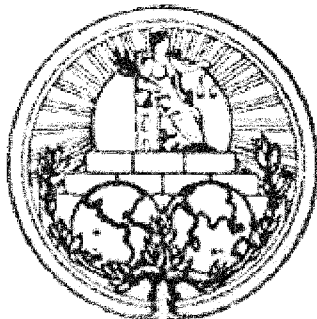


**INTERNATIONAL COURT OF JUSTICE**

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)**

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**MEMORIAL FOR RESPONDENT**  
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2011



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## **STATEMENT OF JURISDICTION**

The State of Ardenia (“**Applicant**”) and the State of Rigalia (“**Respondent**”) have submitted 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.**”), pursuant to article 40(1) of the Statute of the I.C.J. (“**Statute**”). Therefore, Applicant and Respondent 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 against Zetian terrorists in Rigalia and Ardenia are consistent with Rigalia's rights under international law, and thus the Court has no authority to order cessation of the drone attacks;

### **II.**

Whether the attack on the Bakchar Valley hospital was not attributable to Rigalia and Rigalia has no obligation to investigate the attack or to compensate Ardenia therefore; moreover, the act was not an act of aggression but part of a legitimate and proportionate operation to defend against Zetian terrorists;

### **III.**

Whether Rigalia's limited ban of the Mavazi for Zetian women and girls is consistent with international law; and

### **IV.**

Whether Ardenia's failure to investigate and prosecute the alleged corruption and to provide legal assistance to Rigalia constitute breaches of the OECD Anti-Bribery Convention, and the failure of the Ardenian NCP to respond to the complaint by the CRBC constitutes a breach of the OECD Decision on MNE Guidelines.

## **STATEMENT OF FACTS**

### **THE RICH AND THE POOR**

The State of Rigalia is a populous state comprised of 65% ethnic Rigalians and 35% ethnic Zetians. It is a developing nation with several prosperous major cities. Its countryside is economically underdeveloped and quite mountainous. Its northern region (“the Northern Provinces”) is largely inhabited by ethnic Zetians, who make up nearly 100% of the populace.

The State of Ardenia is a small state to the north of Rigalia. It is a developed and prosperous nation, with the exception of the tribal areas in the southern provinces (“the Southern Provinces”), whose population is 90% ethnic Zetian.

Although ethnic Zetians have been granted full citizenship rights by both States, many Zetians now live in settled communities in either State.

### **THE SEEDS OF CORRUPTION**

In 1994, Leo Bikra (“Bikra”), President and Director General of Rigalian Refining Inc. (“RRI”), in charge of industrializing Rigalia’s coltan reserves, issued a call for tender for a five-year exploration and development contract for the Moria Mine in the Northern Provinces, on behalf of RRI.

After going through the proper bidding process for three (3) years, the contract was ultimately awarded to Mineral Dynamics Incorporated (“MDI”), a major Ardenian state-owned corporation. Upon expiration of the contract, it was renewed for an additional ten years. Media reports indicated that the renewal was secured through MDI’s offer of support to the Zetian Refugees Fund (“ZRF”), as well as the payment of large sums of money and MDI shares to Clyde Zangara (“Zangara”), Bikra’s nephew.

The Rigalian government believes that some of these monies are also being funnelled to the Zetian Democratic Party (“ZDP”) through the ZRF. Allegations also surfaced that MDI

transporters succumbed to the solicitations from members of the provincial tribal councils in the Northern Provinces and paid mandatory undocumented fees to ensure protection of the extraction site and smooth delivery of the product to RRI's plant.

### **THE SEARCH FOR TRUTH**

President Khutai asked the Rigalian Minister of Justice, Charlene Finch, to open an investigation into the bribery allegations.

A former MDI employee involved in the renewal of the contract gave a statement – incorporated in a preliminary police report – substantiating the media allegations, implicating Bikra, Zangara and the ZRF. He stated that it was common practice for MDI to ensure “cooperation” from local communities when operating in sensitive areas.

Rigalia requested mutual legal assistance (“MLA”) from Ardenia, seeking information on MDI's ZRF-related activities and possible financial ties with Zangara and the tribal council members. Ardenia initiated an inquiry but did not respond to Rigalia's request.

Meanwhile, MDI engaged in strong lobbying activities with a number of influential judges, parliament members, and officials of the Ardenian government, inviting them to lavish events, for the purpose of having the inquiry dropped. Not surprisingly, the Ardenian Public Prosecutor dropped the investigation.

A Rigalian non-governmental organization, the Committee for Responsible Business Conduct (“CRBC”) filed a complaint against MDI and RRI for violations of the OECD Guidelines for Multinational Enterprises (“OECD Guidelines”) before the National Contact Point (“NCP”) of Ardenia, in accordance with the OECD Guidelines. The Ardenian NCP refused to examine the complaint and did not answer the CRBC's request to organize a meeting to discuss ways to solve these issues.

## **THE BURDEN OF THE MAVAZI**

Zetian women and girls are obliged by the tribal council, to wear a “Mavazi,” an article of clothing which covers the entire head, including the face, making identification difficult. The Mavazi also heats up quickly in the sun, making it difficult for the wearer to work outdoors.

Women who refuse to wear the garment are punished severely, either by confinement for long periods of time, or by receiving as many as 40 lashes in a public flogging ceremony. Ardenian Zetians are likewise obliged, by custom and provincial law to wear the Mavazi.

Aiming to eradicate the pernicious effects of the Mavazi – increased security risks and the discrimination of women – President Khutai proposed its ban to the Rigalian parliament which was adopted by an overwhelming majority.

## **A NATION UNDER SIEGE**

For many years, the ZDP, which reportedly represents more than 75% of the ethnic Zetians in Rigalia, has sponsored several secessionist efforts in Rigalia, seeking to consolidate the five provinces in both Rigalia and Ardenia into a single state.

Fighting broke out in the Northern Provinces, with Rigalian soldiers attempting to quell the disturbance. Tens of thousands of Zetians marched on both the Rigalian and Ardenian capitals; the Ardenian Zetians to show their solidarity with their Rigalian brethren. Many of the marchers wore arm bands with the initials “ZRF,” and many carried a proposed Zetian “flag.” Protestors rebelled and began resisting arrest.

A group of Zetian tribal leaders, all known ZDP members, began mounting a violent campaign, pressing for full independence by attacking Rigalian infrastructures, kidnapping Rigalian citizens, and demanding the release of arrested Zetian protestors in exchange for the kidnap victims.

In December 2008, a bridge was blown up in Rigaliaville, killing more than 130 Rigalians. Between January and February 2009, a series of suicide bombings took place at two government buildings – a school and a hospital – killing more than 25 civilians, and wounding 112 others. One of the suicide bombers was concealed in a Mavazi, who was able to approach the government-run school surreptitiously.

### **SERIOUS ALLEGATIONS**

The *Rigalian Daily Monitor* published a story alleging that sometime in 2009, President Arwen of Ardenia met with Rigalian and Ardenian Zetian tribal leaders and promised that she would allow Zetians to retain their traditional practices such as wearing the Mavazi and marriage laws; and support a future Zetian State in Rigalian territory. This “secret agreement” was reportedly memorialized in writing and included promises where, in exchange, Zetian separatists agreed to renounce any secessionist claims against Ardenia. Zetians likewise promised not to use violence against Ardenian civilians or the Ardenian government.

### **MORGANIA’S DRONES**

Facing statistical and logistical difficulties in its fight against the terrorists, President Khutai sought assistance from President Ratko of Morgania to deploy drones. As a victim of terrorist attacks itself, Morgania readily agreed to President Khutai’s request for assistance. President Ratko instructed the Morganian Air Force to deploy drones from Fort Raucus in Rigalia and begin a military offensive against the terrorists.

The drones are supervised by Morganian officers. They are operated by the Morganian army in Morganville, who had control to the operation of the drones, including the decision to deploy missiles or not.

The drones are equipped with video cameras that project an image onto a screen in Morganville. Predator Drones carried out more than 50 strikes against suspected Zetian separatists. Experts estimate that the strikes resulted in the deaths of 15 important Zetian separatist leaders, including Adar Bermal, a prominent ZDP leader, who actively participated in the Zetian attacks. In light of the attack, the UN Security Council released a statement urging Ardenia and Rigalia to resolve their differences by peaceful means.

#### **SUBMISSION TO THE ICJ**

On May 2010, after attempts to reach a peaceful settlement failed, the matter was elevated to the International Court of Justice (“ICJ”). Rigalia maintains that the ICJ is barred from exercising jurisdiction because of Morgania’s absence.

## SUMMARY OF PLEADINGS

Preliminarily, the absence of Morgania, an essential party in these proceedings, bars the International Court of Justice's ("ICJ") jurisdiction over the dispute. The central issue in this case is the legality of Morgania's deployment of drones in Rigalia ("**Respondent**") and Ardenia ("**Applicant**"). Consequently, Morgania's absence is fatal to the ICJ's jurisdiction.

