INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE 2011 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

THE CASE CONCERNING THE ZETIAN PROVINCES

THE STATE OF ARDENIA
(APPLICANT)

v.

THE STATE OF RIGALIA
(RESPONDENT)

MEMORIAL FOR APPLICANT

2011

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STATEMENT OF JURISDICTION

The State of Ardenia ("**Ardenia**") and the State of Rigalia ("**Rigalia**") have agreed to submit by Special Agreement their differences concerning the Zetian Provinces, and transmitted a copy thereof to the Registrar of the International Court of Justice ("**I.C.J.**") in accordance with Article 40(1) of the Statute of the I.C.J ("**Statute**"). Therefore, Ardenia and Rigalia have accepted the jurisdiction of the I.C.J. pursuant to Article 36(1) of the Statute.

QUESTIONS PRESENTED

I.

Whether Rigalia's Predator Drone strikes in Rigalia and in Ardenia violate International Law and that the Court should order their immediate cessation;

II.

Whether the attack on the Bakchar Valley hospital is attributable to Rigalia, Rigalia has an obligation to investigate the attack and to compensate Ardenia therefore and, the attack was a disproportionate and unlawful act of aggression against the people of Ardenia;

III.

Whether Rigalia's ban of the Mavazi for Zetian women and girls violates their rights under international law; and

IV.

Whether Ardenia violated the OECD Anti-Bribery Convention or the OECD Decision on MNE Guidelines.

STATEMENT OF FACTS

BONDED NEIGHBORS

Rigalia and Ardenia are neighboring States. Rigalia is comprised of 65% ethnic Rigalians and 35% ethnic Zetians, the latter making up nearly 100% of its northern region's ("**Northern Provinces**") inhabitants. Ardenia is a less populous but more developed, with the exception of the Southern Provinces, which are mostly inhabited by ethnic Zetians. Pursuant to a 1924 agreement between Rigalia and Ardenia, ethnic Zetians have been and continue to be considered citizens of both States.

THE MINING INDUSTRY

In 1994, Leo Bikra ("**Bikra**"), as President of the State-owned Rigalian Refining Inc. ("**RRI**") issued a call for tender for a five-year exploration and development contract for the Moria Mine, on behalf of RRI. After following a proper and lengthy bidding procedure, of three years, the contract was awarded to Mineral Dynamics Inc. ("**MDI**"), an Ardenian Corporation.

In 2002, the contract was renewed for an additional 10 years. Media reports alleged that the deal was secured through MDI's offer of support to a charity, the Zetian Refugees Fund ("**ZRF**") and through payments of money and MDI shares to Clyde Zangara, ZRF's founder and Bikra's nephew. Allegations were also made that MDI transporters paid mandatory undocumented fees to ensure the protection of the extraction site and the smooth delivery of the product to RRI's plant.

RIGALIA'S LACK OF CONTROL

Over the years, Rigalia had failed to establish control in the Northern Provinces, which are largely governed by ethnic Zetian tribal councils, despite its centralized government. Nor has it exerted any effort to control the Zetian tribal areas as tribal council rules which have 100% effect in the Northern Provinces are not recognized by the State as legally binding.

THE ZDP

Representing more than 75% of the Zetians in Rigalia, the Zetian Democratic Party ("**ZDP**") was formed to unite the five provinces traditionally inhabited by Zetians. In furtherance of its plight, the ZDP engaged in numerous political demonstrations, which Ardenian Zetians have not participated in.

INCITING ANGER

Consequently, the tribal councils in the Northern Provinces held their first regional Joint Tribal Council on 3–5 May 2008. As a result, a Manifesto was issued demanding respect for the Zetian traditional, tribal way of life. It also called for a greater share in the coltan revenue reserves.

Instead of pacifying the Zetians, Rigalia's President, Teemu Khutai, disparaged Zetian traditional medicine and tribal structures, and concluded that the backward mentality and the insularity of the tribal leaders is what caused the Zetian provinces to be less well-off than the rest of Rigalia.

NORTHERN UNREST

Resulting from these discriminatory remarks, sporadic fighting broke out in the Northern Provinces. Rigalian soldiers were then ordered to quell the disturbance, increase surveillance, and arrest protesters.

The plan, however, backfired, as it only sparked increased violence in Rigalia. Because of this, President Khutai prohibited public assembly and introduced a bill in Parliament barring all Rigalians, *including Zetians*, from wearing Mavazis in public, and ordered the denial of public services to those who did not comply. The 25 Zetian Parliament members who voted against its imposition were simply out-numbered by the 275-member Rigalian majority.

ARDENIA: A DIFFERENT APPROACH

Ardenia, on the other hand, took a different direction in addressing the situation. It launched an information campaign, providing support to Zetian schools and agricultural ventures, as well as granting the tribes significant autonomy in consideration of their interests. Instead of imposing an absolute and discriminatory ban on the Mavazi, an important feature of the Masinto Religion, Zetian women were allowed to take off the Mavazi in their homes and in special "women's gardens," whenever they felt uncomfortable wearing it. In 2009, the Rigalian Daily Monitor reported that President Arwen met with Zetian Tribal Council leaders to discuss how to best strengthen friendly ties between the two peoples.

A FISHING EXPEDITION

President Khutai, angered by the alleged secret agreement between Ardenia and the Zetians, asked the Rigalian Minister of Justice, Charlene Finch, to launch a bribery investigation questioning the renewal of MDI's mining contract.

Based on the statements of a former MDI employee that failed to identify any specific transaction, Rigalia suspended Bikra and requested Ardenia to provide mutual legal assistance ("**MLA**") in order to obtain bank records of MDI's transactions. It also requested that correspondence between the ZRF and provincial tribal councils be likewise given. In response, Ardenia initiated an inquiry.

COMPELLING STATE INTERESTS

On June 2009, Ardenia's Public Prosecutor, Sam Strong, dropped the investigation on Rigalia's inquiry due to public security reasons. Moreover, at the Phase 2 examination of Applicant's compliance with the OECD Anti-Bribery Convention, it declared that it was still looking for ways to satisfy Rigalia's request, given that its legislation did not allow its authorities

access to information on bank records. Ardenia also maintained that the correspondence between ZRF officers and the tribal councils cannot be the subject of an MLA request.

THE CRBC COMPLAINT

On July 2009, the Committee for Responsible Business Conduct ("**CRBC**"), a Rigalian non-governmental organization receiving up to 30% of its budget from the Rigalian Government, filed a complaint against MDI and RRI for violation of Chapter VI of the MNE Guidelines to the Ardenian National Contact Point ("**NCP**"). The Ardenian NCP, however, refused to examine the complaint, stating that: (1) it should be dealt with by the Rigalian NCP; (2) the MNE Guidelines do not apply to RRI; and (3) similar investigations had been launched in Ardenia and Rigalia.

KHUTAI'S WRATH

Frustrated with his inability to address the Zetian situation, President Khutai sought assistance from President Sophia Ratko of Morgania to deploy Predator Drones along the border between Rigalia and Ardenia. The drones were stationed in Fort Raucus, a Morganian Air Force Base situated in Rigalia and home to both Morganian and Rigalian soldiers. For six months, from 14 September 2009 until March 2010, more than 50 drone strikes against suspected Zetian separatists were launched, killing 15 alleged terrorists and an estimated 230 civilians.

In every drone strike, Respondent provided targeting information through informants recruited from Rigalian prisons.

LOSS OF LIFE

On 15 March 2010, a Predator Drone strike was launched in Ardenia against Adar Bermal, ZDP's top commander. The strike was conducted without warning and while Bermal's wife, children, and elderly parents were at home. The strike also hit a hospital next to Bermal's

home, resulting in 150 innocent civilian deaths and 200 injuries. According to the Incident Report, the drone operator claims that the strike against the hospital was merely accidental.

CONDEMNATION

Ardenia's President Arwen condemned Rigalia's entire drone program and alleged in an international press conference that no armed conflict exists between the two States which permits Respondent's use of military force in Ardenia. She asserted that the attack on the Bakchar Valley Hospital is an act of aggression against Ardenia. She also notified the UN Security Council which in turn urged the two States to settle their differences peacefully.

THE ROAD TO THE ICJ

After failure of negotiations, Ardenia brought the matter to the International Court of Justice ("**ICJ**") on 5 May 2010. Respondent raised a preliminary objection on the ground that Morgania is an indispensable third party, which was rejected by the ICJ. Both States now stand before the Court praying for relief.

SUMMARY OF PLEADINGS

States cannot and should not rely on the so-called "war on terror" to violate the fundamental rules of State sovereignty, territorial integrity, and of human rights. In these proceedings, the State of Ardenia ("**Applicant**") will prove that the State of Rigalia ("**Respondent**") violated these fundamental tenets of International Law by conducting illegal drone attacks in the territory of both States.

