F1040-R

THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,

THE HAGUE, THE NETHERLANDS

THE 2008 LAWASIA MOOT COURT COMPETITION

CASE CONCERNING ATTACK ON DONAVALE AND OTHER RELATED MATTERS

REPUBLIC OF DONAVALE

(APPLICANT)

V.

STATE OF BURGUNDAN

(CO-RESPONDENT)

AND

STATE OF FOUDALIN

(CO-RESPONDENT)

MEMORIAL FOR THE RESPONDENTS

2008

TABLE OF CONTENTS

INDEX OF AUTHORITIES

TREATIES AND CONVENTIONS

UN DOCUMENTS, REPORTS AND RESOLUTIONS

JUDICIAL AND ARBITRAL DECISIONS

BOOKS AND TREATISES

6. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).....25
7. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW (1953).....41
8. G. SCHWARZENBERGER, INTERNATIONAL LAW (1976).....20
9. I. BROWNLIE, SYSTEM OF THE LAW OF NATIONS STATE RESPONSIBILITY (2001) 20, 35, 39
10. I. BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW (1998).....20, 34
11. J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE (1968) 23, 26
12. L. OPPENHEIM, INTERNATIONAL LAW (H. Lauterpacht ed., 1952) .....passim
13. L.M. GOODRICH & E. HAMBRO, THE CHARTER OF THE UNITED NATIONS (1949) 22
14. LAUTERPACHT, ANNUAL DIGEST (1929-1930).....20
15. M. AKEHURST, MODERN INTRODUCTION TO INTERNATIONAL LAW (1990) 21
16. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2004)... 39, 41, 42
17. MOORE, INTERNATIONAL LAW DIGEST Vol. VI (1906). 34
18. PIETER DROST, GENOCIDE: UNITED NATIONS LEGISLATION ON INTERNATIONAL CRIMINAL LAW (1959) 25
19. R. DOLZER AND C. SHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008) 39
20. R. LILLICH, INTERNATIONAL HUMAN RIGHTS (1991) 27
21. S. BOWETT, SELF DEFENCE IN INTERNATIONAL LAW (1958) 27
22. STEVE RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY (1997).....25
23. T.M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).....39, 40
24. WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2000) 24
25. Y. DINSTEIN, WAR, AGGRESSION AND SELF DEFENCE (2001) 19

ARTICLES, NOTES AND COMMENTS

1. A. Freeman, *Responsibility for Armed Forces,* 88 RECUEIL DES COURS 280 (1995).19, 34, 35
2. A. Maniruzzman, *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) 39, 40
3. B. Weston, *The Charter of Economic Rights and Duties of States and Deprivation of Foreign – Owned Wealth*, 75 AM. J. INT'L. L 437 (1981) 40
4. Bullington, *Problems of International Law in the Mexican Constitution of 1917*, 21 AM. J. INT'L. L 702 (1927) 40
5. C. Tomuschat, *General Course on Public International Law,* 281 RECUEIL DES COURS 207 (1999).....18
6. C. Tomuschat, *Self Determination in a Post Colonial World* in MODERN LAW OF SELF DETERMINATION 3 (1993).....21
7. C. Tomuschat, *The Right of Resistance and Human Rights* in VIOLATIONS OF HUMAN RIGHTS: POSSIBLE RIGHTS OF RECOURSE AND FORMS OF RESISTANCE 13 (UNESCO ed., 1984).....23
8. Cornelius F. Murphy, Jr. *Limitations upon the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization*, in R.B. LILLICH, THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 58 (1975) 36, 42
9. D. Bowett, *State Contract with Aliens,* 59 BRIT. Y.B. INT'L L 49 (1988).....37
10. D. Murswiek, *The Issue Of A Right To Secession – Reconsidered* in C. TOMUSCHAT, THE MODERN LAW OF SELF DETERMINATION 37 (1993).....22, 23

33. S. E. Nahlik, *Development of Diplomatic Law: Selected Problems*, 222 RECUEIL DES COURS 191 (1990) 32

34. T. J. Farer, *Foreign Intervention in Civil Armed Conflict* 142 RECUEIL DES COURS 354 (1974).....26

35. T.H. Sponsler, *International Kidnapping*, 5 INT'L L. 27 (1971).....28

36. T.M. Franck, *The Emerging Right To Democratic Governance* 86 AM. J. INT'L. L 46 (1992).....21

37. *US Interpretation of Core NAFTA Investment Standards*, (Shawn Murphy ed.) 95 AM. J. INT'L. L 881 (2001) 40

MISCELLANEOUS

1. Draft Convention on Extradition, 29 AM. J. INT'L. L 623-32 (1935) 26, 27
2. Fact Sheet No. 26, UN Working Group on Arbitrary Detention, available at http://www.unhchr.ch/html/menu6/2/fs26.htm.....28
3. Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, (1961) 26 AM. J. INT'L. L SUPPL 194 (1932) 34, 37
4. ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (hereinafter "ILC Articles") 18, 32
5. International Meeting Of Experts On Further Study Of The Concept Of The Rights Of Peoples, Convened By The UNESCO, Paris 27-30 November, 1989, SHS-89/CONF.602/7 21
6. Restatement of Foreign Relations Law, (1974) 13 I.L.M. 767, 771 37

STATEMENT OF JURISDICTION

The Union of Donavale, the State of Burgundan and the State of Foudalin have submitted the present dispute to this court in accordance with Article 36(2) of the Statute of the International Court of Justice, and have accepted the compulsory jurisdiction of this court without special agreement. The parties have agreed to the contents of the *Compromis*. The parties shall accept the judgment of this court as final and binding and shall execute it in good faith and in entirety.

STATEMENT OF FACTS

Agitha (now New Agitha) was a province of Donavale until several years ago. When Donavale got independence, since the people of Agitha were racially, ethnically and culturally different from the Donavalans, they insisted on a clause in the Donavale Constitution, which provided them with the opportunity to secede after ten years of independence. It was stated that if the province of Agitha wished to secede then a referendum must be held, in which more than 70 % of the people must approve the secession. Thereafter, the Donavale Parliament must approve the secession by a 60 % majority. Twelve years later, a referendum was held in Agitha in which 75% of residents approved the secession and formation of New Agitha, amidst speculation of malpractice during the elections, following which 64% of the members of the Parliament approved the secession. However, two days before the formal secession, the army chief, Elva Natu, suspended the Constitution and announced himself as a new Head of State. He refused recognition of Agithan independence and sent troops to reassert control over Agitha.

As a result, a civil war broke out, which continued from 2003 to 2007 between the Agitha Liberation Movement and Donavale where $1/20^{th}$ of the Agithan population being wiped out and children forcibly transferred, there were allegations of genocide. A joint report by the UN-New Agitha investigation panel (one member dissenting) concluded that there might have been genocide. Consequently, 10,000 people fled as refugees to Burgundan, a bordering State. Burgundan was accused of training the rebels who were fighting the civil war, which was denied. In late 2007, Donavale troops invaded Burgundan territory, allegedly in pursuit of the rebels/freedom fighters of Agitha. A warning was issued by the Burgundan government to Donavale that no more armed incursions will be tolerated. United Nations Security Council

(UNSC) also adopted a resolution deploring the temporary armed attack by Donavale on Burgundan territory.

