LAWASIA MOOT COMPETITION

2008

IN THE INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

2008

THE GOVERNMENT OF THE UNION OF DONAVALE

Applicant

v

THE GOVERNMNET OF BURGUNDAN

Co – Respondent

and

THE GOVERNMENT OF FOUDALIN

Co – Respondent

MEMORIAL FOR THE RESPONDENTS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INTERNATIONAL AND REGIONAL TREATIES

STATUTES OF INTERNATIONAL COURTS AND TRIBUNALS

INTERNATIONAL JURISPRUDENCE (INTERNATIONAL COURT OF JUSTICE AND THE PERMANENT COURT OF INTERNATIONAL JUSTICE)

INTERNATIONAL JURISPRUDENCE (OTHER COURTS)

NATIONAL CONSTITUTIONS AND LEGISLATIONS

NATIONAL JURISPRUDENCE

TREATISES AND BOOKS

ESSAYS AND ARTICLES

UNITED NATIONS DOCUMENTS

LEAGUE OF NATIONS DOCUMENTS

MISCELLANEOUS MATERIALS

STATEMENT OF JURISDICTION

The Governments of Donavale, Burgundan and Foudalin have submitted the present dispute before this Court under Article 36(2) read in conjunction with Article 40(1) whereby all parties have accepted the Compulsory Jurisdiction of this Court, in particular Article 36(2)(a) concerning the interpretation of a treaty. The disputes regarding the Government of Burgundan and the Government of Foudalin were filed separately and this Court has decided to hear them jointly as the present dispute.

QUESTIONS PRESENTED

I.

Whether this Court has the jurisdiction to hear all declarations of this case.

II.

Whether (a) the use of force in Agitha by Burgundan was justified as either an act of self-defence or as support given to a national liberation movement, and if it is answered in the negative; whether (b) Burgundan is liable to compensate Donavale for US$1000 million.

III.

Whether the abduction and subsequent trial of Tavilisi violated the sovereignty f Burgundan and international minimum standards.

IV.

Whether Foudalin has complied with its duty under the 1961 Vienna Convention on Diplomatic Relations to protect the Donavalan Embassy and has thereby incurred state responsibility.

V.

Whether the nationalisation of Socilio and compensation given in accordance with Donavalan domestic law was in accordance with the Investment Agreement and with international law.

STATEMENT OF FACTS

THE FORMATION OF UNION OF DONAVALE AND THE CONSTITUTION

The Union of Donavale, consisting of ten provinces, came into existence in 1990 after its independence from its former Colonial power. Agitha and Sapitu decided to join Donavale with a condition that their right to secede after ten years of independence be guaranteed.

THE SECESSION OF AGITHA

In 2002, the province of Agitha exercised its constitutional right to secede by way of provincial referendum and Parliamentary approval in accordance with its Constitution.

THE COUP AND THE WAR ENSUED

However, two days before Agitha's scheduled independence, Donavalan Army Chief Evala Natu overtook the Government. The Constitution was suspected and Agitha was denied its right to secede and independence. Donavalan forces were sent to Agitha and Donavale reasserted control over the province.

Thereafter the Agitha Liberation Movement ('ALM') arose and resisted the authority of the New Government from 2003 to 2007. According to the report of a Joint-Agitha-UN-Commission and Amnesty International, there were some justifications for the allegations of genocide committed by the Donavalan Government. The Joint Commission also found that Donavale had committed genocide and forcible transfers of Agithan children during the conflict.

THE SPILLOVER UPON BURGUNDAN'S TERRITORY AND THE RESPONSES

During the civil war, there was massive inflow of refugees into the territory of Burgundan/ Burgundan duly protected them and settled them in refugee camps. In early and late 2007m Donavalan forces twice entered into the territory of Burgundan allegedly in pursuit of rebels, whom Burgundan viewed as refugees or freedom fighters. In late 2007,

Colonel Phathone of Donavalan launched an aerial bombing against a refugee camp in Burgundan, causing a number of deaths and injuries, including Burgundan nationals. Phathone was subsequently prosecuted by Donavale.

Upon a declaration of exercise of self-defence and assistance to the ALM, Burgundan troops entered the territory of Agitha and joined force with the ALM. The troops withdrew in three weeks after the declaration of independence of the new state 'New Agitha'.

THE ABDUCTION OF TAVILISI FROM FOUDALIN

Immediately after the declaration of independence by Agitha, Tavilisi, a journalist in Burgundan, made various remarks on the Head of State of Donavale. Donavalan agents crossed the border, arrested and abducted Tavilisi from the Foudalin and brought her to trial. A Donavalan lawyer was appointed to her and she was convicted. The Supreme Court of Donavale reduced Tavili's sentence to two years house arrest on humanitarian grounds.

THE PROTESTS OUTSIDE THE DONAVALAN EMBASSY IN FOUDALIN

After Tavilisi's trial, some three hundred Foudalin nationals demonstrated in front of the Donavalan Embassy in Foudalin. While police guards were assigned to control the crowd, the crowd overwhelmed the police and entered the Embassy premises, destroying some of the property and injuring one of the Embassy staff. Foudalin military police reinforcement arrived and quickly took control of the situation, although the Third Secretary of the Embassy was accidentally injured in the thigh during the Operation. The staff member and Third Secretary were offered immediate emergency treatment. Within a few hours of the incident, the Foreign Minister of Foudalin telephoned the Donavalan Ambassador and Foreign Minister to apologise for the temporary loss of control over the crowd and guaranteed future safety of the Embassy.

THE EXPROPRIATION OF SOCILIO AND THE INVESTMENT AGREEMENT

After two days, the Donavalan Head of State announced a nationalisation programme. Socilio, a Foudalin company which owned the Unicom telephone industry, was nationalised. Just compensation was promised to be paid in accordance with Donavalan domestic law and principles stated in UN documents such as the Charter of Economic Rights and Duties of States.

SUMMARY OF PLEADINGS

THIS COURT SHOULD DECLINE JURISDICTION TO HEAR THE FIRST AND SECOND DECLARATIONS

The indispensable third party principle applies since it will be inevitable for this Court to adjudge on whether Agitha was a state.Therefore Agitha's interests forms the very subject-matter of this dispute.

THIS COURT SHOULD HEAR THE THIRD AND FOURTH ISSUES

The fact that both Donavale and Foudalin are parties to the ICSID does not bar this Court from exercising jurisdiction. There are also no other procedural bars to prevent this Court's jurisdiction.

USE OF FORCE WITHIN AGITHA WAS JUSTIFIED BY SELF-DEFENCE

The use of force within Agitha was justified by either individual or collective self-defence. There was an armed attack; and Burgundan's response was necessary and proportionate. The fact that Burgundan did not report the self-defence to the UN Security Council did not affect its legality.

The use of force was also justified by collective self-defence. Agitha had exercised properly its right to secede and had become a state right after approval from the Parliament. Since Burgundan's use of force was under the invitation of Agitha, therefore international law was not breached.

THE USE OF FORCE WITHIN AGITHA WAS JUSTIFIED AS ASSISTANCE GIVEN TO A NATIONAL LIBERATION MOVEMENT

Agitha was a 'people' and enjoyed the right to self-determination ('RSD'). Its external RSD was triggered since it was denied of its internal RSD, entailing the right to

secede. Agitha was therefore entitled to seek assistance in the form of direct military help from Burgundan and the use of force was justified.