In anticipation of Respondent's invocation of Morgania's absence in the proceedings, Applicant notes that the International Court of Justice's ("**ICJ**") decision in the preliminary objections phase is binding on both parties. In any case, the issues raised here can be resolved without Morgania.

Having debunked any procedural bar to the proceedings, Applicant will establish that Respondent's drone strike in Ardenia is an unlawful use of force. Respondent cannot rely on the exceptions of self-defense and Security Council authorization, since Respondent was neither the subject of an armed attack nor was it authorized by the Security Council.

Apart from violating the rules of inter-State force, Respondent's policy of targeted extra-judicial killings, committed in both Ardenia and Rigalia, constitutes an arbitrary deprivation of life that violates International Human Rights Law ("**IHRL**"). The more permissive standards of International Humanitarian Law ("**IHL**") are inapplicable since no armed conflict exists. Even if an armed conflict exists, however, Respondent's policy also violates IHL, since it failed to observe the principles of distinction, necessity, and proportionality.

Further, the attack on the Bakchar Valley Hospital ("**Hospital**") is attributable to Respondent, because (1) the drone operator was under its disposal, and (2) it exercised effective control over her. Respondent cannot escape liability even if it instructed Morgania to "avoid

unnecessary and disproportionate attacks," as States are responsible for the acts of those under its disposal or control, even if they acted beyond their authority.

Furthermore, Respondent's drone strike in Ardenia, constitutes Aggression. Aggression is defined as the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State. The gravity of Respondent's violations is exacerbated by the fact that a hospital, protected by the Red Cross emblem, and innocent civilians were its victims. Respondent cannot find solace in its invocation of "terrorism" to justify its actions since no attack, whether terrorist or otherwise, was launched from Ardenian territory. More importantly, Applicant neither consented to nor acquiesced to the use of its territory as a safe haven for terrorists.

Since Respondent's attacks resulted to violations of the Right to Life, Respondent is obliged to investigate the attacks, while Applicant must be compensated for the violations that occurred within its territory.

Applicant's obligations under the IHRL regime have likewise prompted it to espouse the claims of Zetians victimized by the ban on the Mavazi. As Ardenian nationals, the Rigalian Zetians subjected to the ban, may enjoy Applicant's diplomatic protection. Alternatively, as a state party to the International Covenant on Civil and Political Rights ("**ICCPR**"), Applicant may invoke the principle of *erga omnes inter partes* to claim a direct injury for Respondent's breach of the ICCPR.

At the heart of Applicant's submissions relating to the ban, Applicant submits that Respondent's blanket ban on the wearing of the Mavazi violates the Zetians's right to (1) non-discrimination, (2) freedom of religion, and (3) cultural integrity. Respondent cannot rely on the

derogation provision of the ICCPR, as well as the enumerated valid restrictions of these rights, as the elements for the valid exercise of either are absent in this case.

With respect to Respondent's counter-claim, Applicant's conduct did not violate the OECD Convention on Bribery and the Guidelines for Multinational Enterprises ("**Guidelines**"). Applicant validly refused to render Mutual Legal Assistance ("**MLA**"), since none of the alleged acts committed constitutes bribery under the Convention. Likewise, Applicant had already performed acts that complied with the Convention. In any event, Applicant's refusal is justified by its national security concerns.

Finally, Applicant did not violate the Guidelines. The Guidelines are not binding and inapplicable to both the Rigalian Refining Incorporated and Mineral Dynamics Incorporated. Moreover, the Ardenian NCP has no jurisdiction over the case, as (1) the alleged acts occurred in Rigalia; and (2) parallel investigations have been undertaken.

PLEADINGS AND AUTHORITIES

I. RIGALIA'S PREDATOR DRONE STRIKES VIOLATE INTERNATIONAL LAW AND THE INTERNATIONAL COURT OF JUSTICE ("ICJ") SHOULD ORDER THEIR IMMEDIATE CESSATION.

Efforts to combat the threat of terrorism[1] cannot trump the fundamental rules of State sovereignty,[2] territorial integrity,[3] and the protection of human rights[4] under International Law. In this submission, the State of Ardenia ("**Applicant**") will establish that the State of Rigalia ("**Respondent**") violated International Law when it used force against the former and when it murdered suspected ZDP members and innocent civilians in both Ardenia and Rigalia [Compromis ("C.") 29-30].

A. THE ICJ HAS JURISDICTION NOTWITHSTANDING MORGANIA'S ABSENCE.

Initially, Applicant anticipates that Respondent will re-argue that Morgania's absence bars the ICJ's exercise of jurisdiction on the ground of the principle of *audiatur et altera pars.* However, this principle would bar ICJ jurisdiction only when the *very subject matter* of the

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[1] S.C. Res. 1373, U.N. SCOR, U.N. Doc. S/RES/1373 (2001); S.C. Res. 1368, U.N. SCOR, U.N. Doc. S/RES/1368 (2001); S.C. Res. 1377, U.N. SCOR, U.N. Doc. S/RES/1377 (2001); S.C. Res. 1566, U.N. SCOR, U.N. Doc. S/RES/1566 (2004); Abi-Saab, *The Proper Role of International Law in Combating Terrorism*, *in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, Ch. XVII (Bianchi, ed., 2004); Reisman, *In Defense of World Public Order,* 95 AM. J. INT'L L. 4, 833, 834 (2001).

[2] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8082 (1970) ["Declaration on Principles of International Law"]; HIGGINS, PROBLEMS AND PROCESS ch.4 (1994).

[3] U.N. CHARTER, art. 2(4); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 12, U.N. Doc. A/6220 (1965); 1 OPPENHEIM, INTERNATIONAL LAW 334 (Jennings & Watts, eds., 1999).

[4] International Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 171 ["ICCPR"]; Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226.

parties' submissions consists of the legal interest of a non-party third State.[5] This contention of Respondent was already rejected by the ICJ in the Preliminary Objections phase of this case where it declared that the parties' submissions do not require the determination of the rights and obligations of Morgania (C.36). This determination binds Applicant and Respondent.[6] Thus, Respondent may no longer raise Morgania's absence to challenge the ICJ's jurisdiction.

B. THE DRONE STRIKE IN ARDENIA VIOLATES THE PROHIBITION AGAINST THE USE OF FORCE.

1. Respondent's drone strike constitutes unlawful use of force.

Article 2(4) of the United Nations ("**UN**") Charter prohibits States from using force against the territorial integrity of another State.[7] There is unlawful use of force when a State unilaterally conducts military operations[8] in the territory of another State, such as when it engages in extra-territorial targeted killings.[9] Respondent's targeted killing of Adar Bermal in Ardenia (C.30) therefore constitutes unlawful use of force.

2. Respondent's use of force in Ardenia is not justified.

Recognizing the central role of the prohibition against the use of force in preserving the UN system,[10] the ICJ has taken a cautious approach in determining whether uses of force, may

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[5] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 392, 431 *reiterated in* Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253; Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90; Phosphate Lands in Nauru (Preliminary Objections) 1992 I.C.J. 240, 255 ¶54; 2 ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005, 543 (2005).

[6] Statute of the International Court of Justice, art. 59.

[7] U.N. CHARTER, art. 2(4).

[8] WALLACE, INTERNATIONAL LAW 249 (1997).

[9] *Nicaragua,* 1986 I.C.J. 14, ¶103.

[10] BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE 72-4 (1963).

be justified under the legally recognized grounds. As Applicant will establish, none of the valid exceptions to the use of force is present in this case.

a. There is no valid act of self-defense.

i. There was no armed attack.

In *Nicaragua*, the ICJ held that a State may resort to self-defense under Article 51 of the UN Charter[11] only if that State has been the target of an actual[12] prior attack originating from another State.[13] Such attack must consist of the sending by or on behalf of another State of armed forces, armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State.[14] In this case, Applicant never attacked Respondent.

The acts of violence by the ethnic Zetian groups (C.15) and separatist Zetian tribal leaders (C.18) do not constitute an armed attack under Article 51. *First,* the Zetians' conduct is not attributable to Applicant since they are neither its organs nor under its effective control.[15] Thus, the Zetian acts of violence do not qualify as an attack by another State. *Second,* even assuming that the Zetians' conduct is attributable to Applicant, such attacks are not sufficiently

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[11] *Nicaragua*, 1986 I.C.J. 14; U.N. CHARTER, art. 51; DUFFY, THE WAR ON TERROR AND THE FRAMEWORK OF INTERNATIONAL LAW 150 (2005); JESSUP, MODERN LAW OF NATIONS 164-67 (1948).

