MYKOLAS ROMERIS UNIVERSITY

FACULTY OF LAW

DEPARTMENT OF INTERNATIONAL LAW

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THE LEGALITY OF THE UNILATERAL USE OF FORCE ON HUMANITARIAN GROUNDS AND THE INTERNATIONAL RESPONSIBILITY FOR THE MISCONDUCT OF THE UNITED NATIONS PEACEKEEPING TROOPS: A HYPOTHETICAL CASE STUDY

Master Thesis

Supervisor

Assoc. Prof. Dr. J. Žilinskas

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INTRODUCTION

Background and limitations of the work. This work is a legal analysis of the hypothetical case concerning the "Operation Provide Shelter", which formed the problem in the Philip C. Jessup International Law Moot Court Competition in 2009. The summary of the facts of the case is provided before the analytical part of the work. The hypothetical case constitutes the framework of the study and thus draws the limits to the research – the scope of the analysis is limited to the extent that is relevant to the facts of the case. Furthermore, this thesis analyzes the hypothetical case from the perspective of the Applicant and presents its claims. Therefore, it is not an objective evaluation of the situation – it is aimed to prove and reason the claims raised by the Applicant. While being subjective, this work does not intend to hide disadvantageous facts or law. Subjectivity here means emphasizing the points favorable to the Applicant and defending against those that are not. Nevertheless, it is aimed to diminish the value of the contrary arguments and to make categorical conclusions; it limits the comprehensiveness of the work. Hence, this thesis provides analysis of the facts and law concerning the problems raised in the hypothetical case, however, the conclusions are prejudiced and determined by the position of the Applicant.

Relevance of the topics. The hypothetical case concerns two main topics - legality of the unilateral (i.e. without the authorization of the United Nations) use of force on humanitarian grounds and the international responsibility for the misconduct[1] of the United Nations peacekeeping troops. The legality of the unilateral use of force on humanitarian grounds has been subject of the discussions within the international community for more than a half of century – ever since it became clear that the system of the United Nations is imperfect and the veto right of the permanent members of the Security Council may prevent the United Nations from responding imminent international threats. The relevance of this topic particularly increased after the genocide in Rwanda in 1994, when the UN Charter's regulation of the use of force led to the indifference of the international community towards the Rwanda crisis and resulted into deaths of up to 1 million people. During the war in Kosovo the international community acted differently – in 1999 the North Atlantic Treaty Organization [hereinafter – the NATO] used military force outside the scheme of the Charter of the United Nations [hereinafter – the UN Charter] to stop the atrocities in Kosovo. However, these actions received controversial reaction and the Member States of the NATO were exposed to the international responsibility. Although the case against them before the International Court of Justice

[1] For the purposes of this work the word "misconduct" is used to define the acts that are alleged to be in breach of the international obligations. Precisely, it is used with regard to the wrongful actions of the military personnel in the peacekeeping mission.

[hereinafter – the ICJ] proved to be inadmissible and did not reach the merits stage, the situation highlighted the contentiousness of the issue of the unilateral use of force on humanitarian grounds. The current crisis in Darfur, continuing for 7 years now and estimating the deaths of around 300 000 people reminds that the UN Charter's regulation of the use of force still fails to respond to the present-day challenges and fails to protect from another humanitarian tragedy.

The relevance of the second problem of the study is also evident. There are currently 16 United Nations peacekeeping missions operating throughout the world. The United Nations does not have its own military personnel, 115 Member States have contributed their troops to these missions. This determines the dual nature of the United Nations peacekeeping missions - while the peacekeeping troops act as a subsidiary organ of the United Nations and thus under its authority, they are contributed by the Member States and those States also retain some control. Therefore, the allocation of the international responsibility for the misconduct of the peacekeeping troops is uncertain. The personnel of the peacekeeping missions often engage into violent acts, primarily sexual misdeeds, manifestly violating the rights of the nationals of the host state. In most cases the individuals guilty for such acts cannot be subjects of the international responsibility and their misconduct has to be attributed either to the United Nations or to the Member State to which troops they belong (or to both of them). The absence of clear rules regulating the allocation of the responsibility in such cases and ambiguities in the interpretation of the existing rules may lead to the impunity for the most brutal international crimes and abuses; such situation is without a doubt unacceptable. Therefore, it is important to elucidate on the international regulation regarding the international responsibility for the misconduct of the United Nations peacekeeping troops.

The value of the work.

- *Theoretical*: this work provides the analysis and interpretation of existing international rules concerning the research problems and determines the application of these rules to the facts of the hypothetical case, thus highlighting the problematic aspects of the research objects;
- *Practical*: this study suggests the legal arguments that support one of the positions to the research problems, i.e. the position, which in this case is beneficial to the interests of the Applicant.

Research problems. Two problems are to be distinguished in this work. ***First***, the legality of the unilateral use of force on humanitarian grounds – its compliance with the prohibition of the use of force, enshrined in the Article 2(4) of the UN Charter and the customary international law. The main issue of controversies here is whether the use of force on the humanitarian grounds, without the authorization of the Security Council and not in response of an armed attack may find justification under the international

law. There is no uniform position in the international law as to the issue – while the moral arguments and the need to protect essential human rights intensify the debates, the legal regulation remains obscure.

The ***second*** problem is the allocation of the international responsibility for the misconduct of the United Nations peacekeeping troops. To establish international responsibility of a state two elements of an internationally wrongful act need to be proven: breach of the international obligations and the attribution of the acts in question to the state concerned. The latter element is the most contentious one in the cases of the international responsibility for the United Nations peacekeeping troops. The essential question is – what acts of the peacekeeping troops are attributable to the United Nations and what acts are attributable to the troops contributing Member States. There is no comprehensive international regulation of this issue and the existing rules are ambiguous.

Research objects. There are two objects of the research: the exceptions to the prohibition of the use of force in the international law and the international responsibility for the misconduct of the United Nations peacekeeping troops.

Research subject matters. With regard to the first object following subject matters will be primarily discussed in this work: the conditions and problematic of the application of the exceptions to the prohibition of the use of force provided in the UN Charter; the validity and credibility of the claims alleging the emergence of a right of humanitarian intervention under the customary international law; the legal significance of the concept of the responsibility to protect and its effect, if any, to the use of force prohibition.

As concerns the second object, the focus will rest upon these subject matters: the content of the international prohibitions of sexual exploitation of children and interference in the internal affairs of a State (the analysis is limited to the extent that is relevant to establish a breach of international obligations in the circumstances of the hypothetical case); the problematic of the attribution of the conduct of the United Nations peacekeeping troops for the purposes of the international responsibility; the peculiarities in the application of the rules concerning legal consequences of the internationally wrongful acts to the facts of the hypothetical case.

Aims and tasks of the work. There are two aims raised in this work. ***First***, to explore what exceptions to the prohibition of the use of force exist under the international law and how do they apply, if at all, to the facts of the hypothetical case. ***Second***, to analyze the international regulation with regard to the international responsibility for the United Nations peacekeeping troops and to determine the application of the existing international legal rules to the facts of the hypothetical case. Following tasks are to be completed to achieve these aims:

1. to examine the possible application to the facts of the hypothetical case of the exceptions to the prohibition of the use of force provided in the UN Charter: the right to self-defense and authorization by the Security Council;

2. to survey the state practice and *opinio juris* of states with regard to the existence of a right of humanitarian intervention under the customary international law and to evaluate their sufficiency to establish a customary rule;

3. to determine the legal significance of the responsibility to protect concept;

4. to identify whether the acts of the peacekeeping troops as described in the hypothetical case amount to the sexual exploitation of children and interference in the internal affairs of the Applicant and thus breach Respondent's international obligations;

5. to establish that for the purposes of the international responsibility for the misconduct of the United Nations peacekeeping troops the effective control test applies;

6. to indicate the main rules imposed by the effective control test;

7. to determine the legal consequences of the internationally wrongful acts claimed to be committed by the Respondent.

Accordingly, two **hypotheses** are raised in this work, which are determined by the position of the Applicant:

- The exceptions provided in the UN Charter do not apply to the facts of the hypothetical case and there are no additional exceptions to this prohibition under the customary international law; therefore, the Respondent breached the prohibition of the use of force.
- The acts of the military personnel of the Respondent amount to the breach of the Respondent's international obligations and are attributable to it, therefore, the Respondent bears international responsibility for these acts and must compensate the injuries caused.

Scope of the previous research and the authorities used in this work. The legality of the unilateral use of force has been analyzed by various scholars and publicists, including the most prominent ones as Sir Ian Brownlie, Bruno Simma, Christine Gray, Simon Chesterman, Noam Chomsky. This problem has been subject to the discussions within the United Nations and resulted into various reports of the Secretary General, resolutions of the General Assembly and the Security Council, as well as statements by the permanent representatives of States to the United Nations. The problem has never been directly addressed

by the ICJ, although, several States briefly touched upon this issue in their written submissions in the *Legality of the Use of Force* case. Despite the active debates within the international community as to this issue, the situation remains ambiguous; no unique solution has been suggested, which is not surprising, since the issue concerns the modifications of the UN Charter and in particular, of the *jus cogens* prohibition of the use of force. The international responsibility for the United Nations peacekeeping missions has been most thoroughly elaborated by the International Law Commission [hereinafter – the ILC] in the reports of the special rapporteurs and more generally – in the Articles on the Responsibility of States for the Internationally Wrongful Acts [hereinafter – the ARS], Draft Articles on the Responsibility of the International Organizations and the commentaries to them. The question of the responsibility for the peacekeeping troops has also been brought up before the European Court of Human Rights. However, there is no comprehensive document addressing this issue and therefore it is subject to uncertainties and ambiguities.

The analysis in this work is relied upon the sources of the international law, including, but not limited to those mentioned above. International law is understood as comprising the sources enumerated in the Article 38 of the Statute of the ICJ: treaties, international customs, general principles of law, judicial decisions and writings of the most highly qualified publicists. Treaties, international customs and general principles of law are regarded as primary sources. The subsidiary sources - judicial decisions and writings of the most highly qualified publicists – are only relied on to interpret the primary sources or to confirm the conclusions drawn from the analysis of the primary sources.

Methods of the research. The main methods used in this work to determine the meaning of international regulation with regard to the research problems and to examine how it applies to the facts of the hypothetical case are theoretical - deduction, systematic analysis, analogy and empirical - document analysis.

Logical structure of the work. The analytical part of the work is divided into two main sections reflecting the two research problems. The first section is divided into four subsections: first, showing the breach of the use of force prohibition; second, proving that no exceptions apply; third, demonstrating that no circumstances precluding the wrongfulness may be invoked and fourth, considering the issue of reparations. The second section is also divided into four subsections: first, dealing with Applicant's right to bring a claim before the Court with regard to the second issue, second and third – proving the elements of the internationally wrongful act (breach of international obligations and attribution), fourth – discussing the issue of reparations.

THE CASE CONCERNING THE "OPERATION PROVIDE SHELTER"
(Summary of the facts)

The military intervention. In August, 2008, Ravisia (the Respondent) intervened in Alicanto (the Applicant) with its armed forces and declared the beginning of "Operation Provide Shelter" – the military operation allegedly to prevent humanitarian catastrophe within Alicanto. By the following week, Camp Tara, the territorial region in Alicanto, housed 6,000 armed Ravisian troops. The Prime Minister of Alicanto regarded these actions as the actions violating the sovereignty of Alicanto and threatening the entire international legal order. Moreover, he denounced this as an act of war. Most importantly, this military intervention was not authorized by the Security Council. When the Ravisian President a week before the intervention requested an emergency Security Council session and proposed to authorize the military intervention in Alicanto, this proposal was defeated by the exercise of two vetos of the Permanent Members of the Security Council. Nevertheless, notwithstanding the position of the Security Council, Ravisian military forces invaded Alicantan territory.

The alleged humanitarian motives of the intervention. To justify the military intervention of 6,000 troops Ravisia invokes humanitarian motives. It relies on the intelligence data, which it solely showed to the Secretary General and claimed the sensitive nature of the data to prevent anyone else from seeing it. This intelligence data, that no one except the Secretary General has seen, allegedly shows the danger of ethnic cleansing in Alicanto. The Secretary General did not verify the reliability of the data and due to the sensitive nature of the data refuses to comment on this issue. Ravisia also relies on the conclusions of the medical NGO, Doctors of the World, which declared that sporadic riots and violence throughout the Alicanto caused hundreds of deaths. Doctors of the World predicted ethnic cleansing on a massive scale. Alicanto does not regard the riots occurring between the two ethnic groups – Dasu and Zawaabi – as systematic violence. Also, there are no indications that Alicantan Government supports one or another group. The Security Council Resolution 6620 urged Alicanto to deal with the humanitarian situation within its borders, however, barely two weeks passed after the Resolution was adopted and Ravisia invaded Alicantan territory with its military forces.

