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INTERNATIONAL COURT OF JUSTICE

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THE PEACE PALACE  
THE HAGUE

THE 2011 PHILIP C. JESSUP INTERNATIONAL LAW  
MOOT COURT COMPETITION

THE CASE CONCERNING THE  
ZETIAN PROVINCES

**THE STATE OF OF ARDENA**  
(APPLICANT)

v.

**THE STATE OF RIGALIA**  
(RESPONDENT)

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**MEMORIAL OF THE RESPONDENT**

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## STATEMENT OF JURISDICTION

The State of Rigalia and the State of Ardenia submit the present dispute concerning the Zetian Provinces to the International Court of Justice by Special Agreement, dated 5 May 2010, pursuant to article 40(1) of the *Statute of the International Court of Justice*. The parties have agreed to the contents of the *Compromis* submitted as part of the Special Agreement. Both the State of Rigalia and the State of Ardenia have accepted the compulsory jurisdiction of the Court in accordance with article 36(2) of the *Statute of the International Court of Justice*. The State of Rigalia undertakes to accept the judgment of this Court as final and binding and shall execute it in good faith in its entirety.



## QUESTIONS PRESENTED

The State of Rigalia respectfully asks this Honourable Court:

- A. whether Rigalia's drone strikes in Rigalia and Ardenia are consistent with international law, including international humanitarian law, international human rights law and the *Charter of the United Nations*, and whether there are any grounds for ordering their cessation;
- B. whether the attack on Bakchar Valley Hospital is attributable to Rigalia, whether said attack was an act of aggression or any other violation of international law, whether Rigalia has a substantive or remedial obligation to investigate the attack, and whether Rigalia is required to compensate Ardenia;
- C. whether Rigalia's ban of the Mavazi for Zetian women and girls is consistent with its obligations under the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination against Women*; and
- D. whether Ardenia's failure to investigate and prosecute the alleged corruption and its failure to provide legal assistance to Rigalia constitute breaches of the *OECD Anti-Bribery Convention*, and whether the failure of the Ardenian NCP to respond to the complaint by the CRBC constitutes a breach of the *OECD Decision on MNE Guidelines*.

## STATEMENT OF FACTS

The mountainous and economically underdeveloped Zetian Provinces straddle the Ardenian- Rigalian border. The Zetian Provinces comprise the Southern Provinces of Ardenia and the Northern Provinces of Rigalia. The Northern Provinces are rich in coltan, an important natural resource.

The Zetian Provinces are populated by ethnic Zetians who live according to tribal custom and practise the Masinto religion. Their autonomous communities are governed by tribal leaders.

Ardenia and Rigalia have granted citizenship to all Zetians.

The Masinto religion obliges Zetian women to wear the Mavazi, a headcovering that hampers the wearer's ability to work in the heat. Under tribal council laws, Zetian women are publicly flogged and exiled for not wearing the Mavazi, prohibited from driving and taking paid employment and forced into marriage from as young as eight or nine.

Rigalia's President, Teemu Khutai, has denounced these practices as oppressive. Rigalia has been unable to enforce its laws in the Northern Provinces where the tribal councils enjoy virtually 100 per cent control. Ardenia, a decentralised State, accords Zetian tribal leaders autonomy to govern as they wish.

The Zetian Democratic Party (ZDP) purportedly represents more than 75 per cent of Zetians in the Northern Provinces. It has sponsored efforts of the Zetian separatist movement (ZSM), a ZDP-affiliated group.

On 5 May 2008, the ZDP-dominated meeting of the Joint Tribal Council of the Northern Provinces produced a manifesto demanding a greater share of coltan revenue for Zetians, non-interference in Zetian affairs, and support for a future Zetian State.

President Khutai responded by emphasising national unity and the need to modernise the impoverished Zetian Provinces. He spoke out against tribal leaders imposing the Mavazi on women. Violence followed in the Northern Provinces, necessitating deployment of Rigalian forces. Disorder prompted President Khutai to invoke emergency powers in Rigalia's Constitution. Citing concerns over safety and the rights of Zetian women and girls, President Khutai also introduced a bill to ban the wearing of the Mavazi in public spaces and when receiving public services.

ZSM leaders launched a violent campaign to secure full independence. In December 2008, ZSM members bombed a bridge in Rigaliaville, killing over 130 Rigalians. Over the next two months, ZSM suicide bombings occurred at a Rigalian school and hospital, killing 25 civilians and wounding 112 more. An attack on a public school occurred when a terrorist escaped detection by wearing a Mavazi.

Allegations subsequently surfaced that Rigalian Zetians were meeting in Ardenia to elude Rigalian troops. Rigalian intelligence corroborated this information.

In March, the media reported President Arwen had brokered an agreement with Zetian tribal leaders. It alleged that President Arwen had agreed to support a future Zetian State on Rigalian territory in exchange for the renunciation of secessionist claims against Ardenia. President Arwen has not denied these allegations. Her office confirms the meeting occurred.

On 22 March, as a result of these developments, President Khutai declared war on the ZSM and its supporters. The Mavazi bill was enacted the same day.

Confronted by geographical and cultural barriers to pursuing ZSM attackers, President Khutai appealed to President Sophia Ratko of Morgania to deploy Predator Drones to Fort Raucus, a Morganian base in Rigalia. Against a backdrop of ZSM threats to Morganian interests, President Ratko acceded to the request. Morganian personnel operate the drones from Morganville. They receive targeting information from Rigalian-paid informants, but retain discretion in launching attacks.

From September 2009 to March 2010, drone strikes in Rigalia killed 15 important ZSM leaders. 230 Zetian civilians were killed.

On 15 March 2010, a drone strike took place in Ardenia against Adar Bermal, a key ZSM leader who planned and initiated attacks against Rigalia. A missile struck his house, killing everyone inside. During the attack, an unauthorised phone call from an informant distracted the drone operator and caused her to fire accidentally on Bakchar Valley Hospital. Rigalia's Defence Minister expressed regret at the civilian loss of life.

In early 2009, President Khutai requested an investigation into bribery allegations concerning Mineral Dynamics Incorporated (MDI), an Ardenian State-owned corporation, and Rigalian Refineries Inc. (RRI), a Rigalian State-owned enterprise.

There exist two allegations. First, that MDI secured the renewal of its contract with RRI by offering support and payment on trust to the Zetian Refugee Fund (ZRF) and Clyde Zangara respectively. Zangara is both the nephew of Leo Bikra, RRI's President and Director-General, and founder of the ZRF. The second allegation was that MDI transporters responded to solicitations from tribal council members to pay mandatory undocumented fees to ensure the added security of its mining operation and the smooth delivery of its products. While these allegations were reported in the media in 2002, Ardenia did not investigate until 2009.

In 2009, a former MDI employee involved in the contract renewal further substantiated the first allegation. While he could not confirm the

MDI transporter payment allegations, he stated such payments were common practice when MDI operated in similarly sensitive areas.

Ardenia only investigated these allegations in response to a request from Rigalia for mutual legal assistance (MLA) sent on 30 April 2009. MDI intensely lobbied influential Ardenian government officials to drop the inquiry, hosting lavish receptions for this purpose. On 3 June 2009, Ardenian Public Prosecutor Sam Strong dropped the investigation, citing unexplained security concerns. Twelve days later, however, President Arwen hinted the decision was influenced by national economic concerns.

Rigalia's MLA request sought, *inter alia*: (a) MDI's bank records since 2001, (b) correspondence between, on the one hand, Clyde Zangara or the ZRF and, on the other, Leo Bikra or the President of MDI, and (c) correspondence between the ZRF and tribal council members. Ardenia did not respond to Rigalia's request.

When Rigalia raised the MLA request on 23-24 March 2010, Ardenia cited its bank secrecy legislation as the basis for its delay. Ardenia also refused request (c), claiming it was irrelevant to Rigalia's investigation.

Rigalia and Ardenia are Parties to the *OECD Anti-Bribery Convention* and have criminalised the bribery of a foreign public official. Ardenia is a member of the OECD, while Rigalia is an adherent to all related OECD anti-bribery instruments.

Rigalia and Ardenia have both established National Contact Points in accordance with the OECD Decision on MNE Guidelines, to which they both adhere. On 1 July 2009, the Committee for Responsible Business Conduct (CRBC), a government-funded Rigalian NGO, filed a complaint with Ardenia's NCP, alleging violations of the MNE Guidelines by MDI and RRI.

Two days later, the Ardenian NCP refused to examine the complaint on grounds that, *inter alia*: 1) the complaint should be dealt with by Rigalia's NCP as the alleged misconduct occurred in Rigalia; 2) the MNE Guidelines do not apply to RRI; and 3) investigations were already underway in Ardenia and Rigalia. Ardenia's NCP did not respond to a written request from the CRBC for a meeting between all interested parties, including the Rigalian NCP.

Ardenia and Rigalia have exchanged diplomatic notes. The Zetian situation has also been discussed in the UN Security Council. Following failed negotiations, the Parties have invoked article 36(2) of the Court's Statute. An Application and *Compromis* were filed with the Court on 5 May 2010.

## SUMMARY OF PLEADINGS

*A.*

Ardenia's claims are inadmissible insofar as they relate to drone strikes in Rigalia. As a Party to the *Geneva Conventions* and *International Covenant on Civil and Political Rights (ICCPR)*, Ardenia has an interest in Rigalia's compliance with these treaties. Absent direct injury, however, this interest does not permit instituting proceedings in this Court.