THE EXERCISE OF JURISDICTION OVER TAVILISI VIOLATED BURGUNDAN'S SOVEREIGNTY AND INTERNATIONAL MINIMUM STANDARDS

Transborder abduction without consent clearly violated Burgundan's sovereignty. The arrest was also arbitrary and unlawful. In addition, Donavale's exercise of adjudicative jurisdiction violated international minimum standards, since: (1) there existed no principle of *male captus bene detentus*; and (2) Tavilisi's right to fair trial was violated.

FOUDALIN COMPLIED WITH THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

Firstly, Foudalin had respected the inviolability of the Embassy premises. Secondly, Foudalin complied with its special duty to protect the Embassy. Thirdly, the inviolability of the person of the Third Secretary and Embassy staff was respected. Lastly, the apology by the Minister of Foreign Affairs of Foudalin did not constitute an admission of responsibility. In any event, it constituted sufficient reparation and therefore this Court is not entitled to make any declaration of breach.

THE NATIONALISATION OF SOCILIO AND COMPENSATION BREACHED THE INVESTMENT AGREEMENT AND INTERNATIONAL LAW

Firstly, the nationalisation breached the Investment Agreement which provided that it was only allowed in 'special' or 'exceptional' circumstances. Secondly, it breached international law since it was not for a public purpose and was discriminatory. Thirdly, the compensation given in accordance with Donavalan domestic law breached the Investment Agreement since it was a state contract and must be governed by public international law. Lastly, the compensation breached international law since it is accepted as the proper law governing diplomatic protection of alien property. The CERDS and ISCID were of no relevance.

COMMON PLEADINGS FOR PRELIMINARY RULINGS

I. THIS COURT SHOULD NOT HEAR THE FIRST AND SECOND DECLARATIONS

A. The indispensable third party principle is applicable

The jurisdiction of this Court is based on consent of the states before it,[1] and it must not adjudicate the legal interests of a non-party third state where the evaluation of its legal interests would form 'the *very subject-matter*'[2] or 'a necessary foundation' to resolve the case.[3] This Court has on a few previous occasions proceeded to hear a case only where the legal of a third state was peripheral and did not form the 'prerequisite' of the case. [4]

B. The legal interest of Agitha is the very subject-matter of the First and Second Declarations

Only international persons possess rights and responsibilities under international law.[5] Since Donavale may dispute the status of Agitha as a third state, this requires this Court to determine the personality of Agitha which clearly affects the legal interest of Agitha.

Moreover, a ruling on whether Agitha's independence was lawful forms the necessary foundation or prerequisite of Burgundan' liability on the claim of self-determination. Therefore this Court should not hear the First and Second Declarations.

---

1 *Monetary Gold Removed from Rome in 1943* [1954] ICJ Rep 19 ('*Monetary Gold*') 32; *East Timor* [1995] ICJ Rep 90 ('*East Timor*') ¶26; *Certain Phosphate Lands in Nauru* [1992] ICJ Rep 240 ('*Nauru*'), ¶¶50-55, 260; *Larsen v The Hawaiian Kingdom* [2001] 119 ILR 566, ¶12.6 (*'Hawaiian Kingdom')*, ¶¶11, 20.

2 *Monetary Gold*, supra n1, 17, *East Timor*, supra n1, 90, 101-2.

3 *Hawaiian Kingdom ,* supra n1, ¶11.23.

4 *Nauru* , supra n1, 240, 261; *Armed Activities on the Territory of the Congo* General List No 116 [2005] ICJ 1 ('*Armed Activities*') ¶¶203-204.

5 *Reparation for Injuries Suffered In the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179.

II. THIS COURT SHOULD HEAR THE THIRD AND FOURTH DECLARATIONS

A. The ICSID does not prevent this Court to proceed

Although Donavale and Foudalin are parties to ICSID,[6] this Court is not barred from exercising jurisdiction. Where there are apparently competing jurisdictions, jurisdiction should only be declined if the dispute would fall within the exclusive jurisdiction of some other authorities,[7] or where there are clear convention clauses preventing this Court from hearing.[8]

The jurisdiction of ICSID tribunals is flexible and consensual. Unless the present case is pending before ICSID tribunals, there is no duty on this Court to refrain from resolving the dispute.[9] No such pending case is noted here and there were also no clauses of such effect to negate the jurisdiction of this Court. Hence, this Court should proceed.

B. There are no procedural bars applicable

Tavilisi had already exhausted all local remedies by appealing to the Supreme Court.[10] Therefore there are no procedural bars to the Third Declaration.

It is also accepted that there are no procedural bars regarding the Fourth Declaration.

---

6 International Convention on the Settlement of Investment Dispute between States and Nationals of Other States, 575 UNTS 159 ('ICSID').

7 *Rights of Minorities in Upper Silesia (Minority Schools)* (1928) PCIJ Rep Series C No.15, 23.

8 *The Factory at Chorzów* (1927) PCIJ Rep Series A No.9, 30.

9 ICSID, art 26. See also Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2003) 192.

10 Amerasinghe, *Local Remedies in International Law* (2nd edn CUP, 2004) 182-188.

PLEADINGS FOR THE FIRST RESPONDENT

III. THE USE OF FORCE WAS JUSTIFIED BY SELF-DEFENCE

Burgundan accepts that force was used in Agitha which was justified either by individual or collective self-defence.

A. The attack was justified by individual self-defence

There are three elements of self-defence: (1) presence of an armed attack,[11] (2) necessity; and (3) proportionality.[12]

1. Burgundan had suffered from an armed attack for which Donavale was responsible

To qualify as an armed attack, an operation must be of sufficient 'scale and effect',[13] targeted at the victim state,[14] and attributable to the aggressor state.[15]

a. The Incursions and the Airstrike were of sufficient scale and effect and deliberate

An armed attack is distinguished from a 'frontier incident' by its 'scale and effect'.[16] However, it need not be massive and could be 'low intensity fighting'[17] and even the destruction of one vessel.[18] Whether the incursions in late 2007 ('the Incursions') and the aerial bombing by Colonel Phathone ('the Airstrike') were viewed collectively or individually, there was an armed attack.

---

11 Charter of the United Nations TS 993 ('UNC') art 51.

12 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 22 ¶245.

13 *Military and Paramilitary Activities in and against Nicaragua* (Judgment on Merits) [1986] ICJ Rep 14 ('*Nicaragua*') ¶195.

14 *Oil Platforms* [2003] ICJ Rep 161, ¶91.

15 *Nicaragua*, supra n13, ¶195; *Oil Platforms*, supra n14,¶91.; *Armed Activities on the Territory of the Congo* General List No 116 [2005] ICJ 1 ('*Armed Activities* Case') ¶¶216-219; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] <http://www.icj-cij.org/docket/files/91/13685.pdf> ('*Bosnian Genocide*') ¶¶399-400, 406.

16 *Nicaragua*, supra n13, ¶195

17 Dinstein, *War, Aggression and Self Defense* (4th edn CUP, 2005) 195-6; Gray, *International Law and the Use of Force* (2nd edn, OUP, 2004) 119.

18 *Oil Platforms,* supra n14, ¶72.

In the Incursions, military troops were dispatched into Burgundan upon condemnation by the UNSC, [19] and there were at least twenty casualties of refugees. Regarding the Airstrike, at least one hundred refugees and fifty Burgundans were killed, in addition to the property loss and destruction of the camp. These two invasions were clearly targeted specifically at Burgundan.

b. The Incursions and the Airstrike were attributable to Donavale

Clearly, the Incursions were dispatched by Donavale.

