BENCH MEMORANDUM
FOR JUDGES
THE CASE CONCERNING CERTAIN CRIMINAL PROCEEDINGS IN ADOVA AND ROTANIA
Version 5.1

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2008 Philip C. Jessup Competition

IMPORTANT NOTICE TO JUDGES: ILSA circulates two versions of the Compromis: one in HTML format, and one in Microsoft Word format. This year, there is a small discrepancy between the two versions. In one, the attachments to the Compromis are labeled as "Annexes," while in the other the attachments are labeled as "Appendices."
We ask that all judges note this discrepancy. Please allow teams to refer to the attachments as either Annexes or Appendices without penalty. We apologize for the mistake.

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PART 1: INTRODUCTION

I. Purpose of the Bench Memorandum

The purpose of this bench memorandum is to provide judges in the Jessup Competition with basic factual and legal information to enable evaluation of the written and oral performances of the participating teams. This Bench Memorandum should be read in conjunction with the 2008 Jessup Problem (the "Compromis") and the Corrections and Clarifications to the Compromis. The Compromis was designed to present the competitors with a balanced problem, such that each side has strengths and weaknesses in its case. The Compromis contains a number of legal issues that are relevant to more than one claim for relief, and participants will often need to argue in favor of a rule of law in support of one claim and distinguish the same rule with respect to another claim. Judges should note and question any internal inconsistencies that may arise in a competitor's or team's argument.

This memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis. Judges should not be surprised when, in evaluating either a Memorial or an oral argument, they see arguments or authorities not discussed in this memorandum. This does not suggest that such arguments are not relevant or credible.

II. Synopsis

This year's Jessup problem focuses on the growing tension between the goals of protecting human rights and combating terrorism. Among the many issues addressed are the following: national security versus self-determination; definition of terrorism; definition of torture; role of the United Nations and Security Council in the global struggle against terrorism; international humanitarian law versus international human rights law; international due process norms; head of state immunity; command responsibility; and the responsibilities of the international lawyer.

The dispute at the heart of this year's Jessup Problem involves two states – Rotania, which has suffered violent attacks by an activist group representing a repressed minority; and Adova, which is accused of supporting and harboring the perpetrators of the attacks.

Originally part of the same sovereign nation (the Kingdom of Sybilla), the populations of Adova and Rotania are primarily composed of two ethnic groups – Stovians and Litvians. Adova is predominantly Litvian, and Rotania is predominantly Stovian.

The Litvian minority living in Rotania is less educated, less affluent, and has a lower average life expectancy than the Stovian majority. To reduce this disparity and to preserve their culture, ethnic Litvians formed the Litvian Advancement and Protection Society (LAPS). Funded in part by the state of Adova, LAPS began as a social and civic organization, but eventually became a political organization with three distinct political factions.

In January 2006, a radical faction of LAPS called the Independent Litvia Solidarity Association (ILSA) began to openly defy the Rotanian government by organizing strikes and protests in the Upland Plateau, where most Litvians live in Rotania. Rotania reacted by assigning a military unit, the 373rd Batallion, to the Upland Plateau. From February to December 2006, there were six disturbances in the Upland Plateau resulting in Litvian causalities. Some of the disturbances involved confrontations between the 373rd Battallion and ILSA.

In January and February 2007, four arson attacks were committed against Stovian cultural and religious sites in Rotania. Property destruction was substantial, but only minimal injuries were sustained. ILSA claimed responsibility for three of the four attacks.

On February 22, 2007, ILSA warned that it was planning an attack on the holiest site of the Stovian religion, the Shrine of the Seven Tabernacles. The warning was not heeded and that evening the Shrine was completely destroyed by fire. Twenty-two clergy and staff were killed, and a badly burned body of a man in camouflage was found .

The President of Rotania, Michael Kirgov reacted with a three-step plan: (1) declaring a national emergency, (2) empowering the 373rd Battalion to take necessary measures to apprehend the perpetrators, and (3) establishing a Military Commission to prosecute those responsible.

In March 2007, the UN Security Council adopted a resolution condemning the attacks in Rotania and calling on Adova to cooperate in the apprehension of any perpetrators.

In April 2007, the commanding officer of the 373rd Battalion, Colonel Gommel Vinitsa, announced that the Battalion had apprehended various LAPS members within the borders of Adova, including LAPS chairman Samara Penza. The prisoners were transported to a Rotanian facility in a third state, Merkistan, where they were questioned and subjected to controversial interrogation techniques. After the prisoners were discovered by Merkistani officials, the Rotanian military transferred the prisoners to Rotania, where they currently are detained and under the jurisdiction of the Rotanian Military Commission, charged with conspiracy, arson, murder, and aiding in a terrorist operation.

In May 2007, President Kirgov reported to the Rotanian Parliament that Samara Penza had confessed to her involvement in the disturbances in the Upland Plateau, and in the attacks on Stovian cultural and religious sites, including the deadly Shrine attack. Praising Colonel Vinitsa for his "brilliant work," President Kirgov also reported that the government was able to prevent a future attack on the Rotanian National Theater during the National Day Celebration, a plot to which Penza confessed during her interrogation.

Later in May 2007, Kirgov resigned the presidency due to health reasons and Vinitsa retired from the military after a promotion to General.

In July 2007, Adovan national police raided a Stovian restaurant in Adova and arrested Vinitsa, charging him for crimes under the Torture Convention in connection with the apprehension and treatment of Penza and the other LAPS members. Adova also indicted

former President Kirgov as a co-conspirator, requesting an international arrest warrant from INTERPOL.

Relations between Adova and Rotania deteriorated and in August 2007, the countries suspended trade relations and dispatched troops to their shared border. At the urging of the UN Security Council, the states submitted their dispute to the ICJ.

III. The Legal Issues

1. Did the apprehension and rendition of Penza and the other LAPS members violate Adova's sovereignty and international law?

2. Were Penza and the other LAPS members detained and treated in a manner consistent with international law?

3. Is Rotania's prosecution of Penza and the other LAPS members before the Military Commission consistent with international law?

4. Is Adova's prosecution of former President Kirgov and former Colonel Vinitsa consistent with international law?

PART 2: LEGAL ANALYSIS

I. The Apprehension and Rendition of LAPS members

Did the apprehension and rendition of Penza and the other LAPS members violate Adova's sovereignty and international law?

Adova will argue that the cross-border abduction is a violation of Article 2(4) of the UN Charter, which prohibits the use of force against the territorial integrity or political independence of a State. Simma, *The Charter of the United Nations: A Commentary*, 123 (2002) (prohibition includes any use of armed force, even small and temporary operations that do not result in any deprivation of territory).

A. Standing

Since Adova is claiming a direct injury (Rotania's violation of Adova's territorial integrity), rather than exercising diplomatic protection on behalf of a victim, there is no requirement to exhaust local judicial remedies in order to have standing before the ICJ.

B. Self-defence

Article 51 of the UN Charter recognizes the inherent right of self-defence against an armed attack. In order to be legitimate, a military action carried out in self-defence must meet the requirements of necessity (no other alternative action is possible) and proportionality (the response is proportionate to redress the initial attack).

