddeen, Sep. Op.), ¶16.

[86] Genocide Case, 2007 ICJ 43 (Judge Ad HocMahiou, Diss. Op.), ¶¶114-5; (Vice-President Al-Khasawneh, Diss. Op.),¶¶ 38-9.

[87] Behrami v. France, App.No.71412/01 ["Behrami"].

[88] Milanovic & Papic, *As Bad as it Gets*, 58(2) ICLQ 284, 289(2009).

[89] Sari, *Autonomy, Attribution and Accountability*, *in* INTERNATIONAL ORGANISATIONS AND THE IDEA OF AUTONOMY 259 (2011).

[90] Behrami, ¶132; Bell, *Reassessing Multiple Attribution*, 42 N.Y.U. J. INT'L. L.&POL.501, 511(2010).

Behrami is not reflective of custom. Customary international law recognises only the *derivative* responsibility of international organisations for the authorisation of unlawful acts, and does not rule out the responsibility of the State carrying out the mandate of the organisation.[91] In any case Rantania's obligations under the UN Charter would override any obligation under the ENI Treaty.[92] Thus, since the air strikes constituted a violation of Article 2(4) of the Charter, Rantania's participation in the air strikes amounts to a breach of the obligation to refrain from the use of force. The ENI's authorisation of the air strikes does not absolve Rantania of responsibility of this obligation.[93]

c. In any event, Rantania used ENI as a means of circumvention of its obligations.

28. States incur primary responsibility for acts committed by an international organisation, if the organisation is used as a means to circumvent its obligations in international law.[94] An inference of circumvention follows if a State exercises control over an organisation, so as to undermine the autonomy of the international organisation,[95] and hence causes a certain

[91] Article 17, DARIO.

[92] Articles 103, CHARTER OF THE UNITED NATIONS, 1 U.N.T.S. XVI (1945).

[93] Second Report, ¶7; FINAL REPORT ON THE ACCOUNTABILITY OF INTERNATIONAL ORGANISATIONS, INTERNATIONAL LAW ASSOCIATION, BERLIN CONFERENCE (2004), 28.

[94] Article 61, DARIO; Waite & Kennedy, App.No.26083/94, ¶67; Bosphorus v. Ireland, App.No.45036/98, ¶154.

[95] Aspremont, *Abuse of the Legal Personality of International Organisations*, 4 INT'L ORG. L.R. 91, 101(2007).

decision to be taken.[96] This test is particularly apposite in small organisations, which exercise limited autonomy from their members.[97] In the present case, Green invited intervention from Rantania. However, Rantania introduced a resolution before the ENI Council for intervention by ENI, despite being the only ENI member-State with the airborne military capacity necessary for such an operation. Moreover, Force Commander Brewscha was appointed at Rantania's suggestion. Although Rantania may contend that it lacked specific intent to circumvent obligations through ENI, Aprophe submits that specific intent need not be established in order to arrive at an inference of circumvention of obligations.[98] Therefore, Aprophe submits that Rantania used ENI as a means to circumvent its obligations in international law. Consequently, Rantania is responsible for the use of force in OUD.

III. RANTANIA MAY NOT EXECUTE THE JUDGMENT IN TURBANDO, ET AL., V. THE REPUBLIC OF APROPHE.

29. Aprophe requests the Court to hold that the Rantanian courts' exercise of jurisdiction in *Turbando, et al., v. The Republic of Aprophe* violated international law since Article XV of the 1965 Treaty bars all claims by individuals [**A**]. Additionally, Rantania's exercise of jurisdiction violates Aprophe's sovereign immunity [**B**].

A. Article XV of the 1965 Treaty bars all claims by individuals.

30. Since the EN Court's decision invalidating Article XV does not bind Aprophe [a] and the EN Charter does not affect Aprophe's rights under that provision [b], Aprophe can invoke

[96] DARIO Commentary, 122 ¶7.

[97] BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 684 (2008).

[98] Gaja, Fourth Report, U.N.Doc.A/CN.4/564/Add.2, ¶73.