Donavale was also responsible for the Airstrike even though: (1) it might have been *ultra vires*;[20] (2) Colonel Phathone acted overtly, or had exceeded his competence by acting without authorisation; and (3) even if Donavale had 'disowned the conduct' by prosecution.[21] The only question is whether Phathone acted in his official status and used means placed at his disposal on account of the status.[22]

The Airstrike was clearly initiated under the cloak of Phathone's official capacity, as strongly evidenced by his act of mobilising or ordering the three bombers driven by his subordinates.[23] Donavale must be held responsible for it.

2. <u>The response was necessary and proportionate</u>

Necessity is proven when: (1) Donavale but not any other state bears responsibility; (2) the attack was deliberate; and (2) peaceful alternatives are futile.[24] Whereas the first two elements have already been established in the preceding section, (3) is also satisfied since

---

19 *Compromis,* 3.
20 ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' UN GAOR 56th Session Supp No 10 UN Doc A/56/10 (2001) ('ASR') art 7.
21 Crawford, *The International Law Commission's Articles on State Responsibility* (CUP, 2002) ('ASR Commentary') 106.
22 *Gustave Caire v United Mexican States* (1929) V RIAA 516, 531.
23 *Compromis,* 3.
24 *Oil Platforms,*supra n14, ¶51; Dinstein, supra n17, 209.

Donavale repeatedly attacked Burgundan from 2007, even after Burgundan had attempted to resolve the matter in peaceful means by protesting and reporting to the UNSC.

Proportionality means 'proportionate to achieve the legitimate goal of the repulsion of the attack'. [25] Forced used beyond what necessity requires would clearly be disproportionate;[26] however, this should be interpreted flexibly in favour of the claimant state.[27] So long as Donavale-Agitha conflict did not cease, refugees would continue to flood into Burgundan; and whereas Donavale's duty to comply with the Refugee Convention continued, it would still continue to be abused by Donavale.

It was therefore reasonable for Burgundan to respond since Donavale's conduct would cease only if the conflict ceased, or where Agitha became a state. The prompt withdrawal of Burgundan's forces from Agitha in three weeks was strong evidence of proportionality.s

3. Burgundan complied with the reporting obligation under Article 51

Reporting to the UNSC is not mandatory under customary law or the UNC.[28] The UNSC had every right to take over the situation and terminate Burgundan's exercise of self-defence.[29] It had chosen not to. This was strong evidence that the self-defence operation was considered to be legitimate by the UNSC.

B. The attack was justified by collective self-defence

1. Agitha had achieved statehood prior to Donavale's reassertion of control

a. International law permits secession

---

25 AO on *Nuclear Weapons,* supra n12, Dissenting Opinion of Judge Higgins.; Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP, Cambridge 2004)158.

26 Alexandrov, *Self-Defense against the Use of Force in International Law* (Kluwer, 1996) 277;

27 Dinstein, supra n17, 210.

28 *Nicaragua*, supra n13, ¶200.

29 UNC, supra n11, art 51.

International law neither prohibits nor authorises secession[30] but rather acknowledges any successful secession as fact.[31] Secession is governed by domestic law.[32] Where a constitution sanctions secession, it shall be recognised by international law.[33]

b. Agitha exercised its constitutional right to secede properly

Agitha had already, in the absence of any judicial pronouncement to the contrary, properly exercised its constitutional right both temporally (after ten years of ndependence) and procedurally (referendum and approval by Parliament).

When the Donavalan Parliament approved of Agitha's independence, it: (1) granted independence to Agitha; (2) agreed to the secession; and (2) recognised Agitha as a new state. The absence of a formal declaration was irrelevant since it was not a criterion of statehood.

Consent from a parent state is powerful indication of a province's statehood in cases of secession.[34] Donavale, being a federal state, could only restrict the international personality of Agitha to the extent the Donavale Constitution allowed.[35]Once Agitha's right to secede was properly exercised, statehood of Agitha was fully achieved.

Customary criteria of statehood[36] had also been fulfilled. Agitha had a 'permanent population' and 'territory' even prior to the joining of the Donavale Union. Agitha also had

---

30 *Re Secession of Quebec from Canada* (1999) 115 ILR 536 (Canada, SC) ('*Quebec'*) ¶112.

31 *Opinion No. 1* (1991) 92 ILR 162 (Arbitration Commission, EC Conference on Yugoslavia) ¶1; Brierly, *The Law of Nations* (6th edn OUP, 1963) 137; Crawford, *The Creation of States in International Law* (2nd edn OUP, 2006) 28, 69.

32 *Quebec,* supra n30, ¶112.

33 Raič, *Statehood and the Law of Self-Determination* (Kluwer, 2002) 313. C.f. *Quebec*, supra n30, ¶112.

34 Crawford, supra n31, 376-379.

35 Harris, *Cases and Materials on International Law* (6th edn S&M, 2004) 106.

36 Convention on the Rights and Duties of States 165 LNTS 19.

the 'capacity to interact' with other states after its independence.[37] Moreover, the existence of 'effective government' after the approval was also inherent, since independence entailed an exclusive right to exercise authority over the territory.[38] The subsequent loss of control to Donavale was irrelevant since it was due to the unlawful conduct of the parent state.[39]

2. The reassertion of control constituted an armed attack

The law on armed attack pleaded in Section III.A applied similarly. Donavale dispatched military troops and put Agitha under their control, and the same time massacred and forcibly transferred countless Agitha people. These acts undoubtedly constituted an armed attack.

3. Burgundan's response was conducted at the invitation of Agitha

An invitation was properly pronounced by the ALM directed to Burgundan.[40] At law, ALM was the *de facto* government as it 'commands the habitual respect and obedience of the bulk of people'.[41] This is further demonstrated by: (1) there was no other resistance movement apart from ALM during the civil war; and (2) Agithans strongly supported the inviting of Burgundan's assistance in their liberation movement.

4. The response was necessary and proportionate

As pleaded above in Section III.A.2 on the law of necessity, here the necessity arose because of the scale of attack suffered by Agitha: (1) forcible armed control directed at Agitha; (2) deliberately launched by Donavale; (3) no prospect of peaceful solutions[42].

---

37 *Customs Régime between Germany and Austria* (1931) PCIJ Rep Ser A/B No.41, Separate Opinion of Judge Anzilotti.

38 Dugard and Raič, 'The Role of Recognition in the Law and Practice of Secession' in Kohen (ed), *Secession* (CUP, 2008) 136.

39 *Ibid.*; Raič, supra n33,95-105, 402-413; Harris, supra n35, 101.

40 *Compromis*, 2.

41 Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) LVI *BYIL* 189, 192.

42 See below.

Regarding proportionality pleaded above in Section III.A.2, Burgundan forces retreated once after the new state of Agitha was formally declared. This was entirely proportionate in the circumstances.

5. Burgundan complied with the reporting obligation under Article 51

Burgundan pleads the same as in Section III.A.3.

IV. THE USE OF FORCE WAS JUSTIFIED AS ASSISTANCE GIVEN TO A NATIONAL LIBERATION MOVEMENT

A. Agitha as a 'people' was entitled to the right of self-determination

While the definition of 'people' for the purpose of the right to self-determination ('RSD') is not entirely settled, it is however clear that 'people' encompasses people other than those under colonial rule, which is defined as 'a group of individual human being who share any similar (a) history; (b) race or ethnicity; (c) culture; (d) language; (e) religion or ideology; (f) territorial connection; and (g) economic life,[43] and it can include people within a state.[44]

Agitha constituted a 'people' entitled to RSD. Agitha was racially, ethnically and culturally distinct. It possessed its own territorial boundaries and had already manifested its RSD by joining and leaving the Donavale Union. As shall be pleaded below, the people of Agitha was also a group of 'oppressed people' or 'people subject alien domination and discrimination', thus almost certainly bringing them under the minimal agreed scope of 'people'.

