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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 RESPONDENTS

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STATEMENT OF JURISDICTION

The Government of Burgundan, the Government of Foudalin and the Government of the Union of Donavale have 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 in accordance with international law;

II. Whether the abduction and conviction of Ms Tavilisi was a legitimate exercise of jurisdiction by Donavale and if it did meet the international minimum standard of justice;

III. 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;

IV. 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 being 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 to 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, 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 *Unicom* 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. Burgundan acted lawfully when they entered into Agitha as it was done in accordance with international law. Burgundan can rightfully invoke the rights of self-defense as provided by Article 51 of UN Charter. The attack was necessary and proportionate to the attack carried out by Donavale. Furthermore, with the major human rights violations by Donavale in Agitha, Burgundan had the responsibility to protect in accordance with the principles of humanitarian intervention. Donavale committed major human rights violation against the Agitha people and violated obligations Erga Omnes in their treatment of the Agithians. Therefore, Burgundan is not required to make any reparation to Donavale.

II. The abduction and the subsequent trial of Miss Tavilisi by Donavale constitute a violation of the Burgundan's sovereignty. The extra-territorial abduction by Donavale is in violation of Burgundan's sovereignty and jurisdiction. The abduction renders the following trial in violation of international law and Donavale does not have the jurisdiction to prosecute and sentence Miss Tavilisi. Secondly, the trial of Miss Tavilisi did not meet the minimum standards of justice as required by the international law as the right to choose a counsel for representation was denied and she was not given adequate time and facilities to prepare defense. As Donavale committed an international wrongful act, the reparation of Ms Tavilisi must be done immediately.

III. Foudalin did not violate international law as all appropriate steps were taken to address the Embassy attack and therefore is not in breach of international law. Thereby, Foudalin was not in breach of the 1961 Vienna Convention on Diplomatic Relations as the steps taken to protect the Donavalen Embassy by Foudalin were

appropriate. Furthermore, the verbal apology by the Foudalin Foreign Minister does not amount to an admission of guilt which incurs State responsibility. Alternatively, should there be a violation of VCDR, it is justified under provisions of international law.

IV. The nationalisation of *Socilio*, a Foudalin company by Donavale and the provision of compensation according to domestic law is a violation of the agreement between the government of Donavale and Socilio and contemporary principles of international investment law. Additionally, this Court is conferred with jurisdiction to take cognizance of Foudalin's counter-application and the termination of the investment agreement is an internationally wrongful act which incurs State responsibility. The expropriation of *Socilio* by Donavale is not sanctioned by principles of international law as it was discriminatory and not for a public purpose. Furthermore, the compensation offered by Donavale to *Socilio* does not meet the international standard.

PLEADINGS

I. BURGUNDAN'S ACT IN AGITHA IS CONSISTENT WITH INTERNATIONAL LAW.

A. The attack against Agitha was an act pursuant to Article 51 of the UN Charter.[1]

Burgundan's attack against Agitha amounted to an act of self-defense, enshrined under Article 51 of the UN Charter.[2] Article 51 is the exception to the prohibition on the use of force in Article 2(4) of the UN Charter, preserves the inherent right to self-defense when the state concerned has been the victim of an armed attack. The Court in *Nicaragua* [3] has clearly established that the right of self-defence exists as an inherent right under the customary law[4] as well as the UN Charter[5] . Article 51 of the UN Charter[6] states that there are three requirements; the existence of prior attack[7], necessity and proportionality needed in order to rightfully invoke Article 51. All of these elements have been met in the present case. Thus, Burgundan's attack is justified as an act of self-defense.

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1 Charter of United Nations (signed 26 June 1945, entered into force 24 October 1945) (hereinafter UN Charter) ; Simma, *The Charter of The United Nations, A Commentary,* Oxford University Press (2002), p. 789

2 *Ibid*

3 *Nicaragua v US* [1986] ICJ Reports 14.

4 Malanczuk, *Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness* in *the International Law Commission's Draft Articles on State Responsibility*, ZaọRV 43 (1983), p. 754

5 Article 51 (n.1).

6 Simma, (n.1), p.792

7 *Ibid* ,pp. 792; Wright, Q., *The Cuban Quarantine,* AJIL 57 (1963) pp. 546-65; *Nicaragua* (n.3), p.103.

1. The attack against Agitha was a result of prior attacks carried out by Donavale.

Self-defense can only be resorted to if an armed attack occurs[8] and in no other circumstances.[9] The term 'armed attack' represents the key notion [10] of the concept of self-defence pursuant to Article 51 of the UN Charter[11]. Armed attack includes the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein.[12] This is affirmed in the case of *Nicaragua,*[13] where it was held that a mere intrusion of regular armed forces across an international border as to amount to an armed attack.[14]

The three hour incursions made by the Donavale's military troops in late 2007 resulted to the death of 20 Agitha refugees.[15] Even though Burgundan issued a warning statement to Donavale [16] and reported the incursion to the United Nations Security Council (UNSC)[17] but the second attack was still carried out by 3 military planes which bombed a

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8 Brownlie, *The Principle of the Non-Use of Force in Contemporary International Law,* pp. 275-8; Schreuer, *Discussion Settlement*, DGVR Berichte 26 (1986),pp.144-5; Malanczuk, (n.2).

9 Brownlie, *Use of Force in Self-defence,* British Yearbook of International Law, XXVII: 183-268, pp. 112-3; Kelsen, *The Law of the United Nations,* London, 1950, p.914.

10 Constantinou, *The Right of Self-Defence Under Customary International Law and Article 51 of the UN Charter,* 2000.

11 (n.1)

12 Article 3*(g),* Definition of Aggression annexed to General Assembly resolution 3314 (XXIX).

13 n. 3.

14 ¶ 195 *ibid.*

15 Moot Problem, p.2, ¶ 4

16 *Ibid,* p. 2, ¶ 4

17 *Ibid,* p. 3, ¶ 1

refugee camp. The attack killed 100 Agithians and 50 Burgundans[18]. Thus, the first element of prior attack is fulfilled and this allows Burgundan to assert their inherent right.

