

**LAWASIA MOOT COMPETITION
2008**

**IN THE INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS**

THE GOVERNMENT OF THE UNION OF DONAVALE
Applicant

v

THE GOVERNMENT OF BURGUNDAN
Co-Respondent

and

THE GOVERNMENT OF FOU DALIN
Co-Respondent

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The Government of Donavale has submitted the present dispute before this Court under Article 36(2) read in conjunction with Article 40(1) whereby The Government of Donavale, the Government of Burgundan and the Government of Foudalin have accepted the Compulsory Jurisdiction of this Court, in particular Article 36(2)(a) concerning the interpretation of a treaty. The disputes against 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 attack and continued occupation of Agitha by Burgundan constituted a violation of international law, and if it is answered in the affirmative; (b) whether it 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; (c) whether Burgundan is liable to compensate Donavale for US\$1000 million, or if not, what amount of monetary award.

III.

Whether the apprehension, trial and conviction of Tivilisi was a legitimate exercise of jurisdiction by Donavale in accordance with international law and international minimum standards.

IV.

Whether Foudalin has failed 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 THE UNION OF DONAVALE

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 after negotiating a right to secede after ten years of their independence.

THE ATTEMPTED SECESSION OF THE PROVINCE OF AGITHA

In 2002, the province of Agitha attempted to exercise its right to secede by way of referendum and Parliamentary approval. The referendum approved of the secession by 5% more than the Constitutional requirement. The Parliament subsequently approved of the secession by 4% more than the Constitutional requirement. The Government now led by Army Chief Evala Natu ('The New Government'), took over the situation and suspended the Constitution before Agitha's purported declaration of independence. The New government did not recognise the purported secession which was then regarded as unsafe. Troops were dispatched to maintain control over Agitha.

THE CIVIL WAR

Thereafter the Agitha Liberation Movement ('ALM') arose and resisted the authority of the New Government from 2003 to 2007. There were various allegations made against Donavale, including the perishing of 1/20 Agitha population, genocide, and forcible transfers. Agitha unilaterally formed a Joint-Commission with the United Nations, which by a majority found that there might have been justifications of the allegations relating to genocide and forcible transfer of Agitha children.

THE INVOLVEMENT OF BURGUNDAN AND THE DISMEMBERMENT OF THE DONAVALE UNION

With the ALM asking for all moral and material assistance (in particular from Burgundan), the Burgundan President repeatedly alluded to provide help to the ALM to

secede. Eventually Burgundan invaded Agitha in late 2007, which was allegedly in response to a few incidents where Donavale dispatched its troops into the territory of Burgundan to capture Agitha rebels who were harboured and trained by Burgundan. On one incident, renegade Colonel Phathone bombed a camp (where the rebels were harboured) without authority and order. Phathone was immediately tried publicly, convicted and sentenced.

Burgundan troops joined the ALM and dismembered the province of Agitha from the Union of Donavale. In particular, Burgundan troops proceeded notwithstanding the UNSC Resolution calling for restraint on both sides, Burgundan continued their invasion until Donavalan forces were driven out of Agitha.

THE APPREHENSION AND TRIAL OF TAVILISI

Immediately after Agitha's declaration of independence and the Donavalan army retreat, Tivilisi, a Burgundan journalist, made various remarks on the Head of State of Donavale including 'buffoon', of 'unsound mind' and called Donavalan people to 'rise up and punish' the Head of State. These remarks violated Donavalan law and so Donavale lawfully apprehended Tivilisi in the territory of Foudalin. She was brought to trial, afforded legal representation and was duly convicted. The Supreme Court of Donavale reduced Tivilisi's sentence to two years house arrest on humanitarian grounds that she was a foreigner.

THE PROTESTS OUTSIDE THE DONAVALAN EMBASSY IN FODALIN

After Tivilisi's trial, some three hundred Foudalin nationals demonstrated in front of the Donavalan Embassy in Foudalin. Only five police guards were assigned to control the crowd. Eventually 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 some time later, and although they regained control of the situation in some time, the Third Secretary of the Embassy was injured by the Foudalin police in the

course of their operation. The staff member and Third Secretary were then offered 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 NATIONALISATION OF SOCILIO

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

JURISDICTION OF THIS COURT

The local remedies rule is inapplicable to all Declarations sought. This Court has jurisdiction to hear the First and Second Declarations due to the inapplicability of the indispensable third party rule. This Court also has jurisdiction to hear the Third Declaration since Foudalin has pleaded in common. This Court should decline to hear the Fifth Declaration since both Donavale and Foudalin are parties to the International Convention on the Settlement of Investment Dispute between States and Nationals of Other States ('ISCID') and the present case falls under its exclusive jurisdiction.

THE ARMED ATTACK AND CONTINUED OCCUPATION OF AGITHA VIOLATED THE PRINCIPLE OF NON-USE OF FORCE

Burgundan's employment of armed forces against Donavale and within its territory clearly constituted use of force which was not justified on self-defence. There was no armed attack committed by Donavale even if the three Operations were taken together as a whole. In particular, the Third Operation was not attributable to Donavale since it was a private act of Colonel Phathone. In any event, Burgundan's act of occupying the whole province of Donavale and dismembering Donavale was clearly unnecessary and disproportionate.

The wrongfulness was not justified by Burgundan's being in assistance of Agitha's national liberation movement. The right of self-determination ('RSD') does not entail the right to succession. In any event, external RSD was not engaged and Agitha had no right to secede. Burgundan must also compensate Donavale for US\$1 billion since loss of territory is financially assessable and compensable.

DONAVALE LAWFULLY APPREHENDED AND CONVICTED TAVILISI

Since the apprehension did not take place within Burgundan's territory or jurisdiction, there was no violation of Burgundan's sovereignty. In any event, Foudalin consented or acquiesced to the apprehension. The apprehension and trial of Tivilisi also complied with international minimum standards.

FOUDALIN BREACHED THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

Firstly, Foudalin breached the inviolability of the Embassy premises by entering the Embassy without consent of the head of mission. Secondly, Foudalin breached its special duty to protect the Embassy by failing to prevent intrusion into the Embassy and from damage. Thirdly, the inviolability of the person of the Embassy staff and Third Secretary was breached since Foudalin failed to protect them from being injured by the angry crowd and by the own negligence of their police. Lastly, any apology from the Foudalin Foreign Minister constituted an admission of responsibility but was not sufficient reparation.

THE NATIONALISATION OF SOCILIO AND COMPENSATION GIVEN WERE CONSISTENT WITH THE INVESTMENT AGREEMENT AND INTERNATIONAL LAW

Firstly, the nationalisation was consistent with the Investment Agreement since it was nationalised under 'special' or 'exceptional' circumstances. Secondly, it was consistent with international law since the nationalisation was for a public purpose and was not discriminatory. Thirdly, the provision of compensation in accordance with Donavalan domestic law was consistent with the Investment Agreement. Lastly, the provision compensation in accordance with Donavalan domestic law was consistent with international law, argument supported by the ICSID and the Convention on the Economic Rights and Duties of States.

PLEADINGS

I. JURISDICTION OF THIS COURT

A. The local remedies rule is inapplicable to all five Declarations

The rule is inapplicable since: (1) there is no issue on diplomatic protection against either Respondents;¹ and (2) only declaratory judgments are sought² save for the issue on dismemberment which is obviously a ‘direct injury of state’.³

Lastly, Donavale takes no issue on local remedies on the Fourth and Fifth Declarations.

