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IN THE INTERNATIONAL COURT OF JUSTICE

THE CASE CONCERNING CERTAIN MATTERS IN DONAVALE AND BURGUNDAN & FOUDALIN

2008

The Government of the Union of Donavale

v.

The Government of Burgundan

&

The Government of Foudalin

MEMORIAL FOR THE APPLICANT

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Miscellaneous

STATEMENT OF JURISDICTION

The Government of the Union of Donavale, the Government of Burgundan and the Government of Foudalin has submitted the following matter to the International Court of Justice pursuant to paragraph 2 of Article 36 of the Statute of the International Court of Justice. All three states have made Declarations accepting the compulsory jurisdiction of the Court.

QUESTIONS PRESENTED

I. Whether the attack against Agitha by Burgundan was a violation of the norms of contemporary international law;

II. Whether the invasion by Burgundan can be justified as an act of self-defense;

III. Whether the apprehension and prosecution of Ms Tavilisi was a legitimate exercise of jurisdiction by Donavale and if it met the international minimum standard of justice;

IV. Whether there is breach by Foudalin of the *1961 Vienna Convention on Diplomatic Relations* and if this incurs state responsibility on the part of Burgundan;

V. Whether the nationalization of Socilio, a Foudalin company by Donavale and compensation according to domestic law is a violation of the agreement and principles of international investment law.

STATEMENT OF FACTS

New Agitha and Donavale are neighbouring countries and until several years ago, New Agitha was a province of Donavale. Donavale had ten provinces when it obtained independence in 1990. The Donavale Constitution states that in order for Agitha and Sapitu to secede from the union, a referendum should be held with 70% of the residents approving. It also has to be approved by a 60% majority of the Donavalen Parliament.

In 2002, a referendum favouring the secession from the union was passed by Agitha. The referendum to independence was approved by the Donavalen Parliament. However in mid-2003, Elava Natu, chief of the Donavalen army, seized power and announced himself as the new Head of State. He suspended the Constitution and disregarded the referendum.

This lead to the rise of the Agitha Liberation Movement (ALM) who fought a civil war for four years from 2003 to 2007. It was alleged that about 1/20 of the Agitha populace perished in the civil war. There was also an allegation of genocide by the Donavalen army and this was investigated by the United Nation and New Agitha panel.

Burgundan, a country bordering Agitha has about 10,000 refugees present in three camps in Burgundan. During the presidential campaign, President Jawaldi expressed support to the struggles of the Agitha people to exercise the right of self-determination.

In 2007, there was a brief incursion by the Donavalen troops in Burgundan in pursuit of rebels. Later in the same year, another incursion was made which resulted in the death of 20 Agithian. As a result, Burgundan issued a warning statement to Donavale and reported the incursions to the United Nation Security Council (UNSC). The UNSC met and adopted a resolution that called' for restraint from both countries.

A week after that, Donavalen Air Force military officer, Colonel Phathone acting

without authorization sent three bombers to Agitha refugees' camp and whereby approximately 100 refugees and 50 Burgundan nationals were killed. Within two hours of the attack, Phathone and several of the air force pilots were arrested and tried within twenty-four hours by a Donavalen military tribunal. Within five days, Phathone and his subordinates were sentenced to 10 years' imprisonment.

Following the attack, President Jawaldi announced that Burgundan will exercise their inherent right of self-defense. The statement was supported by the Burgundan parliament and the Burgundan troops were inside Agitha within a few hours. The troops were welcomed by the Agitha people and the Agitha rebels/ freedom fighter joined forces with them. During the war, UNSC adopted another resolution calling for restraint.

An announcement on the establishment of New Agitha was made on the 10th January 2008. A few days after the announcement, a journalist from Burgundan, Ms Tavilisi wrote an article calling Elava Natu a buffoon and of unsound mind. Donavale's law states that it is a crime to cause ridicule or disrespect to the Head of State. Ms Tavilisi was apprehended in Foudalin by agents of Donavale. Following that, she was tried in Donavale and sentenced to three years' imprisonment. On appeal, her sentence was reduced to two years' of house arrest.

As a result of the apprehension of Ms Tavilisi, a demonstration was carried out in front of the Donavalen Embassy in Foudalin by about 300 Foudalin nationals. The crowd overwhelmed the five police guards and entered the Embassy. As a result, an embassy staff and three policemen were injured. The Foudalin military police reinforcement arrived within 30 minutes and cleared the Embassy ground. During the fracas, the third secretary of the Donavalen Embassy was shot and injured in the thigh. The third secretary and Embassy staff was given medical treatment. Within a few hours the Foreign Minister of Foudalin apologized to the Donavalen Ambassador and Foreign Minister.

Two days later, Elava Natu announced the nationalisation of the Unicorn telephone

industry inside Donavale which is owned by a private company from Foudalin called Socilio. The article in the agreement between *Socilio* and Burgundan Company states that just compensation according to Donavalen law. This is in accordance with the principles in New International Economic Order and Charter of Economic Rights and Duties of States. The nationalisation decree signed by Head of State, Elava Natu stating the nationalisation was due to the attack on the Donavalen Embassy in Foudalin. Within a few weeks after the nationalisation, Donavale lodged a suit in this Court against Burgundan and Foudalin.

SUMMARY OF PLEADINGS

I. The attack and continued occupation in Agitha by Burgundan is in violation of Donavale's sovereignty and integrity. The attack by Burgundan did not only violate Donavale's territorial sovereignty and integrity but it was also a prohibited unilateral use of force. In addition to that, Burgundan unlawfully intervened in another State's internal affairs. Humanitarian intervention is no justification for the attack by Burgundan as there was no breach of human rights committed by Donavale and Burgundan did not fulfill the prerequisite elements. Hence, Donavale is entitled for compensation for the wrongful act committed by Burgundan.

II. Burgundan cannot justify the invasion in Agitha as self-defense under either the UN Charter or customary international law. This is because Burgundan failed to meet the requirements imposed by Article 51 of the UN Charter as the response was neither necessary nor proportional. Furthermore, Burgundan breached its treaty obligation to report its action under Article 51 of the United Nation Charter. The doctrine of anticipatory self-defense does not justify Burgundan's attack as there was no imminent threat posed by Donavale to Burgundan. In the alternative, Burgundan cannot preclude its wrongfulness under the excuse of supporting the national liberation movement as aiding rebels in civil war is contrary to international law.

III. The forcible transfer of the accused and the conviction of Ms Tavilisi was a legitimate exercise of jurisdiction by Donavale. Donavale has not breached any principle of international law as Donavale's exercise of jurisdiction is in accordance with principles of international law. Additionally, the failure of Burgundan to protest the alleged abduction is tantamount to acquiescence in light of international law practices.