B. Agitha's right to secede under the right of self-determination was triggered

1. The denial of internal RSD triggered the external RSD

---

43 International Meeting of Experts on Rights of People UN Doc SHS-89/CONF.602/7, ¶23; Brownlie, 'The Rights of People in Modern International Law' in Crawford (ed), *The Rights of People* (Clarendon, 1988) 5.

44 *Quebec,* supra n30, ¶124.

Internal RSD involves the right to choose a people's own political and economic regime which can be satisfied by a democratic participatory regime;[45] while external RSD implies a right to freely choose the international status of the people[46], including the right to secede.[47] This right to secession is triggered where there is: (1) denial of internal RSD by denying an effective participatory democracy; (2) systematic and flagrant violation of human rights; and (3) no possible peaceful solution.[48] Worldwide judicial practice generally corresponds.[49]

2. External RSD and the unilateral right to secede had been triggered

a. The formation of new Donavale Government and the suspension of the Constitution constituted denial of internal RSD

The illegality of the *coup d'etat* was almost decisive to show that Agitha's internal RSD was deprived of. Although the status of the Donavalan Government at the time of the *hearing* is not disputed, the Donavalan Government initially after the coup was illegitimate, since: (1) there was no necessity as to preserve the order of the state; (2) there was still rival

---

45 Cassese, *Self Determination of People* (CUP, 1995) 101.

46 Cassese, supra n45, 72.

47 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, UNGA Res 2526 (XXV) (24 Oct 1970) ('DFR') '*Principles of equal rights and self-determination',* ¶¶4-6; Cassese, supra n45, 118. See also 'The Åaland Island Question: Report by the Commission of Rapporteurs' (April 1921) LN Doc B7[C] 21/68/106 at 22, 27-28; *Re Quebec*, supra n30, ¶112; *Katangese People's Congress v Zaire* (1995) Comm. No 75/92 Afr Comm HR, ¶6.

48 Cassese, supra n45, 119-120; Crawford, supra n31, 118-121; ; Summers, *Peoples and International Law* (M.Nijoff, 2007) 220; Shaw, *International Law* (5th edn CUP, 2003) 184; Tomuschat, 'Self-Determination in a Post-Colonial World' in Tomuscaht (ed), *Modern Law of Self Determination* (M.Nijhoff, 1993) 10; Raič, supra n33, 332. Nanda, 'Self Determination under International Law: Validity of Claims to Secede' (1981) 13 *Case Western JIL* 257, 278.

49 *Loizidou v Turkey (Merit)* (1998) 108 ILR 441 (ECHR) at 471; *Quebec*, supra n30, ¶¶122-130, 134-135; *Katangese Congress*, supra n47, ¶6.

movement (the ALM); and (3) no evidence of popular will.[50] Therefore, the suspension of Constitution was illegitimate.

Taking this together with the illegitimate coup two days before the formal independence of Agitha, there was forcible deprivation of all means of democratic participation and thus internal RSD was denied.

b. There had been systematic human rights violations and oppression

Donavale bore the responsibility for genocidal acts with the intent to destroy in part the people of Agitha.[51] Moreover, the mere fact of abduction of children and systematic massacre was a violation of human rights.

Regarding the genocidal acts, Burgundan seeks to rely chiefly on the Joint-Commission Report ('the Report') which was highly relevant and of high probative value.

Fully conclusive evidence (but not 'beyond reasonable doubt' or 'unequivocal') must be adduced to satisfy the standard of proof.[52] Weight should be given to evidence that is: (1) prepared independent of the proceeding; (2) acknowledges unfavourable facts towards the relying state; (3) unchallenged; (4) impartial; (5) carefully or judicially produced; and (6) of good quality.[53]

The Report fell squarely under this formulation. It was: (1) not made specifically for this proceedings; (2) not absolutely supportive of Burgundan's case; (3) unchallenged and also corroborated by an Amnesty International report; (4) produced by independent experts who deliberated carefully; and (5) not based on uncontested facts. Moreover, Burgundan had

---

50 See, for example, *Republic of Fiji v Prasad* [2001] NZAR 385 (Fiji, CA); *Mokotso v King Moshoeshoe II* [1989] LRC 24 (Lesotho, HC) 133; *Mitchell v DPP* [1986] LRC 35 (Greneda, CA) 72.

51 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, art 2(e). Binding as *jus cogens*, see for example, *Prosecutor v Blagojević and Jokić* (Trial Judgment) ICTY-02-60-T (17 Jan 2005) ¶639.

52 *Bosnian Genocide,* supra n15, ¶209; c.f. *Nicaragua*, supra n13, 24.

53 *Armed Activities,* supra n4, ¶61; *Bosnian Genocide*, supra n15, ¶227

no interest in the fact-finding process of the Report, and the finding of the 'forcible transfer' of Agithan children was unanimous. The *actus reus* was clearly shown.

Genocidal intent can be inferred from factual circumstances,[54] including the general context together with other systematic and culpable acts against the same group[55] or underlying political doctrines.[56]

In the present case, the coup and suspension of Constitution were politically targeted at Agitha. The allegation made by Evala Natu against Agitha, the re-assertion of control, and systematic massacres were undisputed. All these support Donavale's genocidal intent to destroy at least in part.

Lastly, even if genocide was not factually proved, the mere fact that there were forcible transfers of children and massacres undoubtedly constituted violation of human rights.

c. There was no prospect for a peaceful solution

The suspension of the Constitution which deprived Agitha of its right to secede was the best evidence supporting the impossibility of peaceful solutions. This must be seen in the context of the four-year civil war and that the ALM arose seeing there was no possibility to reconcile with Donavale. All these went beyond the mere failure to negotiate (which Agitha was not bound to),[57] constituting an impossibility of peaceful solutions.

In conclusion, Agitha had a right to secede under international law independent of its Constitutional right.

C. The right to secede rendered Burgundan's assistance legal

---

54 Quigley, *The Genocide Convention* (Ashsgate, 2006) 116.

55 *Prosecutor v Akayesu* (Trial Judgment) ICTY-96-4-T (2 Sep 1998) ¶728; *Prosecutor v Jelisić* (Appeal Judgment) ICTY-95-10 (5 Jul 2001) ¶47

56 *Prosecutor v Karadžić* (Review of Indictment) ICTY-95-5-R61/ICTY-96-18-R61 (11 Jul 1996) ¶94.

57 *Quebec,* supra n30, ¶137.

1. The people of Agitha was entitled to 'assistance'

According to the Declaration on Friendly Relations ('DFR'), Agitha was 'entitled to seek and to receive support' within the scope of the UNC[58] in their action against the deprivation of their internal RSD. This also suppoted by state practice[59] and publicists' opinions.[60]

2. 'Assistance' may take the form of direct military help

Whereas the right to seek and receive support must be 'in accordance with the purposes and principles of' the UNC, Burgundan submits that that forcible actions to assist RSD is permitted.

Firstly, the *purpose* to promote equal rights and self-determination and the *principle* of territorial integrity and political independence are both enshrined in the UNC[61] and in the DFR[62] without preference given to either.