Assuming the ICJ may hear this case, Respondent's acts are justified under International Law. While the principles of sovereignty and territorial integrity remain sacrosanct, International Law is not so unreasonable as to deny States the right to take measures to defend itself from the universal threat posed by terrorism.

*First*, Respondent has the inherent right to act in self-defense against the armed attack launched by the ZDP. In any event, Applicant's unwillingness and/or inability to suppress the terrorist attacks emanating from within Ardenia triggered Respondent's right of self-defense pursuant to the principle of *sic utere tuo non laedas*.

*Second*, Respondent's response was necessary and proportionate. Applicant's unwillingness to address the terrorist threat made it necessary for Respondent to launch a single 15-mile drone incursion into Ardenia to neutralize the ZDP leader, Adar Bermal.

*Finally*, should Respondent's claim of self-defense fail, the principle of necessity under the *Caroline Incident* justifies the drone strike in Ardenia.

Moreover, the non-international armed conflict between Respondent and the ZDP justifies the use of lethal force against the Zetian terrorists. The ZDP's series of attacks against Rigalia and Respondent's military response have reached the threshold of "protracted armed violence" as enunciated in *Prosecutor v. Tadić*.

Consequently, Respondent's necessary and proportionate use of lethal force against the Zetian terrorists directly participating in hostilities is legitimate under International Humanitarian Law.

Applicant cannot rely on International Human Rights Law ("IHRL") since IHRL does not apply extraterritorially nor does it operate in armed conflict situations. In any case, Respondent's actions, being necessary and proportionate, are justifiable under IHRL.

The attack on the Bakchar Valley Hospital ("**Valley**") is not attributable to Respondent under any of the internationally recognized modes of attribution.

Since the attack is not attributable to Respondent, Respondent's obligation to investigate and compensate was never engaged. In any event, Respondent complied with the duty to investigate when its drone operator filed an *Incident Report* which stated all the necessary information related to the attack.

Finally, Respondent's use of armed force was not against Applicant's sovereignty, territorial integrity or political independence, nor was it inconsistent with the United Nations Charter.

With regard to Respondent's ban on the Mavazi ("**legislation**"), Applicant has no standing to question the legislation because: (1) the predominant nationality of the concerned Zetians is Rigalian and (2) Applicant is coming before the ICJ with unclean hands.

In any event, the legislation is not unlawful as it merely promotes Respondent's IHRL obligations. *First*, Respondent is obliged to eliminate all discriminatory practices, including the use of the Mavazi. *Second*, Respondent only sought to eliminate a situation that has commonly led to the cruel and degrading punishment of Zetian women. *Finally*, the ban is a justified

restriction of rights as it (1) aims to protect public safety, public order, and other fundamental rights; (2) is proportionate; and (3) is not unduly discriminatory.

As regards Respondent's counterclaim, Applicant violated the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("**Convention**") when it failed to investigate and prosecute MDI's corrupt practices. *First*, the investigation of MDI in Ardenia involves Leo Bikra, a public official, who was bribed by MDI in an international business transaction. *Second*, MDI's payment of "mandatory undocumented fees" to the Tribal Councils constitutes bribery as the council leaders are public officials and Respondent's laws do not sanction small facilitation payments. Consequently, Applicant's unjustified failure to provide legal assistance is a violation of the Convention. Likewise, the failure of Applicant's National Contact Point to examine a valid complaint is a violation of the Guidelines on Multinational Enterprises.



## PLEADINGS AND AUTHORITIES

### **I. RIGALIA'S PREDATOR DRONE STRIKES AGAINST ZETIAN TERRORISTS IN RIGALIA AND ARDENIA ARE CONSISTENT WITH RIGALIA'S RIGHTS UNDER INTERNATIONAL LAW, AND THUS THE COURT HAS NO AUTHORITY TO ORDER CESSATION OF THE DRONE ATTACKS.**

While the principles of sovereignty<sup>1</sup> and territorial integrity<sup>2</sup> remain sacrosanct, International Law is not so unreasonable as to prevent States from taking measures to defend themselves from the universal threat of international terrorism.<sup>3</sup> As Respondent will prove, the terrorist attacks in its territory, perpetrated by the Zetian Democratic Party (“ZDP”), justify the use of military action against its leaders and members [Compromis (“C.”)18, 29-30].

### **THE ABSENCE OF MORGANIA BARS THE ICJ'S EXERCISE OF JURISDICTION OVER THE DISPUTE.**

Before proceeding to the merits, Respondent reiterates its procedural objection to the exercise of the ICJ's jurisdiction in this case. Pursuant to the principle of *audiatur et altera pars*<sup>4</sup> and the consensual nature of proceedings before the ICJ, the absence of an essential party bars

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<sup>1</sup> 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”].

<sup>2</sup> 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); Declaration on Principles in International Law, G.A. Res. 2625(XXV); 1 OPPENHEIM, INTERNATIONAL LAW 334 (Jennings & Watts, eds., 1999).

<sup>3</sup> S.C. Res. 1373, U.N. SCOR, U.N. Doc. S/RES/1373 (2002); 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 xvii (Bianchi, ed., 2004).

<sup>4</sup> Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253; 2 ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005, 543 (2005).

the ICJ from exercising jurisdiction.<sup>5</sup> In the Jurisdiction Phase of *Military and Paramilitary Activities in Nicaragua* (“**Nicaragua**”), the ICJ held that if a case cannot be resolved without examining the legality of the conduct by a State who is not a party to the proceedings, it may not exercise jurisdiction.<sup>6</sup>

Here, the central issue is the legality of Morgania’s use of drones (C.28-30) which cannot be settled without examining its conduct. Morgania’s absence therefore bars the ICJ’s exercise of jurisdiction. Whilst the ICJ has earlier rejected this claim (C.36), it may reverse its decision in the interest of justice.<sup>7</sup>

■ **THE DRONE STRIKE IN ARDENIA IS LAWFUL.**

**1. Respondent’s attack against the ZDP in Ardenian territory is a valid act of self-defense.**

Article 51 of the United Nations (“UN”) Charter codifies States’ inherent right of self-defense against an armed attack.<sup>8</sup> As will be shown, the series of armed attacks in Rigalia triggered this right.

*a. Self-defense can be invoked against the ZDP, a non-State actor.*

Textually, Article 51 does not limit the right of self-defense to a State-sponsored “armed attack.”<sup>9</sup> In fact, Security Council Resolutions 1368 and 1373 even recognized that the 9/11

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<sup>5</sup> Monetary Gold Removed from Rome in 1943 (Italy v. Fr. et al.), 1954 I.C.J. 19; 2 ROSENNE, *supra* note 4 at 559.

<sup>6</sup> 1986 I.C.J. 14, ¶392, ¶431 ¶88.

<sup>7</sup> See Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 33.

<sup>8</sup> *Nicaragua*, 1986 ICJ Rep. ¶194; See also A Randelzhofer, ‘Article 51,’ in THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 661-78 (Simma ed., 2004); SCWHEBEL, AGGRESSION, INTERVENTION AND SELF-DEFENCE IN MODERN INTERNATIONAL LAW 482 (1972); Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV.1620, 1633-34 (1984).

attacks perpetrated by the Al-Qaeda terrorist organization engaged the United States' right of self-defense.<sup>10</sup> Thus, even assuming that the ZDP's attacks are not attributable to a State, Respondent may invoke self-defense.<sup>11</sup>

***b. Pursuant to the accumulation of events theory, the ZDP has committed an armed attack against Respondent.***

Under the accumulation of events theory,<sup>12</sup> a series of independent disturbances, bombings, and civilian attacks of sufficient gravity,<sup>13</sup> taken together, constitutes an armed attack, which triggers the affected State's right of self-defense.

In this case, the ZDP attacked Respondent's infrastructure, kidnapped its citizens, and perpetrated a series of suicide bombings, killing over 150 civilians and wounding 112 more (C.18). The gravity of these acts, underscored by Respondent's inability to address them (C.27), makes the ZDP's violent campaign equivalent to an armed attack against Respondent.

***c. Applicant is unwilling or unable to stop the terrorist attacks.***

Assuming that Respondent cannot invoke self-defense against the ZDP, Applicant's failure to prevent them from using its territory as a safe haven nevertheless triggered

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<sup>9</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, 2004 I.C.J. 242 (Separate Opinion of Judge Buergenthal) (Separate Opinion of Judge Higgins); Case Concerning Armed Activities on the Territory of the Congo (Congo v. Ug.), 2005 I.C.J. 168, ¶26.

<sup>10</sup> See also *Armed Activities*, 2005 I.C.J. 168, ¶11 (Separate Opinion of Judge Simma).

<sup>11</sup> Paust, *Self-defense Targetings of Non-State Actors and Permissibility of U.S. Drones in Pakistan*, 192 U. PA. J. TRANS. L. & POLICY 237, 238 (2010).

<sup>12</sup> BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE* 56, 361 (1963); Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L. Q. 589, 596 (1989); Feder, *Reading the UN Charter Connotatively: Towards a New Definition of Armed Attack*, 19 N.Y.U. J. INT'L. & POL. 395, 415-18 (1987).

<sup>13</sup> *Nicaragua*, 1986 I.C.J. 14, ¶195.

