

**TELDERS INTERNATIONAL LAW MOOT COURT
COMPETITION**

2019

The Great Football Match

(Tenovia v. Brolin)

Written Memorial on behalf of *Tenovia*

(Applicant)

Registration Number:

18-I

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(b) List of Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
Add.	Addendum
AIR	All India Reporter
aka	Also known as
All ER	All England Law Reports
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
Art./Arts.	Article(s)
AUS	Australia
BGH	Bundesgerichtshof (German Federal Court of Justice)
CAT	Committee against Torture
CB	Colombie Britannique (British Columbia)
CCPR	Committee on Civil and Political Rights (Human Rights Committee)
Cf.	<i>confer</i> (compare)
Ch.	Chapter
CEO	Chief Executive Officer
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CLAWS	Commission for Long Distance Athletics and Women's Squash
Conn.	Connecticut Supreme Court

Corp.	Corporation
CTR	Claims Tribunal
DEIDRB	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
Dev.	Development
DRC	Democratic Republic of Congo
ECJ	European Court of Justice
ECR	Reports of Cases Before the Court of Justice of the European Communities
ECSC	European Coal and Steel Community
Ed./Eds.	Editor/Editors
EMRIP	Expert Mechanism on the Rights of Indigenous People
<i>et al.</i>	<i>et alia</i> (and others)
<i>et seq.</i>	<i>et sequens</i> (and the following pages/paragraphs)
EWCA Civ	England and Wales Court of Appeal (Civil Division) Decisions
EWHC	High Court of England and Wales
Fam	Family Division (Law Reports)
FCO	British Foreign and Commonwealth Office
FCR	Federal Court Reports
FIFA	Fédération Internationale de Football Association (International Federation of Association Football)
FLR	Federal Law Reports
FSA	<i>Falconner Security Act</i>

GA	General Assembly (United Nations)
GC	General Comment
GR	General Recommendation
GPUDS	Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations
Hous.	Housing
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
Imm AR	Immigration Appeal Reports
Int.	International
LN	League of Nations
Ltd	Limited
MPEPIL	Max Planck Encyclopedia of Public International Law
NATO	North Atlantic Treaty Organisation
No./Nos.	Number(s)
NSWLR	New South Wales Law Reports
OECD	Organisation for Economic Co-Operation and Development

OHCHR	Office of the United Nations High Commissioner for Human Rights
UNODC	United Nations Office on Drugs and Crime
p./pp.	Page(s)
para./paras.	Paragraph(s)
PCIJ	Permanent Court of International Justice
QB	Queen's Bench
R	Regina (Queen)
RIAA	Reports of International Arbitral Awards
SC	Supreme Court
sec.	Section
St.	Sankt (Saint)
TV	Television
UDHR	Universal Declaration of Human Rights
UEFA	Union of European Football Associations
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
U.S.	Supreme Court of the United States
USA	United States of America
v.	Versus
VCDR	Vienna Convention on Diplomatic Relations

VCLT Vienna Convention on the Law of Treaties

Vol. Volume

WLR Weekly Law Reports

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(d) Statement of Relevant Facts

Brolin and *Tenovia* are two neighbouring states. The border region in *Brolin* is called Jaynia, its counterpart in *Tenovia* is called Wittson. *Tenovia* has a population of about 98,000, while the Respondent has 2.8 million inhabitants. The proportion of individuals who identify as ethnic *Tenovis* in the Respondent State is 6% and in *Tenovia*, it is 89%. They are indigenous to both States. *Brolin*'s capital, Gremont, seats the *International Commission for Long-distance Athletics and Women's Squash*, hereinafter CLAWS. Both *Brolin* and *Tenovia* are member States of CLAWS.

For over fifty-five years, an annual football game has been held between *Brolin* and *Tenovia*. In order to watch the game, each year thousands of citizens of *Tenovia* cross the border by car into *Brolin*. According to the domestic laws of both States, citizens wanting to cross the border have to apply for an electronic visa via the internet.

Since 2015, the private security company *Falconner* has been appointed by *Brolin* to provide security for the tournament and thus to take on police functions. In 2015, as well as in 2017, *Brolin*'s parliament formally transferred these functions by passing the *Falconner Security Act (2015)* and the *Falconner Security Act (2017)*. These acts empowered *Falconner* employees to check tickets, provide security within the stadium during the game and control vehicular traffic on *Brolin*'s roads within a fifteen-kilometre radius around the stadium from one week prior to the game until two days after the game. In addition, *Falconner* was empowered to use "reasonable force" to complete its tasks and *Brolin* provided its employees with government-issued materials, such as uniforms and crowd-control equipment, as well as tasers and patrol vehicles with sirens. All of the materials were emblazoned with *Brolin*'s emblem and intended to be used by *Brolin*'s police force. In return, *Falconner* was paid a lump sum for its services. Besides providing security at the football game, *Falconner* also assisted the police force in quelling domestic unrest in 2016, again with the authorisation of domestic legislation,

specifically the *Drizac Management Act (2016)*. At this time, *Falconner* was empowered to take “all action necessary” to put an end to the unrest.

A few weeks before the football match in 2017, the mascot of *Brolin*'s national football team, a dog called *Coco*, escaped from its kennel in Jaynia, and walked over the border into Wittson. *Julie Starman*, a *Tenovi* citizen, took the tired and thirsty looking dog home. As historically winning the football match against *Tenovia* is of special importance to *Brolin* in order to maintain political power in the country, the Prime Minister not only ordered the issue of a printed media release, but also held information sessions about the disappearance of the dog. The government specifically appealed to members of the armed forces, the police and *Falconner* employees to attend the sessions, which were held at police stations in *Brolin*. The CEO of *Falconner* urged her employees to attend the session. The participants were given photos of the dog and a map which encompassed, *inter alia*, the *Tenovi* border region.

A security guard at *Falconner*, Mr *Zunitte*, attended one of the information sessions and decided to do everything he could to get the dog back. A police officer told the security guard, who was issued with a vehicle, uniform and a government-supplied taser, that he should look for the dog on *Tenovi* territory. Upon this instruction, the security guard crossed the border and entered *Tenovia* without applying for a visa. As he spotted the dog being walked by *Julie Starman*, the security guard yelled out of the window for her to stop walking. Although she immediately complied with his demand, the security guard nevertheless used his taser on the utterly defenceless, unarmed woman. *Julie Starman* fainted and suffered severe injuries, including numerous fractures to her jaw and skull. The security officer, now in possession of the dog, escaped the scene, leaving *Julie Starman* unconscious in the mountainous area.

Fortunately, *Julie Starman* was found by hikers and – after several hours of being unconscious – was able to make a report to *Tenovi* police, giving precise details about her uniformed attacker.

Further evidence of the attacker's identity was later found by the police while searching the crime scene. They found a taser emblazoned with *Brolin's* emblem, as well as tyre marks heading back towards *Brolin*.

Back in *Brolin*, the security guard was called a "national hero" by *Brolin's* Minister for Sports and given a State medal usually reserved for service in *Brolin's* emergency services. In addition, he was paid a \$ 10,000 reward. As the security guard himself revealed that he had found the dog in *Tenovia* during a broadcast on national television, *Tenovia's* authorities were then certain that he had assaulted and seriously injured *Julie Starman*.

Immediately, *Tenovia's* Ambassador to *Brolin* called an urgent meeting with *Brolin's* Minister of Foreign Affairs and demanded the extradition of the security guard. *Brolin's* Minister of Foreign Affairs was told that *Julie Starman* identified *Brolin* insignia on the uniform of her assailant. *Brolin's* Minister of Foreign Affairs assured *Tenovia's* ambassador that *Brolin* would do everything in its power to apprehend the security guard.

Despite the urgent meeting and the information provided, *Brolin's* Minister of Sports invited the security guard to a party in honour of *Brolin's* football team. After attending the party, the security guard drove across the border into the neighboring state *Ixap* and did not return. The government did not even attempt to apprehend the security officer and did not prevent his escape. The day after, the cabinet of *Brolin* decided to prioritise the football match over arresting the security guard.

Due to an uproar in *Tenovia* as a reaction to the assault on *Julie Starman*, *Brolin's* Minister of Sports implemented a new security requirement for the football match. Therein, *Brolin's* Minister of Sports decided to abuse the ethnic *Tenovis'* tradition according to which they adhere to all promises they make or otherwise they will be dishonoured. Each attendee of the football match had to sign a declaration in front of security guards pledging to behave well during the match. Besides the fact that in ancient *Tenovi* writings, making a promise is described as a devout act and compliance with promises as a form of worship. A copy of this declaration was

sent to *Tenovia*'s Minister of Sports on 4 September 2017. The next day, *Tenovia*'s Minister of Sports responded with a note, stating that ethnic *Tenovis* are not under any circumstances permitted to make promises to a stranger on Thursdays – the day of the football match – and requesting *Brolin* not to proceed with the measure. *Brolin* did not respond to the note and rather instituted its plan of asking every spectator to sign the declaration before being permitted to enter the stadium. As a consequence, half of ethnic *Tenovis* felt forced to break with their traditions and beliefs and the other half was not permitted to enter the stadium and had to watch the match from outside.

In order to ease tension between *Brolin* and *Tenovia*, *Brolin* instructed *Paintgood*, a firm based at *Brolin*, to paint a mural on the stadium. Ms *Desmond*, *Paintgood*'s former director, received full payment in advance for completion of the mural. Besides her position in *Paintgood*, Ms *Desmond* is a well-known artist of *Tenovi* nationality, *Tenovi* ethnicity and is the daughter of the current *Tenovi* Minister for Women.

Due to private circumstances, Ms *Desmond* used her personal savings to pay the sub-contractors and fell behind on the mortgage repayments for her home in *Brolin*'s capital.

Unable to continue paying her mortgage, she moved into rented accommodation on 15 December 2017. By mid-January 2018 Ms *Desmond* had fallen behind on her rent, which is why her landlord initiated proceedings against her in the domestic court of *Brolin* on 11 May 2018 claiming \$18,500. Although Ms *Desmond* was appointed as *Tenovia*'s permanent representative to CLAWS, based in *Brolin*'s capital, on 2 March 2018 and thus claimed that she was immune from the proceedings due to Art. 9 CLAWS Convention, the domestic court continued proceedings against her.