In any event, Rigalia's strikes comply with international humanitarian law (IHL) and international human rights law (IHRL). IHL applies because a non-international armed conflict has arisen between Rigalia and the Zetian separatist movement (ZSM). Rigalia's use of precision weaponry and informants discharges its IHL obligation to take feasible precautions to verify targets and minimise civilian casualties. The strikes are also proportionate, given the anticipated military advantage of eliminating ZSM aggressors. As the strikes are IHL-compliant, they are not arbitrarily depriving Zetians of life.

Strikes in Ardenia are justified as self-defence. Non-State actors are capable of executing an 'armed attack' triggering the right of self-defence. Cumulatively, ZSM attacks constitute an 'armed attack'. Rigalia's strikes are necessary as Ardenia is unwilling or unable to act against the ZSM. They are proportionate to the purpose of ending ZSM aggression.

The strikes are consistent with Rigalia's obligation to accord the Zetians' internal self-determination as they are directed at suppressing an insurgency.

*B.*

The Bakchar Valley Hospital attack is not attributable to Rigalia. Those involved in the attack did not exercise Rigalian governmental authority, had not been placed at Rigalia's disposal and were not under Rigalia's effective control. Rigalia has not adopted the attack as its own.

In any event, the strike occurred in the lawful exercise of Rigalia's right of self-defence. Alternatively, it was not sufficiently grave to constitute an act of aggression.

The strike complied with IHL. Rigalia directed its attack against Adar Bermal, a lawful target. As with all the strikes, Rigalia took feasible precautions. The attack was proportionate. As the IHL-compliant strike did not arbitrarily deprive persons of life, Rigalia is not obligated to investigate.

Alternatively, investigation is an inappropriate modality of satisfaction.

C.

The ban on wearing the Mavazi in public spaces and when receiving public services is consistent with the rights of Zetian women and girls under IHRL. Ardenia cannot assert a claim in diplomatic protection in the absence of an affected national whose predominant nationality is Ardenian.

The ban permissibly limits the freedom of Zetian women and girls to manifest religious belief and enjoy minority culture as it is prescribed by law and is necessary to protect public safety, order and the fundamental rights of Zetian women. The Mavazi is violently imposed on women and is a threat to public safety, evidenced by its use in a terrorist attack. Rigalia has a margin of appreciation in determining the necessity of the ban.

The ban does not violate the economic, social and cultural rights of Zetian women and girls as they remain able to access public services by not wearing the Mavazi. The ban is necessary in a democratic society as it has the purpose and effect of increasing equality and improving the realisation of economic, social and cultural rights.

D.

Ardenia breached the *OECD Anti-Bribery Convention* ('*OABC*') and the *OECD Decision on MNE Guidelines* ('*Decision*'), binding instruments to which Ardenia and Rigalia are States Parties. These breaches directly injure Rigalia.

Ardenia breached article 5 of the *OABC*. In responding to allegations that Mineral Dynamics Incorporated (MDI) had bribed foreign public officials, an offence under the *OABC*, Ardenia failed to exercise its prosecutorial discretion in conformity with article 5. For seven years, Ardenia failed to investigate allegations that created a well-founded suspicion of an offence. Ardenia never prosecuted MDI and allowed considerations prohibited by article 5 to influence its decision to suspend an inquiry.

Further, Ardenia has breached its obligation under article 9 of the *OABC* to provide prompt and effective legal assistance to States Parties when requested as Ardenia has failed to satisfy Rigalia's request for mutual legal assistance for over one year, without lawful excuse.

Additionally, in refusing to examine the complaint by the Committee for Responsible Business Conduct, Ardenia's National Contact Point breached its obligation to take due account of the *Decision's* Procedural Guidance.

## PLEADINGS

I. RIGALIA'S PREDATOR DRONE STRIKES IN RIGALIA AND ARDENIA ARE CONSISTENT WITH RIGALIA'S RIGHTS UNDER INTERNATIONAL LAW, AND THUS THE COURT HAS NO AUTHORITY TO ORDER CESSATION OF THE DRONE ATTACKS

An armed conflict has arisen between Rigalia and the Zetian separatist movement (ZSM). Customary international humanitarian law (IHL), common article 3 of the *Geneva Conventions (GCs)*,<sup>1</sup> and international human rights law (IHL) govern the conflict. Rigalia accepts attribution of the Predator Drone strikes ('the strikes') on the limited basis that it has adopted them in these proceedings.<sup>2</sup> The strikes comply with Rigalia's IHL obligations. Further, they neither arbitrarily deprive Zetians of life, nor deny them self-determination. Strikes in Ardenia are justified as self-defence under article 51 of the *Charter of the United Nations (Charter)*.<sup>3</sup>

*A. Ardenia does not have standing in respect of Rigalia's drone strikes in Rigalia*

Ardenia's capacity to enforce fundamental principles of IHL,<sup>4</sup> the right to life<sup>5</sup> and the collective right to self-determination<sup>6</sup> is governed exclusively by the GCs and the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>7</sup> Absent any direct injury, Ardenia's capacity to enforce the GCs is limited to diplomatic protest, action through international organisations, and not recognising conduct which breaches Convention obligations.<sup>8</sup> In addition, the ICCPR 'concern[s] the

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1. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth)* [1949] 75 UNTS 287, art 3(1)(a) ['GC-IV'].

2. International Law Commission (ILC), *Articles on the Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (2001) art 11 ['ASR'].

3. [1945] 1 UNTS XVI.

4. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 199 ['Israeli Wall'].

5. *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 32.

6. *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102 ['East Timor'].

7. [1966] 999 UNTS 171 ['ICCPR']; *Vienna Convention on the Law of Treaties* [1969] 1155 UNTS 331, art 32 ['VCLT']; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 445.

8. *Israeli Wall*, n4, 200.

endowment of individuals with rights' and does not confer standing on States independently of diplomatic protection.<sup>9</sup>

Ardenia does not have standing in respect of Rigalia's drone strikes in Rigalia, as it cannot point to any identified Ardenian national affected by said strikes over whom it can exercise diplomatic protection.<sup>10</sup>

*B. Rigalia is complying with international humanitarian law (IHL) and international human rights law (IHRL) obligations applicable to the non-international armed conflict in the Zetian Provinces*

1. An armed conflict has arisen between Rigalia and the Zetian separatist movement (ZSM)

An armed conflict arises where there is 'protracted armed violence between governmental authorities and organized armed groups'.<sup>11</sup> This threshold has been met. Protracted armed violence is evidenced by the seriousness and escalation of ZSM attacks;<sup>12</sup> the deployment of Rigalian forces to the crisis area;<sup>13</sup> Rigalia's recognition of ZSM belligerency;<sup>14</sup> and Security Council recognition of hostilities.<sup>15</sup> The ZSM's organisation is evidenced by its military chain of command;<sup>16</sup> its successful execution of 'large-scale' attacks;<sup>17</sup> its *de facto* control over territory through dominant representation on Zetian tribal councils;<sup>18</sup> its claim to Zetian statehood

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9. Human Rights Committee ['HRC'], *General Comment 24*, UN Doc CCPR/C/21/Rev.1/Add.6 (1994), [17].

10. *Mavrommatis Palestine Concessions Case (Greece v UK) (Jurisdiction)* [1924] PCIJ (Ser A) No 2, 12.

11. *GC-IV art 3; Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal)* (ICTY, IT-94-1-AR72, 2 October 1995) [70] ['*Tadić (Interlocutory Appeal)*'].

12. *Compromis*, [29]; *Prosecutor v Boškoski* (ICTY, IT-04-82-T, 10 July 2008) [177] ['*Boškoski*']; *Public Committee Against Torture in Israel v Israel* (2007) 46 ILM 375, 381 ['PCATI'].

13. *Compromis*, [15]-[16], [18]-[19]; *Prosecutor v Haradinaj* (ICTY, IT-04-84-T, 3 April 2008) [49] ['*Haradinaj*']; *Prosecutor v Limaj* (ICTY, IT-03-66-T, 30 November 2009) [169] ['*Limaj*'].

14. *Compromis*, [21]; International Committee of the Red Cross ['ICRC'], *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 1320-21.

15. *Compromis*, [32]; *Boškoski*, n12, [177].

16. *Compromis*, [30]; *Prosecutor v Tadić (Appeal Judgment)* (ICTY, IT-94-1-A, 15 July 1999) [120] ['*Tadić (Appeal)*'].

17. *Limaj*, n13, [129].

18. *Compromis*, [6], [13], [18].



based on this control;<sup>19</sup> and its ability to ‘speak with one voice’ in negotiations.<sup>20</sup>

## 2. The conflict is non-international in character

An international armed conflict is one that arises ‘between two or more of the High Contracting Parties’.<sup>21</sup> International tribunals have consistently held that international armed conflicts require ‘a resort to armed force between States’.<sup>22</sup> This criterion is not satisfied because Ardenia has not deployed armed forces against Rigalia and the ZSM is a non-State group.<sup>23</sup> Nor is the ZSM acting on Ardenia’s behalf according to the applicable test of ‘overall control’<sup>24</sup> as Ardenia is not coordinating ‘the general planning of its military activity’.<sup>25</sup> The ZSM’s secessionist aims do not internationalise the conflict, because Rigalia is neither ‘founded on racist criteria’ nor is a colonial or occupying power.<sup>26</sup>

## 3. Rigalia’s strikes are consistent with the law of non-international armed conflict

The non-international armed conflict between Rigalia and the ZSM is governed by the ‘minimum rules applicable to international and to non-international conflicts’ expressed in common article 3 and customary IHL.<sup>27</sup> As any lacuna in the laws of war is resolved according to custom and ‘the

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19. Pictet (ed), *Commentary to 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (1958) 36.