[12] DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 187 (2003); Randelzhofer, *Article 51*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 803 (Simma eds., 2002).

[13] *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 135, ¶139; Armed Activities on Territory of the Congo (D.R.C. v. Uganda), 2005 I.C.J 168 (2005).

[14] *Nicaragua*, 1986 I.C.J. 14, ¶¶194-95, *reiterated in Palestinian Wall,* 2004 I.C.J. 135, ¶139 and *Armed Activities*, 2005 I.C.J 168, ¶271.

[15] *Nicaragua,* 1986 I.C.J. 14, ¶195, ¶103; *Armed Activities*, 2005 I.C.J 168 ¶21 (2005); ERICKSON, LEGITIMATE USE OF FORCE AGAINST STATE SPONSORED TERRORISM 100, 134 (1989); Travalio, *Terrorism International Law and the Use of Military Force,* 18 WISCONSIN INT'L L.J.145,153 (2000).

grave to constitute an armed attack. The "sporadic fighting" (C.15) and isolated acts of violence (C.18) in this case are not sufficiently grave,[16] in terms of scope, duration, and intensity to qualify as an armed attack.[17]

i. In any case, self-defense cannot be invoked against non-State actors.

The recent cases of *Congo v. Uganda*[18] and the *Israeli Wall Advisory Opinion,*[19] the ICJ held and opined, respectively, that International Law does not recognize the right to exercise self-defense against non-State actors. According to the ICJ, Article 51 of the UN Charter applies only when an armed attack is launched by a State, or by a non-State actor acting under the "effective control" of a State.[20]

ii. Applicant exercised due diligence.

Respondent cannot rely on Applicant's alleged unwillingness or inability to stop the attacks to justify its use of force.[21] Applicant's compliance with its duty to protect other States from terrorist attacks[22] is evinced from Respondent's response to the hostilities, *i.e.* President Arwen: (a) launched an information campaign aimed at pacifying the Zetians and upholding

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[16] *Nicaragua,* 1986 I.C.J. 14, ¶249, ¶117, ¶191, ¶101; Oil Platforms (Iran v. U.S.) 1996 I.C.J. 161, ¶51, 187; 192, ¶64.

[17] Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,* ¶41 U.N. Doc. A/HRC/14/24//Add.6 (2010).

[18] *Armed Activities,* 2005 I.C.J 168.

[19] *Palestinian Wall,* 2004 I.C.J. 135, ¶139.

[20] *Nicaragua,* 1986 I.C.J. 14, ¶195, ¶103; *Armed Activities*, 2005 I.C.J 168, ¶21.

[21] Declaration on Principles of International Law; *See also* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 22.

[22] *See* Lillich, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217 (1977).

their interests (C.17) and (b) met with tribal leaders to facilitate a dialogue between the parties concerned (C.20).

iii. In any case, the drone strike did not meet the requirements of necessity, proportionality, and immediacy, and was not reported to the Security Council.

Respondent's actions fail to meet the material and formal requirements of self-defense – necessity, proportionality, immediacy of action, and reporting to the Security Council.[23] *First*, Respondent's failure to initially pursue peaceful means of redressing its perceived national security threat, *e.g.* by utilizing diplomatic lines with Applicant, makes its resort to force unnecessary.[24] *Second*, the excessiveness of the means employed by Respondent in its attack is manifest in the fact that 150 civilians died as a result of the operation which targeted only one alleged terrorist.[25] *Third,* the alleged act of self-defense was not immediately exercised. More than one year had elapsed since the last disturbance in February 2009 (C.18) before Respondent launched its 15 March 2010 drone strike (C.30). In *Oil Platforms*, the ICJ held that the passage of a mere three days between the alleged armed attack and the supposed act of self-defense casts doubt on a State's assertion of self-defense.[26] Finally, Respondent's failure to report its alleged defensive use of force to the Security Council weakens its claim that it validly exercised its right to self-defense.[27]

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[23] U.N. CHARTER, art. 51.

[24] LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 45 (2010); Randelzhofer, *supra* note 12 at 805; Printer, *The Use of Force Against Non-State Actors under International Law: An Analysis of the US Predator Drone Strike in Yemen*, 8 UCLA J. INT'L & FOREIGN AFF. 331 (2008).

[25] Randelzhofer, *supra* note 12 at 805.

[26] Oil Platforms (Iran v. U.S.), 1996 I.C.J. 25, 175-176.

[27] *Nicaragua*, 1986 I.C.J. 14, at ¶¶121-22; *See* GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 100 (2004).

b. Respondent cannot rely on the principle of necessity.

For the principle of necessity to apply: (a) the use of force must have been the only means of safeguarding an essential State interest against a grave and imminent peril; (b) the use of force must not seriously impair an essential interest of the target State or the international community as a whole; and (c) the defending State must not have contributed to the situation of necessity.[28] Respondent's claim fails on all grounds.

First, Respondent could have diplomatically requested for Applicant's assistance in addressing the Zetian situation. It did not. *Second*, the drone attack seriously impaired Applicant's territorial sovereignty.[29] *Finally*, Respondent contributed to the situation when it discriminated against the Zetians [see i*nfra* Part III(B)(1)(*c*)], thereby sparking unrest and violence in the Northern Provinces (C.15-16).[30]

C. RESPONDENT'S POLICY OF TARGETED KILLINGS VIOLATES THE RIGHT TO LIFE.

Aside from the violations of the regime of inter-State Law, Respondent's policy of targeted killings also violates International Human Rights Law ("**IHRL**").

1. Respondent has the obligation to respect the ICCPR rights of the victims of its targeted killings in both Ardenia and Rigalia.

The ICCPR imposes an obligation to respect the rights of all individuals within a State's territory and anyone subject to its jurisdiction.[31] A State is deemed to have jurisdiction over an individual when it violates his or her human rights even if the violation occurred outside its

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[28] *Articles on State Responsibility*, G.A. Res. 56/83, art. 25, U.N. GAOR, 56th Sess., Annex, Agenda Item 162 at 3, U.N. Doc.A/RES/56/83 (2001) ["AOSR"]; *See also* Gabcikovo-Nagymaros Project (Hung.v. Slov.), 1997 I.C.J. 7, 51-52.

[29] *See* Chicago Convention on International Civil Aviation, art.3, 1944, 15 U.N.T.S. 295.

[30] *Palestinian Wall,* 2004 I.C.J. 242, ¶122, ¶137, ¶140.

[31] ICCPR, art.2(1); H.R. Comm., General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

territory.[32] In *Burgos*, the UN Human Rights Committee ("**HRC**") found that Uruguay had jurisdiction over the victims of arbitrary killings committed by Uruguayan agents even when acting on foreign soil.[33] Thus, insofar as the targeting killings in this case were conducted by Rigalian agents [see *infra* Part II(A)], their victims are deemed under Respondent's jurisdiction and therefore covered by Respondent's ICCPR obligations.

2. Respondent's policy of targeted killings constitutes an arbitrary deprivation of life.

A policy of selective extra-legal executions, fostered or tolerated by a State, is incompatible with the protection of the right to life.[34] Respondent's adoption of such a policy in dealing with ZDP members therefore constitutes a systematic arbitrary deprivation of life. These targeted killings cannot be justified since Respondent failed to observe the principles of necessity, proportionality, and precaution.[35]

a. The strikes were not necessary.

To be justified, the use of lethal force must be "absolutely necessary" to protect the security or other vital interest of the State.[36] Three tests of necessity must be satisfied: (1) qualitative; (2) quantitative; and (3) temporal.

First, there was no qualitative necessity, as Respondent's drone strikes were neither strictly unavoidable nor necessary.[37] Respondent could have utilized diplomatic cooperation

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[32] Öcalan v. Turkey, Eur. Ct. H.R., App. No. 46221/99 ¶¶91-93 (2003); Issa v. Turkey, 41 Eur. Ct. H.R., App. No. 31821/96 ¶¶71-76 (2004).

[33] Burgos v. Uruguay, Comm. No. R.13/56 U.N. Doc. Supp. No. 40 (A/26/40) at ¶12.1 (1981).

[34] Chang v. Guatemala, Inter-Am. Ct. H. R. (Ser.C) No. 101 at ¶154 (2003); Juan Humberto Sanchez Case, Inter-Am. Ct. H.R., (Ser.C) No.99, at ¶110 (2003).

[35] MELZER, TARGETED KILLING IN INTERNATIONAL LAW 101 (2008).