2. The attack was necessary in light of the situation in Agitha and its effect to Burgundan.

There had to exist a necessity of self-defense which is, instant, overwhelming, leaving no choice of means, and no moment of deliberation as laid out in the *Caroline* case[19]. In the Advisory Opinion of the General Assembly on the *Legality of the Threat or Use of Nuclear Weapon*,[20] it was emphasised that the submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law.[21] It is essential to demonstrate that as a reasonable conclusion on the basis of facts reasonably known at the time, the armed attack was imminent and required the responses that were taken.[22] In late 2007, Donavale had launched a similar incursion into Burgundan territory causing the death of about 20 Agithians and that the ungrounded allegation that Burgundan military was training Agitha freedom fighters is widespread among the Donavalan military. Not long after the first incursion, Colonel Phathone launched another, even deadlier attack.

In light of all these facts, it was necessary in Burgundan's point of view to deter future attacks by Donavale. The fact that such a move was debated and approved in Burgundan Parliament gives credence to the fact that the move was not just a meaningless hasty retaliation but an exercise of self-defense calculated to deter and imposed check on the

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18 *Ibid*, p. 2, ¶ 2

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

20 ICJ Reports (1996), ¶48, pp.246

21 *Ibid*, pp.226-245.

22 Judge Ago, Eighth Report on State Responsibility, Yearbook of the ILC, 1980, vol. II, part 1, p.69

prevailing military threat by Donavale, as well as to reiterate Burgundan's political independence and territorial integrity. It was imperative for the Burgundan to take swift actions in order to prevent more innocent lives to be lost and the attack was the last resort.

3. The response by Burgundan is proportionate to the attack carried by Donavale.

This Court in the *Legality of the Threat or Use of Nuclear Weapons*[23] took the view that a use of force that is proportionate must meet the requirements of the law applicable in armed conflict in order to be lawful. Proportionality is concerned with the quantum of force used against the prior armed attack to repel as well as the casualties and damage sustained.[24]. The use of force must not be more than what is necessary and it should be adequate in order to rectify the situation.[25] Burgundan troops were inside Agitha within a few hours and the Agitha populace welcomed them. There was a significant majority of people in Agitha who supported the Burgundan troops.[26] The Agitha freedom fighters had already occupied and were in effective control of 60% of Agitha territory and they joined forces with Burgundan troops[27]. This shows that the use of force was proportionate as the use of force by Burgundan was not more than necessary in order to achieve their goal.

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23 (n.20)
24 Dinstein, *War Aggression and Self-Defence*, Fourth Edition, part III, p.237
25 Grieg, *Self-eDefense and the Security Council: What Does Article 51 Require?*40 ICLQ 1991, pp.366
26 Moot Problem, p. 4, ¶ 1
27 *Ibid*

4. In the alternative, Burgundan may assert the right of anticipatory self-defence.

Anticipatory self-defense is the right for a state to anticipate and thus take pre-emptive measures without having to wait for an armed attack to occur.[28] The concept of anticipatory self-defense is of particular relevance in the light of modern weaponry that can launch an attack with tremendous speed which may allow the target state little time to react to the armed assault before successful conclusion, particularly if that state is geographically small.[29] In addition, the Report of the Secretary-General's high-level Panel on Threats, Challenges and Change[30], explicitly stated that the pre-emptive use of force in self-defence is permissible in the face of an imminent threat of an attack. Resolution 1368[31] and Resolution 1373[32] of the UNSC, which was adopted after September 11 shows that, although the bombing campaign in Afghanistan by USA was not explicitly authorised by the Security Council Resolution, but it was accepted that the attack was a legitimate act of self-defence. Thus, it can be said that pre-emptive self-defence is in line with an extensive interpretation of the right to use force in self-defence in accordance with Article 51 of the UN Charter[33].

As Agitha and Donavale are neighbouring countries[34] and the incursions made by Donavale in late 2007 [35] resulted to the death of 20 Agithians, this indicates that Donavale poses threat. The attack by Colonel Phathone killed more than 150 people including

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28 Higgins, *The Development of International Law Through the Political Organs of the United Nations,* Oxford, 1963, pp216-21

29 (n. 28)

30 *Executive Summary, A More Secure World: Our Shared Responsibility, Report of the Secretary-General's High-level Panel on Threats, Challenges and Change*. United Nations, 2004.

31 S/Res/1368(2001)

32 S/Res/1373(2001)

33 Frank, *Preemption, Prevention and Anticipatory Self-defence : New Law Regarding Recourse to Force?,* Hastings International and Comparative Law Review, 27(3), pp 425-435

34 Moot Problem, p. 2, ¶ 2

35 *Ibid*, p.2, ¶ 4

Burgundan nationals[36]. Within two hours of the attack[37], the Donavalen military officer and air force pilots returned to the air base in Donavale and this reflects that the proximity between these States. This shows that Burgundan was in a vulnerable position as they are prone to another attack by Donavale. The threat that existed was immediate and it was imperative for Burgundan to take actions to prevent future attacks Thus, Burgundan had to take measures in order to protect its nationals, territory and sovereignty.

B. Burgundan's act was a humanitarian intervention as Donavale committed major human rights violations.

1. Burgundan has the responsibility to protect and the humanitarian intervention was vital to protect lives.

Humanitarian intervention is the entry into a state by the armed forces of another state or international organization with the aim of protecting citizens as well as preventing or ending widespread and grave violation of the fundamental human rights. If a state is unwilling or unable to protect its citizens from massive human rights violations, the principle of non-intervention yields to the international responsibility to protect[38].The primary purpose of the intervention must be to halt or avert human suffering even though there may be other motives the intervening states have. 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

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36 *Ibid*, p.3, ¶ 2

37 *Ibid*, p.3, ¶ 2

38 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (adopted by the heads of state and government at the UN Millennium Summit in 2005).

to secure the defined human protection objective.[39] The protection of human rights is a higher priority than the defense of national sovereignty from armed intrusion. [40] UNSC Resolution 1674[41] adopted on April 28, 2006 expressly recognized a legal responsibility to protect civilians in times of conflict.