Tenovia sent a Note Verbale to *Brolin* condemning the systematic discrimination against ethnic *Tenovis*. *Brolin* also claimed that it would not tolerate any abrogation of the immunity, which the national envoy to the CLAWS, Ms *Desmond*, was entitled to. The court stated that Ms *Desmond* was appointed by *Tenovia* to this position and that following a notification sent to

Brolin, no response was given. The court acknowledged the Note and confirmed that the notification of Ms *Desmond's* appointment was received by *Brolin*. Even when it heard that Ms *Desmond* used the rental property for official functions as part of her position at CLAWS, the court denied her immunity in relation to the claim and went further by concluding that Ms *Desmond's* appointment to CLAWS was an abuse of privileges and immunities. Ms *Desmond* was ordered to pay her landlord \$18,500.

As she did not comply with the court's order, Ms *Desmond* received a letter on 3 August 2018 stating that if she did not comply, she would be subject to the seizure and sale of her private property.

Tenovia and *Brolin* have both ratified the Charter of the UN, the ICERD, the VCDR, the CLAWS Convention and the VCLT without any reservations.

On 28 August 2018, *Tenovia* instituted proceedings against *Brolin* before the International Court of Justice in respect of alleged violations of international law by *Brolin*. *Tenovia* requests the Court to adjudge and declare that:

- i) *Brolin* violated customary international law by the assault on Ms *Starman* in *Tenovi* territory and by failing to apprehend Mr *Zunitte*;
- ii) *Brolin* violated its obligations under the ICERD by its insistence that attendees at the great football game sign a declaration before being permitted to enter the stadium;
- iii) *Brolin* violated, and continues to violate, its obligations towards *Tenovia* under Art. 9 CLAWS Convention in relation to Ms *Desmond*, *Tenovia's* national envoy accredited to CLAWS, by failing to recognise her immunity from all forms of legal process in *Brolin*.

(e) Issues

Tenovia respectfully asks the Court to decide the following questions:

A. Did *Brolin* violate customary international law by the assault on Ms *Starman* in *Tenovian* territory and by failing to apprehend Mr *Zunitte*?

- I. Is Mr *Zunitte*'s assault on Ms *Starman* attributable to the State of *Brolin*?
 1. Does *Falconner* constitute an organ of the State of *Brolin*?
 2. Does *Falconner* constitute an entity exercising elements of governmental authority?
 - a. Does the search for the dog concern governmental authority?
 - b. Is *Falconner* legally empowered to exercise governmental authority?
 3. Did Mr *Zunitte* act within his official capacity as a *Falconner* employee?
 4. Did Mr *Zunitte* act upon the instructions, as well as under the direction and control, of *Brolin*?
 - a. Were the actions of Mr *Zunitte* based upon instructions given by *Brolin*?
 - b. Did *Brolin* direct and control the conduct of Mr *Zunitte*?
 5. Is Mr *Zunitte*'s conduct in any case *ex post facto* attributable to *Brolin*?
- II. Does the conduct of Mr *Zunitte* constitute a breach of international obligations?
 1. Did *Brolin* violate the prohibition on the use of force against the territorial integrity of *Tenovia*?
 2. Did *Brolin* violate the international principle of non-intervention?
 3. Did *Brolin* violate the obligation to respect the State sovereignty of *Tenovia*?
- III. Does the failure to apprehend Mr *Zunitte* constitute a breach of *Brolin*'s obligations?

1. Did *Brolin* violate its obligation of reparation arising from the internationally wrongful conduct?
2. Did *Brolin* create an obligation it did not comply with by promising to apprehend Mr *Zunitte*?

IV. Did *Brolin* violate its due diligence obligation to prevent and punish the conduct?

B. Did *Brolin* violate its obligations under the ICERD by its insistence that attendees at the great football match sign a declaration before being permitted to enter the stadium?

I. Did the measure constitute an act of racial discrimination against ethnic *Tenovis*?

1. Did the measure constitute an exclusion based on ethnic origin?
2. Did the measure have the effect of impairing human rights and fundamental freedoms in the social and cultural life of ethnic *Tenovis*?
 - a. Did *Brolin* violate the ethnic *Tenovis*' right to freedom of religion of ethnic *Tenovis*?
 - b. Did *Brolin* violate the ethnic *Tenovis*' right to equal participation in cultural activities?
 - c. Did *Brolin* violate the ethnic *Tenovis*' right of equal access to a public place?

3. Was the measure initiated by *Brolin* with a discriminatory purpose?

II. Was the measure justified?

1. Did *Brolin* obtain the consent of ethnic *Tenovis*?
2. Did *Brolin*'s act constitute a special measure?
3. Was *Brolin*'s measure legitimate?

C. Did *Brolin* violate and does it continue to violate its obligations towards *Tenovia* under Art. 9 of the CLAWS Convention by failing to recognise Ms *Desmond*'s immunity from all forms of legal process?

- I. Was *Brolin* prohibited from instituting legal proceedings against Ms *Desmond*?
 1. Does Ms *Desmond* enjoy immunity?
 - a. Was the notification of Ms *Desmond*'s appointment sufficient?
 - b. Did Ms *Desmond*'s appointment to CLAWS comply with international diplomatic law?
 2. Is Ms *Desmond*'s immunity restricted?
 - a. Is Ms *Desmond*'s immunity restricted on functional necessity?
 - b. Is Ms *Desmond*'s immunity restricted by Art. 31 (1) (a) VCDR?
 - c. Is Ms *Desmond*'s immunity restricted by Art. 31 (1) (c) VCDR?
 - d. Is Ms *Desmond*'s immunity restricted by Art. 38 (1) VCDR?
- II. Does the order to pay the landlord \$18,500 and the threat to issue a writ for seizure and sale violate Ms *Desmond*'s immunities?

(f) Summary of Arguments

A. *Brolin* violated customary international law by the assault on Ms *Starman* in *Tenovian* territory and by failing to apprehend Mr *Zunitte*

- I. Mr *Zunitte*'s assault on Ms *Starman* is attributable to the State of *Brolin*
 1. *Falconner* constitutes an organ of the State of *Brolin*
 2. *Falconner* constitutes an entity exercising elements of governmental authority
 - a. The search for the dog concerns governmental authority
 - b. *Falconner* is legally empowered to exercise governmental authority
 3. Mr *Zunitte* acted within his official capacity as a *Falconner* employee
 4. Mr *Zunitte* acted upon the instructions, as well as under the direction and control, of *Brolin*
 - a. The actions of Mr *Zunitte* are based upon instructions given by *Brolin*
 - b. *Brolin* directed and controlled the conduct of Mr *Zunitte*
 5. Mr *Zunitte*'s conduct is in any case *ex post facto* attributable to *Brolin*
- II. The conduct of Mr *Zunitte* constitutes a breach of international obligations
 1. *Brolin* violated the prohibition on the use of force against the territorial integrity of *Tenovia*
 2. *Brolin* violated the international principle of non-intervention
 3. *Brolin* violated the obligation to respect the State sovereignty of *Tenovia*
- III. The failure to apprehend Mr *Zunitte* constitutes a breach of *Brolin*'s obligations
 1. *Brolin* violated its obligation of reparation arising from the internationally wrongful conduct
 2. By promising to apprehend Mr *Zunitte*, *Brolin* created an obligation it did not comply with
- IV. *Brolin* violated its due diligence obligation to prevent and punish the conduct

B. *Brolin* violated its obligations under the ICERD by its insistence that attendees at the great football match sign a declaration before being permitted to enter the stadium

- I. The measure constituted an act of racial discrimination against ethnic *Tenovis*
 1. The measure constituted an exclusion based on ethnic origin
 2. The measure had the effect of impairing human rights and fundamental freedoms in the social and cultural life of ethnic *Tenovis*
 - a. *Brolin* violated the ethnic *Tenovis*' right to freedom of religion
 - b. *Brolin* violated the ethnic *Tenovis*' right to equal participation in cultural activities
 - c. *Brolin* violated the ethnic *Tenovis*' right of equal access to a public place
 3. The measure was initiated by *Brolin* with a discriminatory purpose
- II. The measure was not justified
 1. *Brolin* did not obtain the consent of ethnic *Tenovis*
 2. *Brolin*'s act did not constitute a special measure
 3. *Brolin*'s measure was not legitimate

C. By failing to recognise Ms *Desmond*'s immunity from all forms of legal process, *Brolin* violated and continues to violate its obligations towards *Tenovia* under Art. 9 of the CLAWS Convention

- I. *Brolin* was prohibited from instituting legal proceedings against Ms *Desmond*
 1. Ms *Desmond* enjoys immunity
 - a. The notification of Ms *Desmond*'s appointment was sufficient
 - b. Ms *Desmond*'s appointment to CLAWS complied with international diplomatic law
 2. Ms *Desmond*'s immunity is not restricted

- a. *Ms Desmond's* immunity is not restricted on functional necessity
 - b. *Ms Desmond's* immunity is not restricted by Art. 31 (1) (a) VCDR
 - c. *Ms Desmond's* immunity is not restricted by Art. 31 (1) (c) VCDR
 - d. *Ms Desmond's* immunity is not restricted by Art. 38 (1) VCDR
- II. The order to pay the landlord \$18,500 and the threat to issue a writ for seizure and sale violates *Ms Desmond's* immunities

(g) Jurisdiction of the Court

On 28 August 2018, *Tenovia* instituted proceedings against *Brolin* before the International Court of Justice in respect of alleged violations of international law by *Brolin*. Both parties have made declarations under Art. 36 (2) of the Statute of the International Court of Justice, accepting the Court's jurisdiction.¹ There has been no question of jurisdiction or admissibility raised.²

¹ Case, para. 35.

² Case, para. 35; Clarification No. 60.

(h) Argument

A. *Brolin* violated customary international law by the assault on Ms *Starman* in *Tenovian* territory and by failing to apprehend Mr *Zunitte*

A State is responsible for wrongful conduct if it is attributable and breaches an international State obligation.³ Mr *Zunitte*'s assault on Ms *Starman* is attributable to *Brolin* (I.) and violates its State obligations (II.). *Brolin*'s failure to apprehend Mr *Zunitte* also breaches its obligations (III.). *Brolin* violated its due diligence obligation to prevent and punish wrongful conduct (IV.).

I. Mr *Zunitte*'s assault on Ms *Starman* is attributable to the State of *Brolin*

Mr *Zunitte*'s conduct is attributable to *Brolin* as *Falconner* constitutes a State organ (1.) or at least an entity exercising elements of governmental authority (2.) and Mr *Zunitte* acted in his capacity as a *Falconner* employee (3.). Even if *Falconner* was held to be neither of the above, Mr *Zunitte*'s conduct would still be attributable as he was acting upon the instructions and under the direction and control of *Brolin* (4.) and as the conduct is also *ex post facto* attributable (5.).

