

TEAM 400R

THE 1996 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT COMPETITION

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

SPRING TERM 1996

CASE CONCERNING THE PROTECTION OF THE
MILITARY PERSONNEL DATABASE

GOVERNMENT OF ERCOLA

APPLICANT

v.

GOVERNMENT OF FILOVA

RESPONDENT

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

ABBREVIATIONS. iv

INDEX OF AUTHORITIES. vi

STATEMENT OF JURISDICTION. xix

STATEMENT OF FACTS. xx

QUESTIONS PRESENTED. xxiii

SUMMARY OF PLEADINGS xxiv

PLEADINGS AND AUTHORITIES. 1

I. ERCOLA'S TREATMENT OF THE YTTIC MINORITY VIOLATES BINDING INTERNATIONAL LEGAL NORMS. 1

A. The United Nations Charter Mandates The Observance Of Human Rights. 1

B. Ercola Is Under A Duty Not To Defeat The Object Of The International Covenant On Civil And Political Rights. 1

C. Filova Has Jus Standi To Bring This Claim On Behalf Of The Yttic Minority. 2

 1. Ercola's Treatment Of The Yttic Minority Violates Obligations Erga Omnes 2

 2. Ercola Is Precluded From Challenging The Admissibility Of This Claim By Virtue Of The Special Agreement. 2

D. International Law Accords Protection And Recognition Of Minorities Rights. 3

E. The Nature Of Minorities Rights Protection. 4

F. The Refusal To Permit Paid Leave For The Observance Of Yttic Religious Holidays Constitute A Violation Of The Right To Religion. 4

 1. This Refusal Denies The Yttic People The Right To Practice Their Religion. 4

 2. This Refusal Violates The Principle Of Non-Discrimination. 5

<u>G. The Statutory Provision Providing That The Nicastrian Language Shall Be The Official Language And The Prohibition Of The Usage Of Foreign Language In Public Business Violate The Yttic People's Right To Use Their Language.</u>	6
II. YLSA'S ACTIONS AND FILOVA'S INVOLVEMENT IN THEM ARE CONSISTENT WITH THE RIGHT OF THE YTTIC PEOPLE TO SEEK SELF-DETERMINATION AND WITH THE RIGHT OF FILOVA TO ASSIST IN THAT STRUGGLE.	7
<u>A. The Right To Self-Determination Is No Longer Restricted To The Decolonization Context.</u>	8
<u>B. The Right To Self-Determination Encompasses Internal And External Self-Determination.</u>	9
<u>C. International State Practice Has Recognized The Right To Secede In Exercising External Self-Determination.</u>	10
<u>D. The Yttic People Have The Status Of A 'People' In International Law</u>	11
<u>E. The Yttic People Have A Legitimate Right To Self-Determination.</u>	12
<u>F. YLSA's Actions Were Consistent With The Yttic People's Right To Seek Self-Determination</u>	12
<u>G. Filova's Involvement In The Struggle Is Consistent With Its Right To Assist.</u>	13
III. FILOVA'S SUPPORT FOR YLSA'S ACTIVITIES DOES NOT VIOLATE INTERNATIONAL LAW.	14
IV. FILOVA'S REFUSAL TO DECLARE YLSA ILLEGAL IS NOT A VIOLATION OF INTERNATIONAL LAW.	15
<u>A. YLSA Is Not A Terrorist Movement And Moreover There Is No Duty In International Law To Declare Terrorist Movements Illegal.</u>	15
V. THE POLITICAL OFFENCE EXCEPTION CLAUSE IN THE EXTRADITION TREATY EXEMPTS FILOVA FROM THE DUTY TO EXTRADITE.	16
<u>A. The Crimes Committed Do Not Constitute Terrorist Acts And In Any Case. It Is Not Mandatory To Extradite Terrorists.</u>	19
VI. NO RIGHT TO DAMAGES FOR INVASION OF PRIVACY IS KNOWN IN INTERNATIONAL LAW.	20

A. <u>The Right Of Privacy Is Not Recognized Under Customary International Law.</u>	20
B. <u>The Covenant And Other Human Rights Instruments Do Not Provide For A Right To Damages For Invasion Of Privacy.</u>	20
C. <u>The Proper Remedy For Invasion Of Privacy Is Not Damages But Satisfaction.</u>	20
VII. <u>FILOVA'S RETENTION OF THE ESPRI DATABASE HAS NOT CAUSED ANY INJURY TO ERCOLAN CITIZENS.</u>	21
VIII. <u>FILOVA IS NOT LIABLE TO PAY DAMAGES FOR THE COST OF HAVING TO CREATE AN ENTIRELY NEW SYSTEM FOR ENCRYPTING AND RETAINING MILITARY PERSONNEL FILES.</u>	22
IX. <u>FILOVA IS UNDER NO OBLIGATION TO DELIVER COPIES OF THE DATABASE.</u>	23
A. <u>Restitutio In Integrum Is Only Available When There Is A Violation Of International Law.</u>	23
B. <u>Filova Has Not Assumed Any Treaty Obligation To Return The Database Copy.</u>	24
C. <u>Filova Is Justified In Retaining The Database Copy.</u>	24
D. <u>An Injunction Is Not Appropriate In This Case.</u>	25
X. <u>PRAYER FOR RELIEF.</u>	25

ABBREVIATIONS

AJIL:	American Journal of International Law.
All ER:	All England Reports.
Ann. Dig:	Annual Digest and Reports of Public International Cases.
Annex:	Annexure.
ASIL:	American Society of International Law.
Aust. LJ:	Australian Law Journal.
BYIL:	British Yearbook of International Law.
Duke J Comp & Int'l L:	Duke Journal of Comparative And International Law
et. al.:	et alii and others
ETS:	European Treaty Series.
Foreign Aff:	Foreign Affairs
Fordham Int'l LJ:	Fordham International Law Journal
F.2d:	Federal Reporter, Second Series.
GBTS:	Great Britain Treaty Series.
Harv LR:	Harvard Law Review.
HRLJ:	Human Rights Law Journal
ICAO:	International Civil Aviation Organisation.
ILC:	International Law Commission.
ICLQ:	International And Comparative Law Quarterly.
ICJ Rep.:	Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice.
ILO:	International Labour Organisation.
Indian JIL:	Indian Journal of International Law.
ILM:	International Legal Materials.

ILR:	International Law Reports.
Isr'l Yb. HR:	Israel Yearbook on Human Rights.
JILP:	Journal of International Law and Policy.
LNTS:	League of Nations Treaty Series.
N.Y. Times:	New York Times.
Notre Dame L Rev:	Notre Dame Law Review.
PCIJ:	Permanent Court of International Justice.
Publ. ECHR Ser.A:	Publications of the European Court of Human Rights: Judgements and Decisions.
Recueil Des Cours:	Collected Courses of the Hague Academy of International Law.
RIAA:	Reports of International Arbitral awards.
RDH (UN):	Revue des droits de l'homme.
Sess.:	Session.
Supp.:	Supplement.
UN Doc.:	United Nations Document.
UNGAR:	United Nations General Assembly Resolutions.
UNGAOR:	United Nations General Assembly Official Records.
UNTS:	United Nations Treaty Series.
UKTS:	United Kingdom Treaty Series.
Va J Int'l L:	Virginia Journal of International Law.
Vand L Rev:	Vanderbilt Law Review.
Vand J Transnational Law:	Vanderbilt Journal of Transnational Law.
YBILC:	Yearbook of International Law Commission.
Yale LJ:	Yale Law Journal.

INDEX OF AUTHORITIES

	Pages
<u>TREATIES AND INTERNATIONAL CONVENTIONS</u>	
African Charter on Human and People's Rights. 21 ILM (1982) 59	5
Agreement on The Rescue of Astronauts. The Return of Astronauts and The Return of Objects Launched Into Outer Space. 56 U.K.T.S. (1969) CMND 3997.	24
American Convention on Human Rights. 9 ILM 1970	5.20
1952 Arab League Extradition Agreement (League of Arab States Treaty Series. p. 27).	16
Berne Convention for the Protection of Literary and Artistic Works of Sept 9 1886, revised on July 24 1971. World Intellectual Property Organisation, Geneva 19880 (287)(E).	23
Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data. 28 Jan 1981 (CMND S341) (London HMSO 1981).	23
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Montreal. Sept 23, 1971. ICAO Doc. S966.	15
Convention for the Suppression of Unlawful Seizure of Aircraft. The Hague. December 16. 1970. ICAO Doc. S920.	15
Convention of American States to Prevent and Punish Acts of Terrorism. Washington. February 2, 1971. U.N. Doc. A/AC/C.6/418. Annex IV.	16.19
Convention on the Elimination of All Forms of Racial Discrimination. 660 UNTS 195.	6
Convention on The Means of Prohibiting and Preventing The Illicit Import. Export and Transfer of Ownership of Cultural Property. adopted in General Conference. UNESCO on 14 Nov. 1970. Records of The General Conference. 16th Session at 135.	24

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Person. Including Diplomatic Agents. New York. Dec.14 1973 UN Doc. A/3166 (XXVIII).	16
Convention on the Rights of the Child 1989. U.N. Doc. A/44/25.	6
European Charter for Regional or Minority Languages opened for signature on 2 Oct. 1992. ETS No. 148.	6
European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. 213 UNTS 211.	5.20
1957 European Convention on Extradition (ENTS No. 24).	16
ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, (No. 169) entered into force 5 Sept 1991.	3
ILO Discrimination (Employment and Occupation) Convention 1958. Vol. 362 UNTS at 31.	6
International Covenant on Civil and Political Rights. entered into force on March 23 (1976) 999 UNTS 171.	1.3.5.6.8 11.13.20
International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (entered into force Jan. 3. 1976).	8.11.13
International Convention Against the Taking of Hostages. 34 UNGAOR Supp.39, UN Doc.A/34/39 (1979).	15
Optional Protocol To The International Covenant on Civil And Political Rights entered into force on 23 March 1976. 999 UNTS 302.	20
Peace Treaty of West Phalia. cited in F. Capotorti. MINORITIES. ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (1985).	3
Treaty between the Principal Allied and Associated Powers and Poland, signed 28 June 1919, 112 GBTS 232.	3
Treaty on Principles Governing The Activities of of States in the Exploration and Use of Outer Space. Including the Moon and Other Celestial Bodies. 610 UNTS (1967) 205.	24