In the alternative, should the abduction be adjudged to be illegal, the principle of *male captus* enables Donavalen courts to exercise jurisdiction over Ms Tavilisi. The trial and subsequent conviction of Ms Tavilisi was done in accordance with international standards.

IV Foudalin was in breach of the Convention on Diplomatic Relations by failing to provide adequate protection to Donavale's diplomatic corps. Since, Foudalin is obligated to accord Donavale's diplomatic corps appropriate protection under international law. The breach of the VCDR incurs State responsibility on the part of Foudalin.

V The nationalisation of *Socilio* and compensation given in accordance with Donavalen domestic law is in accordance with cotemporary international principles. Furthermore, this Court is not conferred with jurisdiction to take cognizance of Foudalin's counter-application. The nationalisation of *Socilio* is sanctioned by principles of international law as Donavale had the right to nationalise and international law does not preclude the exercise by Donavale of its sovereign right to nationalise *Socilio*. Additionally, the termination of the investment agreement does not constitute an internationally wrongful act as the compensation given in accordance with Donavalen domestic law is in conformity with principles of international law.

PLEADINGS

I. THE ATTACK AND CONTINUED OCCUPATION IN AGITHA BY BURGUNDAN IS IN VIOLATION OF DONAVALE'S SOVEREIGNTY AND INTERNATIONAL LAW.

A. The attack in Agitha by Burgundan violates Donavale's territorial sovereignty and integrity.

The basic premise of international law rests upon sovereign equality of states.[1] Sovereignty represents the totality of rights a State holds and its ultimate authority to exercise those rights in controlling its territory and determining its political behaviour.[2] This principle has culminated in an absolute prohibition of the use of force by States in their international relations where States are obliged to settle their disputes by peaceful means rather than resorting to armed confrontation.[3] At the time of the attack, Agitha was a province of the Donavalen Union[4] as it has not seceded. As the Head of State of Donavale suspended the Donavale Constitution and reasserted control of Agitha[5], Agitha was still part of Donavale's territory when Burgundan invaded Agitha. Agitha Liberation Movement (ALM) only announced the establishment of the nation, New Agitha on 10th January 2008[6]. Hence, Agitha was a province of the Donavalen Union and part of its territory. Therefore, the attack and

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1 *Ibid*, Article 2(4) ; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States In Accordance with The Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8082 (1970)

2 *Corfu Channel (U.K. v Alb.)*, 1949 ICJ Rep 4, 43

3 Art 2(3), 2(4) UN Charter; Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 Academie de Droit Int'l, Recueil des Cours 455, 493 (1952, Vol. II); Levitin, *The Law of Force and The Force of Law: Grenada,the Falklands, And Humanitarian Intervention*, 27 Harv. Int'l L.J. 621, pp. 627-29 (1986).

4 Moot Problem, p.1, ¶1

5 *Ibid,* p.1, ¶ 3

6 *Ibid,* p.4, ¶ 2

continued occupation of Agitha constitutes a violation to Donavale's sovereignty and territory.

B. The attack and the occupation of Agitha by Burgundan was a prohibited unilateral use of force.[7]

Article 2(4) of the UN Charter[8] totally prohibits the use of force[9] unless explicitly allowed by the UN Charter[10] because it has the character of *jus cogens,*[11] where no derogation is permitted[12] and it is affirmed in the case of *Nicaragua*.[13] Subsequently, Burgundan's attack on and 'continued occupation' of Agitha breached Article 2(4) and it amounts to a violation of international law. The prohibition is not confined to the actual use of force but extends to the mere threat of force.[14] The prohibition includes the open incursion of regular military forces into the territory of another State or cross-border shooting into the territory.[15] Therefore, an incursion into the territory of another State constitutes an infringement of Article 2 (4) of the

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7 Alexandrov, *Self-defence Against the Use of Force in International Law,* (1996); Arena and Beck, *International Law and the Use of Force,* (1993); Higgins, *The Development of International Law through the Political Organs of the UN,*(1963), pp. 167-239.

8 Signed at San Francisco on 26 June 1945, entry into force 24 October 1945, in accordance with Article 110.

9 Oppenheim, *International Law,* vol 2; Brownlie, *International Law and the Use of Force by States,* p. 267. Schwarzenberger, *International Law as Applied by International Courts and Tribunals,* Vol.2, *The Law of Armed Conflict,* Stevens & Sons, London, (1976); Brownlie, *International Law and the Use of Force by States,* Clarendon Press, Oxford,(1963); Cassese, Antonio, *Violence and Law in the Modern Age,* Polity Press, Cambridge, (1986)

10 Right of Self Defence in Article 51 of the UN Charter and Collective Use of Force under Chapter VII of the UN Charter.

11 Yearbook of the ILC, 1996, vol. 2, 172, at 247.

12 Article 53, Vienna Convention on the Law of Treaties 1969.

13 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* (1986) ICJ Rep 14.

14 R.Sadurska, *Threats of Force,* 82 AJIL, 1988, p.239; White and Cryer, *Unilateral Enforcement of Resolution 687: A Threat Too Far?,* 29 California Western International Law Journal, 1999, p.243.

15 Zanardi, Lamberti, *Indirect Military Aggression,* in Cassese (ed.), *Current Legal Regulation,* pp.111-119

UN Charter.[16] Even if the incursion was not intended to deprive that State of its territory and the invading troops are meant to withdraw immediately after completing a temporary and limited operation but it still constitutes a violation.[17] The two requirements of Article 2(4) of the UN Charter[18] are fulfilled as the attack was an act of retaliation [19] and it was done deliberately against the territorial sovereignty of Donavale to cause the dismemberment of the Union permanently. The invasion by Burgundan in Agitha is a completely unjustified use of force forbidden by the UN Charter [20] and customary law.

C. Burgundan unlawfully intervened in another State's internal affairs.

The 1970 Declaration on Principles in International Law[21] emphasized that no state has the right to intervene in the external or internal affairs of any state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements are condemned.[22] This principle is affirmed in the judgment given in *Nicaragua.*[23] The principle upholds the right of every sovereign State to conduct its affairs without outside interference either directly or indirectly which involves the use of force.[24] A civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State or when a large portion of the population of a State rises in arms against the

16 (n.3)
17 Oppenheim, *International Law ii, Disputes, War and Neutrality,*(Lauterpacht,ed.7th, pp 154)
18 (n.3)
19 Moot Problem, p. 3, ¶ 4
20 (n.3)
21 General Assembly, Resolution 2625 (XXV)
22 Reisman, *Criteria for the Lawful Use of Force in International Law,* (1985) 10 Yale J Int'l L, pp. 279-85
23 Nicaragua, (n.13)
24 (n.3), ¶ 209

legitimate government[25].