A week later, a military officer, Colonel Phathone, bombed refugee camps in the territory of Burgundan. For this act, Phathone was arrested and publicly tried by Donavale within twenty-four hours. Phathone was found guilty of insubordination and endangering the security of the State with unauthorized military action' and sentenced to 10 years of punishment. Burgundan President Jawaldi criticized the attack and declared support to the Agitha freedom fighters, which was endorsed by the Burgundan Parliament in an emergency session. Burgundan then launched an attack on Donavale, chasing Donavalan troops out of Agitha and assisting the Agithans in claiming their territory. During the war, UNSC adopted a resolution asking from restraint from all parties in conflict. In January 2008, after the withdrawal of Donavale troops, New Agitha was formed.

Sometime later, Ms Tavilisi, a reporter from Burgundan, was apphrehended by the security service of Donavale from Foudalin, for publishing defamatory remarks against the Donavalan head of State Eleva Natu. Donavalan law subscribes a maximum punishment of 10 years to anyone who causes ridicule and disrespect to the head of State. Within a week she was tried in accordance with Donavalan law, being represented by a court-appointed lawyer. The trial court convicted her and punished her to two years imprisonment, which was alleviated by the Supreme Court of Donavale to house arrest for two years in government bungalow, on humanitarian grounds.

In protest, a mob of almost three hundred Foudalin nationals protested in front of Donavale embassy. The five Foudalin police guards were overwhelmed by the demonstrators who destroyed Embassy property and injured three police guards and an Embassy staff-member. However, within half an hour, the military police arrived and took charge of the situation. but in the commotion, the third secretary of the Embassy was injured by a stray bullet fired by one police officer. The secretary and staff were given immediate medical treatment and an apology was issued on behalf of Foudalin government to Donavale.

According to an investment agreement between Donavale and Socilio, a Foudalin private company, which owned Unicom Telephone industry in Burgundan, the latter could be nationalized only under 'special circumstances' with just and fair compensation according to law. Within two days of the attack on Embassy, Elava Natu announced the nationalization of Unicom because of the Embassy attack, with compensation to be paid according to Donavalan law.

Donavale has challenged the attack by Burgundan, and has alleged that Foudalin has breached the Vienna Convention on Diplomatic Relations. Burgundan has challenged the kidnap and trial of Ms. Tavilisi, and Foudalin has challenged the nationalization of Unicom.

QUESTIONS PRESENTED

1. WHETHER THE ACTS OF BURGUNDAN ARE IN A VIOLATION OF INTERNATIONAL LAW.
2. WHETHER THE TRIAL OF MS. TAVILISI WAS IN VIOLATION OF PRINCIPLES OF INTERNATIONAL LAW.
3. WHETHER FOUDALIN IS IN BREACH OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961.
4. WHETHER THE NATIONALIZATION OF UNICOM TELEPHONE INDUSTRY AND THE PROVISION FOR COMPENSATION ACCORDING TO DONAVALAN DOMESTIC LAW IS IN VIOLATION OF THE AGREEMENT BETWEEN THE GOVERNMENT OF DONAVALE AND SOCILIO, AND THE CONTEMPORARY PRINCIPLES OF INTERNATIONAL INVESTMENT LAW.

SUMMARY OF ARGUMENTS

1. THE ACTS OF BURGUNDAN ARE NOT IN A VIOLATION OF INTERNATIONAL LAW.

The acts of Burgundan are not in violation of international law, for the attack on Donavale was in exercise of Burgundan's right to self-defence. The attack by Donavale on Burgundan by Colonel Phathome is attributable to Donavale, and constitutes 'armed attack' within the scope of A.51 of the UN Charter. The aggression by Burgundan was proportionate and necessary to repel the Donavalan attack. Additionally, the aggression was in furtherance of Burgundan's obligation to help the Agithans exercise their right to self determination, and is hence valid.

2. THE TRIAL OF MS. TAVILISI WAS IN VIOLATION OF PRINCIPLES OF INTERNATIONAL LAW.

Donavale has violated the territorial sovereignty of Burgundan by kidnapping a Burgundan citizen, Ms. Tavilisi, and subjecting her to criminal prosecution. The trial of Ms. Tavilisi pursuant to her illegal kidnapping, to bring her within the territorial jurisdiction of Donavale is invalid in international law. Further, the trial does not meet minimum standards of justice required, for she was arbitrarily detained, in violation of her right to liberty, she was not allowed to choose a lawyer to represent her, and she was judged by a partial tribunal: hence, her rights to fair trial were violated.

3. FOUDALIN IS NOT IN BREACH OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961.

It is submitted that Foudalin has not breached its obligations under the Vienna Convention on Diplomatic Relations, 1961, for it has complied with all the measures necessary to protect the premises and person of diplomatic agents of Donavale in Burgundan. Foudalin cannot be held responsible for the acts of a mob of persons within its territory, over which it did not have control, when it took all the necessary due diligence measures to avoid such an attack. Further, the act of the police officer who accidentally shot the Donavalan diplomatic agent are not attributable to Foudalin, for it is outside the scope of the police officer's authority as a State agent, and moreover, because all acts of a minor official (like a police officer) are not attributable to State.

4. THE NATIONALIZATION OF UNICOM TELEPHONE INDUSTRY AND THE PROVISION FOR COMPENSATION ACCORDING TO DONAVALAN DOMESTIC LAW IS IN VIOLATION OF THE AGREEMENT BETWEEN THE GOVERNMENT OF DONAVALE AND SOCILIO, AND THE CONTEMPORARY PRINCIPLES OF INTERNATIONAL INVESTMENT LAW.

The nationalization of Unicom is in breach of the agreement because no 'special' circumstances, warranting the nationalization, as required by the agreement, have arisen. It is also illegal *per se* because it does not satisfy the international customary law requirements of being for a public purpose, and being non-discriminatory. The nationalization is illegal *sub modo* because the payment of compensation as per domestic law is in violation of the agreement, which implies that such payment has to be in accordance with international law, and is in violation of contemporary international law, which lays down principles other than domestic law to govern payment of compensation.

PLEADINGS

1. THE ACTS OF BURGUNDAN ARE NOT IN A VIOLATION OF INTERNATIONAL LAW.

1.1. Burgundan's acts were a legitimate exercise of self-defence.

Article 51 of the UN Charter provides for the use of force in self-defence. The ingredients of self-defence are, there has to be an armed attack, the attack has to be imminent, and the force used in self-defence has to be necessary and proportional. It is submitted that in the instant case, all the ingredients are satisfied.

1.1.1. The act of bombing and incursion amount to an 'armed attack'

An armed attack means any act of invasion by the armed forces of a State on another State's territory,[1] including any bombardment.[2] If armed attacks perpetrated are in flagrant violation of the sovereignty and political independence of a State,[3] the State has an inherent right of self-defence.[4]

The incursion by Donavalan troops into Burgundan in late 2007 as well as the bombing of Burgundan territory were blatant acts of aggression amounting to an 'armed attack' and in direct

[1] C. Tomuschat, *General Course on Public International Law*, 281 RECUEIL DES COURS 207 (1999).
[2] Definition Of Aggression, G.A. Res. 3314 (XXIX), (14 December, 1974); Y. DINSTEIN, WAR, AGGRESSION AND SELF DEFENCE 165 (2001); Military and Paramilitary Activities in and against Nicaragua (*Nicaragua* v. *United States of America*), 1986 I.C.J. 14 (hereinafter "*Nicaragua*").
[3] Case concerning armed Activities on the Territory of the Congo (*Democratic Republic of the Congo* v. *Uganda*) 2005 ICJ Reps. 3, 30; L. Henkins, *General Courses On Public International Law*, 216 RECUEIL DES COURS 147 (1989).
[4] Article 51, UN Charter, 1945; Corfu Channel Case (*United Kingdom* v. *Albania*) 1949 ICJ Reps. 4; Tomuschat, supra note 1, at 209.

contravention of the rules of international law of refraining from the '*threat or use of force*' and the ban on 'armed attack'.