Trianon Peace Treaty with Hungary 1930, 3 Israel. Major Peace Treaties of Modern History. 1648-1967 (1885).	3
Charter of the United Nations	S.11.13
Vienna Convention on the Law of Treaties 1969 1155 UNTS 331 (entered into force Jan. 27 1980).	1.2.20
 <u>INTERNATIONAL DECISIONS</u>	
<u>Barcelona Traction, Light and Power Company, Ltd</u> (Belgium v. Spain), Judgement, ICJ Rep.3 1970.	2.13
<u>Belgian Linguistic Case</u> , Application 1474/62. 23 Inhabitants of Alsemberg and Beersel v. Belgium Yearbook VI (1963) at 332.	7
<u>Chorzow Factory Case (Merits)</u> (1928) PCIJ, Ser. A. No. 17. at 47.	21.23
<u>Corfu Channel</u> (UK v. Alb) (1949) ICJ Rep. 18	22
<u>Elettronica Sicula Sp. A (ELSI) Case</u> 1989 ICJ Rep.42	3
<u>F v. Switzerland</u> , Judgement of 18 Dec. 1987, Publ. ECHR, Ser.A 12S (1988) at 20.	21
<u>German Interest in Polish Upper Silesia (Merits)</u> PCIJ Ser.A. no.7 at 30.	1
<u>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)</u> , Advisory Opinion, [1971] ICJ Rep.16.	1
<u>Lotus Case</u> PCIJ Ser.A: no.10 (1927) at 28	4
<u>Marckx Case</u> , Judgement of 13 June 1979. Publ. ECHR. Ser.A no. 31 (1979) at 14.	21
<u>Military and Paramilitary Activities in and Against Nicaragua</u> (Nicaragua v. United States) (Merits) 1986 ICJ Rep. 14.	4.9
<u>Minority School in Albania</u> [1935] PCIJ Ser.A/A. no.64 at 17.	4
<u>Neer Claim</u> (US v. Mex.) + RIAA 60 (1926)	7
<u>Norris Case</u> , Judgement of 26 Oct 1988. Publ ECHR. Ser.A 142 (1989).	21

<u>North Sea Continental Shelf Case</u> (Den v. FRG/ FRG v. Neth) (1969) ICJ Rep.3.	20
<u>Robert's Claim</u> (US v. Mex.) 4 RIAA 77 (1926).	7
<u>Temple of Preah-Vihear Case</u> (Cambodia v. Thailand) (1967) ICJ Rep. 36-37.	23
<u>Western Sahara Advisory Opinion</u> , 1971 ICJ Rep.12.	8
Opinion 1 & 2, Conference on Yugoslavia Arbitration Commission: <u>Opinions on Questions Arising From The Dissolution of Yugoslavia.</u> 31 ILM 1488 at (1992)	3
 <u>MUNICIPAL DECISIONS</u>	
<u>In re Castioni</u> [1891] 1 QB 149.	17
<u>Doherty</u> , The Guardian. 14.12.1984 at 4.	18
<u>Zivad Abu Eain v. Wilkes</u> , 641 F.2d 504 (7th Cir. 1981). cert.denied 454 US 894 (1981).	18
<u>In re Ezeta</u> 62. F.d 198 (9th Cir. 1957).	17
<u>In re Giovanni Gatti</u> [1946-1947] Ann. Dig., 145 (no.70).	18
<u>Ex Parte Kolczvnski</u> 21 ILR 240 (1954).	17
<u>In re Meunier</u> 2 QB 415 (1894).	17
<u>In re Nappi</u> (1952) 19 ILR 375.	19
<u>In re Ockert</u> [1933-1934] Ann. Dig. 369 (no.157).	19
<u>Ktir v. Ministere Public Federal</u> (1961) 34 ILR 143.	19
<u>Piperno and Pace</u> . Chambre d'Accusation de Paris (1979).	18
<u>Quinn</u> . The Guardian. 4.10.1983 at 28.	18
<u>Tel-Oren v. Libyan Arab Republic</u> . US Circuit Court of Appeals. District of Columbia. 726 F.2d. 774 (D.C. Cir.1984).	16

V.P. Wasilief. US Foreign Relations. 1909 at 520
(Dept. State). 19

UN MATERIALS.

Declaration On Apartheid And Its Destructive
Consequences in Southern Africa. UNGAR S-16/1.
Annex of 14.12.1989 at 14; UNGAR 41/35F (1986). 14

Declaration On The Rights Of Persons Belonging
To National Or Ethnic, Religious Or Linguistic
Minorities. UN Doc.E/CN.4/1992/48 & Corr.1 1992
at 16-19; UNGAR 48/138 (1993). 3.5.6

Universal Declaration Of Human Rights. 1948.
adopted on Dec.10 (1948) UNGAR 217A (III),
UN Doc.A/810. 5.12.20

Declaration On The Inadmissibility Of
Intervention In The Domestic Affairs Of State
And The Protection Of Their Independence and
Sovereignty. UNGAR 2131 (XX) UN Doc.A/6014 (1966);
UNGAR 36/103 (1981). 24

Declaration Of Principles Of International
Law Concerning Friendly Relations Among
States In Accordance With The Charter of
The United Nations, Annex to UNGAR 2625.
UNGAOR. 25th Sess.. Supp.no.28 at 121,
UN Doc.A/S028 (1970). 8.11.12.
13.14

Declarations On The Elimination Of All Forms
Of Intolerance And Of Discrimination Based
On Religion Or Belief. UNGAOR 36/55 1981. 5

Vienna Declaration And Programme of Action.
pt.I. para.2, UN Doc.A/CONF.157/24(pt.I)(1993),
reprinted in 32 ILM 1661 (1993). 9.12

Basic Principles Of The Legal Status Of
The Combatants Struggling Against Colonial
And Alien Domination and Racist Regimes.
UNGAR 3103 Dec. 12 (1973). 13

The Situations Of Democracy And Human Rights In
Haiti. UNGAR 48/ 27 (1993); UNGAR 46/7.
UNGAR 46/138 (1991); UNGAR 47S/20A (1992);
UNGAR 47/20B (1993). 14

Programme Of Action For The Full Implementation Of The Declaration On The Granting Of Independence To Colonial Territories And Peoples. UNGAR 2621 (XXV), 25 UNGAOR, Supp.(no.28) at 1. UN Doc.A.8028 (1975).	13
Resolution On The Definition Of Aggression UNGAR 2621 (XXV), 25 UNGAOR, Supp.(no.31) at 142. UN Doc.A/9631 (1975).	13
Strict Observance Of The Prohibition Of The Threat Or Use Of Force In International Relations And The Right Of Peoples To Self-Determination, UNGAR 2160, 21 UNGAOR, Supp.16 at 4, UN Doc. A/6316 (1966).	14
UNGAR 1807, 17 UNGAOR, Supp.17, UN Doc.A/5217 (1963); UNGAR 2107, UNGAR 2022, UNGAR 2074, 20 UNGAOR, Supp.14, UN Doc.A/6014 (1966); UNGAR 2151, UNGAR 2189 , UNGAR 2184, 21 UNGAOR Supp.16, UN Doc.A/6316 (1967); UNGAR 2383 , UNGAR 2395, 23 UNGAOR Supp.18, UN Doc.A/7218 (1969).	14
UNGAR 46/236, UNGAR 46/237, UNGAR 46/238 (1992)	11
Draft Articles On State Responsibility, Report of the ILC on its 37th session. [1985] 2 YBILC (part 1).	2
Draft Articles On State Responsibility. Report by F.V. Garcia Amador, Special Rapporteur. YBILC 1961 Vol II, Doc. of the 13th Session. UN Doc.A/CN.4/Ser.A/1061/Add.1.	21
International Law Commission, Commentary on Article 18, at 202 YBILC II (1966).	1
Report of The ILC on its 18th Session. YBILC II (1966).	3
Report of the ILC on its 28th Session [1976] 2 YBILC 95.	2
General Comment 12(21), UN Doc.A/39/40, 142	13
U.N. Study, The Main Types And Causes Of Discrimination, UNP Sales No. 1949, XIV.3 at 3.	9

F. Capotorti. Study On The Rights Of Persons Belonging To Ethnic, Religious And Linguistic Minorities. UN Doc.E/CN.4/Sub.2/384/Rev.1 (1979) at 54 para 316. 4.7

Uses Of Vernacular Languages In Education (Paris: UNESCO. 1953) at 46. 7

OECD Guidelines On The Protection Of Privacy And Transborder Flows Of Personal Data 1980 (Paris: UNESCO). 23

MUNICIPAL LEGISLATION

Act. No. 33 of 11 March 1974 Iraq -

Constitutions of Belgium, Finland, Hungary, India, Spain, Sri Lanka and Switzerland in Blaustein and Flanz, CONSTITUTIONS OF THE WORLD. -

TREATISES, DIGESTS, RESTATEMENTS

K.U.Ahmad. BREAKUP OF PAKISTAN (1972). 14

C.F.Amerasinghe. LOCAL REMEDIES IN INTERNATIONAL LAW (1990). 3

American Law Institute. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). 2.13

Anzilotti. VOL.1 TRACTADO DE DIREITO INTERNACIONAL PUBLICO (1956). 21

M.M.Boguslarsky. COPYRIGHT IN INTERNATIONAL RELATIONS: INTERNATIONAL PROTECTION OF LITERARY AND SCIENTIFIC WORK (1979). 23

M.Bothe. THE LEGITIMACY OF THE USE OF FORCE TO PROTECT PEOPLES AND MINORITIES. 14

I.Brownlie. PRINCIPLES OF PUBLIC INTERNATIONAL LAW (1990). 2.13

L.C.Buchheit. SECESSION: THE LEGITIMACY OF SELF-DETERMINATIONAN (1978). 10-14

A.Cassese. INTERNATIONAL LAW IN A DIVIDED WORLD (1988). 2

J.Casteneda. LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (1969).	9
D'Amato. THE CONCEPT CUSTOM IN INTERNATIONAL LAW (1971).	4
C.Gray. JUDICIAL REMEDIES IN INTERNATIONAL LAW (1990).	24
L.Hannikainen. PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW (1988).	2
L.Henkin. INTERNATIONAL LAW : CASES AND MATERIALS (1993).	11
H.Lauterpacht. INTERNATIONAL LAW AND HUMAN RIGHTS (1950).	1
H.Lauterpacht. PRIVATE LAW SOURCES AND ANALOGIES IN INTERNATIONAL LAW (1927).	23
McNair. LAW OF TREATIES (1961).	1
T.Meron. HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1991).	2
J.Moore. LAW AND THE INDO-CHINA WAR (1972).	24
J.F. Murphy. PUNISHING INTERNATIONAL TERRORISTS (1985).	15
Oppenheim. VOL.I INTERNATIONAL LAW (1992).	15.25
O'Connell. VOL.II INTERNATIONAL LAW (1971).	21
Perschnaz. LA REPARATION DU PREJUDICE EN DROITAT INTERNATIONAL (1952).	21
D.V.Sandifer. EVIDENCE BEFORE INTERNATIONAL TRIBUNALS (1975).	22
G.Schwarzenberger. INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1945).	23
Sorenson. MANUAL OF PUBLIC INTERNATIONAL LAW (1968).	21
S.M.Stewart. INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS (1993).	23
J.Syataw. DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (1962).	22

P.Thornberry. INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES (1991).	5
Dr.C.Van den Wijngaert. THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION (1980).	16.17.19.20
J.Verzijl. JURISPRUDENCE OF THE WORLD COURT (1966).	22
R.Wacks. PERSONAL INFORMATION (1989).	20
R.Wallace. INTERNATIONAL LAW (1992).	2