ALM arose and fought a civil war for four years from 2003-2007 against the Donavale government.[26] Once a civil war is in progress, a state cannot request for military assistance from either party whether directly or indirectly as affirmed in *Nicaragua.*[27] Burgundan provided assistance to the civil war by invading into Agitha and joining forces with the Agithian rebels which resulted to the occupation of Agitha for 6 weeks. President Jawaldi during his election campaign stated the intention to assist the Agithians.

D. Humanitarian intervention is no justification for the attack by Burgundan.

Extreme atrocities justify armed intervention by outside states, despite the prohibition on the use of force.[28] The paucity of past genuine humanitarian interventions as well as the frequent condemnations of such actions indicates that there is no customary norm permitting such intervention. [29] Indeed, the doctrine is contrary to the fundamental precepts of sovereignty and non-intervention embodied in the UN Charter[30] and customary international law.[31] Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur.[32]

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25 (n. 17),p. 209

26 Moot Problem, page 1, ¶ 3,

27 (n.13)

28 Richard B. Lillich, *Humanitarian Intervention : A Reply to Ian Brownlie and A Plea for Constructive Alternatives, in Law and Civil War in the Modern World,* (1974), pp.229-51

29 Brownlie, *Humanitarian Intervention, in Law and Civil War in the Modern World,* (1974), pp. 217-28

30 Article 2(4) UN Charter.

31 Richard B. Lillich, *Economic Coercion and the International Legal Order,* 52 Int'l Aff. 358 (1975);Schroder, *Principle of Non-Intervention,* Encyclopedia of Public International Law, 358 (1981)

32 *Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty (ICISS),2001 (adopted by the heads of state and Government at the United Nations Millennium +5 Summit,2005) (hereinafter Report of ICISS)

Although India's intervention in East Pakistan in 1971 and Tanzania's humanitarian invasion of Uganda in 1979 resulted in unquestionable benefits for the groups, India and Tanzania were reluctant to use humanitarian ends to justify their invasion of a neighbour's territory and preferred to quote the right of self-defense.[33] During the Security Council Debates, many states explicitly declared that force could not be employed to protect human rights in another State.[34] Additionally, in the 1999 Kosovo intervention, many leading North Atlantic Treaty Organization (NATO) members made clear that they considered this intervention to be an exception that should not be repeated in the future.[35] This reflects that humanitarian intervention has yet been crystallized into customary international law.

1. Alternatively, if the principle of humanitarian intervention amounts to customary norm, there was no breach of human rights committed by the Applicant

Genocide is defined as any of the following acts committed with intent to destroy in whole or in part a national, ethnical, racial such as killing members of the group and forcibly transferring the children.[36] The Genocide Convention[37] reaffirms that genocide is a crime whether committed in time of war or peace is a crime under international law.[38] The question of intent is such that states may deny genocidal activity by noting that the relevant

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33 United Kingdom Foreign Office Policy Document, No 148, reprinted in 57 AJIL (1986) 614.

34 Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, Martinus Nijhoff Publishers, (1985) 101-2.

35 Chesterman, supra; Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 Eur. J. Int'l L. 1, 2 (1999); Jonathan Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 Vand. J. Transnat'l L. 1231, 1239 (1999).

36 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention)

37 *Ibid*

38 W.Schabas, *Genocide in International Law,* Cambridge, 2000; G. Verdirame, *The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals,* 49 ICLQ 2000,pp. 578

intent in whole or in part was in fact absent. [39] In *Prosecutor v. Akayesu*[40], the Trial Chamber held that to incur responsibility for genocide, acts must be committed against an individual specifically because the individual belonged to a racial, ethnic, religious, or national group. The victim is chosen not because of his individual identity, but rather on account of his membership in the protected group. In contrary to the present situation, there was civil war between the ALM and Donavale. The deaths of the Agithians were the result of the civil war which lasted for four years.[41] The element of intention is not present as genocide specifically requires the intention of destroying a group of people based on their race, ethnicity or religion. The UN New Agitha investigation panel formed to investigate the allegation of genocide concluded that the element of intent required by the Genocide Convention was absent.[42]

Genocide by forcibly transferring children requires the perpetrator forcibly transfer one or more persons and the perpetrator intended to destroy in whole or in part that national, ethnical, racial or religious group.[43] However, the children born of Agitha women and Donavalen fathers were removed and transferred to the Donavalen group not with intention to destroy as stated in the Genocide Convention.[44] In addition, the report also stated that there is no evidence of the intent element required to establish genocide. The report found that Donavale did not commit genocide neither by killing nor forcible transfer of children.

2. Burgundan did not fulfill the prerequisite elements of humanitarian intervention.

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39 N.Lewis, *The Camp at Cecilio Baez in Genocide Paraguay,* (ed. R. Arens), Philadelphia, 1976, pp. 58; Ruhashyanko, *Study on the Question of the Prevention and Punishment of the Crime Genocide,* 1978, E/CN.4/Sub.2/416

40 ICTR -96-4-T, 1998, ¶ 523

41 Moot Problem, p. 1, ¶ 4

42 *Ibid*, p. 1, ¶ 3.

43 Genocide Convention (n. 36)

44 *Ibid,* p. 9, ¶ 1

The primary purpose of the intervention must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned. Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored with reasonable grounds for believing lesser measures would not have succeeded. The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective. [45] The attack by Burgundan was done as a political retaliation and with ulterior motives. This is seen from the promise made by President Jawaldi during presidential campaign that he will take actions in regards to the Agitha people as it brings negative impact on the economy and livelihood of Burgundan.[46] Furthermore, the intervention was not proportionate as Burgundan troops continued to occupy Agitha for 6 weeks after the invasion. The intervention was not the last resort as the proper authority to intervene is the United Nations Security Council (UNSC).

E. Donavale is entitled for compensation for the wrongful act committed by Burgundan

The state responsible for an international wrongful act is under an obligation to make reparations or remedy the breach of an international obligation. [47] Article 36 of the Draft Articles[48] states that the State responsible for the wrongful act is under an obligation to compensate for the damage caused. The compensation to be provided shall cover any

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45 Report of ICISS (n.32); N. Tsagourias, *The Theory & Praxis of Humanitarian Intervention,* Manchester, 1999, D.J. Scheffer , *Towards a Modern Doctrine of Humanitarian Intervention,* University of Toledo Law Review, 1992, pp. 253

46 Moot Problem, p. 2, ¶ 2

47 Shaw, *International Law,* Cambridge University Press , (5th ed., 2003)pp, 715-720; F.A. Mann, The Consequences of an International Wrong in International and National Law, 48 BYIL, 1978, pp.1

48 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Commentary 2001 (adopted in 2001, submitted to the General Assembly) (hereinafter Draft Articles).

financial assessable damage.[49] In the *Gabčíkovo-Nagmaros Project*[50] case, the Court declared that it is a well established rule of international law that an injured State is entitled to obtain compensation from the State which has committed the wrongful act. The principle of reparation to wipe out the consequences of an illegal act is emphasized in the *Chorzów Factory* [51]case. As Burgundan committed an international wrongful act by invading and occupying Agitha and breached international obligation, Donavale is entitled for reparation and the form of reparation claimed is compensation. Donavale suffered damage as Burgundan's act resulted to the dismembering of the Donavalen Union[52] permanently. In light of the situation, Donavale seeks USD 1 Billion as compensation or any suitable amount the International Court of Justice deems fit.