1. *Falconner* constitutes an organ of the State of *Brolin*

The conduct of a State organ is attributable to the State.⁴ To be considered an organ of *Brolin*, *Falconner* needs to be characterised as such either by *Brolin*'s internal law or by its practice, provided that *Brolin* exercises complete control over it and renders it a mere instrument that is functionally a part of the State structure.⁵ Even though *Brolin* did not expressly declare

³ Art. 2 ARSIWA; *Phosphates in Morocco*, p. 28; *Corfu Channel Case*, p. 23; *Nicaragua*, paras. 283, 292; *Tehran Hostages*, para. 56; *Gabčíkovo-Nagymaros*, para. 47; *Dickson v. Mexico*, p. 678; *International Fisheries v. Mexico*, p. 701; *Rainbow Warrior*, para. 75.

⁴ Art. 4 (1) ARSIWA; *Certain German Interests in Polish Upper Silesia*, p. 19; *Difference Relating to Immunity from Legal Process*, para. 62; *Italian Nationals Resident in Peru*, pp. 401, 404, 407 *et seq.*; *Salvador Commercial Company*, p. 477; *Finnish Shipowners*, p. 1501.

⁵ Cf. ARSIWA with Commentaries, Ch. II, para. 6; Art. 4 ARSIWA with Commentaries, para. 11; *Nicaragua*, paras. 109 *et seq.*, 114; *Bosnian Genocide*, para. 391 *et seq.*; *Currie Case*, p. 24; *Difference Relating to Immunity from Legal Process*, para. 66; Crawford, *State Responsibility: The General Part*, pp. 124, 148; *Momtaz*, in: Crawford *et al.*, *Law of International Responsibility*, pp. 239, 243; *Interprétation de l'article 79*, pp. 431-432.

Falconner an organ in law, it lifted the company to State level by regularly assigning it public functions usually performed by the police.⁶ *Brolin* created a close relationship with *Falconner*, making it an essential part of its structure by repeatedly putting it in charge of the maintenance of *Brolin*'s internal security by way of the *Falconner Security Acts* and the *Drizac Management Act*.⁷ In the legislative acts, *Brolin* specified the exact tasks and strategies to be accorded to *Falconner* and granted it permission to use force.⁸ It also regulated the payment and number of employees in a financial agreement and supplied *Falconner* with extensive equipment from its police forces.⁹ Herewith, *Brolin* established *Falconner*'s complete dependence rendering it merely an instrument through which it acted.¹⁰ Particularly with regard to the search during which the assault occurred, *Brolin* exercised the same degree of control over *Falconner* employees as over its own forces that were likewise present at the sessions.¹¹ Consequently, *Brolin* cannot circumvent the attribution of *Falconner*'s conduct merely by denying it the status of an organ under its law as it established *Falconner* as a *de facto* organ through its practice.¹²

2. *Falconner* constitutes an entity exercising elements of governmental authority

Even if this Court held that *Falconner* is not a State organ, it is at least an entity empowered to exercise elements of governmental authority.¹³ A private company constitutes such if it is empowered by law to perform public functions usually executed by State organs and where any

⁶ Cf. Case, para. 5 *et seq.*; ARSIWA with Commentaries, Ch. II, para. 6.

⁷ Case, para. 5 *et seq.*; cf. *Bosnian Genocide*, para. 392; *Momtaz*, in: Crawford *et al.*, Law of International Responsibility, p. 243.

⁸ Case, para. 5 *et seq.*

⁹ Case, para. 7.

¹⁰ Cf. *Bosnian Genocide*, para. 392 *et seq.*; *Nicaragua*, para. 109 *et seq.*

¹¹ Cf. Case, para.11; *Nicaragua*, para. 114; *Milanović*, State Responsibility for Genocide, p. 577.

¹² Cf. Art. 4 ARSIWA with Commentaries, para. 11; *Yeager v. Iran*, para. 42.

¹³ Cf. Art. 5 ARSIWA.

of its related conduct is attributable.¹⁴ The search for the dog concerns governmental authority (a.) which *Falconner* was legally empowered to exercise (b.).

a. The search for the dog concerns governmental authority

Whether the search for the dog concerns governmental authority depends on its significance in *Brolin*'s history and traditions and the specific conferral of powers to *Falconner*.¹⁵ For *Brolin*, the dog's presence is crucial to the game, which in turn is important for the stability of *Brolin*'s government and has a permanent place in its history.¹⁶ Hence, the dog's disappearance concerns governmental authority. As *Brolin* explicitly appealed to *Falconner* to ensure the dog's timely return,¹⁷ the engagement in the search and seizure¹⁸ thus constitutes an exercise of elements of governmental authority.

b. *Falconner* is legally empowered to exercise governmental authority

Brolin legally delegated public powers normally executed by its police to *Falconner* through the *FSA (2017)*.¹⁹ The *FSA (2017)* was already in force when the assault on Ms *Starman* occurred,²⁰ but it did not expressly refer to the search for the dog.²¹ However, it was impossible for *Brolin* to foresee all potential circumstances that might require *Falconner*'s assistance and include them in the *FSA (2017)*.²² As ensuring the dog's indispensable presence at the game

¹⁴ Art. 5 ARSIWA with Commentaries, paras. 2, 5, 7.

¹⁵ Art. 5 ARSIWA with Commentaries, para. 5; *Crawford*, *State Responsibility: The General Part*, p. 129 *et seq.*

¹⁶ Case, paras. 4, 10, 19.

¹⁷ Case, para. 11.

¹⁸ Art. 5 ARSIWA with Commentaries, para. 2; *Hyatt v. Iran*, pp. 88-94; *Crawford*, *State Responsibility: The General Part*, p. 129.

¹⁹ Case, paras. 5, 7; cf. *Hyatt v. Iran*, pp. 88-94; LN, *Responsibility of States for Damages*, p. 90.

²⁰ Clarification No. 10.

²¹ Case, paras. 5, 7; Clarifications Nos. 10, 19.

²² Cf. *Blokker*, in: MPEPIL, Vol. VI, *International Organizations or Institutions, Implied*

was essential for the successful performance of *Falconner*'s duties in order to achieve a well-regulated game, the search was covered by an implied power that exceeds those expressly provided for in the *FSA (2017)* in accordance with the implied powers doctrine.²³ *Falconner* is thus an entity legally empowered to exercise elements of governmental authority.

3. Mr Zunitte acted within his official capacity as a *Falconner* employee

In order for Mr *Zunitte*'s conduct to be attributable, he must have acted in his official capacity as a *Falconner* employee.²⁴ *Brolin* specifically appealed to *Falconner* and *Falconner*'s CEO urged employees to attend the sessions, where Mr *Zunitte* introduced himself as part of *Falconner*.²⁵ During the dog's retrieval, he followed the geographical instructions as to the dog's suspected whereabouts near the border and he only used *Brolin*'s equipment that had already been provided to him without explicit restrictions on its use.²⁶ Even if he was considered to have exceeded competences, his *ultra vires* conduct would still be attributable.²⁷ With the emblazoned official equipment, Mr *Zunitte* used means placed at his disposal and acted under the cover of his status as a *Falconner* employee.²⁸ The conduct was thus in any case committed in his official capacity and is therefore attributable to *Brolin*.

Powers, para. 6 *et seq.*; *McCulloch v. Maryland*, p. 385.

²³ Case, paras. 5, 7, 10; cf. *Blokker*, in: MPEPIL, Vol. VI, Implied Powers, paras. 10 *et seq.*, 17 *et seq.*; the implied powers doctrine has been applied by the ICJ in several judgments, by the ECJ and by the US Supreme Court: cf. *Reparation for Injuries*, p. 182; *Reparation for Injuries*, Dissenting Opinion Judge *Hackworth*, p. 196; *Effect of Awards*, p. 57; *Nuclear Weapons in Armed Conflict*, para. 25; *Fédération Charbonnière de Belgique v. ECSC High Authority*, p. 299; *Commission v. Council*, para. 15 *et seq.*; *Tadić, Appeals Chamber, Decision on the Defence Motion*, para. 18; *Marbury v. Madison*, p. 175 *et seq.*; *McCulloch v. Maryland*, p. 385.

²⁴ Cf. Art. 7 ARSIWA; Art. 4 ARSIWA with Commentaries, para. 4; Art. 5 ARSIWA.

²⁵ Case, para. 11 *et seq.*

²⁶ Case, para. 11 *et seq.*

²⁷ Art. 7 ARSIWA.

²⁸ Case, paras. 7, 12 *et seq.*; cf. Art. 7 ARSIWA; Art. 7 ARSIWA with Commentaries, paras. 1, 7; *Petrolane v. Iran*, para. 92; *Caire Case*, p. 531; *Rodríguez v. Honduras*, para. 170.

4. Mr Zunitte acted upon the instructions, as well as under the direction and control, of Brolin

Even if *Falconner* was held to be neither an organ nor an entity exercising governmental authority, Mr *Zunitte*'s private conduct would nevertheless be attributable as the assault on Ms *Starman* was performed upon *Brolin*'s instructions (a.) and under its direction and control (b.).²⁹

a. The actions of Mr Zunitte were based upon instructions given by Brolin

Mr *Zunitte*'s conduct is attributable to *Brolin* as he acted upon its instructions regarding the particular mission, during which the assault occurred.³⁰ In its newspaper article proclaiming the search, *Brolin* requested the public to help find the dog wherever it was.³¹ *Brolin* furthermore specifically appealed to *Falconner* employees to volunteer³² and provided photos and maps of both border regions.³³ Mr *Zunitte* was explicitly advised by a police officer from *Brolin*³⁴ to look for *Coco* in the *Tenovian* border region.³⁵ Even if the instructions are considered imprecise, Mr *Zunitte*'s conduct still remains within their remit as the instructions were incidental to the dog's retrieval and otherwise, *Brolin* could avoid responsibility simply by giving instructions as vague as possible.³⁶ Hence, Mr *Zunitte*'s conduct was instructed by *Brolin* and is attributable.

²⁹ Cf. Art. 8 ARSIWA; Art. 8 ARSIWA with Commentaries, para. 1.

³⁰ Cf. Art. 8 ARSIWA; Art. 8 ARSIWA with Commentaries, para. 2; *Bosnian Genocide*, para. 400; *Crawford*, State Responsibility: The General Part, p. 144.