1.1.2. The armed attacks carried out by Colonel Phathome are attributable to Donavale.

The vicarious liability of the State for the acts of its military forces is to be given an 'unlimited and unrestricted' interpretation.[5] When a State agent commits a wrongful act, it can be attributed to the State,[6] as long as there is some ostensible relationship between his function as an official and the act committed, even if he may be violating the duties assigned to him[7] and even unauthorized acts, in violation of military regulations, do not exclude the responsibility of the State.[8] The acts of the military officers are directly attributable to the State.[9]

In the instant case, the actions of Colonel Phathone, a Donavalan military officer, can be clearly attributed to Donavale. The fact that he was acting without authorization from Donavale does not exclude its responsibility because an ostensible relationship can be drawn between his functions as a Colonel and the act of bombing the refugee camps in Burgundan. Even if he has acted beyond the scope of his actual authority, his acts are directly attributable to the Donavale under international law.

---

[5] A. Freeman, *Responsibility for Armed Forces*, 88 RECUEIL DES COURS 280 (1995).

[6] G. SCHWARZENBERGER, INTERNATIONAL LAW 227 (1976); ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (hereinafter "ILC Articles"), I. BROWNLIE, SYSTEM OF THE LAW OF NATIONS STATE RESPONSIBILITY 162 (2001); ANZILOTTI, COURS DE DROIT INTERNATIONAL (Gidel trans.1908).

[7] LAUTERPACHT, ANNUAL DIGEST 356 (1929-1930); L. OPPENHEIM, INTERNATIONAL LAW 545 (H. Lauterpacht ed., 1952); *Caire Claim*, (1929) RIAA v. 516, 530.

[8] *Charles S. Stephens & Bowman Stephens, United States & Mexico: General Claims Commission*, International Law Reports: Annual Digest of Public International Law Cases 140 (1927); *T. H. Youmans* v. *United Mexican States*, (1926) RIAA iv. 110, 116 (hereinafter "Youmans Claim").

[9] IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 451 (1998).

1.1.3. The attack by Burgundan troops satisfy the test of necessity

As per the test laid down in the *Caroline* case, the test of necessity requires the target State's response to be instant, overwhelming, [10] leaving no choice of means and no moment for deliberation.[11] If delay may cause danger, the State can counter attack to combat the threat.[12]

Donavalan incursions and bombing are a clear instance of armed aggression, resulting in the death of 100 refugees and about 50 Burgundan nationals. In the face of such an attack, there was an instant and overwhelming need to avert these incursions where it had no other option but retaliating because it had exhausted all its options of reporting the incursions to the Security Council which passed a resolution calling for restraint from both countries. However, inspite of that, it faced incursions from the Donavale again which necessitated the entry of Burgundan troops into Donavale, to avert the threat looming over their security. A delay in acting would have entailed more damage as there was a possibility of further incursions, therefore, rendering the urgent actions of Burgundan troops necessary.

1.1.4. The attack by Burgundan troops satisfy the test of proportionality

The test of proportionality requires that the counter attack not be unreasonable or excessive, and should be justified by necessity.[13] Self-defence must be limited to the action that is necessary to

[10] B. SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 675 (1995).
[11] OPPENHEIM, supra note 7, at 421; DINSTEIN, supra note 2, at 189.
[12] OPPENHEIM, supra note 7, at 421.
[13] OPPENHEIM, supra note 7, at 422; M. AKEHURST, MODERN INTRODUCTION TO INTERNATIONAL LAW 317 (1990); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (separate opinion of Judge Higgins) (hereinafter "*Nuclear Weapons*"), 42; SIMMA, supra note 10, at 677.

repel or prevent the attack.[14] However, it is not necessary that the act in self-defence be proportional to the initial attack.[15]

In the instant case, the act of self-defence was in response to repeated attacks by Donavale. Self restraint was exercised the first time, but after the second attack, there was an imminent need to exercise self-defence. Therefore, it is clear that no punitive purpose is involved. Also, the entry of Burgundan troops in Agitha was the only way in which the bombing could be averted and the incursions could be repelled, hence the acts of Burgundan are proportional to the threat. In such circumstances, they could not have waited for the Security Council to take any action. The only option open to Burgundan to prevent these acts of aggression was to enter the Donavalan territory and hence, this cannot be considered to be disproportionate.

1. 2. Burgundan's acts are also justifiable under the right of self-determination.

1.2.1. The ingredients of self determination are satisfied.

1.2.1.1. *The people of Agitha are within the definition of "peoples".*

Under international law, all peoples have the right to self determination, and by virtue of that right they freely determine their political status[16] and pursue their economic, social and cultural development.[17] The notion of people, derived from a literal meaning of the provision,[18] denotes

[14] OPPENHEIM, *supra* note 7, at 422; AKEHURST, *supra* note 13, at 317; SIMMA, *supra* note 10, at 677; L.M. GOODRICH & E. HAMBRO, THE CHARTER OF THE UNITED NATIONS 346 (1949).
[15] *Nuclear Weapons*, *supra* note 13, (separate opinions of Justice Higgins and Schwebel).
[16] T.M. Franck, *The Emerging Right To Democratic Governance* 86 AM. J. INT'L. L 46, 58-59 (1992).
[17] Greco Bulgarian Communities Case, (1930) 17 PCIJ 21; GA Res. 421 (V), Dec 4, 1950; GA Res.1514 (XV), 1960 (hereinafter "Colonial Declaration"); SIMMA, supra note 10, at 65; Friendly Relations Declarations G.A. Res. 2625 (XXV), (October 24, 1970) Supplement no. 28 (A/8028), 12-14 (hereinafter "Friendly Relations Declaration")
[18] C. Tomuschat, *Self Determination in a Post Colonial World* in MODERN LAW OF SELF DETERMINATION 3 (1993); *Legal Consequences for States of the Continued Presence of South*

the concept of important groups of a population of a State which differ from each other by ethnical, cultural, linguistic, religious or possibly other characteristics,[19] with common features like common historical tradition, racial or ethnic identity, cultural homogeneity, religious affinity and territorial connection.[20] The residents of Agitha are racially, ethnically and culturally different from the main ethnic group of Donavale[21]. This is not a recent development since Agithans have had a territorial connection with Agitha since its independence in 1990 and before. The distinctiveness of Agithans has also been formally recognized and acknowledged by the State of Donavale, in as much as their right of secession has been incorporated in their Constitution, as per their will.[22] This shows that Agitha has always been a population different from the main ethnic group of Donavale, with a different culture and a distinct ethnic and racial identity.

1.2.1.2. There was discrimination or mistreatment amounting to genocide committed by Donavale.

If the ethnic group is discriminated or maltreated by the government[23] and treated in a way that violates its fundamental human rights depriving them of their specific characteristics[24], making it

---

Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971.

[19] J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 322 (1968).

[20] International Meeting Of Experts On Further Study Of The Concept Of The Rights Of Peoples, Convened By The UNESCO, Paris 27-30 November, 1989, SHS-89/CONF.602/7, Para 19; D. Murswiek, *The Issue Of A Right To Secession – Reconsidered* in C. TOMUSCHAT, THE MODERN LAW OF SELF DETERMINATION 37 (1993); Article 27, The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (hereinafter "ICCPR").

[21] *Compromis,* Page 1, Para 3.