20. *Limaj*, n13, [129]; *Haradinaj*, n13, [88]; *Compromis*, [6], [18], [21], [30].

21. *GC-IV* art 2.

22. *Tadić (Interlocutory Appeal)*, n15, [70]. Emphasis added. See also *Prosecutor v Delalic (Trial Judgment)* (ICTY, IT-96-21-T, 16 November 1998) [183]; *Haradinaj*, n17, [37]-[49]; *Boškoski*, n16, [175]; *Limaj*, n17, [84].

23. Kreb, ‘Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts’ (2010) 15 *Journal of Conflict & Security Law* 245, 255-56.

24. *Tadić (Appeal)*, n20, [131]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* (International Court of Justice, General List No 91, 26 February 2007) [404] [‘*Bosnian Genocide*’].

25. *Ibid.*

26. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* [1977] 1125 UNTS 3, art 1(4); ICRC, n14, 54.

27. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14, 114 [‘*Nicaragua*’].

laws of humanity', these rules apply to transnational armed conflicts wherever there is protracted armed violence.<sup>28</sup>

*a. The strikes are consistent with customary IHL and common article 3 of the GCs*

In non-international armed conflicts, belligerents must: distinguish between civilians and 'persons who are actively participating in hostilities', attacking only the latter;<sup>29</sup> do everything feasible to verify that targets are lawful and that civilian loss of life is minimised; and refrain from launching disproportionate attacks.<sup>30</sup> ZSM members who have assumed a 'continuous combat function' may be targeted at any time.<sup>31</sup>

Rigalia is taking feasible precautions to verify lawful targets and minimise civilian loss of life. Feasibility is determined by what is practicable in the circumstances.<sup>32</sup> Given the mountainous terrain and hostile populace of the Northern Provinces, Rigalia's use of precision weaponry<sup>33</sup> in conjunction with local informants and corroborative UAV surveillance discharges its obligation to verify lawful targets.<sup>34</sup> In any event, Ardenia must adduce 'fully conclusive evidence' to prove that Rigalia is impermissibly attacking civilians, which is an allegation of

28. *Hague Convention IV – Laws and Customs of War on Land*, 205 Consol TS 277, Preamble [*'Hague Convention'*]; HRC, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, UN Doc E/CN.4/2001/121 (2001) 39; Jinks, 'September 11 and the Laws of War' (2003) 28 *Yale Journal of International Law* 1, 41; Ben-Naftali and Michaeli, "'We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings' (2004) 36 *Cornell International Law Journal* 233, 271; Hamdan v Rumsfeld, 126 S Ct 2749 (2006) 2757.

29. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 257 [*'Nuclear Weapons'*]; Fleck (ed), *Handbook of International Humanitarian Law* (2008) 614; Henckaerts and Doswald-Beck (eds), *Customary International Humanitarian Law: Volume 1 (Rules)* (2005) 3-8, 19-24 (Rules 1, 6) [*'CIHL Rules'*].

30. GC-IV art 3(1); *Nuclear Weapons*, n29, 257; *CIHL Rules*, n29, 19-24, 55-56 (Rules 6, 16); *Prosecutor v Kupreškić (Trial Judgment)* (ICTY, Case No IT-95-16-T, 14 January 2000) [524] [*'Kupreškić'*].

31. ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009) 34 [*'DPH Study'*].

32. *Judicial and Similar Proceedings: Eritrea-Ethiopia Claims Commission: Partial Award regarding Ethiopia's Central Front Claim 2* (2004) 43 ILM 1275, 1295; *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc A/HRC/14/24/Add.6 (2010) 4.

33. O'Connell, 'Lawful Use of Combat Drones', *Testimony Submitted to US House of Representatives Committee on Oversight and Government Reform*, Subcommittee on National Security and Foreign Affairs, Second Hearing on Drone Warfare (28 April 2010) 1.

34. Henckaerts and Doswald-Beck (eds), *Customary International Humanitarian Law: Volume 2 (Practice)* (2005) 357-60 [*'CIHL Practice'*].

‘exceptional gravity’.<sup>35</sup> No such evidence exists. The elimination of ‘15 important Zetian separatist leaders’ commends the opposite conclusion.<sup>36</sup>

As the proportionality rule attaches to specific attacks, not military campaigns as a whole,<sup>37</sup> Rigalia’s strikes would be disproportionate only if the civilian loss of life expected from each strike would exceed its concrete and direct military advantage.<sup>38</sup> In each operation, the anticipated military advantage of disrupting ‘increasingly deadly attacks’ by eliminating important separatist leaders outweighed the comparatively low civilian loss of life expected to result from a precision strike.<sup>39</sup>

*b. Rigalia’s IHL-compliant strikes do not arbitrarily deprive Zetians of life under IHRL*

Rigalia’s obligation not to arbitrarily deprive Zetians of life under article 6 of the *ICCPR* applies during an armed conflict alongside the *GCs*.<sup>40</sup> Where two treaty provisions are inconsistent, the specific legal rule prevails over a general one.<sup>41</sup> IHL rules are more specific than IHRL because they regulate the more permissive use of lethal force in times of armed conflict, whereas IHRL ‘deals with the inherent rights of the person to be protected at all times against abusive power’.<sup>42</sup> Accordingly, IHL rules are determinative of what constitutes arbitrary deprivation of life during hostilities. Rigalia’s IHL-compliant strikes cannot, therefore, have breached article 6.

In any event, strikes beyond Rigalia’s territory need not comply with article 6. A State owes *ICCPR* obligations only to persons ‘within its territory and subject to its jurisdiction’.<sup>43</sup> As States can ensure human rights only where they exercise sovereign control,<sup>44</sup> ‘jurisdiction’ in this context

35. *Bosnian Genocide*, n24, [209].

36. *Compromis*, [29].

37. *CIHL Practice*, n34, 326-27; Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (2nd ed, 2010) 94; ICRC, n14, 2218.

38. *CIHL Rules*, n29, 46-50 (Rule 14).

39. *Compromis*, [28]-[29].

40. *Nuclear Weapons*, n29, 240.

41. *VCLT* art 32; *Nuclear Weapons*, n29, 240; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation) (Provisional Measures)* [2008] ICJ Rep 353, 387.

42. Droege, ‘The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 40 *Israel Law Review* 310, 310.

43. *ICCPR* art 2(1).

44. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005) 43-44.

refers to a State's power over territory, not individuals.<sup>45</sup> Rigalia lacks territorial control in Ardenia. Hence, its obligations do not extend there.

*C. Rigalia's use of force against the ZSM in Ardenia is justified as self-defence*

The strikes in Ardenia are justified as self-defence, being a necessary and proportionate response to the ZSM's armed attack.<sup>46</sup> Rigalia's failure to report its action to the Security Council does not estop it from asserting self-defence. Reporting is merely a procedural mechanism for monitoring compliance with *Charter* commitments.<sup>47</sup>

1. Non-State actors are capable of carrying out armed attacks

Customary law permits States to use force extraterritorially in self-defence against non-State actors. A rule of customary law can emerge rapidly if State practice is 'extensive and virtually uniform' and evinces the international community's recognition that a rule of law is involved.<sup>48</sup> Following 11 September 2001, the near-universal practice of NATO, OAS, ANZUS and EU member States in acknowledging the US-led response against al-Qaeda as lawful self-defence brought about a customary rule permitting self-defence against non-State actors.<sup>49</sup> Security Council Resolutions in response to the 11 September attacks also endorsed self-defence against non-State actors and helped crystallise the customary rule.<sup>50</sup>

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45. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Merits)* [2005] ICJ Rep 168, 231 [*Armed Activities*]; *Israeli Wall*, n4, 180; *Bankovic v Belgium* (2007) 44 EHRR SE5, 85-86; *Loizidou v Turkey* (1995) 20 EHRR 99, 130.

46. *Charter* art 51; *Nicaragua*, n27, 93-94.

47. Ruys, '*Armed Attack*' and Article 51 of the UN Charter: *Evolutions in Customary Law and Practice* (2010) 8-9.

48. *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark v Netherlands) (Judgment)* [1969] ICJ Rep 3, 43.

49. *Statement by the NATO Secretary-General* (2001) 40 ILM 1268; *Resolution of the Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs*, OAS Doc No RC24/RES1/01 (21 September 2001); Council of the EU, '2372nd Council Meeting (General Affairs)' (Press Release, 8-9 October 2001) 7; *Letter dated 7 October 2001 from the Permanent Representative of the USA*, UN Doc S/2001/946 (2001); Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 993, 997.

50. *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN Doc S/RES/1373 (2001); *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1368, UN Doc S/RES/1368 (2001); *Armed Activities*, n45, 172-73 (Judge Simma), 314 (Judge Kooijmans); *Israeli Wall*, n4, 215 (Judge Higgins).

Further, article 51 must be interpreted in accordance with its ordinary meaning and the *Charter's* object and purpose.<sup>51</sup> Article 51 refers to an 'armed attack' without specifying the attacker. Consistent with the *Charter's* object of maintaining international security, a purposive interpretation of article 51 must recognise that non-State actors can inflict attacks equally lethal to those executed by States.<sup>52</sup>

## 2. The accumulation of ZSM attacks constituted an armed attack against Rigalia

ZSM attacks, which this Court may consider as a whole for the purposes of identifying an 'armed attack',<sup>53</sup> are of sufficient scale and gravity to trigger the right of self-defence.<sup>54</sup> They have caused extensive civilian fatalities and are linked together by a 'violent campaign'.<sup>55</sup>

Regardless, the *Charter* does not exclude the customary right of self-defence against an imminent attack by the ZSM.<sup>56</sup>

## 3. Rigalia is using necessary and proportionate force against legitimate Zetian targets

Self-defensive action must be necessary as a last resort, and proportionate to the purpose of ending the aggression.<sup>57</sup>

Cross-border force is necessary where an aggressor organises attacks from another State which cannot or will not end the aggression.<sup>58</sup> ZSM members plan attacks against Rigalia from Ardenia.<sup>59</sup> Ardenia is either unable to act against them owing to the mountainous terrain and

51. *VCLT* art 31(1); *Compromis*, [37].