However, the UNGA subsequently in Res 3314 (XXIX) acknowledged that the recognition of one act as aggression was not 'in anyway to prejudice the [RSD]…of people who are forcibly deprived of the right…[and their right to] seek and receive support' [63] Such assistance therefore forms an important exception to what is prohibited under international law.[64]

---

58 DFR, supra n47, ¶5.
59 See, infra, n65.
60 See, infra, n64.
61 UNC, supra n11, preamble, art 1.
62 DFR, supra n47, ¶¶5-7.
63 UNGA Res 3314 (XXIX) (14 Dec 1974) art 7.
64 Röling, 'The 1974 UN definition of Aggression' in Cassese (ed), *The Current Legal Regulation of the Use of Force* (M.Nijhoff, 1986) 418; Summers, supra n48, 231.

Lastly, that forcible actions are allowed to assist RSD is supported by numerous statements made by states in the United Nations.[65]

V. THE DISMEMBERMENT WAS TOO REMOTE TO BE COMPENSATED

A. The dismemberment occurred before Burgundan's action

A state is only obliged to make full reparation for injuries *caused* by an internationally wrongful act.[66]

Since the alleged dismemberment occurred when Agitha become a *de facto* state after Parliamentary approval, therefore there existed no causal link between the dismemberment and Burgundan's actions.

B. Even if there was a causal link, the dismemberment was too remote

Even if Agitha was not yet a state by the time Burgundan acted, the dismemberment was too remote to be reparated. The test is whether or not the dismemberment could be attributed to the acts of Burgundan 'as a proximate cause'.[67] When Burgundan forces entered into Agitha, the ALM already controlled 60% of the territory. Taking the circumstances as a whole, the *eventualis* was that ALM would inevitably obtain total control of the territory. It was therefore too remote to attribute the ultimate dismemberment to Burgundan.

VI. THE EXERCISE OF JURISDICTION OVER TAVILISI VIOLATED BURGUNDAN'S SOVEREIGNTY AND INTERNATIONAL MINIMUM STANDARDS

A. The abduction violated Burgundan's sovereignty

---

65 See, for example, statements made by Afghanistan, Algeria, Bulgaria, Cameroon, Congo, Cuba, Ghana, Iraq, Kenya, Libya, Mongolia, Pakistan, Tukey, Uganda, Zambia: Summers, supra n48, 227 note 411, 230 note 432, 231 note 436, 233 notes 447-448.

66 ASR, supra n20, art 31

67 ASR Commentary, supra n21, 202.

1. Transborder abduction without the refuge state's consent constituted a violation of international law

One state may not exercise power or jurisdiction in another state without its consent,[68] in particular by abducting a person from the territory of another state.[69]

In the current dispute, no evidence suggested that consent had been given by Foudalin prior to or at the time of the abduction. Consent does not operate retrospectively,[70] and 'retrospective consent' is no more than acquiescence,[71] which is only a procedural bars does not make an illegality otherwise legal.[72] Tavilisi's arrest was therefore unlawful.

2. The arrest was arbitrary and contrary to customary international law

The abduction of Tavilisi violated her freedom from arbitrary arrest guaranteed under customary international law, as demonstrated by state practice and *opinio juris* from a survey of international decisions,[73] international treaties,[74] international declaration,[75] national jurisprudence[76]; UN organ practice[77] and other publicists' opinion.[78]

---

68 *S.S. "Lotus"* (1927) PCIJ Rep Series A No.10 ('*Lotus*') 18.

69 Lowe, 'Jurisdiction' in M Evan (ed), *International Law* (2nd edn OUP, Oxford 2006) 357; Mann, *Further Studies In International Law* (Clarendon, 1990) 337.

70 ASR, supra n20, art 36.

71 ASR Commentary, supra n21, _.

72 Mann, supra n69, 341.

73 See, for example, *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 3 ('*Hostages*') __; *Chattin v United Mexican States* (1927) IV RIAA 282, 295; *Parrish v United Mexican States* (1927) IV RIAA 314, 316.

74 See, for example, International Covenant on Civil and Political Rights 999 UNTS 171 ('ICCPR'), art 9(1); European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 ('ECHR') art 5(1); American Convention on Human Rights 1144 UNTS 123 ('AmCHR') art 7(3); African Charter on Human and Peoples' Rights (1982) 21 ILM 58 ('AfCHR') art 6.

75 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) ('UDHR') art 9; see also, American Law Institute, *Restatement of The Law: The Foreign Relations Law of the United States* (Minnesota, American Law Institute 1986) s702.

76 See, for example, *Sosa v Alvarez-Machain* (2004) 124 S Ct 2739 (US, SC). See also those cited in infra n81.

77 See, for example, United Nations Working Group on Arbitrary Arrest, 'Implementation of the Mandates of the Group' (1998) UN Doc E/CN.4/1998/44, Annex I, ¶8.

As recognised in the cited materials, transborder abduction is one of the clearest examples of arbitrary arrest. Due to the absence of legal basis of the abduction and consent from Foudalin, and taking into account that Tavilisi only exercised her fundamental freedom of press and expression, [79] arbitrariness was undoubtedly established.

3. The injury inflicted on Tavilisi constituted a concurrent violation of Burgundan's sovereignty

Since state sovereignty can be violated by injuries against individuals and against the state itself,[80] therefore the injury suffered by Tavilisi constituted a concurrent violation of Burgundan's sovereignty.

B. Donavale's exercise of adjudicative jurisdiction violated international minimum standards

1. Donavalan Courts had no jurisdiction to try Tavilisi since *male captus bene detentus* did not represent the law

The principles of: (1) extraordinary measures are not to be use if ordinary measures are available; and (2) *ex injuria ius non oritur* ('no legality follows from serious illegality') are relevant to the present dispute.

Here, no ordinary measure was attempted by Donavale at all, be it negotiation or ad hoc extradition. The abduction was a blatant interference with sovereignty and customary human rights afforded to Tavilisi, constituting 'serious illegalities. Hence, Donavalan courts' exercise of jurisdiction was clearly not justified since it followed from a 'serious illegality'.

---

78 See J Quigley, 'Government Vigilantes at Large' (1988) 10 *HRQ* 193, 205; Feinrider, 'Extraterritorial Abductions' (1978) 14 *Akron LR* 27, 45; MC Bassiouni, 'Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition' (1973-74) 7 *Vanderbilt JTL* 25, 29; Rodley, *Treatment of Prisoners Under International Law* (Clarendon, 1987) 269.

79 See supra, n77.

80 Garcia-Amador, 'International Responsibility: Report by Special Rapporteur' [1956] II *YbILC* 173, 181.

Moreover, the principle of *male captus bene detentus* no longer represented the law in most national courts.[81] It is only applied in the prosecution of serious violation of international humanitarian law.[82] Since Tavilisi was only prosecuted for a domestic crime before a national court, Donavale was not entitled to exercise jurisdiction since *male captus male detentus* applies and the trial is rendered unfair.[83]

2. Tavilisi's right to fair trial was violated

a. The right to fair trial is guaranteed under customary international law

The right to fair trial is guaranteed by customary international law as 'of course'.[84] State practice and *opinio juri*s is reflected in international decisions,[85] international treaties[86] and international declarations,[87] national constitutions and national practice[88] and publicist's opinion.[89]

---

81 See, for example, Common Law: *R v Bennet* (1994) 95 ILR 380 (UK, HL) 381-400; *United States v Toscanino* (1981) 61 ILR 190 (US, CA), 191; *R v Hartley* [1978] NZLR 199 (New Zealand, CA); *State v Ebrahim* (1994) 95 ILR 417 (S Afr, SC); *State v Beahan* [1992] 1 SACR 307 (A) (Zimbabwe, SC); *S v Mushwena* [2004] NASC 2 (21 Jul 2004) (Namibia, SC); *Levinge v Director of Custodial Services* (1987) 9 NSWR 546 (Australia, SC), 556-557. Civil Law/Roman Dutch Law: *In Re Jolis* (1933-34) 7 Ann Dig 191 (France, TCA); *X v Swiss Justice and Police Department* [1983] Europäische Grundrechte-Zeitschrift 435 (Switzerland, FC); Monro (tr.), *The Digest of Justinian* (CUP, 1909) 57, 70 and generally, *State v Ebrahim*, supra, 426-438.