[22] *Compromis,* Page 1, Para 3.

[23] Preamble, Universal Declaration of Human Rights, G.A. Res. 217A (III) (1948) (hereinafter "UDHR"), 1948; K. Doehring, *Das Selbstbestimmungsrecht Der Volker* in Charta der Vereinten

impossible for them to remain with the State, there is no obligation on that group to stay as part of the State[25] and they would have a right to secede.[26] Therefore, the right to external self determination can be exercised in times when the population is a victim of an attack on its physical existence or integrity, [27] or of a massive violation of its fundamental rights.[28]

In the instant case, the Amnesty International Report as well as the UN New Agitha Investigation Panel reported that there might be some justifications of the allegations of genocide. Article 6 of The Rome Statute defines *genocide* to mean "any of the following *acts* committed, with *intent* to destroy, wholly or in part, a national, *ethnical*, racial or religious group, *as such*: (a) killing members of the group". Proving the elements of the crime of genocide, therefore, requires proving:[29]

A. *Actus reus*, the killing of members of *the group* has happened. It must be shown that the perpetrator has killed one[30] or more persons of the group[31] or forcibly transferring children of

---

Nationen 30-32 (B. Simma ed., 1991) as cited in JOCHEN A. FROWEIN, SELF DETERMINATION AS A LIMIT TO OBLIGATION 212 (1993).

[24] MURSWIEK, supra note 20, at 27; *See also* C. Tomuschat, *The Right of Resistance and Human Rights* in VIOLATIONS OF HUMAN RIGHTS: POSSIBLE RIGHTS OF RECOURSE AND FORMS OF RESISTANCE 13, 22 (UNESCO ed., 1984).

[25] R. Higgins, *General Course on Public International Law* 230 RECUEIL DES COURS 1, 171(1991).

[26] Murswiek, supra note 20, at 26.

[27] O. Kimminich, *A "federal" right of self determination?* in TOMUSCHAT, supra note 20, at 92; Frederic Kirgis Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L. L. 304, 307-308 (1994); A. Cristescu, *The Right To Self Determination, Historical And Current Development On The Basis Of United Nations Instruments*, UN Doc. E/CN.4/Sub.2/404/Rev/1,1981, Para 173.

[28] *Reference re Secession of Quebec*, 37 ILM (1998) 1340; A. CASSESSE, SELF DETERMINATION OF PEOPLES A LEGAL REAPPRAISAL, 120 (1995).

[29] WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 151 (2000).

[30] Article 6 (a), Elements of Crime (2002).

[31] Article 6 (a) of the Rome Statute of the International Criminal Court, 37 ILM 1002 (1998) (hereinafter "Rome Statute").

the group to another group.[32] In the instant case, the *actus reus* of killing the members of the group of Agitha has been conclusively established. 1/20th of the population of Agitha had have perished. Not only that, the findings of the majority of the UN-New Agitha Investigation Panel revealed a few dozen instances of children of Agitha women, especially children of Agitha women and Donavalan men were forcibly removed from their mothers[33]. Both these acts constitute an *act* for the purposes of genocide.

B. *Mens rea*, the intent to destroy, wholly or in part, the group as such, is present. It must be shown the perpetrators *intended* to destroy members of the protected group *as such*.[34] The meaning of the phrase "*as such*" implies an intent clearly directed *against* the group[35], inferred from the relevant facts and circumstances.[36] A person is said to have intent where, in relation to the conduct, that person means to cause the consequence, or is aware that it will occur in the ordinary course of events,[37] irrespective of motive. [38]

It is submitted that the requisite *mens rea*, that is, the intent against the Agithan population *as a group* is evident from the facts and circumstances surrounding the *actus reus*. The leader of the military coup, Elava Natu, did not recognize the independence of Agitha, calling them 'Agitha rebels' and 'destructionists'. Under his command, a major part of the Agithan

---

[32] Article 6 (e), Rome Statute, *id.*
[33] *Compromis*, Page 1, Para 4.
[34] Article 6, Rome Statute, supra note 31.
[35] *Prosecutor* v. *Niyetegaka*, Case No. ICTR-96-14-A (ICTR Appeals Chamber, 9 July 2004); *See also* Nuclear Weapons Case, supra note 13, at 226; ILC Articles.
[36] Para 3, Elements of Crime, 2002.
[37] Article 30, Rome Statute, supra note 31.
[38] *Prosecutor* v. *Rutaganda*, Case No. ICTR-96-3-T (ICTR Trial Chamber I, December 6, 1999); STEVE RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY 36 (1997); PIETER DROST, GENOCIDE: UNITED NATIONS LEGISLATION ON INTERNATIONAL CRIMINAL LAW 84 (1959); CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 258 (1995).

population was also wiped out. Also, there was forcible transfer of Agithan children to another group of Donavale. All these acts are pointers to the fact that the *actus reus* of killing the Agithan population was supported with an intent to destroy the group of Agithans.

Therefore, it is submitted that the population of Agitha were subjected to gross mistreatment amounting to genocide and therefore, had a right to secede from Donavale.

1.2.1.3. The 'peoples' of Agitha freely expressed their will to secede from Donavale.

The mode of implementing the right of self determination of a "peoples", as recognized by international instruments,[39] may be through the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status *freely determined by a people*. [40] The free determination of their political status and pursuance of their economic, social and cultural development[41] must be through an informed and democratic process[42] directly by the people concerned, either by means of a referendum or a plebiscite and not by any indirect mechanism.[43]

In the instant case, a referendum was held in Agitha to decide as to whether the majority of the population wants to break away from the Donavale Union[44]. This was an informed and democratic process through which the people of Agitha voted by a 75% majority in favor of secession. Although there were allegations of misconduct on both sides, there is no evidence to prove the same and therefore, it cannot be said that the referendum process was unfair or bogus.

---

[39] Friendly Relations Declaration, supra note 17.
[40] *International Court of Justice Advisory Opinion in Western Sahara Case*, ICJ Reps. 50 (1975).
[41] G.A. Res. 1514 (XV) (14 December, 1960); Western Sahara Case, *ibid*., at 32; G.A. Res. 36/103 (9 December, 1981).
[42] Principle VII, G.A. Res.1541 (XV) (15 December, 1960); VERZIJL, supra note 19, at 326.
[43] East Timor (*Portugal* v. *Australia*), 1995 I.C.J. 90.
[44] Compromis, Page 1, Para 2.

1.2.2. Burgundan's act of intervention was justified in international law.

While the prohibition of the use of force is a rule of customary international law, it has some well-established exceptions to the prohibition and the value of national sovereignty is balanced with world peace.[45] The price of inviolability of any territory is the maintenance of justice therein [46] and every State has a duty to promote, through joint or several action, realization of the principle of self determination of peoples.[47] If this duty is not realized, a third State may lawfully use force, by way of exception, when the act provoking the wrongful act is an armed attack. [48]

When a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention by armed forces if necessary, to protect those rights is recognized as *jus cogens,* to be legally permissible, also to assist people in their demand for self determination,[49] provided it is resorting to force only within the strict limits of necessity in order to prevent further violations of fundamental human rights, and it withdraws troops as soon as possible[50], This would not be in violatinion of territorial sovereignty or political independence.[51]

In this case, troops of Burgundan entered Agitha only in response to the violation of their territorial integrity. Also, Burgundan was under a legal obligation to assist the people of Agitha who were entitled under international law to self determination and for that, Burgundan extended