Rotania will argue that the apprehension and rendition of Penza and the others was permitted as an act of self-defence in response to armed attacks against Rotanian territory. Rotania will argue that its self-defensive actions were both necessary and proportionate.

Rotania will submit that Adova is responsible for the attacks by LAPS because it supports the LAPS terrorist movement through financing and by providing LAPS members with a safe haven. Rotania will rely on recent state practice and UN Security Council resolutions 1373 and 1368 (2001), which recognized the U.S.'s right to Self-Defence against the government of Afghanistan (the Taliban) for harbouring terrorists who conducted an armed attack against the U.S.

Adova will argue that Rotania may not invoke the principle of self-defence because the incidents did not constitute an "armed attack" against the state of Rotania. Nicaragua v. United States (mere "frontier incidents" do not amount to an armed attack).

Rotania will rebut by pointing out that the ICJ in Nicaragua v. U.S. held that several events can be considered in a cumulative manner to prove an armed attack.

Adova will argue that Rotania may not invoke the principle of self-defence because Adova is not responsible for the acts committed against Stovian sites in Rotania. International Law Commission, Articles on State Responsibility (states are responsible for conduct of its formal or de facto organs). Adova will argue that LAPS is not a formal or *de facto* organ of the Adovan government, whether applying the effective control test, which requires proof of the strict direction of the State over the private bodies, or the overall control test, which only requires political guidance, logistic support, weapons and financing.

Adova will submit that the military action of Rotania did not meet the requisite of necessity since other diplomatic means were available in order to redress the issue.

Rotania will counter that the apprehension of Penza and the others was necessary because Adova announced it would refuse to comply with the SC Resolution, thus leaving Rotania no reasonable diplomatic options. Rotania will argue that the act of self defence was proportionate since it was a single military operation that did not involve or provoke any collateral damage to properties or persons.

C. State Responsibility for Supporting Terrorism

1. Traditionally, international law did not recognize sponsorship of terrorist activities as a justification for the use of armed force against the sponsoring state. During the Cold War, the Security Council regularly condemned invocations of the right of Self-Defence against other States because of their support for terrorist groups.

   (a). In 1969, Portugal attacked Guinea, Senegal and Zambia in 1969 claiming its right to Self-Defence against terrorist attacks and blaming these countries for offering sanctuary to terrorists conducting activities against its colonies. In

all these circumstances, the UN Security Council strongly criticized the military actions. UN Security Council Resolutions 268, 273, and 275 (1969).

(b). In 1985, Israel bombed PLO headquarters in Tunisia in response to a terrorist attack. Even in this case, the Security Council condemned the attack by 14 votes to 0. UN Security Council Resolution 573 (1985).

2. In the last decade the international community has changed its position.

(a). The shift began when the UN Security Council stopped condemning self-defensive operations (e.g., no condemnation of Sudan in 1996 when it accused Eritrea of armed aggression because of its sponsorship and hosting of members of SPLM; no condemnation of Burundi in 1997 when it justified its action inside the Tanzanian territory by accusing the Dar Es Salaam government of training and supplying Burundian exiles with weapons).

(b). The shift continued as the international community endorsed some military operations against States that support terrorist or rebel groups (UN and many states supported the U.S. attack against Afghanistan and Sudan in 1998 in response to the terrorist attacks against U.S. embassies in Nairobi and Dar es Salaam, after the U.S. complained of such support to both countries and such warnings were not heeded).

3. A clear corner stone of this practice can be argued based on UN Security Council Resolutions 1368 and 1373 (2001), which reaffirmed the right of Self-Defence against terrorist groups after the September 11th terrorist attack. Some scholars read this resolution as enabling States to resort to Self-Defence against another State that tolerates terrorist activities in its territory.

4. There is no concrete definition of state-sponsored terrorism in any ratified anti-terrorism convention. At the same time, there is no language in any of the ratified conventions which necessarily excludes a State from responsibility. However, the UN General Assembly Resolution has provided guidance when it announced the following standard:

[E]very state has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force. GA Resolution 2625 (1970).

See also UN Security Council Resolution 731 (1992) (issuing sanctions against Libya for connections to terrorism by applying standard from above GA Resolution 2625).

Rotania will argue that Adova did not "refrain from assisting" ILSA in its terrorist acts and that it "acquiesced to organized terrorist activities within its territory" by harboring LAPS leaders and funding LAPS activities within its territory. Thus, Rotania will argue that its

military operation should be considered legitimate in light of recent UN policy and an evolution in the practice of states.

Adova will counter that the aid they gave LAPS was of a different nature from that given by other States found to be sponsoring terrorism. Adova will submit that the mere support of organizations connected to terrorist activities, without direct state involvement, cannot legitimize Self-Defense, recalling the jurisprudence of the ICJ in Nicaragua v. U.S. and DRC v. Uganda.

Adova will submit that Adova's financial assistance to LAPS was legitimate because the funds were used for charitable and educational purposes and because the funds were given to LAPS, not ILSA. Adova will also argue that LAPS is not a terrorist group but a movement struggling to exercise the internationally recognized right of self-determination, relying on the statements of Epsilon and Delta in the Verbatim Record to SC Resolution 2233.

D. Self-Defence against Non-State Actors

Rotania will argue that article 51 enables the right of self-defence even if there is no provable connection between Adova and LAPS (i.e. even if the armed attack comes from a non-State actor with no links to the State). Rotania will rely on recent events, including:

- the current military operation of Turkey against PKK members in northern Iraq.
- Israel's 2006 operation against Hezbollah in Lebanon where the majority of UN Security Council members and the UN Secretary General acknowledged the right of Israel to act in self defence against Hezbollah attacks. S/PV.5489/06. See also Tom Ruys, *Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-defense against Hezbollah*, 43 Stan. J Int'l l. 265 (2007).
- the 2001 U.S. invasion of Afghanistan where UN Security Council twice recognized the right of Self-Defence against Al Qaida, a non-State actor. UN Security Council Resolutions 1373 and 1368 (2001).

Adova will reply that international law does not legitimize self defence against non-State actors, relying on the DRC v. Uganda decision and ICJ's Israeli Wall advisory opinion, with the latter clearly stating that Article 51 applies when an armed attack comes from a State.

Rotania will point out that the right of Self-Defense can be invoked against a non-State actor, relying on:

- the fact that Article 51 does not exclude attacks by non-state actors;
- the fact that the ICJ's decision in DRC v. Uganda did not exclude in theory the possibility of Self-Defence against non-State actors

- positive support for right of self-defense against non-State actors in concurring opinions in DRC v. Uganda (J. Simma and Kooijmans), and a separate opinion in the Israeli Wall (J. Higgins)

E. Necessity

1. Necessity may be invoked by a State if the act in question (1) is the only means of safeguarding against a grave and imminent peril; and (2) does not seriously impair an essential interest of the State. Art. 25, Articles on State Responsibility.

2. Necessity may not be invoked if (1) the international obligation in question excludes the possibility of invoking necessity; (2) the invoking state has contributed to the situation of necessity; or (3) doing so would violate a preemptory norm. Arts. 25 and 26, Articles on State Responsibility.