82 C.f. *Prosecutor v Nikolić* (Decision on Legality of Arrest) ICTY-94-2-AR73 (5 June 2003) ¶¶26, 30; *Prosecutor v Lubanga* (Judgment on the Appeal Against the Decision on Jurisdiction) ICC-01/04-01/06 (14 Dec 2006) ('*Lubanga*') ¶¶42-43; *Prosecutor v Guek Eav Kaing* (Order of Provisional Detention) ECCC-002/14-08-2006 (31 Jul 2007) ¶¶20-23.

83 *Lubanga*, supra n82, ¶38.

84 *Prosecutor v Alekovski* (Appeal Judgment) ICTY-95-14/1-A (25 Jun 2999) ¶104.

85 *Ibid*.; see also *Prosecutor v Kayishema* (Appeal Judgment) ICTR-95-1-A (1 Jun 2001) ¶51.

86 See, for example, ICCPR, supra n74, art 14; ECHR, supra n74, art 6; AmCHR, supra n74, art 8; AfCHR, supra n74, art 7.

87 UDHR, supra n75, art 10; see also, American Law Institute, supra n75, s702 est seq.

88 See: National Constitutions: Generally, Weissbrodt, *The Right to a Fair Trial* (M.Nijhoff, 2001) 12. Judicial Opinion: *Thomas v Baptiste* [1999] 3 WLR 249 (UK, PC), 259 ("observed by all civilized nations"); *Dietrich v R* (1992) 177 CLR 292

b. The right to legal assistance of one's choosing and right to self-representation was violated

The right to legal assistance of one's choosing and right to self-representation are already well-recognised.[90] Although these rights may not be absolute in all circumstances, they can be restricted only in very limited situations. Recognised circumstances include where the accused cannot afford his own counsel;[91] where the accused or his chosen counsel acts disruptively;[92] where the accused is physically or mentally unsound;[93] where classified materials are involved;[94] or exceptionally, where justice so requires.[95] Even if these circumstances are met, the restriction must be no more than necessary and proportionate. In most cases, the appointment of an assistant counsel,[96] co-counsel,[97] or special advocates[98]

(Australia, HC) ¶1 ("central pillar of our criminal justice system"); *Kaunda v President of the Republic of South Africa* [2004] ZACC (4 Aug 2004) (S Africa, CC) ¶¶263-364.

89 See, for example, Clayton, *Fair Trial Rights* (OUP, 2001) v; D Harris, 'The Right to a Fair Trial in Criminal Proceedings as a Human Rights' (1967) 16 *ICLQ* 352, 352-353; Weissbrodt, supra n88, 153.

90 See, for example, ICCPR, supra n74, art 14(3)(d); ECHR, supra n74, art6(3)(c); AmCHR, supra n74, art 8(2)(d); AfCHR, supra n74, art 7(1)(c); *United States of America v. Josef Alstötter* et al. (1948) VI TWC 1; *Ward v Texas* (1942) 316 US 547 (US).

91 See, for example, *Prosecutor v Kambanda* (Appeal Judgment) ICTR-97-23-A (19 Oct 2000) ¶33; *Prosecutor v Martić* (Decision on Appeal Against Decision of Registry) ICTY-99-11-PT (2 Aug 2002) 5-6.

92 See, for example, *Croissant v. Germany* (1992) Series A no 237-B (ECHR); *Prosecutor v Milošević* (Decision on Interlocutory Appealon the Assignment of Defence Counsel) ICTY-02-54-AR73.7 (1 Nov 2004)

93 See, for example, *Milošević* Decision, supra n92.

94 See, for example, See, for example, National Security Information (Criminal and Civil Proceedings) Act 2004 (Australia) s.39; Special Immigration Appeals Commission Act 1997 (United Kingdom) s.6; Military Commissions Act of 2006 (United States) ('MCA') s.949c. See also *Öcalan v Turkey* (2003) 37 EHRR 10.

95 See, for example, Statute of the International Tribunal of the Former Yugoslavia UNSC Res 728 (25 May 1993) UN Doc S/RES/827, art 21; Statute of the International Tribunal for Rwanda UNSC Res 955 (8 November 1994) UN Doc S/RES/955, art 21. See also *Crossaint*, supra n92.

96 See, for example, *Prosecutor v Seselj* (Decision Appointing Counsel) ICTY-03-67-PT (9 May 2003).

97 See, for example, *Croissant,* supra n92; see also MCA, supra n94,s.949c.

suffices, and the right to have one's own counsel and to conduct his case shall still be respected.

The present case did not show any of the circumstances stated above. There were no misconducts and no disability on Tavilisi, be it physical, mental or financial. No classified materials were used. This was also not a case where justice would require the appointment of counsel. No evidence suggested that any injustice would have been done if Tavilisi were allowed to retain her own counsel. As such, her right to fair trial was plainly violated.

---

[98] See, for example, Special Immigration Appeals Commission (Procedure) Rules 2003 (United Kingdom); *A v Secretary of State for the Home Department* [2006] 2 AC 221 ¶¶6-7.

PLEADINGS FOR THE SECOND RESPONDENT

VII. FOUDALIN COMPLIED WITH THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

A. Foudalin respected the inviolability of the Embassy premises

Under VCDR Art 22(1),[99] the premises of the Donavalan Embassy is inviolable and agents of Foudalin may not enter it except with the consent of the head of the mission, even in times of emergency.[100]

There was no evidence that the Foudalin police entered the Embassy premises. At the beginning of the riot, five policemen were assigned to protect the Embassy, and when the crowds 'overwhelmed the guards and entered the Embassy premises', there was nothing to suggest that the policemen also entered the Embassy. After half-an-hour when the military police reinforcement arrived, the only evidence is that they 'eventually managed to clear the Embassy ground'. There was simply nothing to suggest that the Embassy ground was *within* the Embassy premises and that the forces entered the Embassy.

Even if the Foudalin forces entered the premises, the head of mission gave implied consent to their entrance. Whether there was implied or presumed consent must be judged in accordance with the merits of each case.[101] In the current circumstances, despite Foudalin twice sending its police forces to protect the Embassy, there was no protest from Donavale that they were not allowed to enter. Donavale also did not interrupt the military police in clearing the Embassy. Had Donavale intended not to consent to the entrance, they could have

---

99 Vienna Convention on Diplomatic Relations 500 UNTS 95 ('VCDR').

100 Denza, *Commentary on the Vienna Convention on Diplomatic Relations* (Clarendon Press, Oxford 1998) 120-123; Nahlik, 'Development of Diplomatic Law' (1990) 222 *Recueil Des Cour*s 187, 277.