Agitha was in a civil war between Agitha Liberation Movement (ALM) and Donavale troops from 2003 to 2007. The civil war took the lives of 1/20 of the Agitha population[42]. But, there was neither assistance nor aid given to Agitha even though there was a major violation of human rights committed by Donavale. The UNSC did not authorise any troops to be sent to help the Agitha people and as a neighbouring country, this gave Burgundan the justification to interfere. There was an existence of an emergency situation, whereby the right of life was violated and all peaceful means were exhausted.

2. <u>There were major human rights violations by Donavale towards the Agithians.</u>

The invasion by Burgundan was a humanitarian intervention[43] as there was major human rights violation by Donavale. The human rights violation committed by Donavale cannot be justified by Donavale regardless of the excuses.

a. <u>Donavale committed genocide against the Agithians</u>

There are two types of genocide committed by Donavale towards the Agithians which are genocide by forcibly transferring children and genocide by killing as massacres

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39 Duke, *The State and Human Rights: Sovereignty Versus Humanitarian Intervention,*12 ILR 1994, pp.25-48;Lillich, *Forcible Self-Help by States to Protect Human Rights,* 53 Iowa Law Review 1967, pp.325

40 Ganji, *International Protection of Human Rights,* New York, 1962, chapter 1.

41 SC. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

42 Moot Problem, p. 1, ¶ 3

43 Chesterman, *Just War or Just Peace: Humanitarian Intervention and the United Nations;* Lillich, (n.38), pp.325

against the Agithians were carried out. The elements of the crime of genocide in Article II of the Geneva Convention [44] are conduct, consequences or circumstances and intent. To find a State to have committed genocide of forcibly transferring children, the intention must be to destroy, in whole or in part, that national, ethnical, racial or religious group. Children born of the Agitha women with Donavalen father were forcibly transferred to the group belonging to Donavale. As such, the forcible transfer of the children falls within the meaning of the Genocide Convention[45].

Furthermore, ethnic massacres were also committed by Donavale and this is a form of genocide by killing.[46] There were allegations of genocide in the civil war by the Donavalen troops and this was reported in an Amnesty International report. A joint investigation panel of UN and Agitha was formed to investigate the allegations. The UN New Agitha[47] investigation panel found that indeed there was genocide committed by the Donavale especially in regards to the fact that children of the Agitha women born with Donavalen father were forcibly removed from their mothers'.[48] The report acknowledged that main bulk of massacres was committed by Donavale. [49]

b. Donavale also violated the Geneva Convention. [50]

There is also a violation of Article 4 [51] that guarantees the fundamental rights. For those who do not take a direct part or who have ceased to take part in hostilities are entitled to respect for their person, honour and convictions and religious practices. They shall in all

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44 Convention for the Prevention and Punishment of Genocide of 1948

45 *Ibid*

46 Totten, *Century of Genocide: Eyewitness Accounts and Critical Views,* New York: Garland, 1997

47 Moot Problem, p.1, ¶ 2

48 *Ibid*, p.9, ¶1

49 *Ibid,* p.9, ¶ 1

50 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

51 *Ibid,* Article 4

circumstances be treated humanely, without any adverse distinction. The acts of violence to the life, health and physical or mental well-being of persons, in particular murder is prohibited at all times.[52] Article 13[53] relates to the protection of the civilian population that they shall not be the object of attack. Acts or threats of violence with the primary purpose to spread terror among the civilian population are prohibited. Agithians were the target of the attacks by the Donavalen troops and the attack resulted in many civilians lives to be perished[54]. Thus, there was a violation of the Geneva Convention[55] when they mounted attacks and committed bulk of massacres during the civil war.

In addition, there was also violation to Article 3, Part III [56] that states every human being has the inherent right to life and this right shall be protected by law. These rights were violated by Donavale when they mounted attacks in Agitha. Agitha was in a civil war for four years when the Army Chief of Donavale, Elava Natu sent troops and reasserted control of Agitha as he did not recognize the independence given to Agitha[57].

c. Donavale refused to allow Agitha the right of self-determination.

The principle of self-determination refers to the right of persons living in a particular territory to determine the political and legal status of that territory.[58] It is beyond the aura of any doubt that the right of self-determination is widely recognised as an essential principle of contemporary international human rights law. This Court has recognised it as an

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52 *Ibid,* Article 4 (2) (a)
53 *Ibid,* Article 13
54 Moot Problem, p.1, ¶ 3
55 (n.44)
56 International Covenant on Civil and Political Rights (ICCPR) (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 Dec 1966).
57 Moot Problem p.1, ¶ 2
58 O'Brien, *International Law,* London, Cavendish, pp.162.

erga omnes rights evolved from UN Charter[59] and practice[60]. Resolution 1514 (XV)[61] stressed the right of self-determination and the right to determine political status. In relation to present case, Agitha met the requirements stated in the *Donavale Constitution of 1990*[62] but two days before the scheduled independence, the Donavalen army took control and suspended the Constitution.[63] The Head of State of Donavale did not recognise the independence given to Agitha and reasserted control of Agitha[64]. This refusal to allow Agitha to establish New Agitha is a violation of the inherent right of self-determination.

3. Donavale has violated obligations *erga omnes* in their treatment of the Agithians.

Although the general requirement is that a state may claim only the rights of its own nationals[65], there exist important exceptions which entitle a state to exercise protection on behalf of non-nationals.[66] International law has consistently recognised legal interests in matters apart from direct and physical interests. [67] States other than the state directly injured can have a legal interest in the observance of certain obligations. These are obligations *erga omnes,*[68] which are the concerns of all states by virtue of the importance of the rights

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59 Article 1(2), (n.1)

60 *East Timor (Portugal v Australia),* [1985] ICJ Reports, pp 100-1; *Namibia Opinion,* [1971] ICJ Reports, pp.6 &31.

