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**THE INTERNATIONAL COURT OF JUSTICE**

AT THE PEACE PALACE,

THE HAGUE, THE NETHERLANDS

THE 2008 LAWASIA MOOT COURT COMPETITION

**CASE CONCERNING ATTACK ON DONAVALE AND OTHER RELATED MATTERS**

---

**REPUBLIC OF DONAVALE**

**(APPLICANT)**

V.

**STATE OF BURGUNDAN**

**(CO-RESPONDENT)**

AND

**STATE OF FOUDALIN**

**(CO-RESPONDENT)**

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MEMORIAL FOR THE APPLICANT

2008

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## STATEMENT OF JURISDICTION

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

## QUESTIONS PRESENTED

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

## STATEMENT OF FACTS

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

As a result, a civil war broke out, which continued from 2003 to 2007 between the Agitha Liberation Movement and Donavale where 1/20th of the Agithan population being wiped out and children forcibly transferred, there were allegations of genocide. A joint report by the UN-New Agitha investigation panel (one member dissenting) concluded that there might have been genocide. Consequently, 10,000 people fled as refugees to Burgundan, a bordering state. Burgundan was accused of training the rebels who were fighting the civil war, which was denied. In late 2007, Donavale troops invaded Burgundan territory, allegedly in pursuit of the rebels/freedom fighters of Agitha. A warning was issued by the Burgundan government to

Donavale that no more armed incursions will be tolerated. United Nations Security Council (UNSC) also adopted a resolution deploring the temporary armed attack by Donavale on Burgundan territory.

A week later, a military officer, Colonel Phathone, bombed refugee camps in the territory of Burgundan. For this act, Phathone was arrested and publicly tried by Donavale within twenty-four hours. Phathone was found guilty of insubordination and endangering the security of the State with unauthorized military action' and sentenced to 10 years of punishment.

Burgundan President Jawaldi criticized the attack and declared support to the Agitha freedom fighters, which was endorsed by the Burgundan Parliament in an emergency session. Burgundan then launched an attack on Donavale, chasing Donavalan troops out of Agitha and assisting the Agithans in claiming their territory. During the war, UNSC adopted a resolution asking from restraint from all parties in conflict. In January 2008, after the withdrawal of Donavale troops, New Agitha was formed.

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

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

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

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

## SUMMARY OF PLEADINGS

1. THE ACTS OF BURGUNDAN ARE IN VIOLATION OF INTERNATIONAL LAW.

The acts of Burgundan are in violation of Art. 2(4) of the UN Charter. The attack on Donavale is not in exercise of Burgundan's right to self-defence because the ingredients of self defence are not satisfied. The attack by Donavale does not consitutute an 'armed attack' under Art.51 of the UN Charter. Colonel Phathone's acts are not attributable to Donavale, The counter-attack by Burgundan was proportionate and necessary to repel the Donavalan attack. Also, Agitha had no right to secede, and Burgundan exceeded the permissible limit in extending support to the Agithans for self determination and is therefore, in violation of Art.2(4).

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

Donavale has not violated the territorial sovereignty of Burgundan but has legitimately exercised its jurisdiction as courts do not inquire into the means of procuring the accused if it has jurisdiction under the protective principle. The trial not only meets, but exceeds minimum standards of justice required, for she was not arbitrarily detained, and she was given a fair trial, in that she was given legal representation, and tried by the judiciary, an impartial organ.

3. <u>FOUDALIN IS IN BREACH OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961</u>.

Foudalin has breached its obligations under the Vienna Convention on Diplomatic Relations, 1961, for it has failed to protect the inviolable person and premises of diplomatic agents of Donavale in Foudalin. Also, Foudalin incurs state responsibility because Donavalan diplomatic agents and premises were violated on its territory by its citizens, and police officers, who are agents of the State caused harm to the person of Donavalan diplomatic agents. Due diligence was not exercised by Foudalin to prevent this violation of the Convention.

4. <u>THE NATIONALIZATION OF UNICOM TELEPHONE INDUSTRY AND THE PROVISION FOR COMPENSATION ACCORDING TO DONAVALAN DOMESTIC LAW IS NOT IN VIOLATION OF THE AGREEMENT BETWEEN THE GOVERNMENT OF DONAVALE AND SOCILIO, OR CONTEMPORARY PRINCIPLES OF INTERNATIONAL INVESTMENT LAW.</u>

The nationalization of Unicom is not in breach of the agreement because 'special' circumstances, of the nature contemplated by the agreement arose, on account of the attack on the embassy. It is not also illegal *per se* because the principle of *pacta sunt servanda* does not apply to contracts between States and private persons. It is not settled customary international law that expropriation has to be for a public purpose and non-discriminatory; even so, these requirements are satisfied in the instant case. The doctrine of necessity precludes such illegality, and necessity to expropriate has arisen in this case. The nationalization is not illegal *sub modo* because the provision for payment of compensation according to domestic law is neither in breach of the Agreement, which implies determination of compensation according to Donavalan law, nor of the contemporary

principles of international investment law, which do not mandate any parameter other than domestic law to be taken into account for awarding compensation.

# PLEADINGS

## 1. THE ACTS OF BURGUNDAN ARE A VIOLATION OF INTERNATIONAL LAW.

### 1.1 Burgundan's acts are a violation of Art.2 (4) of the Charter of the United Nations, 1950 (hereinafter "UN Charter").

Art.2(4) of the UN Charter requires all nations to refrain from 'threat or use of force against the territorial integrity or the political independence' of nation states. 'Force' has been interpreted to mean military force,[1] thereby proscribing any armed aggression or intervention by force.[2] Under the UN Charter, 'political integrity' has to be read as 'inviolability,[3] and even a temporary incursion, with an intention to withdraw immediately after completing a limited operation, constitutes an infringement of Art.2(4).[4]

No State or group of states has the right to intervene, directly or indirectly, for any reason, in the internal or external affairs of any other State[5] and any intervention whatsoever is in violation of customary international law as well.[6] Respect for the 'territorial sovereignty' and 'political

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[1] C. Tomuschat, *General Course On Public International Law*, 281 RECUEIL DES COURS 1, 207 (1999).

[2] L. Henkins, *General Courses on Public International Law*, 216 RECUEIL DES COURS 1, 147 (1989); H. KELSEN & R. TUCKER, PRINCIPLES OF INTERNATIONAL LAW 86 (1966); I. BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 362 (1990).

[3] L. OPPENHEIM, INTERNATIONAL LAW 154 (H. Lauterpacht ed., 1952); Declaration On Principles Of International Law Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations, G.A. Res. 2625 (XXV), (October 24, 1970) (hereinafter "Friendly Relations Declaration").

[4] B. SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 117 (1995); Corfu Channel Case (*United Kingdom* v. *Albania*) 1949 ICJ Reps. 4.

[5] G.A. Res. 36/103 (9 December, 1981).