[36] Kelly v. U.K., Eur. Ct. H. R., App. No. 17579/90 (1993).

with Applicant in addressing the alleged presence of terrorists in Ardenia. *Second,* quantitative necessity is also absent because the force employed exceeded what was necessary to achieve its purpose.[38] The targeted members of the ZDP were simple criminals and the use of advanced military drone technology was excessive. Moreover, the death of hundreds of civilians in the course of operations, which only targeted 15 suspects (C.29), highlights the excessiveness of the attacks committed. *Lastly,* there was no temporal necessity since at the time of the attack, the alleged Zetian terrorists no longer posed a threat to Respondent's national security.[39] At the time of the first drone attack on 14 September 2009 (C.29), seven (7) months had elapsed after the last alleged Zetian-led attack in February 2009 (C.18). Therefore, there was absolutely no need to conduct the extra-judicial killings.

b. The strikes were disproportionate.

The principle of proportionality limits the permissible level of force based on the threats posed by the suspect to others.[40] Here, the disproportionality of Respondent's use of force is clear from the resultant 230 deaths of innocent individuals, vis-à-vis the 15 alleged terrorist casualties (C.29).

c. Respondent did not exercise precaution.

States must take precautionary measures before using lethal force against an individual, *e.g.* the individual must first be warned and given an opportunity to surrender.[41] In *Gul v.*

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[37] Alejandre v. Cuba, Report No.86/99, OEA/Ser.L/V/II.106 Doc.3 rev. at 586 at ¶42 (1999).

[38] Ouedraogo v. Burkina Faso, H. R. Comm, Comm. No. 204/97, ¶4 (2001); Chumbivilcas v. Peru, Case No. 10.559, Report No. 1/96 (1996).

[39] Alejandre v. Cuba, Report No. 86/99, at 586 ¶42.

[40] Wolfgram v. Germany, Eur. Ct. H. R., App. No. 11257/84 (1986).

[41] Alegria v. Peru, Inter-Am. Ct. H. R., Ser.C, No. 21, ¶43, ¶62, ¶69 (1995).

Turkey, the European Court of Human Rights ("**ECtHR**") held that the pre-meditated use of lethal force against an identified target in an extra-judicial execution type of raid constitutes arbitrary deprivation of life[42] because such operations preclude the use of any precaution.

Here, all drone operations were directly aimed at extra-judicially annihilating their respective targets. The targeted Zetians were not given any warning, were not permitted to surrender, and were not allowed to challenge the allegations lodged against them.[43]

3. Respondent cannot rely on the laws of war to justify the killings.

a. No armed conflict exists.

A non-international armed conflict ("**NIAC**") exists whenever there is protracted armed violence between the State and an organized armed group,[44] excluding mere internal disturbances and tensions.[45] Here, "sporadic fighting" broke out in the Northern Provinces between Respondent's armed forces and Ethnic Zetians (C.15), which ceased upon Respondent's deployment of emergency powers (C.16), thus preventing the conflict from escalating into an NIAC.

b. Even assuming that a NIAC exists between Rigalia and the ZDP, the drone strikes are not legitimate attacks.

Even in times of war, IHL still protects the right to life and proscribes its arbitrary deprivation.[46] Respondent's failure to observe the principles of distinction, necessity, and

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[42] Gül v. Turkey, Eur. Ct. H. R., App. No. 22676/93 ¶84 (2000).

[43] Suarez de Guerrero v. Colombia, H.R. Comm., Comm. No. R.11/45 ¶14.2 (1982).

[44] *See* Prosecutor v. Tadić, Case No.IT-94-1-A, at ¶70 (1999).

[45] *Tadić*, Case No.IT-94-1-A, at ¶70.

[46] *Nuclear Weapons*, 1996 I.C.J. 226, ¶25.

proportionality in attacking the Zetians renders the drone strikes unlawful even under the permissive standards of IHL.[47]

First, a party to an armed conflict must distinguish between civilian and military objectives.[48] Respondent's disregard of the principle of distinction is evident from: (i) the death of 230 civilians resulting from 50 attacks which targeted only 15 alleged terrorist leaders and (ii) the death of family members and the destruction of the Backchar Valley Hospital resulting from the attack against Adar Bermal (C.30). *Second*, the drone strikes were unnecessary and disproportionate.[49] IHL forbids any attack expected to cause excessive incidental loss or injury to civilians.[50] The launching of 50 drone strikes against 15 individual targets would naturally result in excessive collateral civilian damage (C.29).

c. In any case, IHRL does not cease to operate during an armed conflict.

Even during an armed conflict, the prohibition against arbitrary deprivations of life remains absolute.[51] Thus, even assuming a NIAC exists, Respondent must abide by the fundamental principles of necessity, proportionality, and precaution imposed by IHRL [see *supra* Part I(C)(2)].

4. Applicant has standing to invoke the violations of the right to life committed in both Ardenia and Rigalia.

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[47] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977, 1125 U.N.T.S. 609 ["A.P. II"]; MELZER, *supra* note 37 at 140.

[48] A.P. II; 1 HENCKAERTS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, rules 1, 5 and 7.

[49] Prosecutor v. Galić, Case No. IT 98-29-T, ¶58 (2003); Prosecutor v. Blaskić Case No. IT-95-14-A, ¶180 (2004); Dinstein, *Military Necessity*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶21 (Worlfrum, ed.,2009)

[50] A.P. II, art. 51(5)(b).

[51] H.R. Comm., General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001); 1 HENCKAERTS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 300 (2005).

An injured State may invoke the responsibility of another if the obligation breached is owed to that state individually or to the international community as a whole.[52] Here, the targeted killings were committed against Zetian nationals of Applicant. Moreover, Respondent violated the *jus cogens*[53] right to life,[54] which is an obligation *erga omnes.*[55] Respondent's violation of this obligation gives Applicant standing to invoke Respondent's responsibility pursuant to its right of *actio popularis*.[56]

II. THE ATTACK ON THE BAKCHAR VALLEY HOSPITAL ("HOSPITAL") IS ATTRIBUTABLE TO RIGALIA, RIGALIA HAS AN OBLIGATION TO INVESTIGATE THE ATTACK AND TO COMPENSATE ARDENIA THEREFOR; MOREOVER, THE ATTACK WAS A DISPROPORTIONATE AND UNLAWFUL ACT OF AGRESSION AGAINST THE PEOPLE OF ARDENIA.

To incur State responsibility, two elements must concur: conduct (1) that is attributable to the State and (2) which violates that State's international obligation.[57] The attack against the Hospital satisfies both these requirements.

A. THE ATTACK IS ATTRIBUTABLE TO RESPONDENT.

While the drone operators are not Respondent's organ, their actions are nonetheless attributable to Respondent because (1) the operators were under the disposal of Respondent,[58] and (2) Respondent exercised effective control over them.[59]

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[52] AOSR, art. 42.

[53] NOWAK, UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 104 (2005).

[54] ICCPR, art. 6.

[55] H.R. Comm., General Comment 31, ¶2; Austria v. Italy, Eur. Comm'n H.R., App.no. 788/60, ¶140 (1961); Ireland v. U.K., Eur.Ct.H.R. Ser.A No. 25, ¶239; Nicaragua v. Costa Rica, Inter-Am. C.H.R., Report No.11/07, OEA/Ser.L/V/II.130, doc.22.rev.1 ¶199 (2007).

[56] H.R. Comm., General Comment 31, ¶2.

[57] AOSR, art. 2.

1. The drone operator was placed at the disposal of Respondent.

The conduct of a State organ who acts at the disposal[60] of another State is attributable to the latter when (1) the actor is an organ of the sending State; and (2) the conduct consists of an element of the receiving State's governmental authority. Domestic law enforcement activities constitute part of a State's governmental authority,[61] and thus unlawful conduct done pursuant thereto engages that State's responsibility for any consequences.[62]

First, as part of the Morganian Air Force (C.28), the drone operator is an organ of Morgania. Authority over the operator was ceded to Respondent when she was placed under President Khutai's command (C.29). *Second,* the attack on the Hospital was done pursuant to Respondent's domestic law enforcement and policing functions.

Respondent cannot disclaim liability despite its instructions that Morgania "avoid unnecessary and disproportionate attacks" (C.31). In the *Caire Claim*, the Arbitral Tribunal held that States are responsible for the acts of those under its disposal or control, even if they acted beyond their authority.[63] Thus, Respondent would still be responsible for the Hospital attack despite its instructions.

2. Respondent had effective control over the attack.

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[58] AOSR, art. 6; *See also* Chevreau Case, II R.I.A.A. 1113 (1931).

[59] AOSR, art. 8; *See Nicaragua,* 1986 I.C.J. 14, ¶115.

[60] CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 103-4 (2002).

[61] *See* Palchetti, *De Facto Organs of a State*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 13 (Worlfrum, ed.,2006).

[62] AOSR, art. 5; *See* Hyatt v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 72, at 92-94 (1985).