B. This Court has jurisdiction to hear the First and Second Declarations

1. The indispensable third party principle does not apply

This Court should decline jurisdiction if a third state or entity whose presence is indispensable for deciding the dispute, is absent;⁴ i.e. either where the third state’s legal interest ‘would not only be affected by a decision, but would form the very subject-matter of the decision’ or where its international responsibility constitutes ‘the vital issue to be settled’.⁵

Whether or not the people of Agitha possesses a special status of ‘national liberation’ or ‘self determination unit’ is not the very subject-matter of this dispute, but rather an incidental issue or issue that merely ‘affects’ Agitha, such that the above rule does not apply.⁶

¹ Amerasinghe, *Diplomatic Protection* (OUP, 2008) 173-174.

² *Certain German Interest in Polish Upper Silesia (Preliminary Objection)* PCIJ Rep Series A No.6, 20; *The Factory at Chorzów (Jurisdiction)* PCIJ Rep Series A No.17 (‘Chorzów Jurisdiction’) 26-27.

³ Amerasinghe, *Local Remedies in International Law* (2nd edn CUP, 2004) 146.

⁴ *Monetary Gold Removed from Rome in 1943* [1954] ICJ Rep 19 (‘*Monetary Gold*’) 19, 32; Rosenne, *The Law and Practice of the International Court, 1920-2004* (4th edn M.Nijhoff, 2006) 543.

⁵ *Monetary Gold*, supra n4, 17; *East Timor* [1995] ICJ Rep 90, 101-2.

⁶ Rosenne, supra n4, 578.

Firstly, the remedies sought are only against Burgundan and no concrete liabilities are created for Agitha.

Secondly, ‘very subject-matter’ means the prerequisite of the case⁷ or its necessary foundation.⁸ Clearly this is not this case since the birth of a state is a matter of fact not law, the process of it coming into existence is irrelevant,⁹ and it is an irreversible process. No legal position of Agitha is affected.

Lastly, any pronouncement on the Agitha Liberation Movement (‘ALM’) is only an incidental issue. This case is starkly different from previous cases in which this Court declined to rule, where the subject matters were either wholly belonging to or dependent on a third state.¹⁰ In conclusion, this Court should decline to hear the First and Second Declarations.

2. This Court has jurisdiction to grant monetary award for the First Declaration

It is well-settled that this Court has jurisdiction to award monetary compensation¹¹ and to assess the quantum.¹²

C. **This Court has jurisdiction to hear the Third Declaration**

The indispensable third party principle does not apply to the Third Declaration. Since the cases of Burgundan and Foudalin are to be heard and pleaded together, they are de facto pleadings in common¹³ and Foudalin is not a third party to the Third Declaration.

⁷ *Certain Phosphate Lands in Nauru* [1992] ICJ Rep 240 (‘*Nauru*’) 261.

⁸ *Larsen v The Hawaiian Kingdom* [2001] 119 ILR 566 (PCA, Arbitral Tribunal) (‘*Larsen*’) 592.

⁹ *Opinion No. 1* (1991) 92 ILR 162 (Arbitration Commission, EC Conference on Yugoslavia) ¶1; Crawford, *The Creation of States in International Law* (2nd edn OUP, 2006) 28, 69.

¹⁰ C.f., for example, *Monetary Gold*, supra n4; *East Timor*, supra n4; *Larsen*, supra n8.

¹¹ *Military and Paramilitary Activities in and against Nicaragua* (Judgment on Merits) [1986] ICJ Rep 14 (‘*Nicaragua*’) 142.

¹² *Corfu Channel* (Assessment of Compensation) [1949] ICJ Rep 224 (‘*Corfu Channel* (Compensation)’).

D. This Court should decline to hear the Fifth Declaration

Since both Donavale and Foudalin are parties to the ISCID,¹⁴ this matter should first be adjudicated by the ISCID tribunal and not this Court.

Where there are apparently competing jurisdictions, this Court should decline jurisdiction where the dispute falls within the exclusive jurisdiction of some other authorities¹⁵ or where there is an agreement providing for a more specialised tribunal.¹⁶

Firstly, ISCID tribunals are specialised in dealing with investment disputes, thus constituting a specialised tribunal over this Court.

Secondly, ISCID jurisdiction is exclusive at law. A draft clause of Article 27, which contained the right of states to bring inter-state claims in other courts for breach of investment agreements, was removed.¹⁷ The intention was to make the jurisdiction of ISCID tribunals exclusive¹⁸ and to avoid abuse of the International Court of Justice where a case could have been brought before ISCID tribunals.¹⁹

As such, specialised and exclusive jurisdiction was vested with ICSID tribunals and this Court should decline to hear the Fifth Declaration.

II. THE ARMED ATTACK AGAINST AGITHA VIOLATED THE PRICIPLE OF NON-USE OF FORCE

¹³ Rules of the Court, International Court of Justice (adopted 14 Apr 1978) (1978) 17 ILM 1286, art 47.

¹⁴ International Convention on the Settlement of Investment Dispute between States and Nationals of Other States, 575 UNTS 159 ('ICSID').

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

¹⁶ *The Mavrommatis Palestine Concessions* (1924) PCIJ Rep Series A No.2, 31-32.

¹⁷ 'Chairman's Report on Preliminary Draft of an ICSID' (9 July 1964) ICSID Doc Z11 cited in Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2003) 194.

¹⁸ Schreuer, *The ICSID Convention: A Commentary* (CUP, 2001) 403-404.

¹⁹ 'Report of the Executive Directors on the ICSID, 1965' (1965) 1 ICSID Rep 23, 33.

Burgundan's employment of armed forces against Donavale within its territory violated the prohibition of use of force.²⁰ There was no relevant UNSC resolution authorising the use of force²¹ nor was it justified by self-defence.

A. The wrongfulness was not precluded by self-defence

The three essential elements of self-defence are: (1) presence of an armed attack,²² (2) necessity; and (3) proportionality.²³

1. No armed attack was committed by Donavale

As a preliminary issue, although the Burgundan President pronounced that Burgundan territory 'had been violated twice', once in late 2007 ('Second Operation') and once by the airstrike launched by Colonel Phathone ('Third Operation'),²⁴ this was insufficient to be an undertaking not to plead on the early 2007 incident ('First Operation').²⁵

Even if the three Operations were viewed collectively, they were not of sufficient 'scale and effect' to constitute an armed attack.²⁶ The mere fact that they took place in Burgundan was not conclusive. No civilian casualties were caused in the First and Second Operations. Even when compared to the lowest threshold ever pronounced, the 'mining of a military vessel'²⁷ in some circumstances, the present dispute was clearly incomparable in terms of human, property and financial loss.

²⁰ Charter of the United Nations TS 993 ('UNC') art 2(4); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, UNGA Res 2526 (XXV) (24 Oct 1970) ('DFR') ¶1; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States 1965, UNGA Res 2131 (XX) (21 Dec 1965) ¶1.

²¹ *Compromis*, 3.

²² UNC, *supra* n20, art 51.

²³ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 22 ¶245.

²⁴ *Compromis*, 3; *Clarifications*, ¶3.