Respondent's right to act in self-defense.<sup>14</sup> Pursuant to the principle of *sic utere tuo ut alienum non laedas*,<sup>15</sup> a State's participation, acquiescence, or inaction towards organized acts of terror engage an affected State's right to use force in self-defense in the territory of the terrorists' host State.<sup>16</sup>

In this case, the ZDP's top commander has been operating from Ardenia with impunity (C.30) due to Applicant's indifference towards the growing terrorist presence in its territory. Applicant has not only tolerated meetings among Rigalian Zetians in Ardenia (C.20), but has also conspired with them (C.20). Therefore, Applicant's inaction and tolerance towards, as well as its acquiescence to the ZDP's terrorist campaign, justify Respondent's use of self-defense.<sup>17</sup>

***d. Respondent's response is necessary and proportionate.***

Necessity means that there must be no other peaceful and effective means reasonably available to address an actual danger or threat.<sup>18</sup> Here, the use by the ZDP of Applicant's

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<sup>14</sup> Declaration on Principles of International Law G.A. Res. 2625(XXV); *See also* Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution*, A/HRC/14/24/Add.6 ¶35 (2010).

<sup>15</sup> Dupuy & Hoss, *Trail Smelter and Terrorism: International Mechanism to Combat Transboundary Harm*, in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* 228 (Bratspies & Miller eds., 2006).

<sup>16</sup> Declaration on Principles of International Law G.A. Res. 2625(XXV); Sorel, *Some Questions About the Definition of Terrorism and the Fight Against its Financing*, 14 E. J. INT'L. L., no.2, 365-78 (2003); Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 ISRAELI Y.B. H.R., 233-46 (1989).

<sup>17</sup> *Aerial Incident at Lockerbie (Libya v. U.K., U.S.)*, 1992 I.C.J. 3; *See also* *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 22; DUFFY, *THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW* 171 (2005); Lillich, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217 (1977).

<sup>18</sup> LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 45 (2010); Ago, *The Internationally Wrongful Act of the State, Source of International Responsibility (part 1)* Addendum to the 8<sup>th</sup> report on State Responsibility by the Special Rapporteur, ILC 32<sup>nd</sup> Sess. A/CN.4/318/Add.5-7 (1989); Printer, *The Use of Force Against Non-State Actors under*

territory as the staging ground for its violent attacks against Respondent, coupled with Applicant's unwillingness to curb the ZDP's activities, left Respondent with no other choice than to exercise its right of self-defense (C.30).

The proportionality<sup>19</sup> of Respondent's response is evinced from its calibrated operation in Ardenia, characterized by [i] a limited 15-mile incursion into Ardenian territory (C.30); [ii] the use of laser-guided precision missiles (C.29); and [iii] the targeting of a single strategic objective (C.30). Having used the minimum amount of force necessary to protect its national security, Respondent's attack is therefore proportionate.<sup>20</sup>

**2. Respondent's drone strike in Ardenia is justified by the principle of necessity.**

Respondent's use of force is justified under the *Caroline Incident's* Doctrine of Necessity<sup>21</sup> which requires that: (1) the measure taken is the only way for the State to safeguard an essential interest against a grave and imminent peril; (2) the measure must not seriously impair an essential interest of the State or of the international community; and (3) the State must not have contributed to the situation of necessity.<sup>22</sup>

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*International Law: An analysis of the US Predator Drone Strike in Yemen*, 8 UCLA J. INT'L. & FOREIGN AFF. 331 (2003).

<sup>19</sup> Randelzhofer, *supra* note 8 at 805.

<sup>20</sup> Alston Report, A/HRC/14/24/Add.6, ¶43.

<sup>21</sup> *Letters from U.S. Secretary of State Daniel Webster to British Minister Mr. Fox*, 29 BRIT. FOREIGN STATE PAPERS 1129 (1840-4 1).

<sup>22</sup> Responsibility of States for Internationally Wrongful Acts, G.A. Res. 83, UN GAOR, 56th Sess., UN Doc. A/RES/56/83, art.21, cmt. 1 (2001) ["AOSR"]; *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, ¶¶51-52; *Palestinian Wall*, 2004 I.C.J. 242, ¶140.

*First*, Respondent has "objectively established"<sup>23</sup> the peril, gravity, and imminence of the terrorist attacks<sup>24</sup> when President Khutai invoked his emergency powers to protect life and public security in Rigalia (C.16).<sup>25</sup> Applicant's unwillingness and inability to address the attacks left Respondent with no other course of action. *Second*, a minor incursion<sup>26</sup> in Ardenian territory to neutralize a strategic terrorist target<sup>27</sup> did not seriously impair Applicant's or the international community's interests.<sup>28</sup> *Finally*, Respondent did not contribute to the situation of necessity. As will be discussed in *infra* Part III (B), the ban on the Mavazi was a measure necessary to protect both Respondent's public order and the rights of Zetian women (C.16).

**THE USE OF LETHAL FORCE AGAINST ZETIAN TERRORISTS IS VALID.**

**1. The targeted killings are justified under International Humanitarian Law ("IHL").**

In an armed conflict, the more permissive standards of IHL may be used to justify the use of lethal force against an individual.<sup>29</sup> As will be shown, the presence of a non-international armed conflict ("NIAC") between Respondent and the ZDP justifies the drone strikes.

***a. A NIAC exists between Respondent and the ZDP.***

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<sup>23</sup> Gabcikovo, 1997 I.C.J. 7, ¶54.

<sup>24</sup> *Palestinian Wall*, 2004 I.C.J. 242, ¶¶140-41.

<sup>25</sup> French Company of Venezuelan Railroads Case, 10 U.N. R.I.A.A. 285, 353 (1905).

<sup>26</sup> D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AM.J.INT'L.L. 584, 555-557 (1983)

<sup>27</sup> UN CODIFICATION OF STATE RESPONSIBILITY 264-65 (Spinedi and Simma, eds., 1987).

<sup>28</sup> AOSR, art. 25(1)(a)(b).

<sup>29</sup> 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, TARGETED KILLING IN INTERNATIONAL LAW 140 (2008).

In *Prosecutor v. Tadić*, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) held that a NIAC exists when there is protracted armed violence between governmental authorities and organized armed groups.<sup>30</sup> *Prosecutor v. Boškoski* further elaborated this as comprising of two primary elements: organization and intensity of violence.<sup>31</sup>

The ZDP, an independent terrorist organization,<sup>32</sup> has exhibited a high degree of organization by carrying out a sustained military operation and a murderous wave<sup>33</sup> of attacks in Rigalia (C.15, 16, 18). The death and violence that resulted from the clashes between the ZDP and Respondent’s forces was so intense that Respondent had to seek Morgania’s assistance in dealing with the ZDP (C.27). Clearly, a NIAC exists between Respondent and the ZDP.

***b. The ZDP terrorists are valid military targets.***

- i. Adar Bermal and the ZDP leaders (“Bermal and Others”) directly participated in the hostilities.

An individual who directly participates in the hostilities becomes a valid military target.<sup>34</sup> Bermal and Others’ direct participation in the hostilities<sup>35</sup> is seen from their planning,

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<sup>30</sup>Case No. IT-94-1-A, ¶70 (1999); A.P. II, art. 4(2).

<sup>31</sup> Case No. IT-04-82 ¶175 (2008); *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, ¶49 (2008).

<sup>32</sup> Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L. L.1, 21 (2003); Gross, *Fighting Terrorism. Bringing Democratic Regime to Non-Democratic Countries-The Legal Implications*, 16 TULANE J. INT’L. & COMP. L 17 (2007).

<sup>33</sup> Zimmermann, *War Crimes Committed in an Armed Conflict Not of an International Character*, in COMMENTARY ON THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT 285 (Triffterer, ed., 1999).

<sup>34</sup> Aldrich, *The Taliban, Al-Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 892 (2002).

<sup>35</sup> MELZER, DIRECT PARTICIPATION IN HOSTILITIES 43 (2009); *See also* COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 19-23 (Pictet et al., eds., 1960).

commanding, and perpetration of terrorist acts against Respondent, thereby rendering them a valid subject of military targeting (C.30).

ii. The drone strikes were necessary and proportionate.

Military action is necessary when it creates a distinct military advantage to the party taking action.<sup>36</sup> Meanwhile, the principle of proportionality requires States to balance the incidental harm to civilians caused by any operation and the military advantage that would result therefrom.<sup>37</sup> In *Prosecutor v. Blaskić*, the ICTY recognized that military necessity may justify an attack resulting to civilian deaths, provided such is not excessive.<sup>38</sup>

In this case, Respondent's drone strikes against the ZDP terrorists are necessary to stop the wave of violent attacks in Rigalia from escalating further. Given the mountainous terrain of the Northern Provinces (C.2) and the ZDP's clandestine operations (C. 16-18), the use of advanced military technology was required. Moreover, Respondent's use of precision weapons underscores the proportionality of its response. Unmanned Aerial Vehicles ("UAV"), by their very nature, are designed to be more accurate,<sup>39</sup> thereby minimizing unnecessary damage to the adverse party.