[63] Caire Claim (Fr. v. Mex.), 5 R.I.A.A. 516, 531 (1929) *cited in* HARRIS, CASES AND MATERIALS IN INTERNATIONAL LAW 514 (2005).

Effective control is established when the planning, direction, and support of a State form an integral part of an operation,[64] such as when that State provides valuable intelligence information,[65] or when great dependency exists between the State and the actor involved.[66]

In this case, such control is illustrated in no less than three (3) instances. *First*, Respondent's informants, acting on its behalf, provided intelligence in the form of essential targeting information to the Morganian operators (C.29). *Second,* it was Respondent's President Khutai who instructed Morgania to deploy the drones (C.28). *Third*, Respondent allowed its territory to be used as a launching point for the drone attacks (C.28-29). Therefore, Respondent is fully responsible for all the consequences of the drone operator's actions.

B. THE ATTACK IS AN ACT OF AGGRESSION.

Aggression is customarily defined[67] as the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the UN Charter,[68] regardless of motive.[69] Respondent's attack on the Hospital constitutes an act of aggression.

1. The attack meets the threshold of aggression.

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[64] *Nicaragua,* 1986 I.C.J. 14, ¶86.

[65] *Alston*, *supra* note 17 at ¶71, ¶73.

[66] DUFFY, *supra* note 11 at 416; *Tadić,* Case No.IT-94-1-A, at ¶117.

[67] U.N. CHARTER, art. 39; Definition of Aggression, art.3(g), G.A. Res 3314(XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974); *See* Stone, *Conflict Through Consensus: United Nations Approach to Aggression;* Charter of the International Military Tribunal for the Trial of the Major War Criminals, art. 6, 1945, 82 U.N.T.S. 279; *see also* Charter of the International Military Tribunal for the Far East, art. 5, 1946, T.I.A.S. No. 1589.

[68] G.A Res.3314, art. 1.

[69] Dinstein, *Military Necessity*, *supra* note 51 at ¶17.

Respondent committed, in pertinent part, the following identified acts of aggression under UN GA Resolution 3314: *First,* Respondent's attack involved the use of force within Applicant's territory, similar to the Israeli air raids in Tunisia;[70] *second*, Respondent placed its territory at the disposal of Morgania (C.29),[71] facilitating the latter's act of aggression against Applicant (C.29-30); and *lastly*, Respondent commanded the drone operator to carry out acts of armed force against Applicant (C.29).[72]

2. The ICJ has jurisdiction to determine whether the Hospital attack constitutes aggression.

Article 36(b) of the ICJ Statute gives it jurisdiction to decide on "all questions of International Law."[73] Being a matter governed by International Law, the determination of whether aggression has been committed is therefore within the ICJ's jurisdiction.

The Security Council's silence in determining whether aggression was committed in this case does not preclude the ICJ from making such determination. In *Nicaragua*, the ICJ held that the Security Council's jurisdiction in matters involving aggression is primary, but not exclusive.[74] In fact, no less than the Security Council itself urged the parties to resolve their differences through peaceful means (C.32), such as by recourse to the ICJ.[75]

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[70] G.A. Res. 3314, art. 3(a); S.C. Res. 573, U.N. SCOR, U.N. Doc. S/RES/573 (2006); S.C. Res.611, U.N.SCOR, U.N. Doc. S/RES/611 (1988).

[71] G.A. Res. 3314, art. 3(f).

[72] G.A. Res. 3314, art. 3(g); *See also Nicaragua*, 1986 I.C.J. 14, *Armed Activities*, 2005 I.C.J 223, ¶146.

[73] ICJ Statute, art. 36(b).

[74] *Nicaragua*, 1986 I.C.J. 14, ¶95; *see also* Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 21, ¶40.

[75] *Nicaragua*, 1986 I.C.J. 14, ¶94.

C. RESPONDENT'S ATTACK IS NOT A LEGITIMATE AND PROPORTIONATE OPERATION TO DEFEND AGAINST TERRORISTS.

Respondent erroneously claims that its act of aggression is, in fact, a legitimate response to a terrorist attack. The use of force in response to an act of terror is justified only when (a) the acts of terror are attributable to the target State; (b) the target State harbored the terrorists; and (c) the target State is attacked pursuant to Security Council authorization. As discussed *supra* Part I(B)(2)(*a*)(i-iv), none of these circumstances exist here.

Further, Respondent cannot rely on the supposed "war on terror" to justify the attack. The war on terror is a concept of political rhetoric, which has no legal relevance under International Law.[76] Aside from the grounds in the preceding paragraph, International Law contains no basis that would allow States to assert that a war against terrorists exists, as they are merely a band of criminals, and not belligerents.[77] In any event, the drone strike was indiscriminate, unnecessary, and disproportionate [see *supra* Part I(C)(3)(*b*)].

D. RESPONDENT MUST INVESTIGATE AND COMPENSATE APPLICANT FOR THE ATTACKS.

Respondent must effectively, promptly, thoroughly, and impartially[78] investigate an actual or alleged violation of the right to life.[79] The circumstances surrounding the Hospital attack which killed 150 civilians and injured 200 more (C.30) give rise to a probable violation of the victims' right to life, triggering Respondent's obligation to investigate. In *Ergi v. Turkey,* the

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[76] *See* O'Connell, *The Choice of Law Against Terrorism,* J. NAT'L SECURITY L.26 (2010).

[77] The Public Committee against Torture in Israel v. Gov't of Israel et al., 38 I.L.M. 1471, ¶6 (2006).

[78] Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N.Doc. A/RES/60/147(2005) ["Basic Principles"].

[79] Finucane v. U.K., Eur. Ct. H.R., App. no. 29178/95, ¶65 (2003); Kaya v. Turkey, Eur. Ct. H.R. App. no. 158/1996/777/978, ¶105 (1998); McCann and Others v. U.K.,324 Eur.Comm'n H.R. (Ser.A), ¶69 (1995).

ECtHR held that mere knowledge of a killing automatically gives rise to a State's obligation to effectively investigate the circumstances surrounding the death.[80]

Respondent cannot claim that the incident report it prepared (C.31) constitutes an effective investigation[81] because it failed to furnish the necessary information for Applicant to examine the attack. Among the incident report's defects are: *first*, it was insufficient[82] to establish the validity of the use of force;[83] and *second*, it was prepared by the drone operator herself (C.31), and not by an uninterested third party.[84]

On compensation, according to the *Velasquez-Rodriguez Case*, it is a basic principle of International Law that States who have committed an internationally wrongful act is obliged to pay compensation.[85] Accordingly, Respondent's act of aggression and its egregious Human Rights violations give rise to its duty to compensate.[86]

III. RESPONDENT'S BAN OF THE MAVAZI FOR ZETIAN WOMEN AND GIRLS VIOLATES THEIR RIGHTS UNDER INTERNATIONAL LAW.

A. APPLICANT HAS STANDING TO INVOKE THE ILLEGALITY OF THE BAN.

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[80] Ergi v. Turkey, Eur. Ct. H.R., App. no. 66/1997/850/1057, ¶II.A.2.b (1998).

[81] United Nations High Commissioner for Human Rights, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, U.N.H.C.R. Res. 1989/65, annex, U.N.Doc.E/RES/1989/65, ¶9 (1989).

[82] *Id.*

[83] Kaya v. Turkey, Eur. Ct. H.R., App. no.158/1996/777/978, §87 (1998). *See also* Roht-Ariazza, *State Responsibility to Investigate and Preosecute Grave Human Rights Violations in International Law*, 78 CAL. L.REV.449 (1990).

[84] Güleç v. Turkey, Eur. Ct. H.R., App. no. 21593/93, §§81-82 (1998).

[85] Velasquez-Rodriguez v. Honduras, Inter-Am. Ct. H. R. (Ser.C) No.4 (1988); Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annexed Regulations, 36 Stat. 2277, 2290, art. 3 (1907); A.P. II, art. 91.

[86] S.C. Res. 573, U.N.SCOR, U.N. Doc. S/RES/573 (2006).

The State of an injured national has two options when invoking the responsibility of another State with regard to a violation of a right under International Law: (1) it may espouse the rights of the injured national through the exercise of diplomatic protection,[87] or (2) it may directly charge a fellow State Party to a multilateral treaty with violating its treaty obligations under the principle of *erga omnes inter partes*.[88]

1. Applicant may validly exercise diplomatic protection over the Zetian women and girls affected by the ban.

A State may exercise diplomatic protection to protect its citizens who have been injured by other States.[89] To validly exercise diplomatic protection, (1) there must be an internationally wrongful act (2) committed against nationals of the injured State,[90] and (3) local remedies were exhausted.[91] We find all these in this case.