ARTICLES (IN BOOKS)

Y.Alexander. <i>Minorities And Terrorism: Some Legal And Strategic Perspectives.</i> in Y.Dinstein and M.Tabory (eds) THE PROTECTION OF MINORITIES AND HUMAN RIGHTS 41 (1992).	16
A. Cassese. <i>Political Self-Determination-Old Concepts and New Developments.</i> in U.N. LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW at 137 (A. Cassese ed.. 1979)	9
A. Cassese. <i>The Self-Determination of Peoples.</i> in Henkin. INTERNATIONAL BILL OF RIGHTS (1981) at 102	12.13
A. Cassese. <i>Political Self-Determination - Old Concepts and New Developments.</i> in UN LAW/ FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 137. at 144 (1979)	9
E.J. de Arechaga & A. Tanzi. <i>International State Responsibility.</i> in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS (1991)	21
Y. Dinstein. <i>Freedom Of Religion And The Protection Of Religious Minorities.</i> in Y.Dinstein and M Tabory (eds) THE PROTECTION OF MINORITIES AND HUMAN RIGHTS at 150 (1992).	5
Y. Dinstein. <i>Self-determination and the Middle East Conflict.</i> in Y. Alexander and R.A. Friedlander (eds). SELF-DETERMINATION: NATIONAL. REGIONAL AND GLOBAL DIMENSIONS (1980). 243-257 at 246-247	11

J. Klabbers and R. Lefeber, *Africa: Lost Between Uti Possidetis and Self-Determination* in C. Brolmann, R. Lefeber and M. Zieck (eds.), RIGHTS OF PEOPLE AND MINORITIES IN INTERNATIONAL LAW (1992) at 43 10.11.12

E. Riedel, *Satisfaction* in VOL.10 MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (1988) 21

R.Y. Jennings, *Treaties*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS (1991). 1

JOURNALS

M. Akehurst, *Custom as a Source of International Law*, 47 B.Y.I.L. (1974-5) at 53 4

E. Arechaga, *International Law In The Past Third of A Century*, Recueil des Cours (1978) 24

G. Alfredsson & A. de Zayas, *Minority rights: Protection by the United Nations*, Vol. 14, No. 1-2 H.R.L.J. (1993) at 1 4

L.F. Damrosch, *Politics Across Borders: Non-Intervention and Non-Forcible Influence Over Domestic Affairs*, 83 AJIL at 1 (1989) 9

Y. Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 I.C.L.Q. (1976) at 102 4

P.L. Dorff, *Chronology 1991*, 71 Foreign Aff. 184 (America and the World 1991/92 issue) 10

L.S. Eastwood, Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 Duke J Comp & Intl L 299, at 322 10,14

M. Evans and D.T. Orlidge, *What can the Past teach the Future? Lessons From Internationally Supervised Self-Determination Elections 1920-1990*, in International Law and Politics [1992] Vol. 24: 1711 at 1716 8

J. Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure?*, 31 BYIL 452 at 455 (1954) 3

T.M. Franck. <i>The Emerging Right to Democratic Governance</i> . 86 AJIL 1992. 46-91 at 58-59	8
R. Gavison. <i>Privacy and the Limits of Law</i> . 89 Yale LJ 421 (1980)	20
G.S. Gilbert. <i>Terrorism And The Political Offence Exemption Reappraised</i> . 34 ICLQ 695 at 697-700	17.18
H. Hannum. <i>Contemporary Developments in International Protection of the Rights of Minorities</i> . 66 Notre Dame L Rev (1991) at 1431-1460	4
J.B. Kelly. <i>National Minorities in Law</i> . 3 JILP (1973) at 253	4
F.L. Kirgis, Jr.. <i>The Degrees of Self-Determination in the United Nations Era</i> . 88 AJIL 304 (1994) at 305	8.9.10
G. Marchildon and E. Maxwell. <i>Quebec's Right of Secession Under Canadian and International Law</i> . in Va J Int'l L [1992] Vol. 32:583.	10.11.12
G.Mora. <i>The Nature Of Political Offenses: A Knotty Problem Of Extradition Law</i> . 48. Va.L.Rev. 1226 at 1240.	17
Mitrovic. <i>The Principle of Non-Intervention In Contemporary International Law</i> . 29 Jugoslovenska Revija Za Medunarodno Pravo (1964)	24
R. Rosenstock. <i>The Declaration of Principles Concerning Friendly Relations: A Survey</i> . 65 AJIL 713 at 732 (1971)	8.9
Schelb. <i>The International Court of Justice and the Human Rights Clauses of the Charter</i> . 66 AJIL 337 at 341-350 (1972)	1
Schmeltzer. <i>Soviet and American Attitudes Toward Intervention: The Dominican Republic, Hungary and Czechoslovakia</i> . 11 VA. J. Int'l L. 97. 101 (1970)	13.14
S. Schwebel. <i>Human Rights in the World Court</i> . 24 Vand. J. Transnational Law 945. 965 (1991)	2

O. Shacter, <i>The Charter and the Constitution: The Human Rights Provisions in American Law</i> , 4 Vand L. Rev 643 at 646-653 (1951)	1
Schreuer, <i>Unjustified Enrichment In International Law</i> , 22 AJIL 289 (1974)	24
B. Sloan, <i>Human Rights, The United Nations and International Law</i> . 20 Nordisk Tidsskrift for International Ret, Act Scandinavia Juris Gentium at 30-31 (1950)	1
H. Storey, <i>Infringement of Privacy and its Remedies</i> 47 Aust. LJ 498 (1973)	20
M. Tabory, <i>Language Rights as Human Rights</i> , 10 Isr'l Yb. H.R. at 196 (1980)	7
H. Thirlway, <i>The Law and Procedure of the ICJ</i> , 60 BYIL at 92-102 (1989)	2.13
P. Thornberry, <i>Self-Determination. Minorities. Human Rights: A Review of International Instruments</i> , 38 ICLQ 867 (1989)	8
D. Turp, <i>Self-Determination: Secession, Autonomy And Integration</i> , in ASIL/NVIR Proceedings 62 at 64	10
B. Vukas, <i>General International Law and The Protection of Minorities</i> . 8 RDH at 47-48 (1975)	6
Warren & Brandeis, <i>The Right to Privacy</i> . Harv. LR 193-220 (1890)	20
M. Weller, <i>The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia</i> , 86 AJIL 569 (1992)	11
Wright, <i>National Courts and Human Rights The Fujii Case</i> . 45 AJIL 62 at 73 (1971)	3

MISCELLANEOUS

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, 29 ILM 1305-1990	3.5.6
---	-------

International Commission of Jurists. The Events In East Pakistan in The Secretariat of the International Commission of Jurists Review. No. 8. June 1972 at 44	8.11
S. Kinzer, Slovenia and Croatia Get Bonn's Nod, N.Y. Times. Dec. 24, 1991. at A3	10
Memorial of Australia, (Aust v France), 1978 ICJ Pleadings (1 Nuclear Tests), 14 (1973)	2
Memorial of New Zealand (N.Z. v France), 1978 ICJ Pleadings (2 Nuclear Tests) 8 (1973)	2
Proposal for a European Convention for the Protection of Minorities, adopted 8 Feb. 1991, Council of Europe Doc. CDL (91)(7)(1991)	3.6
J. Tagliabue, European Ties for Slovenia and Croatia. N.Y. Times, Dec. 17, 1991 at A3	10

STATEMENT OF JURISDICTION

The State of Filova and the State of Ercola have signed the Special Agreement for Submission to the International Court Of Justice of the Differences between Ercola and Filova concerning the Protection of the Military Personnel Database and transmitted a copy thereof to the Registrar of the Court in accordance with Article 40, paragraph 1, of the Statute of the International Court of Justice. Therefore both Filova and Ercola have accepted the jurisdiction of the International Court of Justice pursuant to Article 36, paragraph 1, of the Statute of the Court.

STATEMENT OF FACTS

Filova is a state where the Yttic culture and language are centered in. Situated in the same geographical region is Ercola which has a minority Yttic population of over ten million.

At the time of Ercola's independence, a civil war erupted between the Nicastrians and Yttics and lasted for three years. Since then, there has been continuous hostility between the two ethnic groups. There have been regular claims by the Yttic minority that their freedom to worship according to their traditions has not been respected, mainly concerning the refusal of public employers and private employers in Nicastrian majority areas to permit paid leave for the observance of their religious holidays. In addition, Yttics have repeatedly protested against discriminatory statutory provisions which declared the Nicastrian language to be the official language of Ercola and further forbids the conduct of public business in any foreign language.

In February 1993, by-elections were held in the province of West Firland, a Yttic-majority province. The Yttic Liberation Solidarity Organization (YLSA) submitted a slate of candidates and called for the repeal of Ercola's official language law that prohibits the use of foreign language in public business, the creation of a national Department of Yttic Affairs, an increase in the autonomy exercised by West Firland and the appointment of a commission to draft the constitution of a future independent Yttic republic. However the slate of candidates was rejected by the Electoral Commission on the grounds that YLSA reflected a separatist ideology. A judicial challenge against this decision was unsuccessful. Bloody street demonstrations erupted thereafter in the principal cities of West Firland.

Subsequently, on April 25, YLSA was declared to be an illegal militia

resulting in membership being a punishable offence and the confiscation of property belonging to members without prior judicial authorization. Two major non-governmental human rights organizations concluded that this crackdown on YLSA was unwarranted.

During the traditional summer holidays when few people were at work in the urban areas, an explosion occurred outside the Ercolan Stock Exchange. YLSA, through its Operational Communique No.1 claimed responsibility for this bombing and made an assertion that they were aided by their friends in the Filovan Intelligence Service (FISC). In a diplomatic note, the Filovan government stated that it abhorred the bombing but reminded Ercola of the legitimate aspirations of the Yttic minority to represent themselves which had been effectively thwarted.

Four additional operational communiques were subsequently sent informing the Ercolan authorities of the location of other bombs put in train stations. In the last communique sent, YLSA claimed to have cracked the Ercolan government's ESPRI database. This computer database was created in 1985 by the Ercolan military and contained information on Ercolan military personnel. The communique also stated that to show that YLSA's aim was the liberation of the Yttics and not to cause harm to individuals citizens of Ercola, they would deliver the decoded copy of the database to Filova. They also demanded fresh elections.

Five days later, four Yttic individuals presented themselves to the Filovan police and claimed responsibility only for manufacturing the bombs used in at the Stock Exchange. They also handed over compact discs and other computer media containing the ESPRI database and encryption code. They were charged with misdemeanor firearms offences as unregistered weapons were found in their home. At present they remain in administrative detention in Filova.

In a demarche addressed to Filova, Ercola demanded that Filova ban YLSA as a terrorist organization, prosecute or extradite the Stock Exchange bombers and the perpetrators of other offenses in Ercola, return the ESPRI database as well as copies of the database and to assist Ercola to ascertain whether any copies were made of the database before it was delivered to Filova and to locate and take possession of the copies.