Article XV. Alternatively, Article XV is valid as States can waive claims on behalf of individuals [c].

a. The non-binding nature of the EN Court's decision entitles Aprophe to invoke Article XV

i. Aprophe's reservation to the EN Court's jurisdiction is valid

31. Aprophe submits that since all State parties to the EN Charter consented to Aprophe's reservation, it is valid. According to the Court,[99] the validity of a reservation is governed by objections from other State parties. In fact, Switzerland's impermissible reservation to the League of Nations was validated by unanimous consent of State parties.[100] The ILC also authorises state-parties to accept even an impermissible reservation.[101] Although the final draft of the ILC Guidelines omits this provision, this deletion was based on other grounds, such as inadequate time-period for filing objections.[102]

32. In any case, in consonance with the Court's jurisprudence,[103] Aprophe's reservation does not affect its substantive obligations under the EN Charter. Thus, the reservation is compatible with the object and purpose of the Charter.

ii. In the event that the reservation is invalid, Aprophe is not bound by the EN Charter.

[99] Reservations, 1951 ICJ 15, 21.

[100] Mendelson, *Reservations to the Constitutions of International Organizations*, 45 BYIL 137, 140-141(1972).

[101] ILC Guide to Practice on Reservations with commentaries, 513(2010).

[102] U.N.Doc.A/CN.4/639, 16-19.

[103] Armed Activities, 2006 ICJ 6, ¶67.

33. Reservation to a treaty-provision is instrumental to the State's consent to be bound by the treaty.[104] Thus, the UN Secretary-General's Practice[105] and state practice[106] consistently endorse the Court's opinion[107] that the author of an invalid reservation is not considered a party to the convention. Recent state practice[108] to the contrary is too sparse and inconsistent to develop a rule of custom. Hence, the non-severability of Aprophe's reservation implies its non-membership of the EN Charter.

iii. <u>In any event, the EN Court's decision does not bind Aprophe.</u>

34. Article 31(3) of the EN Charter obligates States to comply with only those EN Court judgments that are made directly against them.[109] Thus, Aprophe has the *discretion*,[110] and not an *obligation*, to follow the EN Court's judgment declaring Article XV as invalid. Thus, Aprophe's rights under Article XV do not conflict with its EN Charter obligations.[111] Consequently, in the absence of a conflict, Aprophe can invoke Article XV.

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[104] Interhandel, 1959 ICJ 6 (Judge Lauterpacht Diss.Op.), 117.

[105] U.N.Doc.ST/LEG/7/Rev.1 57, ¶¶191–3.

[106] 15th Report on Reservations to Treaties, U.N.Doc.A/CN.4/624/Add.1, ¶¶450–1.

[107] Reservations, 29.

[108] Klabbers, *A New Nordic Approach to Reservation*, 69 NORDIC J.INT'L L. 179, 183-185, (2000).

[109] HARRIS ET AL, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 700(1995).

[110] Ress, *The Effect of Decisions and Judgements of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX.INT'L L.J. 359, 374(2005).

[111] FYRM v. Greece, ¶¶109-110.

b. The EN Charter does not affect Aprophe's rights under Article XV.

35. The temporal law governing substantive rights and obligations is that in force at the time of commission of an act.[112] Indeed, the EN Charter itself prescribes against retroactivity.[113] Since the EN Charter came into force after the 1965 Treaty, Article 13 of the Charter does not regulate the application of Article XV.

36. Rantania may contend that Article XV is not an instantaneous act but constitutes a 'continuing situation', recurring during the period Article 13 is applicable. However, the extinguishment of a right does not create a 'continuing situation'.[114] In any event, the right to remedy, a secondary right, cannot independently constitute a continuing breach.[115] Thus, in the absence of any incompatibility, Article XV continues to apply.

c. Article XV is valid as States can waive claims on behalf of individuals.

37. While international law recognises individuals' right to reparation for IHL violations, it entitles States, and not individuals themselves, to claim such reparation [i] and States have the authority to waive this right [ii].

i. International law entitles only States to claim reparations on behalf of individuals

[112] Nauru, 250-253.

[113] Article 31(2), EN Charter.

[114] Malhous v. Czech Republic, App.No.33071/96; Pauwelyn, *The Concept of 'Continuing Violation' of an International Obligation*, 66 BYIL 415, 423(1995).

[115] U.N.Doc.A/56/10, 60.

38. Customary international law does not entitle individuals to claim reparations for IHL violations.[116] The *travaux* of the 1907 Hague Convention and decisions of national courts[117] suggest that Article 3, which provides for war reparations and reflects custom, concerns inter-State responsibility alone.[118] Indeed, only inter-State claims can address the magnitude of war-claims.[119] Although Greek and Italian Courts have allowed reparation claims by individuals, the conferral of such a right on individuals under customary international law requires consistent practice to that effect.[120] Accordingly, the Van Bouven/Bassiouni Principles, providing for individuals' right to claim reparation before national courts, stipulate that these guidelines are *lex ferenda*.[121]

ii. States can waive claims on behalf of individuals.