[6] Article 7, Friendly Relations Declaration, supra note 3.; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua* v. *United States of America*), 1986 I.C.J. 14 (hereinafter "*Nicaragua*"); OPPEINHEIM, supra note 3, at 341; Tomuschat, supra note 1, at 209.

independence' is an essential foundation of international relations[7] and it cannot be violated under *any* circumstance.[8]

In this case, Burgundan troops attacked Agitha, and the Parliament endorsed the forcible entry of Burgundan military troops into Donavale. Even if this was only for a temporary period, it is a violation of the Art.2(4).

**1.2 The acts of Burgundan cannot be justified as self-defence.**

Art.51 of the UN Charter provides for the use of force in self-defence. The ingredients of self-defence are there has to be an armed attack, the attack has to be imminent and the counter-attack has to be necessary and proportional. It is submitted that in the instant case, none of the ingredients of self-defence have been satisfied.

**1.2.1 There was no armed attack.**

An aggression is an attack upon, or military occupation of another State's territory,[9] through the use of its own forces.[10]. However, the incursion amounts to an 'armed attack' under Art.51 only when it is used on a relatively large scale with substantial effects[11] for legitimate exercise of self-

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[7] Article 2, Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, G.A. Res. 42/22 (18 November, 1987); Winfield, 3 BRIT. Y.B. INT'L L 130 (1922-23).

[8] Corfu Case, supra note 4.

[9] Article 2, Definition of Aggression, G.A. Res. 3314 (XXIX) (14 December, 1974)

[10] R. Higgins, General Course on Public International Law, 230 RECUEIL DES COURS 1, 320 (1991); *Nicaragua,* supra note 6.

[11] RANDELZHOFER, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 271 (Bernhardt et. al. eds. 1997).

defence.[12] Mere frontier incidents of incursion into another State's territory do not amount to an 'armed attack'.[13]

Here, the first incursion was only temporary, lasting only three hours, resulting in the death of only 20 Agitha rebels and no Burgundan casualties. The second incursion also was only a frontier incident bombing Agithan rebel camps. These do not have any substantial and large scale effects on the territory of Burgundan, and are mere frontier incidents which do not qualify as 'armed attack' to legitimize a counter-attack as self-defence.

#### 1.2.2 *Arguendo*, the armed attacks were not attributable to the State.

Not all acts of military officials incur state responsibility.[14] The position of a military officer is exceptional, and like other State agents, he is personally responsible for his acts and brings responsibility upon the State only when his act is *clearly authorized*.[15] If his acts are entirely contrary to the instructions received, the State incurs no responsibility.[16] The military is under a greater obligation to act under authorization because a higher standard of prudence is expected[17] and their responsibilities exceed those of other organs[18] and an unauthorized act incurs no state liability.[19]

The act of Colonel Phathone bombing the rebel camps in Burgundan was clearly unauthorized and in contravention of the instructions received. Colonel Phathone acted in insubordination,

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[12] Y. DINSTEIN, WAR, AGGRESSION AND SELF DEFENCE 181 (2001).
[13] *Nicaragua*, supra note 6, at 103; SIMMA, supra note 4, at 669.
[14] OPPENHEIM, supra note 3, at 546.
[15] Eagleton, *Responsibility of States*, 62 *as cited in* A. Freeman, *Responsibility Of Armed Forces*, 88 RECUEIL DES COURS 311 (1995).
[16] *Mosse Case*, 20 ILR 217.
[17] *Spanish Zone of Morocco Claims*, (1925) RIAA ii. 617, 645 (hereinafter "*Spanish Zone Case*").
[18] *American – Turkish Claims Settlement*, Neilsen Opinion and Report, (1923) 608.
[19] Freeman, supra note 15, at 280.

affecting the security of the State when he obliged to wait for orders from the military central command and therefore, his acts cannot be attributed to Donavale.

**1.2.3 The 'attack' was not imminent.**

Art.51 allows self-defence only when an armed attack "*has occurred*". A plain reading of the Charter provision[20] clearly highlights that there being no imminent danger of an armed attack, a State cannot act in self-defence.[21] Further, being an exception to the customary prohibition on the use of force[22], it should be given a restrictive interpretation[23] to avoid misuse of the exception in the garb of self-defence,[24] so much so that even a series of continuous attacks doesn't warrant a right to anticipatory self-defence.[25] Self-defence against attacks which have already taken place are forms of reprisals and impermissible[26], and self-defence against attacks which are yet to occur are unjustifiable unless they are imminent[27] i.e. practically unavoidable.[28]

In this case, there was sufficient time after the incursion to deliberate and take further action. Moreover, there was no proof that any attack was being planned by Donavale, especially keeping in mind the fact that Donavale had actually tried and prosecuted Colonel Phathone, who was

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[20] Article 53, The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969).
[21] M. AKEHURST, MODERN INTRODUCTION TO INTERNATIONAL LAW 312 (1990); S.C. Res. 487, 1, U.N. Doc. S/RES/487 (August 2, 1981).
[22] SIMMA, supra note 4, at 115; *Nicaragua*, supra note 6, at 101; Friendly Relations Declaration, supra note 3.
[23] AKEHURST, supra note 21; J. O'BRIEN, INTERNATIONAL LAW 683 (2001).
[24] *Id*.
[25] D. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L. L. 1, 10 (1972); S.C. Res. 568, U.N. Doc. S/RES/568 (June 21, 1985).
[26] S.C. Res. 487, 1, U.N. Doc. S/RES/487 (August 2, 1981); L.M. GOODRICH & E. HAMBRO, THE CHARTER OF THE UNITED NATIONS 346 (1949); Declaration on the occasion of the fiftieth anniversary of the United Nations, G.A. Res.50/6, (October 24, 1995); Frederic Kirgis Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L. L. 304, 307-308 (1994).
[27] SIMMA, supra note 4, at 666; OPPENHEIM, supra note 3, at 421.
[28] DINSTEIN, supra note 12, at 172.

responsible for the second incursion. Hence, Burgundan's attack in such circumstances is not be self-defence, but reprisal, impermissible by law.

**1.2.4. The counter attack was not necessary.**

The test of necessity requires that the counter-action be *instant, overwhelming*, [29] with *no viable alternative or moment for deliberation*,[30] assuming enhanced importance for anticipatory self-defence.[31]

Within two hours of the incursion, Donavale arrested the pilots responsible for the attacks, announcing their trial and punished them, thereby making its intention of not attacking very clear. It was after deliberation for a period of seven hours that Burgundan troops entered Agitha, on the Burgundan Parliament endorsing President Jawaldi's announcement[32]. Moreover, after reporting the incident to the UNSC and the UNSC resolution, Burgundan had the option of waiting for action by UN, attacking Donavale itself. The attack was, therefore, clearly not necessary.