Filova responded by stating that YLSA is not a terrorist organization, that it is not required to extradite the four individuals as the facts of the case falls within the political offence exception to the treaty and that it is under no obligation to return the database.

Subsequently, packages containing information of individual personnel were sent to their parents. Each envelope contained a political pamphlet espousing the cause of Yttic independence.

Due to the unresolved differences and the failure of negotiations between both states, it has was agreed that these differences should be settled by the International Court of Justice. Hence, a special agreement was concluded to submit this case for the adjudication of this court.

QUESTIONS PRESENTED

1. Whether YLSA's actions and Filova's involvement in them are consistent with the right of the Yttic people to seek self-determination and with the right of Filova to assist in that struggle.
2. Whether Ercola's treatment of its Yttic minority violates binding international legal norms.
3. Whether a right to damages for invasion of privacy is known in international law .
4. Whether Ercolan citizens have been injured by the retention of the discs containing the ESPRI database.

SUMMARY OF PLEADINGS

I Filova has the *jus standi* to bring this claim on behalf of the Yttic minority. First, Ercola's treatment of the Yttic minority violates their basic rights as a minority. Ercola's failure to respect these rights violates obligations *erga omnes*, the observance of which all states have the legal standing to enforce. Secondly, the Special Agreement amounts to a waiver of the nationality of claims rule. Thirdly, the local remedies rule is not applicable as Filova is only seeking a declaratory judgement and the agreement amounts to an implied waiver of the rule.

Ercola's treatment of its Yttic minority violates binding international legal norms. First, not only has Ercola failed to undertake specific measures to protect the Yttic minority, it has consistently discriminated against them. Secondly, the refusal to permit paid leave for the observance of Yttic religious holidays constitute a violation of their right to practice their religion. Thirdly, Ercolan municipal law denies the Yttic's the right to use their language in public business and this right is not protected under the Ercolan constitution.

II YLSA's actions and Filova's involvement in them are consistent with the right of the Yttic people to seek self-determination and with the right of Filova to assist in that struggle. The right to self-determination, which is no longer restricted to the decolonization context, encompasses the right to internal and external self-determination. International state practice has now acknowledged the right to secede to be a legitimate mode of exercising external self-determination with the situation in Yugoslavia being the most compelling evidence of this practice.

The Yttic people have a legitimate right to seek internal and external

self-determination because first, they have the status of a people in international law and secondly, their rights to religion, language, democratic governance and freedom of association have been continuously violated by the discriminatory policies of Ercola. Thirdly, their right to seek internal self-determination has been denied. Thus, YLSA, being the representative of the Yttic people has acted consistently with their right to seek self-determination.

Filova's involvement in the struggle is consistent with its right to assist is and not a violation of international law as Filova is merely giving moral support to a legitimate struggle of self-determination. Moreover, there is no conclusive evidence showing that Filova had intervened or otherwise assisted .

Filova's refusal to declare YLSA illegal is not a violation of international law as YLSA 's activities do not fall within the available definitions of terrorist activities. Furthermore, every state has the prerogative to determine what is and what is not terrorism in the context of its domestic and foreign affairs and in any case, there is no general duty to declare terrorists illegal.

III Filova refuses to extradite the four Yttic individuals on the basis that their acts fall within the political offence exception in the bilateral treaty. Such treaties are based on the principle of unilateral characterization according to which the characterization of the facts as political offences is exclusively and unilaterally left to the discretion of the requested state. In any case, the offenses fulfill the requirements of either a pure or a relative political offense. A relative political offense can be ascertained by applying either the Political-Incidence, Injured Rights or Political Motivation tests. As the acts were acts of revolt committed during a period of

political disturbance and affected mainly the political organization of the state, the political element of the acts predominating over the ordinary criminal element, the acts fall into the category of political offenses.

IV. No right to damages for invasion of privacy is known in international law. First, customary international law does not recognise the right of privacy. Thus no breach has been committed entitling a right to damages. Secondly, the Covenant and other human rights instruments do not provide for such a right. Thirdly, damages is not the proper remedy as the injury suffered is not susceptible to assessment. Instead, satisfaction is the proper remedy for an invasion of privacy.

In the alternative, Filova's retention of the ESPRI database has not caused any injury to Ercolan citizen. There is no connection between the mailing and the retention. YLSA's claim is not substantiated while the Ercolan newspaper's claim goes to show that Filova is not responsible.

V. Filova is not under a duty to return the database in the absence of proof that it was obtained in violation of international law. Restitutio in integrum is only a remedy for a violation of international law. In this case, no violation of international law had been committed. There are no binding obligation relating to copyright or data protection which is binding on Filova. In addition, Filova has not assumed any treaty obligation to return the database.

PLEADINGS AND AUTHORITIES

I. ERCOLA'S TREATMENT OF THE YTTIC MINORITY VIOLATES BINDING INTERNATIONAL LEGAL NORMS

A. The United Nations Charter Mandates The Observance Of Human Rights.

Being a member of the United Nations (hereinafter UN), Ercola has a duty under Art.55 and Art.56 of the Charter¹ to promote universal respect for and observance of human rights and fundamental freedoms and to take joint and separate action to achieve these purposes in good faith.²

B. Ercola Is Under A Duty Not To Defeat The Object Of The International Covenant On Civil And Political Rights.³

Although Ercola has not ratified this Covenant⁴, it is nevertheless obligated by Art.18 of the Vienna Convention to refrain from acts which would defeat the objects and purposes of a treaty.⁵ Thus Ercola is obligated to observe the objects of the Covenant in its treatment of the Yttic minority.

1. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, [1971] ICJ Rep. 16; H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* at 147-149 (1950); Wright, *National Courts and Human Rights- The Fujii Case*, 45 AJIL 62 at 73 (1951); O. Shacter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 Vand L. Rev 643 at 646-653 (1951); Schelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AJIL 337 at 341-350 (1972); B. Sloan, *Human Rights, The United Nations and International Law*, 20 Nordisk Tidsskrift for International Ret, Act Scandinavia Juris Gentium at 30-31 (1950).

2. Article 26, Vienna Convention on Law of Treaties 1969, opened for signature May 23, 1969, 1155 UNTS 331, entered into force Jan 27, 1980 (hereinafter Vienna Convention); McNair, Chapter XXX, *LAW OF TREATIES* (1961).

3. Entered into force on March 23 (1976), 999 UNTS 171 (hereinafter Covenant).

4. Art. 16 and Art. 34 Vienna Convention and Art. 48(2) of Covenant.

5. International Law Commission, Commentary on Article 18, YBILC II at 202 (1966); German Interests in Polish Upper Silesia (Merits), [1926] PCIJ. Ser. A no. 7 at 30; McNair, *supra* n. 2 at 199-205; RY. Jennings, *Treaties*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* at 138 (1991).

C. Filova Has Jus Standi To Bring This Claim On Behalf Of The Yttic Minority.

1. Ercola's Treatment Of The Yttic Minority Violates Obligations Erga Omnes.

Every state has a legal interest to enforce obligations erga omnes⁶, a breach of which injures all states.⁷ This includes the obligation to respect basic human rights.⁸ Consequently, every state including Filova possesses the right to bring an action against a violating state⁹ like Ercola whose treatment of the Yttic minority violates their basic rights as a minority.

Obligations erga omnes are distinct from obligations which arise from the subject of diplomatic protection, which do not concern all states.¹⁰ Therefore, the nationality of claims rule which applies to diplomatic protection is not applicable to cases involving obligations erga omnes.

2. Ercola Is Precluded From Challenging The Admissibility Of This Claim By Virtue Of The Special Agreement.

Art.31 of the Vienna Convention provides that the terms of a treaty shall be interpreted in good faith and in light of its context, object and

6. Barcelona Traction, Light and Power Company Limited (Belgium v. Spain), (1972) ICJ Rep.4 at 32; American Law Institute, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES para.703 (1987); L.Hannikainen, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW at 276 (1988); H.Thirlway, *The Law and Procedure of the ICJ*, 60 BYIL at 92-102 (1989); I.Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 598 (1990).

7. Draft Articles on State Responsibility, Art.5(2)(e)(iii) *infra* n.9; T.Meron. HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW at 191 (1991).

8. Barcelona Traction Case *supra* n.6; S.Schwebel, *Human Rights in the World Court*, 24 Vand.J.Transnational Law 945 at 965 (1991).

9. Barcelona Traction Case *supra* n.6; RESTATEMENT, *supra* n.6; T.Meron, *supra* n.7; Report of the ILC on its 28th session [1976] 2 YBILC 95; Draft Articles on State Responsibility, Art.5(2)(e)(iii) in Report of the ILC on its 37th session.[1985] 2 YBILC (part 1); A.Cassese, INTERNATIONAL LAW IN A DIVIDED WORLD at 12 (1988); R.Wallace, INTERNATIONAL LAW at 171 (1992); Memorial of Australia, (Aust v. Fr), 1978 ICJ.Pleadings (1 Nuclear Tests), 14 (1973); Memorial of New Zealand (N.Z v. Fr), 1978 ICJ.Pleadings (2 Nuclear Tests) 8 (1973).

10. Barcelona Traction Case *supra* n.6.

purpose. Moreover, following the principle of effectiveness.¹¹ Ercola had waived the nationality of claims rule and recognized Filova's standing when it had agreed to submit to the jurisdiction of the court. The local remedies rule is also not applicable as Filova is seeking a declaratory judgement¹² and, furthermore, the special agreement evinces sufficient intention to waive the rule by Ercola.¹³

D. International Law Accords Protection And Recognition Of Minorities Rights.

1. Customary International Law Recognizes Rights Of Minorities.

Minorities rights is a peremptory norm of international law.¹⁴ Treaties concluded since 1648 have provided for and recognized these rights.¹⁵ Recent international efforts¹⁶ reaffirm the rights of minorities and are clear evidence of state practice¹⁷ which exhibits a belief by states that the practice

11. Report of the ILC on its 18th session, YBILC II at 219 (1966).

12. J. Fawcett, *The Exhaustion Of Local Remedies: Substance Or Procedure?*, 31 BYIL 452 at 455 (1954); C.F. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW at 271 (1990).

13. Elettronica Sicula Sp.A (ELSI) Case 1989 ICJ Rep. at 42.

14. Opinion 1 & 2, Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From The Dissolution Of Yugoslavia, 31 ILM 1488 at (1992).

15. Peace Treaty of Westphalia, cited in F. Capotorti, Minorities, Vol. 8 Encyclopedia of Public International Law (1985); Treaty between the Principal Allied and Associated Powers and Poland, signed 28 June 1919, 112 GBTS 232; Trianon Peace Treaty with Hungary 1920, 3 Israel, Major Peace Treaties of Modern History, 1648-1967 (1985); Art. 27, of the Covenant.