---

[45] T. J. Farer, *Foreign Intervention in Civil Armed Conflict* 142 RECUEIL DES COURS 354 (1974).
[46] S. BOWETT, SELF DEFENCE IN INTERNATIONAL LAW 87 (1958).
[47] Friendly Relations Declaration, supra note 17.
[48] *Nicaragua Case*, supra note 2, at Para 193 to 195; G.A. Res.50/6, 1, U.N. Doc. A/RES/50/6 (October 24, 1995); United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, June 25, 1993, 32 I.L.M. 1661 (1993); Kirgis Jr., supra note 27.
[49] OPPENHEIM, supra note 7, at 445; Nicaragua Case, supra note 2; *Quebec Case*, supra note 28, at 1372.
[50] ROBERT LILLICH, INTERNATIONAL HUMAN RIGHTS 575 (1991).
[51] *Legality of the Use of Force* Cases (Yugoslavia/Serbia and Montenegro v. United States/United Kingdom/ Spain/Belgium/Italy/Netherlands/Canada (1999, 2004).

its full moral and material assistance. Moreover, the constant flow of refugees was negatively affecting the economy and political order of Burgundan. Therefore, Burgundan was acting with the twin purpose of defending themselves from the acts of aggression of Donavale, and to protect the right of self determination of Agithans. Once the danger of Donavalan incursions subsided and Agitha was a free nation, Burgundan troops immediately withdrew. Hence, Burgundan act is a legitimate act of self defense and in support to the Agithan population for self determination.

2. THE TRIAL OF MS. TAVILISI WAS IN VIOLATION OF PRINCIPLES OF INTERNATIONAL LAW.

2.1. Donavale has violated the sovereignty of Burgundan by illegally kidnapping Ms. Tavilisi, and the trial of Ms. Tavilisi after such illegal kidnapping is not a valid exercise of jurisdiction.

It is a rule of international law that a State must not perform sovereign acts on the territory on another State.[52] In exercising jurisdiction, no State shall prosecute or punish a person who has been brought within its territory by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or states whose rights have been violated by such measures.[53] Any assertion of criminal jurisdiction in relation to conduct of aliens in a foreign State may be infringing the sovereign rights of that State to regulate matters taking place in its territory and the principles of non intervention and the sovereign equality of States.[54] State practice indicates that courts have inquired into the legality

[52] OPPENHEIM, supra note 7, at 295; M. Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L 145, 148 (1972-1973).
[53] Article 16, Draft Convention on Extradition, 29 AM. J. INT'L. L 623-32 (1935).
[54] OPPENHEIM, supra note 7; L. Preuss, *Kidnapping Fugitives From Justice On Foreign Territory* 29 AM. J. INT'L. L 507 (1935).

of the arrest [55] and have declined jurisdiction[56] where a criminal brought before it has been seized in violation of international law, as the sovereignty of another State has been violated.[57] If it does not, it not only condones and fails to uphold the rule of international law prohibiting seizure but gives effect to the violation of international law[58]

Resort to measures in violation of international law or international convention in obtaining custody of a person charged with crime entails State responsibility, which must be discharged by the release or restoration of the person taken, indemnification of the injured State, or otherwise.[59] The State whose sovereignty has been violated by an unlawful arrest is entitled to demand the return of the person arrested,[60] especially where State agents have seized the individual by violence upon a foreign territory.[61]

Ms. Tavilisi was a journalist of Burgundan nationality and it was Burgundan responsibility to punish her if any crime had been committed by her. However, Donavale secret service agents kidnapped her from the foreign territory of Foudalin and brought her into Donavale, in order to acquire jurisdiction. Also, this was not done with either Burgundan's or Foudalin's consent. This was in violation of Burgundan sovereignty because Ms. Tavilisi was a Burgundan citizen and it

---

[55] *Attorney-General* v. *Cass*, 147 ER 494; *Attorney-General* v. *Dorkings* (1822) 147 ER 433; *Attorney-General* v. *Golder*, (1823) 147 ER 739 as cited in P. O'Higgins, *Unlawful Seizure And Irregular Extradition* 36 BRIT. Y.B. INT'L L 282 (1960).

[56] *R* v. *Mullen* [1999] 2 Cr App R 143, 157.

[57] *R*. v. *Garrett* (1917) 86 KB 894; *Ex parte Sharf* (1917) 2 KB 99; E.D. Dickinson, *Jurisdiction Following Seizure in Arrest in Violation of International Law*, 28 AM. J. INT'L. L, 231 (1934).

[58] F. Morgenstern, *Jurisdiction In Seizures Effected In Violation Of International Law* 29 BRIT. Y.B. INT'L L 265, 279 (1952); M.H. Cardozo, *When Extradition Fails, Is Abduction The Solution*? 55 AM. J. INT'L. L 127, 135 (1961); T.H. Sponsler, *International Kidnapping*, 5 INT'L L. 27, 49 (1971).

[59] Draft Convention, supra note 53.

[60] Higgins, supra note 55, at 319.

[61] Travers, Le droit penal international, III (Paris, 1921), Nos. 1302, 1304 as cited in Preuss, supra note 54, at 505.

was Burgundan's responsibility to protect her from all forms of foreign intervention and therefore entails State responsibility.

2.2 The trial of Ms Tavilisi by Donavale does not meet the international minimum standards of justice.

It is an accepted standard as per the international minimum standards of justice that an accused in a criminal case should be afforded a fair and free trial[62], and cannot be arbitrarily detained without due procedure[63]. It is submitted that the trial of Ms. Tavilisi by Donavale does not meet the international minimum standards of justice.

2.2.1 The manner of arrest and detention of Ms. Tavilisi is unlawful and arbitrary.

Arbitrarily detention or arrest is a violation of basic human rights.[64]. Detention is arbitrary if, first, there is no legal basis justifying the deprivation of liberty and, secondly, when there is total or partial non-observance of the related procedural guarantees.[65] Procedural norms for detention and minimum standards of fair trial[66] require, *inter alia*, that detainees be informed of the

[62] Art.14, ICCPR, supra note 20; Art.10 and 11, UDHR, supra note 23; Art.6, European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222; Art. XVIII and XXVI ,American Declaration of the Rights and Duties of Man, Organisation of American States, 9th International Conference of American States, Res. XXX, OEA/Ser.L.V/II.82 Doc.6 Rev.1 at 17 (1992); Art.8 Inter-American Convention on Human Rights, 1144 U.N.T.S. 123; Art.7 and 26, African Charter on Human and Peoples' Rights, (1982) 21 I.L.M. 58.

[63] Art. 3, 9 of UDHR, supra note 23; Art.9(1) of ICCPR, supra note 20.

[64] Art.9(1), ICCPR, supra note 20; Art.9 UDHR, supra note 23.

[65] Fact Sheet No. 26, UN Working Group on Arbitrary Detention, available at http://www.unhchr.ch/html/menu6/2/fs26.htm.

[66] Art.14(3), ICCPR, supra note 20.

reasons for their arrest and charges against them,[67] and promptly brought before a judge or any other authorized officer.[68]

The *kidnapping* of Ms. Tavilisi by State agents of Donavale cannot be construed to constitute a procedurally valid arrest. She was apprehended, without even being told that she was being 'arrested' for a criminal offence, and without being told what the charge was. There is nothing to suggest that, even after being apprehended and taken to Donavale, she was informed of the criminal charges against her. She was detained for a week, and only after that brought to trial. Detaining a person for a week, without telling him or her the reason for detention is a clear violation of the human right to liberty and freedom from arbitrary arrest. Therefore, it cannot be construed to constitute a procedurally valid arrest.