**1.2.5. The armed intervention was not proportional.**

Self-defence actions must be limited to only that which is strictly necessary to repel or prevent the attack in question,[33] not being unreasonable or excessive but limited by necessity, [34]

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[29] SIMMA, supra note 4, at 675; *Caroline Case*, http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm
[30] OPPENHEIM, supra note 3, at 421; DINSTEIN, supra note 12, at 184.
[31] OPPENHEIM, supra note 3, at 422.
[32] *Compromis*, Page 3, Paragraph 4; Page 4, Paragraph 1.
[33] AKEHURST, supra note 21, at 317; Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ Reps. 226 (separate opinion of Judge Higgins) (hereinafter "*Nuclear Weapons*").
[34] *Caroline* case, supra note 29; AKEHURST, supra note 21, at 264.

especially so for anticipatory self-defence.[35] Anything in the nature of a reprisal, i.e. with a punitive purpose, is disproportionate.[36]

In this case, no method of defence was adopted during the attack. After the attack had ceased, the Burgundan Parliament deliberated and resolved to allow the troops of Burgundan to enter Donavalan territory and carry out attacks there. This was not an act even related to the bombing at the time of bombing, leave alone a method adopted to repel the bombing. Hence, the further measurers of attack taken by Burgundan in letting the military troops were an act of reprisal, and disproportionate.

### 1.3 Burgundan's acts cannot be justified on the basis of self-determination.

#### 1.3.1. There is no right to external self-determination.

While the right to internal self-determination is recognized as a rule of customary international law,[37] there is no right to external self-determination, read in conjunction with the principle of territorial integrity, to prevent a rule permitting secession from independent states.[38] Territorial integrity insists on the 'integrity of the territory of dependant people'[39] and against the

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[35] OPPENHEIM, supra note 3, at 422.
[36] DINSTEIN, supra note 12, at 198-199; GOODRICH & HAMBRO, supra note 26, at 346.
[37] East Timor (*Portugal* v. *Australia*), 1995 I.C.J. 90; GA Res. 421 (V), (Dec 4, 1950); The International Covenant on Civil and Political Rights, 1994, 999 U.N.T.S. 171 (hereinafter "ICCPR"); International Covenant on Economic Social and Cultural Rights, 1976, 21 UN GA OR Supp. (No. 16) at 49; UN Charter, 1945; Helsinki Act, 1975.
[38] R. Higgins, *General Course On Public International Law*, 230 RECUEIL DES COURS 1, 170 (1991); *Reference re Secession of Quebec*, 115 ILR 536, 582; T.M. FRANCK THE POWER OF LEGITIMACY AMONG NATIONS, 153 (1990); T.M.Franck, *General Course on Public International Law* 240 RECUEIL DES COURS 13, 127 (1993); Opinion No. 2, Arbitration Commission, Conference in Yugoslavia (11 January 1992) 31 (6) I.L.M. 1497 (1992).
[39] DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 15 (1991); Paragraph 4, Declaration of the Granting of Independence to Colonial Countries and Peoples, GA Res.1514 (XV), 1960 (hereinafter "Colonial Declaration").

'disruption of the national unity and territorial integrity of a country'.[40] The provision intends to only accommodate the legitimate claims of peoples by giving them a say their own matters, without destroying the institution of the government.[41]

In the instant case, Agitha is a province under the sovereign State of Donavale, which is a member of the United Nations, and therefore, Agitha does not have a right to secede, violating the territorial integrity of Donavale.

**1.3.2. There was no discrimination or mistreatment by Donavale.**

As long as a multi-ethnic State respects the collective and individual rights of their ethnic groups,[42] they should find their protection only within the State.[43] It is only if the State *consistently* violates these rights [44] and all internal self-determination attempts have failed,[45] do they have a right to secede.[46] Before 2003, there have been no attempts to any form of internal self-determination or any complains about there rights being subrogated. Moreover, the fact that the other province of Sapitu which was also given the right to 'break away' has so far not

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[40] Paragraph 6, Colonial Declaration.

[41] Report of the Secretary-General, *An Agenda For Peace: Preventive Diplomacy, Peacemaking and Peace Keeping*, UN Doc. A/47/277 – S/24111, 17th June, 1992; J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 323 (1968); A. CASSESSE, SELF DETERMINATION OF PEOPLES A LEGAL REAPPRAISAL 42, 72 (1995); Kirgis, supra note 26, at 306; Case Concerning the Frontier Dispute (*Burkina Faso/Republic of Mali*) 1986 ICJ Reps. 554, 565.

[42] D. Murswiek, *The Issue Of A Right To Secession – Reconsidered* in C. TOMUSCHAT, MODERN LAW OF SELF DETERMINATION, 38 (1993).

[43] Otto Kimminich, *A "Federal" Right of Self Determination?* in TOMUSCHAT, supra note 42, at 92.

[44] *Id*.

[45] CASSESSE, supra note 41, at 120.

[46] Preamble, Universal Declaration of Human Rights, 1948 G.A. Res. 217A (III) (1948) (hereinafter "UDHR"). *See also* C. Tomuschat, *The Right of Resistance and Human Rights* in VIOLATIONS OF HUMAN RIGHTS: POSSIBLE RIGHTS OF RECOURSE AND FORMS OF RESISTANCE, 13, 22 (UNESCO ed., 1984).

exercised its right lends credence to the same. Since all attempts at internal self-determination have not been exhausted, the right of external self-determination does not accrue.

*1.3.2.1 Genocide has not been committed against the Agithans.*

The 'finding' of the Investigation Panel Report was not unanimous; the UN appointed member dissented from the view that genocide has been committed while, two members of the Commission were undecided on the issue. The ingredients of genocide are *actus reus*, that is, the killing of members of a group *protected under the Statute*; and the *mens rea*, that is, the intent to destroy, wholly or in part, the group as such. In the instant case, neither the *actus reus* nor the *mens rea* has been satisfied.

A. The ICC Statute seeks to protect all national, ethnical, racial and religious groups. For a particular group to come within the Statute, it is not sufficient that it should *objectively* come under one of the four broad heads that have been enumerated; it is essential that *subjectively*, the perpetrators should also view it as such.[47] It is submitted that the Elava Natu viewed the Agithans only as a different *political* entity and not as a separate ethnic, racial or religious group. He was against the secession of Agitha as a separate nation and bore no grudge against their race, ethnicity or culture. Therefore, the subjective component of determining whether or not the Agithans were protected under the ICC Statute has not been satisfied. The *actus reus* of Genocide, therefore, has not occurred.

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[47] WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 110 (2000); *Prosecutor* v. *Seromba*, Case No. ICTR-2001-66-1 (ICTR Trial Chamber, 13 December 2006); *Prosecutor* v. *Semanza*, Case No. ICTR-97-20-T (ICTR Trial Chamber, 15 May 2003); *Prosecutor* v. *Musema*, Case No. ICTR-96-13-A (ICTR Trial Chamber I, 27 January 2000); *Prosecutor* v. *Jelisic*, Case No. IT-95-10-T (ICTY Trial Chamber, 14 December 1999) ("Jelisic").