[116] Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 TUL. J.INT'L &COMP.L. 157, 173(2002).

[117] Princz v. Germany, 26 F.3d 1166 ["Princz"]; Bong, *Compensation for Victims of Wartime Atrocities*, 3(1) J.INT'L CRIM. JUST. 187, 188(2005).

[118] Zwanenburg, *Van Bouven/Bassiouni Principles*, 24 NETH.Q.HUM.RTS. 641, 658(2006).

[119] Gattini, *The Dispute on Jurisdictional Immunities of the State Before the ICJ*, 24(1) LJIL 173, 193(2011) ["Gattini"].

[120] Tel-Oren v. Libya, 726 F.2d 774 (Judge Bork Conc.Op.).

[121] U.N.Doc.E/CN.4/2003/63, ¶8.

39. *Post* World War peace treaties unequivocally suggest that States' authority to waive the claims of individuals is "*universally accepted*."[122] Further, practice of states, entitled to claim reparations, has expressly affirmed the lawful exercise of sovereign authority to waive claims, including claims for *jus cogens* violations.[123] Indeed, such waiver clauses are valid as they do not *directly* conflict with *jus cogens* norms.[124] Further, the lack of alternate remedy does not restrict such authority of States[125] where the legitimate aim of establishing peaceful relations and quelling further injury is proportionate to the waiver.[126] Since the Mai-Tocao War had resulted in loss of life and property and had reached a stalemate, the waiver of claims by both States to achieve such legitimate aim is justified.

40. Although China criticized the Japanese Court decision dismissing Chinese nationals' claims for war reparations, its reaction is inapposite as it did not question the Court's ruling on the

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[122] MCNAIR, LEGAL EFFECTS OF WAR 391,395 (1948); Draper, *The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols*, 164 RDC 1, 43(1979).

[123] Polish Institute for International Affairs, 172 German Affairs, in 9 Series of Documents (1953); Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AJIL 132, 141(2001); Nishimatsu Construction v. Song Jixiao, (Sup.Ct.Apr.27), 2007 ["Nishimatsu"].

[124] Fitzmaurice, Third Report, U.N.Doc.A/CN.4/SER.A/1958/Add.l, 44,45.

[125] Taiheiyo v. The Superior Court, 117 Cal. App. 4th 380, 395.

[126] Prince v. Germany, App.No.42527/98, ¶¶56-59.

validity of the waiver clause.[127] Moreover, in response to the recent support of the US government for individuals' claims against Germany, the Senate Judiciary Committee clarified that the 1951 Peace Treaty barred the claims.[128]

41. Thus, Aprophe submits that the unambiguous waiver of individuals' claims under Article XV of the 1965 Treaty bars the jurisdiction of Rantanian Court.

B. Rantania violated international law by denying sovereign immunity to Aprophe

42. It is well settled that, subject to recognised exceptions, States enjoy immunity from jurisdiction of foreign courts in consonance with sovereign equality of States. Aprophe contends that the Rantanian courts' denial of jurisdictional immunity violates international law as the 'tort exception' is inapplicable in this case [a]. Further, the violation of *jus cogens* norms does not justify denial of immunity [b].

a. The tort exception is inapplicable as it does not include acts of armed forces

43. The tort exception justifies denial of immunity from jurisdiction of foreign courts to States for injury caused by its organs in the forum State. However, Aprophe submits that the exception does not include within its scope the activities of armed forces.[129]

44. Since the conduct of armed forces, inextricably linked to states' foreign and defence policy,[130] is regulated through inter-State agreements, the 'tort exception' does not extend to

[127] Asada & Ryan, *Post-war Reparations between Japan and China and Individual Claims*, 27 J.JAPAN.L. 257, 282(2009).

[128] Hearing before the Senate Committee on the Judiciary, 106th Cong. 14 (2000).

[129] McElhinney v. Ireland, App.No.31253/96, ¶38.