The peacekeeping mission. A day before Ravisian intervention, the United Nations peacekeeping mission in Alicanto was terminated. The United Nations Mission Overseeing Rocian Plateau and Hinterlands [hereinafter – the UNMORPH] was deployed by the Security Council Resolution 5440 from the February 2006 to defuse the tension in Alicanto. This mission was requested by the Prime Minister of Alicanto and its counterpart from a neighboring State New Bennu. The rights and obligations of the peace-

keeping mission were discussed in the Status of Forces Agreement [hereinafter – the SOFA] concluded between the United Nations and Alicanto. As the peacekeeping mission was deployed, Ravisia became its largest participant and the Major-General of Ravisian Army was appointed as the head of the mission. In 2008 Ravisian Prime Minister requested the Security Council to terminate the mandate of the mission because of the unbearable conduct of the Ravisian soldiers participating in the mission. The mission was terminated and the troops were removed. The Security Council refused to satisfy Ravisia's proposal to renew the mandate of the mission.

The offensive radio broadcasting. The Resolution 5440, by which the peacekeeping mission was deployed, *inter alia* underlined the need of the peacekeeping mission to broadcast certain radio transmissions for the purposes of communication between the personnel of the peacekeeping mission. Ravisian troops in the UNMORPH set up a radio station, staffed entirely by Ravisian soldiers. The radio programming eventually expanded to include educational and cultural programs from the U.N. Radio News Service. Much of the content of programming was offensive, as it was by general acknowledgement inconsistent with the orthodox teachings of Tallonic faith – religion, espoused by the people of Alicanto. The radio station drew protests from orthodox religious leaders in Alicanto. It was moreover objected by the Alicantan Government. However, the head of the mission, Ravisian Major General, refused to alter the content of the broadcasting. There are no indications that the Security Council or the Secretary General was aware of this programming and the objections from the Alicantan side – the head of the mission has never informed the United Nations.

The sexual exploitation of Alicantan girls. Human rights NGO's reported about the sexual exploitation of minor Alicantan girls by Ravisian soldiers participating in the peacekeeping mission. The United Nations Secretary-General set up the Commission of Inquiry and this Commission confirmed the allegations of the human rights NGO's and concluded that Ravisian troops had routinely engaged in non-violent sexual relations with Alicantan girls, while off-duty. It found that the girls, whose average age was sixteen, but some of them were as young as thirteen, engaged in sexual acts out of hunger, fear, poverty, or all three, in return for money or food. Alicantan law prohibits sexual relations with persons aged under sixteen. Both Ravisia and Alicanto are the Parties to the Convention on the Rights of the Child.

1. RAVISIAN MILITARY INTERVENTION AS A VIOLATION OF THE PROHIBITION OF THE USE OF FORCE AND THE LEGAL CONSEQUENCES OF THIS VIOLATION

In this part of the work it is aimed to be proven that Ravisia has to remove its military personnel from Alicanto, because its intervention without the authorization of the Security Council and the subsequent presence of Ravisian military troops in the territory of Alicanto amounts to the use of force and has been a violation of the Article 2(4) of the UN Charter and customary international law. For this purpose it is crucial to first establish the violation of the use of force prohibition and then examine, what exceptions to this prohibition exist under the international law and whether they apply to the facts of the hypothetical case. It is intended to show that first, Ravisian intervention cannot be justified under the scheme of the UN Charter and second, that no additional exceptions exist under the customary international law – neither the right of humanitarian intervention, nor the responsibility to protect concept. In the alternative, it is also analyzed, what would be the conditions of a legitimate humanitarian intervention, if it existed under the customary international law, and how they have been fulfilled, if at all, by the Respondent. Further, it is also important to consider the application of the circumstances precluding the wrongfulness, primarily, the circumstance of necessity, because the Respondent is likely to rely on it, claiming it was necessary to use force against Alicanto to stop atrocities there. Finally, the consequences of Ravisia's violation of the use of force will be determined.

1.1. Ravisian intervention as a violation of the Article 2(4) of the UN Charter and the customary international law

To claim Respondent's responsibility first and foremost it is essential to prove that Ravisian military intervention amounts to the use of force and thus breaches the prohibition enshrined in the Article 2(4) of the UN Charter and reflected in the customary international law. Ravisia as a member of the United Nations is obliged under the Article 2(4) of the UN Charter to "refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[2] Territorial integrity should be understood here as inviolability of State's physical territory and the prohibition of any trespassing without the permis-

[2] Charter of the United Nations, Article 2(4).

sion of the State concerned[3]. The ICJ has held that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations".[4] Moreover, the phrasing of the Article 2(4) of the UN Charter ("against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations") does not restrict the scope of the prohibition, i.e. it is not necessary to indicate and prove, whether the use of force in question breached territorial integrity, political independence of a State concerned or the purposes of the United Nations. Preparatory work of the UN Charter is sufficiently clear that this phrasing was not intended to have a restrictive effect.[5] On the contrary, it is an "absolute all-inclusive prohibition; the phrase "or in any other manner" was designed to ensure that there should be no loopholes."[6] Therefore, Ravisian military intervention with 6,000 troops breaches Article 2(4) of the UN Charter.

Furthermore, Ravisian military intervention violates the customary rule of the non-use of force. The ICJ held in the *Nicaragua case* that the fact the rule is incorporated in the treaty, does not mean the rule ceases to exist under the customary international law. The ICJ was of the opinion that "even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability."[7] Further in that case the ICJ specifically recognized that the use of force prohibition is as well a rule of customary international law despite its incorporation among the principles of the UN Charter.[8] Thus, Ravisian military intervention breached the non-use of force rule, both embedded in the UN Charter and existing under the customary international law.

Moreover, the subsequent presence of Ravisian armed troops in the territory of Alicanto is a continuous violation of the international law. The use of force prohibition is elaborated in the General Assembly Resolution 2625, *The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, and the Resolution declares that "[t]he territory of a State shall not be the object of military occupation resulting from

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3 ICJ, *Corfu Channel* (United Kingdom v Albania) (Merits) 1949, I.C.J. Reports 4. P. 33.

4 *Ibid,* P. 35.

5 Brownlie I. *Principles of Public International Law*. - Oxford: Oxford University Press, 2003, 6th edn. P. 700.

6 Chesterman S. *Just War or Just Peace? Humanitarian Intervention and International Law.* - Oxford: Oxford University Press, 2001. P.49, citing the Statement by a delegate of the United States to the San Francisco Conference, 6 UNCIO 335, Summary Report of Eleventh Report of Committee I/1 (4 June 1945).

7 ICJ*, Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) 1986 I.C.J. Reports 14, para. 175.

8 *Ibid*, para. 190.

the use of force in contravention of the provisions of the Charter."[9] Thus, the legality of the military occupation is dependent upon the legality of the acts from which the occupation results. Since Ravisian military intervention violated the non-use of force rule, the subsequent occupation of a part of Alicantan territory has also been illegal. Consequently, Ravisian military intervention and the continuous presence of its forces in the Alicantan territory have been violations of the prohibition of the use of force.

1.2. Ravisian intervention and the exceptions to the prohibition of the use of force

The use of force prohibition is subject to the exceptions. Even if the force is used within the meaning of the Article 2(4) of the UN Charter, it may still be justified. The purpose of this subsection of the work is to show that Ravisian military intervention cannot be justified under the international law. First, it cannot be justified by the exceptions to the prohibition of the use of force provided in the UN Charter – it was neither based on the self-defense, nor authorized by the Security Council. Second, it cannot be justified under the customary international law, because there are no exceptions under the customary international law to the prohibition of the use of force in addition to those provided by the UN Charter. Alternatively, the conditions of a legitimate humanitarian intervention are considered and it is aimed to prove that even if humanitarian intervention existed as a customary right, its legality would be dependent on the certain conditions, which haven't been met by the Respondent.

1.2.1. Ravisian intervention: no justifications under the scheme of the UN Charter

The UN Charter foresees two exceptions to the prohibition of the use of force: the right of self-defense and enforcement measures undertaken by the Security Council acting under the Chapter VII of the UN Charter.[10] None of these exceptions provides a legal basis for the military intervention in question. While it is evident that the conditions of a legitimate self-defense have not been fulfilled in this case, the authorization by the Security Council is more controversial. It is clear from the facts of the case that there was no explicit authorization. However, the contentious issue that will be focused on here is whether the international law recognizes the possibility of the implied authorization by the Security Council and even

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[9] UNGA Res 2625, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (24 October 1970), UN Doc A/8082.

[10] Charter of the United Nations, Articles 42 and 51.

if so, whether it was present in the Resolution 6620, which urged Alicanto to improve humanitarian situation within its borders and encouraged other States to stay vigilant with regard to it.

1.2.1.1. Ravisia's failure to satisfy the conditions of a legitimate self-defense

Ravisian intervention was not based on the right of self-defense and the essential conditions for the exercise of this right have not been fulfilled. Article 51 of the UN Charter foresees a right of self-defense as an exception to the prohibition of the use of force in the cases when "an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." However, Ravisia has never relied on the right of self-defense to justify the intervention in Alicanto.

Furthermore, the conditions of a legitimate self-defense have no been fulfilled. First and foremost, the State is entitled to the right of self-defense when "an armed attack occurs" against it. [11] As the ICJ held in the *Nicaragua case*, "[i]n the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack."[12] However, no armed attack against Ravisia occurred. Secondly, Article 51 of the UN Charter foresees that "[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council". The ICJ has held that "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence."[13] Ravisia has never informed the Security Council about exercising this right against Alicanto. Therefore, the right of self-defense is inapplicable and does not justify Ravisian intervention.

1.2.1.2. The absence of the authorization by the Security Council

Ravisian intervention was not authorized by the Security Council neither expressly, nor implicitly. First, the express provisions of the Security Council Resolution 6620 do not authorize Ravisia to intervene in Alicanto. On the contrary, the Resolution 6620 emphasizes "the commitment of all Member States to respect the sovereignty, political independence and territorial integrity of both Alicanto and New Bennu".

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11 Charter of the United Nations, Article 51.

12 *Supra note* 7, para. 195.

13 *Ibid*, para. 200.

This phrasing, which is identical to the Article 2(4) of the UN Charter, is a reaffirmation of States' obligation to refrain from the use of force. It clearly shows that the Security Council had no intention to provide authorization to use the force against Alicanto and it did not do so.

Secondly, there is no implied authorization in the Resolution 6620, because the Security Council cannot provide the authorization to the military intervention implicitly and even if it could, Resolution 6620 contains no implied authorization. The implied authorization for the military intervention is not possible, because, as the Permanent Court of International Justice [hereinafter – the PCIJ] clarified in the *Lotus case*, "[r]estrictions upon the independence of States cannot (...) be presumed."[14] Furthermore, the use of force prohibition is a norm *jus cogens* and exceptions to it should not and cannot be interpreted broadly. This position is supported by the international community: the use of the doctrine of implied authorization by the Security Council has not been accepted by the international community, even though the United States of America [hereinafter – the USA] and the United Kingdom [hereinafter – the UK] in Iraq in 1993 and 1998, the NATO in Kosovo and the USA, the UK, and Australia in the Operation Iraqi Freedom, invoked this basis to justify military interventions on this basis.[15] In addition, those scholars that consider implied authorization admissible, hold that the consent of the Security Council in such cases "must be deduced with absolute certainty by the behaviour of the Security Council … the Security Council must be seen unequivocal through its behaviour."[16] The Security Council's refusal to authorize Ravisian military intervention in Alicanto clearly evidences that there was no intention of the Security Council to provide authorization for the use of force.

On the alternative, it is important to consider, whether the Resolution 6620 contains an implied authorization in any case. The ICJ explained in *Namibia case*, the Security Council Resolutions have to be interpreted "having regard to … all circumstances that might assist in determining the legal consequences."[17] There are at least two circumstances, pointing out that Resolution 6620 does not contain implied authorization. First, immediately after the adoption of the Resolution the Security Council rejected Ravisia's request to authorize the military intervention to restore order in Alicanto. Second, the Secretary General in his Report after the adoption of the Resolution in question, *inter alia*, recommended the Security Council to consider "the delegation of Chapter VII authority to a multilateral operation, authorizing R-

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14 PCIJ, *S.S "Lotus"* (France v. Turkey), PCIJ Series A, No. 10 (1927) P. 18.

15 Gray C. *International Law and the Use of Force.* - Oxford: Oxford University Press, 2004. P. 264-281.

16 Villani U. The *Security Council's Authorization of Enforcement Action by Regional Organizations* // Max Planck Yearbook of United Nations Law, 2002. Volume 6. P. 543.

17 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory opinion), 1971 I.C.J. Reports 16. P.53, para. 114.