First, the internationally wrongful act in this case is discussed *infra* Part III(B).

Second, in cases involving dual nationals of two States, it is well-settled that only the State of predominant nationality may exercise diplomatic protection over the dual citizen against his or her other State of nationality.[92] Predominant nationality lies with the State having stronger factual ties with the affected persons.[93]

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[87] Draft Articles on Diplomatic Protection, art. 1, U.N. Doc. A/61/10 (2006).

[88] AOSR, art. 48(1) (a).

[89] Mavrommatis Palestine Concessions (Greece v Gr. Brit.), 1924 P.C.I.J. (Ser.A) No.2, ¶12; Interhandel Case (Switz. V. U.S.), 1959 I.C.J. 6.

[90] AMERASINGHE, DIPLOMATIC PROTECTION 25-26 (2008).

[91] AOSR, art. 44.

[92] Draft Articles on Diplomatic Protection, art. 4 & 7; Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930, art.1, 179 L.N.T.S.89; BAR-YAACOV, DUAL NATIONALITY 2 (1961).

[93] Nottebohm (Liech. v. Guat.), 1955 I.C.J. 22.

As in *Nottebohm*, the predominant nationality of the Zetians in Rigalia is Ardenian, as the center of their interests, family ties, and participation in public life is in Ardenia.[94] For one, Zetians in Ardenia are allowed to establish their own rules and court systems (C.6). Moreover, Ardenian institutions have provided Rigalian Zetians with educational opportunities and humanitarian assistance (C.11), and have dedicated substantial funds to schools and agricultural subsidies for Zetians (C.17). Finally, Applicant has consistently provided refuge to Rigalian Zetians seeking sanctuary from the attacks against them in Rigalia (C.19).

Respondent, in contrast, does not afford the Zetians in Rigalia the same amount of respect and assistance. In fact, aside from ignoring Zetian tribal customs (C.6), Respondent's President Khutai has even gone so far as to actively insult their culture, disparaging Zetian traditions and customs as "barbaric" (C.14). This hostility towards the Zetians has led to the creation of secessionist groups such as the ZDP, which represent more than 75% of Zetians living in Rigalia (C.9). In contrast, Applicant has never faced such opposition from the Zetians (C.9).

Thus, although the Zetians are territorially linked to Respondent, their interests, ties, and participation in public life rest with Applicant.

Finally, remedies have been exhausted in this case [Clarifications ("Cl.") 5].

2. In the alternative, Applicant may validly invoke Respondent's *erga omnes inter partes* obligations under the relevant Human Rights Instruments.

Since both Applicant and Respondent are parties to the ICCPR (C.37), any violation of the Covenant committed by either State may be invoked by other States Parties.[95] These obligations to uphold multilateral treaty provisions are referred to as *erga omnes inter partes*

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[94] *Nottebohm*, 1955 I.C.J. 22 *cited in* Commentaries on the Draft Articles on Diplomatic Protection, 2 Y.B. I.L.C. 46 (2006).

[95] AOSR, art. 48(1); CRAWFORD, *supra* note 62 at 276.

obligations.[96] Here, Respondent cannot deny its obligation to respect the rights protected by the ICCPR precisely because it is a State Party to it (C.37). Applicant may thus invoke Respondent's breach of the Covenant pursuant to its right of *actio popularis*.[97]

3. Respondent cannot invoke the unclean hands doctrine.

The unclean hands doctrine is only applicable when the claimant State has not complied with the same obligation it seeks to invoke against the respondent State.[98] Here, Applicant's claim suffers no infirmity as it has consistently accorded the Zetians respect and autonomy in the practice of their cultural traditions (C.6, 7, 17).

B. THE BAN VIOLATES IHRL, THUS CONSTITUTING AN INTERNATIONALLY WRONGFUL ACT.

1. The imposition of the ban violates the ICCPR.

The regulation of clothing which may be worn by women in public can violate the ICCPR,[99] particularly its provisions upholding the rights of non-discrimination,[100] religion,[101] and cultural practice.[102] The imposition of a nationwide ban on wearing the Mavazi violates these rights.

a. The ban violates the right to religious freedom.

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[96] CRAWFORD, *supra* note 62 at 276.

[97] H.R. Comm., General Comment 31, ¶2.

[98] Diversion of Water from the Meuse Case, 1937 P.C.I.J. (ser.A/B) No.70, at 77 (Opinion of Judge Hudson); Fitzmaurice, *The General Principles of International Law, Considered from the Standpoint of the Rule of Law*, 92(2) RECEUIL DE COURS 119 (1957); *Nicaragua*, 1986 I.C.J. 14, ¶268 (Dissenting Opinion of Judge Schwebel); Case Concerning the Gabčikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, at 76 ¶133.

[99] H.R. Comm., General Comment 28, ¶13, U.N.Doc. CCPR/C/21/Rev.1/Add.10 (2000).

[100] ICCPR, arts. 2, 3, 26.

[101] ICCPR, art. 18.

[102] ICCPR, art. 27.

The ICCPR ensures the protection of customs and practices which manifest religious belief.[103] This includes the wearing of distinctive clothing or head coverings[104] such as the Mavazi, which is worn by the Zetians in accordance with orthodox Masinto religious tenets (C.3).

Any restriction of this right[105] must meet the standards of purpose and proportionality.[106] Here, while the Mavazi ban is pursuant to a law, it was not passed primarily for the purpose of protecting public order or safety,[107] but as a means to perpetrate discrimination (C.16). Significantly, only one attack involving the Mavazi had been committed when Respondent passed the ban (C.18). Its imposition as a nationwide prohibition (C.16), in response to an isolated incident does not reflect a valid purpose but discriminatory intent. And even if the ban was done for a valid purpose, it would still be disproportionate, as its universal application (C.21), even in places where no threat existed, is clearly excessive.

b. The ban violates the rights of a cultural minority.

Article 27 of the ICCPR protects the rights of cultural, ethnic, or religious minorities, or numerically inferior groups within a State.[108] It ensures the minority's right to enjoy their own

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[103] ICCPR, art. 18(1); Boodoo v. Trinidad and Tobago, U.N. Doc. CCPR/C/74/D/721/1996, ¶6.6 (2002).

[104] H.R. Comm., General Comment 28, ¶4.

[105] H.R. Comm., General Comment 22, ¶8, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993).

[106] ICCPR, art.18(3).

[107] ICCPR, art.18(3).

[108] H.R. Comm., General Comment 23, ¶1, CCPR/C/21/Rev.1/Add.5 (1994); JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 755 (2004).

culture and profess and practice their own religion.[109] Hence, Respondent cannot deny the Zetians, comprising 35% of Rigalia's population (C.1), the practice of their traditional cultural and religious beliefs (C.3).

Any restriction affecting the rights of a minority requires their effective participation,[110] *e.g.* through consultation,[111] in the decision to implement it. Here, no regard was given to Zetian interests. In fact, though Zetians have minimal representation in the Rigalian Parliament, the dissenting vote of the 25 Zetian members was easily overruled by the 275-strong Rigalian majority (C.21). Clearly, the Zetians have not been given effective participation. Additionally, the principles of proportionality, reasonableness, and objectivity[112] mandate that States must also ensure the minimization of regulation's impact on the affected cultural activity.[113] A universal ban does not limit such impact.

c. The ban violates the right against discrimination.

The ICCPR prohibits any legislation that has the purpose or *effect*[114] of discriminating[115] by creating a distinction[116] based on race, color, sex,[117] religion, or political opinion.[118] Malice, in this case, is immaterial.[119]

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[109] ICCPR, art. 27.

[110] Länsman v. Finland, U.N. Doc.CCPR/C/52D/511/1992, ¶9.6 (1992); H.R. Comm., General Comment 23, ¶7.

[111] Länsman v. Finland, U.N. Doc. CCPR/C/52D/511/1992, ¶9.6(1992).

[112] Lovelace v. Canada, U.N. Doc. Supp. No. 40 (A/36/40)166, ¶16(1981).

[113] Länsman v. Finland, U.N. Doc.CCPR/C/52D/511/1992, ¶9.7(1992).

[114] Hill & Joseph, *Obligations of Non-Discrimination, in* THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 575 (Harris, eds.,1995); JOSEPH ET AL., *supra* note 110 at 694.

[115] H.R. Comm., General Comment 18, ¶12 (1989); Minority Schools in Albania (Greece v. Alb.), 1935 P.C.I.J. (ser.A/B) No. 64 (1935).