II. BURGUNDAN CANNOT JUSTIFY ITS INVASION AS SELF-DEFENSE UNDER EITHER THE UN CHARTER OR CUSTOMARY INTERNATIONAL LAW.

A. Burgundan fails to meet the requirements imposed by Article 51 of the UN Charter[53].

The inherent right of self-defense is preserved by Article 51 of the UN Charter.[54] Article 51 imposes three criteria: an armed attack must occur before a nation may retaliate with force; it must be necessary to take such measures; and the response must be proportionate.[55]

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49 *Ibid*

50 *Gabčíkovo-Nagmaros Project (Hungary v Slovakia),* ICJ Reports 1997, pp. 81

51 *Chorzów Factory (Germ. v. Pol.)* (Merits) 1927 PCIJ , (ser.A), No. 9,20

52 Moot Problem, p.6, ¶ 3

53 (n.3)

54 *Ibid*

55 Don Wallace, Jr., *International Law and the Use of Force: Reflections on the Need for Reform,* 19 Int'l Law. 259 (1985); Oscar Scharter, *United Nations Law in the Gulf Conflict,* 85 Am. J. Int'l L. 452 (1991)

1. Burgundan's response did not meet the requirement of necessity.

In order to invoke the right of self-defense, Burgundan must show not only that it was responding to an armed attack, but that its response was both necessary and proportional to the initial attack.[56] In any event, the reason for necessity to exist is that the State attacked must not have any means of halting the attack other than recourse to armed force.[57] Necessity involves an element of immediacy. Immediacy has been recognised in the *Nicaragua*[58] case as element of necessity. The *Caroline*[59] case further states that there had to exist a necessity of self-defense that is instant, overwhelming and leaving no choice of means and moment of deliberation. There was no imminent threat to Burgundan posed by Donavale as Colonel Phatone and his men were arrested after the attack. The appropriate response by Burgundan would be a request for action by the Security Council or resort to the International Court of Justice[60] rather than the recourse of armed force. It was unnecessary for Burgundan to take such measures as other resort was still available.

2. The act of invading and occupying Agitha for 6 weeks was disproportionate.

It is the general principle of law that the defensive action must commensurate with and in proportion to the armed attack which gave rise to the exercise of the right of self-defense. [61] Proportionality as a criterion of self-defense requires consideration of the type of weaponry to be used. It also suggests that defensive measures should be confined to the territory of the defending state.[62] Burgundan invaded Agitha and further occupied for six weeks after the invasion. Burgundan troops only left after chasing the Donavalen troops out

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56 Wallace, (n. 55)

57 Ago, *Addendum to the Eighth Report on State Responsibility*, Yearbook of the I.L.C., (1980) vol.2, part.1, pp. 69

58 *Nicaragua v US*, pp. 122 (n. 13)

59 *Caroline Case* (1837) 2 Moore *Digest of International Law, ii (1906), pp.412*

60 Article 2(4), Article 39-51, (n.3)

61 Garham, *Proportionality and Force in International Law,* (1993) 87 A.J.I.L., 391;

62 Ian Brownlie, (n. 29), p. 372.

of the Agitha province. [63] This reflects that the attack by Burgundan is disproportionate to the gravity of the attack.

3. Burgundan breached its treaty obligation to report its action under Article 51 of the UN Charter.

Article 51 of the UN Charter states that a State is precluded from invoking the right of self-defense if that State fails to immediately report to the Security Council.[64] In the *Nicaragua Case*, this court ruled that a State could not invoke the right of self-defense if it failed to comply with the requirement of reporting to the Security Council.[65] Failure of Burgundan to report to the Security Council after attacking Agitha shows that Burgundan acted in contravention of the requirements imposed by the UN Charter. Hence, the defense of Article 51 of the UN Charter cannot be invoked.[66]

B. The doctrine of anticipatory self-defense does not justify Burgundan's attack.

The right of anticipatory self-defense has been recognised only in very narrow circumstances in customary international law, and that right is conditioned on certain prerequisites.[67] Anticipatory self-defense generally requires that threat be "instant, overwhelming, leave no other means and no moment for deliberation." [68] This formulation of anticipatory self-defense doctrine reflects a widespread international desire to restrict the right of self-defense to situations where an attack has actually occurred.[69] An anticipatory self-defense would be contrary to the wording of Article 51 of the UN Charter [70] as well as to

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63 Moot Problem, p. 4, ¶ 1
64 (n.3)
65 Nicaragua Case, (n.13)
66 Moot Problem, p. 3, ¶ 3.
67 Schachter, (n. 55)
68 Edward Gordon, *International Law and the United States Action in Grenada: A Report,* 18 Int'l Law 331, 367 (1984)
69 Schachter, (n. 55); Louis Henkin, *How Nations Behave* 295 (2nd ed. 1979)
70 (n.3)

its object and purpose to cut to a minimum the unilateral use of force in international relations.[71] Self-defense is only permissible only after the armed attack has already been launched. [72] In contrary, Donavale did not pose imminent treat against Burgundan. There is no evidence that Donavale was planning to attack Burgundan. Hence, Burgundan cannot justify its invasion under the doctrine of anticipatory of self-defense.

C. In addition, Burgundan cannot preclude its wrongfulness under the excuse of supporting the national liberation movement.

Self-determination refers to the right of the majority within a generally accepted political unit to the exercise of power.[73] The exercise of self-determination by the people of Agitha was contrary to Article 2(4) UN Charter as it involved the use of force contrary to the UN Charter by Burgundan military troops.[74] The act of Burgundan in supporting the ALM to exercise their right of self-determination was not justified as there was unlawful use of force by the Burgundan troops and it was a direct violation of the non-use of force principle enshrined in the UN Charter.