FAN to carry out these operations". If the Resolution 6620 provided the implied authorization, there would be no need for the Secretary General to recommend the Security Council to consider this issue one more time. Consequently, the Security Council did not authorize Ravisia to intervene in Alicanto, on the contrary, it emphasized States' obligation to respect Alicanto's sovereignty, political independence and territorial integrity and rejected Ravisia's request for the authorization of the military intervention.

1.2.2. Ravisian intervention: no justifications under the customary international law

Having examined in the context of the hypothetical case the exceptions to the prohibition of the use of force provided in the UN Charter, it is crucial to evaluate the legal significance of other exceptions allegedly existing under the customary international law and for the purposes of this thesis to determine that customary international law provides no additional exceptions to those, foreseen in the UN Charter. The ICJ in the *Nicaragua case* held that "[t]he United Nations Charter … by no means covers the whole area of the regulation of the use of force in international relations."[18] Apparently, the ICJ regarded the UN Charter's provisions as capable of change over time through state practice.[19] However, the provisions of the UN Charter concerning the regulation of the use of force have not changed. The Secretary-General Kofi Annan confirmed that "[o]nly the Charter provides a universally accepted legal basis for the use of force."[20]Thus, first, the responsibility to protect concept is not a part of customary international law and does not modify the prohibition of the use of force in the international relations. Second, the right of humanitarian intervention has not emerged under the customary international law. Finally and alternatively, it will be shown that even if the right of humanitarian intervention was a part of the customary international law, it would be subject to certain conditions for the humanitarian intervention to be legitimate. However, the Respondent failed to fulfilled these conditions and therefore can in no event invoke the right of humanitarian intervention to justify its military intervention.

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[18] *Supra note* 7, para. 176

[19] *Supra note* 15, P. 7.

[20] Annan K. *Preventing War and Disaster: A Growing Global Challenge*// Annual Report on the Work of the Organization (1999) UN Doc Supplement No.1 A/54/1, para. 66.

1.2.2.1. Ravisian intervention and the responsibility to protect concept

The responsibility to protect concept is not a part of customary international law and does not modify the provisions of the UN Charter, in particular Article 2(4). Although the Security Council recognized the doctrine of the responsibility to protect in 2006[21] and the concept has often appeared on the United Nations agenda ever since[22], it is not a part of customary international law for the elements of a custom are not present. This concept is very recent, therefore, there are no relevant examples in the state practice and there is no *opinio juris* of states that would confirm States' belief to regard this rule as mandatory. Thus, the responsibility to protect concept is not, at least at this stage, a rule of customary international law. Its legal status will depend on how comprehensively this new concept is implemented and applied in practice, as well as recognized in principle, in the years ahead.[23]

Furthermore, the responsibility to protect concept does not and has no intention to modify the provisions of the UN Charter. The responsibility to protect concept reiterates the regulation of the use of force as provided in the UN Charter and adds no other exception to the use of force prohibition. It encourages the States and international organizations "to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII".[24] This phrasing at most sharpens the wording of the Article 42 on authorization for the Security Council to resort to force.[25] The purpose of the responsibility to protect is to encourage the states to accept the common responsibility for humanitarian catastrophes in the world and for this reason to make them contribute to the prevention of such catastrophes, support the actions of the United Nations in responding them and help to restore peace and security in the post-conflict regions.[26] Therefore, responsibility to protect does not count as an

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21 UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674.

22 Report of the Secretary General, *Implementing the Responsibility to Protect* (12 January 2009), UN Doc A/63/677; UNGA Res 63/308, *The Responsibility to Protect* (7 October 2009), UN Doc A/Res/63/308.

23 Evans G. *Statement to United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect* (23 July 2009, New York)// available at http://www.un.org/ga/president/63/interactive/protect/evans.pdf; last accessed 1 May 2010.

24 UNGA Res 60/1, 2005 *World Summit Outcome*, (24 October 2005), UN Doc A/Res/60/1, para. 139.

25 Noam Chomsky, *Statement to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect* (23 July 2009, New York)// available at http://www.un.org/ga/president/63/interactive/protect/noam.pdf; last accessed 13 March 2010.

26 The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect Report*// The International Development Research Centre (Otawa, December 2001)// available at http://responsibilitytoprotect.org/ICISS%20Report.pdf; last accessed May 2 2010.

exception to the prohibition of the use of force.

Moreover, Ravisia cannot rely on this concept, since it failed to cooperate with the United Nations and thus did not satisfy the conditions of the responsibility to protect. Provisions of the 2005 *World Summit Outcome Document* state that the responsibility to protect determines only "collective action … through the Security Council, in accordance with the Charter."[27] Requirement of the right authority, which is the Security Council or when it fails to act – the General Assembly, is determined as one of the core principles of this concept.[28] Thus, the concept complies with the recognized rules that the Security Council has the sole competence to "determine the existence of any threat to the peace … and to … decide what measures shall be taken"[29] and in cases when it fails to act "because of lack of unanimity … the General Assembly shall consider the matter."[30] Neither a State itself, nor a group of States, nor any regional organizations are competent to claim themselves this right. Therefore, even if the responsibility to protect concept was a part of the customary international law, Ravisia, acting with disregard to the position of the Security Council, cannot rely on the responsibility to protect concept to justify its military intervention.

1.2.2.2. Ravisian intervention and the alleged customary right of humanitarian intervention

Ravisia's military intervention in Alicanto cannot be justified under the right of humanitarian intervention for two main reasons. First, such right does not exist under the customary international law. Secondly and alternatively, Ravisia did not meet the necessary requirements for the alleged humanitarian intervention to be legitimate.

1.2.2.2.1. The premature claims of the customary right of humanitarian intervention

The UN Charter does not recognize an exception of humanitarian intervention to the prohibition of the use of force. It is claimed therefore that this right exists under the customary international law. The ICJ specified in *North Sea Continental Shelf case* that to prove the existence of a custom "two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory … The

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27 *Supra note* 24.

28 *Supra note* 26, P. XII-XIII.

29 Charter of the United Nations, Article 39.

30 UNGA Res 377 (3 November 1950), UN Doc A/Res/377 (V).

need for such a belief … is implicit in the very notion of the *opinio juris sive necessitatis*."[31] Moreover, to establish customary law, state practice has to be "uniform, extensive and representative in character"[32] Thus, to prove the existence of humanitarian intervention under the customary international law it must be shown that this right amounts to the "evidence of a general practice accepted as law"[33], hence, uniform, extensive, and representative state practice backed by *opinio juris* of the states has to be proven.

However, the established state practice and the *opinio juris* of states do not evidence the existence of a right of humanitarian intervention under the customary international law. There is no general recognition of a unilateral right of humanitarian intervention – in the cases of unilateral interventions in the state practice humanitarian motives were either not claimed by the interveners, or not accepted by the international community as a justification for the use of force. Following survey of state practice confirms this:

- In 1960 Belgium sent its troops to the newly independent Congo. Only France claimed that the mission allegedly to protect European residents "is intervention on humanitarian grounds"[34]. Neither Belgium itself, nor any other state relied on this basis. Therefore, it is often argued that this intervention was more out of the concern for future access to the copper-rich province than any genuinely "humanitarian" concern.[35]

- In 1965 the USA troops intervened in the Dominican Republic after the USA Embassy was informed that the newly installed military junta was not able to guarantee the safety of American nationals. This intervention is considered as protection of the nationals abroad rather than humanitarian intervention. Moreover, the words of the USA President confirm the existence of political rather than humanitarian aims: "The American nations can not, must not, and will not permit the establishment of another Communist government in the Western Hemisphere."[36]

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[31] ICJ, *North Sea Continental Shelf* (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands,) 1969 I.C.J. Reports 3. P.43, para. 77.

[32] International Law Association, Final Report of the Committee on Formation on Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law* (London Conference, 2000) P.20// available at http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376; last accessed 15 November 2009.

[33] Statute of the International Court of Justice, Article 38(1)(b).

[34] UNSC Official Records Fifteenth Year 873dt meeting (13/14 July 1960) UN Doc S/PV.873 (1960) para. 144.

[35] *Supra note* 6, P. 66.

[36] Friedmann W. *General Course in Public International Law*// 127 Recueil des Cours 190 (1970), citing President Lyndon B. Johnson Statement of 2 May 1965.

• In 1971 India intervened in the East Pakistan allegedly impelled by brutal events there and *inter alia* asserted humanitarian motives. However, humanitarian concerns were not accepted by the other states as justifications. States were of the position that "[t]he fact that the use of force in East Pakistan … can be characterized as a tragic mistake does not, however, justify the actions of India in intervening militarily."[37]

• In 1976 Israel intervened in the Uganda to free its nationals taken as hostages by the Palestinian terrorists at Entebbe Airport. Israel did not claim humanitarian motives, but the "right of a State to take military action to protect its nationals in mortal danger."[38] Thus, this is another instance of the protection of the nationals abroad rather than humanitarian intervention.

• In 1978 Vietnamese troops invaded Kampuchea and overthrew the Pol Pot's Government. However, neither the acting state, nor the few states that supported this intervention, referred to humanitarian intervention.[39] Moreover, the General Assembly passed a Resolution "[d]eeply regretting the armed intervention by outside forces in the internal affairs of Kampuchea".[40] In addition, France and the UK claimed that violations of human rights could not justify the use of force.[41]

• In 1983 the USA intervened in Grenada, however, it did not claim the right of humanitarian intervention in relation to its actions. Moreover, the General Assembly deplored the events in Grenada.[42]

• In the 1989-90 USA operation "Just Cause" against the Noriega Regime in Panama humanitarian issues were beyond the installation of democratic regime.[43] Moreover, the General Assembly strongly deplored this intervention.[44]

• In 1990 the Economic Community of West African States [hereinafter – the ECOWAS] deployed a joint military intervention force in Liberia for humanitarian objectives. However, this is not an instance of unilateral humanitarian intervention, because the Security Council was involved, as it retrospectively

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37 UNSC Official Records Twenty Sixth Year 1611th meeting (12 December 1971) UN Doc S/PV.1611 para. 19.

38 UNSC Official Records Twenty First Year 1939th meeting (9 July 1976) UN Doc S/PV.1939 para. 106.

39 *Supra note* 6, P. 79-81.

40 UNGA Res 34/22 (14 November 1979), UN Doc A/Res/34/22.

41 *Supra note* 15, P. 32.

42 UNGA Res 38/7 (2 November 1983) UN Doc A/RES/38/7.

43 *Supra note* 6, P. 83.

44 UNGA Res 44/240 (29 December 1989) UN Doc A/RES/44/240.

acted under the Chapter VII of the UN Charter.[45] Moreover, the interim President of Liberia Amos Sawyer consented to the intervention, which was significant for the Security Council to act.[46]

- The "no fly zones" established in 1991 and 1992 were designed to prevent the Iraqi Government from effective military action against its own citizens. Iraqi compliance was supervised by patrol flights of the USA, the UK, and France. The interveners relied on the basis of self-defense and the alleged implied authorization by the Security Council Resolution 688 rather than the right of humanitarian intervention. The humanitarian intervention has never been relied on by the USA and never since 1992 by the UK.[47] Moreover, this intervention was condemned by other states, e.g.: "no fly zones in Iraq run counter to the UN Charter and the norms governing international relations."[48]

- In 1997 the ECOWAS performed military action against Sierra Leone to restore the government of the President Kabbah. These actions were retrospectively authorized by the Security Council.[49] Therefore, this is not an instance of a unilateral humanitarian intervention.

- In 1999 the NATO forces intervened in the Federal Republic of Yugoslavia [hereinafter – the FRY] without the authorization by the Security Council. Although the Security Council passed resolutions affirming that the situation in Kosovo constitutes a threat to the peace and security in the region, it did not authorize military force.[50] This intervention being the most recent intervention on humanitarian grounds needs more elaboration, focusing on the reactions of States. They confirm that the States do not regard humanitarian intervention as a legal right. The NATO intervention in Kosovo was condemned by the international community and reflects the current position of the community towards the alleged right of humanitarian intervention. The Russian representative in the Security Council considered that "[a]ttempts to justify the NATO strikes by a need to prevent humanitarian catastrophe are completely groundless. Such

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45 UNSC Res 788 (19 November 1992) UN Doc S/RES/788 (1992).

46 *Supra note* 6, P. 136-137.

47 Krisch N. *Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council*// 3 Max Planck Yearbook of United Nations Law. 1999. P. 73-79.

48 *Supra note* 6, P. 77, citing *Statement of the Spokesman of the Foreign Ministry of China*, 29 September 1998.