101 Nahlik, supra n100, 275.

flatly refused to admit the Foudalin forces, as the Soviet Embassy in Canada did in the 1960s.[102]

Lastly, even if there was no consent from the Head of Embassy, such entry without consent may still be justified by the need to protect human life.[103] Foudalin was entitled to take measures reasonable necessary to protect the security of the life and property of its people and the Embassy staff.[104] Here, there was a strong need to protect the safety of those inside the Embassy given the unruly break-in of the crowd of 300 into the Embassy premises, not to mention the injury they caused on the Embassy staff the Foudalin police guards. In those circumstances, Foudalin was entitled to enter the Embassy to disperse the crowd and regain control of the situation.

B. Foudalin complied with its special duty to protect the Donavalan Embassy

Foudalin has a special duty under Art 22(2) VCDR to take all appropriate steps to protect the premises of the Embassy against intrusion or damage, and to prevent any disturbance of the peace of the Embassy or the impairment of its dignity.[105] However, this duty to 'take all appropriate steps' is not absolute and depends on the degree of threat to the Embassy and whether Foudalin was aware of any unusual threat.[106]

This special duty was clearly complied with. Police guards were assigned to protect the Embassy from the demonstrators immediately. Although they were unable to control the crowd, Foudalin quickly rectified the situation by sending military police reinforcement which arrived within half-an-hour. The military forces quickly cleared the Embassy ground,

---

102 BH Brittin and LB Watson, *International Law for Seagoing Officers* (US Naval Institute, 1960) 36.

103 Denza, supra n100, 126; Vicuna, 'Diplomatic and Consular Immunities and Human Rights' (1991) 40 *ICLQ* 34, 48.

104 Mann, supra n69, 326, 336.

105 Nahlik, supra n100, 135-140; Denza, supra n100, 277.

106 Denza, supra n100, 139.

provided immediate emergency treatment to the injured Embassy staff, and restored the Embassy to its former situation in the hands of the mission staff. This was strong indication that the special duty was complied with.[107]

C. Foudalin did not violate the person of the Embassy staff and Third Secretary

Foudalin has a duty under VCDR Art 29 to take all appropriate steps to prevent attack on the person, freedom or dignity of a diplomatic agent.[108] However, the 'appropriate steps' to be taken must be determined in light of the relevant circumstances and particular threats or dangers.[109]

Under VCDR Art 1(e), 'diplomatic agent' includes 'members of the diplomatic staff' of the mission, and Art 1(d) provides that 'members of the diplomatic staff' are members of the staff having a diplomatic rank. While it is accepted that the Third Secretary fell under the definition of 'diplomatic agent' under Art 29, the injured Embassy staff was not such a 'diplomatic agent', since he did not have a diplomatic rank.

In any event, the injury suffered by the Third Secretary was a mere accident on a reasonable discharge of duty by the Foudalin police. The police acted *bona fide* to protect the Embassy and did not aim at the Secretary at all. There was no recklessness or negligence on the part of Foudalin; the injury was a mere accident and no more.

D. The apology by the Foreign Minister of Foudalin did not constitute an admission of responsibility; in any event, it constituted sufficient reparation

1. <u>The apology did not amount to an admission of an internationally wrongful act</u>

---

107 *Hostages,* supra, ¶¶69-70; Hardy, *Modern Diplomatic Law* (MUP, 1968), 47.
108 VCDR, supra n99, art 29.
109 Denza, supra n100, 216.

While a full and straightforward apology may imply admission of responsibility,[110] the crucial elements of a full apology is that it must: (1) acknowledge that the incident took place; (2) admit that the state bears international responsibility for the occurrence of the incident; and (3) express regret that the incident ever happened.[111] It must also be an apology by a high official of one state to a high official of another state.[112]

Although the Foreign Minister of Foudalin did telephone the Donavalan Ambassador and Foreign Minister and apologised for the temporary loss of control over the crowd, it was merely an express of apology *that* the incident happened, rather than an apology *for* the incident.[113] In particular, the Foudalin Foreign Minister did not express any regret over the incident; merely guaranteeing future safety and security did not transform the apology into an admission of international wrong.

2. Even if the apology constituted admission of international liability, the apology was sufficient reparation under the ILC Articles on State Responsibility

Full reparation of an international wrong can take the form of satisfaction,[114] of which and apology can be one form.[115] The apology was sufficient in the current circumstances as full reparation since, together with the guarantee of future safety of the Embassy, all physical and moral damage had been reparated.

3. Since the apology was sufficient reparation, it is unnecessary for this Court to make a declaration of breach

---

110 Watts, 'The Art of Apology' in M Ragazzi (ed), *International Responsibility Today* (BRILL, Leiden 2005) 111.
111 Watts, supra n110, 108.
112 Watts, supra n110, 114.
113 Watts, supra n110, 108-109.
114 ASR, supra n20, art 34.
115 *Rainbow Warrior* (1987) 74 ILR 241 (Arbitration Tribunal) 271; *S.S. "I'm Alone"* (1925) III RIAA 1609.

As pleaded above, even if the apology constituted an admission of responsibility, it was sufficient reparation under the ILC Articles on State Responsibility. As such, it is simply unnecessary for this Court to either declare on: (1) whether there was wrongful act on the part of Foudalin; and (2) how such wrongfulness should be compensated.

VIII. THE NATIONALISTION OF SOCILIO AND THE COMPENSATION GIVEN BREACHED THE INVESTMENT AGREEMENT AND INTERNATIONAL LAW

A. The nationalisation breached the Investment Agreement

Under the Investment Agreement, Donavale contracted not to nationalise Socilio unless under 'special' or 'exceptional' circumstances. Since these terms were undefined, their ordinary and natural meanings in light of the context must be considered;[116] which means that nationalisation is only allowed if it is 'unusual' or 'out of the ordinary course'.[117]

Here, the Donavalan Head of State himself admitted that the reason for nationalising Socilio was because of the recent attack on the Donavalan Embassy and they were 'forced' to nationalise the company. The nationalisation was not effected to implement any economic objective, such as to completely control the Unicom telephone industry; but was motivated by purely political concerns, aiming specifically at Socilio simply because it was a Foudalin company.[118]

Although international tribunals are generally reluctant to interfere with a state's decision as to what its public good requires,[119] public good must still be considered within the framework of the Investment Agreement which Donavale voluntarily entered into. Since the

---

116 Vienna Convention on the Law of Treaties 1155 UNTS 331 ('VCLT') art 31.

117 JA Simpson and ESC Weiner, *Oxford English Dictionary* (2nd edn Clarendon, 1989). See vol. V ('exceptional, *a.*') and vol. XVI ('special, *a, adv, n.*').

118 *BP Exploration Co (Libya) v Libyan Arab Republic* (1979) 53 ILR 297 (USICT), 329.

119 Pellonpää, 'Compensable Claims Before the Tribunal: Expropriation Claims' in Lillich *et al.* (eds), *The Iran-United States Claims Tribunal* (Transnational, 1998) 204.

nationalisation was neither 'exceptional' nor 'special', therefore the nationalisation breached Investment Agreement.