B. The word "*as such*" implies an intention to destroy the group as a separate and distinct identity, and *not merely some individuals because of their membership in a particular group.*[48] The action taken must be the means to ultimately obliterate the entire *group*[49] or at least a substantial part.[50] Elava Natu didn't direct his attacks towards destroying the distinct identity of the Agithans on the basis of their culture, ethnicity or race. The destruction of 1/20$^{th}$ of the population was in the course of the civil war between both the political entities. The number of casualties do not imply an intention of systematic effort of eradication of all Agithans as members of the racially, ethnically and religiously different members of the group. Hence, there was no *mens rea* for genocide.

**1.3.3. The referendum in favour of secession was not the expression of the will of the peoples.**

The exercise of the right of self-determination must be made directly by the *overwhelming majority* of the people concerned,[51] by means of a referendum or a plebiscite and not by any indirect mechanism[52]; and the circumstances should be such so as to give the people the right to

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[48] Jelisic, *Id*; ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (hereinafter "ILC Articles").

[49] *Prosecutor* v. *Slobodan Milosevic*, Case No. IT-02-54-T (ICTY Trial Chamber, 16 June 2004); *See also* Report of the International Law Commission on the Work of its Forty Eighth Session, 6 May – 26 July 1996, U.N. Doc/A/51/10.

[50] SCHABAS, supra note 47; *Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T (ICTR Trial Chamber I, 2 September 1998); *Prosecutor* v. *Nicolic*, Case No. IT-94-2A, (ICTY Appeals Chamber, 4 February 2005).

[51] T. J. Farer, *Foreign Intervention in Civil Armed Conflict*, 142 RECUEIL DES COURS 345 (1974); Friendly Relations Declaration, supra note 3.

[52] *East Timor*, supra note 37; Principle VII, Principles which should guide Members in determining whether or not an obligation exists to transmit information called for under A. 733e of the Charter, G.A. Res.1541 (XV) (15 December, 1960).

*freely* and *genuinely* express their will. [53] The area concerned is provisionally placed under the administration of an international commission or the UN, under whose auspices the voting takes place.[54]

In the instant case, the referendum was conducted solely by Donavale, without external supervision. Also, the manipulation of the votes discounts the credence of the poll results. The proposal to secede was passed by only 75% of those voting. This is not an overwhelming majority for the purposes of determining the legal status of the province of Agitha, because not all the people of Agitha voted, and of those voting in the referendum, one-fourth of the population still voted in favor of staying with Donavale. Therefore, the referendum results don't reflect a free and genuine expression of the will of all Agithans.

**1.3.4 *Arguendo*, Burgundan exceeded its legitimate authority in extending support to Agitha for self-determination.**

The UN Charter imposes a duty to refrain from intervention[55], in another State's internal matters.[56] Although every State has a duty to promote the realization of the principles of self-determination of peoples,[57] this is limited to providing economic, political and logistic support along arms and ammunitions,[58] and doesn't include sending armed troops[59] or any forcible

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[53] *Id*.
[54] VERZIJL, supra note 41, at 326; *East Timor*, supra note 37; *International Court of Justice Advisory Opinion in Western Sahara Case*, ICJ Reps. 50 (1975); CASSESSE, supra note 41, at 76.
[55] Article 2 (4), UN Charter, 1945; Article 1, Friendly Relations Declaration, supra note 3; E. McWhinney, *Self Determination of Peoples* 294 RECUEIL DES COURS 321 (2002).
[56] Article 2 (7), UN Charter; Article 8, Convention on Rights and Duties of States (Montvideo Convention) 1933; Article 1, Friendly Relations Declaration, supra note 3.
[57] Article 1, Paragraph 28, Friendly Relations Declaration, supra note 3.
[58] CASSESSE, supra note 41, at 184.
[59] *Nicaragua*, supra note 6, at 351; T.M. Franck & N.S. Rodley, *After Bangladesh: the Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L. L 1, 275 (1973).

action.[60] The territory of a State is inviolable and may not be the object of military occupation imposed by another State directly or indirectly.[61]

While providing moral and material assistance is allowed, the entry of its armed forces by Burgundan exceeds permissible interference. Also, the creation of the State of Agitha from Donavale is a matter to be determined domestically, without any external interference from Burgundan. Therefore, under the garb of extending support to the peoples of Agitha, Burgundan was violating the territorial integrity of Donavale, and principles of non-intervention.

### 1.4. Burgundan's acts incur state responsibility and therefore, it is under an obligation to make reparation.

An act of the State which constitutes a breach of an international obligation or duty is an internationally wrongful act[62] giving rise to State responsibility.[63] The illegal invasion by Burgundan military troops incurs State responsibility, since their acts are endorsed by the Parliament and President of Burgundan.[64]

The duty to pay pecuniary reparation, in the form of compensation for financially assessable damage[65], is a normal consequence and obligation for breach of responsibility.[66] Quantifying the

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[60] Article 1, Para 31, Friendly Relations Declaration, supra note 3.; E. McWhinney, supra note 55.

[61] Article 11, Montevideo Convention on the Rights and Duties of States, 1934; Article 1, Paragraph 11, Friendly Relations Declaration, supra note 3; R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 8-9 (1963).

[62] Article 2 (a), ILC Articles, supra note 48.; *Spanish Zone Case*, supra note 17.

[63] Article 2 (b), ILC Articles, supra note 48; OPPENHEIM, supra note 3, at 501; I. BROWNLIE, SYSTEM OF THE LAW OF NATIONS STATE RESPONSIBILITY 23 (2001).

[64] *Prosecutor* v. *Dusko Tadic,* Case No. IT-94-1-A, 1999 (ICTY Appeals Chamber); Article 4, ILC Articles, supra note 48; *Claire* Claims, (1929) RIAA v., 516 at 530.

[65] Article 36, ILC Articles, supra note 48.

[66] BROWNLIE, supra note 2, at 466; OPPENHEIM, supra note 3, at 529.

damages is in relation to the deaths, personal injuries and damage to property occasioned by the incursion.[67]

The incursion of Burgundan troops resulted in the capital of Agitha falling, and dismemberment of Donavale. This has led to a yeoman loss of property and to the economy of Donavale, and reparation is quantified at $1000million.

## 2. THE TRIAL OF MS. TAVILISI WAS NOT IN VIOLATION OF PRINCIPLES OF INTERNATIONAL LAW.

### 2.1. The transfer of Ms. Tavilisi was in legitimate exercise of jurisdiction.

State practice indicates that in trying a person criminally, courts cannot inquire into the means or circumstances by which the accused was brought within the jurisdiction of the receiving state, and forcible abduction is no sufficient reason for the wrongdoer not to answer when brought within the jurisdiction of the court which has the right to try him for an offence.[68] Proceedings are not barred where the custody has been obtained by abduction[69] because the guilt of the accused is in no way affected by the means by which he was brought into the jurisdiction.[70] Donavale has jurisdiction to try Ms. Tavilisi on the grounds of protective principle. Therefore, it

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[67] UN SC Res. 189 (1964); UN SC Res. 290 (1970); UN SC Res.387 (1976); UN SC Res.455 (1979); UN SC Res. 487 (1981); *Chorzow Factory* Case (Germany v Poland) (Merits) PCIJ Ser, A (1928) No. 17, at 47.