49 UNSC Res 1232 (8 October 1997) UN Doc A/RES/1132 (1997).

50 UNSC Res 1199 (23 September 1998) UN Doc S/RES/1199 (1998); UNSC Res 1203 (24 October 1998) UN Doc S/RES/1203 (1998); UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

attempts are not based on the UN Charter or other universally recognized norms of international law"[51] China's representative opposed the use or threat of use of force in international affairs, power politics of the "strong bullying the weak", and interference in the internal affairs of others - under whatever pretext or in whatever form.[52] The Indian representative stated: "[t]he attacks against the Federal Republic of Yugoslavia . . . are in clear violation of Article 53 of the Charter … we have been told that the attacks are meant to prevent violations of human rights. Even if that were to be so, it does not justify unprovoked military aggression."[53] France, Portugal, Italy and Canada did not give legal justifications for the NATO action at the FRY proceedings. The Netherlands specified its position in the Dutch Report on Humanitarian Intervention: "In the case of the intervention in the Kosovo crisis… [a]lthough there was a consensus on the need for intervention, each Member State had its own views regarding the justification for it".[54] In addition, Dr. Javier Solana, the then Secretary-General of the NATO, did not refer to any legal justifications and only asserted that the NATO had "a moral duty" to use force to stop atrocities in Kosovo.[55] Moreover, the Netherlands concluded that there are no signs of the emergence of a right of humanitarian intervention in the customary law "for no opinio iuris appears to be materializing, particularly given the differing views of major countries such as Russia, China and India.[56] The Secretary-General generalized the reactions of the states to the NATO actions in Kosovo by expressing his disapproval to the unilateral resort to force without the authorization of the Security Council: "Differences within the Council reflected the lack of consensus in the wider international community … but what is clear is that enforcement actions without the Security Council authorization threaten the very core of the international collective security system founded on the Charter of the United Nations. Only the Charter provides a universally accepted legal basis

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[51] Statement in Security Council meeting *"NATO military action against FRY"* by Sergey Lavrov, Permanent Representative of the Russian Federation to the United Nations (March 24, 1999)// available at http://www.un.int/russia/statemnt/sc/1999/99_03_24.htm#english; last accessed 1 January 2009.

[52] UNSC Press Release *NATO action against Serbian military targets prompts divergent views as Security Council holds urgent meeting on situation in Kosovo* (24 March 1999) UN Doc SC/6657.

[53] Statement in Security Council meeting *"NATO military action against FRY"* by Mr. Kamalesh Sharma, Permanent Representative of India to the United Nations (March 24, 1999)// available at http://www.un.int/india/ind110.htm; last accessed 3 December 2009.

[54] Report of the Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law, *Humanitarian Intervention* (The Hague, Netherlands, 2000)// available at http://www.aiv-advice.nl; last accessed 3 December 2009.

[55] Dr Javier Solana, Secretary General of NATO "*Press Statement*" (Media Release, 23 March 1999)// available at http://www.nato.int/docu/pr/1999/p99-040e.htm; last accessed 26 December 2009.

[56] *Supra note* 54.

for the use of force."[57] Finally, in the Ministerial Declaration produced by the Meeting of Foreign ministers of the Group of 77 (the coalition of the developing nations at the United Nations) held three months after the NATO action the ministers "rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or international law"[58] This represents the opinion of 132 states. Those international lawyers who espouse the right of humanitarian intervention, few in number, tend to ignore the practice of States, including the opinion of 132 states quoted above. Instead of the practice of States generally, reliance is placed upon a number of ambiguous episodes.[59]

To sum it up, there have been only a few contentious episodes where the right of humanitarian intervention was claimed and even in those cases such justification was not accepted by the international community. Thus, a State may not without the authorization of the Security Council use force to ensure the respect for human rights. This was also stated in the *Nicaragua case*, where the ICJ held that while a State "might form its own appraisal of the situation as to respect for human rights … the use of force could not be the appropriate method to monitor or ensure such respect."[60]

Moreover, the prohibition of the use of force is by general acknowledgment a *jus cogens* norm[61] and therefore it can only be modified by a subsequent norm having the same character.[62] Given the exclusive character of the *jus cogens* norms, the emergence of such a norm under the customary international law has to be evidenced by the extremely widespread and consistent state practice backed by a certain and uniform *opinio juris.* Obviously, a few ambiguous episodes from the state practice, which were in most cases met by a strong condemnation of the international community, do not evidence the emergence of a rule of humanitarian intervention in the international law.

1.2.2.2.2. Ravisia's failure to satisfy the conditions of a legitimate humanitarian intervention

In the alternative to the assertion that there is no right of humanitarian intervention under the international law, it is important to consider, what conditions would apply for a legitimate humanitarian inter-

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57 *Supra note* 20.

58 The Group of 77, *Ministerial Declaration adopted in the Twenty-third Annual Meeting of the Ministers for Foreign Affairs* (New York, 24 September 1999), para. 69.

59 *Supra note* 5, P. 712.

60 *Supra note* 7, P. 134, para. 268.

61 *Ibid*, para.190; ILC, *Draft Articles on the Law of Treaties*, 18th Session (1966), II ILC Yearbook. P. 247-9, 261.

62 *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980), UNTS vol 1155. P. 331 Article 53.

vention, if it existed under the customary international law. These conditions necessarily include the existence or prospect of the large-scale atrocities (e.g. genocide or crimes against humanity), collective action, proportionality, the exhaustion of all peaceful means of resolving the situation.[63] The aforementioned conditions have not been met by the Respondent.

First, there was no genocide or crimes against humanity in Alicanto. It is well-established in the international law that the party asserting a particular fact has to prove it.[64] Therefore, Ravisia, bears the burden of proof with regard to the existence of genocide or crimes against humanity in Alicanto. The ICJ has explained that where the offenses alleged are of exceptional gravity (and the allegations of ethnic cleansing are clearly such), they must be proven by the production of fully conclusive evidence, i.e. the standard of proof applying in such cases is beyond the reasonable doubt.[65] In addition, the ICJ laid down several rules for the assessment of evidences, specifically, that in the assessment of evidence, it will treat materials emanating from a single source with caution and will favor contemporaneous evidence from persons with direct knowledge.[66] These are the rules that have to be applied.

Genocide is defined as *inter alia* killing of the members of a protected group or deliberately inflicting on a group conditions of life calculated to bring about its physical destruction, "with intent to destroy it in whole or in part."[67] There are no indications in the facts of the hypothetical case of the intent to commit genocide. Furthermore, a crime against humanity is the multiple commission *inter alia* of murder or the forcible transfer of population "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[68] The increase in criminality in Alicanto has been neither widespread, nor systematic. Doctors of the World's allegation of violent deaths and the prediction of the

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63 Stromseth, J. *Rethinking Humanitarian Intervention: The Case for Incremental Change*// Holzgrefe & Keohane (eds.). *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*. - Cambridge: Cambridge University Press, 2003, 1st edn. P. 250 ff.

64 *Supra note* 7, para.101; ICJ, *Request for Interpretation of the Merits of 20 November 1950 in the Asylum Case* (Colombia v Peru), 1950, I.C.J. Reports 266, P.281; ICJ, *Rights of Nationals of the United States of America in Morocco* (France v United States of America), 1952, I.C.J. Reports 176, P. 191.

65 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) (Merits), 2007, para. 209.

66 ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) (Judgment), 2002, I.C.J. Reports, para. 61.

67 *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted December 1948, entered into force January 1951), 78 UNTS 277, Article 2.

68 *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90, Article 7.

prospect of ethnic cleansing in Alicanto is unreliable, because these contentions have not been independently verified and, moreover, are based on the evidence emanating from a single source and have to be, therefore, assessed with particular caution.

Moreover, Ravisian military action involves solely Ravisian troops operating under Ravisian command structures. No state or international organization has provided military, financial, logistical or any other kind of support.[69] Also, the intervention has not been in any way supported by the United Nations. Therefore, the requirement of collectivity has not been met in this case.

Furthermore, Ravisian intervention was disproportional. Ravisia intervened in Alicanto with 6,000 troops, which is at least three times more than the troops of the UNMORPH peacekeeping mission which operated in Alicanto prior to the Ravisian intervention. The disproportionality also gives doubts about the humanitarian motives of the intervention.

Finally, Ravisian military intervention was not used as the last resort. Ravisia did not pursue any peaceful alternatives, e.g. economic or diplomatic sanctions, suspension of the membership of Alicanto or expulsion from the regional organization R-FAN, to which they both belong. Also, it did not request the General Assembly to consider the issue after the Security Council refused to authorize the intervention. As Ravisia failed to do that, its intervention by no means can be regarded as the last resort.

The conclusions of this subsection are that the exceptions to the prohibition of the use of force provided in the UN Charter do not apply in this case, the responsibility to protect concept does not affect the prohibition of the use of force and the right of humanitarian intervention has not emerged under the customary international law, moreover, it in any case would be subject to certain conditions, which haven't been met by Ravisia. For all these reasons, Ravisia's breach of the prohibition of the use of force cannot be justified under the international law.

1.3. The inapplicability of the circumstances precluding the wrongfulness

The last point that needs to be considered for the purpose of establishing Ravisia's responsibility for its military intervention is the application of the circumstances, precluding the wrongfulness, primarily, the circumstance of necessity. Even though the Respondent may claim that the intervention was necessary to stop human rights violations within Alicanto, the circumstance of necessity cannot be invoked for it is not applicable to the use of force. According to the ARS, necessity may not be invoked as a circumstance,

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[69] *Supra note* 7, para. 115.

precluding the wrongfulness, if the international obligation in question excludes the possibility of invoking necessity.[70] Article 2(4) of the UN Charter provides no possibility to justify the use of force on the basis of necessity. This is confirmed by the ILC: "The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by Article 25."[71]

Furthermore, as the prohibition of the use of force is a *jus cogens* norm, none of the circumstances precluding the wrongfulness can be invoked to justify the military intervention. Article 26 of the ARS states that "[n]othing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law".[72] Thus, Ravisian military intervention cannot be justified by invoking necessity or any other circumstance precluding the wrongfulness.

1.4. The legal consequences of Ravisia's illegal use of force

Ravisia violated its international obligation to refrain from using the force in the international relations, thus committing an internationally wrongful act and this has legal consequences under the international law. Article 30 of the ARS states that a State responsible for internationally wrongful act has an obligation to cease the act in the first place[73], and in accordance with the Article 31 of the ARS, to provide full reparation for the injury caused. It was also held by the PCIJ that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[74] Since Ravisia has violated the prohibition of the use of force and continues this violation by keeping its armed forces in Alicanto, it has an obligation to remove its military personnel from Alicanto and to pay reparations for the injury caused.

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70 ILC, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001)// Yearbook of the International Law Commission, 2001, vol. II (Part Two), Article 25(2)(a).

71 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* Report of the International Law Commission on the work of its fifty-third session// Yearbook of the International Law Commission, 2001, vol. II, Part Two. P. 84.

72 *Supra note* 70, Article 26.

73 *Ibid,* Article 30.

74 PCIJ, *Factory at Chorzow* (Germany v. Polish Republic) PCIJ Series A No. 17 (1928) P. 29.

Following conclusions should be emphasized at the end of this part of the work. Ravisian intervention and the subsequent presence of its military personnel in Alicanto amount to the use of force within the meaning of the Article 2 (4) of the UN Charter and breach this Article, as well as the customary international law. No justification for this violation is to be found in the UN Charter, because there was no authorization by the Security Council and the conditions for a legitimate self-defense have not been met. The evaluation of the legal significance of the responsibility to protect concept affirmed that this concept does not intend to provide a basis for a unilateral intervention for it stresses the sole authority of the United Nations to authorize the use of force. Furthermore, the survey of the state practice confirmed that it is premature to claim the existence of a right humanitarian intervention. On the alternative, it has been shown that in any case a legitimate humanitarian intervention should be subject to certain requirements and these requirements have not been met by the Respondent. Therefore, it in any case cannot invoke humanitarian intervention to justify its actions. In addition, the Respondent may not rely on the necessity or any other circumstance precluding the wrongfulness of a violation of the international law, because these circumstances are inapplicable to the use of force prohibition. Lastly, having violated the prohibition of the use of force the Respondent is obliged under the international law first, to remove its military personnel from the territory of the Applicant and second, to pay reparations for the injury caused.

2. RAVISIA'S INTERNATIONAL RESPONSIBILITY FOR THE MISCONDUCT OF RAVISIAN MILITARY PERSONNEL IN THE UNITED NATIONS PEACEKEEPING MISSION AND THE LEGAL CONSQUENCES OF THE VIOLATIONS

In this part of the work it is aimed to show that Ravisia bears international responsibility for the offensive radio broadcasting and the engagement into sexual acts with minor Alicantan girls committed by its military troops while acting under the mandate of the United Nations. The central point in this part is the establishment of the two elements of an internationally wrongful act - breach of the international obligations and attribution to the Respondent State[75], because internationally wrongful act entails international responsibility.[76] However, it is important to first discuss the pre-conditional matter and to show that the Applicant has a right to bring a claim on behalf of its nationals that have been injured by the Respondent. Lastly, the legal consequences of the internationally wrongful act will be discussed – reparations and their appropriate form in the circumstances of the hypothetical case.