B. The nationalisation breached international investment law

1. Donavale has the right to nationalise under international law

Donavale has the right to nationalise or expropriate foreign property under international law.[120] However, certain conditions must be fulfilled to render a nationalisation legal or not arbitrary:[121] (1) for a public purpose;[122] and (2) non-discriminatory.[123]

2. The nationalisation was not for a public purpose

Although it has been suggested that the term 'public purpose' should be broadly interpreted and that states have sometimes granted the term extensive discretion,[124] there is still an absence of an agreed definition of the term in international law.[125] In any event, the public purpose requirement mandates that the expropriation must generate some advantage for the public.[126]

---

120 Pellonpää, supra n, 198; Charter on Economic Rights and Duties of States, UNGA Res 3281 (XXIX) ('CERDS') art 2(c); *Amoco International Finance v Islam Republic of Iran* (1987) 15 Iran-USCTR 189 ('*Amoco*'), 222; *AMCO v Indonesia (Merits)* (1985) 89 ILR 405 (ICSID), 466; Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon, 1967) 130; Brownlie, *Principles of Public International Law* (6th edn OUP, 2003) 508; Shaw, supra n48, 738.

121 Weston, "The New International Economic Order and the Deprivation of Foreign Property Wealth" in Lillich *et al.* (eds), *The Iran-United States Claims Tribunal* (Transnational, 1998) 98-99.

122 *Amoco,* supra n120, 222-223; *TOPCO v Libyan Arabic Republic* (1979) 53 ILR 389 (Arbitral Tribunal) ('*TOPCO*'); *INA Corporation v Islamic Republic of Iran* (1985-I) 8 Iran-USCTR 373; *Certain German Interests in Polish Upper Silesia* (1926) PCIJ Rep Series A No.7, 22; Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 Dec 1962); Higgins, "The Taking of Property by the State: Recent Developments in International Law" (1983) 176 *Recueil Des Cours* 267, 288.

123 *Amoco*, supra n120, 231-232; *American International Group Inc v Islamic Republic of Iran* (1984) 4 Iran-USCTR 96 ('*AIG*'), 105; Pellonpää, supra n_, 205;

124 *Ibid*.

125 *Amoco*, supra n120, 233.

126 Eisenberg, 'Public Purpose' and Expropriation' (1995) 11 *S Afr J of HR* 207, 221.

Here, the only motive for the nationalistion was a reprisal response towards the recent riot in the Embassy. It was not part of any larger reform programme or governmental economic plan,[127] and no advantage whatsoever could have been generated from the nationalisation. Therefore the public purpose test had not been satisfied.

3. In any event, the nationalisation was discriminatory

Nationalisation must not be racially-based.[128] Although differential treatment of various persons or class or owners does not automatically amount to discrimination;[129] however, unless there are objective and reasonable justifications for the distinction made, such differential treatment amounts to discrimination.[130]

Here, there was strong evidence to suggest that Socilio was targeted by Donavale simply because Socilio was a company from Foudalin. As evidenced by the nationalisation decree signed by the Head of State himself, the nationalisation was racially-based and aimed at taking reprisal action against the Embassy incident which happened in Foudalin. No justification whatsoever was provided as to why the Unicom telephone industry, but not any *other type* of industries, was targeted differentially. In conclusion, such nationalisation based on purely extraneous political reasons must be taken as arbitrary and discriminatory in character, as was held in *BP Exploration*.[131]

C. The provision of compensation in accordance with Donavalan domestic law breached the Investment Agreement

Under the Investment Agreement, Donovale undertook to give fair and just compensation 'according to law' upon nationalisation. While there was no express indication

---

127 *AIG*, supra n123, 105.
128 Pellonpää, supra n119, 207; Sornarajah, *The Pursuit Of Nationalized Property* (M.Nijhoff, 1986) 183-187.
129 *Amoco*, supra n120, 232.
130 Pellonpää, supra n119, 206-207.
131 *BP Exploration*, supra n118, 329.

of whether the term 'law' covered domestic or international law, since: (1) the Agreement erected the entitlement to compensation, and (2) it was an agreement between a private party and a state i.e. an international contact; therefore the proper interpretation should be that public international law is the applicable law.[132] This is so unless Donavalan domestic law was in harmony with international law on compensation principles.[133]

Since international law was the governing law under the Investment Agreement, any payment in accordance with domestic law clearly breached the Agreement.

D. The provision of compensation in accordance with Donavalan domestic law breached the international investment law

Donavale has a clear duty under international law to pay compensation for the nationalisation of Socilio even if the issue of compensation was not stated in the Investment Agreement.[134] The only issue is whether it should be based on Donavalan domestic law or international law. It is submitted that compensation should be given in accordance with international law which was long-accepted as the proper law governing diplomatic protection of alien property.[135]

The fact that both Foudalin and Donavale are parties to the CERDS does not affect the applicability of international law in such compensation. Although Art 2(2)(c) does

---

132 *The Channel Tunnel Group Ltd and another v The Secretary of State for Transport (United Kingdom) and another)* (Partial Award) (2007) IIC 58 ('*Eurotunnel*') ¶92; *Sandline International Inc v Independent State of Papua New Guinea* (2000) 117 ILR 552 (Arbitral Tribunal) 560.

133 Delaume, 'The Proper Law of State Contracts Revisited' (1997) 12 *ISCID Review* 4; Shihata and Parra, 'Applicable Substantive Law in Disputes between States and Private Foreign Parties' (1994) 9 *ISCID Review* 183, 205-206.

134 CERDS, supra n120, art 2(2)(c); *Amoco*, supra n120, 223; *AIG*, supra n123, 105; *INA,* supra n122, 378; Pellonpää, supra n119, 207;

135 Murphy, 'Compensation for Nationalization in International Law', 110 *S Afr LJ* 79, 89; *Eurotunnel*, supra n_, ¶92; *Sandline,* supra n_, 560.

attempt to renounce international law in the adjudication of expropriation cases,[136] it is however clear that CERDS is only a political rather than legal declaration, merely proposing new law (contrary to purporting to declare existing law), and not creating any binding obligations on states.[137] This is further evidenced by the *travaux preparatoires* of CERDS, where a provision which suggested that the CERDS was to be a 'measure of codification and progressive development of international development law' was deleted from its final draft.[138]

Additionally, any provisions ISCID regarding choice of law, such as Art 42(1), are also irrelevant to the principle. This is because the current dispute is adjudged in this Court and not in ISCID tribunals, thus ISCID does not constitute binding law nor any strong indication of applicable law before this Court.

Even if the parties had implicitly agreed to apply Donavalan domestic law on compensation, international law still could not be excluded in the entirety since there must be lacunas in the domestic law which must be supplemented by international law.[139]

Applying the above to the current circumstances, since Donavale only agreed to pay just compensation in accordance with domestic law 'which would be in accordance with…*Charter of Economic Rights and Duties of States*', international investment law was breached for two reasons: (1) CERDS does not represent the principles under international law and is a mere political aspiration; (2) Public international law should be the governing law regarding compensation; and

---

136 CERDS, supra n120, art 2(2)(c).

137 *TOPCO*, supra n122; Murphy, supra n135, 90; Amerasinghe, 'Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice' (1992) 41 *ICLQ* 22, 35; Dupuy, 'Declaratory Law and Programmatory Law' in Akkermans *et al, Declarations on Principles* (Sijthoff, Leyden 1977) 247,

138 Von Mehren and Kourides, 'International Arbitration Between States and Foreign Private Parties' (1981) 75 *AJIL* 476, 526.

139 *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* (1993) 32 ILM 951 (Arbitral Tribunal) ¶80.

IX. CONCLUSION AND PRAYER FOR RELIEF

On the basis of the foregoing facts and points of law, Burgundan and Foudalin respectfully requests this Honourable Court to adjudge and declare that all declarations sought by the Respondents be granted.