[130] Lechouritou v. Dimosio, C-292/05 (ECJ), ¶37.

such conduct.[131] Indeed, the exception concerns "*accidents occurring routinely within the territory*" of the forum State.[132] Thus, the European Convention,[133] legislations of UK[134] and Australia[135] expressly exclude armed forces' conduct. Additionally, even in the absence of an express exclusion, the UN Convention[136] and States' declarations[137] endorse this interpretation. Further, the Italian Military Court in *Lozano* observed that the exception does not include such acts.[138] Although the Greek SC considered the conduct of armed forces within the 'tort exception', the Greek Special Supreme Court rejected this view.[139] Thus, Aprophe submits that the tort exception is inapplicable in this case.

b. Violation of jus cogens norms does not justify denial of jurisdictional immunity

45. The alleged violation of a peremptory norm does not "*automatically*" deprive states of their sovereignty.[140] Hence, a State performing such a violation cannot be considered to have

[131] U.N.Doc.A/CN.4/SER.A/1988/Add.l, 111.

[132] Hall, *UN Convention on State Immunity*, 55(2) ICLQ 411, 412 (2006).

[133] Article 31, EUROPEAN CONVENTION ON STATE IMMUNITY, ETS.NO.074 (1972).

[134] §16(2), UK State Immunity Act, 1978, 17 ILM 1123.

[135] §6, Australia Foreign States Immunities Act, 1985, 17 ILM 1123.

[136] U.N.Doc.A/C.6/59/SR.13, ¶36.

[137] Declarations of Sweden and Norway to the UN Convention.

[138] Lozano v. Italy, ILDC1085 (IT2008), ¶7.

[139] Germany v. Margellos, ILDC87(GR2002), ¶14.

[140] Gattini, *War Crimes and State Immunity in the* Ferrini *Decision*, 3(1) J.INT'L CRIM. JUST. 224, 236(2005).

impliedly waived its immunity. Indeed, the 'waiver exception' to immunity is narrowly construed.[141] Further, Aprophe submits that independent of the recognised exceptions to sovereign immunity, denial of immunity for *jus cogens* violations is not justified.

i. International law does not recognise a *jus cogens* exception to sovereign immunity

46. Aprophe contends that sovereign immunity does not conflict with *jus cogens* norms. Since immunity is a limitation on the *jurisdictional* powers of national courts, it does not purport to justify the State's conduct or recognise its lawfulness.[142] Consequently, it can conflict with a peremptory norm only if that norm also implies a duty to establish jurisdiction that is peremptory in nature.[143] However, as the Court has clarified, States' obligation to punish and prosecute various crimes is without prejudice to the immunities under customary international law.[144] Accordingly, subsequently the Court[145] and also the ILC observed that *jus cogens* does not provide "*automatic access to justice irrespective of procedural obstacles*".[146] Therefore,

[141] Sampson v. Germany, 250 F.3d 1145, ¶19.

[142] Yang, *State Immunity in the European Court of Human Rights*, 74(1) BYIL 333, 340(2003).

[143] Wet, *The Prohibition of Torture as an International Norm of* Jus Cogens *and its Implications for National and Customary Law*, 15(1) EJIL 97, 107(2004).

[144] Arrest Warrant, 2002 ICJ 3, ¶60.

[145] Armed Activities, ¶64.

[146] Report of the Study Group of the ILC, Fragmentation of International Law, U.N.Doc.A/CN.4/L.682, ¶372.

international law does not justify denial of immunity based on the hierarchical supremacy of *jus cogens* norms.[147]

47. Indeed, state practice is insufficient to prove the existence of a *jus cogens* exception to jurisdictional immunity of States.[148] The European Convention, the UN Convention, national legislations, dealing with State immunity do not recognise this exception.[149] Further, during the drafting of the UN Convention, the exception was not considered to be *lex lata*.[150] Indeed, the absence of a *jus cogens* exception in the Convention is "*wholly inimical*" to Rantania's case.[151]

48. The decisions of international and national courts[152] also militate against the existence of a *jus cogens* exception. The ECHR has found no firm basis for it in custom.[153] The ICTY's decision in *Furundjiza*[154] is inapposite as it did not address the issue of damages in the context of State immunity.[155]

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[147] FOX, THE LAW OF STATE IMMUNITY 156 (2008).

[148] THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 216 (Tomuschat ed.,2006) ["TOMUSCHAT"].

[149] Gattini, 174.

[150] U.N.Doc.A/C.6/54/L.12, 7.

[151] Jones v. Saudi Arabia, 2006 UKHL 26, ¶26 ["Jones"].

[152] Nishimatsu; Bouzari v. Iran, [2004] OJ No.2800, ¶88,90; Jones, ¶27.