2.1. The right of Alicanto to bring a claim before the ICJ on behalf of the Alicantan people

Alicanto has a right to bring a claim before the ICJ defending the interests of the injured Alicantan people, because a State has a right to exercise diplomatic protection on behalf of its nationals.[77] As the PCIJ explained in the *Mavrommatis Palestine Concessions case*, "by taking up the case of one of its subjects and by resorting to … international judicial proceedings on his behalf, a State is in reality asserting its own right"[78] Since Alicantan nationals were injured in this case, Alicanto has a right to bring a claim to defend their rights and to seek for remedies.

Although the exhaustion of the local remedies is a standard requirement for the exercise of the diplomatic protection, this requirement does not apply in this case. It applies only when there is a "relevant connection" between the injured individual and the responsible State. As the ILC pointed out in its commentary to the *Articles on Diplomatic Protection*, to find if there is such a relevant connection, a "tribunal

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75 *Supra note* 70, Article 2.

76 *Ibid*, Article 1.

77 ILC, *Draft Articles on Diplomatic Protection with commentaries*// Yearbook of the International Law Commission, 2006, vol. II (Part Two), Article 2.

78 PCIJ, *Mavrommatis Palestine Concessions* (Greece v. U.K) PCIJ Series A No.2 (1924) P. 12.

will be required to examine…, whether the injured individual was present … in the territory of the host State".[79] The rights of the Alicantan nationals were injured during the peacekeeping mission in Alicanto, thus, obviously, Alicantan nationals were in the territory of Alicanto and not Ravisia. Failing the "relevant connection", the requirement of the exhaustion of local remedies does not apply. Therefore, Alicanto may lawfully exercise diplomatic protection and bring a claim before the ICJ on behalf of its injured nationals.

2.2. The broadcasting of an offensive radio programming and the sexual exploitation of Alicantan children as violations of the international law

For the purposes of the international responsibility in the first place it has to be established that the acts in question entail a breach of international obligations.[80] Therefore, it is necessary to identify what international obligations have been breached by the misconduct of Ravisian soldiers – how does the engagement into sexual acts with minor Alicantan girls and the offensive radio broadcasting in Alicanto qualify under the international law and what violations they constitute.

2.2.1. The broadcasting of the radio programming notwithstanding the position of the host state as a violation of the international law

Broadcasting of the radio programming in Alicanto is the exercise of power in Alicantan territory, therefore, Ravisia has to point to a rule of the international law permitting it to do so and act in accordance with it. As the PCIJ explained in the *Lotus case*, "the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State."[81] Therefore, Ravisia, to legitimately radio-broadcast in Alicanto, needed a permissive rule of the international law, providing it such right. However, Ravisia did not act in accordance with such rules, provided primarily in the SOFA, and therefore the broadcasting in question constituted a violation of international law.

Security Council Resolution 5440, which authorized the UNMORPH, did not give the right for the troops to broadcast radio programming. Although the relevant provision of the Resolution "[u]nderlines the need for UNMORPH to have at its disposal an effective public information capacity, including radio

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79 *Supra note* 77, P. 83.

80 *Supra note* 70, Article 2 (b).

81 *Supra note* 14, P. 18.

transmission facilities", it does not authorize the UNMORPH troops to establish a radio station. The Resolution sets general guidelines for the peacekeeping mission to operate; however, it does not give any specific rights to the mission and its personnel, especially those rights that would interfere within the affairs of the host state. All such rights regulated in the SOFA.

Although the SOFA is concluded between the United Nations and Alicanto, Ravisia is also bound by its provisions. The Vienna Convention on the Law of Treaties declares that the rights and obligations under the treaty may arise to the third State, if that State consents to that.[82] Such consent was expressed in the Agreement between the United Nations and Ravisia. The troops contributing State, Ravisia, signed an Agreement with the United Nations. It foresaw that "the military and/or civilian personnel provided by [the Participating State] shall enjoy the privileges and immunities, rights and facilities and comply with the obligations provided for in the status agreement."[83]By signing this Agreement Ravisia consented that the rights and obligations to it arise under the SOFA signed between the United Nations and the host State Alicanto, therefore, Ravisia is bound by the provisions of the SOFA.

The offensive broadcasting committed by Ravisian soldiers breached the provisions of the SOFA. Establishment of the radio station is foreseen in the Article 10 of the SOFA, which emphasizes that "peacekeeping operation shall enjoy the facilities … in co-ordination with the Government."[84] Therefore, the broadcasting, to which content the Alicantan Government strongly objected, breached Article 10, as there was no coordination with the Government. It also breached Article 6 of the SOFA, which foresees that "[t]he United Nations peacekeeping operation and its members shall refrain from any action or activity incompatible with the impartial and international nature of their duties (…), shall respect all the local laws and regulations."[85] The content of the broadcasting was contrary to the local laws and regulations and aimed to convince the local people not to comply with those regulations. This was incompatible with the impartial nature of the duties of the peacekeepers and disrespectful to the laws and regulations of the host state Alicanto.

Furthermore, the unlawful expansion of the content of radio programming to educational and cultural programs, inconsistent with the regulations in Alicanto, disregarding the objecting position of host state, constitutes interference in the internal matters of Alicanto and thus breaches Article 2(1) of the UN

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82 *Supra note* 62, Articles 35, 36.

83 Report of the Secretary General, *Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects* (23 May 1991), UN Doc A/46/185, Article 5.

84 Report of the Secretary-General, *Model Status of Forces Agreement for Peacekeeping Operations* (9 October 1990) UN Doc a/45/594, Article 10.

85 *Ibid*, Article 6.

Charter, referring to the sovereign equality of States. The General Assembly Resolutions specify the content of the principle of the sovereign equality of States. In the *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of State,* the General Assembly points out that every State has a right "to develop fully, without interference, the system of information and mass media."[86] The General Assembly also explains in the *Declaration on Friendly Relations* Resolution that the principle of the sovereign equality of States *inter alia* means that "no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State"[87]. Thus, it is irrelevant, what is the reason of interference and Ravisia cannot justify its conduct relying on the fact, that this programming was intended to educate Alicantan people. As the General Assembly emphasized in the Resolution 2131, "[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State."[88] Thus, obviously, the radio broadcasting aimed at changing the views of the local people towards the existing laws and regulations interferes within Alicanto's right to decide freely and to choose its own political, economic, social, cultural system and thus intervenes in the internal affairs of Alicanto breaching the Article 2(1) of the UN Charter.

Finally, Ravisia cannot invoke circumstances precluding the wrongfulness, specifically, countermeasures, allegedly responding to Alicanto's non-compliance with its international obligations to justify the offensive broadcasting. Article 22 of the ARS foresees that "[t]he wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State." However, to invoke a countermeasure, certain conditions have to be satisfied, which are set out in Articles 49 and 52 of the ARS have not been met.[89]

First, the Article 49 of the ARS requires that countermeasures can only be taken "against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations." The teachings of the Talonnic faith and the domestic laws reflecting the faith, although restricting the rights of women, are consistent with Alicanto's obligations under the Convention on the Elimination of All Forms of Discrimination against Women as interpreted under the declaration transmitted by Alicanto upon ratification of the Convention. By this declaration Alicanto reserved itself a right to

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86 UNGA Res 36/103 *Annex Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States* (9 December 1981) UN Doc A/RES/36/103 para. 2(I)(c).

87 UNGA Res 2625 (XXV) (24 October 1970), UN Doc A/Res/25/2625.

88 UNGA Res 2131(XX) (21 December 1965), UN Doc A/Res/20/2131.

89 *Supra note* 70, Articles 49, 52.

interpret the relevant provisions of the Convention in way complying with Alicanto's domestic regulations. Therefore, Alicanto is not in breach of any relevant international obligations. Furthermore, countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations.[90] Ravisia is not in any way injured State. For these reasons the requirement set out in the Article 49 of the ARS has not been satisfied in this case.

Secondly, the requirement for a legal countermeasure provided in the Article 52 of the ARS has also not been satisfied by Ravisia. This Article requires first to "[c]all upon the responsible State (...) to fulfill its obligations" and second, to "[n]otify the responsible State of any decision to take countermeasures and offer to negotiate with that State".[91] Ravisia neither called upon Alicanto to fulfill obligations that it allegedly did not fulfill, nor notified about its intention to take countermeasures. Therefore, the requirement foreseen in the Article 52 of the ARS has not been satisfied. Since the conditions for a justified countermeasure have not been met, Ravisia cannot invoke countermeasures to justify its conduct and is therefore it is in breach of the international law.

2.2.2. The sexual exploitation of Alicantan children as a violation of the international law

The acts committed by Ravisian soldiers amount to the sexual exploitation of children. Muntarbhorn, the first United Nations Special Raporteur on the sale of children, child prostitution and child pornography, defined sexual exploitation as "the use of children (under 18 years of age) for sexual satisfaction of adults. The basis of the exploitation is the unequal power and economic relationship between the child and the adult."[92] In addition, the Secretary General defined sexual exploitation as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another"[93]. This definition was reaffirmed by the General Assembly.[94] Hence, Ravisian soldiers by giving money or food to the girls and thus abusing their vulnerable position (as the Commission of Inquiry concluded,

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90 *Supra note* 71, P. 130.

91 *Supra note* 70, Art. 52.

92 Detrick S.L. *A Commentary on the United Nations Convention on the Rights of the Child*. - Berlin: Springer, 1999. P. 593, citing V. Muntarbhorn, *Sexual Exploitation of Children*// United Nations Publication, Sales No. E.96.XIV.7 (1996) P. 1, para. 3.

93 UN Secretariat, SG Bulletin (9 October 2003), UN Doc ST/SGB/2003/13.

94 UNGA *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session* (Part III) (11 June 2007), UN Doc A/61/19, Article 32.

young girls engaged in sexual acts out of hunger, fear, poverty or all three[95]) sexually exploited them. Moreover, the Commission of Inquiry confirmed that sexual acts performed by Ravisians constitute sexual exploitation. Therefore, Ravisian acts qualify as the sexual exploitation of children.

Sexual exploitation of Alicantan children violated Article 6 of the SOFA. This Article states that the members of the UNMORPH "shall respect all local laws and regulations."[96] Alicantan law prohibits sexual relations between adults and those under the age of fifteen. The Commission of Inquiry's findings of substantial occurrences of precisely such relations therefore amount to the violations of the local laws of Alicanto and thus to the violation of the Article 6 of the SOFA.

Furthermore, sexual exploitation of Alicantan children violates the provisions of the Convention on the Rights of the Child to which Ravisia is a Party. Ravisia as a Party to the Convention on the Rights of the Child is obliged to "protect the child from all forms of sexual exploitation and sexual abuse"[97]. A child for the purposes of the Convention "means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[98] It is evident that the actions of Ravisian soldiers entail a breach of this obligation. Moreover, such actions are strongly condemned by the international community. The General Assembly and the Security Council in their resolutions expressed the absolute condemnation of sexual exploitation of women and children in the peacekeeping missions[99] and regarded such acts as serious misconduct[100].

Furthermore, the territory of Camp Tara where the sexual misdeeds occurred was under the jurisdiction of Ravisia, the occupying power, at the relevant moment. Therefore, Ravisia was obliged to safeguard the interests of children within that territory. Article 2 of the Convention on the Rights of the Child requires the States Parties to safeguard the rights provided by the Convention of all children within their jurisdiction.[101] The vicinity of Camp Tara, where the abuses happened, was under the control of Ravisian troops and thus under the jurisdiction of Ravisia for the purposes of the Convention. Therefore, Ravisian

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95 *Ibid.*

96 *Supra note* 84, Article 6.

97 *Convention on the Rights of Child* (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Article 34.

98 *Ibid*, Article 1.

99 UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 (2006) Art.20; UNGA Res 62/140 (19 February 2008) UN Doc A/RES/62/140 Article 20.

100 *Supra note* 94, Article 30.

101 *Supra note* 97, Article 2.

troops must uphold the Convention rights of Alicantan children, even though they were injured outside the territory of Ravisia.

Finally, it is important to underline that Alicanto has not breached its obligations under the Convention on the Rights of Child –there was no failure by Alicanto to safeguard children's rights within its territory. The Convention obliges states parties to undertake all appropriate measures to protect the rights of children within their jurisdiction.[102] Alicanto has not breached this obligation for two reasons. First, the Camp Tara where the abuses occurred although is the territory of Alicanto, was at the relevant moment under the jurisdiction of Ravisia. Secondly, Alicanto has undertaken the appropriate measures to protect the rights of children within its territory (e.g. passed the laws ensuring such rights), thus it did not breach its obligation of due diligence. Therefore, not Alicanto, but Ravisian soldiers, whose conduct is attributable to Ravisia, breached the provisions of the Convention on the Rights of the Child.