Rotania will argue that the apprehension and rendition of Penza and the others was permitted under the principle of necessity. ICJ, Gabcikovo-Nagymaros Project (1997) (recognizing necessity principle as customary international law). Rotania may argue that nothing could prevent it from invoking a State of Necessity since all requisites have been met. The ILC admitted the possibility of the resort to State of Necessity in cases of attacks by private actors. Robert Ago, Int'l Law Commission, *Addendum to 8th Report on State Responsibility* (1980).

Rotania may rely on the following state practice:

- In 1960, two weeks after the independence of Congo, Belgium entered into the former colony with troops to ensure the safety of European Residents. In front of the Security Council, Belgium justified this action claiming a State of Necessity. No debate followed on the legality of the action.

- In 1995, the Turkish Army invaded Iraq in an anti PKK operation (Operation Steel). In a letter to the UN Security Council, Turkey complained that since Iraq could not exercise its control over the northern part of its territory, "measures imperative to its own security [Turkey's incursions into Iraq,] originating from the principle of self-preservation and necessities, cannot be regarded as a violation of Iraq's sovereignty."

Adova will argue that the requirements for invoking necessity have not been met since the cross-border violation seriously impaired the interests of Adova and since Rotania was not subject to grave and imminent peril. Adova will argue that Rotania contributed to the alleged situation of necessity because Rotania systematically repressed the Litvian minority and conducted military actions against it during the Upland Plateau disturbances.

Adova will also argue that a State of Necessity does not permit military operations in other states. Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 Vand. J. Transnat'l L. 485, 2004. Adova will submit that Article 51 of the UN Charter represents the only exception to the prohibition of force of Article 2(4) of the UN Charter. Furthermore, Adova

will argue that Article 2(4) of the UN Charter reflects a preemptory norm which can never be overcome by the principle of necessity, except in a situation calling for self-defensive measures, which Adova has already argued does not exist.

Rotania will argue that only the core part of Article 2(4) of the UN Charter reflects a Jus Cogens norm. Natalino Ronzitti, *Use of Force, Jus Cogens and State Consent, in* The Current Legal Regulation of the Use of Force (1986).

F. Terrorism and Self-Determination

Is LAPS a terrorist organization? Did ILSA's attacks amount to terrorism or legitimate action for self-determination?

1. Despite numerous efforts at the international level to formulate a definition of terrorism, the outcomes remain ambiguous and inconclusive.

2. Freedom Fighter Exception

   (a). The right to self-determination is enshrined in Articles 15 and 73 of the UN Charter, article 1 of the International Covenant on Economic, Social, and Cultural Rights, article 1 of the International Covenant on Civil and Political Rights, and factors significantly into other major international instruments (Declaration on the Granting of Independence to Colonial Countries and Peoples; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations; Final Act of the Conference on Security and Co-operation in Europe). However, the right has never carried with it either a specific allowance or an exception for violence.

   (b). During the 1950's and 60's, attempts were made to carve-out an exception for "freedom fighters" from the definition of terrorism. Hampered by the political realities of the Cold War, different world powers with competing interests in either the promotion or suppression of particular "freedom fighters" made this effort effectively impossible. The international community thus turned towards specific acts associated with terrorism rather than a universal definition. Thomas Weigend, *The Universal Terrorist*, 4 J. Int'l Crim. Just 912, 918 (2006).

   (c). The Draft Comprehensive Convention against International Terrorism has not been adopted due, in part, to the proposed inclusion in either the preamble or an operative paragraph of language referring to a "right to self-determination, freedom, and independence, and that those people who have been forcibly deprived of its exercise have a right to struggle to that end . . . ." Draft Comprehensive Convention Against International Terrorism, A/59/894. App. II (2005).

3. Definition of Terrorism

(a). The United Nations has set forth a Draft Comprehensive Convention, but this definition has not been adopted by the General Assembly. A/59/894 (2005).

(b). The United Nations has thirteen conventions in force related to terrorism. The most comprehensive of these is the International Convention for the Suppression of the Financing of Terrorism, defining terrorism as any act defined in the other twelve conventions *or* "[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." With 129 ratifying States, it is considered to be the closest the international community has come to establishing a universal definition of terrorism. Michael P. Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects,* 36 Case Western Reserve Journal of International Law 359, 360 (2004).

(c). U.N. Security Council Resolutions 1373 (2001) and 1566 (2004) contain language related to the definition of terrorism. Resolution 1373 restates the language found in the International Convention for the Suppression of the Financing of Terrorism and calls upon states to take action against terrorism. Resolution 1566 contains its own language relating to terrorism, recalling "that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature." There is still debate over whether this constitutes an official definition of terrorism and not, rather, a compromise meant to send a political message. Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation*, 29 Boston College International & Comparative Law Review 23, 42-46 (2006).

(d). Other regional organizations have established their own definitions of terrorism. One commentator has observed that there are over one-hundred scholarly definitions of terrorism alone. Major Karin G. Tackaberry, *Time to Stand Up and be Counted: The Need for the United Nations to Control International Terrorism, Army Law 1, 7–8 (July 2007).*

Rotania will argue that there is no recognized exception for a "freedom fighter" in the currently established international instruments that define terrorism. Rotania will categorize ILSA and LAPS as terrorist organizations. Rotania will argue that Adova

harbored and supported these terrorists, and that this justified Rotania's capture of the terrorists in Adovan territory.

Adova will point out the continued recognition by the international community of self-determination rights. Adova will appeal to regional terrorist declarations which allow a "freedom fighter" (or, rather, self-determination) exception. Art. 2(a), Arab Convention for the Suppression of Terrorism (1998); Art., 2, Organization of African Unity, Convention on the Preventing and Combating of Terrorism (1999).

G. Reporting Self Defense

Is Rotania estopped from arguing self-defence because it failed to report its exercise of its right to self-defence to the Security Council of the United Nations?

1. Article 51 of the UN Charter requires states exercising the right of self-defence to immediately report such exercise to the Security Council.

2. In Nicaragua v. U.S. (1986), the ICJ noted the failure of the U.S. government to comply with this requirement, and stated that "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in Self-Defence." Since this decision, states exercising the right of self-defence have mostly complied with the reporting requirement of Article 51.

3. There is controversy regarding compliance of States with the obligation to report. Some scholars have commented that States comply only rarely Simma, *The Charter of United Nations: a Commentary* (2002). Other authors report that, compliance has been generally respected by states since the ICJ's Nicaragua v. United States case. Gray, *International Law and the Use of Force* (2004).

Adova will argue that Rotania's failure to report to the Security Council is evidence against its claim of self-defence. Nicaragua v. U.S. and DRC v. Uganda (noting Uganda's failure to report to the Security Council events that Uganda regarded as requiring self-defence).

Rotania will argue that Security Council Resolution 2233's recognition of Rotania's right to self-defence renders a report unnecessary. Rotania will also argue that the failure to report cannot challenge the legitimacy of the military action.

H. Security Council Resolution 2233

Can the cross-border abduction be justified by implied authorization of the Security Council?

1. Security Council Resolution 2233 condemned the attacks on Stovian sites and reaffirmed Rotania's right of self-defence.

2. The Resolution also reaffirmed the principle of self-determination of peoples, at the insistence of member states Epsilon and Delta in their statements, which legitimized the struggle of Litvian people for self-determination.