²⁵ *Nuclear Tests* [1974] ICJ Rep 457, ¶¶43-46.

²⁶ *Nicaragua*, *supra* n11, ¶195.

²⁷ *Oil Platforms* [2003] ICJ Rep 161 ('*Oil Platforms*'), ¶72.

Moreover, the Third Operation was a private act of Colonel Phathone. Self-defence can only be exercised against a state or a state to which acts of private actors are attributable to.²⁸ A state is only responsible for the *ultra vires* acts of its officials²⁹ when they ‘act in their capacity’,³⁰ i.e. when ‘cloaked with governmental authority’.³¹ It is submitted that: (1) Phathone was merely a colonel and *prima facie* should not have had the capacity to initiate the attack without express order; (3) Phathone and the pilots who attacked the camps organised the renegade attack on their own and were not cloaked with any government authority.³² As such, the Third Operation was not attributable to Donavale.

2. In any event, the acts of self-defence were unnecessary and disproportionate

Necessity means ‘no choice of means’ and ‘no moment of deliberation’,³³ while proportionality means ‘proportionate to achieve the legitimate goal of the repulsion of the attack.’³⁴ Hence, the scale of Donavale’s military operations became relevant in determining necessity and proportionality.³⁵ Whether the three Operations were taken individually or collectively, Burgundan’s response was clearly unnecessary and disproportionate.

²⁸ *Nicaragua*, supra n11, ¶195, affirmed *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*) ¶377-415; *Oil Platforms*, supra n27, ¶51; *Armed Activities on the Territory of Congo*, General List No 116 [2005] ICJ 1, ¶147.

²⁹ International Law Commission, '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.

³⁰ ASR, supra 29, art 7. J Crawford, *The International Law Commission's Articles on State Responsibility* (CUP, 2002) ('ASR Commentary') 108.

³¹ *Petrolane Inc v Islamic Republic of Iran* (1991) 27 Iran-USCTR 64, 92.

³² *Compromis*, 3.

³³ *Nicaragua*, supra n11, ¶176; 'Letter from Daniel Webster to Lord Ashburton' in British Parliamentary Papers Vol. LXI (Great Britain, House of Commons 1843) ('*Caroline*'); Shaw, *International Law* (5th edn CUP, 2003) 1031.

³⁴ *Nicaragua*, supra n11, ¶176; AO on *Nuclear Weapons*, supra n23, Dissenting Opinion of Judge Higgins; Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 158.

³⁵ Dinstein, *War, Aggression and Self Defense* (4th edn CUP, 2005) 238.

Burgundan's response was unnecessary since wholesale occupation and assistance of dismemberment of Donavale was clearly not the last resort. Burgundan had a duty to first verify that the Third Operation was a genuine armed attack and not mere mistake or misbehavior.³⁶ Moreover, immediately after the Third Operation, Phathone was already prosecuted publicly and was sentenced,³⁷ meaning that a peaceful solution was open to Burgundan, a condition precedent to the use of armed force.³⁸

In any event, three Operations with minimal collateral damage did not justify Burgundan's response of occupying a whole province together with the dismemberment of Donavale. The disproportionality was self-evident.

B. Burgundan's wrongfulness was not justified by them being assistance of Agitha's national liberation movement

1. Self-determination or national liberation was irrelevant

The ALM, a mere resistance movement, had no right to request any form of foreign assistance in a civil war.³⁹ Even if the right of self-determination ('RSD') was engaged, the prohibition of armed intervention and the principle of territorial integrity prevailed over any right of assistance.⁴⁰ Although RSD does create obligations *erga omnes*, this does not entail that it is *corpus iuris cogentis* so to override the principle of non-use of force.⁴¹

2. In any event, external RSD was not engaged and Agitha had no right to secede

³⁶ *Oil Platforms*, supra n27, ¶51; Dinstein, supra n35, 209.

³⁷ *Compromis*, 3.

³⁸ Gardam, supra n34,152-153; Dinstein, supra n35, 209, 237; Jennings and Watts, *Oppenheim's International Law Vol 1 Part 1* (9th edn Longman, 1992) 422.

³⁹ *Nicaragua*, supra n11, ¶246; Tanca, *Foreign Armed Intervention in Internal Conflicts* (M.Nijhoff, 1993) 107; Nolte, 'Secession and External Intervention' in Kohen (ed), *Secession* (CUP, 2008) 77, 89.

⁴⁰ Tanca, supra n39, 106-7, note 21.

⁴¹ Castellino, *International Law and Self Determination* (M.Nijhoff, 2000) 105; Musgrave, *Self-Determination and National Minorities* (Clarendon, 1997) 191; Summers, *Peoples and International Law* (M.Nijhoff, 2007) 230; Schrijver, 'Secession and the Ban on the Use of Force: Some Reflections' in Dahlitz (ed), *Secession and International Law* (TMC, 2003) 97.

a. *The right to secede under the Donavale Constitution was irrelevant*

The *coup d'etat* and the consequential suspension of the Donavale Constitution were *fiat accompli* or otherwise domestic questions, irrelevant to international law.⁴² The consequence is that Agitha remained at all material times a province of Donavale, with all rights governed by domestic law.⁴³ This means that when Agitha's Constitutional right to secede was suspended, any such right must come from international law.⁴⁴

Even if this Court is to adjudge on the legality of the *coup* and the suspension of the Constitution, it is submitted that a *coup* is lawful so long as, at the time of the hearing: (1) The new Government is effective and has no rival opposition to its governing status; (2) people largely conform to the new Government; and (3) it was necessary to preserve order and unity.⁴⁵ In the present case, (1) the new Donavale Government had been effective after the *coup* in nine provinces (albeit except Agitha); (2) the majority of Donavalans conformed to the rule (including the state of Sapitu); and (3) the *coup* was necessary to prevent the disintegration of the federal state due to a suspected rigged referendum. In conclusion, the lawfulness of the new Donavalan regime was beyond doubt.

b. *Internal RSD does not entail a unilateral right to secede*

⁴² Crawford, *supra* n9, 150-151 and *infra* n43.

⁴³ See, for example, *Re Secession of Quebec from Canada* (1999) 115 ILR 536 (Canada, SC) ('*Quebec*') ¶112; *Madzimbamuto v Lardner-Burke* (1970) 39 ILR 61 (UK, PC) 71; *Re Self-Determination of the Comoros Islands* (1987) 74 ILR 91 (France, Cons.Council) 92-93.

⁴⁴ *Quebec*, *supra* n43, ¶112.

⁴⁵ See, for example, *Republic of Fiji v Prasad* [2001] NZAR 385 (Fiji, CA); *Matanzima v President of the Republic of Transkei* [1989] 4 SALR 989 (Transkei, SC); *Mokotso v King Moshoeshoe II* [1989] LRC 24 (Lesotho, HC) 133; *Mitchell v DPP* [1986] LRC 35 (Grenada, CA) 72; *Bhutto v Chief of Staff* [1977] PLDSC 757 (Pakistan, SC); *Lakanmi v Attorney-General* [1971] U Ifre LR 201 (Nigeria, SC); *Sallah v Attorney-General* [1970] Unrep (Ghana) in (1970) *Annual Survey of Commonwealth Law* 49; *Uganda v Matovu* [1966] EALR 514 (Uganda, HC).