In conclusion to this subsection, the misconduct of Ravisian soldiers in the United Nations peacekeeping mission qualifies as sexual exploitation of children and interference in the internal affairs of Alicanto. It thus breaches the international obligations, which Ravisia owes under the Convention on the Rights of a Child, the UN Charter and the SOFA.

2.3. The attribution of the misconduct of Ravisian soldiers to Ravisia

The attribution of the acts in question to the State concerned is another element of an internationally wrongful act, which has to be proven to establish international responsibility of a State.[103] The United Nations peacekeeping mission is of a dual nature - it is a subsidiary organ of the United Nations, however, the troops do not belong to the Organization, but are contributed by the Member States that retain certain authority over their troops. Therefore, the conduct of the troops may be attributed (and accordingly the international responsibility for that conduct) either to the United Nations or to the troops contributing Member State or to both of them. This subsection discusses the international regulation with regard to this issue and its application to the circumstances of the hypothetical case. It is aimed to show that in this case the misconduct of the Ravisian peacekeeping troops in the United Nations mission should be attributed to the Respondent rather than the United Nations.

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102 *Ibid*.

103 *Supra note* 70, Article 2(b).

2.3.1. The effective control test as an ultimate test for the attribution

Although the United Nations peacekeeping mission is a subsidiary organ of the United Nations[104], this does not *per se* attribute the conduct of the peacekeeping troops to the United Nations; the respective troops contributing state retains some authority. It is agreed that "[a]s a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization"[105]. However, "[t]he principle of attribution of the conduct of a peacekeeping force to the United Nations is premised on the assumption that the operation in question is conducted under United Nations command and control, and thus having the legal status of a United Nations subsidiary organ."[106] Thus, the national contingent is not fully placed at the disposal of the United Nations and this has consequences with regard to attribution of conduct.[107] Specifically, given the dual nature of the peacekeeping missions the effective control test prevails over the general rule that the acts of a subsidiary organ of the United Nations are attributable to the United Nations.

When considering the attribution of the internationally wrongful acts of Ravisian soldiers acting under the mandate of the United Nations, effective control test applies. This test is applicable both when attributing the conduct of a person to the State and when attributing the conduct of a person to the international organization. Article 6 of the *Draft Articles on the Responsibility of International Organizations* provides that the act of the State's organ, placed at the disposal of organization, is attributable to international organization only if "organization exercises effective control over that conduct."[108] Similarly, Article 8 of the ARS provides that the conduct of a person is considered an act of the state if the person "is in fact acting on the instructions of, or under the direction or control of, that State."[109] The requirement of

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104 UNGA, *Responsibility of International Organizations, Comments and Observations received from International Organizations* (25 June 2004)// UN Doc A/CN.4/545, P. 17-18.

105 UNGA *Second Report on Responsibility of International Organizations by Mr. Giorgio Gaja, Special Rapporteur* (2 April 2004)// UN Doc A/CN.4/54. P.18, citing United Nations Legal Counsel, Mr. Hans Corell statement on 3 February 2004 to the Director of the Codification Division, Mr. Václav Mikulka.

106 *Supra note* 104, P. 17-18.

107 *Supra note* 105, P. 18.

108 ILC, *Draft Articles on Responsibility of International Organizations*, ILC Report of the sixty-first session// 2009 UN Doc A/64/10 (2009), Article 6.

109 *Supra note* 70, Article 8.

"direction or control" in the Article 8 of the ARS points in particular to the "effective control" test.[110] This test, when determining the responsibility of a State, was applied by this Honorable Court in the *Nicaragua*[111] and *Genocide* cases[112] and by the European Court of Human Rights in *Bankovic*[113] and *Behrami/Saramati*[114] cases. Evidently, it is generally accepted to apply this test as an ultimate test when determining the attribution of a person (persons) to the State or international organization. Therefore, this test applies and determines the attribution of the misconduct of Ravisian soldiers in the UNMORPH.

2.3.2. The sexual exploitation of Alicantan children by Ravisian soldiers and its attribution to Ravisia

The sexual exploitation of Alicantan children is attributable to Ravisia pursuant to the effective control test. Two rules implied by this test lead to the attribution of the sexual exploitation to the State of Ravisia. First, the off-duty acts in the United Nations peacekeeping mission are attributable to the respective State. Second, the conduct concerning the disciplinary matters and criminal affairs is attributable to the respective State.

Sexual exploitation of Alicantan children was committed by Ravisian soldiers while off UNMORPH duty and outside of Camp Tara. Thus, the soldiers were not exercising UNMORPH duties at the time of committing the acts in question. Therefore, the United Nations did not exercise effective control over these acts. Such position is supported by the United Nations: "UN policy in regard to off-duty acts of the members of peacekeeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts."[115] However, although the soldiers were not exercising duties as the UNMORPH participants, they were still exercising their duties as Ravisian soldiers in their official capacity provided by Ravisia, and as reaffirmed in the *Case concerning Armed Activities on the Territory of Congo*: "The conduct of individual soldiers and officers … is to be considered as the conduct of a State

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110 Mujezinovič Larsen K. *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*// 19 European Journal of International Law. 2008. P. 514.

111 *Supra note* 7, P. 65 para. 115.

112 *Supra note* 65, para. 400.

113 ECHR, *Bankovic and others v. Belgium and 16 other Contracting States* (Application no. 52207/99) (12 December 2001), para. 70

114 ECHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (Application no. 78166/01) (02 May 2007), paras. 138-140.

115 *Ibid*, P. 300.

organ."[116]

Moreover, the position of the ILC is that the respective State "retains control over disciplinary matters and has exclusive jurisdiction in criminal affairs".[117] This is confirmed in the Article 48 (b) of the SOFA: "Military members of the military component of the UN peacekeeping operation shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them in host country/territory."[118] Sexual exploitation of children is undoubtedly a matter of criminal responsibility and as such acts fall under the jurisdiction of Ravisia, which is considered to have retained the control over these acts. Therefore, they are attributable to it.

2.3.3. The offensive radio broadcasting by Ravisian soldiers and its attribution to Ravisia

The offensive radio programming is attributable to Ravisia pursuant to the effective control test. It is presumed that "the operation in question is under the exclusive command and control of the United Nations"[119]. However, the "United Nations as a whole cannot be held responsible for an unlawful act by the state conducting the operation, for the ultimate test of responsibility remains 'effective command and control'."[120] Ravisia and not the United Nations exercised the control over the radio programming during the UNMORPH and therefore these acts are attributable to Ravisia.

Ravisia, rather than the United Nations exercised control over the broadcasting, because the United Nations was not aware of such acts and therefore did not control them. The Ravisian Major-General, the head of the mission, did not inform the Organization and thus the soldiers when broadcasting offensive radio programming operated outside the chain of command of the United Nations. The Special Rapporteur Giorgio Gaja in his *Second Report on the Responsibility of International Organizations* explained that "[w]hen forces operate outside the United Nations chain of command, the United Nations constantly held that conduct had to be attributed to the respective national State."[121] Moreover, the Special Rapporteur

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116 ICJ, *Armed Activities on the Territory of the Congo* (Judgment) (Democratic Republic of the Congo v. Uganda), (19 December 2005),General List No. 116// available at http://www.icj-cij.org/docket/files/116/10455.pdf; last accessed 20 December 2009, para. 213.

117 *Supra note* 105, P. 18.

118 *Supra note* 84, Article 47 (b).

119 UN Secretary-General Report (20 September 1996) UN Doc A/51/389, para. 17.

120 UNGA, *Responsibility of International Organizations Comments and Observations Received from Governments and International Organizations* (12 May 2005) UN Doc A/CN.4/556, P. 46.

121 *Supra note* 105, P. 16.

emphasized that "[t]his approach appears to have been generally accepted by States whose forces were involved in operations authorized by the Security Council."[122] There are no indications that the Secretary General or the Security Council was informed about these actions. Thus, the United Nations cannot be held responsible for the acts committed outside its chain of commands.

Furthermore, the offensive broadcasting by Ravisian soldiers is attributable to Ravisia, because the soldiers committed these acts with the full knowledge of their commander – Ravisian Major-General. It is agreed that "what is decisive is not whose organ (from the organizational standpoint) the person alleged to have caused the damage actually was, but rather in whose name and for whom (from the functional standpoint) that person was acting at the moment when the act occurred."[123] The broadcasting was performed only with the knowledge of the Major-General of Ravisian army, who refused to alter the content of the programming. Therefore, Ravisia and not the United Nations exercised the effective control and command over this particular conduct and it is therefore attributable to Ravisia.

2.3.4. Irrelevance of the possible excess of State authority

Although Ravisian soldiers by committing illegal acts possibly exceeded the authority of State, this does not preclude the attribution of the conduct to and thus the responsibility of Ravisia. According to the Article 7 of the ARS, "[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions." The State cannot take refuge behind the notion that, according to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence.[124]

Furthermore, admittedly, the attribution of the *ultra vires* conduct may be excluded, if the acts in question were performed in the private capacity. However, the attribution of the *ulta vires* conduct to Ravisia is not excluded, because the Ravisian soldiers acted under the cover of their status as officers and not in their private capacity. In the case *Caire (France) v United Mexican States* it was held that the conduct

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122 *Ibid*.

123 Superior Provincial Court (Oberlandesgericht) of Vienna, *N. K. v. Austria* (Austria, 1979)// International Law Reports. Volume 77. P. 470, 472.

124 *Supra note* 71, P. 45.

of the officers "even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.[125] Ravisian soldiers abused their peacekeepers status in the commission of the acts. The soldiers acted in their official capacity when they broadcasted offensive radio programming, because they were on duty at that time. Furthermore, although they sexually exploited Alicantan children while off-duty, they have still been acting under the cover of their official function. This is clear from the fact that the minor girls engaged in the sexual acts out of fear which supposedly has been caused by the position of the soldiers. In addition, it is considered that the State officials acted in their official capacity "if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it"[126] and this is precisely the case. For these reasons, the possible excess of state authority would not preclude the attribution of the actions of the Ravisian soldiers to Ravisia.

2.3.5. Possibility of the dual attribution

Even if the acts of Ravisian soldiers or some of those acts would be considered to be attributable to the United Nations, this would not preclude the attribution of these acts to Ravisia. The position of the ILC is that the dual attribution of the same conduct is possible and "attribution of conduct to an international organization does not necessarily exclude attribution of the same conduct to a State."[127] Thus, if it was to be decided that the United Nations exercised control over certain acts of Ravisian soldiers acting under the mandate of the UNMORPH peacekeeping mission and the acts of Ravisian soldiers were thus attributed to the United Nations, they could at the same time be attributed to Ravisia.

To conclude this subsection of the thesis, given the dual nature of the United Nations peacekeeping missions the effective control test is the ultimate test determining, whether the acts in question should be attributed to the United Nations or to the troops contributing Member State. The application of this test to the circumstances of the hypothetical case leads to the conclusion that the Respondent rather than the United Nations exercised control over the acts in question and therefore bears international responsibility.

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125 International Arbitral Award, *Caire (France) v United Mexican States* (1929), V RIAA 516, P.531.

126 *Supra note* 71, P. 46.

127 *Supra note* 105, P. 4.

2.4. The legal consequences of Ravisia's international responsibility for the misconduct of its troops

The last issue that needs to be considered with regard to the internationally wrongful acts committed by Ravisian soldiers is the reparations that Ravisia, being responsible for those acts[128], is obliged to make and thus remedy the injuries caused. Ravisia as the "responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[129]

Although the restitution is the primary form of reparation, it is materially impossible in this case.[130] Article 35 of the ARS specifies that "[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed". Also, the PCIJ held in the *Chorzow Factory case* that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[131] However, in the circumstances of the hypothetical case the restitution is materially impossible - it is impossible to re-establish the situation as it was before Ravisian soldiers sexually exploited Alicantan children or before they broadcasted offensive radio programming aimed at changing the views of Alicantans; this damage is irreversible.

The appropriate form of reparation for the injuries caused by the acts of Ravisian soldiers is compensation. Article 36 of the ARS provides that "[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution". Also, the PCIJ explained that in case the restitution is impossible, the responsible State would have an obligation to pay "a sum corresponding to the value which the restitution in kind would bear".[132] The ICJ emphasized in the *Gabcikovo-Nagymaros Project case* that "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."[133] The damage encompasses the damage suffered by the State itself as well as damage suffered by nationals on whose behalf the State is claiming within the framework of diplomatic protection.[134] Therefore, Alicanto is entitled to get compensation from Ravisia for the injuries caused by Ravisian soldiers to the Alicantan nationals.