Rotania will submit that the Penza's apprehension was legitimate because Adova failed to meet the request of Resolution 2233. Rotania will argue that the Resolution is implied authorization to take action in exercise of its right to self-defence. Rotania will rely on similar Security Council Resolutions in connection with the 2001 U.S. invasion of Afghanistan.

Adova will argue that the Resolution should not be considered as a legal foundation for proving the legitimacy of Rotania's cross-border operation. Adova will argue that the phrasing of the resolution is too vague to be considered a full endorsement. Adova will submit that the absence of endorsement is also reflected in the statements of the member States. Adova will point to the lack of the agreement of member States on this issue, noting that Delta and Gamma clearly denied Rotania's right to resort to Self-Defence. Furthermore, Adova may rely on the fact that a provision contained in the initial draft of the Resolution ("authorizing all necessary means to apprehend the leaders of the LAPS who are present in the territory of Adova if the government of Adova fails immediately to comply with this Resolution") was removed. Int'l Criminal Tribunal for the former Yugoslavia, Tadic Appeal Judgement (in the case of ambiguity a Security Council Resolution may be interpreted in light of the statements of its members that, as part of the"*travaux preparatoires*", may "constitute a supplementary means of interpretation"); Article 32, Vienna Convention on the Law of Treaties ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning ... when the interpretation (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable."). Adova will support its position by referring to Security Council Resolution 1441 (2003), in which the SC did not allow Iraq's lack of compliance with earlier SC resolutions regarding UN inspections to justify or impliedly authorize an armed attack.

I. Standard of proof

1. There is a split in authorities over who must prove crimes of exceptional gravity and what burden is imposed on this demonstration.

   (a). In the 1949 Corfu Channel case, the ICJ held that a "[victim] State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence," thereby liberalizing the standard of proof.

   (b). However, in the 2007 judgment in the Bosnian Genocide case, the ICJ, citing the exceptional gravity of the charges alleged, imposed a higher standard of proof of requiring "fully conclusive evidence" in order to establish "beyond any doubt" the responsibility of the Republic of Serbia and Montenegro.

Adova will argue that Rotania has the burden to prove Adova's responsibility for the acts of LAPS. Adova will argue that Rotania cannot meet this burden, especially considering the

gravity of the accusations made. Adova will point out that no organs of the Adovan government were involved in the attacks.

Rotania will argue that while the burden is on them to prove responsibility, inferences may be drawn on account of Adova's sovereign control over their territory and the information about Adova's financial and perhaps other support of LAPS and ILSA.

Adova will argue that while freer inferences are permissible, the evidence does not meet the burden which Rotania must meet in consideration of the charges alleged.

J. Clean Hands Doctrine

According to the clean hands doctrine, a claimant cannot seek any equitable remedy when its illicit conduct contributed or provoked the respondent's wrongful act (*ex dolo malo non oritur action*).

Rotania will submit that even if the Court finds that Rotania's self-help measures were illegitimate, Adova is nevertheless not entitled to equitable relief (the repatriation of Penza and the others) because Adova has unclean hands for financially supporting and providing sanctuary to a terrorist organization.

Adova will counter that its hands are clean, and that the application of the clean hands doctrine is highly disputed to cases of direct state harm. Special Rapporteur John Dugard, Int'l Law Commission, 57th Session, Sixth Report on Diplomatic Protection (2005).

Rotania will reject the latter objection referring to the Gabcikovo-Nagymaros Project case where the clean hands doctrine was claimed and recognized by the Court outside the context of diplomatic protection.

II. The Detention and Treatment of LAPS Members

Were Penza et al. detained and treated in a manner consistent with international law?

A. Standing

Standing is based on Adova's diplomatic protection of the detainees and therefore requires a finding of futility since no local judicial remedies were sought.

B. International Humanitarian Law vs. International Human Rights Law

1. International Humanitarian Law (IHL) applies in situations of armed conflict and balances security objectives of states against protection of individuals. IHL is largely codified in the Geneva Conventions but also arises from customary international law.

2. International Human Rights Law (IHRL) traditionally applies in times of peace and primarily focuses on the rights of the individual. IHRL arises from a number of established treaties and documents, including the Universal Declaration of

Human Rights, the International Convention on Civil and Political Rights (ICCPR), and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention).

3. A state combating terrorism will likely prefer to operate under IHL in responding to attacks. IHL permits States to exercise self-defense, and limits the protections afforded to opponents. The operation of IHL to the exclusion of IHRL permits the suspension of certain civil and political rights, including the right to liberty. Thus, the detainment of persons, particularly combatants, under IHL is not prohibited and actually anticipated by the Geneva Conventions. Art. 44, Protocol I; Art. 5, Protocol II..

4. Overlap between the two doctrines is a topic of much debate. One commentator has noted that the line between them is "blurring." Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239 (2000).

5. Doctrine of Lex Specialis

   (a). Lex Specialis is a term describing a specific law that is triggered by certain circumstances to replace a general law. The traditional view is that during armed conflict, IHL is lex specialis and IHRL provisions are in abeyance.

   (b). However, some authorities have disputed this traditional view. ICJ, Nuclear Weapons Advisory Opinion (1996) (IHRL protection "does not cease in times of war, except . . . certain provisions may be derogated from in a time of national emergency"). The International Committee of the Red Cross considers certain rights to never be derogable, including prohibitions against torture and cruel, inhuman or degrading treatment or punishment. U.N. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention ("the [Torture] Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction").

Adova will argue that both IHL and IHRL apply because the two are not mutually exclusive. Alternatively, Adova will argue that IHRL applies because the circumstances do not rise to the level of an armed conflict.

Rotania will argue that IHL is lex specialis and claim that it does not have to satisfy protections guaranteed under IHRL. Rotania will argue that armed conflict exists because of the severity and frequency of the attacks and the goals of ILSA/LAPS.

C. Definition of Armed Conflict

Do the hostilities between Rotania and ILSA/Adova constitute an armed conflict?

1. In order for IHL to apply, there must be an armed conflict.

2. The Geneva Conventions, while not defining the term, set out two basic categories of armed attack:

   (a). international armed conflict: includes "all cases of declared war" and all other armed conflicts between states, even if not recognized; governed by the four Geneva Conventions and Protocol I;

   (b). "armed conflict not of an international character": governed by Common Article 3 and Protocol II of the Geneva Conventions

3. Protocol II provides some guidance in defining armed conflict by stating that the protocol does not apply "to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."

4. Factors for armed conflict analysis:

   Intensity; number of participants; number of victims; duration and protracted character of the violence; organization of the parties; reaction of the parties to the hostilities; reaction of the international community; recognition of IHL; character of the hostilities; direct involvement of nation's armed forces; and non-state actors' authority.

5. Two thresholds

   (a). Low Threshold: Some courts and commentators establish a low threshold in defining armed conflict such that carefully coordinated attacks constitute armed conflict. ICJ, Nicaragua v. U.S. (non-state forces may engage in armed attacks if the violence would constitute an armed attack had the forces been state-sponsored); Inter-American Commission on Human Rights, Abella v. Argentina (1997) (determining that 24-hour attack by insurgents on military base constituted an armed conflict due to nature and level of violence); ICTY, Prosecutor v. Tadic (1995) (armed conflict existed if there was protracted violence between governmental authorities and organized groups due to level and intensity of the violence). Some identify the September 11 attacks as sufficient to qualify as armed conflict. Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 33 (2003); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 Harv. Int'l L. J. 83, 100 (2002). The Supreme Court of Israel also determined that an armed conflict existed between Israel and terrorists active in its territories, citing a "constant, continual, and murderous wave" of attacks. Public Committee Against Torture in Israel v. Israel (2005).