**2. There was no violation of IHRL.**

***a. Respondent's obligations under the ICCPR do not apply extraterritorially and in an armed conflict situation.***

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<sup>36</sup> Case No. IT-95-14-A, at ¶180 (2004); Dinstein, *Military Necessity*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 21 (Worlfrum, ed., 2009).

<sup>37</sup> *Prosecutor v. Galić*, Case No. IT 98-29-T, ¶58 (2003).

<sup>38</sup> IT-95-14-A, ¶180 (2004).

<sup>39</sup> Benvenisti, *The Legal Battle to Define the Law on Transnational Assymetric Warfare*, 20 DUKE J.COMP. & INT'L L. 339, 353 (2010).

Respondent's ICCPR obligations do not apply to individuals outside its territory, unless it exercises jurisdiction over them.<sup>40</sup> In *Banković et al. v. Belgium*, the European Court of Human Rights ("ECtHR") held that a State is deemed to have jurisdiction when (1) it has effective overall control over a territory or (2) the acts at issue are performed by the State's authorities on foreign soil.<sup>41</sup> Here, Respondent neither had effective control over the Valley nor did its agents perpetrate the drone strikes. Consequently, Respondent's ICCPR obligations do not apply to Adar Bermal.

Additionally, IHRL ceases to operate in situations of armed conflict because the *lex specialis*<sup>42</sup> rules of IHL govern.

***b. Assuming IHRL applies, the drone strikes are necessary and proportionate.***

The emergence of terrorism as a global phenomenon requires a complex balance between human rights and security.<sup>43</sup> Under IHRL, the use of lethal force is lawful if (1) the targeted individual poses an imminent threat to life, and (2) no less extreme means are sufficient to address such threat.<sup>44</sup> These circumstances are present here.

*First*, the ZDP perpetrated egregious acts of terrorism against at least two States – Rigalia and Morgania – and continuously poses a threat to life in both. *Second*, Applicant's unwillingness to cooperate and its acquiescence (C.27), in addition to the gravity of ZDP's

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<sup>40</sup> International Covenant on Civil and Political Rights, 1966, art. 2(1), 999 U.N.T.S. 171 ["ICCPR"].

<sup>41</sup> App. No. 52207/99, Eur. Ct. H. R. , 41 I.L.M. 517, ¶¶68-73 (2001).

<sup>42</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240, ¶25.

<sup>43</sup> Freeman, *Order, Rights, and Threats: Terrorism and Global Justice*, in HUMAN RIGHTS IN THE 'WAR ON TERROR' 52 (Wilson ed., 2005).

<sup>44</sup> H.R.C., General Comment No. 6, U.N. Doc. HRI/GEN/1/Rev.6, ¶3 (1982).

attacks, left Respondent with no choice but to use lethal force against ZDP members in order to “prevent them from carrying out [further] terrorist activities.”<sup>45</sup>

*c. Finally, Applicant does not have standing to espouse a claim on behalf of the Zetians.*

It is elementary that diplomatic protection cannot be brought against the individual’s State of nationality.<sup>46</sup> Although the Zetians are dual nationals of both Applicant and Respondent, their predominant nationality is Rigalian [see *infra* Part III(A)(1)]. Thus, Applicant cannot espouse the Zetians’ alleged claims against Respondent.

**II. THE ATTACK ON THE BAKCHAR VALLEY HOSPITAL (“VALLEY”) IS NOT ATTRIBUTABLE TO RIGALIA, RIGALIA HAS NO OBLIGATION TO INVESTIGATE THE ATTACK AND TO COMPENSATE ARDENIA THEREFORE AND, MOREOVER, THE ACT WAS NOT AN ACT OF AGGRESSION BUT PART OF A LEGITIMATE AND PROPORTIONATE OPERATION TO DEFEND AGAINST ZETIAN TERRORISTS.**

Respondent commiserates with the accidental and unfortunate attack on the Valley. However, the fact remains that the attack is not attributable to Respondent, negating any responsibility to investigate and to compensate Applicant for the same. Moreover, the attack on the Valley does not constitute an act of aggression, since it is valid under *jus in bello*, or in the alternative, under *jus ad bellum*.

**THE ACT OF THE DRONE OPERATOR IS NOT ATTRIBUTABLE TO RESPONDENT.**

A State’s international responsibility is engaged only if a breach of an international obligation has been committed, and such breach is attributable to it.<sup>47</sup> Here, none of the relevant modes of attribution are present.

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<sup>45</sup> Kelly v. U.K., Eur. Ct. H. R., App. No. 30054/96, ¶139 (1993).

<sup>46</sup> ILC, *Draft Articles on Diplomatic Protection with Commentaries*, A/61/10 (2006); [“Diplomatic Protection”]; AOSR, art. 42.

<sup>47</sup> AOSR, art. 1.

**1. The drone operator is not Respondent's organ.**

The conduct of a State organ delegated with executive, legislative, judicial<sup>48</sup> or any other function under municipal law<sup>49</sup> is attributable to the State.<sup>50</sup> In this case, there is neither a showing that the drone operator was given the status of an organ by Respondent,<sup>51</sup> or any indication that the drone operator is a common or joint organ<sup>52</sup> of Respondent and Morgania. Consequently, none of its acts are directly attributable to Respondent.

**2. The drone operator is not Respondent's para-Statal entity.**

Para-Statal entities are persons or entities who exercise elements of governmental authority<sup>53</sup> under the mandate of a State's internal law. Here, there is no showing that the drone operator was specifically delegated or entrusted with military functions by Respondent's internal law.<sup>54</sup> At most, it merely took part in the military affairs of Respondent as a necessary incident to the military assistance rendered by Morgania (C.27).<sup>55</sup>

**3. The drone operator was not placed at Respondent's disposal.**

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<sup>48</sup> AOSR, art. 5; *Hyatt International Corporation v. Iran*, 9 IRAN-U.S. CL. T. REP. 72, 88-94 (1985).

<sup>49</sup> CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 91 (2002).

<sup>50</sup> *Id.*, at 94, 97; *Chattin Case*, 4 R.I.A.A. 282 (1927); *Nicaragua*, 1986 I.C.J. 14, ¶17 (Separate Opinion of Judge Ago).

<sup>51</sup> Palchetti, *De Facto Organs of a State*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶10 (Wolfrum, ed., 2006).

<sup>52</sup> AOSR, art. 47; CRAWFORD, *supra* note 49 at 272.

<sup>53</sup> AOSR, art. 5.

<sup>54</sup> AOSR, art. 5; *Hyatt*, 9 IRAN-U.S. CL. T. REP. 72, at 88-94.

<sup>55</sup> CRAWFORD, *supra* note 49 at 272.

The conduct of organs of a State for the temporary benefit of another State is attributable to the beneficiary State.<sup>56</sup> The drone operator, in this case, was not placed under Respondent's disposal but was merely supplied by Morgania as a form of military assistance (C.27). According to the *Chevreau* case,<sup>57</sup> in order for an organ to be considered as placed at the disposal of another State, it must be under the governmental authority and instructions of the receiving State.<sup>58</sup> Applicant cannot claim that the conduct of the drone operator arose from joint instructions of Morgania and Respondent, since the drone operator remained under the supervision of Morgania (C.27) and was not even authorized to contact Respondent's *informants directly* (C.30).

**4. Respondent did not control or direct the conduct of the drone operator.**

In *Nicaragua*, the ICJ held that specific instructions<sup>59</sup> and not a mere general declaration of support<sup>60</sup> must be given by a State in order for it to be deemed to have effective control or direction over the activities of a non-State actor. Significantly, no *specific* instruction was given by Respondent to the drone operator, negating the presence of control or direction (C.29).

**5. Respondent never acknowledged nor adopted the acts of the drone operator.**

The ICJ in *Tehran Hostages*, affirmed that conduct, which is not attributable to a State, shall be considered an act of that State if it endorses and subsequently approves such act as its

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<sup>56</sup> AOSR, art. 6.

<sup>57</sup> 2 R.I.A.A. 1113, 1114 (1931).

<sup>58</sup> CRAWFORD, *supra* note 49 at 103.

<sup>59</sup> *Nicaragua* 1986 I.C.J. 14, ¶14, ¶62, ¶109, ¶115; *Armed Activities*, 2005 I.C.J. 168, ¶301.

<sup>60</sup> *Nicaragua* 1986 I.C.J. 14, ¶109-115; See *Rights of Nationals of the United States of America in Morocco*, 1951 I.C.J. ¶176 cited in CRAWFORD, *supra* note 49 at 152; DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 416 (2005).

own.<sup>61</sup> Here, Respondent never declared that it approves or endorses the acts of the drone operator.<sup>62</sup> To be sure, its defense minister instructed Morgania to avoid unnecessary and disproportionate military actions (C.31).