[153] Al-Adsani v. United Kingdom, App.No.35763/97, ¶63; Kalogeropoulou v. Greece, App.No.50021/00, 9.

[154] Prosecutor v. Furundzija, IT-95-17/1-T, ¶155.

[155] Per Lord Hoffman, Jones, ¶54.

49. The apparently contrary practice of US and Italy is not sufficient to establish the customary law nature of the *jus cogens* exception. The *sui generis* 'anti-terrorism' exception added to the US FSIA denies immunity only for *certain jus cogens* violations and only to *specific* states.[156] Indeed, even after the amendment, following pre-amendment rulings, US courts grant immunity for *jus cogens* violations not expressly stated therein.[157]

50. Rantania may rely upon Italian practice, in particular *Ferrini* and *Milde*,[158] to support the existence of the exception. However, the Court in *Ferrini* itself acknowledged the absence of "*definite and explicit international custom*" to support such a conclusion.[159] Further, the Court in *Tissino* held: "*international practice, even after* Ferrini, *had invariably reiterated as 'fundamental' the rule on jurisdictional immunity… even when the defendant state was accused of an international crime*".[160] Significantly, the Italian government did not consider *Ferrini* and *Milde* in consonance with international law.[161] Hence, Italian practice, which is inconsistent, cannot unilaterally alter custom.[162]

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[156] TOMUSCHAT, 216.

[157] Belhas v. Ya'alon, 515 F.3d 1279, 1282.

[158] Criminal proceedings against Milde, ILDC 1224(IT2009), ¶6.

[159] Ferrini v. Germany, ILDC19 (IT2004), ¶11 ["Ferrini"].

[160] US v. Tissino, ILDC 1262 (IT2009), ¶20.

[161] Jurisdictional Immunities, 2008 ICJ General List No. 143, Memorial of the Federal Republic of Germany, 18.

[162] Lauterpacht, *Problem of Jurisdictional Immunities of States*, 28 BYIL 220, 248(1951).

51. Thus, Aprophe submits that international law does not recognise a *jus cogens* exception to jurisdictional immunity.

IV. APROPHE'S DESTRUCTION OF A BUILDING OF THE MAI-TOCAO TEMPLE DOES NOT VIOLATE INTERNATIONAL LAW.

52. Aprophe submits that the destruction of a building of the Mai-Tocao Temple does not violate the 1965 Treaty [A], the WHC [B], the ICESCR [C] or customary international law [D].

A. Aprophe's act does not violate the 1965 Treaty.

53. Aprophe's act does not violate Article 1 of the Treaty [a]. In any case, the non-performance exception precludes its wrongfulness [b].

a. Aprophe did not violate Article 1 of the Treaty

54. Article 1, which ceases hostilities between the States, marks the termination of armed conflict.[163] Therefore, a violation of this obligation requires "*unleashing a new war*"[164] i.e. hostile acts directed *against* an adversary causing harm to its military operations.[165] Since Aprophe's destruction in its own territory would not constitute an act *against* Rantania,[166] it does not violate Article 1.

b. In any event, the non-performance exception precludes the act's wrongfulness.

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[163] THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 62 (Dieter Fleck ed., 2008).

[164] DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 46 (2005).

[165] MELZER, TARGETED KILLING IN INTERNATIONAL LAW 276 (2009) ["MELZER"].

[166] SANDOZ ET AL, ICRC COMMENTARY ON THE ADDITIONAL PROTOCOLS ¶1890(1987) ["SANDOZ"].

55. According to the non-performance exception, a general principle of law, an injured State can withhold the execution of reciprocal obligations under a treaty.[167] Although the VCLT and the ASR do not expressly provide for this exception, it is a principle of treaty interpretation.[168] It is implied through reciprocity that is inherent in certain treaty obligations such as cease-fire agreements.[169] Since Rantania's attacks *prevented*[170] Aprophe from performing its obligations under the Treaty, the non-performance exception precludes the wrongfulness of the act.

B. Aprophe's destruction of a building of the Temple did not violate the WHC.

56. Aprophe contends that Rantania lacks standing to invoke the WHC [a]. In any case, the WHC is inapplicable during armed conflict [b].

a. Rantania lacks standing to invoke the WHC.

57. The preservation of World Heritage Sites within a State's territory is the prerogative of the State.[171] Therefore, outside agencies can interfere only with the State's consent.[172] Further,

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[167] Diversion of Water from the Meuse, 1937 PCIJ., SeriesA/BNo.70 (Judge Anzilotti Diss.Op.), 50; Klöckner v. Cameroon, 114 ILR 211(1989).