Under international law, civil war is perfectly lawful and it is extremely unlikely that third party military intervention can be justified. Once a civil war is in progress, no other State may respond to a request for military assistance.[75] This shows that aid to rebels is contrary to international law. The General Assembly Declaration on Principles of International Law 1970 emphasized that no state shall interfere in civil strife in another State. In the *Nicaragua* case, it was confirmed that giving assistance to rebels is an indirect use of force contrary to international law. In contrary, President Jawaldi announced that Burgundan

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71 Simma, (n. 35), pp.803

72 *Ibid*

73 H. Hannum " Rethinking Self-Determination", (1993), 34 Virginia JIL 1-69

74 (n.3)

75 Oppenheim, *International Law,* Lauterpacht (ed.), vol.2, *Disputes, War and Neutrality,*pp.209

owed a legal and moral obligation to assist the people of Agitha.[76] In furtherance of that statement, the leader of ALM requested President Jawaldi to assist in the struggle for self-determination.[77] This shows that Burgundan's act was a form of assistance to the national liberation movement struggles by the Agitha people.

III. THE FORCIBLE TRANSFER OF THE ACCUSED AND CONVICTION OF MS TAVILISI WAS A LEGITIMATE EXERCISE OF JURISDICTION BY DONAVALE AND THE TRIAL OF MS TAVILISI MEETS THE INTERNATIONAL MINIMUM STANDARD.

A. Donavale has not breached any principle of international law.

In accordance with established jurisdictional principles of international law,[78] Donavale may exercise jurisdiction over Ms Tavilisi for crimes committed against the State. Therefore, the Applicant has acted in conformity with international law.

1. Donavale's exercise of jurisdiction is in accordance with principles of international law.

A State may criminalise conduct which occurs outside its territory and provide for prosecution of the accused should they enter the State's territory.[79] The Protective Principle allows a State to prosecute citizens of other State's for conduct outside its territory that threaten the security or political independence of the State.[80] In *US v Pizzarusso*, it was decided that jurisdiction arises if actions have a potentially adverse effect upon the security or

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76 Moot Problem, p.2 ¶2

77 *Ibid*

78 Harvard Draft Convention on Jurisdiction with Respect to Crime, with Comment, reprinted in 29 AJIL Supp. 439 (1935).

79 Iain Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot, England: 1994) 11-12.

80 William R. Slomanson, *Fundamental Perspectives on International Law* (3rd ed.) p 213.

governmental functions and there need not be any actual effect within the country.[81] As the statements of Ms Tavilisi, which amounts to *lèse majesté*, adversely affects the stability of Donavale,[82] the State has the requisite jurisdiction to apprehend her to stand trial in Donavale.

Additionally, freedom of speech is a limited right as demonstrated in *White v Sweden*, where it was decided that protection of the right to impart information required journalists to act in good faith, on an accurate factual basis because freedom of expression entailed duties and responsibilities.[83] Therefore, a journalist's freedom of expression cannot excuse the crime of causing disrespect and ridicule to a Head of State.

In addition to that, the Passive Personality Principle permits the exercise of jurisdiction based on the nationality of the victim when the crime has occurred outside the prosecuting State's territory.[84] In the *SS Lotus Case*, the Permanent Court of International Justice (PCIJ) acknowledged the applicability of this principle when a French ship harmed Turkish citizens and property.[85] As Elava Natu is a citizen of Donavale and the victim of Ms Tavilisi's crime, the exercise of jurisdiction by Donavale is permitted under international law.

2. Additionally, the failure of Burgundan to protest the alleged abduction is tantamount to acquiescence in light of international law practices.

In *United States ex rel. Lujan v Gengler*, the Court relying on the proposition that consent or acquiescence by the offended State waives any right it possessed and heals any violation of international law, found that neither Argentina nor Bolivia, the countries where

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81 388 Fed.2d. 8 (2nd Cir. 1968); 88 S.Ct. 2306.

82 Moot Problem, pg 4, ¶ 3.

83 (2008) 46 EHRR 3, ¶ 21

84 Slomason, supra; Jennings, 121 Hague Recueil (1967, II) 154; Sarkar, 11 ICLQ (1962) 461; Akehurst, 46 BY (1972-3) 162-6; United States v Yunis (No 2) ILR 82.

85 The SS Lotus (France v Turkey) PCIJ, Ser. A No 10 (1927); Louis Henkin, How Nations Behave 141-145 (1979); Robert Lillich, *Forcible Self-Help under International Law*, in Readings In International Law, Naval War College Review 135 (1980).

the forcible abductions had occurred, had declared that its sovereignty had been violated, and such failure to protest was 'fatal' to the abductee's attempt to rely on the UN Charter.[86]

Similarly, as Burgundan has not formally protested and failed to make a claim with regards the apprehension of Ms Tavilisi, Burgundan has acquiesced to the apprehension and is estopped from raising the contention.

B. In the alternative, should the abduction be adjudged to be illegal, the principle of *male captus* enables Donavalen courts to exercise jurisdiction over Ms Tavilisi.

There is no principle of customary international law which requires courts to decline jurisdiction where an accused has been brought before it illegally.[87] In *US v Alvarez-Machain*,[88] the Court was of the opinion that the abduction of the accused, who was a citizen of Mexico did not require the setting aside of jurisdiction even if there was a violation of international law as the proper remedy for the breach of international law was at the diplomatic level. In affirming the *male captus, bene detentus* rule, the Supreme Court decided that the physical presence of the accused before the Court, no matter how he had been brought there, sufficed to validate the proceedings.[89]

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86 US ex rel Lujan v. Gengler, 510 F.2d 62 (2nd Cir.1975) pp 65-7; Mitchell J. Matorin, *Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition*, 41 Duke L.J. 907, 928 (1992); F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, (Yoram Dinstein & Mala Tabory, eds., 1989).

87 US v Rauscher (1886) 119 US 407; Kerr v Illinois (1986) 119 US 346; Ex parte Scott (1829) 9 BC 446; R v Garrett (1917) 86 LJKB 894; Ex parte Elliott [1949] 1 All ER 376; R v Plymouth Magistrates' Court, ex parte Driver [1985] 2 All ER 681; State of Vermont v. Brewster, 7 Vt. 118 (1835); A-G of Israel v Eichmann (1962) ILR 36; Ndhlovu v Minister of Justice (1976) ILR 68; Nduli v Minister of Justice (1977) ILR 69; Re Argoud (1964) ILR 45; US v Alvarez-Machain, 112 S.Ct. 2188 (1992); Restatement (Third) of Foreign Relations Law § 433 (1987).

88 US v Alvarez-Machain, ibid.

89 US v Alvarez-Machain, ibid; Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AJIL 736 (1992); Glennon, *State Sponsored Abduction: A Comment on United States v Alvarez-Machain*, 86 AJIL 746 (1992); John Rogers, *Response to President's Notes on Alvarez-Machain*, ASIL Newsletter, 6

In the present case, the accused was apprehended and brought before the Donavalen Court of law to face criminal proceedings in accordance with the domestic law of the State which has dictated that causing ridicule or disrespect to the Head of State shall be punishable by imprisonment.[90] As such, the manner in which the accused was brought before the Court does not negate the Court's jurisdiction to try the accused. Donavale's exercise of jurisdiction is therefore, in line with international law.