2.2.2 Ms. Tavilisi was not allowed to choose her own lawyer.

In a criminal case, the accused has a right to be represented by a counsel of his own choosing[69]. However, Ms. Tavilisi was represented by a court appointed lawyer[70]. Not being given the opportunity to choose a lawyer of her choice is a violation of standards of justice and fair trial as per ICCPR and the principle of 'equality of arms' between the plaintiff and the defendant, recognized in international law.

[67] Article 9(2), Art.14(3) of ICCPR, supra note 20.
[68] Article 9(3), ICCPR, supra note 20.
[69] Article 14(3), ICCPR, supra note 20.
[70] *Compromis*, Page 4, Para 4.

2.2.3 The trial of Ms. Tavilisi was not conducted by an impartial tribunal.

One of the principles of minimum standards of justice in international law is the right of an accused to be tried by an impartial tribunal[71]. The situation between Donavale and Burgundan is one of conflict, in light of the armed attacks by Donavale on Burgandan, and the counter attacks by Burgundan in self defence.and assistance in self determination. Further, the kidnap of Ms. Tavilisi by Donavalan agents highlights Donavale's willingness to resort to even illegal acts against Burgundan nationals, in pursuit of its conflict with Burgundan.

In light of these circumstances, Ms. Tavilisi could not have had a fair and impartial trial by Donavalan judges, given that she was being tried for the statements she made against Elava Natu, the leader of the military coup which established a dictatorial regime in Donavale. The trial, if at all, ought to have been conducted by a tribunal constituted of neutral judges, who would have ensured a protection of Ms. Tavilisi's rights to a fair trial.

3. FOUDALIN IS NOT IN BREACH OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961 (HEREINAFTER "VCDR").

It is submitted that there has been no breach of the VCDR[72] by Foudalin, and the attack on the embassy is not attributable to Foudalin.

---

[71] Art.10, UDHR, supra note 23; Art.14(1) ICCPR, supra note 20; UN Basic Principles on the Independence of the Judiciary, UNGA Res. 40.32 of 19 November, 1985 and Res. 40/146 of 13 December 1985; Art.6, European Convention on Human Rights, supra note 62; American Declaration of the Rights and Duties of Man, Art. XVIII and XXVI, supra note 62; Inter-American Convention on Human Rights, Art.8; African Charter on Human and People's Rights, Art.7 and 26, supra note 62.

[72] Vienna Convention on Diplomatic Relations, 1961, 500 UNTS 95.

3.1 Foudalin has complied with all measures necessary under VCDR.

As per A.22 and A.29 of the VCDR, the receiving State needs to take 'all appropriate steps' to prevent a violation of the person or premises of a diplomatic mission. All appropriate steps has been interpreted to mean that appropriate care must be taken by the receiving State in providing police protection for the personnel and premises[73], and that the State did everything it could to prevent or repress the impugned actions.[74]

In this case, all measures of protection of the embassy that could have been taken had been taken. Five police guards were posted solely to protect the embassy[75]. It was unforeseeable for Foudalin that a crowd of as many as three hundred people would attack the embassy. The loss of control was caused on account of the overwhelming strength of the mob, and not because of lack of protection offered by the State of Foudalin.

The police officers present tried their best to control the crowd, and were even injured in the process[76]. Also, despite this temporary loss of control, reinforcements arrived almost immediately, and control was regained as soon as was possible. Emergency treatment was given to the injured diplomatic agents of Donavale, and an apology was issued within a few hours by the Foudalin Foreign Minister[77]. It is clear from all the actions taken as soon as was reasonably possible, by Foudalin, that the requirement of 'all adequate steps' has been fulfilled.

---

[73] *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*USA* v. *Iran*) (1980) 19 I.L.M. 553.
[74] Stanislaw E. Nahlik, *Development of Diplomatic Law: Selected Problems*, 222 RECUEIL DES COURS 191, 319(1990, iii.).
[75] *Compromis*, Pg. 5, Paragraph 3.
[76] *Compromis*, Pg. 5, Paragraph 3.
[77] *Compromis*, Pg. 5, Paragraph 3.

3.2. State responsibility for the attack cannot be incurred by Foudalin.

3.2.1 Acts of a mob cannot be attributed to State.

Acts of a person not acting on behalf of the State is not attributable to the State.[78]. Under international law, no government can be held responsible for the acts of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing the insurrection[79]. The State cannot reasonably be expected to be aware of every unlawful activity happening, or about to happen on its territory.[80]

The attack on the Donavalan Embassy was perpetrated by a mob of three hundred persons[81], and the State could not have been expected to know that such an act of violence was to occur; nor did State agents have any role to play in the same. The individuals constituting the mob were not in capacity State agents or representatives of the State of Foudalin. The rationale to the principle of attribution of State responsibility in cases of actions by private individuals is that such responsibility can only be based upon *some ultimate default of the organs of the State*, the activities of private persons merely constituting an objective condition which gives rise to a breach of a principle in general international law or of a treaty to which the State is a party[82]. However, in the instant case, there has been no default by any organ of the State; the state organs concerned, i.e. the police force and the ministry of Foreign Affairs, did everything they could have to prevent the violence of the mob, took all steps necessary and adequate subsequent to the

[78] A.11, ILC Article, supra note 6.
[79] *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States)* 1 ILR 173; MOORE, INTERNATIONAL LAW DIGEST Vol. VI 956, 957 (1906).
[80] Corfu Channel Case, 1949 I.C. J. 18 (Dec. 15).
[81] *Compromis*, Pg. 5, Paragraph 3.
[82] *British Property in the Spanish Zone of Mexico*, RIAA ii. 615, at 642-647; BROWNLIE, supra note 9, at 160-162.

attack to restore status quo, and even apologized to the Donavale Foreign Ministry for the attacks at the earliest.

3.2.2 Foudalin exercised due diligence.

State responsibility can be attributed for the act of a private person(s) only in a situation where the State concerned has breached its duty to exercise due diligence in control of the private person(s)[83]. It is submitted that, as argued above, all measures to prevent the attack, and to restore status quo immediately, have been taken, and hence, it has discharged its duty of due diligence to control the mob causing the attack, and taking subsequent measures to restore status quo.

3.2.3 The act of the Foudalin police officer is not attributable to Foudalin.

Not all acts of State agents are attributable to the State. Strict rules of agency do not apply to the relations between a government and its officials, to make the government internationally responsible for all the wrongs committed by its officials.[84] It is apparent that the Foudalin police officer was acting in fulfillment of Foudalin's international obligations owed as per the VCDR, and attempting to clear the infiltrating crowd from the Donavalan Embassy. The shot fired by him inadvertently hit the Third Secretary of the embassy, subsequent to which all measures were taken to give him emergency medical aid[85]. Hence, the impugned act was clearly a mistake

[83] BROWNLIE, supra note 9, at 161; *Youmans Claim*, supra note 8, at 155; *Volkman* Case (1903), RIAA x. 499; *Aroa Mines* Case, (1903) RIAA x. 455; *British Property in the Spanish Zone of Mexico, ibid*, at 642-647; *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States)*, supra note 79; LORD MCNAIR, OPINIONS ii., 452, as in BROWNLIE, supra note 9, at 455-456; OPPENHEIM, supra note 7, at 549.
[84] Freeman, supra note 5, at 280.
[85] *Compromis*, Pg. 5, Paragraph 3.

committed by the police officer, while he was trying to save the diplomatic agents of Donavale. It was not in furtherance of his responsibilities as a State agent, and causing injury to the diplomatic agent was certainly not an act authorized by the State. Hence, State responsibility on the part of Foudalin should certainly not accrue for such an act by its official.