61 Declaration on the Granting of Independence to Colonial Countries and People, Resolution 1514 (XV)

62 Moot Problem, p.1, ¶ 2

63 *Ibid*, p. 1, ¶ 3

64 *Ibid*

65 *Panavezys- Saldutiskis Railway* (*Est. v. Lith.*), [1939] PCIJ (Ser. A/B) No. 76, pp. 16

66 *Reparations for Injuries suffered in the services of the United Nations*, [1949] ICJ 174,pp. 181

67 South West Africa (*Eth. v. S.Africa* ; *Lib. v. S. Africa*), [1962] ICJ 319,pp.425; Dugard, *The South West Africa Cases, Second Phase,* 1966, 83 SALJ 429, pp. 449-51

68 *East Timor* (n. 60) pp. 172 , 221 & 266; Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter Draft Articles), Art .48.

involved[69] and all states have a legal interest in their protection. The rules on basic human rights comprise one of these obligations.[70] Donavale's treatment of the Agitha people amounts to flagrant violation of their basic rights which have been incorporated into the UDHR[71] and subsequent international instruments in human rights. [72] The incorporation of these rights coupled with evidence of state practice confirms its character as customary international law. [73] The binding effects of these rights as customary law places the obligation squarely on Donavale to respect them. As these rules were established for the protection of human rights, their interests are not allocated exclusively to a particular state. [74] In the event of a violation of these rules, every other state bound by these rules must necessarily be considered an injured state,[75] and Burgundan comes logically within this category.

C. In any event, Burgundan is not required to make any reparation to Donavale.

The consequence of an internationally wrongful act is that the delinquent state must make reparations to any other state that suffers injury[76] for which the wrongful act is the proximate cause. [77] Donavale is seeking for USD1 Billion as compensation for Burgundan's

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69 *Barcelona Traction, Light and Power Company Limited (Belgium v Spain*), [1970] ICJ 3, pp.32

70 *Ibid*, p. 101

71 Universal Declaration of Human Rights 1948, adopted and proclaimed by General Assembly Resolution 217A (III) of 10 December 1948 [hereinafter UDHR], International Conference on Human Rights in Teheran, Res. XX, U.N. Doc. A/CONF.32/41 (1968)

72 ICCPR (n. 56)

73 D'Amato, *The Concept of Human Rights in International Law,* 82 Col LR 1110, pp.1128; Oppeneheim, *International Law,* (Jennings ed., 1992) pp. 935-9

74 Draft Articles, (n. 68), art. 5.

75 *Ibid*.

76 *Chorzow Factory Case* (Merits) (*Germany v. Poland*), 1928 P.C.I.J. (ser. A), No.13; Draft Articles, Art.31,(n. 68).; Brownlie, *Principles of Public International Law 403* (5th Edition, 1998) pp.460

77 Shelton, *Remedies in International Human Rights Law* 10 (1999); Henkin et.al, *Cases and Materials,* 758 (3rd edition, 1993)

act in invading Agitha[78]. However, since Burgundan only entered into Agitha in pursuant to its inherent right of self-defence and as humanitarian intervention, therefore it did not commit any wrongful act. Hence, Burgundan is not liable to pay compensation.

II. THE APPREHENSION AND THE PROSECUTION OF MISS TAVILISI BY DONAVALE CONSTITUTES A VIOLATION OF BURGUNDAN'S SOVEREIGNTY AND THE TRIAL DID NOT MEET THE INTERNATIONAL MINIMUM STANDARDS OF JUSTICE.

A. The abduction of Ms Tavilisi by Donavale is a violation to Burgundan's sovereignty.

1. The extra-territorial abduction by Donavale is in violation of Burgundan's sovereignty and jurisdiction.

Unlawful apprehension of a suspect by state agents acting in the territory of another state is a bar to the exercise of jurisdiction.[79] Such apprehension constitutes a breach of international law and the norm of non-intervention involving state responsibility[80]. An illegal apprehension may be seen less crucial in cases where recognised international crimes are alleged.[81] When one State exercises its police power in the territory of another State, it exceeds its sphere of jurisdiction permitted under international law, and it violates a fundamental tenet of international law, the respect for the sovereignty and territorial integrity of States.[82] Extraterritorial abduction in violation of international law does not give rise to

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78 Moot Problem, p.6, ¶ 3

79 Akehurst, *Jurisdiction in International Law,* 46 BYIL, 1972-3, p. 145; *Third US Restatement of Foreign Relations Law,* 1987, vol.1,part IV.

80 Article 2(4) UN Charter; *Nicaragua*, (n. 3), p.110; Mann, *The Doctrine of Jurisdiction in International Law,* 111HR, 1964, p.415

81 Higgins, *Problems and Process,* Oxford, 1994, p.69

82 Oppenheim, *International Law: A Treatise* 295 (8th ed., Hersch Lauterpacht 1955)

any right, including the "right" to exercise jurisdiction. In addition, the offended State is entitled to remedies, and the offending State is obligated to undo its wrongs, regardless of whether the offended State protests or demands remedies.[83] In the *Lotus* case,[84] the World Court declared that the first restriction imposed by international law upon a State is that it may not exercise its power in any form in the territory of another State. Since Ms Tavilisi was in Foudalin at the time that she was detained by agents of Donavale, therefore, Donavale has exceeded its sphere of jurisdiction and violated the territorial sovereignty of Burgundan.

2. <u>The abduction amounts to a violation of Article 9 of the UDHR and Article 9(1) of the International Covenant on Civil and Political Right (ICCPR).</u>

Article 9 of the UDHR[85] and Article 9(1) of the ICCPR[86] provides that no one shall be subjected to arbitrary arrest and detention. The human rights values enshrined in the UDHR and ICCPR have all elements of customary international law.[87] They contend that most international human rights principles are included in a subset of customary norms.[88] At present, Donavale had violated these articles by their act of abducting Ms. Tavilisi from Foudalin through five Donavalen agents.[89] The abduction had deprived Ms. Tavilisi's personal liberty and security as well as violated Burgundan's sovereignty as she is a citizen of Burgundan.

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83 Jianming, *Responsibilities and Jurisdiction Subsequent to Extraterritorial Apprehension,* 23 Denv. J. Int'l L. & Pol'y 43

84 *Lotus* case (1927) PCIJ Series A, No 10.

85 (n.71)

86 ICCPR (n. 56)

87 Strossen, *Recent U.S and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis,* Hastings Law Journal, 41 Hastings LJ 805.