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128 *Supra note* 70, Article 1.

129 *Ibid,* Article 31 (1)

130 *Supra note* 70, Article 35 (a).

131 *Supra note* 74, P. 47.

132 *Ibid*.

133 ICJ, *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, 7, P. 81, para. 152.

134 *Supra note* 71, P. 99.

Furthermore, Alicanto is entitled to the compensation, because a direct causal link exists between the acts committed by the Ravisian soldiers and the damage suffered by the Alicantan nationals. As the ICJ explained in the *Genocide case*, for the compensation to be required, there has to be "sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation … and the injury suffered by the Applicant, consisting of all damage of any type, material or moral"[135]. Direct causal link is evident both between the sexual exploitation of Alicantan children and grave damage caused to them thereby, and as between the offensive radio broadcasting and the moral damage to the religious people of Alicanto. This damage would have been averted, if Ravisian soldiers had acted in compliance with legal obligations. Therefore, there is a direct causal link between Ravisia's breach of international obligations and the damage suffered by Alicantans; Alicanto is therefore entitled to require compensation.

The actual extent of the compensation will depend upon various relevant circumstances. The principles of assessment to be applied in quantification vary, depending upon the content of particular primary obligations, an evaluation of the respective behavior of the parties and, more generally, a concern to reach an equitable and acceptable outcome.[136] Compensable personal injury encompasses not only associated material losses, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as "moral damage" in national legal systems).[137] Thus, all the relevant circumstances should be taken into account and all the damage should be assessed – not only the material one like the medical expenses for the injuries suffered by Alicantan children, but also the moral one like the pain and suffering, as well as the affront to sensibilities associated with an intrusion on the person. The mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injury should not be compensated.[138]

Finally, there are no circumstances that would reduce the amount of compensation due to the conduct of Alicanto. Admittedly, the form and extent of reparation might be affected by the conduct of the injured State.[139] This was also recognized by the ICJ in the *LaGrand case*.[140] However, to affect the amount of the compensation the contribution to the injury has to be "willful or negligent, i.e. which mani-

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135 *Supra note* 65, para. 462.

136 *Supra note* 71, P. 100.

137 *Ibid*, P. 101.

138 International Arbitral Award, *Lusitania case* (1923), UNRIAA, vol. VII (Sales No. 1956.V.5) 32. P. 40.

139 *Supra note* 70, Article 39.

140 ICJ, *LaGrand* (Germany v. United States of America), Judgment , I.C.J. Reports 2001, 466, P.487, para. 57.

fest a lack of due care on the part of the victim".[141] There is no indication that Alicanto's actions would manifest a lack of due care. Accordingly, the compensation must be paid in full.

In conclusion, the Respondent is responsible for the acts of its troops in the peacekeeping mission that are attributable to it and breach its international obligations owed under the Convention on the Rights of the Child, the UN Charter and the SOFA. To remedy the situation it must compensate for the injuries caused.

[141] *Supra note* 71, P. 110.

CONCLUSIONS

1. The exceptions to the prohibition of the use of force, provided by the UN Charter do not apply in this case. First, the right to self-defense cannot be invoked, because there was no armed attack against the respondent State and other conditions of a legal self-defense have not been fulfilled - Ravisia never claimed this right with regard to the intervention in Alicanto, nor reported the United Nations about resorting to self-defense. Second, the Security Council did not authorize Ravisia to use the force against Alicanto, on the contrary – such proposal was defeated in the Security Council by the exercise of two vetos. The implicit authorization by the Security Council is not possible in the international law, because restrictions of State's sovereignty cannot be presumed or interpreted broadly. Moreover, the state practice confirms this position – reliance on the implicit authorization of the Security Council to justify the use of force has never been accepted by the international community. Alternatively, even if the implicit authorization was possible, the Resolution in question did not contain such authorization – its provisions and the relevant circumstances are sufficiently clear to show that the Security Council had no intention to authorize the use of force against Alicanto and did not do so.

2. The veto right in the voting system of the Security Council may prevent the United Nations from authorizing the use of force when it is indispensable to avert humanitarian catastrophe. However, despite the imperfect system of the United Nations it is too soon to claim the existence of a customary right of the states or international organizations other than the United Nations to undertake military measures in such cases disregarding the position of the Security Council. The two elements of a custom – state practice and *opinio juris* – are not present. Although the historical overview shows that there were instances in the state practice of the interventions on humanitarian grounds, these interventions were either justified invoking other reasons, such as authorization by the Security Council, the right of self-defense, the consent of the state concerned etc, or they were condemned by the international community. The use of force prohibition is a *jus cogens* norm and it can only be modified by a subsequent norm having the same character. For such a norm to emerge under the customary international law, state practice has to be extremely widespread, consistent and uniform and *opinio juris* has to be certain and unambiguous. This is not the case as regards the right of humanitarian intervention. Thus, from the legal point of view it is premature to claim that unauthorized military use of force can be justified relying solely on the humanitarian motives. Nevertheless, the right of humanitarian intervention is not precluded by the UN Charter regulation and may still emerge under the customary international.

3. The responsibility to protect concept does not modify the prohibition of the use of force enshrined in the Art. 2(4) of the UN Charter and does not make an exception to this prohibition. The intention of this concept is to encourage the States to stay vigilant and detect international threats at their early stage, also to support the United Nations when it takes action responding humanitarian catastrophes and to help to restore the peace in the post-conflict regions. It is not the intention of the responsibility to protect concept to give a right to the States to intervene other States on humanitarian grounds and thus it is not the euphemism of humanitarian intervention. This concept, recognized by the United Nations, once again reaffirms the sole authority of the Security Council to authorize the use of force in the international relations and sets other conditions for its implementation, such as the collectiveness of the action, proportionality, exhaustion of all peaceful means etc. Also, this new concept is so far *de lege ferenda* and in that sense is not (yet) a part of the customary international law and does not confer any obligations to the States, nor change in any way their existent obligations.

4. The acts of Ravisian soldiers acting under the mandate of the United Nations peacekeeping mission constituted the violation of Ravisian international obligations – they amount respectively to the interference in the internal matters of Alicanto and the sexual exploitation of Alicantan children. The radio broadcasting, contradicting the laws and regulations of the host state and without its permission is interference in the internal matters of the State and thus breaches Art 2(1) of the UN Charter and the provisions of the SOFA. The sexual acts with minor Alicantan girls abusing their vulnerable position constitute sexual exploitation of children as they are defined in the international law. Such acts breach the provisions of the Convention on the Rights of the Child and the SOFA.

5. The effective control test is the ultimate test for the attribution of the misconduct of the United Nations peacekeeping missions and thus for the determination of who bears the international responsibility in such cases. Although the United Nations peacekeeping missions operate as a subsidiary organ of the United Nations, their actions are not *per se* attributable to this Organization. This is because of the dual nature of the peacekeeping forces – while operating as an organ of the United Nations, the troops do not belong to the Organization, but are contributed by the Member States. The position of the ILC as well as the jurisprudence of the ECHR confirm that particularly the effective control test should be the determining factor in allocating the international responsibility (whether attributing it to the Organization, or the respective State) for the misconduct of the peacekeeping troops.

6. The effective control test generally means that whoever exercised the effective control and command over the peacekeeping troops at the relevant moment over the acts in question – the United Na-

tions or/and the troops contributing state – it is for those acts internationally responsible. Thus, when the forces operate outside the United Nations chain of command, the conduct has to be attributed to the respective national State. The effective control tests also implies that the respective State retains control over the disciplinary matters and has exclusive jurisdiction in criminal affairs, as well as is responsible for those acts that have been committed while off the United Nations peacekeeping mission duty. Furthermore, the possible excess of State authority does not preclude the attribution of certain conduct to that State. Finally, the attribution of responsibility to the United Nations or the troops contributing State does not necessarily exclude the responsibility of another one – the international law does not preclude the dual attribution and thus dual responsibility in such cases.

7. Internationally wrongful act entails an obligation to make reparations. Having established that the misconduct of the Respondent's troops in the United Nations peacekeeping mission amounts to the violations of the international law which are, pursuant to the effective control test, attributable to the Respondent, it follows that the Respondent has to pay reparations for the injuries caused. Since the situation is irreversible and it is not possible to restore it as it was before the injuries were caused, the restitution is materially impossible and the appropriate form of the reparations is compensation. Further, the amount of the compensation is not to be affected by the conduct of the Applicant, because there is no indication of its willful or negligent contribution to the injury. For all these reasons the Respondent is obliged under the international law to pay full compensation for the injuries caused to the Alicantan nationals by the Ravisian soldiers.

8. Based on the conclusions provided above, the following must be deduced with regard to the the claims of the Applicant in the case concerning the "Operation Provide Shelter" and accordingly the hypotheses raised in this work. First, Ravisian intervention violated the use of force prohibition and no exception provided in the UN Charter applies. Furthermore, there are no other exceptions to this prohibition under the customary international law. Therefore, the intervention and subsequent occupation is illegal and Ravisia has to remove its military personnel from Alicanto. Second, Ravisia is responsible for the misconduct of its troops in the United Nations peacekeeping mission, as the acts concerned breached the international obligations of Ravisia and these acts are attributable to it. As it is responsible for the internationally wrongful acts, it must pay reparations for the injuries caused.

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ABSTRACT

Čepinskytė A. The Legality of the Unilateral Use of Force on Humanitarian Grounds and the International Responsibilty for the Misconduct of the United Nations Peacekeeping Troops: a Hypothetical Case Study / Master Thesis. Supervisor Assoc. Prof. Dr. J. Žilinskas. – Vilnius: Faculty of Law, Mykolas Romeris University, 2010. – 58 p.

This master thesis is a legal analysis of the hypothetical case, which formed a problem in the Philip C. Jessup International Law Moot Court Competition in 2009. It presents the position of the Applicant, therefore, the analysis is subjective and the conclusions are prejudiced. There are two main problems that are analyzed in the context of the hypothetical case: the legality of the unilateral use of force on humanitarian grounds and the allocation of the international responsibility for the United Nations peacekeeping troops. It is aimed to be proven that first, only the UN Charter provides a universally accepted basis for the use of force and no additional exceptions exist under the customary international law. Therefore, as the military intervention in question cannot be justified under the UN Charter, it is illegal. Second, for the purposes of the allocation of the international responsibility for the misconduct of the United Nations peacekeeping troops the effective control test applies and the rules imposed by it lead to the attribution of the misconduct to the Respondent. The conclusions are made using the methods of deduction, systematic analysis, analogy and analysis of the international law, which is understood as comprising the sources enumerated in the Article 38 of the Statute of the International Court of Justice.

Key words: humanitarian intervention, responsibility to protect concept, sexual exploitation, interference in the internal affairs, effective control test.

ANOTACIJA

Čepinskytė A. Vienašalio jėgos naudojimo humanitariniais tikslais teisėtumas ir tarptautinė atsakomybė už Jungtinių Tautų taikos palaikymo misijų neteisėtus veiksmus / Magistrinis darbas. Vadovas Doc. Dr. J. Žilinskas. – Vilnius: Teisės fakultetas, Mykolo Romerio Universitetas, 2010. – 58 p.

Šis magistrinis darbas yra hipotetinės bylos, kuri buvo 2009 metų Philip C. Jessup tarptautinės teisės konkurso problema, analizė. Jis pristato valstybės ieškovės poziciją, taigi, analizė yra subjektyvi ir išvados iš anksto nulemtos. Hipotetinės bylos kontekste nagrinėjamos dvi pagrindinės problemos: vienašalio jėgos naudojimo humanitariniais tikslais teisėtumas ir tarptautinė atsakomybė už Jungtinių Tautų taikos palaikymo misijų neteisėtus veiksmus. Siekiama įrodyti, kad pirma, tik Jungtinių Tautų Chartija nustato jėgos naudojimo tarptautinėje teisėje pagrindus ir nėra jokių papildomų išimčių tarptautinėje paprotinėje teisėje. Taigi, kadangi aptariama karinė intervencija negali būti pateisinta pagal Jungtinių Tautų Chartiją, ji yra nelegali. Antra, tarptautinės atsakomybės už Jungtinių Tautų taikos palaikymo misijų neteisėtus veiksmus nustatymo tikslais taikomas efektyvios kontrolės testas, ir pagal jo numatytas taisykles atsakomybė šioje byloje priskirtina valstybei atsakovei. Išvados daromos remiantis dedukcijos, sisteminės analizės, analogijos, tarptautinės teisės analizės metodais. Tarptautinė teisė suprantama kaip šaltiniai išvardyti Tarptautinio Teisingumo Teismo Statuto 38 straipsnyje.