³¹ Case, para. 10.

³² The ARSIWA with Commentaries expressly name a State sending volunteers to a neighbouring country to carry out a particular mission as an example of attributable conduct based upon the instructions of a State: Art. 8 ARSIWA with Commentaries, para. 2.

³³ Case, para. 11.

³⁴ The police officer is a part of a State organ and his advice is thus attributable to *Brolin* even though he was off-duty as he was still at the police station and therefore under the cover of his official status: cf. Art. 4 ARSIWA with Commentaries, para. 7; Art. 7 ARSIWA with Commentaries, para. 7.

³⁵ Case, para. 12.

³⁶ Cf. *Crawford*, State Responsibility: The General Part, p. 145; *Epiney*, in: *Frieden in Freiheit*, pp. 883, 887; *Finke*, Private Sicherheitsunternehmen im bewaffneten Konflikt, p. 25; *Hoppe*, Private Military Companies, p. 992; *Molle*, Sicherheitsunternehmen, p. 371.

b. *Brolin* directed and controlled the conduct of Mr *Zunitte*

Mr *Zunitte*'s conduct is attributable as *Brolin* had sufficient control over the specific operation of searching for the dog.³⁷ The effective control standard, established in *Nicaragua*,³⁸ requires that *Brolin* trained, armed, equipped, financed and encouraged Mr *Zunitte*'s conduct.³⁹ *Brolin* granted a lump sum to *Falconner*, which in turn paid Mr *Zunitte*'s salary.⁴⁰ *Brolin* provided equipment – including tasers – as well as essential guidance at the sessions and, by offering the reward, also encouraged the engagement in the search.⁴¹ It is irrelevant whether the illegal border crossing and the assault on Ms *Starman* went beyond Mr *Zunitte*'s authorisation as this was incidental to the retrieval of the dog.⁴² *Brolin* thus had effective control over the operation and *prima facie* directed Mr *Zunitte*'s wrongful conduct.⁴³ Even if this Court held that *Brolin*'s control over Mr *Zunitte* does not satisfy the effective control standard, it is in any case attributable according to the overall control standard established in *Tadić*.⁴⁴ The extent to which conduct needs to be controlled is to be decided on a case by case basis.⁴⁵ In order to avoid the narrow requirements of the effective-control test provoking inconsistencies with the general principle that *Brolin* cannot circumvent its responsibility by simply hiring a private company instead of acting through its own organs, the overall control test is applicable to the case at

³⁷ Cf. Art. 8 ARSIWA with Commentaries, para. 3.

³⁸ Cf. *Nicaragua*, para. 115; *Crawford*, State Responsibility: The General Part, p. 149.

³⁹ Cf. *Nicaragua*, paras. 108 *et seq.* and 115; *Crawford*, State Responsibility: The General Part, p. 149.

⁴⁰ Case, paras. 7, 12; Clarification No. 52.

⁴¹ Case, paras. 7, 11 *et seq.*

⁴² Cf. Art. 8 ARSIWA with Commentaries, para. 8.

⁴³ Cf. *Nicaragua*, para. 114; *Crawford*, State Responsibility: The General Part, p. 149.

⁴⁴ The overall control test was established by the ICTY, in: *Tadić, Appeals Chamber*, para. 131.

⁴⁵ Art. 8 ARSIWA with Commentaries, para. 5; see also *Yeager v. Iran*, para. 42 *et seq.*; *Loizidou v. Turkey*, para. 56.

hand.⁴⁶ In line with the overall control test, Mr *Zunitte* is part of *Falconner*, which constitutes an organised and hierarchically structured group that participated in the mission and *Brolin* also provided operational support in the coordination and planning at its information sessions.⁴⁷ It is not necessary for *Brolin* to have given specific instructions regarding the commission of any wrongful acts.⁴⁸ *Brolin* had overall control over Mr *Zunitte*'s conduct, which is thus attributable.

5. Mr *Zunitte*'s conduct is in any case *ex post facto* attributable to *Brolin*

Conduct committed in a private capacity with the State being genuinely unaware of it is attributable if a State retrospectively acknowledges and adopts it as its own.⁴⁹ After retrieving the dog, Mr *Zunitte* was congratulated and called a national hero on TV where, besides his monetary reward, he was also awarded a State medal reserved for emergency services.⁵⁰ *Brolin* thus expressly lifted Mr *Zunitte*'s conduct to a State level.⁵¹ After *Brolin* was notified of Mr *Zunitte*'s conduct, the Minister of Sports was neither urged to approach him at the party he attended, nor did *Brolin* apprehend him after his escape.⁵² *Brolin*'s continuation of its approval

⁴⁶ The effective control test was developed to attribute actions of a party in an internal armed conflict to an outsider State. Considering its narrow requirements, it bears the risk of a lower standard of victim and human rights protection where the respective conduct was committed by an employee of a private company hired by the State. The overall control test is thus applicable in such cases of State responsibility: cf. Art. 8 ARSIWA with Commentaries, para. 5; *Nicaragua*, para. 116; *Tadić*, *Appeals Chamber*, paras. 104, 117; BGH 3 StR 372/00, para. 4. c) aa); *Cassese*, *Nicaragua and Tadić Tests Revisited*, p. 657 *et seq.*; *Groeben*, *Transnational Conflicts*, p. 29; *Molle*, *Sicherheitsunternehmen*, pp. 387, 389.

⁴⁷ Case, paras. 7, 11 *et seq.*; cf. *Tadić*, *Appeals Chamber*, paras. 120, 131, 137; This is in contrast to the facts in *Stephens v. Mexico*, where the Mexico-US General Claims Commission attributed acts committed by a member of the "irregular auxiliary" to Mexico even though the member lacked both a uniform and insignia, see: *Stephens v. Mexico*, p. 267.

⁴⁸ Cf. *Tadić*, *Appeals Chamber*, para. 131; *Molle*, *Sicherheitsunternehmen*, p. 375.

⁴⁹ Art. 11 ARSIWA; Art. 11 ARSIWA with Commentaries, para. 5 *et seq.*; *Tehran Hostages*, para. 59; *Crawford*, *State Responsibility: The General Part*, pp. 183, 185, 187.

⁵⁰ Case, para. 16; Clarification No. 34.

⁵¹ Cf. *Tehran Hostages*, para. 74; Art. 11 ARSIWA with Commentaries, para. 9.

⁵² The meeting in which *Tenovia* informed *Brolin* about Mr *Zunitte*'s conduct took place before the party: Case, para. 17 *et seq.*; Clarification No. 46.

and endorsement of Mr *Zunitte*'s retrieval of the dog thus resulted in an unequivocal and unqualified acknowledgment and adoption of his entire conduct,⁵³ which translated it into acts of *Brolin*.⁵⁴ Hence, even if Mr *Zunitte*'s conduct was considered to have been entirely private, *Brolin*'s subsequent acts of acknowledgment and adoption render it *ex post facto* attributable.

II. The conduct of Mr *Zunitte* constitutes a breach of international obligations

By way of Mr *Zunitte*'s conduct on *Tenovian* territory, *Brolin* violated its international obligations to respect the prohibition on the use of force against the territorial integrity of States (1.), the principle of non-intervention (2.), as well as the sovereignty of other States (3.).

1. *Brolin* violated the prohibition on the use of force against the territorial integrity of *Tenovia*

The international prohibition on the use of force constitutes custom and *jus cogens*.⁵⁵ It covers any use of armed force directed against another State.⁵⁶ The attack on Ms *Starman* was committed with a taser which falls under the remit of armed force⁵⁷ and it caused severe physical harm⁵⁸. Hence, Mr *Zunitte*'s illegal border-crossing and subsequent assault constitute

⁵³ Cf. Art. 11 ARSIWA; Art. 11 ARSIWA with Commentaries, para. 8; *Crawford*, State Responsibility: The General Part, p. 187.

⁵⁴ Cf. Art. 11 ARSIWA with Commentaries, para. 4; *Crawford*, State Responsibility: The General Part, p. 186.

⁵⁵ Art. 2 (4) UN Charter; Friendly Relations Declaration; Art. 1 NATO Treaty; *Nicaragua*, paras. 73, 187 *et seq.*; *Israeli Wall*, para. 87; *Armed Activities (DRC v. Uganda)*, paras. 162, 166; *Dörr*, in: MPEPIL, Vol. X, The Prohibition of the Use of Force, paras. 1, 9; *Gray*, International Law and the Use of Force, p. 32; *Kreß*, in: Oxford Handbook on the Use of Force, The ICJ and the 'Principle of Non-Use of Force', p. 567.

⁵⁶ *Dörr*, in: MPEPIL, Vol. X, The Prohibition of the Use of Force, para. 14.

⁵⁷ Case, para. 13; In *Nuclear Weapons*, the ICJ held that prohibition on the use of force applies irrespective of the weapon used, yet the UN placed tasers at the high end of the scale of force and the CAT urged the restriction of their use as a substitute for potentially lethal weapons. They can thus in any case be considered as armed force: *Nuclear Weapons*, para. 39; UNODC, Resource book on the use of force, p. 92; see also: *Kreß*, in: Oxford Handbook of the Use of Force, The ICJ and the 'Principle of Non-Use of Force', p. 576.

⁵⁸ Case, para. 13 *et seq.*; The attack on Ms *Starman* is in any case covered by the prohibition on the use of force as it also effectively includes force in "less grave forms" not constituting an armed attack: cf. *Nicaragua*, para. 191; *Kreß*, in: Oxford Handbook of the Use of Force, The ICJ and the 'Principle of Non-Use of Force', p. 576.

a direct use of force against *Tenovia*'s territorial integrity.⁵⁹ Even if *Falconner* was considered independent from *Brolin*, the arming and training Mr *Zunitte* received⁶⁰ fulfils the requirements of the indirect use of force.⁶¹ The assault thus violates *Brolin*'s prohibition on the use of force.

2. *Brolin* violated the international principle of non-intervention

The principle of non-intervention constitutes custom.⁶² It prohibits the use of coercive means against the sovereign affairs of another State.⁶³ The assault on Ms *Starman* considered as direct or indirect force, contained the necessary element of coercion.⁶⁴ The breach of *Tenovia*'s border regulations and the assault on Ms *Starman* as a *Tenovian* citizen solely concerned the domestic affairs of *Tenovia*.⁶⁵ *Brolin* violated its obligation to respect the principle of non-intervention.