88 *Belgium v. Spain*, 1970 ICJ 3,301.

89 Moot Problem, p. 4, ¶ 4

3. Donavale does not have the jurisdiction to prosecute and sentence Miss Tavilisi.

By virtue of the principle *ex injuria jus non oritur*, Donavale is precluded from exercising jurisdiction over Ms Tavilisi as the apprehension was illegal. Since the act of abduction is illegal and invalid under international law, the abducting State does not have a right to subject the abducted individual to its laws and proceedings following such illegal abduction. In *State v Ebrahim*,[90] the court held that when the State is a party to a dispute, it must come to court with clean hands. The *Eichmann*[91] case was so extreme and horrendous that a court before which Eichmann appeared could not possibly be expected not to exercise jurisdiction or even to ask whether it should be exercised.[92] The case of *US v Toscanino* states that a court must divest itself of jurisdiction over an accused where it had been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's rights because the court's acquisition of power over his person represents the fruits of the government's exploitation of its own.[93] The justification for illegal apprehension, however magnificent it might be at domestic law, for acquiring, trying, and punishing a wanted criminal must yield to the rules of international law.[94] A violation of customary international law cannot give rise to legal consequences in relation to any party. [95]

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90 (1990) 31 ILM 888.

91 *Att.-Gen. of Israel v. Eichmann*, 36 I.L.R. 18-276, at 273-276, 56 A.J.I.L. 805 (1962).

92 Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law, in International Law at Time of Perplexity* (eds., 1989), pp. 407

93 United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BYBL 265, 269 (1952); Draft Convention on Jurisdiction with Respect to Crime, 29 AJIL SUPP. 435, Art. 16, p. 623.

94 Arendt, *Eichmann In Jerusalem* 219-231 (1963); Baade, *Eichmann Trial: Some Legal Aspects*, 1961 Duke L.J. 400 (1961); Fawcett, *The Eichmann Case*, 38 BRIT. Y.B. INT'L. L. 181 (1962); Lippman, *The Trial of Adolph Eichmann and the Protection of Universal Human Rights under International Law*, 5 HOUS. J. INT' L. 1 28 (1982); Peter Papadatos, *The Eichmann Trial* (1964)

95 (n.93)

In addition, the principle of *male captus bene detentus* is not applicable to Donavale as it is not a recognized customary international law since it is not an established rule of customary international law as this principle has no uniform and consistent practice of States. Donavale therefore cannot rely on this principle to legalize their conviction on Ms. Tavilisi as abduction is illegal [96] and violates the international law and the rule of law.[97]

B. The trial of Ms Tavilisi did not meet the minimum international standard of justice.

1. The trial did not meet the standard of justice as the right to choose a counsel for representation was denied.

The right to a fair and just criminal process is a fundamental principle in international law and implicit in the concept of order and liberty[98] since at least the adoption of the UDHR in 1948 and the codification of the ICCPR.[99] The ICCPR[100] recognizes due process of the law as a right derived directly from the inherent dignity of the human person.[101] Article 14(3) (d)[102] provides that accused has the right to defend herself or through legal assistance of her choosing. The accused's right to choose her counsel requires her to have an opportunity to choose freely. In *Estrella v Uruguay,*[103] The Committee found that Estrella did not effectively have a choice when forced to pick from pre-selected counsels by

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96 *R v. Hartley* [1978] 2 NZLR 199.

97 *R v. Horseferry Road Magistrates' Court, ex parte Bennett* [1993] 3 All ER 138.

98 Safferling, *Towards an International Criminal Procedure* (OUP 2003)

99 Basic Principles on the Independence Judiciary, 7th UN Congress on the Prevention of Crime and the treatment of Offenders, Milan, U.N.Doc.A /CONF.121/22/ Rev.1 at 59 (1985)

100 (n. 56)

101 *Ibid,* Preamble

102 *Ibid*

103 *Estrella v Uruguay*, Communication No. 74/1980, U.N. Doc. A/38/40 at 150 (1981)

the military.[104] A court shall not assign a lawyer when counsel of his own choice is available.[105] Ms Tavilisi who was tried at Donavale for the offence of writing an article which causes ridicule was given a counsel who was appointed by the Court. [106] She was not given an opportunity to choose a counsel of her own choice and this violation renders the trial to be unfair.

2. The trial failed to provide Ms Tavilisi adequate time and facilities to prepare defense.

Article 14(3) (b) of the ICCPR provides that an accused shall have adequate time and facilities to prepare a defence and shall be able to communicate with counsel of his own choosing. Adequate time depends on the circumstances of each case.[107] Adequate facilities include access to documents and other evidence which the accused requires to prepare his case, along with the opportunity to engage and communicate with counsel[108]. In *Perkins v Jamaica*[109], the Committee held that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important aspect of the principle of equality of arms. In contrary, Ms Tavilisi was tried within one week from her apprehension and she was convicted of the offence[110]. This reflects that she did not have adequate time to prepare her defense as she was tried and sentenced within one week in Donavale.

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104 *Burgos v Uruguay*, Communication No. R. 12/52, U.N. Doc A/36/40 at 176 (1981)
105 *Price v Jamaica*, Communication No. 572/1994, U.N. Doc. CCPR/C/58/D/572/1994
106 Moot Problem, p. 4, ¶ 4
107 Human Rights Committee, General Comment 13, Article 14, paragraph 8, Compilation of the General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N.Doc. HR/GEN/Rev.1 at 14 (1994)
108 *Ibid*
109 *Perkins v Jamaica,* Communication No. 733/1997, U.N. Doc. CCPR/C/63/D/733/1997
110 Moot Problem, p. 4, ¶ 4

C. As Donavale committed an international wrongful act, the reparation of Ms Tavilisi must be done immediately.

According to the Permanent Court of International Justice (PCIJ)[111], reparation must as far as possible wipe out all the consequences of the illegal act and re-establish the situation existed before that act was committed.[112] An abducting State committing an international wrong must make appropriate restitution to the offended State. [113] The law of remedies in international law requires that under no circumstances, may forcible and fraudulent abduction in violation of international law be forgiven or go unpunished. The Court may order the return of the abducted individual in order to re-establish the status quo ante. [114] A violation of foreign territory undoubtedly engages the responsibility of the State of arrest, which is under a clear duty to restore the prisoner.[115] In pursuant to state practice, when a person has been forcibly abducted by agents of another state, the offended State can demand the return of the person abducted and the criminal punishment of the abductors.[116] As Ms Tavilisi was abducted from Foudalin by Donavale and the abduction was in violation of international law. Therefore, there lies a duty upon Donavale to return Ms Tavilisi to Burgundan immediately.