**RESPONDENT HAS NO OBLIGATION TO INVESTIGATE AND COMPENSATE**

In *Finucane v. UK*, the ECtHR held that the duty to investigate arises when *State agents* are alleged to have used force in violation of the right to life.<sup>63</sup> In cases where State agents are not involved, the Inter-American Court of Human Rights stated in *Velasquez-Rodriguez* that the duty will only arise if the State failed to exercise “due diligence to prevent the violation [of the right to life] or to respond to it.”<sup>64</sup> As the attack on the Valley cannot be attributed to Respondent, and since Respondent was not remiss in preventing or responding to the alleged violation, no duty to investigate exists.

In any event, the duty to investigate has already been fulfilled. The ECtHR in *Ergi v Turkey* held that an incident report constitutes effective investigation as long as it describes the circumstances surrounding the killing and verifies whether the military operation that caused the killing was done in the proper manner.<sup>65</sup> Similarly, the *Incident Report* filed by the drone operator in this case is an effective investigation since it indicated that the deaths were due to an

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<sup>61</sup> US Diplomatic and Consular Staff in Tehran (U.S. v. Ir.), 1980 I.C.J. 3.

<sup>62</sup> AOSR, art. 11; Lighthouses Arbitration, 12 R.I.A.A. 155 (1956).

<sup>63</sup> App. no. 29178/95, ¶67 (2003); *See also* Frey, *Report of the Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, U.N. G.A.O.R., A/HRC/Sub.1/58/27 (2006).

<sup>64</sup> *Velásquez-Rodríguez v. Honduras*, Inter-Am.C.H.R., Series C No. 4, ¶172 (1988).

<sup>65</sup> App. no. 23818/94 (1998); *See also* MENSAH, *EUROPEAN HUMAN RIGHTS CASE SUMMARIES 1960-2000*, 291-292 (2002).

accidentally fired missile and that the missile hit the hospital causing the deaths of 150 persons and wounding 200 more (C. 30).

Consequently, the absence of any internationally wrongful act committed by Respondent negates Applicant's claim for compensation.<sup>66</sup>

**■ THERE IS NO ACT OF AGGRESSION.**

Although Respondent recognizes the status of aggression as the most serious and dangerous form of illegal use of force under the UN Charter,<sup>67</sup> Respondent maintains that it is innocent of this crime.

**1. The drone strike does not meet the threshold of aggression.**

General Assembly Resolution 3314 defined Aggression as the “use of armed force against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”<sup>68</sup> However, not all uses of force constitute an act of aggression.<sup>69</sup> In *Nicaragua*, the ICJ opined that a distinction must be drawn between the gravest forms of the use of force, *i.e.* those constituting aggression, and other less grave forms.<sup>70</sup> A *de minimis* use of force directed against individuals within the territory of

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<sup>66</sup> AOSR, art. 36(1); *See* *Ekinici v. Turkey*, App. no. 27602/95, ¶179 (2002); *Orhan v. Turkey*, App. no. 25656/94, ¶451 (2002).

<sup>67</sup> Definition of Aggression, Preamble, G.A. Res 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974).

<sup>68</sup> G.A. Res. 3314, art. 1.

<sup>69</sup> *Randelzhofer*, *supra* note 8 at 117.

<sup>70</sup> *Nicaragua*, 1986 I.C.J. 392, ¶191.

another State does not breach article 2(4) of the UN Charter, since such action is not aimed at compromising the territorial integrity or political independence of the State.<sup>71</sup>

Here, Applicant was never deprived of any portion of its territory and such remains intact.<sup>72</sup> Its political independence was never compromised as its *power* within its territory, vis-à-vis other sovereign governments was never diminished.<sup>73</sup> Finally, the drone strike is not inconsistent with the U.N. Charter,<sup>74</sup> as it was merely intended to stop further terrorist acts in Rigalia.<sup>75</sup>

Notably, the Security Council did not find that an act of aggression was committed in this case.<sup>76</sup> Possessed of the power to determine the existence of aggression,<sup>77</sup> its decision to merely “urge the parties to resolve their differences by peaceful means,” shows that even the Security Council does not consider the drone strike in Ardenia as an act of aggression.

**2. In any event, the strike was a valid act of self-defense.**

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<sup>71</sup> D’Amato, *supra* note 26.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See e.g., S.C. Res. 1373, U.N. SCOR, U.N. Doc. S/RES/1373 (2001).

<sup>76</sup> See e.g. 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) (where the Security Council categorically declared an act of aggression took place).

<sup>77</sup> UN CHARTER, art. 39; See also Frowein and Krisch, *Chapter VII. Action with respect to Threats to the Peace, and Acts of Aggression*, in 1 SIMMA, *supra* note 8 at 719.

The use of force in self-defense cannot constitute an act of aggression.<sup>78</sup> As established in *supra* Part I(B)(1), the drone strike in Ardenia was a valid military action and a proportionate response to the armed attacks by the ZDP.

### **III. RIGALIA'S LIMITED BAN OF THE MAVAZI ("BAN") FOR ZETIAN WOMEN AND GIRLS IS CONSISTENT WITH INTERNATIONAL LAW.**

#### **■ APPLICANT HAS NO STANDING TO QUESTION RESPONDENT'S LEGISLATION.**

Only an injured State may invoke the Responsibility of another.<sup>79</sup> Here, Applicant has no standing, as it cannot enforce the claims of the Rigalians in any case, its hands are unclean.

#### **1. Applicant cannot exercise diplomatic protection over the Rigalian Zetians.**

In situations where an individual has dual or multiple nationalities, it is customarily<sup>80</sup> recognized that one State of nationality may not exercise diplomatic protection in respect of a person against another State of which that person is also a national, unless the nationality of the former State is predominant.<sup>81</sup>

Applicant cannot espouse the claims of the Rigalian Zetians since they are nationals of both Ardenia and Rigalia (C.8) and Rigalian is their predominant nationality. The Rigalian Zetians have closer ties with Respondent, having permanently resided therein (C.8). Moreover, they have greater financial interests<sup>82</sup> in Rigalia, particularly the income that they derive from their share in the coltan mining operation in the Northern Provinces (C.13). Participation in

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<sup>78</sup> DINSTEIN, WAR AGGRESSION AND SELF-DEFENSE 175 (2005), *citing* Nuclear Weapons Advisory Opinion, 1996 I.C.J. 226, 263 (1996).

<sup>79</sup> AOSR, art. 42.

<sup>80</sup> ILC Commentaries on the Draft Articles on Diplomatic Protection 46, A/61/10 (2006); *see* Mergé Claim, It.-U.S. Con. Comm., 22 I.L.R. 443 (1955).

<sup>81</sup> *Draft Articles on Diplomatic Protection*, art. 7, U.N. Doc. A/61/10 (2006); Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930, art. 1, 179 L.N.T.S. 89.

<sup>82</sup> *See* Nottebohm (Liech. v. Guat.), 1955 I.C.J. 22.

public life is evident from their membership and active participation in the Rigalian Parliament (C.21). Thus, Applicant cannot espouse the Rigalian Zetian's claims.

## **2. Applicant's hands are unclean.**

Respondent recognizes the *erga omnes partes* nature of its obligations under the ICCPR,<sup>83</sup> and Applicant's right to invoke the same as basis for standing before the ICJ. Like all claims, however, Applicant must come to the ICJ with clean hands.<sup>84</sup> Otherwise, it loses its legal standing.<sup>85</sup>

More than turning a blind eye to several systematic violations of human rights in the Southern Provinces, Applicant's Southern provinces have gone as far as to legislate the forced wearing of the Mavazi (C.7), itself a violation of IHRL. Hence, Applicant is coming to the Court with unclean hands.

## **THE LEGISLATION UPHOLDS HUMAN RIGHTS.**

### **1. Respondent's legislation aims to eliminate discrimination.**

States are conventionally obliged<sup>86</sup> to eliminate all discriminatory laws<sup>87</sup> and to implement concrete policies to eradicate discrimination.<sup>88</sup> In Resolution 63/181, the UN General

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<sup>83</sup> CRAWFORD, *supra* note 49 at 276.

<sup>84</sup> *Nicaragua*, 1986 I.C.J. 14 (dissenting opinion of Judge Schwebel); *Arrest Warrant (D.R.C. v. Belg.)*, 2002 I.C.J. 35 (dissenting opinion of Judge Van der Wyngaert).

<sup>85</sup> Fitzmaurice, *The General Principles of International Law, Considered from the Standpoint of the Rule of Law* 92(2) RECUEIL DES COURS 119 (1957).

<sup>86</sup> Vienna Convention on the Laws of Treaties, 1969, art. 26, 1155 U.N.T.S. 331; AUST, *MODERN TREATY LAW AND PRACTICE* 179 (2007), (*Pacta sunt servanda*).

<sup>87</sup> ICCPR, art. 26.

<sup>88</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights, principle 37-38, UN Doc. E/CN.4/1987/17, *Annex; Human Rights Quarterly*, Vol. 9 (1987); The Secretary General, *Compilation of General Recommendations Adopted by Human Rights Treaty Bodies*, ¶10, U.N. Doc. HRI/GEN/Rev.7 (2004).

Assembly recognized that religious belief may be used to perpetrate discrimination against women.<sup>89</sup> For instance, the Special Rapporteur on Freedom of Religion has stated that the right against non-discrimination requires preventing women from being forced to wear religious symbols,<sup>90</sup> such as the Mavazi.