C. The trial and subsequent conviction of Ms Tavilisi was done in accordance with international standards.

The International Criminal Tribunal of Yugoslavia (ICTY) was established in accordance with Article 14 of the ICCPR[91] but its Rules and Procedures allow the adoption of measures which derogate from provisions of the ICCPR in situations of national security.[92] Such derogation may be done without any detraction from the right to a fair trial. Therefore, the fact that Ms Tavilisi was accorded a Court appointed counsel[93] as opposed to one of her own choosing, does not amount to a denial of a fair trial as the prevailing situation of unrest in Donavale demanded such a derogation to maintain national peace and security.[94] As such, Ms Tavilisi has been afforded a fair trial under international law.

IV. FOUDALIN WAS IN BREACH OF THE CONVENTION ON DIPLOMATIC RELATIONS BY FAILING TO PROVIDE ADEQUATE PROTECTION TO THE APPLICANT'S DIPLOMATIC CORPS.

(Jan – Feb 1993).

90 Moot Problem, pg 4, ¶ 3.

91 Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/RES/25704, Article 21; ICCPR, supra.

92 Michael Bachrach, *The Protection and Rights of Victims under International Criminal Law*, 34 Int'l Law 7 (2000).

93 Moot Problem, pg 4, ¶ 3.

94 *Ibid*, pg 4, ¶ 1.

A. Foudalin is obligated to accord the Applicant's diplomatic corps appropriate protection under international law.

Under Articles 22(2) and 29 of the VCDR[95], the receiving State has the duty 'to take all appropriate steps to protect the premises of the mission or impairment of its dignity' and at the same time protect the inviolability of a diplomat. In *State v Acuna Araya*, the Court of Cassation of Costa Rica held that the personal inviolability of a foreign official 'is a prerogative in virtue of which the person clothed with that privilege is safeguarded against every outrage and aggression'.[96]

It is also indisputably a rule of law in all civilized countries that individual persons who are called diplomats are entitled to receive from the local sovereign a very high degree of personal protection.[97] The degree of protection provided must be proportionate to the threat[98] and the initial inability by the military reinforcements to control the demonstrators shows that protection by Foudalin was insufficient. In the *Chapman Claim*,[99] the US-Mexican General Claims Commission held Mexico responsible for the delinquency in not according special protection to an American consul who was shot and seriously wounded at the American Consulate in Puerto México. The Commission adopted a very high standard of protection by stating that the Government should realise that foreign Governments are sensitive regarding the treatment accorded to their representatives. Therefore, the Government of the consuls' residence should exercise greater vigilance in respect to their

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95 Vienna Convention on Diplomatic Relations (done at Vienna on 18 April 1961, entered into force 24 April 1964) UNTS Vol. 500, p. 95 [hereinafter VCDR].

96 Annual Digest of Public International Law Cases (Ann Dig), 359 (1927-1928).

97 Cassirer and Geheeb v Japan; Tietz et al v People's Republic of Bulgaria; Bennett and Ball v People's Republic of Hungary 28 ILR 380, 396, 409 (1963); US Diplomatic and Consular Staff in Tehran Case, *infra.*

98 E. Denza, Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations (1976); Harvard Draft Convention on Diplomatic Privileges and Immunities, 26 AJIL 19; Sir E Satow, Guide to Diplomatic Practice (5th ed by Lord Gore-Booth, 1979).

99 US-Mexico, General Claims Commission, 1930, *Opinions of Commissioners* (1931), p. 121; UN, *Reports of International Arbitral Awards*, IV, p. 632.

security and safety. Thus, whenever a diplomat was attacked, the lack of due 'vigilance' on the part of the receiving State will act to presume guilt.[100]

In addition to that, customarily the principle to protect diplomats requires the host State not only to take the necessary police measures to prevent offences but also to punish offenders.[101] Therefore, States must take steps to see that those responsible for crimes against officials of foreign States are prosecuted.[102] Foudalin's failure to submit to its competent authorities for the purpose of prosecution, those persons responsible for the crimes committed against the premises and staff amounts to a violation of customary international law.

B. The breach of the VCDR incurs State responsibility on the part of Foudalin.

The Mexico-United States General Claims Commission in the *Dickson Car Wheel Company Case*[103] stated that in order for a State to incur responsibility, it is necessary that an unlawful international act be imputed to it and there exists a violation of a duty imposed by an international jurisdictional standard. Additionally, Article 2 of the Draft Articles[104] provides that an internationally wrongful act must be attributable to the State and constitute a breach of international obligations.[105]

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100 Luke T. Lee, *Consular Law and Pratice*, 2nd Edition, Clarendon Press. Oxford, 1991 Chapter 23.

101 Adair, *The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929) 237-242; Respublica v De Longchamps (1784) 1 Dall 111; UN Convention For The Prevention And Punishment Of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1973 UNTS vol 1035, pp 167 - 247.

102 US Diplomatic and Consular Staff in Tehran Case, infra; Letter of 15 December 1979 from S. Aquarone, the Registrar of the ICJ addressed to the Secretary-General (19 December 1979) UN Doc S/13697; F. Przetacznik, *Protection of Officials of Foreign States According to International Law*, Martinus Nijhoff Publishers, p 290; Youmans Case, (1961) RIAA 110.

103 4 UNRIAA 678.

104 ILC Draft Articles, supra.

105 Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at p 28; S.S. "Wimbledon", 1923, P.C.I.J.,Series A, No. 1, p 15; Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p 21; US Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3, at p 29, para. 56;

As a State can only act through their agents[106] and representatives, the general rule is that only the conduct of an organ of a State, or of others who have acted under the direction, instigation or control of those organs, can be attributed to the State.[107] Therefore, the apology by the Foreign Minister of Foudalin for the incident implies that the State has acknowledged the failure of the military to provide adequate protection and adopted the breach as its own act under Article 11 of the Draft Articles.[108] In addition to that, the further failure of the State to punish offenders is a breach of customary law which incurs State responsibility.[109]

V. THE NATIONALISATION OF *SOCILIO* AND COMPENSATION GIVEN IN ACCORDANCE WITH DONAVALEN DOMESTIC LAW TO *SOCILIO* WAS IN ACCORDANCE WITH CONTEMPORARY INTERNATIONAL LAW PRINCIPLES.

A. This Court is not conferred with jurisdiction to take cognizance of Foudalin's counter-application.

In the *Anglo-Iranian Oil Company Case*, this Court decided that it lacked jurisdiction over a dispute which the United Kingdom brought against Iran who nationalized

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Dickson Car Wheel Company, supra.