52. *Charter* art 1(1); Greenwood, 'International Law and the "War Against Terrorism"' (2002) 78 *International Affairs* 301, 307-308.

53. *Nicaragua*, n27, 120; *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [2003] ICJ Rep 161, 192 ['*Oil Platforms*']; *Armed Activities*, n45, 223, 315 (Judge Kooijmans); Brownlie, *International Law and the Use of Force by States* (1963) 279; Dinstein, *War, Aggression and Self-Defence* (2005) 230-31.

54. *Nicaragua*, n27, 101; *Armed Activities*, n45, 338 (Judge Simma), 314-15 (Judge Kooijmans); *Jus ad Bellum (Ethiopia v State of Eritrea)* (2006) 45 *ILM* 430.

55. *Compromis*, [18], [28].

56. Bowett, *Self-Defence in International Law* (1958) 187-88.

57. Jennings, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82, 82-84; *Nicaragua*, n27, 103; *Nuclear Weapons*, n29, 245; *Oil Platforms*, n53, 187; *Armed Activities*, n45, 223.

58. *Armed Activities*, n45, 334 (Judge Simma), 307 (Judge Kooijmans); Jennings and Watts (eds), *Oppenheim's International Law*, vol 1 (9th ed, 2002) 419.

59. *Compromis*, [19].

uncooperative populace,<sup>60</sup> or is unwilling to do so,<sup>61</sup> as evidenced by its collusion with the ZSM.<sup>62</sup> The Court may infer such collusion from tacit admissions by President Arwen and her spokespeople.<sup>63</sup> Cooperation with Ardenia is evidently not possible.

Proportionate force is limited to targets whose elimination serves the purpose of ending ZSM aggression.<sup>64</sup> Rigalia's strikes are proportionate because its intelligence and precision weaponry ensure they are directed against ZSM members only.<sup>65</sup>

*D. Rigalia's use of force against the ZSM does not violate the Zetian people's right of self-determination*

As Rigalia has ratified the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), it is obligated to respect the Zetian people's right to self-determination.<sup>66</sup> However, self-determination is limited by the territorial integrity of States, the primacy of which entitles Rigalia to quell the ZSM insurgency within its own territory.<sup>67</sup> Rigalia's use of force does not deny Zetians' right of internal self-determination, which only requires that States grant 'peoples' equal access to government.<sup>68</sup> Zetian political autonomy and participation in Rigalian politics prove that Rigalia respects Zetians' right to self-determination.<sup>69</sup>

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60. *Compromis*, [28].

61. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, GA Res 2625, UN Doc A/8082 (1970) ['*Friendly Relations Declaration*']; *Armed Activities*, n45, 227.

62. *Compromis*, [20].

63. *Compromis*, [19]-[20]; *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 18 ['*Corfu Channel*'].

64. *Oil Platforms*, n53, 196.

65. *Compromis*, [29].

66. ICCPR art 1(3); *International Covenant on Economic, Social and Cultural Rights* [1966] 993 UNTS 3, art 1(3) ['ICESCR']; *East Timor*, n6, 102.

67. *Charter* art 2(7); *Friendly Relations Declaration*, n61; Marcelo Kohen (ed), *Secession: International Law Perspectives* (2006) 105.

68. *Aaland Islands Question (Merits)*, Report of the Commission of Rapporteurs, League of Nations Council Doc B7 21/68/106 (1921) 4-5; *Reference re Secession of Quebec* [1998] 2 SCR 217, [126].

69. *Compromis*, [6], [9], [21].

II. THE ATTACK ON THE BAKCHAR VALLEY HOSPITAL WAS NOT  
ATTRIBUTABLE TO RIGALIA AND RIGALIA HAS NO OBLIGATION TO  
INVESTIGATE THE ATTACK OR TO COMPENSATE ARDENIA; MOREOVER,  
THE ACT WAS NOT AN ACT OF AGGRESSION BUT PART OF A LEGITIMATE  
AND PROPORTIONATE OPERATION TO DEFEND AGAINST ZETIAN  
TERRORISTS

Rigalia is not internationally responsible for the strike on Bakchar Valley Hospital ('the Hospital'). It is not attributable to Rigalia and was, in any event, lawful.<sup>70</sup> Further, Rigalia is not obligated to investigate the attack. Alternatively, this Court should not order an investigation by way of remedy.

*A. The Hospital strike is not attributable to Rigalia*

Rigalia's connection with Morganian personnel does not satisfy any of the established bases for attribution under the International Law Commission's *Articles on State Responsibility (ASR)*, which codify customary rules of State responsibility. Further, Rigalia has not subsequently 'adopted and acknowledged' the strike as its own.<sup>71</sup>

1. Morganian personnel involved in the strike did not exercise elements of  
Rigalian governmental authority

Under article 5, the conduct of persons or entities 'empowered by the law of [the] State to exercise elements of governmental authority' is attributable to that State.<sup>72</sup> Governmental authority connotes acting 'in place of State organs'.<sup>73</sup> It cannot be said that Morganian personnel are acting in place of the Rigalian Defence Force (RDF). They exercise autonomy in launching the strikes and are accountable to Morganian state organs. Moreover, Morgania is motivated by a security interest distinct from that of Rigalia.<sup>74</sup>

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70. *Phosphates in Morocco (Italy v France) (Preliminary Objections)* [1938] PCIJ (ser A/B) No 74, 28; *ASR* art 2.

71. *ASR* arts 5-8, 11.

72. *ASR* art 5; Shaw, *International Law* (6th ed, 2008) 787.

73. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary* (2002) 100 ['*ASR Commentary*'].

74. *Compromis*, [27].

## 2. Morganian personnel have not been placed at Rigalia's disposal

Morganian personnel have not been placed at Rigalia's disposal so as to ground attribution under article 6. Article 6 requires that the receiving State exclusively direct the conduct of the sending State's organ.<sup>75</sup> As the RDF is merely 'urging' Morgania to execute the strikes,<sup>76</sup> which remain under Morgania's operational command, Rigalia is not exclusively directing Morganian personnel involved in the strikes.<sup>77</sup>

## 3. Morganian personnel did not act under Rigalia's effective control

The Hospital strike is not attributable to Rigalia on the basis of 'effective control' as codified in article 8 of the *ASR*.<sup>78</sup> Attribution on this basis requires control of Morganian personnel 'in respect of each operation in which the alleged violations occurred'.<sup>79</sup> The RDF and Defence Minister's non-specific instructions to Morgania do not amount to effective control over Morganian personnel because Morganian personnel retain absolute discretion over target acquisition.<sup>80</sup> In any event, as the drone operator 'clearly went beyond' protocol in directly communicating with an informant while executing the Hospital strike, her actions were *ultra vires* any putative Rigalian instruction and thus not attributable to Rigalia.<sup>81</sup>

## 4. Rigalia has not subsequently 'adopted and acknowledged' the strike as its own

This Court has only ever recognised adoption as a basis for attribution of private conduct where there was a formal, unambiguous and long-standing endorsement of the conduct in public statements.<sup>82</sup> In contrast, the Rigalian Defence Minister's press statement characterises the Hospital strike as a 'consequence of Rigalia's fight to defend itself', which stops short of expressly adopting the conduct.<sup>83</sup> As this statement is at best

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75. *ASR Commentary*, n73, 103; *Behrami v France* (2007) 45 EHRR SE10, 94.

76. *Compromis*, [28].

77. *Compromis*, [30].

78. *Nicaragua*, n27, 65.

79. *Bosnian Genocide*, n24, [400]; *Nicaragua*, n27, 65; *ASR* art 8.

80. *Compromis*, [29].

81. *ASR Commentary*, n73, 113; *Compromis*, [30]-[31].

82. *United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Merits)* [1980] ICJ Rep 3, 33-35; *ASR* art 11.

83. *Compromis*, [31].



ambiguous, this Court should defer to the Rigalian Head of State's official disclaimer of responsibility in a diplomatic note.<sup>84</sup>

*B. The Hospital strike was not internationally wrongful*

Assuming its attribution to Rigalia, the Hospital strike was nevertheless lawful as it occurred in the exercise of Rigalia's right of self-defence.<sup>85</sup> Further, the Hospital strike was not of sufficient gravity to constitute an act of aggression. The strike was also consistent with Rigalia's customary IHL obligations. As discussed above, Rigalia's IHL compliance also discharges its obligations under article 6 of the *ICCPR*.<sup>86</sup>

1. The Hospital strike was not an act of aggression

Even assuming the Hospital strike cannot be justified as self-defence, it was not an act of aggression. An act of aggression is 'the most serious and dangerous form of the illegal use of force' inconsistent with the *Charter*.<sup>87</sup> It must be of 'sufficient gravity' in light of the 'relevant circumstances'.<sup>88</sup> The Hospital strike does not meet this threshold. In the *Armed Activities* case, this Court declined the Congo's request to make a finding of aggression where Uganda had invaded 'vast areas' of the Congo, occupied the Ituri region, and caused many thousands of casualties over six years.<sup>89</sup> Hence, a significantly less invasive and deadly trespass into Ardenia cannot possibly constitute an act of aggression.