Here, Zetian women have been forced to wear the Mavazi under pain of being ostracized by their communities and receiving cruel, inhumane, and degrading treatment (C.3). Such practice, perpetrated under the protective clout of the Masinto religion (C.3), runs afoul with the rights of Zetian women.<sup>91</sup> Thus, by banning the Mavazi, Respondent is promoting the rights of Zetian women, in furtherance of its obligations under International Law.

## **2. The ban seeks to eliminate cruel, inhuman, and degrading treatment**

States must take all actions to stop human rights violations from occurring within its territory.<sup>92</sup> Women who refused to wear the Mavazi are subjected to flogging, which International Law<sup>93</sup> recognizes as a form of inhuman and degrading treatment. By instituting the Ban, Respondent has eliminated a situation which would have subjected Zetian women and girls to this banned form of treatment.

## **3. Respondent enjoys a *margin of discretion* in implementing its human rights obligations.**

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<sup>89</sup> Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief*, A/HRC/13/40, ¶66 (2009).

<sup>90</sup> *Id.*, at ¶¶36-60.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*, at ¶62.

<sup>93</sup> Rodley, *Report of the Special Rapporteur on Torture*, E/CN.4/1995/34 5, ¶6 (1994).

States have a “margin of discretion” in implementing their human rights obligations,<sup>94</sup> since they can best respond to the social, cultural and religious inclinations of its people. Accordingly, Respondent is in the best position to determine how to implement its obligations under IHRL. In its assessment of the cultural and religious underpinnings of its society (C.21, 34), Respondent deemed it necessary to implement the policy.

**■ IN ANY EVENT, THE BAN IS A JUSTIFIED LIMITATION.**

**1. The Ban legitimately aims to protect public safety, public order, and other fundamental rights.**

The freedom to manifest one’s religion is not absolute and may be limited by law in order to protect (1) public safety and order, or (2) the fundamental rights and freedoms of others.<sup>95</sup>

The limitations imposed on the Masinto religion are valid in this case. The armed attacks by the Zetian terrorists (see *supra* Part I),<sup>96</sup> facilitated by the cloak of secrecy which was ensured by wearing the Mavazi (C.18), justifies its ban.

**2. The Ban is proportionate.**

The restriction of a right may only be for the purpose prescribed and must be directly related and proportionate<sup>97</sup> to the predicate specific need.<sup>98</sup> In *Şahin v. Turkey*, it was held that a

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<sup>94</sup>Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing Jurisprudence of Diversity within Universal Human Rights*, 15 EMORY INT’L L. REV. 391, 14 (2003).

<sup>95</sup> ICCPR, art. 18(3).

<sup>96</sup> See e.g. *Freeman v. State of Florida*, 2003 WL 21338619, Fla. Cir. Ct., 12-13 (2003); See also *Bhinder v Canada*, H.R. Comm., 208/1986, U.N. Doc. CCPR/C/37/D/208/1986 ¶6.2 (1989).

<sup>97</sup> ICCPR, art.18(3), *elaborated by* H.R.C., Gen. Comm. 22, U.N. Doc. HRI/GEN/1/Rev.1 ¶8 (1994).

<sup>98</sup> H.R.C., Gen. Comm. 22, U.N. Doc. HRI/GEN/1/Rev.1 ¶8 (1994) *cited in* JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 507, 525 (2004).

headscarf ban in schools is a proportionate response in order to preserve public order.<sup>99</sup> Similarly, the serious and imminent threat posed by terrorism, vis-à-vis the limited intrusion into the Masinto religious beliefs, demonstrates the proportionality of the Ban.

**IV. APPLICANT'S FAILURE TO INVESTIGATE AND PROSECUTE THE ALLEGED CORRUPTION AND TO PROVIDE LEGAL ASSISTANCE TO RESPONDENT CONSTITUTE BREACHES OF THE OECD ANTI-BRIBERY CONVENTION, AND THE FAILURE OF APPLICANT'S NCP TO RESPOND TO THE COMPLAINT BY THE CRBC CONSTITUTES A BREACH OF THE OECD DECISION ON MNE GUIDELINES.**

The last two decades have witnessed a rapid development in the effort to combat corruption in International Law.<sup>100</sup> As a State Party to the Organization for Economic Cooperation and Development (“**OECD**”) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“**Convention**”),<sup>101</sup> Applicant is obliged<sup>102</sup> to cooperate in combating bribery in international business transactions.<sup>103</sup> Having failed to investigate and prosecute MDI's corrupt practices (C.23-26), Applicant has breached this duty.

**APPLICANT'S FAILURE TO INVESTIGATE AND PROSECUTE THE ALLEGED CORRUPTION AND TO PROVIDE LEGAL ASSISTANCE TO RESPONDENT CONSTITUTE BREACHES OF THE CONVENTION.**

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<sup>99</sup> App. No. 44774/98, ¶199, 122 (2005).

<sup>100</sup> United Nation Convention Against Corruption, 2005, U.N. doc. A/58/422; Organization of American States: Inter-American Convention against Corruption, 35 I.L.M. 724; Practical Measures Against Corruption, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.144/8 (1990), revised by U.N. Doc. A/CONF.144/8/Corr.1 (1990); See Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 346 (2000).

<sup>101</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997, 37 I.L.M. 1 [“OECD Convention”].

<sup>102</sup> VCLT, art. 26. (*Pacta sunt servanda*).

<sup>103</sup> OECD Convention, Preamble.

**1. The ongoing investigation involving bribery of foreign officials in Respondent falls within the ambit of the Convention.**

Article 1 of the Convention provides:

[T]hat the offense of bribery of foreign public officials in international business transactions is the intentional offering, promising, or giving of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties in order to obtain or retain business or other improper advantage in the conduct of international business.<sup>104</sup>

The elements of [a] bribery of a public official [b] to gain an improper advantage [c] in an international business transaction [d] indirectly through intermediaries are present in this case.

***a. As President and General Director of a public enterprise, Leo Bikra (“Bikra”) is a public official.***

The Convention penalizes supply-side bribery,<sup>105</sup> or cases where a foreign public official is at the receiving end of a bribery incident.<sup>106</sup> Pursuant to Article 1(4)(a) of the Convention, a public official is any person who exercises a public function, including persons who work for a public enterprise.<sup>107</sup> An enterprise [i] which exercises a public function and [ii] is under the control of a government is a public enterprise. Here, the Rigalian Refining Incorporated (“**RRI**”) (C.10) is a public enterprise, thereby making Bikra a public official.

**i. RRI exercises a public function.**

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<sup>104</sup> *Id.*, art. 1(1).

<sup>105</sup> Tronnes, *Ensuring Uniformity in the Implementation of the 1997 OECD Convention on the Combating Bribery of Foreign Public Officials in International Business Transactions*, 33 GEO. WASH. INT’L L. REV. 97 (2000).

<sup>106</sup> Zerbes, *Article 1. The Offence of Bribery of Foreign Public Officials*, in THE OECD CONVENTION ON BRIBERY: A COMMENTARY 57 (Pieth et al. eds., 2007).

<sup>107</sup> OECD Convention, art. 1(4)(a).

To be deemed an enterprise exercising a public function, there must be: [a] an act of delegation by a State [b] of a function affecting the delegating State's public interest.<sup>108</sup>

*First*, Official Commentary 12 to the Convention recognizes that States normally delegate the performance of public procurement or bidding functions to specialized entities. Persons employed by these entities are considered public officials under the Convention because they represent the State's authority to the other contracting parties.<sup>109</sup> RRI's call for tender offers for the development of the Moria Mine (C.10) shows that RRI exercises delegated public procurement functions, thus making RRI's officers Rigalian public officials under the Convention.

*Second*, Official Commentaries 13 to 16 state that an activity is deemed to affect the public interest when the overarching authority of the State stands behind it.<sup>110</sup> Thus, any activity carried out pursuant to delegated State powers is an exercise of a public function within the meaning of the Convention.<sup>111</sup>

In *Acres-Lesotho*, it was held that the Chief Executive Officer of a company engaged in public procurement is a public official.<sup>112</sup> Bikra, who is the President and Director General of a Rigalian enterprise engaged in public procurement, is therefore a public official.

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<sup>108</sup> Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in OECD Convention and Related Documents, 12 (1997) ["Official Commentary"]; Zerbes, *supra* note 106 at 60.

<sup>109</sup> Zerbes, *supra* note 106 at 65.

<sup>110</sup> *Id.*, at 60.

<sup>111</sup> *Id.*, at 61.

<sup>112</sup> *Id.*, at 60; *See* the *Acres-Lesotho* Case, Judgments in *R. v. Acres International Ltd.* (2002), CRI/T/144/02 (Appeal Court of Lesotho), *affirming* CRI/T/2/2002 (High Court of Lesotho); and *R. v. Sole* (2002), CRI/T/111/91 (Appeal Court of Lesotho), *affirming* (2002), CRI/T/111/99 (High Court of Lesotho).

ii. RRI is controlled by Respondent.