The *principle* or *desideratum* of RSD must first be translated into a customary *rule* of international law before capable of being applied.⁴⁶ While it is accepted Agitha constituted a ‘people’ and possesses RSD under customary international law,⁴⁷ no *jus secedendi* follows. This is demonstrated by state practice and *opinio juris*.

Starting from the text of the Declaration on Friendly Relations (‘DFR’), RSD was put in juxtaposition with the ‘territorial integrity’ and ‘political unity of a state’, yet those rights were placed *before* RSD in the same paragraph.⁴⁸ State practice supports the view that the DFR does not justify the right to secede in whatever circumstances.⁴⁹

c. *Alternatively, only external RSD may entail a right to secede*

RSD is understood to have two facets, external and internal. Internal RSD involves the right to choose a people’s own political and economic regime which can be satisfied by a democratic participatory regime.⁵⁰ In contrast, external RSD implies a right to freely choose the international status of the people.⁵¹

Even if it is assumed that the DFR is binding and does provide for a right to secede, such right is only allowed in *external* not *internal* RSD, denial of which is a conditional precedent for a finding of the former. This is particular pertinent in light of a textual

⁴⁶ Higgins, *Problems and Process* (Clarendon, 1994) 111-114; Welhengama, *Minorities’ Claims* (Ashgate, 2000) 257-258.

⁴⁷ DFR, supra n20; Cassese, *Self Determination of People* (CUP, 1995) 108

⁴⁸ DFR, supra n20, under ‘*Principles of equal rights and self-determination*’, ¶7 (‘Saving Clause’); Cassese, supra n47, 118.

⁴⁹ See, for example, Marston (ed), ‘United Kingdom Materials on International Law’ (1983) LIV *BYIL* 361, 409. Copithorne, (ed) ‘Canadian Practice in International Law’ (1977) *Can YIL* 359, 369, see also Cassese, supra n47, 119-120, 123-124; Crawford, supra n9, 121, 416-417; Welhengama, supra n46, 262-265.

⁵⁰ Cassese, supra n47, 101.

⁵¹ Cassese, supra n47, 72.

interpretation of the DFR together with the ‘saving clause’⁵², as recognised by highly qualified publicists⁵³ and worldwide jurisprudence.⁵⁴

d. *External RSD was not triggered since there was no denial of internal RSD*

Every state enjoys a large measure of discretion in deciding the modality of internal RSD, unless international law is engaged in some way. The mere engagement of external RSD does not automatically entail a right to secede.⁵⁵ It is only in ‘extreme circumstances’ or where internal RSD has been ‘totally frustrated’ that the right to secede might be invoked.⁵⁶

To trigger the right to secession, there must at least be: (1) an effective deprivation of participation in a democracy amounting to discrimination; (2) systematic and flagrant violation of human rights; and (3) impossibility of a peaceful solution.⁵⁷ The mere loss of some kind of participatory right,⁵⁸ mere failure to reach agreements⁵⁹ and the mere entering into an armed conflict, are insufficient. Worldwide judicial practice corresponds to this view.⁶⁰

⁵² See, supra n48.

⁵³ Cassese, supra n47, 118, and infra n57.

⁵⁴ ‘The Åland Island Question: Report by the Commission of Rapporteurs’ (April 1921) LN Doc B7[C] 21/68/106 at 22, 27-28; *Re Quebec*, supra n43, ¶112; *Katangese People’s Congress v Zaire* (1995) Comm. No 75/92 Afr Comm HR, ¶6; *Re the Verification of the Constitutionality of the Declaration of State Sovereignty of the Republic of Tatarstan of 30 August 1990 etc.* (1994) 30(3) Statute and Decisions of the USSR and its Successor States 32 (‘*Tatarstan*’), 39-40.

⁵⁵ C.f., for example, UNC, supra n20, preamble; DFR, supra n20.

⁵⁶ *Quebec*, supra n43, ¶133; Cassese, supra n47, 119-120.

⁵⁷ Cassese, supra n47, 119-120; Crawford, supra n9, 118-121; Summers, supra n41, 220; Shaw, supra n33, 184; Tomuschat, ‘Self-Determination in a Post-Colonial World’ in Tomuschat (ed), *Modern Law of Self Determination* (M.Nijhoff, 1993) 10; Dinstein, ‘Is there a Rights to Secede?’ (1996) 90 *ASIL Proceedings* 299, 301; Raič, *Statehood and the Law of Self-Determination* (Kluwer, 2002) 332; Nanda, ‘Self Determination under International Law: Validity of Claims to Secede’ (1981) 13 *Case Western JIL* 257, 278; Kamenu, ‘Secession and the Right of Self Determination’ (1974) *J Mod Afr Stud* 355, 361.

⁵⁸ Cassese, supra n47, 120.

⁵⁹ *Quebec*, supra n43, ¶137.

⁶⁰ *Loizidou v Turkey (Merit)* (1998) 108 ILR 441 (ECHR) at 471; *Quebec*, supra n43, ¶¶122-130, 134-135; *Katangese Congress*, supra n54, ¶6; *Tartarstan*, supra n54.

In the present dispute, Donavale's take-over of the government and the suspension of the Constitution were insufficient to establish that Donavalan Government was discriminatory and had totally frustrated Agitha of all means of participation. There was no evidence to suggest that Agitha was racially discriminated against and that the suspension of the Constitution was targeted at Agitha.

There was also insufficient evidence to support any flagrant violation of human rights. The evidentiary burden is an extremely heavy one – claims against states involving charges of exceptional gravity (here potentially genocide) must be proved by 'fully conclusive evidence'.⁶¹

In evaluating the Report issued by the Joint Commission, it is submitted that it is only one piece of evidence and its value depends on the neutrality of the Commission, its evidence-gathering process, and the quality of its finding.⁶²

The Report has minimal probative value. Firstly, its neutrality is disputable, since two of its commissioners were appointed by Agitha and not from a neutral third party, giving an appearance of partisanship. Secondly, its evidence-gathering process is unknown. Lastly, the quality and consistency of the finding is disputable. One dissent was given by an independent member, while two other commissioners were undecided on the basis of the finding. More importantly, the finding was no more than a 'possibility' of 'some justification' on 'a few dozen cases' of transfer of persons.⁶³ The 'fully conclusive' evidential standard was clearly not met.

e. As a result, assistance in any form to the ALM constituted a breach of international law

⁶¹ *Bosnian Genocide*, supra n28, ¶209.

⁶² *Bosnian Genocide*, supra n28, ¶227.

⁶³ *Compromis*, 1.

Since the requisite extreme circumstances had not been met, Agitha had no right to unilaterally secede from Donavale. Hence, the assistance given by Burgundan to the ALM violated international law.

III. BURGUNDAN MUST COMPENSATE DONAVALE FOR THE DISMEMBERMENT

The dismemberment of a state is compensable and the amount of one billion USD is appropriate.

First, loss of physical property is compensable,⁶⁴ and therefore the loss of territory of a state is compensable insofar as the consequential loss is financially assessable.⁶⁵

Secondly, the financial accessibility of lost territory is demonstrated by state practice tracing back to 1904, where the United States compensated Colombia for US\$25 million for its loss of Panama.⁶⁶

Lastly, although Donavale does not seek to suggest that the amount of compensation theresaidd is comparable here; however, noting the rate of inflation from 1904 to 2008 being approximately 24 to 30 times,⁶⁷ and taking into account any consequential loss (including potential loss of property and lives), it is submitted that US\$1 billion is the appropriate

⁶⁴ ASR Commentary, supra n30, 218.