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111 Green Hayword Hackworth, *Digest of International Law* 309-312 (1941).

112 *Chorzow Factory Case,* p. 47 (n. 76).

113 Schwarzenberger , *Fundamental Principles of International Law*, 87 RECUEIL DES COURS 195, 353-354 (1955)

114 Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

115 Preuss, *Kidnapping Fugitives from Justice on Foreign Territory*, 29 Am. J. Int'l L. 502 (1935).

116 Bottke , *Rule of Law or Due Process as a Common Feature of Criminal Process in Western Democratic Societies,* 51 U. PITT. L. REV. 419, 453 (1990)

III. FOUDALIN DID NOT VIOLATE INTERNATIONAL LAW CONCERNING DIPLOMATIC RELATIONS AS ALL APPROPRIATE STEPS WERE TAKEN TO PROTECT THE DONAVALAN EMBASSY PREMISES AND THEIR DIPLOMATIC CORPS.

A. Foudalin took all 'appropriate steps' to address the Embassy attack and therefore is not in breach of international law.

Although articles 22(2) and 29 of the VCDR[117] provide that a receiving State is under a special duty to take all appropriate steps to protect the premises and the diplomatic agent of the mission against any intrusion, the duty is not an absolute one and depends whether the receiving State has been made aware of any unusual threat. Here, as Foudalin took all appropriate steps in containing the crowd and clearing the Embassy grounds as soon as reinforcements arrived, its duty under VCDR has been discharged and it is not in breach of international law.

In the case of *United States Diplomatic and Consular Staff in Tehran*, the American embassy in Tehran was seized by armed students and the entire staff of the embassy was held hostage.[118] This Court held that the Government of Iran was in breach of international law because the failure to protect the Embassy was attributed to the guards who abandoned their post during the demonstrations.[119] In our case, the five policemen who were initially tasked with guarding the Embassy did all they could to ward off the protestors until

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117 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]; Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations,* 2nd Edition, Clarendon Press. Oxford, 1998, p 139; Satow, *Diplomatic Practice,* 5th Edition, Longman, Chapter 15.

118 [1980] ICJ 3 (May 24); Marginnis, *Limiting Diplomatic Immunity: Lessons Learned From The 1946 Convention on the Privileges and Immunities of the United Nations*, (2003) 28 Brooklyn J. Int'l L. 989.

119 US Hostages Case [1980] ICJ 3 (May 24).

reinforcements arrived.[120] This shows that in stark contrast to the *US Hostages Case*, Foudalin took all appropriate steps to ensure the inviolability of both diplomatic agents and premises in accordance with its duty under international law.

B. The verbal apology by the Foudalin Foreign Minister does not amount to an admission of guilt which incurs State responsibility.

In light of State practice in international law, a State that offers an apology does not necessarily accept responsibility for wrongfully causing injury to another. An apology is interpreted as an expression of regret for an event to which the speaking State has some causal or other relation, but for which the speaking State claims not to be legally or morally responsible or offers some explanation, justification or excuse.[121] The Cosmos 954 satellite which crashed in Canada in 1978 led to the Soviet Government paying compensation to Canada without any admission of guilt.[122] Similarly, in 2004, the US abuse of Iraqi Prisoners at Abu Ghraib[123] led to an expression of regret on behalf of the Government without an admission of responsibility. Therefore, the apology offered by the Foudalin Foreign Minister does not amount to an admission of guilt in relation to State practice in international law.

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120 Moot Problem, pg 5 ¶1.

121 Shelton, *The World of Atonement: Reparations for Historical Injustices*, 50 Neth. Int'l L. Rev. 289, 298 (2003); Blider, *The Role of Apology in International Law & Diplomacy*, 46 Va. J. Int'l L. 433 (2006); Mark Gibney & Erik Roxstrom, *The Status of State Apologies,* 23 Hum. Rts. Q. 911 (2001); Nicolaus Mills, *The New Culture of Apology,* 48 Dissent 113 (2001).

122 Settlement of Claim between Canada and the Union of Soviet Socialist Republics for Damage Caused by "Cosmos 954" (Released on April 2, 1981).

123 (n.121)

C. Alternatively, should there be a violation of VCDR, it is justified under provisions of international law.

In *Gill,*[124] the UK-Mexico Claims Commission stated that there may be a number of situations where an absence of action does not amount to negligence or omission. This is due to the impossibility of taking immediate and decisive measures. In a situation of a very sudden nature, authorities cannot be blamed for omission or negligence when the action taken by them has not resulted in the entire suppression of the insurrections, risings, riots or acts of brigandage, or has not led to the punishment of all the individuals responsible. In those cases no responsibility will be admitted.[125] The intrusion of the protesters into the Donavalen Embassy was not caused by any omission on the side of the Foudalin Government.[126] The intrusion was not foreseeable and as such, any and all wrongfulness on the part of Foudalin is precluded. State responsibility does not arise in relation to the injury caused to the third Secretary of Donavale because Article 24 of the Draft Articles,[127] provides that a situation of distress precludes a State from conforming to an international responsibility.[128]

An agent of State acting under distress is not acting involuntarily and the interest concerned is the immediate one of saving people's lives, irrespective of their nationality.[129] Distress may only be invoked where a State agent has acted to save his own life or where there exists a special relationship between the State organ and the persons in danger.[130] By

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124 British Mexican Claims Commission UNPIAA, vol. V. p.159 (1931).
125 Cassese, *International Law*, 2nd Edition, Oxford New York: Oxford University Press, 2005.
126 Moot Problem, p. 5, ¶ 2
127 ILC Draft, supra.
128 ILC Draft, supra, Article 24.
129 ILC Draft, ibid.
130 ILC Draft, ibid, Article 27, para 7.

firing shots into the air, the Foudalin police officer[131] was acting in good-faith under very exceptional circumstances where human lives were at stake.[132]

IV. NATIONALISATION OF *SOCILIO,* A FOUDALIN COMPANY BY DONAVALE AND THE PROVISION OF COMPENSATION ACCORDING TO DOMESTIC LAW IS A VIOLATION OF THE AGREEMENT BETWEEN THE GOVERNMENT OF DONAVALE AND *SOCILIO* AS WELL AS CONTEMPORARY PRINCIPLES OF INTERNATIONAL INVESTMENT LAW.