A public enterprise is one over which a government may directly or indirectly exercise dominant influence.<sup>113</sup> Influence and control may be inferred from facts such as ownership or a systematic State support for the activities of the enterprise.<sup>114</sup> RRI is fully owned, operated, and controlled by Respondent (C.10), thereby making it a public enterprise.

***b. MDI gained an improper advantage.***

An award obtained from a bribe<sup>115</sup> is deemed an improper advantage even if the awardee was entitled to it.<sup>116</sup> Thus, regardless of whether or not MDI was indeed entitled to a renewal of its contract (C.12), by virtue of its cash payment and its issuance of MDI shares worth more than \$10,000,000.00 to Rigalian government officials and intermediaries (C.11-12), MDI is deemed to have obtained an improper advantage.

***c. An “international business transaction” is under investigation.***

The Convention applies only to cases of “international” or transnational bribery.<sup>117</sup> Transnational bribery is an *economic transaction* in which a foreign public official provides

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<sup>113</sup> OECD, COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 14.

<sup>114</sup> Zerbes, *supra* note 106 at 62-64.

<sup>115</sup> Official Commentary, ¶4. (referring to Article 1)

<sup>116</sup> *Id.*, ¶5. (referring to Article 1)

<sup>117</sup> Zerbes, *supra* note 106 at 53.

service to a firm in exchange for valuable consideration.<sup>118</sup> A “business transaction” encompasses activities undertaken for profit.<sup>119</sup>

Here, the bribery of Rigalian public officials was made in connection with MDI’s, pursuit of its mineral extraction business in Rigalia (C.12). Evidently, the bribery incident is transnational and therefore subject to the Convention.

***d. Clyde Zangara (“Zangara”) and the Zetian Refugees Fund (“ZRF”) are intermediaries of Bikra.***

To fall under the Convention, a bribe need not be given directly to a public official but may be coursed indirectly through an intermediary.<sup>120</sup> An intermediary is any person who is put in contact with or between two or more parties.<sup>121</sup> Such person can act as a conduit for legitimate economic activities, illegitimate bribery payments, or a combination of both.<sup>122</sup>

In the *Green Case*,<sup>123</sup> a Thai official was found to have committed transnational bribery when he received a bribe from an American company through a friend and his daughter who acted as his intermediaries. In this case, Zangara and the ZRF, acting as an intermediary between RRI and MDI (C.11-12), facilitated the transfer of more than \$10,000,000.00 worth of bribe payments to secure the renewal of the Moria Mine contract (C.11-12). It is immaterial

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<sup>118</sup> Davis, *Self-Interest and Altruism in the Deterrence of Transnational Bribery*, 4 AM. L. & ECON. REV. 314 (2002).

<sup>119</sup> Canadian Corruption of Foreign Corrupt Practices Act, Secs. 2 under 3(1), *cited in* Zerbes, *supra* note 106 at 153.

<sup>120</sup> OECD Convention, art. 1(1).

<sup>121</sup> Working Group on Bribery in International Business Transactions, *Typologies in the Role of Intermediaries in International Business Transactions* 5 (2009).

<sup>122</sup> *Id.*, at 5.

<sup>123</sup> Grand Jury Indictment, Criminal Case No. CR08-59(A)GW (U.S. District Court, Central District of California) (2008).

whether the bribe actually accrued to Bikra's benefit, since the Convention does not require actual receipt and enjoyment of the proceeds of the bribe.<sup>124</sup>

**2. The payment of "mandatory undocumented fees" to the Tribal Councils constitutes bribery.**

***a. The Tribal Councils and their leaders are public officials.***

The Northern Provinces are a weak governance zone over which the Tribal leaders exercise governmental authority. The OECD defines a *weak governance zone* as an "investment environment in which governments *cannot* or will not assume their roles in protecting rights, providing basic public services x x x, and ensuring that public sector management is efficient and effective."<sup>125</sup> In such environments, public authority may in fact be held by persons not formally designated as public officials.<sup>126</sup>

Here, the inability of Respondent's central government to control the Northern Provinces (C.3), in addition to 100% practical effect of Tribal Council rules in the region (C.6), show that the Northern Provinces is a weak governance zone. The Tribal leaders who exercise actual public authority in the area are therefore, deemed public officials for purposes of the Convention.

***b. The payments are not small facilitation payments.***

Although small facilitation payments<sup>127</sup> do not constitute bribery under the Convention, the Convention itself recognizes that such is a "corrosive phenomenon" that must be

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<sup>124</sup> Zerbes, *supra* note 106 at 97.

<sup>125</sup> OECD Council, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, 11 (2006), available at <http://www.oecd.org/dataoecd/26/21/36885821.pdf>.

<sup>126</sup> Official Commentary 16.

<sup>127</sup> OECD Convention, art. 9; Denmark, OECD, Denmark: Phase 1 Report 3 (2000); Canada, OECD, Canada: Phase 1 Report 6 (1999) ("Subsection 3(4)); Slovakia, OECD, Slovak Republic: Phase 1 Report 4 (2003); Sweden, OECD: Sweden: Phase 1 Report 4 (1999); New Zealand, OECD, New Zealand: Phase 1 Report 8 (2002); Australia, OECD, Australia: Phase 1 Report 6

addressed.<sup>128</sup> In *United States v. Kay*, the United States Court of Appeals for the Fifth Circuit held that the facilitating payments exception is “very limited.”<sup>129</sup>

To fall under the exception, two stringent requirements must be met: *first*, the exception must be recognized under the concerned State’s domestic law; and *second*, the payment must be made solely to facilitate lawful decisions where no discretion is involved.<sup>130</sup> None of these requirements are present in this case.

i. The payments are not sanctioned by the laws of Respondent.

The facilitation payment exception cannot be invoked unless the laws of the State concerned has recognized and sanctioned the legality of facilitation payments in its jurisdiction.<sup>131</sup> Here, the Compromis is bereft of any fact to show that Respondent has made such recognition, thus Applicant’s reliance on the facilitation payment exception is misplaced.

ii. In any case, the solicited official act involves the exercise of discretion, thus negating Applicant’s reliance on the facilitation payment exception.

Facilitation payments cannot be used to induce a discretionary decision.<sup>132</sup> Such payments may only be used to obtain lawful decisions where no discretion is involved.<sup>133</sup> The extension of favorable treatment to an investor involves a public official’s exercise of discretion,

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(1999); Switzerland, OECD: Switzerland, Phase 1 Report 5 (2000); OECD, Greece: Phase 1 Report 3 (1999).

<sup>128</sup> Official Commentary 9.

<sup>129</sup> 359 F.3d 738, 750 (5th Cir. 2004).

<sup>130</sup> Zerbes, *supra* note 106 at 139.

<sup>131</sup> Zervos, *Amending the Foreign Corrupt Practices Act: Repealing the Exemption for “Routine Government Action” Payments*, 25 PENN. ST. INT’L L. REV. 251, 253 (2006).

<sup>132</sup> Zerbes, *supra* note 106 at 139.

<sup>133</sup> *Id.*, at 139.

both in terms of whether to make an accommodation and the form of accommodation to extend. By paying the Tribal Councils “mandatory undocumented fees,” MDI was in effect inducing the Tribal Councils to exercise a discretionary act, *i.e.* the extension of favorable treatment to MDI.<sup>134</sup>

**3. Applicant failed to provide legal assistance to the fullest extent possible.**

*Mutual legal assistance* (“MLA”) consists of States’ cooperative investigation of cases and gathering of evidence for use in criminal cases.<sup>135</sup> Recognizing the critical role of credible evidence in bribery prosecutions, the Convention obliges States Parties to extend MLA to other States Parties, requesting for such cooperation. Applicant breached this obligation by failing to extend MLA to Respondent.

***a. Applicant did not investigate MDI’s bribery payments to Respondent’s government officials.***

Article 9 of the Convention requires States Parties to provide, to the fullest extent possible, legal assistance to another Party for the purpose of criminal investigations and proceedings for bribery.<sup>136</sup> Article 5 of the Convention,<sup>137</sup> interpreted in light of Official Commentary 27, requires that complaints for bribery of foreign public officials be seriously investigated by competent authorities.<sup>138</sup> Thus, Applicant’s failure to pursue its investigation of Respondent’s bribery complaint breaches the Convention.

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<sup>134</sup> Zerbes, *supra* note 106 at 138.

<sup>135</sup> EHLERMANN-CACHE, THE IMPACT OF THE OECD ANTI-BRIBERY CONVENTION.

<sup>136</sup> OECD Convention, art. 9(1).

<sup>137</sup> *Id.*, art. 5.

<sup>138</sup> Cullen, *Article 5. Enforcement*, in PIETH, *supra* note 106 at 300.

***b. Applicant had unjustifiably prolonged its compliance with Respondent's request.***

In complying with MLA requests, the Convention requires *prompt* and effective legal assistance to requesting Parties.<sup>139</sup> Respondent requested Applicant for MLA on 30 April 2009. No reply was made until almost a year later, in March 2010 (C.24). This unreasonable delay breaches Applicant's MLA obligation.