2. The attack complied with Rigalia's IHL and IHRL obligations

The Hospital strike complied with Rigalia's IHL obligations given the military necessity of killing Bermal.<sup>90</sup> The distraction of the Morganian drone operator during the execution of the attack constituted human error and, as such, does not breach the proportionality and discrimination principles. This is because 'errors of targeting' which occur in the context of a lawful attack do not constitute breaches of IHL.<sup>91</sup>

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84. *Compromis*, [34].

85. *Rigalian Memorial*, 8-11.

86. *Rigalian Memorial*, 7.

87. *Definition of Aggression*, GA Res 3314, UN Doc A/RES/3314 (1974) Preamble, art 6.

88. *Id*, art 2.

89. *Armed Activities*, n45, 224.

90. *Hague Convention*, Preamble.

91. *Partial Award Regarding Western Front, Aerial Bombardment and Related Claims Eritrea's Claims (Judicial and Similar Proceedings)* (2006) 45 ILM 396, 415; Dinstein, n37, 135.

Nor can Ardenia impugn the broader attack on IHL grounds. Bermal, as a 'top separatist commander' and 'major decision-maker in...all military activities in Rigalia',<sup>92</sup> had assumed a continuous combat function and was therefore a lawful target at any time.<sup>93</sup>

Rigalia took feasible precautions to minimise civilian casualties in addition to verifying lawful targets.<sup>94</sup> Rigalia need not have postponed its attack until it could target Bermal without prospect of civilian casualties because it was permitted to take into account his strategic role in the ZSM and the fact that his whereabouts might not have been known again for some time.<sup>95</sup> Moreover, Rigalia need not have warned civilians because the element of surprise was crucial to operational success.<sup>96</sup>

Further, the attack was not disproportionate as expected civilian loss was not excessive in relation to the direct and concrete military advantage anticipated.<sup>97</sup> Killing Bermal had the significant military advantage of curbing 'increasingly deadly'<sup>98</sup> ZSM attacks in Rigalia. The pre-attack expectation of seven civilian casualties was comparatively low.

*C. Rigalia is not obligated to investigate the attack under the International Covenant on Civil and Political Rights (ICCPR)*

Rigalia's obligation not to deprive individuals of life arbitrarily under article 6 of the *ICCPR* does not extend to Ardenian territory.<sup>99</sup> Even if it did, what is 'arbitrary' for the purposes of article 6 fell to be determined by IHL in accordance with the interpretive principle of *lex specialis*.<sup>100</sup> As the strikes were IHL-compliant they necessarily complied with article 6.<sup>101</sup> The right to an effective remedy arises only upon the breach of a Covenant obligation.<sup>102</sup> As Rigalia has complied with article 6, no remedial obligation of this kind has arisen.

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92. *Compromis*, [30].

93. *DPH Study*, n31, 34; *Rigalian Memorial*, 5.

94. *Rigalian Memorial*, 5-6.

95. *Compromis*, [28].

96. Fleck, n29, 196-197; *CIHL Rules*, n29, 62-65 (Rule 20).

97. *CIHL Rules*, n29, 46-50 (Rule 14).

98. *Compromis*, [28].

99. *Rigalian Memorial*, 7.

100. *Nuclear Weapons*, n29, 257.

101. *Rigalian Memorial*, 7.

102. *ICCPR* art 2.

*D. In any event, an investigation should not be ordered as reparation*

If the Court finds that Rigalia is responsible for the Hospital strike, Rigalia is obligated to make full reparation for any injury caused.<sup>103</sup> This Court may award satisfaction only insofar as restitution and compensation cannot make good a State's wrongful act.<sup>104</sup> Investigation is not an 'appropriate modality' of satisfaction for the Hospital strike.<sup>105</sup> The Court's ruling at the preliminary objections phase precludes any order that would determine Morgania's rights and obligations.<sup>106</sup> As any investigation would necessitate inquiry into the conduct of Morganian personnel, the order would be futile.

III. RIGALIA'S BAN OF THE MAVAZI FOR ZETIAN WOMEN AND GIRLS IS CONSISTENT WITH INTERNATIONAL LAW

Rigalia's prohibition on wearing the Mavazi in public spaces and when receiving public services is a permissible limitation on the rights of Zetian women and girls under the *ICCPR*, the *ICESCR*, the *Convention on the Rights of the Child (CROC)*, and the *Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)*.

*A. Ardenia lacks standing to contest the legality of the ban*

Human rights treaties confer rights on individuals, not States.<sup>107</sup> The ban operates exclusively in Rigalia, causing Ardenia no direct injury.

As Zetians are dual Rigalian-Ardenian nationals,<sup>108</sup> Ardenia cannot exercise diplomatic protection on their behalf unless the nationality of Zetians affected by the ban is predominantly Ardenian.<sup>109</sup> Ardenia cannot demonstrate that the 'predominant nationality' of Zetians living in Rigalia is Ardenian, given their 'habitual residence' in Rigalia and the absence of any evidence countervailing this 'important factor'.<sup>110</sup>

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103. *Factory at Chorzów (Claim for Indemnity)* [1928] PCIJ (Ser A) No 17, 47-48; *ASR* art 31.

104. *ASR* art 37(1).

105. *ASR* art 37(2).

106. *Statute of the International Court of Justice* [1945] 1 UNTS 993, art 59; *Compromis*, [36].

107. HRC, *General Comment 24*, UN Doc CCPR/C/21/Rev.1/Add.6 (1994) [17].

108. *Compromis*, [8].

109. ILC, *Draft Articles on Diplomatic Protection with Commentaries*, UN Doc A/61/10 (2006) art 7 [*'DPA with Commentaries'*]; *Case No A/18* (1984) 5 Iran-USCTR 251, 263.

110. *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4, 22; *DPA with Commentaries*, n109, 46.

*B. The ban permissibly limits freedom of religion and minority culture under the ICCPR and the CROC*

1. The ban permissibly limits religious freedom under article 18(3) of the ICCPR

The ban on the Mavazi, a Masinto headcovering worn by Zetian women, permissibly limits the religious freedom of Zetian women and girls. It is prescribed by law<sup>111</sup> and is necessary to protect public safety and order, and the fundamental rights and freedoms of others.<sup>112</sup> President Khutai's parliamentary speech introducing the ban attests to these legitimate aims.<sup>113</sup>

The scope of ICCPR rights may be interpreted in light of subsequent State practice in the treaty's application.<sup>114</sup> Parties to the ICCPR and the *European Convention on Human Rights* consider *de facto* bans on wearing the burqa or niqab in public<sup>115</sup> or when receiving a public service<sup>116</sup> to be permissible limitations on religious freedom.<sup>117</sup>

*a. Rigalia is afforded a 'margin of appreciation'*

The European Court of Human Rights affords States a 'margin of appreciation' when they limit rights, given their better understanding of local conditions.<sup>118</sup> Rigalia's margin of appreciation is determined by reference to the pressing social need to protect the rights of oppressed Zetian women and girls.<sup>119</sup>

111. *Maestri v Italy* (2004) 39 EHRR 38, 843; *Compromis*, [16], [21].

112. ICCPR art 18(3).

113. *Şahin v Turkey* (2007) 44 EHRR 5, 124 ['Şahin']; *Compromis*, [16].

114. VCLT art 31(3)(b).

115. Belgian Parliament, *Proposition de Loi n° 5-255/1: Interdiction de se couvrir le visage d'une manière rendant impossible toute identification de la personne* (2010); French National Assembly, *Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public* (2010); Italian Council of Ministers, *Nuove norme per il contrasto del terrorismo internazionale e della criminalità* (2005) art 10; Tunisian Executive Decree, *Circulaire n° 81* (1981).

116. US Department of State, *Annual Report on International Religious Freedom* (2010) (citing, *inter alia*, the practice of Belgium, Canada, Egypt, France, Kosovo, Maldives, Tajikistan, Tunisia and Turkey).

117. Article 9(2) is substantially similar to article 18(3) of the ICCPR: Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (2005) 292-93; *Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] 213 UNTS 222, art 9(2).

118. *Handyside v UK* (1979-80) 1 EHRR 737, 754; *Şahin*, n113, 127; Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 *European Journal of International Law* 907, 919.

119. *Şahin*, n113, 127.

*b. The ban is necessary to protect public safety*

The freedom to manifest religious belief may be restricted where it endangers lives or property.<sup>120</sup> The Mavazi enables Zetian separatists to conceal their identity when approaching public targets.<sup>121</sup> The ban is proportionate and within Rigalia's 'margin of appreciation'. Less restrictive limitations, such as mandatory identification measures, would be impracticable given how many Zetians wear the Mavazi and Rigalia's inability to effectively control the Northern Provinces.<sup>122</sup>

*c. The ban is necessary to protect public order*

The prevention of religious or political extremism may justify limitations to protect public order.<sup>123</sup> The ban is necessary on these grounds because the Mavazi perpetuates a culture of systemic violence antithetical to the enjoyment of ICCPR rights.<sup>124</sup> The Zetian tribal councils' violent imposition of the Mavazi on women has given rise to a system of extrajudicial punishment, which compromises the integrity of the Rigalian legal system.<sup>125</sup>

*d. The ban is necessary to protect the fundamental rights and freedoms of others*

Rigalia may restrict the freedom to manifest religious belief in order to protect fundamental rights, as enshrined in the ICCPR and ICESCR.<sup>126</sup> The ban is necessary to protect gender equality and alleviate pressure on women to wear the Mavazi.<sup>127</sup>

The requirement that women wear the Mavazi is incompatible with gender equality. It applies only to women and impedes their social, cultural and economic lives.<sup>128</sup> The ban is also necessary to relieve pressure on Zetian women and girls to wear the Mavazi, which tribal leaders consider a

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120. *Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR*, UN Doc E/CN.4/1984/4 (1984) [33].