[168] Crawford, *Exception of Non-performance*, 21 AUST. YBIL 55, 59(2000).

[169] Report of the Secretary-General to the SC on the Palestine Question, U.N.Doc.S/3596, 7.

[170] Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RDC 1, 119 (1957).

[171] Meyer, Travaux Preparatoires *for the UNESCO World Heritage Convention*, 2 EARTH LAW JOURNAL 45, 61(1976).

[172] World Heritage Committee Report of the 18th Session, U.N.Doc.WHC-94/CONF.003/16, 14 ¶ IX.6.

Chapter II accords primacy to State sovereignty over cultural heritage.[173] This respect for state sovereignty indicates that the WHC does not intend to create *erga omnes* obligations.[174]

58. Moreover, 'collective interest' is a prerequisite to proving *erga omnes* obligations.[175] The phrase 'outstanding universal value' only suggests collective *assistance*,[176] as indicated by the Preamble.[177] Additionally, the substantive obligations do not prescribe the collective aspect.[178] In any event, the collective interest in protection of property is recognised only in the *diplomatic* sense.[179] In any case, *erga omnes* obligations do not confer standing before the Court.[180]

b. In any event, Aprophe's act does not violate the WHC.

i. The WHC is inapplicable during armed conflict.

59. The Preamble to the WHC suggest that it applies only in peace time as its purpose was to secure the peace time protection of cultural heritage and prevent it from "*social and economic*

[173] Simmonds, *UNESCO World Heritage Convention*, 2 ART ANTIQUITY AND LAW 251, 270 (1997) ["Simmonds"].

[174] Per Brennan J., Commonwealth of Australia v. State of Tasmania, [1983] HCA 21, 529.

[175] Congo (Judge Simma, Sep.Op.), ¶ 35.

[176] THE 1972 WORLD HERITAGE CONVENTION 136 (Francioni ed., 2008) ["Francioni"].

[177] 7th Preamble, CONVENTION CONCERNING THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE, 1037 U.N.T.S. 151 (1972) ["WHC"].

[178] Francioni, 134.

[179] Francioni, 134.

[180] Barcelona Traction,1970 ICJ 3, ¶ 91; Nuclear Weapons, 1996 ICJ 226 (Judge Castro, Diss. Op.), 387.

threats".[181] Indeed, the *travaux* expressly rejects the applicability of Article 6(3) during armed conflict, as it was decided that Hague Convention "*should continue to govern States' obligations in these circumstances.*"[182] The Director of UNESCO's Cultural Heritage Division categorically endorsed this view.[183] Further, the 2003 Declaration reinforces the distinct applicability of the WHC in peace time and the Hague Convention in armed conflict.[184] Admittedly, ICTY suggested that the protections of a World Heritage Site remain applicable in armed conflict.[185] However, it relied on the List merely to determine the 'outstanding value' of the cultural property within the scope of Article 3(d) of its statute.[186]

60. In any event, the IHL governing protection of cultural property being *lex specialis*[187] excludes the applicability of WHC in armed conflict.[188] The Court's ruling in *Nuclear Weapons* that applied environmental treaties *only* to determine breaches of IHL endorses this view.[189]

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[181] 1st Preamble, WHC; FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 226-227 (2010).

[182] Simmonds, 275.

[183] U.N.Doc.WHC-2001/CONF.205/10 ¶I.9.

[184] Articles IV, V, 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 32C/Res.38 (2004-2005).

[185] Prosecutor v. Strugar, IT-01-42-T, ¶279.

[186] Vrdoljak, *Intentional Destruction of Cultural Heritage and International Law*, MULTICULTURALISM AND INTERNATIONAL LAW, 377, 388(2007).

[187] O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 312(2006) ["O'KEEFE"].

C. Aprophe's act does not violate the ICESCR.

61. Aprophe contends that non-exhaustion of local remedies by Rantania precludes its claim of diplomatic protection [a]. Alternatively, Aprophe's act does not violate the ICESCR as the Convention does not apply either during armed conflict [b] or extra-territorially [c]. Alternatively, the acts do not violate Article 15(1)(a) [d].

a. Non-exhaustion of local remedies precludes Rantania's claim of diplomatic protection.