⁶⁵ ASR, supra n29, art 36; ASR Commentary, supra n30, 218 est seq.

⁶⁶ Dugard, 'A Legal Basis for Secession: Relevant Principles and Rules' in Dahlitz (ed), *Secession and International Law* (TMC, 2003) 90.

⁶⁷ See, for reference, United States Department of Labor, 'Table Containing History of CPI-U U.S. All Items Indexes and Annual Percent Changes From 1913 to Present' (2008) available at <<ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>>; United States Geological Survey, 'Historical Statistics for Mineral and Material Commodities in the United States: Gold' (2006) available at <<http://minerals.usgs.gov/ds/2005/140/gold.pdf>>. For their generally accepted indicative value, see, Zhou and Mahdavi, 'Gold and Commodity Prices as Leading Indicators of Inflation' (1997) 49 *J of Econ&Bus* 475; GH Moore, 'Analysis: Gold Prices and a Leading Index of Inflation' (1990) 33 *Challenge* 4.

amount. Should this Court be in doubt of the amount submitted, a separate hearing may be ordered for the purpose of assessment.⁶⁸

IV. DONAVALE EXERCISED ITS JURISDICTION LAWFULLY IN APPREHENDING AND CONVICTING TAVILISI

A. The apprehension of Tavilisi was a legitimate exercise of jurisdiction

1. The sovereignty of Burgundan was not violated

While the principle of non-intervention⁶⁹ is accepted, since the apprehension neither took place within the state sovereignty nor jurisdiction of Burgundan, Donavale's international responsibility vis-à-vis Burgundan was not engaged at all.

2. The apprehension was consented to or acquiesced by Foudalin

Although extraterritorial apprehension may violate a third state's sovereignty, this could be cured if Foudalin consented prospectively or retrospectively in express or implied manners.⁷⁰ It is submitted that Foudalin has acquiesced or retrospectively consented to the apprehension.

First, Foudalin did not protest the apprehension immediately or reasonably thereafter. Secondly, even after the Embassy incident when the Foreign Minister of Foudalin apologised, there was no mention of the apprehension. Lastly, Foudalin has participated in the current proceedings but did not raise any issue in this regard.

3. The apprehension complied with international standards concerning aliens

⁶⁸ *Corfu Channel* (Compensation), supra n12.

⁶⁹ S.S. "Lotus" (1927) PCIJ Rep Series A No.10 ('Lotus') 18.

⁷⁰ ASR, supra n29, arts 20, 45; ASR Commentary, supra n30, 163-165; Lowe, 'Jurisdiction' in Evan (ed), *International Law* (2nd edn OUP, 2006) 357; Mann, *Father Studies In International Law* (Clarendon, 1990) 341; Nikolić, infra n77, ¶5.

Donavale accepts that prohibition of: (1) torture, cruel, inhuman and degrading treatment;⁷¹ and (2) unlawful and arbitrary arrest⁷² constitute binding obligations under international law. However, it is submitted that there was no violation of such obligations.

Firstly, nothing on the facts suggested that Tavilisi was mistreated in anyway.⁷³

Secondly, the arrest was lawfully effectuated pursuant to properly enacted legislation.⁷⁴

Thirdly, the arrest was not arbitrary deprivation of liberty. Contrasted from that under human rights treaties,⁷⁵ arbitrary arrest under general principles of international law include: (1) arrest that manifestly cannot be linked to any legal basis; (2) prosecution when one exercises fundamental human rights under international law; (3) denial of fair trial such that it confers the deprivation an arbitrary character.⁷⁶

In the present case, the apprehension was pursuant to express Donavalan legislation. It was also no more than a measure of protection against potential abuse of freedom of expression. Therefore Tavilisi's apprehension was consistent with international law.

B. The trial and conviction of Tavilisi met international minimum standards

⁷¹ *Prosecutor v Furundžija* (Trial Judgement) ICTY-95-17/1-T (10 Dec 1998) ¶¶139, 153; Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon, 1989) 95.

⁷² See below, Section IV.B.2

⁷³ *Compromis*, 4.

⁷⁴ *Compromis*, 4.

⁷⁵ UNCHR Res 28 (1996) UN Doc E/CN.4/RES/1996/28, ¶5 and its background of adoption: Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law* (Antwerpen, 2006) 172-175.

⁷⁶ 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; *Re Yao Fuxin (China)* (Opinion 15/2002) in 'Opinions adopted by the Working Group on Arbitrary Arrest' (26 November 2003) UN Doc E/CN.4/2004/3/Add.1, 3; Maki, 'General Principles of Human Rights Law Recognized by All Nations' (1980) 10 *Cal Western ILJ* 273.

1. Donavale courts had jurisdiction to try Tivilisi whether or not there was a violation of state sovereignty

Generally, the jurisdiction of a court is not affected by the manner which a person is brought before the court. Although the court may decline jurisdiction on various discretionary grounds, that is not mandated. This is supported by international⁷⁷ and national jurisprudence from both continental⁷⁸ and common law⁷⁹ systems.

The only relevant discretionary grounds here are possibly: (1) flagrant violation of international law;⁸⁰ and (2) egregious violation of human rights.⁸¹

In the current dispute, there was no violation of sovereignty as evidenced by the absence of any protest.⁸² Nor was there a violation of any extradition treaties⁸³ or human rights, let alone whether it is serious and egregious. Therefore, there was no reason why Donavalan courts could not exercise jurisdiction.

2. Tivilisi was afforded the right to fair trial

⁷⁷ See, for example, *Öcalan v Turkey* (2003) 37 EHRR 10; *Prosecutor v Nikolić* (Decision on Legality of Arrest) ICTY-94-2-AR73 (5 June 2003) ('*Nikolić*').

⁷⁸ See, for example, *Geldof v Meulmeister and Steffen* (1966) 31 ILR 385 (Belgium, Cour de Cass); *RHK v Netherlands* (1995) 100 ILR 412 (Netherlands, SC); *Re Argoud* (1964) 45 ILR 90 (France, Cour de Cass) ('*Argoud*'); *Re Barbie* (1983) 78 ILR 125 (France, Cour de Cass) ('*Barbie*'); The *Achille Lauro* Case (Italy) cited in Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and other Mechanisms* (M.Nijhoff, 1998) 360.

⁷⁹ See, for example, *Attorney-General of Israel v Eichmann* (1968) 36 ILR 5 (Israel, DC); *United States v Alvarez-Machain* (1994) 95 ILR 355 (US, SC) 360-363; *United States v Toscanino* (1981) 61 ILR 190 (US, CA), 191; *R v Bennet* (1994) 95 ILR 380 (UK, HL) 381-400, 405-416; *R v Latif* [1996] 2 Cr App R 92 (UK, HL) 101; *R v Mullen* [1999] 2 Cr App R 143 (UK, CA) 156; *Ndhlovu v Minister of Justice* (1985) 68 ILR 7 (S. Africa, Div. Ct.) 13; *R v Hartley* [1978] NZLR 199 ('*Hartley*').