121. *Compromis*, [18].

122. *Compromis*, [3]-[4].

123. *Şahin*, n113, 127; *Refah Partisi v Turkey* (2003) 37 EHRR 1, 44 [*'Refah Partisi'*]; *Karaduman v Turkey* (1993) 74 DR 93, [95].

124. *Dahlab v Switzerland*, ECHR, App No 42393/98 (15 February 2001).

125. *Compromis*, [3]-[4].

126. ICCPR art 18(3); Nowak, n44, 385.

127. *Şahin*, n113, 127-28; *Dogru v France* (2009) 49 EHRR 8, 197-98.

128. *Refah Partisi*, n123, 44; *Compromis*, [3]-[4].

'compulsory religious duty'.<sup>129</sup> Prohibiting the wearing of the Mavazi by *all* Zetian women renders it impractical for tribal leaders to inflict inhuman punishment on them.<sup>130</sup> The ban is also required by Rigalia's due diligence obligation under the *CEDAW* to prevent violence against women, given the Mavazi's imposition perpetuates a culture of gender-based violence.<sup>131</sup>

The ban is proportionate to the protection of the rights of Zetian women and girls.<sup>132</sup> Merely criminalising the imposition of the Mavazi is unfeasible, as Rigalia cannot distinguish between women who choose to wear the Mavazi and women who do so out of fear of reprisal. Moreover, Zetians otherwise remain free to practise the Masinto religion.<sup>133</sup>

2. The ban does not violate the rights of Zetian women and girls under article 27 of the ICCPR to enjoy their minority culture and religion

- a. *The ban permissibly limits article 27 rights*

The right of members of a minority to practise their own religion is subject to the same limitations as in article 18(3),<sup>134</sup> which Rigalia has satisfied.<sup>135</sup>

- b. *Rigalia has lawfully derogated from article 27*

Rigalia may derogate from article 27 during officially proclaimed public emergencies threatening 'the life of the nation'.<sup>136</sup> The ZSM campaign constitutes such a threat, as increasing separatist attacks compromise Rigalia's territorial integrity.<sup>137</sup> The ban is 'strictly required by the exigencies of the situation'.<sup>138</sup> It prevents terrorists avoiding detection by wearing the Mavazi during attacks. The ban is not discriminatory as 'it

129. *Şahin*, n113, 128.

130. ICCPR art 7; Nowak, *Report of the Special Rapporteur on Torture*, UN Doc A/HRC/7/3/Add.7 (2008) [17].

131. CEDAW arts 1, 2(a), 2(c)-(f), 3; CEDW, *Yıldırım v Austria*, UN Doc CEDAW/C/39/D/6/2005 (2007) [12.3] [*'Yıldırım'*]; *Opuz v Turkey* (2010) 50 EHRR 28, [77]; Committee on the Elimination of Discrimination against Women (CEDW), *General Recommendation 19*, UN Doc A/47/38 (1992) [6], [10]-[11].

132. *Rigalian Memorial*, 21.

133. *Şahin*, n113, 129.

134. Bossuyt, *Guide to the 'travaux préparatoires' of the ICCPR* (1987) 497; VCLT art 32.

135. *Rigalian Memorial*, 19-23.

136. ICCPR art 4(1).

137. *Lawless v Ireland* (1979-80) 1 EHRR 15, 31-32.

138. ICCPR art 4(1).

applies to all persons without distinction'.<sup>139</sup> The requirement to formally notify other States does not alter the effectiveness of the derogation.<sup>140</sup>

3. The ban permissibly limits the right of Zetian girls to freedom of religion and minority culture under articles 14 and 30 of the CROC

Zetian girls' freedom to enjoy their religion and minority culture under articles 14 and 30 of the CROC is subject to the same limitations applying to articles 18 and 27 of the ICCPR.<sup>141</sup> For reasons given above, the ban permissibly limits these rights.<sup>142</sup>

Further, the ban is consistent with the 'best interests of the child'.<sup>143</sup> This principle applies collectively to Zetian girls.<sup>144</sup> The religious freedom of children may be restricted if it is in their best interests,<sup>145</sup> consistent with Rigalia's duty to protect minors.<sup>146</sup> The ban is in the best interests of Zetian girls because they cannot freely choose to wear the restrictive Mavazi given their socialisation to patriarchal norms.<sup>147</sup>

*C. The prohibition on receiving public services while wearing the Mavazi does not violate the economic, social and cultural rights of Zetian women and girls*

1. Ardenia's claim does not give rise to a separate question in relation to economic, social and cultural rights

The scope of permissible limitations on religious and minority rights is the central issue before the Court, and 'no separate question' arises in relation to economic, social and cultural rights.<sup>148</sup> Further, nothing suggests the ban will affect the access to public services of those women wearing the

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139. ICCPR arts 2, 3; HRC, *Bhinder v Canada*, UN Doc CCPR/C/37/D/208/1986 (1989) [6.1] [*'Bhinder'*].

140. HRC, *Silva v Uruguay*, UN Doc CCPR/C/OP/1 at 65 (1984) [8.3].

141. CROC arts 14(3), 30; Detrick, *A Commentary on the UNCROC* (1999) 248, 535.

142. *Rigalian Memorial*, 19-24.

143. CROC art 3; Detrick, n141, 90.

144. Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child* (2007) 36-37.

145. *X v UK*, ECHR, App No 7992/77 (12 July 1978) 235; *Bhinder*, n139, [6.2].

146. ICCPR art 24; CROC art 36; Committee on the Rights of the Child (CRC), *Concluding Observations: Jamaica* UN Doc CRC/C/15/Add.210, [33].

147. *C v Manitoba (Director of Child and Family Services)* [2009] 2 SCR 181, [72]-[73].

148. *Şahin*, n113, 138; *Dogru*, n127, 201.

Mavazi, given the Northern Provinces are ‘largely governed by the tribal councils’.<sup>149</sup>

2. Alternatively, the ban permissibly limits the economic, social and cultural rights of Zetian women and girls under article 4 of the ICESCR

Rigalia may limit the enjoyment of economic, social and cultural rights if the limitation is ‘compatible with the nature of [ICESCR] rights and solely for the purpose of promoting the general welfare in a democratic society’.<sup>150</sup>

To be ‘compatible with the nature’ of ICESCR rights, the substance of the limitation cannot jeopardise the essence of the rights.<sup>151</sup> The prohibition on wearing the Mavazi while receiving public services does not compromise the essence of the right of *access* to services, as Zetian women and girls may continue to have access to these services if they comply with the ban.<sup>152</sup>

The ban is also necessary for the ‘general welfare’ of Rigalian society. As discussed above, the ban enables the functioning of public services by promoting the safety of public buildings.<sup>153</sup> Further, women’s oppression contributes to poverty in the Northern Provinces by, for example, preventing women from working.<sup>154</sup> The ban will ultimately facilitate the Zetian community’s greater enjoyment of economic, social and cultural rights.<sup>155</sup>

3. The ban is permissible under the CROC

Rigalia is required to ‘undertake all appropriate legislative’ measures to respect children’s right to equal enjoyment of economic, social and cultural rights.<sup>156</sup> The right to access public services under the CROC is not absolute since ‘its very nature calls for regulation by the State’ according to

149. *Compromis*, [3].

150. ICESCR art 4.

151. *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2000/13 (1986) [56].

152. *Şahin*, n113, 135; *Begum v Denbigh High School* [2007] 1 AC 100, 118 [‘*Begum*’].

153. *Rigalian Memorial*, 21.

154. Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: India* UN Doc E/C.12/IND/CO/5 [25], [65].

155. *Masstricht Guidelines on Violations of Economic, Social and Cultural Rights*, UN Doc E/C.12/2000/13 (1997) art 14(d).

156. CROC art 4.



community needs.<sup>157</sup> The ban permissibly limits girls' right to education under article 28 of the *CROC*. The ban is reasonable and adheres to the 'best interests of the child' principle,<sup>158</sup> as it protects girls who may be pressured to wear the Mavazi at school.<sup>159</sup> Further, the prohibition preserves security by preventing unidentified people entering schools. The prohibition does not deny the essence of the right – to access education – as students can attend school by not wearing the Mavazi.<sup>160</sup>

*D. Rigalia is required to implement the Mavazi ban under the CEDAW*

Articles 2(f) and 5(a) of the *CEDAW* create a substantive obligation to eliminate discriminatory cultural patterns.<sup>161</sup> The articles prioritise gender equality over respect for cultural and religious practices.<sup>162</sup> The requirement that Zetian women wear the Mavazi is a discriminatory cultural pattern: forcibly imposing a garment that prevents safe driving and outdoor work is predicated on the assumption that women, by virtue of their gender, cannot or should not do these things.<sup>163</sup> The Mavazi prevents women enjoying equal employment opportunities and safe working conditions, thus violating the *CEDAW*.<sup>164</sup>

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157. *Şahin*, n113, [154]; *Belgian Linguistic Case (Merits)* (1979-80) 1 EHRR 252 (1968) 281 [*'Belgian Linguistic Case'*]; *Fayed v UK* (1994) 18 EHRR 393, 429.