3. *Brolin* violated the obligation to respect the State sovereignty of *Tenovia*

State sovereignty is a pivotal international principle and describes a State's authority within its territory.⁶⁶ As it is intertwined with the prohibitions on the use of force and intervention⁶⁷ *Brolin* also violated *Tenovia*'s sovereignty.

Hence, the assault constitutes wrongful conduct by *Brolin*.

⁵⁹ Cf. *Nicaragua*, paras. 187 *et seq.*, 288.

⁶⁰ Cf. A.I.4.b.

⁶¹ Cf. *Nicaragua*, para. 228; *Armed Activities (DRC v. Uganda)*, para. 163 *et seq.*

⁶² Art. 2 (1) UN Charter; Declaration on Intervention in Domestic Affairs, para. 1; Friendly Relations Declaration; *Nicaragua*, para. 202 *et seq.*; *Armed Activities (DRC v. Uganda)*, paras. 162, 300; *Kunig*, in: MPEPIL, Vol. VI, Prohibition of Intervention, paras. 2, 9; *Keller*, in: MPEPIL, Vol. IV, Friendly Relations Declaration, paras. 33 *et seq.*, 37 *et seq.*

⁶³ *Nicaragua*, para. 205; *Kunig*, in: MPEPIL, Vol. VI, Prohibition of Intervention, para. 2.

⁶⁴ Cf. *Nicaragua*, para. 205; *Kunig*, in: MPEPIL, Vol. VI, Prohibition of Intervention, para. 5 *et seq.*

⁶⁵ Cf. *Kunig*, in: MPEPIL, Vol. VI, Prohibition of Intervention, para. 3; *Ziegler*, in: MPEPIL, Vol. III, Domaine Réservé, paras. 4, 5 b), 5 c).

⁶⁶ Cf. Art. 2 (1) UN Charter; Friendly Relations Declaration; *Island of Palmas*, p. 838 *et seq.*; *Koivurova* in: MPEPIL, Vol. IX, Sovereignty, para. 1.

⁶⁷ *Nicaragua*, paras. 111, 128.

III. The failure to apprehend Mr Zunitte constitutes a breach of Brolin's obligations

The Prime Minister's decision not to apprehend Mr Zunitte⁶⁸ infringes upon Brolin's obligation arising from its responsibility for Mr Zunitte's conduct⁶⁹ (1.). Brolin's promise to apprehend Mr Zunitte furthermore created an obligation it did not comply with (2.).

1. Brolin violated its obligation of reparation arising from the internationally wrongful conduct

A State that is responsible for wrongful conduct is obliged to make reparations.⁷⁰ In the case at hand, this would take the form of penal action against Mr Zunitte who caused the act.⁷¹ Tenovia's request for his apprehension thus created an obligation Brolin did not comply with.⁷²

2. By promising to apprehend Mr Zunitte, Brolin created an obligation it did not comply with

States' unilateral promises create legal obligations if they meet the necessary conditions and manifest the will of a binding legal undertaking.⁷³ Brolin's Foreign Minister can bind a State internationally⁷⁴ and his verbal assurance to Tenovia suffices to do so.⁷⁵ Brolin's promise to do anything in its power to apprehend Mr Zunitte was made in an urgent meeting in which Brolin was informed about the grave suspicion of the severe assault by Mr Zunitte.⁷⁶ It is apparent

⁶⁸ Case, para. 19; Clarification No. 14.

⁶⁹ A.II.3.

⁷⁰ *Chorzów Factory*, p. 21; *Nicaragua*, para. 292; *Armed Activities (DRC v. Uganda)*, paras. 259 *et seq.*, 345; Art. 31 ARSIWA; Crawford, *State Responsibility: The General Part*, p. 480.

⁷¹ Cf. Art. 37 ARSIWA; Art. 37 ARSIWA with Commentaries, para. 3 *et seq.*; *Rainbow Warrior*, p. 272 *et seq.*; Crawford, *State Responsibility: The General Part*, p. 527 *et seq.*

⁷² Cf. Case, para. 19; Clarifications Nos. 63, 69.

⁷³ The binding character of the declaration is then based on the principle of good faith: ILC GPUDS, Principle 1; cf. *Nuclear Tests*, paras. 43, 46; *Frontier Dispute*, para. 39; *Legal Status of Eastern Greenland*, p. 71.

⁷⁴ Cf. Case, para. 17; ILC GPUDS, Principle 4; *Armed Activities (DRC v. Rwanda)*, para. 46; *Legal Status of Eastern Greenland*, para. 192.

⁷⁵ Cf. Case, para. 17; ILC GPUDS, Principles 5, 6; *Temple of Preah Vihear*, p. 31; *Nuclear Tests*, para. 45; *Legal Status of Eastern Greenland*, para. 192.

⁷⁶ Case, para. 17; Clarification No. 26.

from the seriousness of the circumstances that *Brolin* intended its promise to be binding.⁷⁷ It was not outside of *Brolin*'s powers to approach Mr *Zunitte* at the party⁷⁸ or request *Ixap*'s support, hence the failure to apprehend him violates *Brolin*'s corresponding obligation.

IV. *Brolin* violated its due diligence obligation to prevent and punish the conduct

Brolin had the obligation to diligently prevent and punish Mr *Zunitte*'s wrongful conduct.⁷⁹ The use of tasers in law enforcement should at least be legally restricted to situations where an immediate threat to life or a risk of severe injury exists.⁸⁰ *Brolin* thus failed to provide clear guidance as to the means permitted to be utilised in the exercise of the reasonable use of force, provided for in the *FSA (2017)*.⁸¹ *Brolin* also had the duty to promptly investigate Mr *Zunitte*'s abusive use of force but at no time initiated his apprehension requested by *Tenovia*.⁸² Hence, *Brolin* failed to apply due diligence in the prevention⁸³ and punishment of Mr *Zunitte*'s conduct. In conclusion, Mr *Zunitte*'s assault on Ms *Starman* and the subsequent failure to apprehend him constitute wrongful conduct by *Brolin* that is in violation of customary international law.

⁷⁷ Cf. ILC GPUDES, Principles 1, 3 Commentary, para. 1; *Nuclear Tests*, para. 43; *Nicaragua*, para. 261; *Frontier Dispute*, para. 39.

⁷⁸ The party took place the evening after the urgent meeting was held: Case, para. 18.

⁷⁹ Cf. *Tehran Hostages*, para. 63; *Mahmut Kaya v. Turkey*, paras. 101 and 108 *et seq.*; *Kiliç v. Turkey*, paras. 77, 83; *Godínez-Cruz v. Honduras*, paras. 175, 182 and 187 *et seq.*; *Molle*, Sicherheitsunternehmen, p. 397; *Verdross/Simma*, in: *Universelles Völkerrecht*, para. 1281; *Schröder*, in: *Völkerrecht*, sec. 7, para. 26; *Koivurova* in: *MPEPIL*, Vol. III, Due Diligence, para. 2.

⁸⁰ CAT, Observations Reports of the USA, para. 27; CAT, Observations Reports of AUS, para. 13; UNODC, Resource Book on the Use of Force, p. 92; Amnesty, Guidelines Use of Force Principles, p. 138 *et seq.*

⁸¹ Case, paras. 5, 7; cf. UN, Basic Principles Use of Force, Preamble, Principles 1, 4, 5; Amnesty, Guidelines Use of Force Principles, p. 46 *et seq.*

⁸² Case, para. 17 *et seq.*; Clarifications Nos. 26, 69; cf. Art. 2 (3) ICCPR; HRC, GC No. 31, para. 18; UN, Basic Principles Use of Force, Principle 7; Human Rights Council, extrajudicial executions, paras. 78, 83; UNODC, Resource book on the use of force, pp. 19, 92 *et seq.*, 159, 162; Amnesty, Guidelines Use of Force Principles, p. 66 *et seq.*

⁸³ The breach of an obligation to prevent occurs the moment the act is committed: cf. Art. 14 (3) ARSIWA; *Haffner/Bufard* in: *Crawford et al.*, *Law on International Responsibility*, p. 522.

B. Brolin violated its obligations under the ICERD by its insistence that attendees at the great football match sign a declaration before being permitted to enter the stadium

By insisting that spectators sign a declaration in order to be permitted entrance to the stadium, *Brolin* violated its obligation under the ICERD to refrain from engaging in and maintaining an act of racial discrimination according to Art. 2 (1) (a), (c) ICERD as the measure constituted racial discrimination against ethnic *Tenovis* under Art. 1 (1) ICERD (I.) and is not justified (II.).

I. The measure constituted an act of racial discrimination against ethnic *Tenovis*

The measure constituted racial discrimination under Art. 1 (1) ICERD firstly, as it was an exclusion based upon the *Tenovi* ethnicity (1.). Secondly, the measure had the effect of significantly impairing ethnic *Tenovis*' human rights and fundamental freedoms in the social and cultural fields of public life (2.). Thirdly, it was initiated with a discriminatory purpose (3.).

1. The measure constituted an exclusion based on ethnic origin

The insistence that all spectators sign the declaration resulted in the *de facto* exclusion⁸⁴ of ethnic *Tenovis* under Art. 1 (1) ICERD as no less than half of all visiting ethnic *Tenovis* were – in fact – refused entrance.⁸⁵ Even though it applied to all spectators, this exclusion was based upon the ethnic origin of *Tenovis* as the measure substantially only harmed them.⁸⁶ The refusal to sign the declaration derived from the ethnic *Tenovis*' rule not to make promises to anyone but God on their day of worship, which forms an integral part of their ancient traditions.⁸⁷ Due to the interface between their ethnicity and religious based rules of conduct, the exclusion constituted a “‘double’ discrimination” on ethno-religious grounds.⁸⁸

⁸⁴ Cf. *Minority Schools in Albania*, pp. 15, 19; *L.R. et al. v. Slovakia* (CERD), para. 10.4 *et seq.*; *van Boven*, in: MPEPIL, Vol. VIII, Racial and Religious Discrimination, para. 13; CERD, GR No. 32, para. 6.

⁸⁵ Case, para. 23.

⁸⁶ Cf. *Berry*, *Bringing Muslim Minorities within the ICERD*, p. 426.

⁸⁷ Case, paras. 3, 21; cf. *Berry*, *Bringing Muslim Minorities within the ICERD*, p. 444.