⁸⁰ See, for example, *Nikolić*, supra n77, ¶30; *Argoud*, supra n79; *Barbie*, supra n79; *Alvarez-Machain*, supra n79, 360-353; *Eichmann*, supra n79; *Bennet* supra n79, 381-400; *Hartley*, supra n79, 216.

⁸¹ See, for example, *Nikolić*, supra n77, ¶30.

⁸² See, for example, *Nikolić*, supra n77, ¶26; *Argoud*, supra n79; *Barbie*, supra n79. C.f. *United States v Verfugo-Urquidez (No 2)* (1992) 90 ILR 668 (US, SC), 676-677.

⁸³ See, for example, *Alvarez-Machain*, supra n79, 360-353

Donavale accepts the customary or general principles of international law regarding the right to fair trial.⁸⁴ However, in the current circumstances there was no issue on access to and actual impartiality of the court. This is because Tivilisi was clearly brought under regular Donavale court procedures and had even appealed to the highest court. There was no evidence of any unfair, unequal or discriminatory practice of the Donavale courts.

a. Proper legal representation was afforded

The right to choose one's own counsel is not absolute in all circumstances.⁸⁵ This is demonstrated by international jurisprudence⁸⁶ and in particular widespread state practice, where counsel are 'commonly' and 'mandatorily' assigned in serious cases on the grounds of interests of justice; and in international tribunals,⁸⁷ as well as in both continental law⁸⁸ and

⁸⁴ See, for example, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 10; International Law Commission, 'Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal' (1950) 2-II *YbILC* 181; *Furundžija*, supra n71, Separate Opinion of Judge Shahabuddeen, ¶¶25-26.

⁸⁵ *Prosecutor v Seselj* (Decision on Appointing Counsel) ICTY-03-67-PT (9 May 2003) ('*Seselj* Decision') ¶20 est seq; *Prosecutor v Milošević* (Decision on Interlocutory Appeal on the Assignment of Defence Counsel) ICTY-02-54-AR73.7 (1 November 2004).

⁸⁶ *Ibid.*

⁸⁷ See, in addition to n85, Charter of the International Military Tribunal 82 UNTS 279, art 16; Charter of the International Military Tribunal for the Far East 14 State Dept Bull 391S, art 9; United Nations War Crimes Commission, *Digest of Laws and Cases* (1948) XV TWC 1, 163; 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.

⁸⁸ *Seselj* Decision, supra n85, ¶¶16-17. See, for example, Code de Procédure Pénale (France), arts 274, 17; Code d'instruction Criminelle (Belgium) art 294; Strafprozeßordnung 1987 (Criminal Procedure Code) (Germany) s140; Administration of Justice Act (Denmark), s731; Criminal Procedure Act (Yugoslavia) art 13.

common law systems.⁸⁹ The European Court of Human Rights has also confirmed this practice as acceptable.⁹⁰

Since the crime which Tivilisi committed was one of the few most serious crimes against the head of state (which is punishable whoever commits it anywhere in the world), it is submitted that assignment of counsel on the grounds of interests of justice was justified.

b. The proportion or representation of female judges did not affect the fairness of the trial

Donavale notes the growing trend within international courts to ensure a fair representation of male and female judges.⁹¹ However, this aspiration has clearly not crystallised yet into a customary rule to support a fair trial complaint based on gender representation of the court.

In any event, the mere fact that the Donavalan trial court (and not the Supreme Court) was composed solely of female judges could simply not create apparent bias in any way.

V. FOUDALIN WAS IN BREACH OF THE 1961 VIENNA CONVENTION ON DIPLOMATIC RELATIONS

A. Foudalin breached the inviolability of the Embassy premises

⁸⁹ 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) s.949c.

⁹⁰ See, for example, *Croissant v. Germany* (1992) Series A no 237-B (ECHR) ¶29; *Lagerblom v Sweden* (App no 26891/95) ECHR 14 January 2003 ¶¶50-54.

⁹¹ See, for example, Rome Statute of the International Criminal Court 2187 UNTS 90, art 36(8)(a)(iii); Rules of the Court, European Court of Human Rights (adopted Jul 2007) <<http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourtJuly2007.pdf>> art 14; Protocol to the African Charter on Human and Peoples' Rights, OAU Doc OAU/LEG/Min/AFRCHR/PROT 1, Rev 2, art 14(3).

The premises of the Donavalan Embassy is inviolable and Foudalin agents may not enter it except with the consent of the head of the mission.⁹² This inviolability is absolute and cannot be overridden even in times of emergency.⁹³ The head of mission has unfettered discretion to give consent on each occasion and to invite assistance⁹⁴ and consent cannot be presumed.⁹⁵

In the present dispute, the Foudalin police officers ‘eventually cleared the Embassy’ after the initial inability to control the crowd. The Embassy undoubtedly could not be cleared without the police entering the Embassy and carrying out enforcement actions, breaching the inviolability of the premises. Nothing on the facts suggested that there was any express or implied consent obtained from the Head of Embassy. Art 22(1) was clearly violated.

B. Foudalin had a special duty to protect the Donavalan Embassy

Foudalin has a special duty to take all appropriate steps to protect the premises of the Embassy against any intrusion or damage, and to prevent any disturbance of the peace of the Embassy or the impairment of its dignity,⁹⁶ i.e. a special duty to prevent intrusion or damage.⁹⁷

It is accepted that this duty to ‘take all appropriate steps’ to protect may not be absolute and may depend on the degree of threat to the Embassy and whether Foudalin was

⁹² Vienna Convention on Diplomatic Relations 500 UNTS 95 (‘VCDR’) art 22(1).

⁹³ Denza, *Commentary on the Vienna Convention on Diplomatic Relations* (Clarendon, 1998) 120-123; Nahlik, ‘Development of Diplomatic Law’ (1990) 222 *Recueil Des Cours* 187, 277.

⁹⁴ Denza, *supra* n93, 121.

⁹⁵ Nahlik, *supra* n93, 275.

⁹⁶ VCDR, *supra* n92, art 22(2).

⁹⁷ Nahlik, *supra* n93, 135-140; Denza, *supra* n93, 277.

aware of any unusual threat.⁹⁸ However, Foudalin must take special measures that are over and above those it takes to discharge its general duty of ensuring order.⁹⁹

Similar to the *Hostages* case,¹⁰⁰ Foudalin clearly breached Art 22(2) since it failed to prevent the demonstrators from entering the Embassy and destroying the Embassy's property. Foudalin had knowledge that the Embassy was surrounded by an angry crowd of 300 with a real threat of disturbance of the peace,¹⁰¹ and yet only five police guards were assigned to protect the Embassy. This was blatantly not what a state *should* offer and was *required* to offer in the circumstances, where the Embassy was at the peril of being occupied by intruders. This was more than mere negligence or lack of means.¹⁰² The special duty was undoubtedly failed.

C. Foudalin breached the inviolability of the person of the Embassy staff and Third Secretary

Foudalin has a positive duty under VCDR Art 29 to take all appropriate steps to prevent attack on the person, freedom or dignity of a diplomatic agent.¹⁰³ What are the 'appropriate steps' to be taken must be determined in light of the relevant circumstances and particular threats or dangers.¹⁰⁴

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. Hence the Third Secretary clearly falls under this

⁹⁸ Denza, *supra* n93, 139.