   (b). High Threshold: Other authorities maintain that a higher threshold should be applied to non-international armed conflict determinations. Thus, under this rationale, an isolated event might qualify only when non-international "armed forces on either side are engaged." Orna Ben-Naftali & Keren R. Michaeli, '*We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 Cornell Int'l L.J. 233, 257 (2003). *See also*

Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 Wash. U. Global Stud. L. Rev. 135, 136 (2004) (making a case that the September 11th attacks should be treated as international crimes and not acts of war); Antonio Cassesse, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 Eur. J. Int'l L. 993, 993 (2001) (arguing that the term war is a "misnomer" for the September 11th attacks).

6. International vs. Non-International Armed Conflict

(a). The focus of the IHL analysis in this case will likely be on Common Article 3 and Protocol II since the hostilities are best described as non-international armed conflict. Rotania would not want all provisions of the Geneva Conventions to apply since the detainees would receive more protections; Adova would not argue that international armed conflict exists since that would admit to state involvement in the hostilities.

(b). Alternatively, Adova may argue that the conflict is international by operation of Additional Protocol I, which applies to situations involving a people seeking self-determination either against a racist regime or a party exercising colonial domination and alien occupation. Rotania will argue that colonial domination and occupation do not exist, since the territory in which the fighting has occurred always has been a part of Rotania. Art. 96(3) of Protocol I sets forth that groups seeking to qualify under this Protocol may make a declaration to indicate that intent. Rotania will point to the lack of this declaration as evidence that Protocol I does not apply.

(c). Protocol II provides more basic protections than the full protections of Protocol I. Michael W. Lewis, *International Myopian: Hamdan's Shortcut to "Victory,"* 42 U. Rich. L. Rev. 687(2008); Jean-Marie Henckaerts, *Assessing the Laws and Customs of War: The Publication of Customary International Humanitarian Law*, 13 Hum. Rts. Br. 8 (2006) ("[H]umanitarian treaty law does not regulate in sufficient detail non-international armed conflicts. . . . Additional Protocol II contains a mere 15 substantive articles, whereas Additional Protocol I has more than 80."). [Lee Sender]

(d). Finally, Adova may argue that that some protections afforded outside of Common Article 3 and Protocol II are customary international law, and therefore must be accorded to the detainees regardless of the conflict's classification . In Nicaragua v. U.S., the ICJ applied common Articles 1 and 3 of the Geneva Conventions, finding that it did not need to determine their applicability as treaties because the Conventions are a development and an expression of "general principles of humanitarian law."

Relevant Facts: Between February and December 2006 members of the Rotanian military discharged weapons six times based on ILSA's actions, resulting in 100-300 deaths and 750-1200 injuries. Four arson attacks, three for which ILSA claims responsibility, were committed against Stovian cultural and religious sites with minimal injuries but substantial

property destruction. In its written statements, ILSA promised that it would not "shrink from the challenge of confronting the oppressors" and that it would demonstrate its resolve to live free of aggression. The Shrine of the Seven Tabernacles, a site of cultural and religious significance, was destroyed in a final arson attack, killing 23. Among the dead was a body dressed in ILSA's distinctive camouflage uniform, which ILSA members wore during previous armed exchanges with the Rotanian military. In Resolution 2233, the Security Council described these events as "a series of deadly attacks," and stated that "LAPS apparently continues to attack sites in Rotania."

Adova will argue that there is no armed conflict because the attacks were nothing more than isolated internal disturbances, and the targets attacked by ILSA were not strategic military targets. Adova will argue that regardless of whether IHL applies, what theory of IHL applies, or how the detainees are classified, Rotania must provide certain fundamental rights under the Geneva Conventions and customary international law.

Rotania will argue that an armed conflict exists (and thus IHL applies) because there have been ongoing, intense, two-sided violent occurrences.

D. Applying International Humanitarian Law

Was the detention and treatment consistent with IHL?

1. Categories of Persons under IHL

   (a). Civilians

      (1) Civilians receive the most protection under IHL.

      (2) According to Articles 51(3) of Protocol I and 13(3) of Protocol II, civilians receive elevated protection "unless and for such time as they take a direct part in hostilities." See also Israel Supreme Court, Public Committee Against Torture in Israel v. Israel (2005) (for the time that civilians engage in hostilities, they don't receive civilian rights).

   (b). POWs/Lawful Combatants

      (1) Persons qualify as Prisoners of War and lawful combatants if they are members of organized armed forces, groups, and units. These groups must (a) be commanded by a person responsible for the conduct of subordinates; (b) have an internal disciplinary system that enforces rules of international law; and (c) distinguish themselves from civilians (accomplished by carrying arms openly and by having a fixed distinctive sign recognizable at a distance under Article 4 of the Third Geneva Convention). Art. 43, Protocol I.

(2) Any combatant under the power of an adverse party is a POW, and violations of international law shall not deprive a combatant of POW status, unless the combatant fails to distinguish themselves from the civilian population while engaged in an attack. However, a person who takes part in hostilities and is not entitled to POW status still receives the protection of Article 75, which provides fundamental guarantees. Art. 44, Protocol I.

(c). Protections for Civilians and POWs

Common Article 3, Article 75 of Protocol I, and Article 4 of Protocol II provide that civilians and detainees have the right to be free from torture, cruel treatment, and outrages upon personal dignity. One author argues that "stripping a person naked for interrogation . . . and the infliction of pain for interrogation are among the tactics that are patent violations of the laws of war that necessarily involve a number of proscribed forms of treatment under Geneva law." Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Transnat'l L. 811, 845 (2005). The European Court of Human Rights found violations of Common Article 3 where the prisoner endured repeated and sustained assaults and humiliations over a number of days, evidenced by significant bruising and severe pain and suffering. Selmouni v. France (1999).

(d). Unlawful/Enemy Combatants

Commentators and states have argued that a range of participants in armed conflict are neither civilians nor POWs, but instead "unlawful combatants" not protected by the Geneva Conventions. Unlawful combatants participate in hostilities at a degree of intensity equal to armed forces, but are "unlawful" because they fail to act in accordance with IHL themselves. Examples of unlawful combatants: persons who purposely attempt to blend into civilian population ; persons who target civilians and thus violate the "laws and customs of war." One author cites the commentary to Common Article 3 as support for this category, because "the protections of Common Article 3 are earned…the limitation on those protections was based upon the character and conduct of the combatants themselves." Lewis, *supra*, at 708. See also Henckaerts, *supra*, at 11 ("although the terms 'combatants' and 'civilians' are clearly defined in international armed conflicts, practice is ambiguous as to whether members of armed oppositions groups are considered members of armed forces or civilians in non-international armed conflicts.").

This exclusion is controversial because it creates a category of persons unprotected during armed conflict. The Supreme Court of Israel, relying on the principle that IHL is based on a fundamental distinction between

combatants and civilians, rejected the view that IHL allows for the "unlawful combatant" category. Public Committee Against Torture in Israel v. Israel (2005).