106 German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6, p 22

107 Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132–166; D. D. Caron, *The basis of responsibility: attribution and other trans-substantive rules*, The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility, R. B. Lillich and D. B. Magraw, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p. 109; H. Dipla, *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation* (Paris, Pedone, 1994).

108 ILC Draft Articles, supra; *Rainbow Warrior (N.Z. v. Fr.)* 20 R.I.A.A. 217

109 V. Dietrich, *De l'inviolabilité et de l'exemption de jurisdiction des agents diplomatiques et consulaires en pays de Chrétienté*, 46 (Paris 1894); F. Liszt, *Manual of International Law* (in Polish), 154 (Krakow 1906); E. Satow, *A Guide to Diplomatic Practice*, 178 (London 1957); C. Eagleton, *The Responsibility of States for the Protection of Foreign Officials*, 19 AJIL 310 (1925).

oil deposits.[110] In the ICSID,[111] State Parties agreed to the adoption of a system which allowed no resort to any other remedy.[112] As both Foudalin and Donavale are parties to the Convention, it is submitted that the right avenue is ICSID and as such, this Court must decline jurisdiction.

1. Foudalin does not have standing in its own right in respect to Donavale's action because it is not an injured State.

Foudalin does not have the requisite standing to bring a claim in its own right because the requirements set out by the law of State responsibility in that regard have not been satisfied.[113] Indeed, Foudalin cannot be considered as an injured State for the purpose of invoking Donavale's responsibility because the rule for invoking State responsibility in relation to third parties is not part of international law.[114] Under international law, a State can be considered injured if the breached obligation was due to it on a bilateral basis or breach of an obligation specially owed to a group of States.[115] Furthermore, Foudalin cannot invoke Donavale's responsibility by extensively applying the provisions of Article 48 of the Draft Articles.[116] Clearly, no bilateral or multilateral agreement exists between the State parties in relation to *Socilio* and therefore, Foudalin does not have the *locus standi* as an injured State.

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110 (1952) ICJ 103; Barcelona Traction, Light & Power Ltd (Belgium v Spain), (1970) ICJ 3.

111 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159 (adopted in Washington on 18 March 1965) [hereinafter ICSID Convention].

112 Vaughan Lowe, *International Law,* (2007 OUP) p 199.

113 US Diplomatic and Consular Staff in Teheran, supra; Gabčikovo-Nagymaros-Project, ibid, 54; ILC Draft Articles, supra, Article 1.

114 ILC Draft Articles, supra, Part III, Chapter 1.

115 Report of the ILC on the Work of its 53rd Sess., Draft Articles on Responsibility of States, UN GAOR 56th Sess., Supp. No. 10, UN DOC. A/56/10, Article 42, paragraphs 6.

116 Article 42, ibid

2. Alternatively, Foudalin does not have standing because obligations were owed to *Socilio* and Foudalin cannot espouse the claim.

It is generally established that only the entity to which an obligation is owed possesses the capacity to bring an action for the breach of duty.[117] Therefore, the capacity to invoke a breach of an obligation owed must be understood as exclusively favouring *Socilio*.[118] The fact that the Statute of this Court[119] does not permit private corporations like *Socilio* to become parties to contentious proceedings does not imply that Foudalin should be entitled to represent it even if this will result in *Socilio* being incapable of enforcing its rights as this Court has recognized that 'the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception'.[120]

B. The nationalisation of *Socilio* is sanctioned by principles of international law.

1. Donavale had the right to nationalise.

The exercise of a State's right to nationalise is unquestionable and is regarded as an expression of territorial sovereignty, recognized under customary international law.[121] Under international law, nationalisation is the forcible taking and appropriation by the State of individuals' property by means of administrative or legislative action which is illegal.[122]

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117 ILC Draft Articles, with Commentaries, Article 42, paras. 1, 2 and 3.

118 Moot Problem, pg 5, ¶ 2.

119 Statute of the International Court of Justice, 26 June 1945, 1060 USTS 993, Article 34.

120 South West Africa (Ethiopia v South Africa, Liberia v South Africa), Preliminary Objections 1962 ICJ 319 (Dec. 21), 336.

121 Brownlie, *Principles of International Law* (3rd ed. 1979) pg 533; Seidl-Hodenveldern, Völkerrecht (4th ed. 1980) para 1186; Texaco Overseas Petroleum Co., California Asiatic Oil Co. v Government of the Libyan Arab Republic, Award (Jan 19, 1977) 17 ILM 1, para 59.

122 A. Mouri, *The International Law Of Expropriation As Reflected In The Work Of The Iran-U.S. Claims Tribunal* 65 (1994); LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v. Argentine Republic, ICSID Case N° ARB/02/01, 3 October 2006, para. 187; Amoco International Finance Corporation v. Iran, 15 IRAN-U.S. CL. TRIB. REP. 189 (1987), para. 108, 114; Técnicas Medioambientales Tecmed

However, the compensation offered by Donavale[123] proves that the nationalisation was neither forcible nor illegal.

2. International law does not preclude the exercise by Donavale of its sovereign right to nationalise *Socilio*.

Pursuant to Resolution 1803 on Permanent Sovereignty over Natural Resources,[124] nationalisation for reasons of public utility are recognized as overriding purely individual or private interests, both domestic and foreign. The resolution which reflects customary international law[125] further provides that nationalisation can only be justified if it is for a public purpose; provided for by law; non-discriminatory; and accompanied by adequate compensation.[126] Thus, this Court is obliged to recognize the right of sovereign states to determine the incidents of nationalisation

In the present case, the telephone industry is a public utility, nationalized to guarantee the protection the national security of Donavale. Further to that, Donavale is willing to provide compensation in accordance with its obligations under the investment agreement.[127] In regards to the legal requirement, it is accepted in international law that a State may interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated as was done in this case.[128] The *BP Case* recognises that non-discrimination is not an absolute requirement and reasonable

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S.A. v. United Mexican States, ICSID, Case No. ARB (AF)/00/2, 29 May 2003, 43 I.L.M. 133, para. 113.

123 Moot Problem, pg 5, ¶ 2.

124 Resolution on Permanent Sovereignty over Natural Resources, GA Res 1803, UN GAOR 17th Sess. Supp. No 17, UN Doc A/S217 (1962).

125 Rebecca Wallace, *International Law* (4th Ed 2002) 191.

126 Resolution 1803, supra; Amoco Case, *supra*.

127 Moot Problem, pg 5, ¶ 2.

128 Starrett Housing Corp v Iran (Interlocutory Award) (US v Iran), 23 ILM 1090 (1984).

discrimination related to public purpose is not illegal.[129]

In addition to that, recent awards have repudiated the idea that the nationalisation of concession rights was unlawful as such and granted only compensation.[130] Therefore, the nationalisation of *Socilio* is not illegal.