[68] *Ker* v. *Illinois* (1886) 119 US 436; *Emperor* v. *Vinayak Damodar Savarkar*, (1910) ILR 35 Bom. 225, at 228; *R.* v. *Plymouth Magistrates' Court, ex parte Driver*, [1985] 2 All ER 681.

[69] *Sinclair* v. *HM Advocate* (1890) 17 R.(J.) 38; *R*. v. *Officer Commanding Depot Battalion, RASC Colchester, ex parte Elliott* [1949] 1 All E.R. 138 as cited in C. Warbrick, *Judicial Jurisdiction and Abuse Of Process* 49 INT'L & COMP. L.Q. 489 (2000); *State* v. *Ross & Mann*, 21 IA 467 (1866); *In Re, Miles*, 52 Vt. 609 (1880) as cited in T.H. Sponsler, *International Kidnapping*, 5 INT'L L. 27, 30 (1971).

[70] *R*. v. *Marks*, 102 ER 557; *Ex parte Krans*, 107 ER 96 as cited in Paul O'Higgins, *Unlawful Seizure and Irregular Extradition* 36 BRIT. Y.B. INT'L L 282 (1960).

has a legitimate ground for acquiring her presence in their territory and this is not in violation of any principles of international law but a proper exercise of its jurisdiction.

**2.2 It is not in violation of Burgundan sovereignty.**

The transfer of Ms. Tavilisi is in valid exercise of Donavale's legitimate jurisdiction. Any assertion of criminal jurisdiction in relation to conduct of aliens *in* a foreign State may be infringing the sovereign rights of *that* foreign State, violating the principles of non intervention and the sovereign equality of *that* State[71] and it is only that State whose sovereignty has been violated by an unlawful arrest is entitled to demand the return of the person arrested.[72]

The arrest took place in Foudalin. Donavalan agents have not entered the territory of Burgundan and therefore, incur no state responsibility towards Burgundan.

**2.3 The trial of Ms Tavilisi by Donavale meets international minimum standards of justice.**

**2.3.1 Ms. Tavilisi has not been arbitrarily detained.**

Detention is arbitrary if, first, it is clearly impossible to invoke any legal basis justifying the deprivation of liberty and, secondly, when there is grave total or partial non-observance of the procedural safeguards relating to the right to a fair trial.[73] Detention on reasonable grounds for national security reasons does not amount to arbitrary detention.[74]

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[71] OPPENHEIM, supra note 3.
[72] Paul O'Higgins, supra note 70, at 319.
[73] Fact Sheet No. 26, UN Working Group on Arbitrary Detention, available at www.unhchr.ch/html/menu6/2/fs26.htm.
[74] *Ahani* v. *Canada*, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002 (2004).

Donavale had the jurisdiction to try her as per the protective principle[75], for the violation of Donavalan criminal law. Hence, there was legal basis for detaining her. Further, the crime that Ms. Tavilisi committed was publishing material which was disrespectful to Mr. Elava Natu, the head of State of Donavale, and incited Donavalan citizens to rise against him. This act amounts to threatening the peace and security of Donavale, and hence, there was sufficient justification for Ms. Tavilisi's detention.

**2.3.2 There has been no violation of Ms. Tavilisi's right to fair trial.**

The right to fair trial, a requirement of the minimum standards for justice under international law[76] has been granted to Ms. Tavilisi during her trial. She was promptly tried within a week of being brought to Donavale.[77]She was permitted representation by a lawyer, by the Donavalan courts[78]. It cannot be alleged that the trial was by a partial body, because she was tried by the *judiciary*, which has been held to be an impartial, unbiased body[79], and not by any executive or ad hoc body created by the government of Donavale. She was tried in the presence of female judges both at the trial and appeal. The fairness of the process is particularly reflected in that, despite the grave nature of the offence of causing disrespect to the Head of State, and inciting

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[75] M. Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L 145, 148 (1972-1973).
[76] Art.14, ICCPR, supra note 37; Art.10 and 11, UDHR, supra note 46; Art.6, European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222; Art. XVIII and XXVI ,American Declaration of the Rights and Duties of Man, Organisation of American States, 9th International Conference of American States, Res. XXX, OEA/Ser.L.V/II.82 Doc.6 Rev.1 (1992); Art.8 Inter-American Convention on Human Rights, 1144 U.N.T.S. 123; Art.7 and 26, African Charter on Human and Peoples' Rights, (1982) 21 I.L.M. 58.
[77] *Compromis*, page 4, Paragraph 4.
[78] *Compromis*, page 4, Paragraph 4.
[79] *Attorney-General of the Government of Israel* v. *Eichmann* 36 ILR (1961) 5.

citizens against him, she was given a lenient punishment by the trial court, which was alleviated by the Supreme Court on humanitarian grounds.[80]

## 3. FOUDALIN IS IN BREACH OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961 (HEREINAFTER "VCDR").

### 3.1 Foudalin is in breach of the VCDR.

The VCDR[81] requires that the person and premises of diplomatic agents be inviolable, and that the receiving state take 'all appropriate steps' to ensure the same.[82] Inviolability is an obligation of a receiving state owed under the VCDR and under general international law[83]. Inviolability of a diplomatic mission levies a positive duty of protection, which entails a higher degree of protection by the receiving state than is given to its own citizens or other foreign nationals.[84] No measure of constraint or attack can be employed against the person or liberty of a diplomatic agent by authorities or citizens, whether private individuals or groups, of the receiving state.[85] Foudalin did not fulfill its obligations of giving adequate protection to the Donavale Embassy in

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[80] *Compromis,* page 5, Paragraph 1.
[81] VCDR, 500 UNTS 95.
[82] Art.22 and Art.29, *Id.*
[83] Case Concerning United States Diplomatic and Consular Staff in Tehran (*USA* v. *Iran*) (1980) 19 I.L.M. 553 (hereinafter "Hostages case"); *Embassy Eviction* Case, 65 I.L.R. 248; Eileen Young, *The Development of the Law of Diplomatic Relations*, 40 BRIT. Y.B. INT'L L 141 (1964); 'Diplomatic Intercourse and Immunities', Document A/CN.4/98, ILC Yearbook, at 129.
[84] A.B. Lyons, *Personal Immunities of Diplomatic Agents*, 31 BRIT. Y.B. INT'L L 299 (1954); SATOW, GUIDE TO DIPLOMATIC PRACTICE 312, 317 (Ritchie ed., 1932); PARRY, BRITISH DIGEST OF INTERNATIONAL LAW 700 (1956); HURST, INTERNATIONAL LAW: COLLECTED PAPERS 178 (1950).
[85] 'Diplomatic Intercourse and Immunities' supra note 83, at 129; Stanislaw E. Nahlik, *Development of Diplomatic Law: Selected Problems*, 222 RECUEIL DES COURS 191 (1990).