16. Art. 2 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, UN.Doc.E/CN.4/1992/48 & Corr.1 at 16-19 (1992) [hereinafter Decl. of Minorities]; UNGAR 48/138 (1993); Art. 5 & 7 of the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, (no. 169) entered into force 5 Sept 1991; Art. 31, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, 29 ILM 1305, 1990 [hereinafter CSCE]; Proposal for a European Convention for the Protection of Minorities, adopted 8 Feb 1991, Council of Europe Doc. CDL (91)(7)(1991).

17. D'Amato, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW, Chapter 5 (1971); M. Akehurst, *Custom As A Source Of International Law*, 47 BYIL at 53 (1974-5).

has been rendered obligatory.¹⁸ Thus, the necessary requirements for the existence of a customary norm have been met. Furthermore, Article 27 of the Covenant is declaratory of customary international law.¹⁹ Hence Ercola has an obligation to respect these rights.

E. The Nature Of Minorities Rights Protection.

Ercola is under a duty not to discriminate against the Yttic minority²⁰ and to undertake specific measures to protect their rights in order to preserve their identity.²¹ Not only has Ercola failed to undertake these measures, she has in fact consistently discriminated against the Yttic minority.

F. The Refusal To Permit Paid Leave For The Observance Of Yttic Religious Holidays Constitute A Violation Of The Right To Religion.

1.This Refusal Denies The Yttic People The Right To Practice Their Religion.

A person's right to religion includes the right to manifest his religion

18.Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), (Merits) (1986) ICJ Rep. 14; Lotus Case, PCIJ Ser.A, no.10 (1927) at 28.

19.Y.Dinstein, *Collective Human Rights Of Peoples And Minorities*, 25 ICLQ at 102 (1976); J.B.Kelly. *National Minorities in International Law*, 3 JILP at 253 (1973).

20.F.Capotorti, Study On The Rights Of Persons Belonging To Ethnic, Religious And Linguistic Minorities, UN Doc.E/CN.4/Sub.2/384/Rev.1 (1979) at 54 para.316 (hereinafter Capotorti Study); G.Alfredsson & A.de Zayas, *Minority Rights: Protection By The United Nations*, Vol.14, no.1-2 HRLJ at 1 (1993).

21.Minority School in Albania Case, [1935] PCIJ Ser.A/A, no.64 at 17. 20; Capotorti Study, *supra* n.20; UN Study, The Main Types And Causes Of Discrimination, UNP Sales No.11949.XIV.3 at 3; H.Hannum, *Contemporary Developments In International Protection Of The Rights Of Minorities*, 66 Notre Dame L Rev at 1431-1460 (1991).

in practice and observance.²² Persons belonging to minorities (group) should not be denied the right to profess and practice their religion²³ including the right to observe religious holy days in accordance with the precepts of one's religion²⁴. The mere granting of this right is insufficient as it is the effective implementation of the right²⁵ and the removal of obstacles to religious observances that is required. This may require modification of national legislation.²⁶ This right may only be subjected to limitations which are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.²⁷ Hence the refusal to allow paid leave for the observance of religious holidays by the public and private employers amount to a denial and violation of the Yttic people's right to practise their religion.

2.This Refusal Violates The Principle Of Non-Discrimination.

Discrimination means any distinction, exclusion or restriction based on race, national or ethnic origin which has the effect of nullifying or impair-

22.Art.18, Universal Declaration on Human Rights, adopted on Dec.10 (1948) UNGAR 217 A (III), UN.Doc.A/810 [hereinafter Univ.Decl.]; Art.18 of Covenant: Art.1, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UNGAR 36/55 [hereinafter Religious Intolerance Decl.]; Art.9, European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 211 [hereinafter Euro.Conv.]; Art.12, American Convention on Human Rights, 9 ILM 1970 [hereinafter American Conv.]; African Charter on Human and People's Rights , 21 ILM 59 (1982) [hereinafter African Charter].

23.Art.27 of Covenant: Art.2(2) Decl. of Minorities, *supra* n.16; 32.3 CSCE *supra* n.16.

24.Art.6(h), Religious Intolerance Decl.; P.Thornberry, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES at 195 (1991); Y.Dinstein, *Freedom Of Religion And The Protection Of Religious Minorities*. in Y.Dinstein and M.Tabory (eds). THE PROTECTION OF MINORITIES AND HUMAN RIGHTS at 150 (1992).

25.P.Thornberry. *supra* n.24.

26.see Art.4(2)(a), Religious Intolerance Decl.; P.Thornberry, *ibid*.

27.see Art.18(3) of Covenant; Art.1(3) Religious Intolerance Declaration; Art.9(2) Euro.Conv.

ing the recognition, enjoyment or exercise of human rights and fundamental freedoms.²⁸ The granting of paid leave for the observance of religious holidays to the Nicastrians but not the Yttics amounts to a discrimination.

G. The Statutory Provision Providing That The Nicastrian Language Shall Be The Official Language And The Prohibition Of The Usage Of Foreign Language In Public Business Violate The Yttic People's Right To Use Their Language.

Having provided for the Nicastrian language to be the official language, the statute further prohibits the use of foreign language in public business. Read as a whole, the statute prohibits the use of any language which is not Nicastrian or is a language of another state. This includes the language of Filova which is the language of the Yttic people whose culture is centered in Filova. The Yttic people have complained against this statutory provision for the past thirty years as their right to use the Yttic language has been violated. Minorities possess the right to use their own language²⁹ in private and in public³⁰ and this has been supported by recent international activities.³¹ The prohibition on the usage of the Yttic language in public business is thus a violation of Yttic people's rights.³²

In order to ascertain whether Ercola's treatment of her minority violates binding international legal norms, it is submitted, that by drawing a

28. Art.1(1), Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195; Art.1, ILO Discrimination (Employment and Occupation) Convention 1958, Vol.362 UNTS at 31.

29. Art.27, of Covenant; see Art.30, Convention on the Rights of the Child 1989, UN Doc.A/44/25; Art.2, Decl.of Minorities.

30. Art.2, Decl.of Minorities; 32, CSCE: B.Vukas, *General International Law And The Protection Of Minorities*, 8 RDH at 47-48 (1975).

31. see Preamble, European Charter for Regional or Minority Languages opened for signature on 2 Oct.1992, ETS no.148; Art.7, Proposal for a European Convention for the Protection of Minorities, adopted 8 Feb.1991, Council of Europe Doc. CDL (91)(7) (1991); 32, CSCE.

32. See *supra* n.29-31.

parallel to the treatment of aliens, the treatment accorded must "be tested in the light of international law",³³ i.e. the test of international standards.³⁴ in accordance with the ordinary standards of civilization.³⁵ An official language refers to a language that can be used in the affairs of the legislative, the executive and the judiciary.³⁶ State practice shows that the language of a minority is either granted official language status, at the national³⁷ or regional³⁸ level, or is constitutionally protected³⁹. These are the existing international standards. Although the Ercolan constitution provides for freedom of speech, this does not refer to the right to use one's own language.⁴⁰ Thus the right to use the Yttic language in public business is not constitutionally protected. It is therefore submitted that Ercola's treatment of the Yttic minority violates international legal standards.

II. YLSA'S ACTIONS AND FILOVA'S INVOLVEMENT IN THEM ARE CONSISTENT WITH THE RIGHT OF THE YTTIC PEOPLE TO SEEK SELF-DETERMINATION AND WITH THE RIGHT OF FILOVA TO ASSIST IN THAT STRUGGLE.

33.Robert's Claim (US v. Mex.), 4 RIAA 77 at 80 (1926).

34.Neer Claim (US v. Mex.), 4 RIAA 60 at 61 (1926).

35.*Ibid.*

36.THE USES OF VERNACULAR LANGUAGES IN EDUCATION (Paris:UNESCO,1953) at 46.

37.Capotorti Study, *supra* n.19 at 76; s.14, Constitution of Finland (17 July 1919-1994), cited in Vol.VI, Blaustein & Flanz, Constitution of the World (hereinafter Constitution of the World): Art.116, Federal Constitution of The Switzerland Confederation, Vol XIX. Constitution of the World.

38.Article 264(a), Act No.33 of 11 March 1974 Iraq; Article.4. Constitution of Belgium, Coordinated Constitution of Belgium of 14 Feb.1994, Vol.II Constitution of the World; Art.3, Constitution of Spain, Vol.XVIII Constitution of the World.

39.Art.22, Constitution of Sri Lanka (1978); Art.6S(2), Constitution of Hungary & Art.29(1). Constitution of India. Vol.VIII Constitution of the World.

40.M.Tabory, *Language Rights As Human Rights*, 10 Isr'l Yb.H.R. at 196 (1980); Belgian Linguistic Case. Application 1474/62. 23 Inhabitants of Alseberg and Beersel v. Belgium, Yearbook VI at 332 (1963).

A. The Right To Self-Determination Is No Longer Restricted To The Decolonization Context.

International law recognizes the right to self-determination.⁴¹ The text and *travaux preparatoires* of the Covenants support the view that this right reaches beyond the context of decolonization.⁴² The Declaration affirms the application of this right beyond the decolonization context⁴³ by specifying that it does not authorize any action that would affect the territorial integrity of *sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination*, establishes that the right to self-determination applies to peoples within existing states treated in a discriminatory fashion by an unrepresentative government.⁴⁴

The Declaration is considered to be the most authoritative statement of the principles of international law relevant to the question of self-determination.⁴⁵ It has been described as an authoritative interpretation of the UN

41. Art. 1(2) and 55 of the UN Charter; Western Sahara Advisory Opinion, ICJ Reports, 1971, p. 12 at 31-33; Art. 1(3) of the Covenant, *supra* n. 3, and the International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, entered into force on 3 Jan. 1976 [hereinafter the Covenants]; Principle 7 of The Declaration On Principles Of International Law Concerning Friendly Relations Among States In Accordance With The Charter Of The United Nations, Annex to UNGAR 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1970) [hereinafter the Declaration].

42. Art. 1(3) of the Covenants and Art. 25 of Covenant; P. Thornberry, *Self-Determination. Minorities, Human Rights: A Review Of International Instruments*, 38 ICLQ 867 at 878 (1989); M. Evans and D. T. Orlidge, *What Can The Past Teach The Future? Lessons From Internationally Supervised Self-Determination Elections 1920-1990*, in *International Law and Politics*, Vol. 24 [1992] 1711 at 1716; T. M. Franck, *The Emerging Right To Democratic Governance*, 86 AJIL 46 at 58-59 (1992).

43. F. L. Kirgis, Jr., *The Degrees Of Self-Determination in The United Nations Era*, 88 AJIL 304 at 305 (1994); Evans and Orlidge, *ibid* at 1717.

44. R. Rosenstock, *The Declaration of Principles of International Law: A Survey*, 65 AJIL 713 at 732 (1971); Thornberry, *supra* n. 42 at 876.

45. International Commission Of Jurists, *The Events In East Pakistan* in The Secretariat Of The International Commission Of Jurists Review, No. 3, June 1972 at 44.