A. This Court is conferred with jurisdiction to take cognizance of Foudalin's counter-application.

In the *Mavrommatis Palestine Concessions Case*,[133]the PCIJ decided that it is an elementary principle of international law that a State is entitled to protect its subjects when injured by acts contrary to international law committed by another State. Therefore, this Court has the jurisdiction to hear this dispute.[134] In addition to that it is a rule of customary international law that a State may espouse a claim on behalf of nationals injured by the wrongful conduct of another State.[135] This is based on the notion that an injury to a national of a State is an injury to the State itself.[136] Injury need not be in terms of tangible assets, it

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131 Moot Problem, pg 5 ¶ 1.

132 Rainbow Warrior (New Zealand v France), UNRIAA, vol XX, p 217 (1990).

133 (1924), PCIJ, (Ser A) No 2, pg 12.

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

135 Draft Articles on Diplomatic Protection 2006, (adopted by the ILC at its 58th Session, in 2006) UN Doc A/61/10, Article 1(1).

136 Emmerlich de Vattel, The Law of Nations 156 (1758); Lawrence J Lee, *Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later*, 42 Stan. J Int'l L. 237 (2006).

may also include intangible assets such as contractual rights,[137] rights of shareholders[138] and rights of management and control.[139] In the *Barcelona Traction Case*, this Court acknowledged that a State may espouse a claim on behalf of shareholders of a company 'if the act complained of is aimed at the direct rights of the shareholders' thereby causing injury.[140] When a corporation is stripped of all its assets, the mere retention of share rights is nothing more than form devoid of substance. Hence, the injury to the rights of *Socilio* allows Foudalin as the investor State to espouse the claim in order to protect the rights of its nationals[141] and ensure compliance with international law.

B. In addition to that, the termination of the investment agreement is an internationally wrongful act which incurs State responsibility.

Although the investment agreement cannot be classified as a treaty, it constitutes an international legal duty,[142] built upon the principle of *pacta sunt servanda*.[143] Resolution 1803 provided a broad consensus between industrialized and 'third world' States regarding acts which breach agreements which are deemed to be violations of international law.[144] Therefore, the expression of *opinio juris* and State practice necessary to ascertain the

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137 Amoco International Finance Corp. v Iran (1987) 15 Iran-US CTR 189 (Amoco Case).

138 Shahin Shane Ebrahim v Iran (1995) Iran-US Claim Tribunal.

139 Dixon, *Textbook on International Law*, 5th Edition, Oxford University Press, (2005), pg 249.

140 (n.69); Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989, p 15 para. 73.

141 Moot Problem, pg 5 para 2.

142 Harvard Research, *Draft Conventions and Comments on Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners*, (1929), 23 AJIL Special Supp. 167, Article 8; ILA, Report of the Forty-Eighth Conference (1958), 161; Landreau Claim (1921) RIAA i. pp 347, 365.

143 Jennings, 37 BY (1961) pp 173-7; Saudi Arabia v Arabian-American Oil Co, 27 ILR 117; Hyde, *Economic Development Agreements*, (1962-I) 105 Hague Recueil 315.

144 Resolution 1803, infra.

conclusion of customary international law is present[145] which suffices to bind Donavale to its agreement obligations.[146]

Furthermore, the investment agreement was concluded by the Government of Donavale which possessed the authority to act in an internationally binding manner.[147] Thus, there is no room in international law for a distinction between the regime of responsibility for responsibility arising *ex contractu* or *ex delicto*. Therefore, the expropriation by Donavale is an internationally wrongful act and as such, the State incurs responsibility.

C. Additionally, the expropriation of *Socilio* by Donavale is not sanctioned by principles of international law.

Nationalization is a kind of direct expropriation that entails the deprivation of alien property by a State.[148] Notwithstanding the string of resolutions of the UN General Assembly[149] on the subject, the present state of customary international law regarding

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145 North Sea Continental Shelf Cases (FRG v Denmark; FRG v The Netherlands) (1969) ICJ Rep 3; D'Amato, *The Concept of Custom in International Law*, Cornell, 1971; Akehurst, *Custom as a Source of International Law*, (1974) 47 BYIL 1; Mendelson, *The Formation of Customary International Law*, (1999) 272 HR 159.

146 Moot Problem, pg 5, ¶ 2.

147 Nuclear Tests (Australia v. France), Judgment, I.C.J. Rep 1974, p. 253; Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Order of 22 September 1995, I.C.J. Rep 1995, p. 288; ILC Draft Articles, Article 12.

148 Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects)*, 162 RECUEIL DES COURS 255 (1979 I); Hyde, *Permanent Sovereignty over Natural Wealth and Resources*, 50 AJIL 854 (1956); O'Keefe, *United Nations and Permanent Sovereignty over Natural Resources*, 8 J. WORLD TRADE L. 239 (1974); O. Schachter, *Sharing The World's Resources*, 124-33 (1977); Fischer, *La Souverainete sur les ressources naturelles*, 8 Annuaire Francais Droit Int'l 516 (1962); G. Schwarzenberger, *Foreign Investments And International Law* 203-26 (1969).