⁹⁹ International Law Commission, 'Draft Articles Concerning Diplomatic Intercourse and Immunities and Commentary' in 'Report of the ILC Covering the work of its Tenth Session' (1958) 10-II *YbILC* 88, 95.

¹⁰⁰ *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 3 ('*Hostages*').

¹⁰¹ Similar demonstrations outside diplomatic missions were held to be a real threat to the disturbance of the peace: *Minister for Foreign Affairs and Trade v Magno and Another* (1992) 101 ILR 202 (Australia, FC).

¹⁰² *Hostages*, *supra* n100, ¶63.

¹⁰³ VCDR, *supra* n92, art 29.

¹⁰⁴ Denza, *supra* n93, 216.

definition. If the injured Embassy staff also has a diplomatic rank, then his person will also be inviolable.

In the current circumstances, the Foudalin Police failed to protect the Embassy staff during the demonstration and allowed him to be injured by the demonstrators. In addition, the Foudalin Police acted negligently in the course of their execution and injured the Third Secretary of the Embassy. It is therefore beyond doubt that Foudalin was in breach of Art 29.

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

1. The apology consisted an admission of an internationally wrongful act

A full and straightforward apology implies admission of responsibility.¹⁰⁵ The crucial element of a full apology is that it is expressed to be an apology *for* the incident, as opposed to an apology *that* the incident occurred.¹⁰⁶ An apology by a high official of one state to a high official of another state clearly indicates the apologising state's acceptance of international responsibility.¹⁰⁷

In the current circumstances, the Foudalin Foreign Minister telephoned the Donavalan Foreign Minister to 'apologise *for* the temporary loss of control' over the crowd. The statement was made by a Foudalin high official to a Donavalan high official, and was clearly more than an expression of regret that the incident ever happened; it indicated a full apology from Foudalin *for* the incident. This is particularly reinforced by the fact that Foudalin further guaranteed the future safety and security of the Embassy, in other words, promising non-repetition.

¹⁰⁵ Sir A Watts, 'The Art of Apology' in M Ragazzi (ed), *International Responsibility Today* (BRILL, Leiden 2005) 111.

¹⁰⁶ Watts, *supra* n105, 108-109.

¹⁰⁷ Watts, *supra* n105, 114.

2. The apology was not sufficient reparation as defined under the ILC Articles on State Responsibility

Full reparation of an international wrong can take the form of satisfaction,¹⁰⁸ of which apology can be one form.¹⁰⁹

However, the apology was insufficient in the circumstances as full reparation. Not only did Foudalin breach the inviolability of the Embassy premises and person of the Embassy diplomatic personnel; Foudalin had also breached its special duty to protect the Embassy and prevent any intrusion or damage to the property.¹¹⁰ These are serious violations of the well-founded principle of diplomatic privileges.

3. Even if the apology was sufficient reparation, this Court is still entitled to make a declaration of breach

Even if the apology by Foudalin constituted sufficient reparation, it does not preclude this Court from making a declaration of violation.¹¹¹ So long as this Court is satisfied that Foudalin breached its obligations under the VCDR, a declaration in favour of Donavale can be made.

VI. THE NATIONALISATION OF SOCILIO AND COMPENSATION GIVEN WERE CONSISTENT WITH THE INVESTMENT AGREEMENT AND INTERNATIONAL LAW

A. The nationalisation was consistent with 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

¹⁰⁸ ASR, supra n30, art 34.

¹⁰⁹ *Rainbow Warrior* (1987) 74 ILR 241 (Arbitration Tribunal) 271; *S.S. “I’m Alone”* (1925) III RIAA 1609.

¹¹⁰ *LaGrand* [2001] ICJ Rep 466, ¶123.

¹¹¹ *Land and Maritime Boundary Between Cameroon and Nigeria* (Judgment on Merits) [2002] ICJ Rep 453, ¶¶308-324.

ordinary and natural meaning in light of the context must be considered.¹¹² It is submitted that nationalisation is allowed as long as it is unusual or out of the ordinary course.¹¹³ In the current dispute, Donavale only decided to nationalise Socilio in view of the recent attack on the Donavalan Embassy. It was a one-off nationalisation effort and clearly not a usual course of action. International law holds that it is up to the state to determine what its public good requires for the purposes of nationalisation, and international tribunals are reluctant to interfere.¹¹⁴ The nationalisation was therefore consistent with the Investment Agreement.

B. The nationalisation was consistent with international investment law

1. Donavale has the right to nationalise Socilio under international law

A state has the right to legitimately nationalise or expropriate foreign property under international law.¹¹⁵ Certain conditions must be fulfilled to render a nationalisation legal or not arbitrary:¹¹⁶ (1) for a public purpose;¹¹⁷ and (2) non-discriminatory.¹¹⁸

2. The nationalisation was for a public purpose

¹¹² Vienna Convention on the Law of Treaties 1155 UNTS 331 ('VCLT') art 31.

¹¹³ JA Simpson and ESC Weiner, *Oxford English Dictionary* (2nd edn Clarendon, 1989). See vol. V ('exceptional, a. ') and vol. XVI ('special, a, adv, n. ').

¹¹⁴ Pellonpää, 'Compensable Claims Before the Tribunal: Expropriation Claims' in Lillich *et al.* (eds), *The Iran-United States Claims Tribunal* (Transnational, 1998) 204.

¹¹⁵ Pellonpää, *supra* n114, 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* n57, 738.

¹¹⁶ 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.

¹¹⁷ *Amoco*, *supra* n115, 222-223; *TOPCO v Libyan Arabic Republic* (1979) 53 ILR 389 ('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.

¹¹⁸ *Amoco*, *supra* n115, 231-232; *American International Group Inc v Islamic Republic of Iran* (1984) 4 Iran-USCTR 96 ('AIG'), 105; Pellonpää, *supra* n114, 205;

Despite an absence of an agreed definition of ‘public purpose’ in international law,¹¹⁹ it is clear that the term should be broadly interpreted and states have granted the term extensive discretion in practice.¹²⁰ Moreover, it is up to the state to determine what its own public good requires for the purposes of nationalisation, and such a determination can be overruled by an international tribunal only in very exceptional circumstances.¹²¹ The existence of public purpose is generally not disputed in international expropriation cases.¹²²

The public purpose requirement was met under the current circumstances. The sole aim of the expropriation was to completely nationalise the Unicom telephone industry, which is undoubtedly closely connected to Donavale’s economy,¹²³ with a view of achieving the economic and political objectives of the Government. This has been accepted by the Iran-US Claims Tribunal as sufficient to satisfy the public purpose requirement.¹²⁴

3. The nationalisation was not discriminatory

While nationalisation must not be racially-based,¹²⁵ differential treatment of various persons or class or owners does not automatically amount to discrimination provided there is objective and reasonable justification for the distinction made.¹²⁶

Here the sole aim of expropriation was to completely nationalise the Unicom telephone industry. There was no evidence to suggest that it was motivated by any racial concern; it was justified by necessity in midst of the disturbance. Hence the nationalisation of Socilio was not discriminatory.

¹¹⁹ *Amoco*, supra n115, 233.

¹²⁰ *Ibid.*

¹²¹ Pellonpää, supra n114, 204.

¹²² *Amoco*, supra n115, 222-233; *INA*, supra n117, 378-379.