3. Additionally, the termination of the investment agreement does not constitute an internationally wrongful act.

An internationally wrongful act is the violation of an international obligation incumbent upon a State.[131] The observance of an agreement between a State and a private corporation is not required under principles of international law as a State can only bind itself under a treaty.[132] As it is incompatible with the sovereignty of a State to allow a private investor to interfere in the determination of its economic and political system, this Court has denied that a contract is capable of creating obligations between States.[133] The theory of 'internationalised contracts', the breach of which would create international responsibility although abided by some States, has no foundation in customary international law because to prove *opinio juris vel necessitatis* requires abstention based on the belief that it is rendered

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129 The BP Case 53 ILR 297 (1974) para 142; Baade, in Miller & Stranger, eds., *Essays on Expropriation* (1967), p 24; A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. Transnat'l L. & Pol'y 57 (1998).

130 BP Case, supra; Libyan American Oil Co. v Government of the Libyan Arabic Republic, Award (1977), 20 ILM 1 (1981).

131 Roberto Ago, *Third Report on State Responsibility*, (1971) vol. 2 (Part 1) Yearbook of the Int'l Law Comm. 199, 219, UN Doc. A/CN.4/246 and ADD. 1-3; ILC Draft Articles with Commentaries, supra.

132 Brownlie, *Principles of International Law*, supra; ILC Draft Articles, ibid; G. Abi-Saab, *The International Law of Multinational Corporations: A Critique of American Legal Doctrines*, 2 Annals of Int'l Studies 97, 119 (1971).

133 Brownlie, *Legal Status of Natural Persons in International Law (Some Aspects)*, 162 RdC 245, 309 (1979-I); F. Rigaux, *Des Dieuz et des Héros. Réflexions sur Une Sentence Arbitrale*, 67 Revue Critique de Droit International Privé (RCDIP) 435, 456-57 (1978).

obligatory by the existence of some rule of international law.[134]

The purpose of the investment agreement was to regulate the relationship between *Socilio* and Donavale as the home State of the investor. Therefore as the termination of the investment agreement by Donavale neither breaches its international obligations nor its responsibility as a State, the termination and subsequent nationalisation was done in accordance with principles of international law.

C. The compensation given in accordance with Donavalen domestic law is in conformity with principles of international law.

Given the absence of unanimity in applicable compensation standards for nationalisation, this Court must resolve this matter consistently with present and future policy objectives articulated within the international community.[135] Contemporary principles of international law have affirmed that the application of the principle of nationalisation implies that the State adopting such measures is entitled to determine the amount of compensation and the mode of payment and any disputes which might arise should be settled in accordance with the national legislation of that State.[136]

Two disputes involving expropriation of Italian investments in the People's Republic of the Congo have been arbitrated under the auspices of the ICSID in recent years. In the *Benvenuti et Bonfant Case*[137] and the *AGIP Case*,[138] two panels respectively applied

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134 The Lotus Case, supra; North Sea Continental Shelf Case (Judgment), (1969) ICJ Rep. 3.

135 Declaration on the Establishment of a New International Economic Order (G.A. Res. 3201 (XXIX 1974); M. Sonarajah, *The Pursuit of Nationalized Property*, 1986, Martinus Nijhoff Publishers, 19.

136 1973 Resolution on Permanent Sovereignty over Natural Resources (G.A. Res. 3171 (XXVIII 1973); the Charter of Economic Rights and Duties of States (G.A. Res. 3281 (XXIX 1974); Declaration on the Establishment of a New International Economic Order, supra; Texaco Case, supra.

137 Benvenuti et Bonfant v People's Republic of the Congo, 21 ILM 740 (1982);

138 AGIP Co. v People's Republic of the Congo, 21 ILM 726 (1982)

Congolese law in the first instance, supplemented by international law in the absence of a choice-of-law clause in any of the relevant agreements. [139]

The application of just compensation measured in terms of domestic law is illustrated in the *Banco Nacional Case*.[140] The court reviewed much of the literature on the subject and concluded that full compensation need not be paid in all circumstances as the requirement to pay appropriate compensation, despite the lack of a precise definition of that term, is closest to reflecting what international law requires. Additionally, the *Aminoil-Kuwait Arbitration*[141] decided that the standard of appropriate compensation as set forth in Resolution 1803 codifies positive principles and reflects the position of contemporary international law.

Further to that, the Calvo doctrine[142] provides that when a foreigner does business with a State they must accept the standards set forth by that host without seeking the protection of their home State.[143] Therefore, pursuant to Article 42(1) of ICSID[144], Donavale's act of measuring compensation in accordance with its domestic law is consistent with international law.

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139 Patrick M. Norton, *A Law of The Future or A Law of The Past? Modern Tribunals and The International Law of Expropriation*, 85 A.J.I.L. 474 (1991).

140 Banco Nacional de Cuba v Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981)

141 Kuwait v The American Independent Oil Co. (AMINOIL), 21 ILM 976 (1982)

142 Parry and Grant, *Encyclopaedic Dictionary of International Law*, (1986) Oceana Publications, p 53; North American Dredging Claim Co (1926) 4 RIAA 26.

143 Haliburtonh Fales, *A Comparison for Nationalisation of Alien Property with Standards of Compensation Under United States Domestic Law*, 5 J. INTL. L. BUS. 871 (Winter, 1983-84).

144 *Supra*.

PRAYER FOR RELIEF

Considering that the Union of Donavale has been dismembered and no longer enjoys peace and security;

Recalling the absolute prohibition of the use of force;

Recognizing that States are sovereign equals;

Affirming that the rules of customary international law should continue to govern the behaviour of States;

Whereas Burgundan and Foudalin have failed to conduct themselves in compliance with international law;

Donavale prays that this Court adjudge and declare that:

1. the attack on and continued occupation of Agitha constituted a gross violation of the norms of contemporary international law and the compensation of USD 1 billion is just and fair in light of Burgundan's act of dismembering the Donavale Union;
2. the act of Burgundan in invading and occupying Agitha was not an act of self-defense and cannot be justified under principles of contemporary international law;
3. the forcible transfer and conviction of Ms Tavilisi was a legitimate exercise of jurisdiction by Donavale and the trial of the accused met international minimum standards;
4. Foudalin was in breach of the VCDR by failing to afford the Donavalen Embassy

adequate protection; and

5. the nationalisation of *Socilio* and compensation given in accordance with Donavalen domestic law was in conformity with contemporary international law.

Respectfully submitted,

Agents for Donavale.