Foudalin, consequent to which there has been a violation of 'inviolability' of the diplomatic agents and premises of the Embassy.

### 3.1.1 Foudalin has acted in breach of Art.22.

The receiving state is under a *special duty* to take *all appropriate steps* to protect a mission's property and premises from any unauthorized entries, intrusion or damage.[86] In this case, a crowd of three hundred Foudalin nationals entered the premises of the Donovolan Embassy, and destroyed property on the premises[87], breaching the 'inviolability' of the premises. Foudalin did not provide for adequate protection for the premises. The police guards who were supposedly protecting the premises were unable to even keep the attacking mob out of the Embassy. This is in clear violation of the provisions of Art.22 of the VCDR.

### 3.1.2 Foudalin has acted in breach of Art.29.

As per Art.29, the person of a diplomatic agent is inviolable, and the receiving state is under an obligation to take *all appropriate steps* to prevent any attack on his person, including members of the staff.[88] During the attack on the Donavalan Embassy in Foudalin, a Donavalan Embassy staff-member was injured with cuts and bruises in his and head and arms[89]. Further, the Third Secretary of the Donavalan Embassy was injured in his thigh by a gunshot fired by a member of the Foudalin police force[90]. It is submitted that the Foudalin government has rather obviously failed in affording the required protection to the Donavalan Embassy. The injury caused to the

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[86] Art.22(1), Art.22(2), VCDR, supra note 81.
[87] *Compromis*, Pg. 5, Paragraph 3.
[88] Art.1(b) r/w Art.1(e) of VCDR,supra note 81.
[89] *Compromis*, Pg. 5, Paragraph 3.
[90] *Compromis*, Pg. 5, Paragraph 3.

Third Secretary by a member of Foudalin's very own police force not only proves total lack of protection afforded, but is also evidence of the violation of VCDR provisions by a state agent of Foudalin itself.

## 3.2. State responsibility has been incurred by Foudalin.

### 3.2.1 Premises and Person of Diplomatic agents have been hurt on Foudalin territory, by Foudalin nationals.

'Inviolability' includes the duty of the receiving state to protect a foreign diplomat against any attack on his person, his property, also his dignity, perpetrated not only by a state organ or agent, but also by a private individual or group.[91] When a diplomatic or consular agent is involved, a higher standard of conduct by the state is required, and the exceptions to State responsibility, which may be applicable in case of an attack by a mob or insurgents, cannot be invoked[92].

Foudalin cannot avoid state responsibility by claiming that the attack perpetrated on the Donavalan Embassy was not by the state or its agents. It is sufficient that the attack was perpetrated by Foudalin nationals, on Foudalin territory, and the State did not do everything it could to prevent it, thereby failing to discharge the additional burden that is required under the VCDR.

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[91] Nahlik, supra note 85, at 191.

[92] BROWNLIE, supra note 63, at 179; 'Diplomatic Intercourse and Immunities', supra note 83; A.B. Lyons, 'Personal Immunities of Diplomatic Agents', BRIT. Y.B. INT'L L XXXI (1954), at 299; SATOW, supra note 84, at 312-317; PARRY, supra note 84, at 700; HURST, supra note 84, at 178; MICHAEL HARDY, MODERN DIPLOMATIC LAW 48 (1968).

### 3.2.2 Due diligence not exercised by Foudalin.

For the protection of diplomatic agents and premises, every appropriate care must be shown, and every necessary measure be taken[93], in providing police protection for personnel and premises.[94] The question, when attributing liability, is whether the government of the receiving State, even if not directly responsible, has done everything it could either to prevent, or to repress, the action concerned[95]. In case of violence by a group or mob of nationals, the burden of proving the existence of due diligence lies of the defendant state.[96]

Due diligence can be exercised either by providing, in penal law of the receiving country, severe punishment for any infringement of the diplomat's safety, or by ensuring proper police protection[97]. Foudalin has failed the test of due diligence prescribed to avoid attribution of state responsibility. There have been no legal proceedings against the Foudalin nationals who perpetrated the attack, nor are there any stringent penal provisions in place to punish such acts.

Additionally, extra vigilance needs to be exercised by the receiving state as to missions representing regimes which are unpopular, for any reason whatever, in the receiving country.[98] Due to the tension and antipathy between Foudalin and Donavale over the kidnap of Ms. Tavilisi, Foudalin ought to have exercised greater diligence.

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[93] A.B. Lyons, supra note 84; SATOW, supra note 84,312-317.

[94] Hostages case, supra note 83; OPPENHEIM, supra note 3, at 1072-1074.

[95] Nahlik, supra note 85, at 319; *T. H. Youmans* v. *United Mexican States*, (1926) RIAA iv. 110, 116 (hereinafter "Youmans Claim"); *Massey Claim*, RIAA (1927) iv. 82, 155.

[96] Harvard Research, *Responsibility of States*, 26 AM. J. INT'L. L SUPPL 194 (1932); BRIGGS, LAW OF NATIONS 720 (2nd ed., 1952); Accioly, *Principes Généraux de la Responsabilité D'Après la Doctrine et La Jurisprudence,* 96 RECUEIL DES COURS 402 (1959, i) (Trans.); BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 233 (1915), as cited in BROWNLIE, supra note 63, at 172.

[97] HARDY, supra note 92, at 41; *US* v. *Ortega*, (1826) 11 Wheaton, 467; UN Legislative Series: Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities, UN Publication No. ST/LEG/SER.B/7.

[98] Nahlik, supra note 85, at 323.

### 3.2.3 Injury to Third Secretary caused by Foudalin police officer, i.e. agent of State.

A gun shot fired by a Foudalin police officer injured the Third Secretary of the Donavalan Embassy.[99] This is in blatant violation of Art.29 of the VCDR, since a direct attack has been made on the person of a diplomatic agent, causing him injury. Even accidental or negligent acts of State agents,[100] done within their ostensible authority, is attributable to the state[101] and therefore, the acts of the police officer incur state responsibility. In this case, the police officer was acting well within the scope of his authority, at least apparent.

Further, the defence that the State is not responsible for the acts of minor officials, such as police guards, does not hold good as per substantial authority in international law.[102] It is irrelevant as to what the position of the offending officer was in the hierarchy of the government system of Foudalin; state responsibility on the part of Foudalin is incurred regardless.