⁸⁸ *P.S.N. v. Denmark* (CERD), para. 6.3; cf. *Henrard*, in: MPEIPL, Vol. III, Equality of Individuals, para. 40; *Renteln*, in: MPEPIL, Vol. III, Ethnicity, paras. 2, 20; CERD, GR No. 14,

2. The measure had the effect of impairing human rights and fundamental freedoms in the social and cultural life of ethnic *Tenovis*

The requirement to sign the declaration infringed upon numerous human rights and fundamental freedoms referred to in detail in Art. 5 ICERD.⁸⁹ Notably, *Brolin* violated the *Tenovis*' right to freedom of religion (a.), the right to equal participation in cultural activities (b.) and the right of access to a place intended for use by the general public (c.).

a. *Brolin* violated the ethnic *Tenovis*' right to freedom of religion

The right to freedom of religion⁹⁰ includes the manifestation of beliefs in observance.⁹¹ It covers major religions, as well as diverse beliefs that seek the moral advancement of individuals, corresponding to the *Tenovis*' traditions.⁹² By rendering entrance to the stadium conditional upon breaking with their religious rules,⁹³ *Brolin* thus violated the *Tenovis*' freedom of religion.

b. *Brolin* violated the ethnic *Tenovis*' right to equal participation in cultural activities

The right to equal participation in cultural activities⁹⁴ covers the annual football match that has taken place for over half a century.⁹⁵ Equal participation in the football match is to be achieved by considering the different situations of ethnic groups.⁹⁶ Ethnic *Tenovis* are indigenous to the

para. 15; CERD, GR No. 35, para. 6.

⁸⁹ Cf. *Lerner*, The UN CERD, p. 59; *Thornberry*, in: Reflections on the UNDRIP, p. 66: as the ICERD does not define the rights, the text is subject to wider developments in human rights law.

⁹⁰ Art. 5 (d) (vii) ICERD; cf. Art. 18 (1) ICCPR.

⁹¹ The term 'observance' is used in: HRC, GC No. 22, para. 4.

⁹² Case, para. 3; cf. *Martínez Cobo*, Report Chapter XXI-XXII, paras. 279, 280.

⁹³ Cf. Art. 18 (3) ICCPR; HRC, GC No. 22, para. 8.

⁹⁴ Art. 5 (e) (vi) ICERD; Art. 15 ICESCR; Art. 27 (1) UDHR; cf. CESCR, GC. 21, para. 62.

⁹⁵ Case, para. 4; CESCR, GC No. 21, paras. 13, 16 (a); *Weatherhill* in: Culture and European Union Law, 'Sports as Culture in European Commission Law', p. 113.

⁹⁶ Cf. *Thlimmenos v. Greece*, p. 44; CERD, Report 2008, para. 305; *Thornberry*, Confronting Racial Discrimination, p. 255.

areas of *Tenovia* and *Brolin*⁹⁷ and in making up only 6% of its population, they are also an ethnic minority in *Brolin*.⁹⁸ Due to the fact that indigenous people and minorities are regularly subject to marginalisation, they require even greater protection by States,⁹⁹ particularly in regard to their right to fully participate in cultural and social life.¹⁰⁰ *Brolin* thus had to ensure the ethnic *Tenovis*' enjoyment of such rights by taking their specific cultural circumstances into account.¹⁰¹ By failing to change the security measure accordingly, *Brolin* breached its duty to implement measures acceptable to all communities involved.¹⁰² Hence, *Brolin* violated the *Tenovis*' right to equal participation in cultural activities.

c. *Brolin* violated the ethnic *Tenovis*' right of equal access to a public place

The right of equal access to a place intended for use by the general public¹⁰³ covers entrance to the sports stadium.¹⁰⁴ The *Tenovis*' culturally founded refusal to sign the declaration made them outwardly appear as violent tempered spectators not willing to promise peaceful behaviour.¹⁰⁵ They were forced to watch the game in a specifically designated area outside the stadium, which constituted a humiliating experience of racial segregation solely based on their ethnic origin.¹⁰⁶

⁹⁷ Clarification No. 24.

⁹⁸ Black's Law Dictionary, p. 1147.

⁹⁹ EMRIP, Advice No. 2 (2011), para. 1; Advisory Opinion of the ACHPR on the UNDRIP, para. 12 (c); *Martínez Cobo*, Report Chapter VIII, p. 2; *Thornberry*, in: Reflections on the UNDRIP, p. 86.

¹⁰⁰ Art. 5 UNDRIP; Art. 2 II of the Declaration on Minorities.

¹⁰¹ CERD, Consideration of Reports submitted by State Parties under Art. 9 ICERD, para. 21; EMRIP, Advice No. 2 (2011), para. 14.

¹⁰² Cf. *Minority Schools in Albania*, p. 15; CESCR, GC No. 21, para. 16 (c), (e).

¹⁰³ Art. 5 (f) ICERD.

¹⁰⁴ The list of examples in Art.5 ICERD is not exhaustive and a sports stadium is a similar place to those mentioned: *Lerner*, The UN CERD, p. 63; *Thornberry*, Commentary ICERD, p. 388.

¹⁰⁵ Case, paras. 20, 23.

¹⁰⁶ Case, para. 23; cf. *B.J. v. Denmark* (CERD), para. 6.3; *M.L. v. Slovakia* (CERD), paras. 3.4,

3. The measure was initiated by *Brolin* with a discriminatory purpose

Brolin implemented the security measure on the basis of the *Tenovis*' rule to adhere to promises as a means of guaranteeing their compliance with the content of the declaration.¹⁰⁷ *Brolin* acknowledged *Tenovia*'s expressed concern as to the incompatibility of the declaration with their ethnic traditions.¹⁰⁸ Hence, *Tenovis* unwilling to break with their traditions would not even be able to sign the declaration and could consequently, by definition, not attend the game in the first place. This in fact defeats the initial purpose of the declaration to bind *Tenovis* to their promises. *Brolin* thus acted with a discriminatory intent as it knew the declaration would either exclude ethnic *Tenovis* or force them to break with their beliefs.¹⁰⁹ The security arrangements therefore not only abusively utilised the *Tenovis*' ethnic rules but also deliberately aimed to impair their rights and freedoms.¹¹⁰

II. The measure is not justified

The measure can furthermore not be justified¹¹¹ as *Brolin* neither obtained the consent of the ethnic *Tenovis* (1.), nor did the measure constitute a special measure according to Arts. 1 (4), 2 (2) ICERD (2.). Lastly, the measure is in any case not legitimate (3.).

1. *Brolin* did not obtain the consent of ethnic *Tenovis*

A State considering the implementation of a measure with a disproportionately significant effect on indigenous people is obliged to obtain their prior and informed consent.¹¹² *Brolin* was thus required to grant the ethnic *Tenovis* the time necessary to facilitate an active role in the decision-

3.6, 11; *Thornberry*, Commentary ICERD, p. 388.

¹⁰⁷ Case, para. 21.

¹⁰⁸ Case, para. 21; Clarifications No. 23, 56.

¹⁰⁹ Cf. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, p. 266; *Meron*, The Meaning and Reach of the ICERD, p. 288.

¹¹⁰ *Makkonen*, Equal in Law, Unequal in Fact, p. 132.

¹¹¹ Cf. CERD, GR No. 32, para. 7.

¹¹² EMRIP, Advice No. 2 (2011), para. 14; Human Rights Council, Promotion and Protection

making process regarding the security measure.¹¹³ By informing ethnic *Tenovis* only three days prior to the event of a decision already made by providing a mere copy of the declaration and even after *Tenovia* requested the dismissal of the measure, *Brolin* failed to respond and establish an adequate alternative.¹¹⁴ Hence, *Brolin* prevented the effective integration of ethnic *Tenovis*.

2. *Brolin's* measure did not constitute a special measure

According to Arts. 1 (4), 2 (2) ICERD, a measure designed to advance or protect certain ethnic groups does not constitute racial discrimination.¹¹⁵ However, *Brolin's* measure was not implemented for the sole purpose of alleviating disparities in the equal enjoyment of the rights and freedoms of an ethnic group in order to protect it from discrimination.¹¹⁶ Rather, it was a measure applied to all spectators of the game supposedly to ensure the safety and enjoyment of all attendees which was however actually founded upon the abusive utilisation of ethnic rules of conduct and effectively created a disparity to the detriment of ethnic *Tenovis*.¹¹⁷

3. *Brolin's* measure was not legitimate

Differential treatment does not constitute racial discrimination if the criteria for the differentiation, judged against the objectives and purposes of the ICERD, are legitimate.¹¹⁸ The measure pursued an unlawful aim based on unreasonable subjective grounds as it took

of all Human Rights, para. 42 *et seq.*

¹¹³ Cf. EMRIP, Advice No. 2 (2011), paras. 21, 25; CERD, GR No. 23, para. 4 (d); *Mahuika v. New Zealand* (ICCPR), para. 9.5; *Saramaka v. Suriname*, para. 130; *Cowan*, UNDRIP and the Intervention, p. 293.

¹¹⁴ *Wurridjal v. Australia*, para. 309; Case, para. 21 *et seq.*; Clarification Nos. 23, 56.

¹¹⁵ CERD, GR No. 32, paras. 11 *et seq.*, 24 *et seq.*, 33 *et seq.*; *Makkonen*, Equal in Law, Unequal in Fact, p. 134; Black's Law Dictionary, p. 70.

¹¹⁶ Cf. CERD, GR No. 32, paras. 11 *et seq.*, 21 *et seq.*, 33 *et seq.*; *Makkonen*, Equal in Fact, Unequal in Law, p. 134.

¹¹⁷ Case, para. 20 *et seq.*; see B.I.

¹¹⁸ CERD, GR No. 14, para. 2; CERD, GR No. 30, para. 4; *Makkonen*, Equal in Law, Unequal in Fact, p. 131 *et seq.*

advantage of the ethnic *Tenovis*' traditional rules and was deliberately aimed towards compelling them to break with their beliefs or excluding them from entering the stadium and participating in the sports event.¹¹⁹ It was furthermore not necessary as the alleged aim of ensuring security at the match could have been achieved through reasonable, less invasive alternatives.¹²⁰ The screening of spectators before entrance and the removal of any dangerous objects could have equally effectively safeguarded the security and enjoyment of all participants without discriminating.¹²¹ Additionally, the declaration was not proportionate as the discriminatory impact significantly outweighed the importance and benefits of the purported aim of ensuring security at the game.¹²² The measure was initiated based upon riots at past football matches and also as a response to threats of revenge against *Brolin* primarily arising from ethnic *Tenovis* in *Tenovia*.¹²³ However, in regard to the former violent incidents, *Brolin* cannot demonstrate a link to the *Tenovi* ethnicity.¹²⁴ Furthermore, numerically, most ethnic *Tenovis* are citizens of *Brolin*.¹²⁵ It is thus not proportionate to potentially exclude all ethnic *Tenovis* due to a few perpetrators' propensity to violence.¹²⁶ Moreover, watching the game in a designated area outside the stadium is not an appropriate alternative to taking part

¹¹⁹ Case, para. 21; cf. *Drda v. The Czech Republic* (CCPR) para 7.2.; Regarding Art. 26 ICCPR in which the non-discrimination principle arose: *Haraldsson and Sveinsson v. Iceland* (CCPR).