3.2.3.1 *Arguendo*, acts of minor official are not attributable to the State.

The unlawful acts of minor officials do not, without knowledge of the State, engage a State's international liability[86] because there is a logical basis for differentiating between the acts of administrative personnel, such as police officers, and those of military officials and the like, on the basis of the fact that police officers constitute the category of 'minor officials', and their actions do not, like those of military officials, incur State responsibility in almost all cases[87]. There is no clear recognition of responsibility for acts of police authorities as there is for responsibility for acts of military agents[88]. Hence, it is submitted that since the fireshot which injured the Third Secretary of the Donavalan Embassy was fired by a police officer, a negligent act by a minor official, for which State responsibility cannot be incurred for Foudalin.

[86] Harvard Research, *Responsibility of States*, 26 AM. J. INT'L. L SUPPL 194 (1932); Freeman, supra note 5, at 289.
[87] Freeman, supra note 5, at 289; *Malamatinis Case*, American-Turkish Claims Settlement, NIELSEN, OPINIONS AND REPORTS, 608-609.
[88] Freeman, supra note 5, at 289; *Malamatinis Case*, *id.*

4. THE NATIONALIZATION OF UNICOM TELEPHONE INDUSTRY (HEREINAFTER "UNICOM") AND THE PROVISION FOR COMPENSATION ACCORDING TO DONAVALAN DOMESTIC LAW IS IN VIOLATION OF THE AGREEMENT BETWEEN THE GOVERNMENT OF DONAVALE AND SOCILIO (HEREINAFTER "THE AGREEMENT"), AND THE CONTEMPORARY PRINCIPLES OF INTERNATIONAL INVESTMENT LAW.

4.1 The nationalization of Unicom is in violation of the Agreement.

Breach of State contract, i.e. a contract between a State and a private party, incurs State responsibility[89]. Expropriation of an alien's property in contravention to a State contract is illegal.

4.1.1 The nationalization is illegal on account of it being in breach of the Agreement.

The principle of *pacta sunt servanda* applies not only in agreements concluded between States, but also to agreements between a State and a foreigner[90], therefore, requiring the State to honour its obligations in good faith[91]. The arbitrary violation or termination of a State contract is in itself in violation of principles of international law[92].

The nationalization of Unicom is in contravention to the terms of the Agreement which stated that the nationalization of Unicom will be undertaken by the Donavalan government only in

---

[89] H.W.Shawcross, *The Problems of Foreign Investment in International Law*, 102 RECUEIL DES COURS 339 (1962).

[90] *Losinger* Case, (1936) PCIJ, Series C, No.78; *Shufeldt* Case, (1930) UNRIAA ii. 1083; *Delagoa Bay Railway* Case, LA FONTAINE, PASICRISIE INTERNATIONALE (1902), 389.

[91] Para 8, G.A. Res. 1803, 17 UN GAOR Supp (No 17) at 15 on 'Permanent Sovereignty over Natural Resources', (1962) (hereinafter "UN Resolution 1803").

[92] *International Fisheries Company* case, UNRIAA iv. 691, 700; *Sapphire International Petroleum Ltd*. v. *National Iranian Oil Co*., 35 ILR 136 (1967); Cornelius F. Murphy, Jr. *Limitations upon the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization*, in R.B. LILLICH, THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 58, 59 (1975).

'special circumstances'[93] thereby preventing nationalization of Unicom unless circumstances of an extraordinary nature, compelling nationalization of Unicom, arise.I In the instant case, no such circumstances have arisen. The attack on the Donavalan Embassy was perpetrated by a mob in Foudalin, and there is no real rationale to link the attack on the Embassy with the nationalization Unicom. No special circumstances have arisen to justify the nationalization of Unicom, and thus, the State contract has been breached. Therefore, it is submitted, that the nationalization is illegal.

4.1.2 *Arguendo*, it is legal, the compensation payable to Socilio should be enhanced on account of the breach.

If foreign property is taken in breach of a State contract, the compensation to be paid should be enhanced to include damages payable on account of the breach of contract, over and above the compensation ordinarily payable for expropriation[94].

It is submitted that in the instant case, even if the nationalization of Unicom is legal inspite of breach of the State contract, the compensation payable by Donavale should be enhanced on account of this breach.

4.2 The nationalization is in violation of the contemporary principles of international investment law, and is illegal *per se*.

The taking of foreign property by a State is illegal *per se*, i.e. creating no valid title to the property, if obtained in contravention to the principles of international law. Expropriation will be

[93] *Compromis*, Page 5, Para 3.

[94] *Amoco International Finance* v. *Iran, Partial Award* No. 310-56-3, 15 Iran-US Cl Trib Rep 189, para 197 (1987); D. Bowett, *State Contract with Aliens*, 59 BRIT. Y.B. INT'L L 49, 68 (1988).

illegal *per se* if it is not for public purpose, it is discriminatory in nature or compensation is not validly paid[95].

4.2.1 The nationalization is not for a 'public purpose'

There is a right against deprivation of property, except for public purpose[96]. Under contemporary principles of international law, that expropriation, in order to be lawful, has to be for a public purpose or interest,[97] which must be reflected in the national objectives of the State.[98] Under international law, those measures which are more severe than necessary, especially if a less severe option is available, will be disregarded as being in public interest.[99] Also, taking of property for purely extraneous political reasons of the taking State, or out of animosity against

---

[95] *BP Petroleum Award*, (1977) 53 I.L.R. 296 ; BROWNLIE, supra note 9, at 541; OPPENHEIM, supra note 7, at 926-927; M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 395 (2004); T.M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 462l (1995); R. DOLZER AND C. SHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 91(2008).

[96] Art.17(2), UDHR, supra note 62; A.21(2), American Convention on Human Rights, supra note 62.

[97] *Chorzow Factory* Case (Germany v Poland) (Merits) PCIJ Ser, A (1928) No. 17, 45-7; *German Interests in Polish Upper Silesia* (Merits) PCIJ Ser.A (1926) No.7; UN Resolution 1803, supra note 91; BROWNLIE, supra note 9, at 541; SORNARAJAH, supra note 94; OPPENHEIM, supra note 7, at 920; G. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 B.Y.I.L. 307, 308 (1962); *Restatement of Foreign Relations Law*, (1974) 13 I.L.M. 767, 771.

[98] *BP Petroleum Award*, supra note 95, at 317; Article 2(a), *Charter of Economic Rights and the Duties of States*, GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50. ; Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, supra note 86; L. Sohn & R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens: II. Draft Convention on the International Responsibility of States for Injuries to Aliens*, 55 AM. J. INT'L. L. 548 (1961); Art.712(1)(a) of the American Law Institute's *Restatement on Foreign Relations Law, id*.

[99] *Handyside v. United Kingdom*, (1976) 58 I.L.R. 150; *Hentrich v. France*, (1994) 18 *E.H.R.R.* 440; *Sporrong and Lonnroth* v. *Sweden*, (1983) 5 *E.H.R.R.* 35; M. Mendelson, *The UK Nationalisation Cases and the European Convention on Human Rights*, 57 BRIT. Y.B. INT'L L. 33 (1986).

the State to which the alien whose property has been taken[100] will not constitute public purpose[101].