Charter⁴⁶ and its provisions have formed customary international law.⁴⁷

B. The Right To Self-Determination Encompasses Internal And External Self-Determination.

The Declaration provides : 'The establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitutes a mode of implementing the right of self-determination.' The first and second modes refer to external self-determination, which includes secession, while the third refers to internal self-determination, i.e. the right to representation, democratic governance and increased autonomy.⁴⁸

The Declaration however seeks to protect the territorial integrity of sovereign and independent states *possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color*. This principle was reiterated in the 1993 Vienna Declaration that exempted only "a Government representing the whole people belonging to the territory without distinction of any kind."⁴⁹ Thus by 1993, the right of peoples to secede or exercise any other form of external self-determination had expanded to be assertable against a government that is unrepresentative of people who are defined by characteristics not limited to race, creed or color.⁵⁰

46.L.F.Damrosch, *Politics Across Borders : Non-Intervention and Non-Forcible Influence Over Domestic Affairs*, 83 AJIL at 1 (1989).

47.Nicaragua v. United States, Merits, 1986 ICJ Rep.14 at 103; also see J.Casteneda, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS at 165-196 (1969).

48.A.Cassese, *Political Self-Determination - Old Concepts and New Developments*, in UN Law/Fundamental Rights: Two Topics In International Law 137, at 144 (1979); Kirgis, *supra* n.43 at 305; Rosenstock, *supra* n.44 at 732.

49.Vienna Declaration and Programme of Action, pt. I, para. 2, UN Doc. A/CONF.157/24 (pt.I) (1993), reprinted in 32 ILM 1661 (1993) (emphasis added).

50.Kirgis, *supra* n.43 at 306.

C. International State Practice Has Recognized The Right To Secede In Exercising External Self-Determination

The right to secede in the exercise of external self-determination has gained recognition of states. The right of Senegal in seceding from the Mali Federation,⁵¹ of Bangladesh in seceding from Pakistan,⁵² of Eritrea in seceding from Ethiopia,⁵³ of Lithuania, Estonia and Latvia in seceding from the Soviet Union,⁵⁴ of Slovenia, Croatia and Bosnia-Hercegovina in seceding from the former Yugoslavia,⁵⁵ of Quebec to secede from Canada⁵⁶ and recognition of these secessions by states reflect state practice as to the acknowledgement of the right to secede as a mode of implementing self-determination.

The international response to the events in Yugoslavia provide the most compelling evidence of a trend in state practice that recognizes this.⁵⁷ The relatively prompt recognition of Slovenia, Croatia, and Bosnia-Hercegovina by members of the international community,⁵⁸ including the acceptance of the

51.L.C.Buchheit, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION at 99 (1978).

52.Nawaz, *Bangladesh and International Law*, 11 Indian JIL 251 at 256-57 (1971).

53.J.Klabbers and R.Lefeber, *Africa: Lost Between Uti Possidetis and Self-Determination*. in C.Brolmann, R.Lefeber and M.Zieck(eds.), RIGHTS OF PEOPLES AND MINORITIES IN INTERNATIONAL LAW at 73 (1992); Kirgis, *supra* n.43 at 307.

54.L.S.Eastwood, Jr., *Secession: State Practice And International Law After The Dissolution Of The Soviet Union And Yugoslavia*, Vol.3 no.2 Duke J Comp & Int'l L 299 at 319-320 (1993); G.Marchildon and E.Maxwell, *Quebec's Right Of Secession Under Canadian And International Law*. 32 Va J Int'l L 583 at 622 (1992).

55.Eastwood, *ibid* at 322-329.

56.D.Turp, *Self-Determination: Secession, Autonomy And Integration*. in ASIL /NVIR Proceedings 62 at 64 (1993).

57.Eastwood, *supra* n.54 at 322.

58.P.L.Dorff, *Chronology 1991*. 71 Foreign Aff. 184, 195 (America and the World 1991/92 issue); J.Tagliabue, *European Ties for Slovenia and Croatia*, N.Y. TIMES, Dec. 17, at A3 (1991); S.Kinzer, *Slovenia and Croatia Get Bonn's Nod*. N.Y. TIMES, Dec. 24. at A3 (1991).

three states as members of the United Nations,⁵⁹ signifies the widespread international state practice that has favoured legitimate secession movements of peoples still engaged in armed struggles for independence outside the colonial context.⁶⁰

D. The Yttic People Have The Status Of A 'People' In International Law

All peoples have the right to self-determination.⁶¹ A minority may have the status of a people.⁶² Two tests, objective and subjective, have been developed⁶³ to ascertain whether a group is a 'people.' The International Commission Of Jurists⁶⁴ in ascertaining whether the Bangladeshis constitute a 'people' used both the objective test, that examines characteristics such as race, religion, language, historical links and geographic constitution,⁶⁵ and the subjective test that examines the will and conscious identity of the people to be a 'people.'⁶⁶

Applying the two tests, the Yttic people in West Firland do constitute a 'people' in international law due to them possessing a common race, language, religion, history and geographic constitution. More importantly, they are

59. With regard to Slovenia, UNGAR 46/236 of 18.5.1992 in UNYB at 137; With regard to Croatia, UNGAR 46/238 of 18.5.1992, *ibid*; With regard to Bosnia-Herzegovina, UNGAR 46/237 of 20.5.1992, *ibid*.

60. M. Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AJIL 569 (1992).

61. Art. 1(2) of the UN Charter; Art. 1(3), the Covenants; Prin. 5 Para 1, the Declaration; L. Henkin, *INTERNATIONAL LAW : CASES AND MATERIALS* (1993) at 305.

62. Klabbers and Lefeber, *supra* n. 53 at 40.

63. Marchildon and Maxwell, *supra* n. 54 at 608.

64. The International Commission of Jurists, *supra* n. 45 at 42.

65. Y. Dinstein, *Self-determination and the Middle East Conflict*, in Y. Alexander and R. A. Friedlander (eds), *SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS* 243, at 246-247 (1980); Buchheit *supra* n. 51, at 9-10.

66. Klabbers and Lefeber, *supra* n. 53 at 39.

conscious of their identity as a people and have the will to be a people.

E. The Yttic People Have A Legitimate Right To Self-Determination

The Yttic people qualify for the right to self-determination due to their possession of the status of a people in international law and a distinct geographic territory⁶⁷ in West Firland. A legitimate right to seek internal and external self-determination arises because the Yttic people's rights with regard to religion,⁶⁸ language,⁶⁹ freedom of association⁷⁰ and to representation in democratic governance⁷¹ have been violated.⁷² Moreover Ercola, having discriminatory policies against the Yttic people⁷³, has not conducted itself in compliance with the principle of equal rights and has not represented its people without distinction.⁷⁴ In addition the Yttic people's right to internal self-determination has been denied and local remedies have been exhausted.⁷⁵

F. YLSA's Actions Were Consistent With The Yttic People's Right To Seek Self-Determination

The legitimate and peaceful claims of the Yttic people for self-determination were disregarded and suppressed to an extent where there were no legal and peaceful avenues to voice their right to self-determination. In

67. Marchildon and Maxwell, *supra* n.54 at 608;

68. Refer to Memorial at pp. 4-5.

69. Refer to Memorial at pp. 6-7.

70. Art.9 and 20, Univ. Decl.

71. Art.21, Univ. Decl.

72. Klabbers and Lefeber, *supra* n.53 at 43.

73. Refer to Memorial at p.5

74. Prin.5, Para.7, the Declaration; Vienna Declaration and Programme of Action, *supra* n.49.

75. Klabbers and Lefeber, *supra* n.53. at 49, 53-54; A.Cassese, *The Self-Determination Of Peoples*, in Henkin, INTERNATIONAL BILL OF RIGHTS at 102.

circumstances such as these. the affected 'peoples' have an inherent right to struggle by *all necessary means* at their disposal in exercise of their right to self-determination.⁷⁶ Thus YLSA, as a representative of the Yttic people, is entitled to use force to achieve the goal of self-determination,⁷⁷ an exception to the general prohibition on the use of force in Art.2(4) of the UN Charter. This right is also enunciated in UNGAR 2621⁷⁸ and UNGAR 3314.⁷⁹ Hence, YLSA's actions were consistent with the Yttic people's right to seek self-determination.

G. Filova's Involvement In The Struggle Is Consistent With Its Right To Assist

International law requires states to respect and promote the realization of the right of self-determination of peoples within and outside their jurisdiction.⁸⁰ Thus, Filova has a duty to assist the Yttic peoples' legitimate struggle as it has a legal interest to protect rights corresponding with obligations *erga omnes*.⁸¹ This duty has crystallized into custom with the support of state practice such as UN assistance to peoples seeking internal self-

76. Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes, UNGAR 3103, Dec 12, 1973.

77. A. Cassese, *The Self-Determination of Peoples*, in Henkin, INTERNATIONAL BILL OF RIGHTS at 102 (1981); Schmeltzer, *Soviet and American Attitudes Toward Intervention: The Dominican Republic, Hungary and Czechoslovakia*, 11 VA. J. Int'l L. 97, at 101 (1970).

78. Programme Of Action For The Full Implementation Of The Declaration On The Granting Of Independence To Colonial Territories And Peoples, UNGAR 2621(XXV), 25 UN GAOR, Supp.(No.28) at 1, UN Doc.A/S028 (1975).

79. Resolution On The Definition Of Aggression, UNGAR 2621(XXV), 25 UN GAOR, Supp.(No.31) at 142, UN Doc.A/9631 (1975).

80. Art.2, 55 and 56 of the UN Charter; Art.1(3) the Covenants; Prin. Para.1,2,3 and 5 of the Declaration; General Comment (Human Rights Committee) 12(21), UN Doc.A/39/40 at 142.

81. *Supra* n.6.

determination in South Africa⁸² and Haiti⁸³ and UN Resolutions requesting States to offer aid to groups struggling for self-determination.⁸⁴

III. FILOVA'S SUPPORT FOR YLSA'S ACTIVITIES DOES NOT VIOLATE INTERNATIONAL LAW

The duty to assist a group of people in their legitimate struggle of self-determination⁸⁵ is not in contradiction with the duty of non-intervention.⁸⁶ UN intervention into the internal affairs of Haiti⁸⁷ and South Africa,⁸⁸ India's intervention into the affairs of Pakistan,⁸⁹ Soviet Union's support for India's actions⁹⁰ and UN resolutions requesting states to offer aid to groups struggling for self-determination⁹¹ are evidence of state practice.

Moreover, Filova, in her diplomatic note, merely offered shelter and support to any Yttic wishing to live in the Yttic way, authorized her Intelligence Agencies to pursue *these* ends and stated her encouragement of the

82.1989 Declaration on Apartheid and its Destructive Consequences in Southern Africa, UNGAR S-16/1, Annex of 14.12.1989; UNGAR 41/35F (1986).