158. *Detrick*, n141, 92.

159. *Dogru*, n127, 199; *Şahin*, n113, 127-128; *Begum*, n152, 694.

160. *Belgian Linguistic Case*, n157, 28.

161. CEDW, *Vertido v Philippines*, UN Doc CEDAW/C/46/D/18/2008 (2010) [8.4].

162. CEDW, *Concluding Observations: Gabon*, UN Doc CEDAW/C/GAB/CC/2-5 (2005) [30]-[31]; CEDW, *Concluding Observations: Pakistan* UN Doc CEDAW/C/PAK/CO/3 (2007) [28]; *Initial Report: Tajikistan*, UN Doc CEDAW/C/TJK/1-3 (2005) 11.

163. *Compromis*, [4]-[7]; CEDW, *Concluding Observations: Saudi Arabia*, UN Doc CEDAW/C/SAU/CO/2 (2008) [15]-[16].

164. *CEDAW* arts 11(b), 11(f).

IV. ARDENIA'S FAILURE TO INVESTIGATE AND PROSECUTE THE ALLEGED CORRUPTION AND TO PROVIDE LEGAL ASSISTANCE TO RIGALIA CONSTITUTE BREACHES OF THE OECD ANTI-BRIBERY CONVENTION, AND THE FAILURE OF THE ARDENIAN NCP TO RESPOND TO THE COMPLAINT BY THE CRBC CONSTITUTES A BREACH OF THE OECD DECISION ON MNE GUIDELINES

The *OECD Anti-Bribery Convention* ('*OABC*') requires States Parties to criminalise the bribery of a foreign public official ('the offence').<sup>165</sup> The *OECD Decision on MNE Guidelines* ('*Decision*')<sup>166</sup> requires that adherents establish a National Contact Point (NCP) for handling complaints under the *OECD MNE Guidelines (Guidelines)*, which are non-binding standards of responsible business conduct.<sup>167</sup>

These instruments, to which Ardenia and Rigalia are parties,<sup>168</sup> are binding agreements governed by the *Vienna Convention on the Law of Treaties*.<sup>169</sup> Accordingly, States Parties must interpret their obligations under each instrument in good faith; that is, 'honestly, fairly and reasonably',<sup>170</sup> and in light of the instrument's purpose, subsequent State 'practice in [its] application', and any 'relevant rules of international law.'<sup>171</sup>

There exist two allegations that, if proven, would constitute the offence: first, that Mineral Dynamics Incorporated (MDI) secured the renewal of its contract with Rigalian Refineries Incorporated (RRI) by offering payments and support to third parties, namely the Zetian Refugee Fund (ZRF) and Clyde Zangara ('the Contract Allegation'); and second, that MDI transporters made payments to members of the tribal councils ('the Transporters Allegation').<sup>172</sup> Ardenia's response to these allegations violated the *OABC*.

In addition, the alleged conduct of MDI and RRI potentially breached the *Guidelines*. As it was the subject of the CRBC's complaint, Ardenia's

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165. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1998) 37 ILM 4 art 1 ['*OABC*'].

166. OECD, *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, C(2000)96/FINAL (2000) I.1 ['*Decision*'].

167. OECD, *The OECD Guidelines for Multinational Enterprises* (2000) 9 ['*Guidelines*'].

168. *Compromis*, [38].

169. *VCLT* art 2(a); *Convention on the Organisation for Economic Co-operation and Development* [1960] 888 UNTS 179 art 5 ['*OECD Convention*'].

170. Villiger, n7, 425.

171. *VCLT* art 31.

172. *Compromis*, [12], [22].

obligations under the *Decision* were enlivened. Ardenia's NCP violated the *Decision* in its handling of the complaint.

These violations directly injured Rigalia. Ardenia's obligations were owed to all States Parties and its violations 'specially affected' Rigalia because of their impact on a Rigalian State-owned company and non-governmental organisation.<sup>173</sup>

*A. Ardenia's failure to investigate and prosecute the alleged corruption breached article 5 of the OECD Anti-Bribery Convention ('OABC')*

1. In responding to alleged offences under the OABC, States Parties must exercise their prosecutorial discretion in conformity with article 5

Article 5 requires that States Parties investigate allegations of the offence.<sup>174</sup> Subsequent State practice in interpreting article 5 confirms that States Parties are bound to investigate any 'well-founded suspicion'<sup>175</sup> of the offence and prosecute where sufficiently 'credible' evidence<sup>176</sup> creates a 'realistic prospect of conviction'.<sup>177</sup> Further, article 5 expressly prohibits States Parties from allowing 'considerations of national economic interest, the potential effect upon relations with another state, or the identity of the natural or legal persons involved' to influence investigations and prosecutions of the offence.<sup>178</sup>

2. In responding to the alleged corruption, Ardenia did not exercise its prosecutorial discretion in conformity with article 5

*a. Ardenia failed to investigate the allegations reported in 2002*

The 2002 media reports, which first raised the Contract and Transporters Allegations, created a well-founded suspicion of the offence.<sup>179</sup> State practice confirms that article 5 requires States to

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173. ASR art 42(b)(i); *ASR Commentary*, n73, 119.

174. *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1998) 37 ILM 8, [27] [*'OABC Commentary'*].

175. OECD, *Hungary – Phase 1 Implementation Report* (2003) 13 [Hereinafter '*Hungary-Ph.1* (2003) 13']; *UK-Ph.2* (2005) 48; *Luxembourg-Ph.2* (2004) 23.

176. *US-Ph.3* (2010) 19; *Austria-Ph.2* (2006) 29-31.

177. *UK-Ph.2* (2005) 51; *France-Ph.2* (2003) 28; *Canada-Ph.2* (2005) 33.

178. *OABC* art 5.

179. *Compromis*, [12].

proactively seek further evidence in response to such media reports.<sup>180</sup> Ardenia's failure to follow up the reports breached article 5.

*b. Ardenia failed to prosecute the allegations*

The Contract Allegation triggered Ardenia's obligation to prosecute because it was substantiated by an MDI employee directly involved in the negotiations.<sup>181</sup> His statement established a realistic prospect of conviction. It indicated that MDI had committed the offence by 'intentionally' offering and giving 'undue pecuniary ... advantage[s]' to third parties so that Bikra, as the official of a Rigalian public enterprise affiliated with the third parties,<sup>182</sup> would renew MDI's contract.<sup>183</sup>

Further, the employee's statement enlivened Ardenia's obligation to prosecute the Transporters Allegation. It provided credible evidence that MDI transporters had made payments to tribal council members. These members are foreign public officials because they are office-bearers in an 'autonomous' region, the Northern Provinces.<sup>184</sup> The transporters sought an improper advantage as MDI was not 'clearly entitled'<sup>185</sup> to additional security or the 'smooth delivery' of its products.<sup>186</sup> As the fees were undocumented<sup>187</sup> and intended to induce the performance of unofficial, discretionary tasks,<sup>188</sup> they did not fall within the offence's 'small facilitation payments' exception.<sup>189</sup>

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180. *Bulgaria-Ph.2* (2003) 10; *Japan-Ph.2* (2005) 5; *UK-Ph.2* (2005) 8, 48; *Luxembourg-Ph.2* (2004) 23; *Italy-Ph.2* (2004) 25; *Korea-Ph.2* (2004) 7; OECD Working Group on Bribery, *Annual Report* (2009) 26-31.

181. *Compromis*, [22].

182. *OABC Commentary*, n174, [14]-[15].

183. *OABC* art 1(1).

184. *OABC Commentary*, n174, [18]; Zerbes, 'Article 1: The Offence of Bribery of Foreign Public Officials', in Pieth et al (eds), *The OECD Convention on Bribery: A Commentary* (2007) 73-74; *Compromis*, [6].

185. *OABC Commentary*, n174, [5]; *US v Kay* 359 F.3d 738 (2004).

186. *Compromis*, [22].

187. OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, C(2009)159/REV1/FINAL (2009) art 6; *Australia-Ph.1* (2000) 7.

188. *New Zealand-Ph.1* (2002) 8; *US-Ph.2* (2002) 34, 38; *Switzerland-Ph.1* (2000) 22.

189. *OABC Commentary*, n174, [9].

*c. In any event, Ardenia suspended its investigation in violation of article 5*

The influence of national security concerns on Ardenia's decision to suspend the investigation breached article 5.<sup>190</sup> Subsequent interpretation of the *OABC* confirms that article 5 prohibits States from allowing national security considerations to influence enforcement of the offence.<sup>191</sup>

In any event, national security has only been recognised as a permissible consideration where continuing an investigation would expose a State to 'multiple loss of life'.<sup>192</sup> No such risk existed in June 2009, as ZSM violence was confined to Rigalia<sup>193</sup> and Ardenia maintained 'friendly ties' with the Zetians.<sup>194</sup>

Further, this Court may infer that other considerations prohibited by article 5 influenced the suspension.<sup>195</sup> President Arwen's contemporaneous statement, against Ardenian interests, that the suspension was 'founded in part on a concern over ... the loss of hundreds of jobs and millions of dollars'<sup>196</sup> is 'highly probative'<sup>197</sup> evidence that considerations of 'national economic interest' influenced the suspension. Further, this Court may draw the inference that 'the identity of the ... legal person involved' influenced the decision because Ardenia has not proffered evidence, to which it has exclusive access, as to whether the Ardenian Public Prosecutor met with MDI lobbyists<sup>198</sup> or attended MDI functions.<sup>199</sup>

*B. Ardenia's failure to provide prompt and effective legal assistance in response to Rigalia's mutual legal assistance (MLA) request breaches article 9 of the OABC*

Article 9(1) of the *OABC* requires Parties to 'provide prompt and effective legal assistance' when requested by any Party bringing

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190. *Compromis*, [25].