**4. Applicant cannot justify its failure to provide legal assistance.**

***a. Economic considerations cannot justify Applicant's non-compliance.***

Article 5 of the Convention provides that States Parties, in complying with the Convention, shall not be influenced by national economic interest considerations.<sup>140</sup> According to the OECD's Working Group on Bribery, there are *no* "permissible degrees" of national economic interest which would justify non-compliance with, for instance, State Parties' obligation to seriously investigate a bribery charge.

Here, President Arwen herself admitted that the decision to drop the investigation into the alleged bribery by MDI (C.22) was founded on concerns over the cost of the investigation to the Ardenian economy (C.25). These concerns cannot justify Applicant's non-compliance.

***b. Political considerations cannot justify Applicant's non-compliance.***

Political considerations do not justify non-compliance with the obligation to extend legal assistance.<sup>141</sup> Public prosecutors are obliged to exercise their discretion independently, insulated from their State's political concerns.<sup>142</sup>

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<sup>139</sup> OECD Convention, art. 9(1).

<sup>140</sup> *Id.*, art. 5.

<sup>141</sup> *Id.*, art. 1(1).

<sup>142</sup> Agreed Common Elements annexed to the OECD Revised Recommendation of 1997, ¶6.

Here, the Ardenian Prosecutors yielded to political pressure when it dropped the MDI investigation. This is evinced from the fact that while Applicant initially expressed its intention to assist in Respondent's investigation (C.24), it later balked in the face of MDI's strong lobbying efforts.

***c. Applicant cannot claim the supposed absence of an Ardenian implementing law for the Convention to justify its non-compliance.***

The fact that Applicant is already in Phase II of the OECD monitoring system (C.25) shows that it already has sufficient laws and rules in place to comply with its obligation to implement the Convention in its domestic law.

Article 12 of the Convention requires the setting up of a system designed to monitor and promote the full implementation of the Convention.<sup>143</sup> This monitoring system consists of a Phase I and II examination conducted by the OECD. In Phase I, the OECD evaluates the legal texts through which a State implements the Convention and determines whether these meet Convention standards.<sup>144</sup> Phase II, meanwhile, evaluates structures in place to enforce the laws and rules implementing the Convention and assesses their application in practice.<sup>145</sup>

Having reached Phase II (C.25), Applicant must have necessarily passed Phase I, meaning it already has sufficient laws and rules in place to implement its Convention obligations. Applicant's Reliance on the supposed absence of an Ardenian implementing law for the Convention is therefore unavailing.

***d. Applicant cannot rely on its Bank Secrecy laws to justify non-compliance.***

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<sup>143</sup> OECD Convention, art. 12.

<sup>144</sup> PIETH, *supra* note 106 at 452.

<sup>145</sup> *Id.*, at 457.

Article 9 of the OECD Convention provides that “a Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.”<sup>146</sup> The Convention even requires the lifting of professional secrecy rules whenever major public interests so demand.<sup>147</sup>

Accordingly, Applicant’s justification of its failure to provide MLA by claiming that its laws do not allow government access to certain bank records (C.25) does not excuse its non-compliance with its obligation to provide means that would allow it to access bank records in aid of investigation.

**THE FAILURE OF APPLICANT’S NATIONAL CONTACT POINT (“NCP”) TO RESPOND TO THE COMPLAINT BY THE COMMITTEE FOR RESPONSIBLE BUSINESS CONDUCT (“CRBC”) CONSTITUTES A BREACH OF THE OECD DECISION ON THE GUIDELINES FOR MULTINATIONAL ENTERPRISES (“GUIDELINES”).**

Pursuant to the Guidelines, NCPs are established for the purpose of undertaking promotional activities, handling inquiries,<sup>148</sup> and helping resolve issues that arise in specific instances. The refusal of Applicant’s NCP to examine the CRBC’s complaint against MDI and RRI (C.23) and its failure to respond to CRBC’s second letter (C.23) are breaches of the Guidelines.

**1. The complaint meets the admissibility requirements established by the OECD Council and Applicant’s NCP.**

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<sup>146</sup> OECD Convention, art. 9(3).

<sup>147</sup> Harari & Berthod, *Article 9, 10 and 11. International Co-operation*, in PIETH, *supra* note 106 at 430-431.

<sup>148</sup> OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2008).

While giving due regard to functional equivalence,<sup>149</sup> the threshold for launching an investigation only requires that the allegations are “well founded.”<sup>150</sup> This threshold has been met in this case considering that the allegations in the complaint are substantiated by [a] a former MDI employee who was involved in the renewal of the contract (C.22) and [b] the investigations being conducted in both Ardenia and Rigalia (C.22-23).

**2. Applicant is bound to comply with the Guidelines.**

***a. The Guidelines are binding.***

Although the Guidelines are not legally binding by themselves, they form part of the OECD Declaration on International Investment and Multinational Enterprises which contains commitments intended to advance responsible corporate conduct in foreign investment. In this Declaration, the governments of the OECD member States and other participating countries *committed* themselves to promoting the application of this code of conduct via their respective NCPs.<sup>151</sup> Pursuant to this multilateral commitment, the Guidelines have become binding.

***b. MDI is a major Ardenian State-owned corporation.***

The Guidelines apply to multinational enterprises, including State-owned companies.<sup>152</sup> Being a major Ardenian State-owned corporation (C.10), MDI is therefore covered by the Guidelines.

**3. Applicant’s NCP has jurisdiction over the complaint.**

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<sup>149</sup> *see* PIETH, *supra* note 106 at 27 (*Functional equivalence* assumes that every legal a system has its own logic, which is not necessarily determined by legal texts alone).

<sup>150</sup> *Id.*, at 301 (‘Well-founded suspicion is sufficient basis for commencing investigations in Hungary).

<sup>151</sup> Statement by the German National Contact Point on a Specific Instance Brought by the German Clean Clothes Campaign (CCC) Against Adidas-Salomon (2004).

<sup>152</sup> OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 12 (2008).

***a. As an interested non-governmental organization, the CRBC has standing to file the complaint.***

Under the Guidelines, any interested party may file a complaint.<sup>153</sup> The OECD Working Group on the Guidelines has specifically identified complaints filed by non-governmental organizations as a complaint which requires an NCP's response.<sup>154</sup> Accordingly, being a non-governmental association (C.26) engaged in the promotion of responsible business conduct in Rigalia, the CRBC not only has standing to file the complaint, Applicant's NCP also has the obligation to respond to it.

***b. Applicant's NCP cannot deny a complaint merely on the basis of a parallel proceeding.***

A parallel legal proceeding exists when a particular incident is submitted to an NCP while a lawsuit on the same incident is pending before a national or an international court.<sup>155</sup> Significantly, the OECD has clarified that even where a parallel proceeding exists, NCPs are required not to relinquish or delay the case.<sup>156</sup> Thus, although Applicant claims the existence of a parallel legal proceeding as justification for its NCP's refusal to examine the CRBC complaint (C.26), this does not justify its outright disregard of the complaint.

**4. The failure of Applicant's NCP to respond to CRBC's request to organize a meeting constitutes a violation of the Convention.**

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<sup>153</sup> UK NCP for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises, September 2009.

<sup>154</sup> WORKING PARTY ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, COMMENTARY ON THE IMPLEMENTATION PROCEDURES OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ¶12 (2009).

<sup>155</sup> Corrib Gas Project Case: Legal opinion on parallel legal proceedings in the OECD Guidelines for Multinational Enterprises, Sherpa p.2, accessed from [http://oecdwatch.org/cases/Case\\_146/752/at\\_download/file](http://oecdwatch.org/cases/Case_146/752/at_download/file).

<sup>156</sup> *Id.*

NCPs are expressly required to respond to inquiries made regarding the Guidelines.<sup>157</sup> Thus, even assuming that Applicant's NCP acted within its discretion in finding that the CRBC's complaint did not merit examination, the NCP's mere act of not responding to CRBC's request for a meeting with the parties involved (C.23) already constitutes a violation of the Convention.

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<sup>157</sup> OECD GUIDELINES *supra* note 154 at 33.

### **CONCLUSION AND PRAYER FOR RELIEF**

Respondent requests that the ICJ adjudicate and declare that:

- (1) Rigalia's Predator Drone strikes against Zetian terrorists in Rigalia and Ardenia are consistent with Rigalia's rights under international law, and thus the Court has no authority to order cessation of the drone attacks;
- (2) The attack on the Bakchar Valley hospital was not attributable to Rigalia and Rigalia has no obligation to investigate the attack or to compensate Ardenia therefore; moreover, the act was not an act of aggression but part of a legitimate and proportionate operation to defend against Zetian terrorists;
- (3) Rigalia's limited ban of the Mavazi for Zetian women and girls is consistent with international law; and
- (4) Ardenia's failure to investigate and prosecute the alleged corruption and to provide legal assistance to Rigalia constitute breaches of the OECD Anti-Bribery Convention, and the failure of the Ardenian NCP to respond to the complaint by the CRBC constitutes a breach of the OECD Decision on MNE Guidelines.