149 Resolution on Permanent Sovereignty over Natural Resources, GA Res 1803, UN GAOR 17th Sess. Supp. No 17, UN Doc A/S217 (1962); Resolution on Permanent Sovereignty over Natural Resources, GA Res 3171 (XXVIII 1973) GAOR, 28th Sess. Supp. No 30, 68 AJIL 381; Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX 1974) UN Doc A/RES/40/182 [CERDS]; Declaration on the

expropriation of alien property has remained obscure in its basic aspects[150]. Nevertheless, pursuant to principles of international law,[151] expropriation can be justified only if the Host State can prove it is: (i) for a public purpose; (ii) provided for by law; (iii) non-discriminatory; ***and*** (iv) accompanied by adequate compensation.

1. Donavale's expropriation of Foudalin's nationals' assets was illegal because it was discriminatory and not for a public purpose.

Discriminatory expropriation is illegal.[152] In the *Amoco Case*,[153] the Iran-US Claims Tribunal held that customary international law prohibits discriminatory expropriation when there is not an objective and reasonable justification for the distinctions made. Furthermore in the *BP Case*, the arbitrator found Libya's nationalization law to be discriminatory because it was an act of political retaliation against Britain.[154] Hence, the expropriation was done on the basis of political retaliation and punishment rather than national interest. Similarly, the nationalization of *Socilio* was targeted at the Foudalin

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Establishment of a New International Economic Order, GA Res 3201 (XXIX 1974) [DENIEO].

150 Texaco v Libya (Texaco Overseas Petroleum Co and California Asiatic Oil Co v Libya) 53 ILR 389 (1977), 17 ILM 1 (1978); UN Conference on Trade and Development, Second Committee Meeting, UN Doc A/C.2/L.1404 (1974); Rudolf Dolzer, *New Foundations Of The Law Of Expropriation Of Alien Property*, 75 AJIL 553 (1981).

151 Resolution 1803, supra; *Indirect Expropriation and the Right to Regulate in International Investment Law,* OECD Doc. No. 2004/4, 10 (2004); Shaw, *International Law* (4th ed, 2003) 1206;CERDS, supra; DENIEO, supra.

152 OECD Doc, supra; Oppenheim's *International Law* (Robert Jennings & Arthur Jennings eds., 9th ed 1992) pp 1271-73; Shaw, ibid.

153 Amoco Case, supra.

154 British Petroleum Exploration Co (Libya) Ltd v Libya, 53 ILR 297, 329 (1974); Libyan-Am Oil Co v Libya , 62 ILR 141, 194 (1977).

company because the politically retaliatory law was designed to expel Foudalin from Donavale as a result of the Embassy attack.[155]

2. The compensation offered by Donavale to *Socilio* does not meet the international standard.

While there is a divergence of authority with respect to the solution of problems arising out of contracts between States and private investors, the right of the investor to enjoy legal security and thus protection from unilateral seizure is acknowledged.[156] There is no principle of customary international law regarding the standard of compensation because although developing countries have opposed the idea of compensation in accordance with international law,[157] investment contracts have been concluded in which developing countries have agreed to pay 'just and equitable compensation in accordance with international law.'[158]

Consequently, having committed an internationally wrongful act, Donavale is held to *restitutio in integrum* as the expropriation renders restoration to the *status quo ante* impossible.[159] In the *Chorzów Factory Case,* the PCIJ held that the minimum pecuniary obligation in all cases was the payment of the full value of the property taken; and what distinguished unlawful from lawful takings was the additional obligation in the former case,

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155 Moot Problem, pg 5 paras 1, 2.

156 Higgins, *The Taking of Property by the State: Recent Developments in International Law*, (1982) 176 HR 267; Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-US Claims Tribunal*, Dordrecht, 1994; Sonarajah, *The Settlement of Foreign Investment Disputes*, The Hague (2000); SD Myers Inc v Canada, 121 ILR 72.

157 Texaco, supra, para 88;

158 P. Kahn, *Les Contrats d'investissement: etude des principales clauses*, INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 54TH CONFERENCE (1971) p 519.

159 Moot Problem, pg 5 para 2; TOPCO, supra.

to compensate for consequential loss.[160] The United States-Panama General Claims Commission, in the *De Sabla Case*, [161] decided that acts of a government in depriving an alien of his property without compensation imposes international responsibility, claimants are entitled to full compensation in accordance with international standards. As the expropriation was done illegally and in breach of the investment agreement, there is an undisputed legal obligation[162] upon Donavale to pay full compensation in accordance with international law.[163]

Furthermore, as expropriation of alien property expresses principles of international law, it requires compensation on the level of international law.[164] This means that the adequacy of compensation is to be judged by reference to international criteria rather than the provisions of the national law of the expropriating state.[165] Hence the expropriation of *Socilio* by Donavale was unlawful as the compensation[166] given was not in accordance with international standards and thus a violation of international law.

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160 (1928) PCIJ Series A, No. 17; Texaco, supra.

161 28 AJIL 602 (1934)

162 LIAMCO, *supra*

163 Moot Problem, pg 5 para 2.

164 Virally, *La Charte des droits et devoirs economiques des etats*, Notes de lecture, 20 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 57 (1974); Castaneda, *La Charte des droits et devoirs economiques des etats, Note sur son processus d'elaboration*, (1974).

165 P.M. Norton, *A Law of the Future or A Law of the Past? Modern Tribunals and the International Law of Expropriation*, (1991) 85 AJIL 474.

166 Moot Problem, pg 6.

PRAYER FOR RELIEF

Recognizing a State's inherent right of self-defense;

Believing that all nations from ancient times have acknowledged that no one shall be subjected to arbitrary interference with his life;

With a view to promote just and fair investment dealings;

Whereas Donavale has failed to conduct itself in accordance with international law;

Burgundan and Foudalin respectfully prays that this Court adjudge and declare that:

1) That the attack against Agitha was in accordance with international law and therefore, Burgundan is not liable to pay any compensation.

.2) That the abduction and prosecution of Ms Tavilisi is in violation of Burgundan's sovereignty and international law and thus there has to be reparation by Donavale.

3) That Foudalin was not in breach of the Convention and proper measures were taken to provide protection to the embassy.

4) That the nationalisation of *Socilio* and the provision of compensation are in violation of the principles of international investment law and agreement between both States.

Respectfully submitted,

Agents for Co-Respondents