## 4. THE NATIONALIZATION OF UNICOM TELEPHONE INDUSTRY (HEREINAFTER "UNICOM") AND PROVISION FOR COMPENSATION IS NOT IN VIOLATION OF THE AGREEMENT BETWEEN THE GOVERNMENT OF DONAVALE AND SOCILIO (HEREINAFTER "THE AGREEMENT"), AND CONTEMPORARY PRINCIPLES OF INTERNATIONAL INVESTMENT LAW.

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[99] *Compromis*, Pg. 5, Paragraph 3.

[100] *Garcia and Garza* case (Opinion of the Commissioner, 1927), as cited in Freeman, supra note 15, at 285; *Union Bridge Company* Case, (1924) RIAA vi. 138; BROWNLIE, supra note 63, at 145-146.

[101] *Caire Claim,* (1929) RIAA v. *516; Youman's Claim,* supra note 95; *Peers* Case (Moore's Digest, Vol. 2); *Garcia and Garza* case *id.*, at 285; A.11, ILC Articles, supra note 48.

[102] Professor Ago, *Third Report of ILC* 249-253 (1971 ii); EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 49 (1928); BROWNLIE, supra note 63, at 135.

**4.1 The nationalization of Unicom is not in violation of the Agreement.**

The Agreement states that Unicom, which is owned by Socilio, a Foudalin company, will not be undertaken, except under 'special circumstances'.[103] It is for the State which is party to an agreement for foreign investment to decide what circumstances make it necessary for the state to nationalize property.[104] The attack on the Embassy of Donavale in Foudalin necessitated that the Donavale government proceed with caution with respect to Foudalin and its activities relating to Donavale. For its security, Donavale has to ensure that no element which can bring threat to its territory and nationals be present in Donavale. Therefore, the attack on the Embassy is within the legitimate purview of 'special circumstances' envisaged by the agreement, and the nationalization of Unicom was undertaken only after 'special circumstances' of the nature contemplated by the Agreement arose.

**4.2 *Arguendo*, breach of the Agreement does not make the nationalization itself illegal.**

In case of State contracts, i.e. a contract between a State and a private foreign party, a mere breach of the contract does not incur state responsibility on the part of the State concerned[105] because the principle of *pacta sunt servanda* does not prevail over the sovereign power of a State

[103] *Compromis,* Page 5, Paragraph 3.
[104] *Schufeldt* Claim (1930) 2 UNRIAA 1079, 1095; *Oscar Chinn Case* (1934) PCIJ Series A/B No.63, at 70; Brownlie, supra note 2 at 547; *James* v. *UK*, (1986) 8 EHRR 123; T.M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 467 (1995).
[105] Mann, *State Contracts and State Responsibility* 54 AM. J. INT'L. L 572-591 (1960)`; Amerasinghe, *State Breaches of Contracts with Aliens and International law* 58 AM. J. INT'L. L 881-913 (1964); Bishop, 115 RECUEIL DES COURS 399-400; Fitzmaurice, *Hersch Lauterpacht: the Scholar as Judge* 37 BRIT. Y.B. INT'L L 64, 65 (1961); Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach* 59 BRIT. Y.B. INT'L L 49-74 (1988); OPPENHEIM, supra note 3, at 927-9; Schachter, *International Law in Theory and Practice* 178 RECUEIL DES COURS (1982 v.) 309-12; EAGLETON, supra note 15, at 157-68.

to nationalize, and a stabilization clause cannot restraint its sovereignty.[106] Hence, even if there has been a breach of the Agreement, it is not open to Foudalin to claim State responsibility of Donavale, and that the nationalization of Unicom illegal *per se.*

## 4.3 The nationalization is not in violation of contemporary principles of international investment law.

It is not settled customary international law that the taking of an alien's property is unlawful if the State does not give compensation for the same, or the taking is in violation of a treaty, or the taking is not for a public purpose, is discriminatory and arbitrary.[107]

### 4.3.1 The nationalization does not need to be for a public purpose.

The requirement of a nationalization being for public purpose, in order to make an expropriation lawful is not a part of contemporary international law[108]. No case before any tribunal till date has ruled an expropriation to be illegal for the sole reason that it was not for public purpose, and the arbitral awards which are used generally to support the requirement of public purpose are equivocal as to this requirement.[109] In fact, this requirement has been questioned altogether.[110]

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[106] *Kuwait* v. *American Independent Oil Co*. (1982) 21 ILM 976.

[107] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 328-331 (2004).

[108] *LIAMCO v. Libya*, 62 ILR 141, (1981) (hereinafter "*Liamco*"); 194; *Schufeldt* Claim, supra note 104; *Oscar Chinn Case,* supra note 104; FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 142 (1953); AMERASINGHE, STATE RESPONSIBILITY FOR INJURY TO ALIENS 138 (1967).

[109] *Walter Fletcher Smith* Case (1930) AJIL 384; *David Goldberg* Case (1930) 2 UNRIAA 901; *Sabbatino* v. *Banco Nacional de Cuba*, 193 F Supp. 375, 384 (1961); Also see, R. DOLZER AND C. SHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 91(2008); Samuel K.B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L COMP L QUART 588 (1988); John H. Herz, *Expropriation of Foreign Property*, 35 AM. J. INT'L. L 243, 253 (1941) 243, at 253.

[110] *Schufeldt* Claim, supra note 104; *Oscar Chinn Case*, supra note 104; FRIEDMAN, supra note 108, at 142; AMERASINGHE, supra note 105*,* at 138.

The imposition of a limitation on such vague grounds would interfere with the sovereign powers of a State.[111] Hence, it is immaterial whether the nationalization of Unicom is for public purpose or not.

#### 4.3.2 *Arguendo*, there exists such a requirement, the nationalization of Unicom satisfied it.

The burden to prove that the public purpose requirement has not been satisfied is on the defendant.[112] Additionally, expropriation is challengeable only if it was motivated by factors other than a concern for the internal well-being of the state.[113] Only a State can gauge what acts will be in furtherance of its public purpose, and not any external tribunal or other State.[114]

Pursuant to the attack on the Donavalan Embassy in Foudalin, it is submitted that, by any standards, Donavale is justified in undertaking the act of nationalizing Unicom, which is owned by a Foudalin company, in order to secure its safety.