Only restrictions which differentiate based on reasonable and objective criteria are permissible.[120] In Respondent's case, the imposition of the ban is discriminatory as it, in effect, singles out women, Zetians, and practitioners of the Masinto faith. Further, the ban is unreasonable considering that while it covers the Mavazi, it fails to include other articles of clothing, even non-religious, which tend to conceal identities, like masks or face-scarves.

2. Under no circumstance can the ban be justified as a valid derogation from any of these rights.

While the ICCPR allows States to derogate from certain Covenant obligations to ensure the safety of the general public,[121] the Mavazi Ban cannot be justified as a valid derogation.

a. The ban infringes upon non-derogable rights.

The rights to freedom of conscience, thought, or religion[122] and non-discrimination based solely on race, sex, or religion[123] may not be derogated from, even in times of emergency.[124] The Mavazi Ban *specifically* encroaches upon the Zetian Women's right to religious expression, thereby rendering it an improper derogation of Human Rights.

b. In any case, the ban did not meet the requisites of a valid derogation.

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[116] ICCPR, art. 2.

[117] ICCPR, art. 3.

[118] ICCPR, art. 26.

[119] Brooks v. Netherlands, U.N. Doc. CCPR/C/29/D/172/1984, ¶16 (1987); Simunek, et al. v. Czech Republic, U.N. Doc. CCPR/C/54/D/516/1992, ¶11.7 (1995).

[120] Van Oord v. Netherlands, U.N. Doc. CCPR/C/60/D/658/1995, ¶8.5 (1997).

[121] Ghandhi, *The Human Rights Committee and Derogation in Public Emergencies*, 32 GERMAN YEARBOOK INT'L L.323, 326(1989).

[122] ICCPR, art. 4(2).

[123] H.R. Comm., General Comment 29, ¶8, *citing* ICCPR, art. 4(1).

[124] JOSEPH, *supra* note 110 at [25.62] 829.

For a valid derogation, there must exist: (1) a public emergency that threatens the life of a nation; and (2) a measure limited to the extent *strictly required* by the exigencies of the situation.[125]

First, the public emergency contemplated in Article 4(2) must be actual or imminent,[126] and *officially proclaimed* to be so.[127] Mere sporadic fighting and isolated incidents of violence (C.14-16, 18) do not threaten the life of Respondent State. Also, President Khutai never officially declared a public emergency, or informed the UN Secretary-General of any emergency declaration.[128]

Second, any measure taken by a State derogating from the provisions of the ICCPR must be limited, both temporally and geographically,[129] to what is *strictly required by the exigencies of the situation.*[130] A *nationwide* ban on wearing the Mavazi would not have addressed the need of restoring peace and order in Rigalia, since the violence and protests did not involve the Mavazi at all (C.16).

IV. APPLICANT'S CONDUCT DID NOT VIOLATE THE OECD ANTI-BRIBERY CONVENTION OR THE OECD DECISION ON MNE GUIDELINES.

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[125] ICCPR, art. 4(1).

[126] Paris Minimum Standards of Human Rights Norms in a State of Emergency, art. 1(b), 79 AM. J. INT'L L.1072 (1985); Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, principle 54, 7 HUM.RTS.Q. 1(1985).

[127] H.R. Comm., General Comment 29, ¶2.

[128] *Id.,* at ¶17; ICCPR, art. 4(3).

[129] H.R. Comm., General Comment 29, ¶4.

[130] *Id.,* at ¶4.

Recognizing the economic and social costs of corruption,[131] numerous international anti-corruption instruments,[132] including the Organization for Economic Development's ("**OECD**") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("**Convention**")[133] have been ratified. As an OECD member and State Party to the Convention (C.38), Applicant's conduct has been fully compliant with its obligations therein.

A. APPLICANT'S OBLIGATIONS UNDER THE CONVENTION HAVE NOT BEEN ACTIVATED.

1. The donations to the ZRF do not constitute bribery.

For the offense of active bribery in an international business transaction to exist under the Convention, there must be (1) an intentional offer, promise, or giving of undue pecuniary or other advantage of any kind (2) to a foreign public official (3) resulting in a business or other improper advantage obtained or retained by the briber.[134] None of these are present in this case.

a. Mineral Dynamics Incorporated ("MDI") did not intentionally offer, promise, or give any undue pecuniary or other advantage of any kind.

The Convention targets every act disposed to influence a foreign public official to make a corrupt decision, otherwise known as the *quid pro quo*.[135] This means that from the viewpoint of the briber, the foreign official owes him "consideration," *i.e.* the exercise of his public office, in

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[131] WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF WORLD BANK 5 (1997); Wallace-Bruce, *Corruption and Competitiveness in Global Business – The Dawn of a New Era*, 24 MELB.U.L. REV. 349, 49-54 (2000); Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 630 (2000).

[132] Posadas, *Combating Corruption Under International Law* 10 DUKE J.COMP. & INT'L L. 345, 346 (2000).

[133] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997, 37 I.L.M. 1 ["OECD Convention"].

[134] OECD Convention, art.1(1).

[135] Zerbes, *Article 1. The Offence of Bribery of Foreign Public Officials*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY 136 (Pieth, et al. eds., 2007).

exchange for the offer, gift, or promise.[136] Here, MDI has been regularly giving financial support to the Zetian Refugees Fund ("**ZRF**") to advance its charitable purposes (C.11) without expecting any consideration in return.

Further, intent[137] being a material element of the crime, the offender must knowingly commit the bribery himself or through another, out of his own volition.[138] Here, although the donations were voluntarily given by MDI to the ZRF, there is no indication that MDI knew or intended that such would amount to bribery.

b. MDI did not obtain or retain any business or improper advantage.

The essence of the Convention is to prevent the use of bribery as a means of unduly advancing one's *economic interest*.[139] In *United States v. Kay,*[140] it was held that business obtained or retained through bribery will always be regarded as an *improper advantage*.[141]

Here, the five-year exploration and development contract was awarded to MDI only after: (i) it presented its bid for the contract along with other companies and (ii) it complied with the bidding procedures set out in the regulations of both RRI and Respondent. Far from being arbitrary, this shows that the award was a legitimate official decision made after a long and extensive legal process (C.10). The reasonableness of Applicant's award of the contract to MDI is further evinced by the renewal of said contract. This renewal shows that MDI continues to

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[136] *Id.*

[137] Zerbes, *supra* note 137 at 157.

[138] *Id.*, at 158.

[139] OECD, Official Commentary to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 5 (1997) ["Official Commentary"]

[140] U.S. v. Kay, 359 F.3d 738, 750 (5th Cir., 2004).

[141] Official Commentary 5; Zerbes, *supra* note 137 at 66.

meet the criteria set out in the regulations of both RRI and Respondent. Finally, Applicant's award of the contract enjoys the presumption of regularity.[142]

c. In any event, the donations were not made to induce a public official to breach a public duty.

Even assuming that Clyde Zangara and the ZRF are public officials, the donations given by MDI were not made to induce a breach of public duty,[143] as these were made to fund ZRF's charitable projects.

In the *Schering-Plough Case,*[144] the US Securities and Exchange Commission ruled that the Schering-Plough's donations to the Chudow Castle Foundation were made to induce the foundation's Director because it paid more money to the Foundation than any other recipient of its promotional donations,[145] and none of the payments were accurately reflected in the books and records of the Company. In contrast, MDI had already been regularly giving funds to the ZRF even prior to the contract's renewal. More importantly, MDI has been transparent in its donations to the ZRF, even publishing this information on its website (C.10).

2. The alleged payment of mandatory undocumented fees to the Tribal Councils is not bribery.

a. The Tribal Councils and their leaders are not public officials.

Pursuant to the principle of functional equivalence, States Parties to the Convention are given autonomy to prescribe the definition of a public official.[146] Here, the Tribal Councils and

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[142] CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953).

[143] Zerbes, *supra* note 137 at 159.

[144] Schering-Plough Corporation, Administrative Proceeding File No.3-11517 (2004).

[145] *See* CASSIN, BRIBERY ABROAD: LESSONS FROM THE FOREIGN CORRUPT PRACTICES ACT 68-69 (2008).

[146] Zerbes, *supra* note 137 at 57.

their leaders are not public officials as defined in Rigalia's domestic law.[147] In fact, in Respondent's highly centralized government, tribal council laws, courts, and other rules are not officially recognized (C.6).

Even assuming that the Tribal Council leaders exercise *de facto* performance of a public function by virtue of their peculiar position in the Northern Provinces (C.6), they still cannot be regarded as foreign public officials because they do not *actually* hold authority.[148]

b. In any event, the payments constitute small facilitation payments.