83.The Situation of Democracy and Human Rights in Haiti, UNGAR 48/27 (1993); UNGAR 46/7,1991; UNGAR 46/138 (1991); UNGAR 47/20A (1992); UNGAR 47/20B (1993)

84. UNGAR 1807, 17 UNGAOR, Supp.17, UN Doc.A/5217(1963); UNGAR 2107, UNGAR 2022, UNGAR 2074, 20 UNGAOR, Supp.14, UN Doc.A/6014(1966); UNGAR 2151, UNGAR 2184, UNGAR 2189, 21 UNGAOR, Supp.16, UN Doc.A/6316 (1967); UNGAR 2383, UNGAR 2395, 23 UNGAOR, Supp.18, UN Doc.A/7218 (1969).

85.Refer to Memorial at p. 13.

86.Strict Observance of the Prohibition of the Threat or Use of Force in International Relations and the Right of Peoples to Self-Determination, UNGAR 2160. 21 U.N.GAOR, Supp.16, at 4, U.N.Doc.A/6316 (1966); UNGAR 3103, 1973, *supra* at n.75; Schmeltzer, *supra* n.76; L.S.Buchheit, *supra* n.51 at 33-42; M. Bothe, THE LEGITIMACY OF THE USE OF FORCE TO PROTECT PEOPLES AND MINORITIES at 292-293.

87. *Supra* n.83.

88. *Supra* n.82

89.Buchheit. *supra* n.51 at 207; Eastwood, *supra* n.54 at 311.

90.K.U.Ahmad, BREAKUP OF PAKISTAN at 1-2 (1972); Buchheit. *supra* n.51 at 208.

91. *supra* at n.84

Yttic minority's defense of their right to self-determination. These do not indicate actual support for YLSA's activities and, furthermore, the note was private and confidential. YLSA's unsubstantiated claims of assistance from their 'friends' in the FISC and the tracing of Communique No.6 to a number at FISC indicate the possibility of YLSA being assisted by private persons. These circumstantial evidences do not prove that Filova has intervened⁹².

IV. FILOVA'S REFUSAL TO DECLARE YLSA ILLEGAL IS NOT A VIOLATION OF INTERNATIONAL LAW

Although YLSA's rebellion may have breached the domestic law of Ercola, no breach of international law arises through a rebel regime's attempt to secede.⁹³ In such cases, a rebel regime may be recognised accordingly.⁹⁴ Thus there is no duty for Filova to declare YLSA illegal.

A. YLSA Is Not A Terrorist Movement And Moreover There Is No Duty In International Law To Declare Terrorist Movements Illegal.

There is no precise legal definition of terrorism.⁹⁵ The treaties which have been drafted so far in the framework of the UN do not deal with 'terrorism' in general but have confined themselves to a number of specific 'terrorist' offences: hijacking,⁹⁶ unlawful acts against the safety of international aviation,⁹⁷ the taking of hostages⁹⁸ and unlawful acts against internationally

92. Refer to Memorial at p.22.

93. OPPENHEIM'S VOL.1 INTERNATIONAL LAW at 161-162 (1992).

94. *Ibid* at 162.

95. J.F. Murphy, PUNISHING INTERNATIONAL TERRORISTS : THE LEGAL FRAMEWORK FOR POLICY INITIATIVES at 3-4 (1985).

96. Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16.Dec.1970, ICAO Doc. 8920.

97. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, 23 Sept.1971. ICAO Doc. S966.

98. International Convention Against The Taking Of Hostages, 34 UN GAOR Supp.(No.39) at 23, UN Doc. A/34/39 (1979), reprinted in 18 ILM 1456 (1979).

protected persons.⁹⁹ The activities of YLSA do not fall within the available definition of terrorist activities, moreover their activities were not aimed at harming civilian populace. A US lower court judge¹⁰⁰ found that terrorism does not violate international law because there is "less than universal consensus" about "terrorism generally." As a sovereign State, Filova reserves to itself the political and legal authority to determine what is and what is not terrorism in the context of its domestic and foreign affairs.¹⁰¹

V. THE POLITICAL OFFENCE EXCEPTION CLAUSE IN THE EXTRADITION TREATY EXEMPTS FILOVA FROM THE DUTY TO EXTRADITE.

Filova refuses to extradite the four Yttics on the basis that their purported offenses are of a political character as provided for in their bilateral treaty. Extradition treaties are based on the principle of unilateral characterization according to which the characterization of the facts as political offences is exclusively and unilaterally left to the discretion of the requested state.¹⁰² Thus it is within Filova's prerogative to characterize the offenses as of a political character.

Generally, a distinction can be made between 'purely' and 'relative'

99. Convention of American States to Prevent and Punish Acts of Terrorism, Washington, Feb. 2, 1971 UN Doc. A/AC/C.6/418 Annex IV [hereinafter **Washington Convention**]; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, New York, Dec. 14, 1973 U.N. Doc. A/3166 (XXVIII) [hereinafter **New York Convention**].

100. Tel-Oren v. Libyan Arab Republic, US Circuit Court of Appeals, District of Columbia, 726 F.2d.774(D.C.Cir.1984)

101. Y. Alexander, *Minorities and Terrorism: Some Legal and Strategic Perspectives* in Y. Dinstein and M. Tabory (ed.), **THE PROTECTION OF MINORITIES AND HUMAN RIGHTS**, *supra* n.24 at 347.

102. Art.3(1), 1957 European Convention On Extradition (ETS No.24); Art.IV, 1952 Arab League Extradition Agreement (League of Arab States Treaty Series, p.27); Dr.C.V.Wijngaert, **THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION** at 103 (1980)

political offenses.¹⁰³ A purely political offense is exclusively directed against the state without injuring private persons or property and not accompanied by the commission of common crimes.¹⁰⁴ The theft of the ESPRI database is a purely political offense as it fulfills these necessary elements.

The relative political offense can be an extension of the purely political offense, when in conjunction with the latter, a common crime is also committed or when without committing a purely political offense, the offender commits a common crime prompted by ideological motives in furtherance of a political purpose.¹⁰⁵ Thus even if it is argued that the theft of ESPRI is a common crime, it then becomes a relative political offense.

Three major theories have emerged from the jurisprudence of the various courts in determining whether a crime is a relative political offense, i.e. the Political-Incidence, Injured Rights and Political-Motivation theories.¹⁰⁶

The Political-Motivation Theory used by the Anglo-Saxon courts¹⁰⁷ describes as political offenses crimes that were "incidental to and formed a part of political disturbances."¹⁰⁸ The American courts have held that due to there being a political disturbance in Northern Ireland, any crime committed

103. Wijngaert, *ibid* at 106; M.C. Bassiouni, *The Political Offense Exception In Extradition Law And Practice* in M.C. Bassiouni (ed.), INTERNATIONAL TERRORISM AND POLITICAL CRIMES 398 at 405 & 408 (1975).

104. *Ibid*

105. Bassiouni, *supra* n.103 at 408.

106. *Ibid* at 412.

107. G.S. Gilbert, *Terrorism And The Political Offence Exemption Reappraised*, in 34 ICLQ 695 at 697-700 (1985); Wijngaert, *supra* n.102 at 111.

108. *In re Castioni*, 1 Q.B., 149 (1891); recognized by *In re Meunier*, 2 Q.B., 415 (1894); *In re Ezeta*, 62 F.2d 198 (9th Cir., 1957); *Ex parte Kolczvnski*, 21 ILR . 240 (1954); G.Mora, *The Nature Of Political Offenses: A Knotty Problem Of Extradition Law*, 48 Va.L.Rev. 1226 at 1240.

by the IRA is a political offence and thus non-extraditable.¹⁰⁹ The theft of the ESPRI database, the railway station bomb threats and the Stock Exchange bombing were all acts committed in retaliation of the unwarranted crackdown on YLSA and was part of a political revolt to seek self-determination. As the death of the few unnoticed homeless people behind the Stock Exchange and the four policemen in the railway station were not indiscriminate bombings¹¹⁰ and were incidental to the political revolt, the offenses are political offenses.

The Injured Rights Theory used by the French courts¹¹¹ states that a political offense affects the political organization of the state and derives its political character from the nature of the rights it injures.¹¹² The theft of the database, the bombing of the Stock Exchange (which is yet to be reopened) and the bomb threats affected the political organization of the state by injuring Ercola's military, economy and social order. Hence the acts can qualify as a political offense even though this test is too strict and has been described as unworkable and unreasonable.¹¹³ Most recently, the French court has moved towards the Swiss approach below.¹¹⁴

The Swiss courts apply the Political Motivation Theory under which the offense must be committed to help the success of a purely political purpose, there being a direct connection between the crime committed and the political purpose, and the political element predominating over the ordinary criminal

109. Quinn, The Guardian, 4.10.1983 at 28; Doherty, The Guardian, 14.12.1984 at 4.

110. Ziyad Abu Eain V. Wilkes, 641 F.2d 504 (1981); cert.den. 454 US 894 (1981).

111. Gilbert, *supra* n.107 at 700.

112. In re Giovanni Gatti [1946-1947] Ann. Dig., 145 (No 70).

113. Gilbert, *supra* n.107 at 700-701.

114. Gilbert, *ibid* ; Piperno and Pace, Chambre d'Accusation de Paris, 1979.

element.¹¹⁵ The theft, bombing and bomb threats were not criminal in character as they were calculated to avoid harm to civilians. Their political character predominates as the offences relate to their political end of voicing their suppressed cry for self-determination, this being the sole avenue left.¹¹⁶

A. The Crimes Committed Do Not Constitute Terrorist Acts And In Any Case, It Is Not Mandatory To Extradite Terrorists

The crimes committed by the Yttics do not constitute terrorist acts.¹¹⁷ Should this Court decide otherwise, it is submitted that none of the relevant UN treaties¹¹⁸ contain a provision declaring that the political offence exception will be excluded for the 'terrorist crimes' in question. Instead they leave the application of the exception to the discretion of each contracting party.¹¹⁹ Moreover, some conventions explicitly provide that the duty to extradite created by the treaty does not impair the right of the contracting parties to grant asylum.¹²⁰

As for the principle of *aut dedere aut judicare*, the duty to extradite or prosecute is not imposed on Filova as the extradition treaty does not provide for it. This principle has found little recognition in positive international criminal law and in view of its restricted application,¹²¹ this principle has not formed custom and hence does not bind Filova.

115. V.P. Wassilief, U.S. Foreign Relations, 1909, at 520-521 (Dept. State); In re Ockert, [1933-1934] Ann. Dig., 369 (No. 157); In re Nappi, (1952) 19 ILR 375, 376.

116. In re Nappi, *ibid*; Ktir v. Ministere Public Federal, (1961) 34 ILR 143.

117. Refer to Memorial at pp. 15-16.

118. *supra* n. 96, 97, 98 and 99.