#### 4.3.3 The nationalization is non-discriminatory.

A State can discriminate against aliens in certain situations, as long as such acts are not arbitrary, so as to shock the conscience of any judiciary, [115] and are rationally related to the State's

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[111] SORNAHRAJAH, supra note 107, at 183.
[112] *Liamco* case, supra note 108; SORNAHRAJAH, supra note 107, 395.
[113] *Restatement of Foreign Relations Law,* (1974) 13 I.L.M. 767; *James* v. *United Kingdom,* supra note 104; *BP Award*, (1977) 53 I.L.R. 296, 317.
[114] *Schufeldt* Claim supra note 104; *Oscar Chinn Case*, supra note 104; BROWNLIE, supra note 2, at 547; *James* v. *UK*, supra note 104; FRANCK, supra note 104, at 467; STOWELL, INTERNATIONAL LAW, 172 (1931); Cutler, *The Treatment of Foreigners* 27 AM. J. INT'L. L 239 (1933).
[115] *Amoco International Finance Corporation. v. Islamic Republic Of Iran*, 15 *Iran-U.S.C.T.R.* 189 (1987); *S. D. Myers Inc.* v. *Canada,* 121 ILR 7 (2002).

security or economic policies or other such justifiable reasoning[116]. For a violation of the National Treatment Standard, expropriation must be based *solely* on the nationality of the investor.[117] A state is not liable as long the discrimination was unintentional, and was connected with a *legitimate interest* of the offending state.[118] Even the fact that an expropriation law affects only one foreign enterprise does not make it discriminatory.[119]

The nationalization of Unicom was not undertaken solely with the intention of adversely affecting an alien alone, but in light of the recent attack on the Donavalan Embassy by Foudalin nationals. It would not be prudent for any State to harbour a foreign company, belonging to a State where its very own embassy was attacked. Hence, the nationalization was for good reasons, and was not discriminatory.

#### 4.3.4 *Arguendo*, the Doctrine of Necessity precludes the finding of illegality of the expropriation.

A state of necessity may justify the non-compliance with a party's obligation under international law.[120] This court has previously upheld that the conditions of grave public necessity and of

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[116] S. 712(c) of 1987 US Restatement of Foreign Relations Law, supra note 113; FRANCK, supra note 104, at 471; M. SORNARAJAH, *THE PURSUIT OF NATIONALIZED PROPERTY* 187 (1986); Asante, supra note 109, at 616-7.

[117] A. Maniruzzman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. TRANSNAT'L L. & POL'Y 57 (1998); R. Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L. L 553 (1981) ; *Oscar Chinn* case, supra note 104; R. Levin & S. Marin, *N.A.F.T.A. Chapter 11: Investment and Investment Disputes* L & BUS. REV. AM. (1996) 82, 83-90; *Marvin Feldman* v. *Mexico*, 42 I.L.M. 625 (2003).

[118] OECD Declaration of June 21, 1976, 5 I.L.M. 968; *Gami Investments, Inc*. v. *The Government of the United Mexican States*, (2005) 44 I.L.M. 545, 564.

[119] *American Independent Oil Company (Aminoil)* v. *Kuwait,* (1982), ILR 66, 584-586; Case Concerning Elettronica Sicula S.P.A. (ELSI) (*United States of America* v. *Italy*), 1989 I.C.J. 15 (hereinafter "ELSI Case").

[120] Gabcïkovo-Nagymaros Project, (*Hungary* v. *Slovakia*), (1993) 37 I.L.M. 162.

unforeseen urgency warranting adoption of the order of requisition would allow for a departure from obligations under International Law.[121]

The Doctrine of Necessity can be invoked in this case. Since the Donavalan Embassy was attacked in the territory of Foudalin by a crowd of 300 Foudalin nationals[122], it is clear that there is an imminent and grave threat from the nationals of Foudalin to the safety and security of Donavale, and it is absolutely necessary to nationalize Unicom.

## 4.4 The provision for payment of compensation according to domestic law is not in breach of the Agreement, or of principles of international investment law.

### 4.4.1 The provision for payment of compensation is not in breach of the Agreement.

#### *4.4.1.1 'Law' means domestic law.*

Nothing in the Agreement mandates that the compensation will be governed by laws other than those in force in Donavale. It merely mentions that compensation will be paid in accordance with 'law'. Given that the company Unicom was in Donavalan territory, and that the agreement was between the company and the State of Donavale, the natural and obvious meaning, and in fact, the intended meaning, that should be afforded to the term 'law' is the domestic law of Donavale. An alien submits himself to the local jurisdiction of a foreign state when he chooses to reside or conduct business there, or engage in transactions agreed to be governed by local law[123].

[121] ELSI Case, supra note 119.
[122] *Compromis,* Paragraph 3, Page 5.
[123] F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS (1964).

*4.4.1.3 Public international law cannot govern State contracts.*

The applicability of public international law cannot be determined by contract alone, and simply including the term in a contract does not make it the governing law, for international law applies only to contracts between states[124]. State contracts are ordinarily governed by the domestic law of the State involved[125]; there is no body of international law applicable to the subject of State contract in foreign investment transactions[126]. Hence, payment of compensation in accordance with Donavalan law is not in contravention of the Agreement.

**4.4.2 The provision for payment of compensation is not in violation of international investment law.**

There is no customary law to the effect that external principles of international law have to be considered while paying compensation. The Charter of Economic Rights and Duties of States[127] provides that only domestic law needs to be taken into account while awarding compensation for expropriation of property. Varying standards used, to award compensation, evidence that there are no fixed principles of international law governing payment of compensation on expropriation[128]. Thus, it unclear even as to what Foudalin wishes be applied while computing

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[124] 'Economic Development and International Law', Report of the 2nd Inter-American Conference on Democracy and Freedom, (1961), at 180.

[125] *Serbian Loans* Case, (1929) PCIJ Series A, No. 20; *Kahler* v. *Midland Bank*, [1950] AC 24, 56.

[126] SORNARAJAH, supra note 107, at 421.

[127] 14 ILM 251 (1975).

[128] *INA Corporation* v. *Iran*, (1985) 8 Iran-US CTR, 373; *Sedco Inc*. v. *NIOC*, (1986) 10 Iran-US CTR 181; *Tams* v. *Tams-AFFA*, (1984) 6 Iran-US CTR, 219; Case Concerning the Barcelona Traction, Light and Power Company, Limited (*Belgium* v. *Spain*), 1970 I.C.J. 3 (Feb. 5, 1970); SORNARAJAH, supra note 107, at 440; *Banco Nacional de Cuba* v. *Chase Manhatan Bank*, 658 F 2d 875 (1981); Tim Gebert, The Principle for Just Compensation for International Takings 4 J. Int'l L. & Prac. 389 (1995); G. Gantz, The Marcona Settlement,1975 71 AM. J. INT'L. L 474 (1971).

the amount of compensation payable by Donavale, when it requires international standards to be applied, for no such fixed standards exist.

## CONCLUSION

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

1) The attack on and continued occupation by Burgundan constitutes a violation of the norms of contemporary international law, not justifiable as self-defence or self determination, and Burgundan is liable to pay a compensation $1000million or any suitable amount which this Hon'ble Court may deem fit;

2) The transfer of Ms Tavilisi was a legitimate exercise of jurisdiction, and that the trial of Ms Tavilisi meets international minimum standards of justice;

3) Foudalin is in breach of its obligations under the Vienna Convention on Diplomatic Relations, 1961, and State responsibility is incurred by Foudalin;

(2) The nationalization of Unicom and compensation given in accordance with Donavale domestic law is in accordance with the agreement and contemporary international law principles.