As a final point of contention against this category, some authorities point to Common Article 3 as customary international law such that no one could be outside the confines of its minimum protections. The fundamental guarantees in Article 75 of Protocol I arguably apply to any parties not otherwise receiving protection under IHL. Int'l Comm. Red Cross, Commentary to Protocol I. See also Article 45(3), Protocol I ("Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.")

Relevant Facts for Categorizing Detainees: ILSA admitted to engaging in hostilities. Eleven detainees were LAPS members. ILSA, a faction of LAPS, was led by Penza, and ILSA was organized and directed toward self-determination, sought independence, and its members wore unique uniforms that distinguished them from civilians. But ILSA attacked religious sites and killed civilians. The UN Security Council Resolution condemned their actions.

Relevant Facts Regarding Treatment: The detainees were half-starved, unclothed, subject to harsh interrogation tactics, and hung from chains. But the detainees were provided enough food to live, and the interrogation techniques used were to obtain information about impending attacks. No permanent injuries occurred.

Adova will argue that the detainees are civilians and accorded full protection under the Geneva Conventions. Adova may also argue that the detainees are POWs, citing ILSA's actions and organization as evidence of their militaristic nature. The infliction of torture or cruel or degrading treatment violated IHL.

Rotania will argue that the detainees were unlawful combatants, because they did not act in accordance with the laws and customs of war (specifically in committing acts of terrorism and in attacking religious and cultural sites). As unlawful combatants, the detainees would not be entitled to the protections of the Geneva Conventions, and thus the interrogation and treatment of the detainees did not violate IHL. Rotania will ultimately argue that the actions taken toward the detainees, regardless of their categorization, did not rise to a level of suffering sufficient to violate IHL.

E. Applying International Human Rights Law

Was the detention and treatment of Penza and the others consistent with IHRL?

1. International Covenant on Civil and Political Rights (ICCPR)

   (a). Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

(b). Article 9: "Everyone has the right to liberty and security of person," and "No one shall be subjected to arbitrary arrest or detention."

(c). Article 10: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

(d). Application of the ICCPR

(1) Article 2(1) of the ICCPR places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction…"

(2) The ICJ determined that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory." Israeli Wall Advisory Opinion.

(3) Similarly, the UN Human Rights Committee held that "[i]t would be unconscionable to so interpret the responsibility under article 2 of the [ICCPR] as to permit a State party to perpetrate violations of the [ICCPR] on the territory of another State, which violations it could not perpetrate on its own territory." Lopez Burgos v Uruguay.

(4) In Rasul v. Bush, the U.S. Supreme Court looked at the express terms of its agreements with Cuba and decided that the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base. Thus, although Cuba retained ultimate sovereignty, the U.S. had to allow detainees the habeas corpus right.

(5) The Inter-American Commission for Human Rights has noted that "no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights." Detainees in Guantanamo Bay, Cuba; Request for Precautionary Measures (2002).

(6) The apprehension and rendition of Penza and the others may be characterized as a "forced disappearance," as they were "abducted by persons acting on behalf of or with the acquiescence of the state, followed by a denial of information or other forms of accountability by state authorities." While the ICCPR does not expressly prohibit forced disappearances, "the Human Rights Committee and the Inter-American Court have condemned disappearances as violations of articles 7, 9 and 10(1) of the ICCPR." Leila Sadat, *Extraordinary Rendition, Torture, and*

Other Nightmares from the War on Terror, 75 George Washington Law Review 1200 (2007).

Adova will argue that the ICCPR applies and that the "forced disappearances" of the LAPS members were in violation of articles 7, 9 and 10.

Rotania will argue that the ICCPR by its own terms does not apply to territory outside of the country. Rotania will argue that the Camp is not under their "complete" jurisdiction and control, or they would have never allowed the Merkistani police onto the premises at all.

Adova will argue that even though Camp Indigo is outside Rotania's territory, the ICCPR still applies because Camp Indigo is subject to Rotania's jurisdiction. Adova will point to the fact that Rotania maintained Camp Indigo as a military and police training facility in Merkistan territory.

Adova will argue that Camp Indigo, under the Status of Forces Agreement with Merkistan, which is under Rotania's jurisdiction and control because Merkistani police had to negotiate to enter the premises initially and the Merkistani government could not close the Camp outright, but again had to negotiate terms.

2. Torture Convention

(a). Torture

(1) Article 1 defines torture as

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is having suspected of committing, or intimidating or coercing him or a third party, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

(2) Under the Torture Convention, states have many obligations with respect to combating torture: article 2 provides that states must take measures to prevent torture in any territory under its jurisdiction; article 3 prohibits states from removing individuals to other jurisdictions where they believe the individuals will be tortured; article 4 requires states to criminalize acts of torture; and article 5 provides that state parties must take measures to establish its jurisdiction over cases of torture that occurred in its territory, and that were committed by or against nationals of the state party.

(3) "The prohibition against torture is not only a principle of treaty law, but has [...] generally been considered to be a peremptory norm of customary international law from which no derogation is permitted." Leila Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 George Washington Law Review 1200 (2007).

(4) The determination of "severity" of pain or suffering is a subjective determination. Courts generally consider "all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc." European Court Human Rights, Selmouni v. France (1999).

(b). Cruel, Inhuman and Degrading Treatment (CIDT)

(1) Article 16 states that CIDT consists of acts "which do not amount to torture," without providing a specific definition.

(2) By comparison to torture, states have few obligations with respect to CIDT: Article 16 provides that state parties must take measures to prevent CIDT "in any territory under its jurisdiction . . . committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

(c). "[I]ll-treatment must attain a minimum level of severity if it is to fall within the scope of [prohibited treatment]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc." Ireland v. UK, European Court of Human Rights.

(d). In Ireland v. UK, the European Court of Human Rights found that hooding, loud music, sleep deprivation, food and drink deprivation, and stress positions were forms of CIDT. This determination was largely based on the Court's interpretation of the Convention as limiting torture to "deliberate treatment causing very serious and cruel suffering". The Court also relied on General (1975), which declared that "torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

(e). The Supreme Court of Israel has found that violently shaking prisoners, depriving them of sleep, exposing them to loud music, tying them into painful positions for long periods, and covering their heads in foul-smelling sacks to be cruel and inhuman. They also said that sleep deprivation was permitted if was a "side effect" of interrogation, but not if the "suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him

out or 'breaking' him." Judgment on the Interrogation Methods applied by the GSS, 1999.

(f). "[C]ruel treatment is treatment which causes serious mental or physical suffering and constitutes a serious attack on human dignity... "[I]nhuman treatment is an intentional act or omission, that is an act which, when judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity." ICTY, Prosecutor v. Delalic, IT-96-21-T (1998).

(g). The Committee against Torture has found the following interrogation tactics to be either torture or cruel, inhuman or degrading treatment: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill. Concluding Observations of the Committee Against Torture: Israel (1997). See also U.S. State Department Country Reports on Human Rights Practices: Jordan (2006) (describing sleep deprivation as a form of torture).

(h). The European Court of Human Rights found that hanging by the arms amounted to torture when done in "a serious and cruel nature." Aksoy v. Turkey (1996).