¹²⁰ Cf. "test of proportionality" in: *Lane, Woodcock v. Cumbria Primary Care Trust*, p. 147.

¹²¹ Cf. *Hockenjos v. Secretary of State for Social Security*, para. 44; Art. 33 (2) (b) and (c) UEFA Safety and Security Regulations; Art. 29 (1) FIFA Stadium Safety and Security Regulations.

¹²² Cf. *Pandurangarao v. Andhra Pradesh Public Service Commission*, p. 271; CERD, GR No. 30, para. 4; *Townshend-Smith*, Justifying Indirect Discrimination in English and American Law, p. 103; *Sadurski*, Gerhardy v. Brown v. the Concept of Discrimination, p. 40.

¹²³ Case, para. 20.

¹²⁴ Case, para. 20; cf. Sec. 19 (2) (d), Equality Act (UK).

¹²⁵ About 168,000 ethnic *Tenovis* are citizens of *Brolin* and only about 87,220 ethnic *Tenovis* are citizens of *Tenovia*: cf. Case, para. 2.

¹²⁶ Case, para. 2; *Bretthauer*, Aufenthaltsverbot für Fußballfans?, p. 416.

inside, as the essence of the game is to experience the cultural spirit established in over 55 years of matches in the stadium.¹²⁷ The refusal to grant ethnic *Tenovis* entrance to a cultural mass event maintains existing barriers between ethnic *Tenovis* and *Brolinites* and promotes division and rivalry.¹²⁸ In conclusion, *Brolin* violated its obligations under the ICERD by engaging in and maintaining an act of racial discrimination under Arts. 1 (1), 2 (1) (a), (c) ICERD.

C. By failing to recognise Ms Desmond's immunity from all forms of legal process, Brolin violated and continues to violate its obligations towards Tenovia under Art. 9 of the CLAWS Convention

Brolin violated and continues to violate its obligations towards *Tenovia* under Art. 9 CLAWS Convention as it was prohibited from instituting any form of legal proceedings against Ms *Desmond* (I.) and from issuing a writ for the seizure and sale of her private property (II.).

I. Brolin was prohibited from instituting legal proceedings against Ms Desmond

Brolin was prohibited from instituting legal proceedings against Ms *Desmond*, who – as *Tenovia*'s national envoy to the CLAWS organisation – enjoys immunity under Art. 9 (1) CLAWS Convention (1.). Furthermore, her immunity was not subject to the exceptions of Art. 9 (1) CLAWS Convention, Art. 31 (1) (a) and (c) VCDR and Art. 38 VCDR (2.).

1. Ms Desmond enjoys immunity

Ms *Desmond* enjoys immunity under Art. 9 CLAWS Convention as the notification of her appointment was both sufficient under Art. 9 (2) CLAWS Convention (a.) and compliant with the requirements of international diplomatic law (b.).

a. The notification of Ms Desmond's appointment was sufficient

Under Art. 9 (2) CLAWS Convention, Ms *Desmond* is entitled to immunities from the moment the host State receives notification of her appointment. As stated in the *Note Verbale* from 11

¹²⁷ Case, para. 4; cf. *Cleland/Doidge/Millward/Widdop*, Football Fandom, p. 60.

¹²⁸ *Martínez Cobo*, Report Chapter VIII, p. 20.

June 2018 and as confirmed by *Brolin*'s Minister of Foreign Affairs during the proceedings in the domestic court on 3 July 2018, the notification of Ms *Desmond*'s appointment was received by *Brolin* on 2 March 2018.¹²⁹ According to a plain reading of Art. 9 (2) CLAWS Convention,¹³⁰ it is irrelevant to Ms *Desmond*'s immunity that *Brolin* did not respond to the *Note Verbale* as her appointment, and thus her entitlement to immunities, is not dependent on any form of express or tacit acceptance by the host State.¹³¹ Additionally, the CLAWS Convention does not incorporate Art. 4 VCDR, which would require the agreement of *Brolin*, as the receiving State, for the appointment of the head of a diplomatic mission. Applying Art. 4 VCDR to the present case would furthermore infringe upon the article's object and purpose,¹³² which is to grant the receiving State a right of co-decision as the head of the mission must be personally acceptable to both States in order to enable effective diplomatic conduct.¹³³ In contrast, the case at hand does not concern bilateral diplomatic relations but the multilateral commission CLAWS and Ms *Desmond* did not enter into a direct relationship with *Brolin* unlike the case of diplomatic agents accredited to a State.¹³⁴ Requiring all States of CLAWS to accept envoys would be practically unenforceable and massively limit effective multilateral diplomacy¹³⁵. Even if acceptance was required, *Brolin* at least tacitly accepted Ms *Desmond*'s appointment.¹³⁶ By not responding to *Tenovia*'s *Note Verbale*, *Brolin* acted in accordance with

¹²⁹ Case, paras. 30 *et seq.*

¹³⁰ Art. 31 (1) VCLT.

¹³¹ Cf. *R v. Secretary of State for the Home Department, Ex parte Bagga*, p. 497; *Al Attiya v. Bin-Jassim*, paras. 74, 78; *Akande*, Ecuador seeks to confer diplomatic status on Julian Assange.

¹³² Art. 31 (1) VCLT; *Bosnian Genocide*, para. 22; *Commonwealth v. Zentai*, para. 36.

¹³³ Cf. *Al-Juffali v. Estrada*, para. 5; *Denza*, Commentary on the VCDR, p. 40.

¹³⁴ Case, para. 1; cf. *Dittrich*, Rundfunkbeitragspflicht für internationale Organisationen, p. 376; *Ling*, Study of Privileges and Immunities of UN Member Representatives, p. 122.

¹³⁵ *Mahbubani*, in: The Oxford Handbook of Modern Diplomacy, p. 249 *et seq.*

¹³⁶ Silence implies a tacit admission, cf. Black's Law Dictionary, p. 1680.

regional State practice, and *Brolin* did not express any disagreement.¹³⁷ Otherwise, declaring Ms *Desmond persona non grata*¹³⁸ would have been the only means for ensuring compliance with the VCDR and expressing disagreement with her appointment.¹³⁹

b. Ms *Desmond*'s appointment to CLAWS complied with international diplomatic law

There are no additional requirements of international law with which Ms *Desmond*'s appointment had to comply. As the recognition of her status is a prerogative of the Ministry for Foreign Affairs of *Brolin*, the domestic court in *Brolin* did not have the authority to make enquiries into whether an appointment is a sham.¹⁴⁰ Thus, the domestic court in *Brolin* was not entitled to receive and assess evidence in order to determine whether a properly appointed envoy has taken up his post and discharged his responsibilities and indeed what motivated him to seek the post in the first place.¹⁴¹ Even if Ms *Desmond*'s immunity was subject to such a functional interpretation, she would have fulfilled the requirements. The CLAWS Convention does not contain any conditions for a representative of the sending State to fulfil.¹⁴² The appointment as a permanent representative is subject to *Tenovia*'s discretion. Such an approach complies with the general principle of international law contained in Art. 7 VCDR, which, although not expressly incorporated into the CLAWS Convention and thus not directly

¹³⁷ Case, paras. 22, 31.

¹³⁸ Art. 9 VCDR; The VCDR constitutes a self-contained regime: *Tehran Hostages*, p. 40.

¹³⁹ Cf. Art. 9 VCDR; *Al Attiya v. Bin-Jassim*, para. 37; *Behrens*, Diplomatic Law in a New Millennium, pp. 37-38; *Brown*, Diplomatic Immunity, p. 87; *Denza*, Commentary on the VCDR, p. 71; *Foakes/Denza*, in: Satow's Diplomatic Practice, para. 10.18; *Hoffmann*, Wer soll das bezahlen?, No. 26/1964; *Kau*, in: Völkerrecht, p. 156, para. 60.

¹⁴⁰ Cf. *Al Attiya v. Bin-Jassim*, para. 37; *Al-Juffali v. Estrada*, para. 23; *Behrens*, Diplomatic Law in a New Millennium, p. 39.

¹⁴¹ Cf. *Al-Juffali v. Estrada*, para. 23; *Fernandez v. Fernandez*, para. 334.

¹⁴² Cf. *Chesterman*, in: The Oxford Handbook of International Organizations, p. 828 *et seq.*: If "in many organizations, there is no reference whatsoever to the necessary or desirable qualification[s]" of Executive Heads of International Organisations, then in any case there won't be for a single state representative.

applicable, can be relied upon as a means of interpretation to ascertain the meaning of the latter's terms.¹⁴³ In conformity with the principle of State sovereignty,¹⁴⁴ the member States of CLAWS remain independent and thus have the right to decide who will represent them appropriately.¹⁴⁵ Further, according to State practice, expertise in discipline-specific positions is not a mandatory requirement, as the necessary specialisation can be acquired in the course of daily work.¹⁴⁶ It is common to select representatives not for their qualification but due to political reasoning, as with the politically well-connected Ms *Desmond*.¹⁴⁷ The fact that Ms *Desmond* is well connected in *Tenovia* can thus not be invoked against her appointment. It is not fundamentally necessary to have expertise in sports in order to appropriately represent *Tenovia* in CLAWS and to promote women's athletics and squash worldwide.¹⁴⁸ It would be impossible for *Tenovia* to act on an international level if only highly qualified personnel could be selected as representatives, as *Tenovia* has a population of only about 98,000.¹⁴⁹ Considering *Tenovia*'s low population and limited set of human resources,¹⁵⁰ it is inevitable to appoint a

¹⁴³ Cf. *Al Attiya v. Bin-Jassim*, paras. 15, 41; Art. 31 (1) VCLT; *Navigational Rights*, paras. 64 et seq.; *Territorial Dispute*, para. 41; *US-Shrimp*, paras. 17, 155; *Bosnian Genocide*, para. 22; *Commonwealth v. Zentai*, para. 36; *Bianchi/Peat/Windsor*, in: Interpretation in Int. Law, p. 3; *Villiger*, Commentary on the VCLT, pp. 432-434.