119. Wijngaert, *supra* n. 102 at 149.

120. Art. 6, Washington Convention, *supra* n. 99; Art. 12, New York Convention, *supra* n. 99

121. Wijngaert, *supra* n. 102 at 219.

VI. NO RIGHT TO DAMAGES FOR INVASION OF PRIVACY IS KNOWN IN INTERNATIONAL LAW

A. The Right Of Privacy Is Not Recognized Under Customary International Law.

Although this right is recognized in various human rights instruments,¹²² it has not emerged as a customary norm. These treaty rules are not of a fundamentally norm creating nature¹²³ and prominent works on this subject have only dealt with it within the municipal context.¹²⁴ Furthermore, Ercola cannot derive any right from the Covenant as she is not a member there-
to.¹²⁵

B. The Covenant And Other Human Rights Instruments Do Not Provide For A Right To Damages For Invasion Of Privacy.

Damages are granted only to victims of unlawful arrests¹²⁶ and wrongful conviction.¹²⁷ For other cases, complaints of the particular violation can be submitted to the relevant body.¹²⁸

C. The Proper Remedy For Invasion Of Privacy Is Not Damages But Satisfaction.

Invasion of privacy results in moral injury, which is psychological in

122. Art. 12 Univ. Decl.; Art. 17 of the Covenant; Art. 8 Euro. Conv.; Art. 11 American Conv.

123. North Sea Continental Shelf Case (1969) ICJ Rep. 41f at para 72.

124. eg. R. Wacks, PERSONAL INFORMATION (1989); Warren & Brandeis, *The Right to Privacy*, Harv. LR 193-220 (1890); H. Storey, *Infringement Of Privacy And Its Remedies* 47 Aust. LJ 498 (1973); R. Gavison, *Privacy And The Limits Of Law*, 89 Yale LJ 421 (1980).

125. Art. 34 of Vienna Convention *supra* n. 2.

126. Art. 9(5), of Covenant.

127. Art. 14(6), of Covenant.

128. Art. 41, of Covenant; Art. 2, Optional Protocol To The International Covenant On Civil And Political Rights, entered into force on 23 March 1976, 999 UNTS 302; Art. 44, American Conv.

character,¹²⁹ of which the proper remedy should be satisfaction.¹³⁰ The European Court of Human Rights in cases which involve violation of privacy had decided that judgment itself was sufficient just satisfaction to the victim.¹³¹

Damages are granted for the purpose of re-establishing the situation which would exist if the illegal act had not been committed.¹³² The basic assumption upon which damages is granted is that the injury is susceptible to assessment and that a value can be attached thereto, which is not possible when the injury involves a violation of a person's privacy. Satisfaction is the proper remedy as it serves as an expression of regret and acknowledgement of wrongdoing.¹³³

VII. FILOVA'S RETENTION OF THE ESPRI DATABASE HAS NOT CAUSED ANY INJURY TO ERCOLAN CITIZENS.

The mailing of the database's contents, subsequent to its retention by Filova, is said to have caused injury to Ercolan citizens. However, there is no substantial connection between the retention and the mailing. The assertion by the members of the YLSA that the copy handed over to Filova is the only

129..Draft Articles on State Responsibility, Report by F.V.Garcia Amador, Special Rapporteur, YBILC 1961 Vol.II, Doc.of the 13th Session, UN Doc.A/CN.4/Ser.A/1961/Add.1.

130.E.J de Arechaga & A.Tanzi, *International State Responsibility*, in INTERNATIONAL LAW: ACHIEVEMENT AND PROSPECT, *supra* n.5; Sorensen. MANUAL OF PUBLIC INTERNATIONAL LAW at 572 (1968); E.Riedel, *Satisfaction* in Vol.10 ENCYLOPAEDIA OF PUBLIC INTERNATIONAL LAW at 383 (1988).

131.Marckx Case, Judgement of 13 June 1979, Publ.ECHR, Ser.A 31 at 14 (1979); Norris Case, Judgement of 26 Oct 1988, Publ.ECHR, Ser.A 142 at 17 (1989); F.v. Switzerland, Judgement of 18 Dec 1987, Publ. ECHR, Ser.A 128 at 20 (1988).

132.Chorzow Factory Case (Merits) (1928) PCIJ, Ser.A.no.17, at 47; O'Connell... Vol II INTERNATIONAL LAW at 1115 (1971); Personnaz, LA REPARATION DU PREJUDICE EN DROITAT INTERNATIONAL at 197-198 (1952).

133.E.Riedel *supra* n.130 at 383; Anzilotti, Vol.I TRACTADO DE DIREITO INTERNACIONAL PUBLICO at 354-355 (1956).

copy is an unsubstantiated assertion and its validity is questionable. The Ercolan newspapers' claims that the mailings were sent from an address *previously* used by FISC are not only unsubstantiated but go to show that Filova is not responsible for the mailing as it was not done by the FISC. Thus the alleged injuries suffered by the Ercolan citizens were not caused by Filova's retention of the database.

Admissibility of evidence is not conclusive of its weight.¹³⁴ Ercola is relying on unsubstantiated circumstantial evidence¹³⁵ and she can only succeed if her evidence, based on inferences of facts linked together, leads to a single conclusion.¹³⁶ The evidence submitted by Ercola is not capable of leading to such a single conclusion.

VIII. FILOVA IS NOT LIABLE TO PAY DAMAGES FOR THE COST OF HAVING TO CREATE AN ENTIRELY NEW SYSTEM FOR ENCRYPTING AND RETAINING MILITARY PERSONNEL FILES.

The ESPRI database was accessed and copied by the YLSA. Filova did not render them any assistance. The assertion by YLSA that some 'brothers' in Filova had helped them and the tracing of the message to FISC indicate that some private parties may be involved in this affair. These are circumstantial evidence that are incapable of leading to a single conclusion that Filova is party to the 'crime', therefore Filova cannot be held liable to pay damages¹³⁷.

134. D.V. Sandifer, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS at 19 (1975).

135. Corfu Channel Case [1949] ICJ Rep. 18; J. Syntaw, DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE at 24-25 (1962); J. Verzijl, JURISPRUDENCE OF THE WORLD COURT at 106-107 (1966).

136. Corfu Channel Case, *ibid.*

137. *Ibid.*

IX. FILOVA IS UNDER NO OBLIGATION TO DELIVER COPIES OF THE DATABASE.

A. Restitutio In Integrum Is Only Available When There Is A Violation Of International Law.

Restitutio in integrum is a remedy for a violation of international law.¹³⁸ States are under a duty to return an object only if it was held unlawfully.¹³⁹ Filova did not obtain possession of the database copy by breaching any binding international obligation. It was surrendered to her by the YLSA.

Retention of the database copy also does not breach any binding international obligation. Ercola cannot base her claim on copyright protection as neither Ercola nor Filova is a party to the Berne Convention¹⁴⁰, which by itself has not become customary international law.¹⁴¹ Moreover, copyright protection is extended only to literary and artistic works.¹⁴² Recent international activities relating to data protection¹⁴³ are mere guidelines dealing with the municipal sphere and do not create any binding obligations in the international sphere.

Assuming that information is property, it is submitted that in retaining

138. Chorzow Factory Case, *supra* n.132; H.Lauterpacht, PRIVATE LAW SOURCES AND ANALOGIES IN INTERNATIONAL LAW at 149 (1927); G.Schwarzenberger, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS at 233 (1945).

139. Temple of Preah-Vihear Case (Cambodia -Thailand) 1962 ICJ Rep. 36-37.

140. Berne Convention for the Protection of Literacy and Artistic Works of Sept 9 1986, revised on July 24 1971. World Intellectual Property Organisation. Geneva 1980 (2S7)(E) (hereinafter Berne Convention).

141. S.M.Stewart, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS at 29-30 (1993); M.M.Boguslarsky, COPYRIGHT IN INTERNATIONAL RELATIONS: INTERNATIONAL PROTECTION OF LITERARY AND SCIENTIFIC WORKS at 17-19 (1979).

142. Berne Convention, *supra* n.140. at Preamble and Article 2(1).

143. OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980 (Paris: UNESCO): Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data. 28 Jan 1981 (CMD.8341) (London HMSO 1981).

the copy of the database. Filova is not depriving Ercola of its property, as Ercola never lost possession of the database. Filova is also not being unjustly enriched by the retention as she is not making use of it.¹⁴⁴

B. Filova Has Not Assumed Any Treaty Obligation To Return The Database Copy.

States are only bound to return an object in its possession when it had assumed a treaty obligation¹⁴⁵ to do so or as a result of diplomatic proceedings.¹⁴⁶ There is no such treaty between Ercola and Filova.

C. Filova Is Justified In Retaining The Database Copy.

By not handing over the database copy, Filova is acting in accordance with international law by not taking sides in a civil strife.¹⁴⁷ The retention of the database copy preserves the status quo as it existed prior to Filova's possession of the database copy.

The duty of non-intervention requires Filova to refrain from interfering in the conflict between the Ercolan government and YLSA.¹⁴⁸ Filova is precluded from returning the database as to do so would alter the status quo, to the

144.E.Arechaga, *International Law In The Past Third Of A Century*, Recueil des Cours at 299-300 (1978); Schreuer, *Unjustified Enrichment In International Law*, 22 AJIL 289 (1974).

145.C.Gray, JUDICIAL REMEDIES IN INTERNATIONAL LAW at 14 (1990); see eg. Art. VIII, Treaty on Principles Governing The Activities of States in The Exploration And Uses Of Outer Space And Other Celestial Bodies, 610 UNTS (1967) 205; Art.5, Agreement on The Rescue of Astronauts, The Return of Astronauts and The Return of Objects Launched Into Outer Space, 56 UKTS (1969) CMND 3997; Convention on The Means of Prohibiting And Preventing The Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in General Conference, UNESCO on 14 Nov.1970. Records of The General Conference, 16th Session at 135.

146.C.Gray, *ibid* at 64.

147.J.Moore, LAW AND THE INDO-CHINA WAR at 192 (1972); Mitrovic, *The Principle of Non-Intervention in Contemporary International Law*, 29 Jugoslovenska Revija Za Medunarodno Pravo at 41 (1964).

148.Principle 1, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of State and the Protection of Their Independence and Sovereignty, UNGAR 2131(XX) UN Doc.A/6014 (1966); UNGAR 36/103 (1981).

detriment of one party to the conflict.

Intervention is a forcible interference by a state in the affairs of another, calculated to impose certain consequences on the latter.¹⁴⁹ By retaining the database copy, Filova's inaction cannot amount to intervention.

D. An Injunction Is Not Appropriate In This Case

In the Trail Smelter Case,¹⁵⁰ an injunction was granted on the basis that the party responsible for the harm caused was identified and that the harm would persist if the injunction was not given. As there is no indication here that Filova had made use of the database, a cause for an injunction does not arise.

X. PRAYER FOR RELIEF

For the foregoing reasons the Respondent, Filova, respectfully requests that this honorable Court:

1. REJECT Ercola's requests for relief.
2. DECLARE that Ercola's treatment of its Yttic minority violates binding international legal norms.
3. DECLARE that YLSA's actions and Filova's involvement in them are consistent with the right of the Yttic people to seek self-determination and with the right of Filova to assist in that struggle.
4. DECLARE that no right to damages for invasion of privacy is known in international law.
5. DECLARE that Ercolan citizens have not been injured by the retention of the discs containing the ESPRI database.

149. Oppenheim, *supra* n.93 at 430.

150. Trail Smelter (US v. Can.) 3 RIAA (1949) at 1966.