Adova will argue that the LAPS members were tortured in Camp Indigo because they were stripped of clothing; provided inadequate food and water; subject to hanging by the wrists from chains; and exposed to continuous bright light, uncomfortably cold temperatures, and loud discordant music, noting the various sources identifying these acts as torture. Adova will note that the acts were carried out to obtain information or a confession by instigation and with the consent of Colonel Vinitsa, a public official acting in his official capacity.

Rotania will argue that none of the acts resulted in "severe" pain or suffering, and that at worst, Penza and the others were subjected only to CIDT. Rotania will argue that there is no consensus in international law about the techniques that were used at Camp Indigo.

(a). Necessity

If the treatment was only CIDT, was the treatment necessary and therefore not a violation of the Torture Convention?

(1) The Torture Convention explicitly prohibits the use of the necessity defense in the context of torture (Art. 2), but not in the context of CIDT.

(2) "By their very nature, terrorist acts are grave violations of human rights. Therefore, to pursue security at the expense of human rights is short sighted, self contradictory, and, in the long run, self-defeating." Statement

of the Secretary General to the Security Council (Oct. 4, 2002); UN General Assembly Resolution 56/160 (2001).

(3) The Supreme Court of Israel has indicated that interrogators who use physical pressure in extreme circumstances (ticking bomb cases) may be able to rely on the necessity defense. Judgment on the Interrogation Methods applied by the GSS (1999).

Adova will argue that there was no necessity because Penza and LAPS condemned the loss of civilian lives and had no plans to hurt civilians. LAPS never intended for any civilians to be injured and they gave warning prior to the burning of the Shrine of the Seven Tabernacles to evacuate the area. Even if there was necessity, CIDT should not be permitted because it is a violation of human rights.

Rotania will argue that there was necessity because civilian lives were at risk from another terrorist attack by LAPS. Penza had announced after the destruction of the Shrine that LAPS endorsed "the taking of increasingly urgent measures" against Rotania. Colonel Vinitsa announced at a press conference that after interrogating Penza she revealed details of a number of plans for future terrorist attacks within Rotania, which, he said, "would have resulted in substantial loss of life."

III. Rotania's Prosecution of LAPS members before Military Commission

Is Rotania's prosecution of Penza and the others before the Military Commission consistent with international law?

A. Standing

Standing will depend on the theory adopted by Adova. If the focus is on the violation of Adova's territorial integrity and sovereignty, and Adova's demand for repatriation, then standing could be based on direct injury to the State. If repatriation is sought for the violation of the human rights of the abductees, then Adova is bringing the case for purposes of diplomatic protection and requires a finding of futility in order for standing to exist since there was no prior resort to local judicial remedies.

B. Male captus bene detentus

1. The maxim male captus bene detentus literally translates to "wrongfully captured, rightfully detained." Courts invoke the maxim when exercising jurisdiction over defendants who have arrived in their custody through dubious means carried out by state actors or agents, such as extraterritorial abductions.

2. There is disagreement on whether customary international law accepts the male captus bene detentus maxim as legitimate and absolute.

3. Case law challenging the maxim

(a). State v. Ebrahim, South Africa, 1991 (categorically rejecting male captus bene detentus; South African courts have no jurisdiction over persons abducted by the state from another country; relying on Dutch-Roman common law and not customary international law; citing the following principles: 1) protection and promotion of human rights; 2) importance of maintaining good international relations; and 3) healthy administration of justice)

(b). Ex Parte Bennett, England, 1993 (giving English courts discretion to stay the trial where the accused was seized abroad by illegal means; not considering the complicity of foreign government in the seizure or evidence of torture of the accused; involvement of British officials in the kidnapping was a "grave contravention of international law, the comity of nations and the rule of law generally").

(c). State v. Beahan, Zimbabwe, 1992 (holding that cross-border abduction by state actors is illegal under international law and trial court has discretion to stay trial of abducted defendant, even if the state where abduction took place consented to incursion)

(d). Regina v. Hartley, New Zealand, 1978 (trial court has discretion to stay trial of a person seized via an informal agreement between New Zealand and Australian police, even in the absence of a violation of international law)

(e). In re Jolis, France, 1934 (ordering the release of a defendant who was abducted in violation of international law by French agents in Belgium).

4. Case law applying the maxim

(a). Eichmann, Israel, 1962

Israeli agents kidnapped Nazi war criminal Adolf Eichmann from Argentina and returned him to Israel for trial. Eichmann claimed that the extraterritorial abduction negated Israel's jurisdiction. The Israeli court noted that because no extradition treaty existed between Israel and Argentina, Argentina had no obligation to deliver Eichmann to Israel, thus kidnapping was likely the only method by which Israel could obtain personal jurisdiction over Eichmann. Moreover, the Israeli court determined that Israel's violation of Argentina's territorial sovereignty was nonjusticiable and must be addressed in the international community. The Security Council condemned the abduction as a violation of international law and ordered Israel to make reparations to Argentina. However, the Security Councile did not require Israel to return Eichmann to to Argentina.

(b). Alvarez-Machain, U.S., 1992

A Mexican doctor was kidnapped from Mexico and transported to the U.S. at the behest of U.S. authorities, despite a valid extradition treaty between the

U.S. and Mexico, U.S. Supreme Court determined that abduction was no bar to the trial court's exercise of jurisdiction.

(c). Prosecutor v. Dragan Nikolic, ICTY, 2003

Nikolic was kidnapped by unknown captors in Serbia, taken across the border into Bosnia and Herzegovina, and handed over to the NATO Stabilization Force (SFOR). SFOR then remanded Nikolic to the ICTY for prosecution on charges of crimes against humanity. The Chamber held that the legitimate expectation that those accused of universally condemned crimes (genocide, war crimes, etc.) will be swiftly brought to justice, must be weighed against the principles of state sovereignty and the fundamental rights of the accused. The Chamber concluded that it is worse to allow this type of fugitive to go un-apprehended than it is to tolerate limited intrusions upon territorial sovereignty (particularly when the State has been uncooperative). The Appeals Chamber held that the Tribunal's exercise of jurisdiction over Nikolic was valid despite his extraterritorial abduction.

Where the defendant stands accused of universally condemned crimes such as genocide, crimes against humanity, and war crimes, there is a legitimate expectation that these defendants will be brought to justice swiftly. This legitimate expectation needs to be weighed against the principle of State sovereignty and the fundamental human rights of the accused.

The Chamber concluded that

> [The] damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion into its territory, particularly when the intrusion occurs in default of the State's cooperation.

Adova will point to a developing consensus among national courts of both the common law and continental traditions that it is no longer acceptable for courts to ignore the circumstances of a defendant's arrest and subsequent treatment.

Rotania will argue that the maxim is alive and well andRotania may prosecute even if the apprehension was deemed in violation of international law.

Rotania will argue, based on Eichmann and Alvarez-Machain, that extraterritorial abduction does not negate the jurisdiction of its tribunal; and that the issue of whether Rotania violated Adova's sovereignty is unrelated and tangential to its proper exercise of jurisdiction over the detainees.