¹⁴⁴ Art. 2 (1) UN Charter.

¹⁴⁵ Cf. *Lotus Case*, p. 18; *Behrens*, Diplomatic Law in a New Millennium, p. 173; *Kokott*, Souveräne Gleichheit, p. 519; *Ling*, Study of Privileges and Immunities of UN Member Representatives, p. 94; *Orakhelashvili*, Akehurst's Introduction to International Law, p. 11.

¹⁴⁶ *Strauss*, Education Secretary Betsy DeVos; *Demmer/Goffart*, Kanzlerin der Reserve, p. 11 (Ursula von der Leyen - a Doctor of Medicine in the position of German Minister of Defence); *Valencia*, Ecuador attempted to give Assange diplomat post.

¹⁴⁷ Case, para. 25; cf. *Roberts*, in: Satow's Diplomatic Practice, para. 7.25.

¹⁴⁸ Case, para. 1; cf. Art. 3 VCDR.

¹⁴⁹ Case, para. 1.; *Tenovia* is to be regarded as a "micro-State": cf. Introduction to the Annual Report of the Secretary-General, p. 20, paras. 167-169; *Bartmann*, Micro-States in the International System, p. 2; *Harris*, Microstates in the UN, p. 23.

¹⁵⁰ Cf. *Fritz*, Das tägliche Brot eines Diplomaten im Ausland, p. 5; *Naseer*, The Diplomacy of Micro-states, p. 34; *Stringer*, Sovereign Liechtenstein, p. 17; *Watson*, Diplomacy, p. 161.

representative, who is at least to some extent connected to the State.¹⁵¹ Moreover, Ms *Desmond* was not required to appear personally in the CLAWS' offices in order to take up her post as by using her garden regularly for official functions, she already performs her representative duties.¹⁵² Her appointment thus complied with the requirements of international diplomatic law.

2. Ms *Desmond*'s immunity is not restricted

Ms *Desmond* enjoys full immunity from civil jurisdiction according to Art. 9 (1) CLAWS Convention and Art. 31 (1) VCDR. Her immunity is neither restricted by functional necessity (a.), nor are the exceptions of Art. 31 (1) (a) VCDR (b.), Art. 31 (1) (c) VCDR (c.), or Art. 38 VCDR (d.) applicable.

a. Ms *Desmond*'s immunity is not restricted by functional necessity

Ms *Desmond*'s immunity is not restricted to acts performed in her official capacity as regularly required for members of international organisations.¹⁵³ The CLAWS Convention explicitly incorporated the provisions of the VCDR on immunity without reservation.¹⁵⁴ Thus, any restriction of Ms *Desmond*'s immunity by functional necessity would contravene the explicit wording and the purpose of CLAWS Convention, to grant representatives the privileges and immunities normally enjoyed by diplomatic agents.¹⁵⁵

b. Ms *Desmond*'s immunity is not restricted by Art. 31 (1) (a) VCDR

Under the exception of Art. 31 (1) (a) VCDR, a diplomatic agent does not enjoy immunity in the case of a real action relating to private immovable property situated in the territory of the receiving State. The scope of the term "real action" only covers titles of property or orders of

¹⁵¹ Case, para. 30.

¹⁵² Case, para. 31; cf. Art. 3 VCDR.

¹⁵³ Cf. Art. IV sec. 11 Convention on the Privileges and Immunities of the UN.

¹⁵⁴ Art. 9 (1) CLAWS Convention.

¹⁵⁵ Cf. Art. 31 (1) VCLT; *Dörr*, in: VCLT Commentary, pp. 580, 584.

sale or possession.¹⁵⁶ As the relief sought in the action of the present case is the recovery of the rent payments,¹⁵⁷ the relief therefore does not fall under the scope of the term. Art. 31 (1) (a) VCDR is consequently not applicable. Even if it was held to be applicable, Ms *Desmond* would still retain her immunity from civil jurisdiction as she holds her rental accommodation with its suitably large garden on behalf of *Tenovia* for the purposes of the mission.¹⁵⁸ Consequently, Ms *Desmond*'s immunity is not restricted by Art. 31 (1) (a) VCDR.

c. Ms *Desmond*'s immunity was not restricted by Art. 31 (1) (c) VCDR

The immunity of Ms *Desmond* was also not subject to the exception of Art. 31 (1) (c) VCDR, which would require the civil proceedings against her to be an action relating to professional or commercial activity exercised in *Brolin* outside her official functions. Although Ms *Desmond* was the director of the *Brolin*-based company *Paintgood*, the legal actions against her are not related to her activity there but to her leasing relationship.¹⁵⁹ Even if this Court held that the actions relate to her activity at *Paintgood*, such artistic profession can be practiced without infringing Art. 31 (1) (c) VCDR.¹⁶⁰ Through the artistic undertaking of painting the mural on the stadium, Ms *Desmond* highlighted the historical bond of friendship between *Tenovia* and *Brolin*.¹⁶¹ Further, her activity in *Paintgood* ceased on 2 April 2017, meaning that her immunity was restored at the latest when her landlord initiated the proceedings, on 11 May 2018.¹⁶²

d. Ms *Desmond*'s immunity is not restricted by Art. 38 (1) VCDR

¹⁵⁶ *Denza*, Commentary on the VCDR, p. 240.

¹⁵⁷ Case, para. 28.

¹⁵⁸ Case, para. 28; Cf. Art. 31 (1) (a) VCDR; *Australian Federation of Islamic Councils Inc. v. Westpac Banking Corporation*.

¹⁵⁹ Case, paras. 24, 28.

¹⁶⁰ *Denza*, Commentary on the VCDR, p. 250; Conference on Diplomatic Intercourse and Immunities, pp. 165-166, 212-213.

¹⁶¹ Case, para. 24.

¹⁶² Case, para. 24, 28; Clarification No. 3; cf. *Denza*, Commentary on the VCDR, p. 257 *et seq.*

Under Art. 38 (1) VCDR, in connection with Art. 9 CLAWS Convention, an envoy who is a national or permanent resident of the receiving State enjoys full immunity from jurisdiction in respect of official acts performed in the exercise of his functions. Ms *Desmond* is not a national of *Brolin*.¹⁶³ She is likewise not permanently resident in *Brolin* as the CLAWS Convention, any bilateral agreement between *Tenovia* and *Brolin* and *Brolin*'s national law fail to specify any requirements for a person to be considered a permanent resident.¹⁶⁴ However, in accordance with State practice, it is decisive whether Ms *Desmond* would choose to remain in *Brolin*.¹⁶⁵ In particular, her intention,¹⁶⁶ her links to *Brolin* and her closest personal and economic relations¹⁶⁷ need to be considered. Ms *Desmond* is a *Tenovian* national and of *Tenovi* ethnicity.¹⁶⁸ Due to her position as the *Tenovi* royal portrait artist and daughter of a politician, she is strongly connected to *Tenovia*.¹⁶⁹ She owns and lets two apartments in *Tenovia* and thus has to fulfil her duties as a landlord.¹⁷⁰ In contrast, she has no personal connection to *Brolin*. Notwithstanding that she has lived in *Brolin* for several years, Ms *Desmond* no longer owns immovable property in *Brolin* that could prospectively link her to the State.¹⁷¹ As she divorced a citizen of *Brolin* in 2015 and ceased her activity in *Paintgood*, she has no personal or economic link to *Brolin* as

¹⁶³ Case, para. 25.

¹⁶⁴ Cf. Clarification No. 51; *Denza*, Commentary on the VCDR, p. 341.

¹⁶⁵ Cf. Circular Note from January 1969, which was formulated by the FCO of the UK and sent by the Secretary of State to all diplomatic missions located in London, see: *Lewis*, State and Diplomatic Immunity, p. 144; *Al-Juffali v. Estrada*, para. 61.

¹⁶⁶ Cf. *Lewis*, State and Diplomatic Immunity, p. 144.

¹⁶⁷ Cf. Art. 4, para. 2 UN Model Double Taxation Convention; Art. 4, para. 2 OECD Model Tax Convention.

¹⁶⁸ Case, para. 25.

¹⁶⁹ Case, paras. 25, 27.

¹⁷⁰ Cf. Clarification No. 58.

¹⁷¹ She lost her home in *Gremont*: Case, para. 26; cf. *Al-Juffali v. Estrada*, para. 61.

well.¹⁷² Even if Ms *Desmond* was deemed a permanent resident of *Brolin*, she would still enjoy immunity from jurisdiction as she performs official acts in the exercise of her functions.¹⁷³

II. The order to pay the landlord \$18,500 and the threat to issue a writ for seizure and sale violates Ms *Desmond*'s immunities

Pursuant to Arts. 30 (2), 31 (3) VCDR, the order for the payment and the threat to issue the writ violate Ms *Desmond*'s immunity as these executive measures infringe upon the inviolability of Ms *Desmond*'s property. The latter covers her bank account, as well as all of her goods that are for personal use and essential to her livelihood.¹⁷⁴ The threat to seizure and sale by *Brolin*'s domestic court is not limited to property, which is not for Ms *Desmond*'s personal use or not essential to her livelihood but rather targeted her private property as a whole. Furthermore, by forcing Ms *Desmond* to pay \$18.500 and thus to reduce her financial assets, the court order at least indirectly violates the property contained in her bank account. Concluding, Ms *Desmond* has immunity against legal process and executive measures, which *Brolin* fails to recognise. *Brolin* violated and continues to violate its obligations under Art. 9 CLAWS Convention.

(i) Submissions

Tenovia requests the Court to adjudge and declare that:

A. *Brolin* violated customary international law by the assault on Ms *Starman* in *Tenovian* territory and by failing to apprehend Mr *Zunitte*.

B. *Brolin* violated its obligations under the ICERD by its insistence that attendees at the great football match sign a declaration before being permitted to enter the stadium.

C. *Brolin* violated and continues to violate its obligations towards *Tenovia* under Art. 9 of the CLAWS Convention by failing to recognise Ms *Desmond*'s immunity.

¹⁷² She has no further contact to her previous spouse: Clarification No. 58.

¹⁷³ Case, para. 31.

¹⁷⁴ ILC Report of the Ninth session 1957, p. 138.