In this case, the taking of Unicom does not satisfy the condition that it was for public purpose. It was an action directed only at a Foudalin company, on account of the political conflicts. It cannot be justified on the grounds that it was in response to the attack by Foudalin nationals on the Donavalan embassy, because there is no rational nexus between the nationalization of a Foudalin company and the security of Donavale. There was no reason for Donavale to take so drastic a step as nationalizing a Foudalin company in response to the attack. Therefore, the nationalization was not for any public purpose and is illegal *per se*.

4.2.2 The nationalization is discriminatory.

The principle of non-discrimination is recognized in international customary practice, as part of general international law,[102] judicial decisions,[103] and treaty law.[104] Any taking of property which is discriminatory in nature, irrespective of the intention of the impugned State,[105] is unlawful.[106]

---

[100] FRANCK, supra note 94, at 462; OPPENHEIM, supra note 7, at 912.
[101] *BP Petroleum Award*, supra note 95, at 317.
[102] BROWNLIE, supra note 9, at 509.
[103] *LIAMCO v. Libya*, 62 ILR 141, (1981).
[104] The General Agreement on Trade in Services, 1869 UNTS 183 (GATS); The Agreement on Trade-Related Investment Measures, 1868 UNTS 186 (TRIMs); The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 UNTS 299 (TRIPs); Codes of Liberalisation of Organisation for Economic Co-operation and Development, http://www.oecd.org/document/63/ (OECD); North American Free Trade Agreement (NAFTA), 32 ILM 289, 605 (1993); Asia-Pacific Economic Co-operation (APEC), www.apec.org.
[105] R. Levin & S. Marin, *N.A.F.T.A. Chapter 11: Investment and Investment Disputes* L & Bus. Rev. Am. 82, 83-90 (1996); Art 1101 and Art. 1104, North American Free Trade Agreement, at http://www.sice.oas.org/trade/NAFTA/chap-III.asp;A. Maniruzzman, *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); SORNARAJAH, supra note 94.
[106] *Chorzow Factory Case* (1928), supra note 96; *LIAMCO Award* (1981), supra note 102; A. Maniruzzman, *Expropriation of Alien Property and the Principle of Non-Discrimination in*

A taking in violation of the non-discrimination principle occurs irrespective of the intention of the impugned state.[107] Discrimination arises in the taking over of a property which is aimed at persons belonging to nationals of a particular State.[108]

The nationalization of Unicom is discriminatory because it is not part of a general scheme of nationalization, but aimed at only one Foudalin company, and is hence illegal.

4.3 The provision for payment of compensation according to domestic law is in breach of the Agreement, and in violation of the contemporary principles of international investment law; hence, the nationalization is illegal *sub modo.*

4.3.1 Payment of compensation in accordance with domestic law only is a violation of the Agreement.

As per the Agreement, it was agreed by the parties that if the Donavalan government undertook the nationalization of Unicom under exceptional circumstances, it would give *'fair and just*

International Law of Foreign Investment: An Overview, supra note 104; *US Interpretation of Core NAFTA Investment Standards*, (Shawn Murphy ed.) 95 AM. J. INT'L. L 881 (2001); I. Shihata, *Recent Trends Relating to Entry of Foreign Direct Investment*, 10 *ICSID Rev: Foreign Inv. L.J.*, 47 (1995); B. Weston, *The Charter of Economic Rights and Duties of States and Deprivation of Foreign – Owned Wealth*, 75 AM. J. INT'L. L 437 (1981); R. Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS' 259, 294 (1982); R. Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L. L. 553 (1981); G. Christie, supra note 96, at 308.

[107] R. Levin & S. Marin, supra note 104, at 82; Art 1101 and Art. 1104, North American Free Trade Agreement, supra note 105; A. Maniruzzman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview, Id.*; SORNARAJAH, supra note 94.

[108] *BP Award*, supra note 95; *Liamco* case, supra note 103; Oscar Chinn Case (1934) PCIJ Series A/B No. 63, at 70; J. Herz, *Expropriation of Foreign Property*, 35 AM. J. INT'L. L 253 (1941); L. McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 Neth. Intl' L. Rev., 243, 218 (1959); BROWNLIE, supra note 9, at 534; FRANCK, supra note 94, 472; FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 142 (1953); AMERASINGHE, STATE RESPONSIBILITY FOR INJURY TO ALIENS 138 (1967); ASRANJANI, INTERNATIONAL REGULATION OF INTERNAL SOURCES (1981)*;* Bullington, *Problems of International Law in the Mexican Constitution of 1917*, 21 AM. J. INT'L. L 702 (1927).

compensation according to law'[109]. It is submitted that the reference to 'law' here does not mean Donavalan municipal law. It means general principles of law, which include international law[110]. Where the parties contracting have preferred a particular set of laws as the governing law, then that law should be applicable between them *inter se.*[111] Parties can expressly or *impliedly* agree that public international law (or a body of laws other than the local law of the State) may be applicable to the agreement and its termination[112].

Donavale has acted in breach of the Agreement by not taking international law into consideration while determining the compensation.

4.3.2 Payment of compensation is accordance with domestic law only is in violation of principles of international investment law.

Under A.2(2)(e) of the Charter for Economic Rights and Duties[113], in disputes concerning expropriation of foreign property, the applicability of domestic law, as evidence of a standard practice and *opinio juris*, has been rejected[114]. The UN Resolution 1803[115] lays down that *'... the owner shall be paid appropriate compensation'* ensuring that the subject of compensation is

[109] *Compromis*, Page 5, Para 3.
[110] *Texaco Overseas Petroleum Company* v. *Libyan Arab Republic, Dupuy Sole Arbitrator* (1977) 53 ILR 389 (hereinafter "*Texaco* v. *Libya*"); *American Independent Oil Company (Aminoil)* v. *Kuwait*, (1982), ILR 66, 518.
[111] *Sapphire award* (1964) 35 ILR 136; *Texaco* v. *Libya, ibid*; *Revere Copper Inc*. v. *OPIC* (1978) 17 ILM 1321; *Elf Aquitine* v. *NIOC* (1982) 11 YCA 112; SORNARAJAH, supra note 98, at 431.
[112] Mann, *as quoted in* James N. Hyde, *Economic Development Agreements*, Hag R 102 RECUEIL DES COURS 293 (1962).
[113] Supra note 102.
[114] *Texaco* v. *Libya*, supra note 109.
[115] U.N. GAOR, 17th Sess., A/RES/17/1803 (1962).

governed by international law[116]. The term 'appropriate' clearly implies some minimum conditions to be observed while granting compensation, to avoid the arbitrariness that will result from the exclusive application of municipal laws[117].

Granting compensation to Socilio in complete disregard to international standards is a violation of the principles of international investment law, unjustly prejudicing the interests of Socilio.

[116] Orrego Vicuna, *Some International Law Problems Posed by the Nationalization of the Copper Industry in Chile*, 67 AM. J. INT'L. L 711, 718-719 (1973); Cornelius F. Murphy, supra note 91, at 58, 59.

[117] Orrego Vicuna, *Id.*; Cornelius F. Murphy, supra note 95.

CONCLUSION

It is submitted that this Court may be pleased to adjudge and declare that:

1) The attack by Burgundan was in accordance with its right to self-defense, and in furtherance of the right of self-determination of Agithans; therefore it is not liable to pay reparition;

2) The abduction and trial of Ms. Tavilisi by Donavale was in violation of international law.

4) Foudalin is not in breach of the Vienna Convention on Diplomatic Relations, and no State responsibility is incurred on account of the attack on the Donavalan Embassy;

5) The nationalization of Unicom by Donavale and the provision of compensation according to domestic law is in violation of the agreement between Donavale and Socilio, as also, contemporary principles of international investment law.