¹²³ Higgins (1983), supra n117, 298.

¹²⁴ *Amoco*, supra n115, 233.

¹²⁵ Pellonpää, supra n114, 207; Sornarajah, *The Pursuit Of Nationalized Property* (M.Nijhoff, 1986) 183-187.

¹²⁶ *Amoco*, supra n115, 232.

C. The provision of compensation according to Donavalan domestic law was consistent with the Investment Agreement

Under the Investment Agreement, Donavale undertook to give fair and just compensation ‘according to law’ upon nationalisation. Where there was no express indication of whether the term ‘law’ covered domestic or international law, the proper interpretation is to apply normal principles of conflicts of laws, i.e. to determine objectively the law with which the contract has the closest connection.¹²⁷ There is a strong presumption that this is the law of the contracting State party, in particular where the contract is to be performed in that state.¹²⁸ This is further strengthened by the fact that both Donavale and Foudalin have expressed their preference over this by becoming a state party to the ICSID, which normally applies this rule unless otherwise expressed (Art 42(1)).

In the current circumstances, the state contract was to permit Socilio to invest into the Unicom telephone industry in Donavale. Naturally, the contract was performed within the jurisdiction of Donavale. Hence, the presumption of application of Donavalan domestic law prevails and the compensation based on Donavalan domestic law was lawful under the Investment Agreement.

Understandably, should Donavalan domestic law be inadequate to deal with the situation, it might be acceptable to supplement it with general principles of international law.¹²⁹

¹²⁷ *Government of Kuwait v American Independent Oil Co* (1984) 66 ILR 518 (‘Arbitral Tribunal’) (‘*Aminoil*’) ¶6; Bowett, ‘State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach’ (1988) 59 *BYIL* 49, 52-53; Delaume, ‘The Proper Law of State Contracts Revisited’ (1997) 12 *ISCID Review* 4.

¹²⁸ *The Payment of Various Serbian Loans Issued in France* (1929) PCIJ Series A No.20, 42; *The Payment of Various Brazilian Loans Issued in France* (1929) PCIJ Series A No 21, 121; *Saudi Arabia v Arabian American Oil Co* (1963) 27 ILR 167 (‘*Aramco*’).

¹²⁹ ICSID, supra n14, art 42; *Petroleum Development Ltd v Sheikh of Abu Dhabi* (1951) 18 ILR 144 (Arbitral Tribunal) ; *Aramco*, supra n128, 171; *Southern Pacific Properties (Middle East Limited) v Arab Republic of Egypt* (1993) 32 ILM 937 (ICSID) ¶¶78-80.

However, international law in that case should only be a supplemental source of law, and Donavalan domestic law must still be the basic governing law.¹³⁰

D. The provision of compensation according to Donavalan domestic law was consistent with international investment law

1. Duty to pay compensation in accordance with domestic law

Donavale has a 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.¹³¹ The only issue is whether it should be based on domestic law or international law.

As pleaded above in Section VI.C, where there is no express statement of applicable law between the parties in dispute, the ordinary principles of conflicts of law suggests that the *prima facie* applicable law should be that of the host-state.

This principle is further confirmed by Art 42(1) of ICSID,¹³² which provides that in the absence of agreement of applicable law between a Contracting state party and the private national of another party, the law of the Contracting State party should be applied. Although the current dispute is not adjudged in the ICSID tribunal and hence ICSID is not binding as such; since both Donavale and Foudalin are parties to ICSID, they must be taken to have agreed to its *lex specialis*,¹³³ which provides a strong guidance or indication that compensation to Socilio should be based on Donavalan domestic law

¹³⁰ Bowett, supra n127, 403; Pechota, ‘The Limits of International Responsibility in the Protection of Foreign Investment’ in Ragazzi (ed), *International Responsibility Today* (BRILL, 2005) 175.

¹³¹ CERDS, supra n115, art 2(2)(c); *Amoco*, supra n115, 223; *AIG*, supra n118, 105; *INA*, supra n117, 373, 378; Pellonpää, supra n114, 207.

¹³² Schreuer, supra n18, 599.

¹³³ See Section I.D.

Furthermore, Art 2(2)(c) of the CERDS provides that ‘appropriate compensation’ should be paid in the case of nationalisation of foreign property; and it should be settled under the domestic law of the nationalising state in case of controversy.¹³⁴

Given that CERDS was: (1) framed in a weighty and solemn preambular imagery; (2) not an ordinary UNGA Resolution but a prescriptive Charter; and (3) passed by the overwhelming majority vote (120:6:10) of the UN General Assembly;¹³⁵ it is submitted that although CERDS may not be a legally binding instrument,¹³⁶ it is more than aspirational and also represents a strong guidance on the principles of compensation in expropriation cases.¹³⁷

In conclusion, Donavale’s duty to pay compensation should therefore be based on domestic law.

2. Even if compensation should be in accordance with international law, payment of ‘just’ compensation complied with international law

The modern standard of compensation for lawful expropriation of foreign property is no longer the traditional test of ‘prompt, adequate and effective’¹³⁸ or ‘adequate’ compensation.¹³⁹ The proper standard of compensation in cases of lawful nationalisation should be ‘appropriate’ or ‘just’ compensation, meaning a full equivalent of the property

¹³⁴ CERDS, supra n115, art 2(2)(c).

¹³⁵ Weston, ‘The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owner Wealth’; (1981) 75 *AJIL* 437, 451.

¹³⁶ Murphy, ‘Compensation for Nationalization in International Law’, 110 *S Afr LJ* 79, 90-91; Amerasinghe, ‘Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice’ (1992) 41 *ICLQ* 22, 34-36.

¹³⁷ Garcia-Amador, ‘The Proposed New International Economic Order’ (1980) *Law Americans* 1, 32-40; Meagher, *An International Redistribution of Wealth and Power* (Pergamon, 1979), 52-54.

¹³⁸ Doman, ‘Postwar Nationalization of Foreign Property in Europe’ (1948) 48 *Columbia LR* 1125, 1137.

¹³⁹ Murphy, supra n136, 81-82; Amerasinghe (1992), supra n136, 21-24.

taken and not including loss of profits.¹⁴⁰ This should be contrasted with the standard for unlawful takings, which is full restitution or reparation.¹⁴¹

Having established that the nationalisation of Socilio was lawful under both the Investment Agreement and international investment law, thus the standard of compensation should be ‘just’ or ‘appropriate’ compensation. In the current dispute, the Head of State of Donavale has already promised to pay ‘just’ compensation to Socilio upon its nationalisation, thus in accordance with international law.

VII. CONCLUSION AND PRAYER FOR RELIEF

On the basis of the foregoing facts and points of law, Donavale respectfully requests this Honourable Court to adjudge and declare that all declaration sought by the Applicant, the Republic of Donavale be granted.

¹⁴⁰ CERDS, supra n115, art 2(2)(c); *Aminoil*, supra n127, 1133; *TOPCO*, supra n117, 389; *Sola Tiles Inc v Government of the Islamic Republic of Iran* (1987) 14 Iran-USCTR 223, 234-235; International Law Association, *Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New Economic Order* (International Law Association, London 1986) art 5.5.

¹⁴¹ *Interpretation of Judgments Nos 7 and 8 (Chorzów Factory)* (1928) PCIJ Series A No.13, 47.