Since the Convention is directed at serious cases of "genuine" or "grand corruption,"[149] payments intended to secure the performance of "routine government action," or small facilitation payments,[150] are exempted from its scope and allows States Parties to restrict their criminalization. Accordingly, Applicant has adopted a policy of excluding small facilitation payments from the bribery offense (C.38). Here, the mandatory undocumented fees paid to the Tribal Councils are, at most, only small facilitation payments.

First, such payments are common practice when dealing with the local communities in the Northern Provinces. *Second*, the payments were made so that the Tribal Councils and their leaders engage in the lawful act of ensuring the smooth progress of MDI's operations under the contract. And *third*, the tribal councils and their leaders did not and could not have exercised any discretion as to the operation of MDI in their areas (C.11-12), as MDI has a government contract giving it the right to pursue its operations.

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[147] OECD Convention, art.1, ¶4(a).

[148] Zerbes, *supra* note 137 at 67-68.

[149] Wallace-Bruce, *supra* note 133 at 125.

[150] Official Commentary, ¶9; George, et. al, *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAN. J. TRANSNAT'L L.1, 225 (1999).

B. ASSUMING APPLICANT'S OBLIGATIONS UNDER THE CONVENTION HAVE BEEN ACTIVATED, IT DID NOT VIOLATE ITS PROVISIONS.

1. Applicant has yet to enact implementing legislation.

With respect to a State Party's obligation to investigate, Article 5 of the Convention provides that "investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party."[151] This shows that the obligation to investigate under the Convention is not self-executing.[152] Accordingly, it is premature to require Applicant to investigate, considering that Applicant has yet to put legislation in place to govern the investigation of suspected bribery cases.

2. Applicant conducted an inquiry.

Even in the absence of implementing legislation, Applicant was not remiss in its obligations under the Convention. In fact, when Respondent sent its request for mutual legal assistance ("**MLA**"), Applicant immediately initiated its own inquiry with respect to the bribery allegations (C.23). To be sure, even though Applicant's laws prevented it from accessing bank records (C.24), Applicant did its best to conduct an investigation of Respondent's allegations. Contrary to Respondent's submissions, Applicant complied with its obligations under the OECD Convention in good faith.

C. IN ANY EVENT, RESPONDENT'S REQUEST WILL PREJUDICE APPLICANT'S NATIONAL SECURITY.

MLA is "a process by which the requested State executes on its territory an official act to gather evidence on a specific criminal case which is under investigation or is being prosecuted in

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[151] OECD Convention, art. 1(1); Sacerdoti, *The 1997 Convention on Combating Bribery of Foreign Public Officials In International Business Transactions*, I.B.L.J. 1, 3-18 (1999).

[152] Koch, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Some Guidance*, 28 B.C. INT'L & COMP. L. REV. 379 (2005).

the requesting State."[153] A request for MLA under the Convention may validly be denied under certain circumstances.

While the Convention does not explicitly contain a national security exception,[154] Customary International Law recognizes, under the principle of *necessity*, an implicit exception to the application of treaties. In *Al Yamamah*, the British Serious Fraud Office closed the investigation of corruption charges involving a large defense procurement contract due to national security reasons.[155] Similarly, while Applicant initially conducted an inquiry upon receiving Respondent's request (C.23), it was eventually forced to suspend the investigation when it became clear that pursuing it would prejudice its national security (C.25).

D. THE REFUSAL BY APPLICANT'S NATIONAL CONTACT POINT ("NCP") TO EXAMINE THE COMMITTEE FOR RESPONSIBLE BUSINESS CONDUCT'S ("CRBC") COMPLAINT COMPLIES WITH THE GUIDELINES FOR MULTINATIONAL ENTERPRISES ("GUIDELINES").

1. The Guidelines do not apply to RRI.

The Guidelines are recommendations jointly addressed by governments to *multinational enterprises.*[156] Multinational enterprises are defined as "companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways."[157] Since RRI is an enterprise established and operating solely in Rigalia (C.10), the Guidelines do not apply to RRI.

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[153] Harari & Berthod, *Article 9, 10, 11. International Co-operation in* PIETH ET. AL., *supra* note 137 at 410.

[154] *See* OECD Convention, art. 9.

[155] WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, OECD FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS 2, ¶10 (2007).

[156] The OECD Guidelines to Multinational Enterprises, ¶1, DAFFEE/IME/WPG (2000) 15/FINAL ["Guidelines"].

[157] Guidelines §1, ¶3.

2. The Guidelines are not binding.

The Guidelines contain non-binding recommendations.[158] Observance by enterprises of the Guidelines is thus voluntary and not legally enforceable.[159] Accordingly, Applicant's NCP is not bound by it.

3. In any event, the NCP cannot examine the Complaint.

The OECD Council mandates States Parties to set up NCPs tasked to resolve issues relating to the implementation of the Guidelines in specific instances.[160] In providing this assistance, the NCPs are granted full discretion to assess whether the issues raised merit further examination. Applicant's NCP was merely exercising such discretion.

a. Applicant's NCP has no jurisdiction.

i. The subject acts occurred in Rigalia.

Guidelines-related issues are dealt with by the NCP in whose country the issue has arisen. Among States Parties, issues will first be discussed on the national level and, where appropriate, pursued at a bilateral level.[161] Here, the alleged acts occurred in Rigalia (C.12). Thus, Applicant was justified in refusing to examine CRBC's complaint, since it must be filed in Respondent's NCP first. Further, under the principle of *forum non conveniens*, the allegations should be investigated by Respondent's NCP considering that (i) the alleged act occurred in Rigalia (C.12); (ii) Rigalia's Minister of Justice is already conducting an investigation of the allegations (C.22); and (iii) Respondent's witnesses are in Rigalia (C.22).

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[158] Guidelines ¶1.

[159] Guidelines I(1).

[160] Guidelines ¶1.

[161] WORKING PARTY ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, COMMENTARY ON THE IMPLEMENTATION PROCEDURES OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, ¶13 (2009).

ii. Parallel proceedings on the same subject acts are pending in Rigalia.

Parallel proceedings exist when a specific incident is submitted to an NCP while a lawsuit on the same incident is pending before a national or international court.[162] International agreements on judicial co-operation, including the Convention, uphold the principle of *ni bis in idem*[163] as a valid ground for denying a request for investigation. In the case of *11.11.11 et al. v. Cogecom*,[164] complaints filed by several Non-Governmental Groups ("**NGO**") were validly rejected by the Belgian NCP due to the existence of ongoing parallel proceedings in a Belgian court. Accordingly, Applicant's NCP may validly refuse to exercise its jurisdiction since parallel proceedings for the same acts are pending in Rigalia (C.22-23).

b. The CRBC is an improper party-complainant.

NCPs are required to respond only to legitimate inquiries. While NGOs are one of the groups singled out for attention in this regard,[165] the Guidelines nevertheless specifically allow NCPs to make an initial assessment of whether the issues raised merit further examination under the Convention. Thus, the fact that the CRBC is an NGO does not necessarily mean that the inquiries it raised will merit further examination by Applicant's NCP. Moreover, having been filed after Applicant suspended the proceedings against MDI (C.25), the complaint is nothing more but a last ditch effort to further pressure Applicant. Lastly, instead of contacting

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[162] Ward, *The OECD Guidelines for Multinational Enterprises and Non-adhering Countries Opportunities and Challenges of Engagement*, *in* OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT: INVESTMENT FOR DEVELOPMENT – FORGING NEW PARTNERSHIPS (2004).

[163] The principle provides that an offender should not be prosecuted or judged twice for the same offense *see* CHENG, *supra* note 144 at 337.

[164] OECD NCP (Belgium), 2004; *See also* OECD NCP (US) FoE US & RAID v. Cabot Corporation, 2002; OECD NCP (Belgium) 11.11.11 et al v. Belgolaise, 2004; OECD NCP (UK) RAID v. Avient, 2002 (available at: http://oecdwatch.org/cases).

[165] COMMENTARY ON THE IMPLEMENTATION PROCEDURES OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, *supra* note 163 at ¶12.

Respondent's NCP first, it directly filed the complaint with Applicant's NCP even if the alleged acts occurred in Rigalia (Cl.1).

CONCLUSION AND PRAYER FOR RELIEF

Applicant requests that the ICJ adjudge and declare that:

(1) Rigalia's Predator Drone strikes in Rigalia and in Ardenia violate international law and the Court should order their immediate cessation;

(2) The attack on the Bakchar Valley hospital is attributable to Rigalia, Rigalia has an obligation to investigate the attack and to compensate Ardenia therefore and, moreover, the attack was a disproportionate and unlawful act of aggression against the people of Ardenia;

(3) Rigalia's ban of the Mavazi for Zetian women and girls violates their rights under international law; and

(4) Ardenia did not violate the OECD Anti-Bribery Convention or the OECD Decision on MNE Guidelines.