Pagrindiniai žodžiai: humanitarinė intervencija, pareigos apsaugoti koncepcija, seksualinis išnaudojimas, įsikišimas į valstybės vidaus reikalus, efektyvios kontrolės testas.

SUMMARY

Čepinskytė A. The Legality of the Unilateral Use of Force on Humanitarian Grounds and the International Responsibilty for the Misconduct of the United Nations Peacekeeping Troops: Hypothetical Case Study / Master Thesis. Supervisor Assoc. Prof. Dr. J. Žilinskas. – Vilnius: Faculty of Law, Mykolas Romeris University, 2010. – 58 p.

This work is a legal analysis of the hypothetical case, which formed a problem in the Philip C. Jessup International Law Moot Court Competition in 2009. The hypothetical case is analyzed from the perspective of the Applicant, therefore, the analysis is subjective and its comprehensiveness is limited: the value of the contrary arguments is aimed to be diminished and the conclusions are expressed in categorical terms. Although it is not intended to hide disadvantegeous facts or law, it is aimed to defend against them and to convince the reader that the position of the Applicant is the right one.

The hypothetical case raises two main problems: the legality of the unilateral use of force on humanitarian grounds and the allocation of the international responsibility for the misconduct of the United Nations peacekeeping troops. Thus, the research objects are the exceptions to the prohibition of the use of force under the international law and the international responsibility for the misconduct of the United Nations peacekeeping troops. Using the methods of deduction, systematic analysis, analogy and document analysis it is aimed to examine what exceptions to the use of force prohibition exist under the international law, to analyze the international regulation concerning the international responsibility for the misconduct of the United Nations peacekeeping troops and to determine how these rules apply to the facts of the hypothetical case.

The first hypothesis is that the Respondent (Ravisia) by intervening the territory of the Applicant (Alicanto) with its military forces without the authorization of the United Nations, violated the prohibition of the use of force, because the exceptions provided by the UN Charter do not apply and there are no additional exceptions under the customary international law.

The use of force prohibition is embedded in the Article 2(4) of the UN Charter and the customary international law. Ravisia by unilaterally intervening in Alicanto used force within the meaning of the Artcicle 2(4) and the contentious issue here is, whether this use of force can be justified under the international law.

The UN Charter foresees two exceptions to the use of force prohibition: the right to self-defence (Article 51) and the authorization by the Security Council (Article 42). These exceptions do not apply to

the facts of the hypothetical case, therefore, it is further analysed, whether there are any additional exceptions under the customary international law: the existence of a right of humanitarian intervention and the legal significance of the responsibility to protect concept.

It is concluded that it is premature to consider the right to humanitarian intervention a part of a customary international law, because the existence of the two elements of a custom – state practice and *opinio juris* – is in this case questionable. The state practice is insufficient, especially when the use of force prohibition is a norm *jus cogens* and it is very difficult to change it. *Opinio juris* is also uncertain – there is no uniform position within the intrenational community as to the legality of the humanitarian intervention. In addition, even if such right existed under the customary international law, it would be subject to certain conditions, which haven't been met by the Respondent.

The responsibility to protect concept has been recognized by the United Nations, however, it is not intended to modify the use of force prohibition. The concept reaffirms the exclusive right of the United Nations to authorize the use of force. The aim of this concept is to encourage the states to stay vigilant and detect international threats at their early stage, to support the United Nations when responding international threats and restoring peace in the post-conflict regions. Thus, since the military intervention in question cannot be justified under the United Nations Charter, the right of humanitarian intervention is not a part of the customary international law and the responsibility to protect concept does not provide a legal basis for the States to unilaterally use the force, Ravisia is responsible for the illegal use of force.

The second hypothesis is that Ravisia bears international responsibility for the misconduct of its troops in the United Nations peacekeeping mission, because these acts breach Ravisia's international obligations and are attributable to it. The main focus rests on the establishment of the two elements of the internationally wrongful act (breach of international obligations and attribution), because the internationally wrongful act entails international responsibility. The misconduct of Ravisian troops qualifies under the international law as the sexual exploitation of children and interference in the internal affairs of another State and accordingly violates the Convention on the Rights of the Child, the UN Charter and the Status of Forces Agreement.

The most contentious issue is the attribution of the acts of the troops to the Respondent or to the United Nations. The United Nations peacekeeping troops act as a subsidiary organ of the United Nations, therefore, according to the general rule, the acts of the troops should be attributed to the United Nations. However, the troops are contributed by the Member States and those States also retain some authority. According to the international law, in such cases for the purposes of the international responsibility the effective control test applies – the international responsibility is attributed to the United Nations or the

troops contributing Member State depending on who exercised the effective control over the acts in question. Ravisian soldiers sexually exploited minor girls while off duty, therefore, the United Nations had no control over these acts and is not responsible for them. Offensive radio programming is also attributable to the Respondent, because it was broadcasted only with the knowledge of Ravisian Major-General, who did not inform the United Nations and therefore the United Nations could not have any control.

Consequently, the analysis of the international regulation concerning the research problems and its application to the facts of the hypothetical case confirms the hypitheses raised in this work: Ravisia is responsible for the illegal use of force against Alicanto and for the misconduct of its troops in the United Nations peacekeeping mission.

SANTRAUKA

Čepinskytė A. Vienašalio jėgos naudojimo humanitariniais tikslais teisėtumas ir tarptautinė atsakomybė už Jungtinių Tautų taikos palaikymo misijų neteisėtus veiksmus / Magistrinis darbas. Vadovas Doc. Dr. J. Žilinskas. – Vilnius: Teisės fakultetas, Mykolo Romerio Universitetas, 2010. – 58 p.

Šis darbas – tai hipotetinės bylos, kuri buvo 2009 metų Philip C. Jessup tarptautinės teisės konkurso problema, analizė. Byla nagrinėjama iš ieškovo perspektyvos, tad analizė yra subjektyvi ir jos išsamumas apribotas: priešingų argumentų vertė sumenkinama, tuo tarpu naudingi argumentai akcentuojami, o išvados formuluojamos kategoriškais teiginiais. Nors nenaudingi faktai ir teisė nėra nutylimi, juos stengiamasi nuginčyti ir įtikinti skaitytoją ieškovo pozicijos teisingumu.

Bylos kontekste nagrinėjamos dvi pagrindinės problemos: vienašalio jėgos naudojimo humanitariniais tikslais teisėtumas bei tarptautinė atsakomybė už Jungtinių Tautų taikos palaikymo misijų neteisėtus veiksmus. Tyrimo objektai yra jėgos naudojimo draudimo išimtys tarptautinėje teisėje ir tarptautinė atsakomybė už Jungtinių Tautų taikos palaikymo misijų neteisėtus veiksmus. Naudojantis dedukcijos, sisteminės analizės, analogijos, dokumentų analizės metodais, siekiama ištirti, kokios išimtys egzistuoja jėgos nenaudojimo draudimui, išanalizuoti tarptautinės atsakomybės už Jungtinių Tautų taikos palaikymo misijų neteisėtus veiksmus tarptautinį teisinį reguliavimą ir nustatyti, kaip visa tai pritaikoma hipotetinės bylos faktams.

Pirma darbo hipotezė – valstybė atsakovė (Ravisia), įvesdama į valstybę ieškovę (Alicanto) savo karines pajėgas be Jungtinių Tautų leidimo, pažeidė jėgos nenaudojimo principą, nes Jungtinių Tautų Chartijos numatytos išimtys netaikomos, o tarptautinė paprotinė teisė jokių papildomų išimčių nenumato. Jėgos nenaudojimo principas yra reglamentuotas Jungtinių Tautų Chartijos 2(4) straipsnyje bei tarptautinėje paprotinėje teisėje. Ravisia, savavališkai įsiveržusi į Alicanto panaudojo jėgą 2(4) straipsnio prasme, tačiau esminis klausimas yra, ar šie veiksmai gali būti pateisinti pagal tarptautinę teisę. Jungtinių Tautų Chartija numato dvi išimtis jėgos nenaudojimui: savigynos teisę (51 straipsnis) bei atvejus, kai jėgos naudojimas yra leidžiamas Saugumo Tarybos rezoliucija (42 straipsnis). Šie atvejai netinka esamoms aplinkybėms, todėl darbe analizuojama, ar yra papildomų išimčių jėgos nenaudojimo draudimui tarptautinėje paprotinėje teisėje: ar egzistuoja teisė į humanitarinę intervenciją ir kokią teisinę galią turi pareigos apsaugoti principas.

Humanitarinę intervenciją laikyti paprotinės teisės dalimi būtų skubota, nes dviejų papročio elementų – valstybių praktikos ir *opinio juris* – egzistavimas šiuo atveju yra abejotinas. Valstybių praktika

yra nepakankama, ypač turint galvoje, kad jėgos nenaudojimo principas yra *jus cogens* norma, ir ją pakeisti yra itin sudėtinga. *Opinio juris* taip pat nėra aiški – nėra vieningos tarptautinės bendrijos nuomonės humanitarinės intervencijos (ne)teisėtumo klausimu. Be to, jeigu tokia teisė ir egzistuotų, jai galiotų tam tikros teisėtumo sąlygos, kurios nebuvo patenkintos šioje situacijoje.

Pareigos apsaugoti principas yra pripažintas Jungtinių Tautų, tačiau jo tikslas nėra pakeisti jėgos nenaudojimo reguliavimą. Šis principas dar kartą pabrėžia išimtinę Jungtinių Tautų teisę leisti naudoti jėgą. Principo tikslas yra paskatinti valstybių sąmoningumą, paraginti jas išlikti budriomis ir pastebėti kylančius konfliktus ankstyvoje jų stadijoje, padėti Jungtinėms Tautoms atsakyti į tarptautines grėsmes ir atkurti taiką pokonfliktiniuose regionuose. Taigi, kadangi Ravisia'os jėgos panaudojimas negali būti pateisintas pagal Jungtinių Tautų Chartijos numatytas išimtis, teisė į humanitarinę intervenciją (dar) nėra paprotinės teisės dalis, o pareigos apsaugoti principas nenumato teisės valstybėms vienašališkai naudoti jėgą, Ravisia yra atsakinga už neteisėtą jėgos panaudojimą.

Antra hipotezė – Ravisia yra atsakinga už savo karių neteisėtus veiksmus, atliktus tuo metu, kai jie tarnavo Jungtinių Tautų taikos palaikymo misijoje Alicanto valstybėje, nes šie veiksmai pažeidžia Ravisia'os tarptautinius įsipareigojimus ir yra priskirtini Ravisia'ai. Įrodinėjama tarptautinio neteisėto akto sudėtis (tarptautinių įsipareigojimų pažeidimas bei neteisėtų veiksmų priskyrimas valstybei atsakovei), nes tarptautinis neteisėtas aktas užtraukia valstybei tarptautinę atsakomybę. Pirmiausia, karių veiksmai pagal tarptautinę teisę kvalifikuojami kaip seksualinis vaikų išnaudojimas ir įsikišimas į valstybės vidaus reikalus – šie veiksmai atitinkamai pažeidžia Tarptautinę vaiko teisių konvenciją, Jungtinių Tautų Chartiją bei susitarimą, sudarytą tarp Jungtinių Tautų ir Alicanto dėl taikos palaikymo misijos įvedimo.

Labiausiai ginčytinas yra neteisėtų veiksmų priskirtinumas. Taikos palaikymo misijos yra pagalbinis Jungtinių Tautų organas ir pagal bendrą taisyklę karių veiksmai turėtų būti priskiriami Jungtinėms Tautoms. Tačiau kariai yra siunčiami valstybių narių, todėl jos išlaiko tam tikrą kontrolę (ir dalį atsakomybės). Tarptautinė teisė numato, jog veiksmų priskyrimui tokiais atvejais taikomas efektyvios kontrolės testas - atsakomybė priskiriama tai valstybei ar tarptautinei organizacijai, kuri turėjo kontrolę neteisėtų veiksmų atžvilgiu. Kariai seksualiai išnaudojo nepilnametes mergaites ne tarnybos metu, todėl Jungtinės Tautos neturėjo jokios kontrolės šių veiksmų atžvilgiu ir už tai neatsako. Neteisėtas radijo transliavimas taip pat priskirtinas Ravisia'ai, nes jis buvo atliktas tik su Ravisia'os generolės žinia, Jungtinės Tautos nebuvo apie tai informuotos ir negalėjo turėti kontrolės.

Taigi, tyrimo problemų tarptautinio teisininio reglamentavimo analizė ir pritaikymas hipotetinės bylos faktams patvirtina darbe iškeltas hipotezes: Ravisia yra atsakinga už neteisėtą jėgos panaudojimą prieš Alicanto valstybę bei neteisėtus savo karių veiksmus.