62. Exhaustion of local remedies, as an essential requirement of diplomatic protection, is a well-established rule of customary international law.[190] Indeed, the optional protocol to the ICESCR also mandates this requirement.[191] Contrary to the Court's prior jurisprudence, the ILC expressly requires States to exhaust local remedies even while seeking declaratory reliefs[192] to ensure that States "*do not circumvent the… rule*" by seeking reliefs in multiple proceedings.[193] Since Rantania has not exhausted local remedies, its claim is inadmissible.

b. In any event, the ICESCR is inapplicable during armed conflict.

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[188] Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System*, 74 NORDIC J. INT'L L. 27, 32 (2005).

[189] Nuclear Weapons, ¶¶28-31.

[190] Diallo, 2007 ICJ General List 103, ¶43.

[191] Article 10.1(c), ICESCR Optional Protocol, U.N.Doc.A/RES/63/117.

[192] Article 14(3), ILC Draft Articles on Diplomatic Protection, U.N.Doc.A/61/10.

[193] Aréchaga, 293.

63. Rantania submits that in an armed conflict, IHL as *lex specialis*[194] prevails over *general* human rights norms. Hence, an act in compliance with IHL would never violate HR standards.[195] Particularly, the ICESCR contemplates progressive realization of rights,[196] through legislations, which presumes the existence of peace. State Parties have opposed the CESCR's deduction of non-derogable obligations under the ICESCR.[197] Hence, the ICESCR is inapplicable during armed conflict.

c. In any event, the ICESCR does not apply extra-territorially.

64. The Court held that the obligations under the ICESCR are "*essentially territorial*."[198] Further, States[199] have opposed CESCR's observations to the contrary that the rights have extraterritorial application. In any event, extra-territorial operation of human rights obligations arises only in *exceptional situations*, for instance, where the state exercises territorial control outside its borders.[200] Hence, Aprophe has no obligations towards Rantanian nationals.

d. In any event, the destruction does not violate Art. 15(1)(a).

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[194] Nuclear Weapons, ¶25.

[195] Regina v. Secretary of State for Defence, [2005] EXHC 1809, ¶¶128-140.

[196] Article 2(1), INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 993 U.N.T.S. 3.

[197] Dennis & Stewart, *Justiciability of Economic, Social and Cultural Rights*, 98 AJIL 462, 495 (2004).

[198] Wall, 2004 ICJ 36, ¶112.

[199] U.N.Doc.E/CN.4/2004/SR.51, ¶84; U.N.Doc.E/CN.4/2005/52, ¶76.

[200] Cyprus v. Turkey, App.No.25781/94, ¶¶76-81.

65. In the event of an armed conflict, IHL, as *lex specialis*, determines the scope of the HR obligation, the *lex generalis*.[201] Since IHL allows for destruction of cultural property in cases of 'imperative military necessity', the destruction is justified.[202]

D. Aprophe's destruction of the building does not violate customary international law.

66. Aprophe submits that Rantania cannot invoke custom as the obligation to respect cultural property is not *erga omnes* [a]. In any case, such an obligation does not confer standing. Alternatively, the destruction of the Temple in this case is justified under the exception of military necessity [b].

a. The obligation to protect cultural property is not erga omnes in nature

67. International instruments governing cultural property do not contain provisions suggesting the existence of an *erga omnes* obligation.[203] Although States unanimously condemned the destruction of the Bamiyan Buddhas, only Ukraine classified it as a violation of international law.[204] Indeed, the condemnation by States was diplomatic and not legal.[205] This indicates the absence of *opinio juris* required for the formation of an *erga omnes* obligation.

b. Alternatively, the military necessity exception justifies Aprophe's acts

[201] Nuclear Weapons, ¶ 25.

[202] §IV(D), Memorial.

[203] Brenner, *Cultural Property Law*, 29 SUFFOLK TRANSNAT'L L. REV. 237, 263 (2005-2006).

[204] U.N.Doc.A/55/PV.94, 12.

[205] O'Keefe, *World Cultural Heritage*, 53(1) ICLQ 189, 207(2004).

68. While prohibiting destruction of cultural property, customary IHL recognises the military necessity exception.[206] Aprophe submits that the destruction of the building does not violate IHL as: the military necessity exception permits ***destruction*** of cultural property even when it is not used for military purposes and is located within Aprophe's territory [i]; and the present case satisfies the requirements of military necessity [ii].

i. The military necessity exception permits *destruction* of cultural property not used for military purposes within the State's own territory.