191. *VCLT* art 31(1); *Germany-Ph.2* (2003) 37; Cullen, 'Article 5: Enforcement', in Pieth et al (eds), n184, 322; Rose-Ackerman and Billa, 'Treaties and National Security Exceptions' (2008) 40 *New York Journal of International Law and Politics* 441, 458; *UK-Ph.2bis* (2008) 46.

192. *R (On the Application of Corner House Research and Others) v Director of the Serious Fraud Office* [2009] 1 AC 756, 846 (Lord Bingham); Cullen, n191, 325; *France-Ph.2* (2004) 31; *Japan-Ph.2* (2005) 57; *UK-Ph.2* (2005) 55.

193. *UK-Ph.2bis* (2008) 46.

194. *Compromis*, [20]-[21].

195. *Japan-Ph.2* (2005) 57.

196. *Compromis*, [25].

197. *Nicaragua*, n27, 41.

198. *Compromis*, [25]; *UK-Ph.2* (2005) 36.

199. *Corfu Channel*, n63, 18.

investigations and proceedings ‘within the scope of the Convention’. Parties cannot decline assistance on bank secrecy grounds.<sup>200</sup> Rigalia’s MLA request enlivened these obligations. Though Rigalia made the request on 30 April 2009, Ardenia has not provided assistance. Accordingly, Ardenia breached its obligation to provide prompt assistance.

### 1. Rigalia’s request enlivened Ardenia’s article 9 obligations

Rigalia’s request was made for the purpose of an investigation ‘within the scope of the Convention’. It therefore triggered Ardenia’s article 9 obligations. President Khutai’s attempt to pressure Ardenia by requesting the investigation did not violate article 5.<sup>201</sup> This is because article 5 is concerned only with attempts by States to *evade* the enforcement of the offence. It does not apply to requests to open investigations. This is consistent with subsequent State practice<sup>202</sup> and the *OABC*’s purpose of promoting vigorous enforcement.<sup>203</sup>

### 2. Ardenia did not provide prompt assistance in response to Rigalia’s request

Consistent with the ordinary meaning of ‘prompt’ and subsequent State practice, States Parties must provide legal assistance as a matter of priority.<sup>204</sup> In failing to satisfy Rigalia’s request for over one year, Ardenia breached article 9.

### 3. Ardenia’s failure to provide prompt assistance is not excused by the reasons it provided

Ardenia’s failure to provide prompt assistance to Rigalia is not excused by either of the reasons it gave at the Phase 2 WGB Examination.<sup>205</sup> Ardenia’s bank secrecy legislation does not justify its failure to provide prompt assistance as such legislation can only justify short, procedural delays.<sup>206</sup> Further, the irrelevance of ZRF-Council

200. *OABC* art 9(3).

201. *Compromis*, [22].

202. *France-Ph.2* (2004) 29, 31; *UK-Ph.2* (2005) 53; *Denmark-Ph.1* (2000) 17; *Netherlands-Ph.1* (2001) 22; *New Zealand-Ph.1* (2002) 20.

203. *OABC Commentary*, n174, 27.

204. *Luxembourg-Ph.2* (2004) 30; *Poland-Ph.2* (2007) 37; *New Zealand-Ph.2* (2006) 43; *Bulgaria-Ph.2* (2003) 39-40; *Compromis*, [23].

205. *Compromis*, [23].

206. *OABC* art 9(3); *Poland-Ph.2* (2007) 37; *Switzerland-Ph.2* (2004) 28-29; *Israel -Ph.2* (2009) 40-41; *South Africa-Ph.2* (2010) 53-54.

correspondence could not excuse its delay, as defects in a request will only justify delays where those defects have promptly been brought to the requesting party's attention.<sup>207</sup>

In any event, Ardenia provided no reason for its failure to provide the other evidence requested by Rigalia.

*C. The failure of the Ardenian NCP to respond to the CRBC's complaint breached the OECD Decision on MNE Guidelines*

Ardenia's NCP was obligated to respond to complaints under the *Guidelines* in conformity with the *Decision* and its *Procedural Guidance*.<sup>208</sup> Under the *Procedural Guidance*, NCPs may determine whether any complaint under the *Guidelines* 'merit[s] further consideration'.<sup>209</sup> The criteria for assessing the merit of a complaint, enumerated in the *Procedural Guidance*, are non-specific.<sup>210</sup> Accordingly, subsequent State practice is instructive in determining the lawfulness of an NCP's response.<sup>211</sup> Ardenia breached the *Decision* because its NCP failed to comply with the *Procedural Guidance* in handling the CRBC's complaint.

1. Ardenia's NCP could not refuse to respond to the CRBC's complaint as it merited further consideration

*a. Ardenia's NCP was an appropriate forum for the CRBC's complaint*

NCPs must respond to complaints where their involvement is essential to resolving the issues raised, irrespective of where the misconduct occurred.<sup>212</sup> As Ardenian assistance was necessary for obtaining crucial evidence, Ardenia's NCP could not reject the complaint on the basis that the CRBC should have contacted Rigalia's NCP.<sup>213</sup> Furthermore, MDI's status as an Ardenian-owned corporation imposed a heightened obligation on Ardenia's NCP to accept the complaint.<sup>214</sup>

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207. *Switzerland-Ph.2* (2004) 27-28; *Estonia-Ph.2* (2008) 33-34; *Portugal-Ph.2* (2007) 38-40.

208. *Decision*, n166.

209. *Decision*, 'Procedural Guidance', n166, C.1.

210. *Ibid.*

211. *VCLT* art 31(3)(b); OECD, *Annual Report on the OECD Guidelines* (2010) 4.

212. Norway NCP, *Final Statement: Kongsberg Automotive* (2009) 4 [Hereinafter 'Norway NCP, *Kongsberg* (2009)']; UK NCP, *BTC Oil Pipeline* (2004); Norway NCP, *Cermaq ASA* (2009).

213. *Compromis*, [23].

214. OECD Watch, *Model National Contact Point* (2007) 16; *Compromis*, [10].

*b. Ardenia's NCP could not reject the complaint on the basis of parallel legal proceedings*

An NCP's discretion to reject a complaint on the basis of 'parallel legal proceedings' is limited to situations where substantively similar issues have been resolved in prior proceedings or where an MNE declines involvement in the NCP process.<sup>215</sup> As investigations into the alleged conduct have not resolved the issues and the relevant MNEs have not declined involvement, Ardenia's NCP could not reject the complaint on this basis.

*c. Ardenia's NCP could not reject the complaint on the basis that the OECD MNE Guidelines do not apply to RRI*

Ardenia's NCP could not reject the complaint on the ground that the *Guidelines* did not apply to RRI. States Parties have interpreted the *Guidelines*' expansive definition of a multinational enterprise<sup>216</sup> to encompass companies exhibiting sustained dependence on a foreign company's supply of goods.<sup>217</sup> As RRI has depended on MDI-supplied coltan for a decade, it is a multinational enterprise to which the *Guidelines* apply. It breached the *Guidelines* by allegedly demanding bribes.<sup>218</sup> Regardless, Ardenia's NCP was required to examine those parts of the complaint concerning MDI.<sup>219</sup>

2. In any event, Ardenia's NCP breached its obligation to respond to the CRBC's meeting request

The Ardenian NCP's obligation to cooperate with other NCPs required it to contact Rigalia's NCP after determining it was the proper forum for the CRBC's complaint.<sup>220</sup> Accordingly, its decision to ignore the CRBC's joint meeting request and failure to otherwise contact Rigalia's NCP breached the *Decision*.

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215. UK NCP, *Unilever* (2010) [12]; Netherlands NCP, *PSPC* (2009) 4; Ireland NCP, *Corrib Gas Project* (2008) 5.

216. *Guidelines*, n167, 12.

217. *Guidelines*, n167, 58; UK NCP, *Afrimex* (2008) [29]-[51]; Australia NCP, *ANZ* (2006) [10]; Netherlands NCP, *Chemical Pharmacy Holland* (2004) 3; OECD, *Annual Report on the OECD Guidelines* (2003) 21-22.

218. *Guidelines*, n167, 29.

219. Australia NCP, *GSL* (2006) [4]; UK NCP, *Hindustan Lever* (2008) [10]; France NCP, *Nam Theun 2* (2005).

220. *Decision*, n166, 1.2; France NCP, *Aspocomp* (2003); Australia NCP, *ANZ* (2006); Netherlands NCP, *NCP Annual Report* (2009) 5.



## PRAYER FOR RELIEF

For the foregoing reasons, the State of Rigalia respectfully requests this Honourable Court to adjudge and declare:

- A. that Ardenia does not have standing in this Court in relation to the strikes in Rigalia or, alternatively, that Rigalia's drone strikes in Rigalia and Ardenia comply with international law, and that an order for cessation is therefore unavailable;
- B. that the attack on Bakchar Valley Hospital is neither attributable to Rigalia, nor internationally wrongful in any way, and that Rigalia has no obligation to investigate or to compensate Ardenia;
- C. that Rigalia's Mavazi ban is consistent with international law; and
- D. that Ardenia has breached the *OECD Anti-Bribery Convention* by failing to investigate and prosecute MDI's alleged corruption and to provide legal assistance to Rigalia, and that Ardenia's NCP breached the *OECD Decision on MNE Guidelines* by failing to respond to the CRBC's complaint.