



ANU LAW STUDENTS' SOCIETY

LAWS2250

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Question A1

70/100

(a)

The matter could be taken to the ICJ as Art 1 of the VCDR means states parties can bring the matter in application of the Convention. Here, Art 22 of the VCDR (Protection and Inviolability of Diplomatic Premises could be relied on) [✓]. Firstly, for the purposes of this problem, Rohan is considered a state even though its government came into being by a coup d'état (*Tinoco Arbitration*).

The USG should seek the Court to order that Rohan protect the diplomatic premises of the USG in Rohan, due to its obligation of due diligence (Corfu Channel) to protect diplomatic premises under the Vienna Convention on Diplomatic Relations (VCDR). This would mean that Rohan itself would be capable of carrying out the order, as this duty is its own duty, and is not dependent on its ability to control those carrying out the attacks. Therefore, this provision can be attributed to the state because it is its own duty; its due diligence. Something could be done to protect the premises, even if Rohan (Sauron) argued he was not in effective control of the activities being carried out on the premises by the unknown persons. Sauron's likelihood of actually implementing such a measure, however, seems doubtful, as he said that "the military regime would not be able to prevent further attacks on the Embassy".

USG could also ask the Court to order that a provisional measure be ordered to stop further attacks on the Embassy [✓]. However, if Rohan (Sauron) had no means of controlling the people responsible, it would be impossible for the measures to be implemented.

If an order was made however, in relation to other matters, such as issues not relating to the VCDR such as non-intervention or non-use-of-force, Rohan would argue that it did not give its consent in relation to such matters (but only those via the VCDR). In relation to the above orders however, this issue probably would not apply.

UNSG could also ask for reparations if a breach and attribution to the state (Rohan) were found, but this would not help the situation at all [✓].

(b)

A state is responsible for its breaches of international law if those breaches are attributable to it (ILC Articles applied by the ICJ and so can be used as legal basis).

Breach

Unknown persons and a privatised company violated the premises of the Embassy, therefore breaching Art 22 of the VCDR [✓]. The cutting off of water supply was a breach of this principle as it affected the premises and their ability to function, where functioning premises and diplomatic persons are the whole reason behind having the VCDR. The chemical attacks went further and can be argued to be a use of force, as they were physical attacks. They would also be in breach of the principle of non-intervention [why?]. If Sauron would be said to have at all aided these persons, Rohan itself would be in violation of the CIL norm (Nicaragua) of non-

intervention and also use of force, by virtue of the fact that the acts constituted physical attacks. However, no such evidence is available.

Rohan itself failed to protect the diplomatic premises.

Attribution

Because the company is a privatised company, its acts could not be said to be controlled by the Rohan government [✓].

The acts of the unknown persons also would be very difficult to attribute, as no evidence is available to show Rohan was in “effective control” [explain] (*Nicaragua*) of these persons and therefore their acts could not be attributed to it [✓]. The fact that Sauron said the incidents were “an expression of anger...against a national traitor”, did not mean he adopted the conduct [explain “adoption”]. He did not actually say Rohan or he were responsible (the Tehran test seems to need explicit adoption) [✓].

However, the fact that it was Rohan’s responsibility to take due diligence and protect the premises, means that Rohan itself had a duty to take the appropriate steps to protect the premises and was responsible for the safety of its state (*Tehran Hostages*) [✓].

(c)

Operation Gondor Pride

Use of force is prohibited under Art 2(4) of the UN Charter (and all states are members) [✓].

However, there are legal exceptions to this prohibition.

Use of force is permitted in self-defence. However, this test is stringent, but it should also be read in light of Art 51 of the UNC that the right of self-defence is inherent (also CIL:

Nicaragua).

Armed Attack

For self-defence to be made out there needs to be an “armed attack”. This is the “gravest” form of the use of force.

The use of force has to have significant scale and effects (*Nicaragua*) [✓]. Vomiting, fainting, headaches and loss of power (even if the privatised company’s act could be said to be a use of force) are hardly of significant scale and effects [✓]. The attacks of the unknown persons happened only once, however, if it happened several times and caused loss of life [✓], cumulatively it could perhaps be regarded as an armed attack (*Oil Platform*).

Not protecting diplomatic premises is an omission and it is not even a lesser use of force. It is a much less grave breach of international obligations. The “attack”, even if it could be called an armed attack, was not even occurring anymore by the time the USG government was planning the military operation.

Attribution

Even if an armed attack were proved, it would have to be attributable to a state. As has already been shown, attribution cannot be proven in relation to the closest thing to an armed attack (the chemical attacks) [✓].

Intentional Targeting

The Court in Oil Platforms placed heavy emphasis on the intentional targeting [explain] of the state claiming self-defence in order to prove the legal use of force. Here, it could be argued that the statement of G. Suaron: “against the national traitor” meant the attack was intended against Theoden, and not USG itself. However, it can hardly be argued that attacks on the USG Embassy were not, at least obviously, attacks on the USG. As noted earlier, if the military operation were in anticipatory self-defence, it can hardly be said it was instant and overwhelming, leaving no choice of means (*Caroline Case*).

CIL Requirements of Necessity and Proportionality

Clearly, acts of vomiting fainting and headaches cannot be said to be proportional with the use of lethal force at a person’s discretion. This gives a lot of power and is not proportionate [Explain how you measure proportionality].

The attacks, even if said to be armed attacks, were not necessary. There were no continuous attacks occurring at the time the military operation plans were made. They had already ceased.

SC Authorisation

The SC can authorise use of armed force under Arts 39 and 42 of the UNC. However, the Resolution of the SC (“calls upon the de facto government of Rohan to cease harassing the USG Embassy”) is not at all authorising use of force. It is simply calling on Rohan to deal properly with its affairs.