69. Admittedly, custom recognises the principle of distinction[207] and cultural property may only be ***attacked*** if it qualifies as a military objective. However, "*[D]estructive acts undertaken by a belligerent in his own territory would not comply with the definition of attack*" under Art 49 of AP1.[208] Hence, Aprophe submits that its act constituted '*destruction*' and not an '*attack*'. In fact, Netherland's military manual makes the same distinction in the context of cultural property.[209] Prior to the Second Protocol, even UNESCO adopted the traditional interpretation of the exception.[210] Hence, although, Article 6(a) of the Second Protocol does not expressly adopt this distinction, to the extent that it discards this distinction, it departs from custom.[211]

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[206] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW I 127-129 (Henckaerts & Doswald-Beck ed. 2005).

[207] Nuclear Weapons, ¶78.

[208] SANDOZ, ¶1890.

[209] Netherlands, Military Manual (1993); Netherlands, Military Handbook 7-36 (1995).

[210] Hladik, *The 1954 Hague Convention and the Notion of Military Necessity*, 835 INT'L REV. OF RED CROSS (1999) ["Hladik"].

ii. Aprophe's act was justified by 'imperative military necessity'.

70. States have adopted[212] the IMT's definition of military necessity as allowing a belligerent to "*to apply any amount and kind of force to compel the complete submission of the enemy...*"[213] This exception requires the existence of a military purpose; nexus of the measure with the purpose and; proportionality.[214] Additionally, the word 'imperative' requires an advanced warning and that the alleged act is the *only* available method.[215] Here, General Andler issued a statement giving an ultimatum. Further, the report of the independent agency clearly indicated that the military capacity of Aprophe had been exhausted.

71. *First*, the measure must have a legitimate military purpose.[216] This may even be purely defensive in nature.[217] In fact, AP1 recognises defending "*national territory against invasion*" as a legitimate military objective.[218] Hence, Aprophe submits that the act, aimed at ceasing the air strikes and preventing an invasion, had a military purpose.

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[211] O'KEEFE, 251.

[212] MELZER, 283-286.

[213] US v. Wilhelm List, et al. ("The Hostage Case") (1948), XI TWC 1253– 54.

[214] Downey, *The Law of War and Military Necessity*, 47 AJIL 251, 254 (1953).

[215] Hladik.

[216] The Manual of the Law of Armed Conflict (UK Ministry of Defence, 2004) ¶ 2.2.

[217] Hardman v. US, 6 RIAA 25, 26(1913); SHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS II 1332 (1976).

[218] Article 54(5), ADDITIONAL PROTOCOL I TO THE GENEVA CONVENTIONS, 1125 U.N.T.S. 3 (1977).

72. *Secondly*, the measure must have a reasonable nexus with the military purpose.[219] Since the Temple represents the shared culture of Aprophe and Rantania, any damage to the Temple was against Rantania's interests. Notably, States have taken such considerations into account.[220] Although attacks for psychological advantage alone may violate IHL,[221] such advantage may be relied on to achieve a military purpose.

73. *Thirdly*, military necessity requires that the harm resulting from the measure be proportionate to the military value of the purpose.[222] The drafting history of the Hague Convention suggests that destruction of cultural property to save human lives satisfies this requirement.[223] Further, destruction of even *essential civilian objects*, in response to a threat of invasion, is permitted under Article 54(5) of AP1. Thus, the destruction of one of the smaller buildings, which was aborted as soon as the purpose was achieved, was proportionate and satisfied the requirements of the exception of imperative military necessity.

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[219] Wall, ¶137.

[220] Meyer, *Tearing Down the Facade*, 51 AIR FORCE L. REV. 143, 169-171(2001).

[221] DINSTEIN, THE CONDUCT OF HOSTILITIES 86 (2004).

[222] Beit Sourik Village v. Israel, HCJ 2056/04.

[223] REPORT OF THE CONFERENCE CONVENED BY UNESCO, ¶277 (1954).

CONCLUSIONS AND PRAYER FOR RELIEF

The Republic of Aprophe respectfully requests the Court to adjudge and declare that:

A. Since the Andler government is the rightful government the Republic of Aprophe, the Court may exercise jurisdiction over all claims in this case;

B. Rantania is responsible for the illegal use of force against Aprophe in the context of Operation Uniting for Democracy;

C. Since the Rantanian courts' exercise of jurisdiction in *Turbando, et al., v. The Republic of Aprophe* violated international law, Rantania may not execute the judgment in that case; and

D. Aprophe's destruction of a building of the Mai-Tocao Temple did not violate international law.