Rotania will point to the ICTY's decision in Nikolic to justify both its intrusion into Adovan territory and continuing exercise of jurisdiction over the detainees. Rotania will claim that,

on balance, effective prosecution of terrorism offences outweighs Adova's right to territorial sovereignty. Rotania will also use this case to highlight the consequences of Adova's failure to cooperate with the detainees' apprehension.

C. Mistreatment as a bar to jurisdiction

1. U.S. v. Toscanino, U.S. ,1974

   An Italian citizen was allegedly kidnapped from Uruguay, transported to Brazil, tortured (deprivation of nourishment, alcohol flushed in his eyes and nose, electrocuted through his ears, toes, and genitals) then transferred to the United States for trial. The Circuit Court of Appeals commented (in dicta) that due process requires the court to divest itself of jurisdiction when the government deliberately, unnecessarily and unreasonably invades the rights of the accused. If the mistreatment was proven on remand (which it was not), the trial court would have been obligated to decline jurisdiction.

2. Prosecutor v. Dragan Nikolic, ICTY (2003)

   The Appeals Chamber adopted the approach of the Trial Chamber, which held that jurisdiction should be declined "in cases where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over. [And this] would certainly be the case where persons acting for ... the Prosecution were involved." The Appeals Chamber also quoted the U.S. Toscanino case in support of the conclusion that certain human rights violations are so serious that they require jurisdiction be declined. Although the ICTY upheld jurisdiction in Nikolic, it did so based on the relatively benign and alleged mistreatment of the accused.

3. Barayagwiza, ICTR, 1999

   In this case, the Int'l Criminal Tribunal for Rwanda Appeals Chamber held that a court has discretion to decline jurisdiction if there are "serious and egregious violations" of the rights of the accused, and exercising jurisdiction would be detrimental to the court's integrity.

Adova will argue that the male captus bene detentus principle can only be relied upon when the captured individual has: a) not been tortured or severely mistreated; and b) will receive a fair trial. Adova will argue that because of the mistreatment and illegal capture perpetrated by or with the approval of Rotanian officials, Rotania's continuing exercise of jurisdiction over the detainees does not comport with the evolving standards of international due process. Adova will distinguish Nikolic, based on the relatively benign and alleged mistreatment of the accused.

D. Violation of due process as a bar to prosecution

Is the Military Commission too unfair to prosecute?

1. The Rotanian Military Commissions:

   (a). allow witnesses to testify under conditions of anonymity

   (b). does not permit the accused to challenge the admissibility of evidence on the grounds that it was derived from coercive interrogations

   (c). assign military lawyers to defendants, and forbid defendants from retaining counsel of their own choosing

   (d). do not allow defendants or their counsel to inquire into the sources of evidence that is deemed classified for military or security reasons

2. International Human Rights Law

   (a). Article 10 of UDHR: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination ... of any criminal charge against him."

   (b). Article 7 of ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (No derogation permitted.)

   (c). Article 14 of ICCPR: "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ... everyone shall be entitled to the following minimum guarantees, in full equality: ... to communicate with counsel of his own choosing; ... to defend himself in person or through legal assistance of his own choosing; ... To examine, or have examined, the witnesses against him; ... Not to be compelled to testify against himself or to confess guilt."

   (d). Article 4 of ICCPR: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant..."

Adova will first argue that international human rights law (IHRL) applies, and then failing that, international humanitarian law (IHL). Adova will argue that the detainees are not prisoners of war, but civilians accused of regular (as opposed to war) crimes. As a result the detainees are entitled to the due process guarantees of IHRL, illustrated above. If this fails, then Adova will argue that the detainees have POW status and are entitled to the due process protections afforded to them under Common Article 3.

Adova will argue that the Rotanian Military Commission violate article 10 of ICCPR, requiring an independent and impartial tribunal, because the Commission was created by the executive, is administered by the executive and serves the purposes of the executive, thus they are neither independent nor impartial.

Adova will argue that Rotania has violated article 7 of the ICCPR when it subjected the detainees to the harsh treatment and interrogation at Camp Indigo, and allowing Rotania to continue with its trials of the detainees sanctions this violation of international law.

Adova will argue that the Military Commissions' procedural rules violate guarantees of defendants' choice of counsel, examination of witnesses, and the right to be free from self-incrimination contained in article 14 of the ICCPR; and as a result the prosecution is in violation of international law. Adova will argue that there is no emergency threatening Rotania's life as a nation, and therefore no derogation from Article 14 is justified. In addition, Adova will argue that even if an emergency does exist, the denial of the accused's rights to be free from self-incrimination, confrontation of witnesses, and to counsel of their own choosing, are not strictly required by the exigencies of the situation.

Rotania will argue that this situation amounts to a public emergency that threatens the life of the nation, and as such, that Rotania is entitled to derogate from certain of its obligations under the ICCPR. Rotania will argue that its declaration of an emergency serves as the required official proclamation. Moreover, sufficient notice of Rotania's intent to derogate from certain articles of the ICCPR was given, if not to the secretary general, then when Rotania declared its intention to try the perpetrators of the arsons via its Military Commissions before the Security Council.

Rotania will argue that under the circumstances it is necessary: to hold the trials in secret for the protection of witnesses and the accused; to deny the accused access to certain evidence and witnesses; and to restrict the pool of counsel available to the accused for the protection of national security.

Rotania will alternatively argue that no derogation took place as Rotania satisfied its Article 10 and 14 obligations. Rotania will argue that the Commissions are independent and impartial because no other branch of government is permitted to directly intervene in the Commission's deliberations. Rotania will argue that although the accused may not challenge the admissibility of evidence against him obtained by virtue of coercion, there is no rule related to the weight such evidence must be given. Thus the accused is not compelled to testify against himself or to confess guilt. Rotania will also argue that defendants are provided with competent counsel that can adequately assist the accused with presenting a defense.

3. International Humanitarian Law

(a). The Geneva Conventions

Common Article 3 of the Geneva Conventions guarantees that detainees be tried "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Protocol I and II enumerate many of these indispensable guarantees including the right of the accused to be free from self incrimination, to examine witnesses, and to be present at trial. Art. 75(4), Protocol I; Art. 6(2), Protocol II.

(b). Hamdan, U.S., 2006

Addressing the legality of military tribunals set up by U.S. Government for prosecuting accused terrorists captured in the "war on terror," the U.S. Supreme Court held that Common Article 3 of the Geneva Conventions applied to the actions of the United States. The Court held that a procedure denying the accused the right to appear at his trial and to be presented with the evidence against him was a violation of Common Article 3. In addition, the Court determined (with reference to the commentary on the Fourth Geneva Convention) that the phrase "regularly constituted court" means ordinary military court and excludes all special tribunals.

Adova will argue that even if the court accepts that in this case IHRL does not apply, at least the Geneva Conventions apply because this is an armed conflict taking place within the territory of a high contracting party.

Adova will argue that the Military Commissions are not "regularly constituted," and that Rotania is obligated to try the detainees within Rotania's regular civilian or military system of justice.

Rotania will argue that the detainees are not entitled to all the protections of the Geneva Conventions because the detainees are unlawful combatants not falling into any categories of protected persons under the Geneva Conventions.

Rotania will rebut Adova's claim that regularly constituted courts are ordinary military courts by citing the Red Cross treatise Customary International Humanitarian Law for the proposition that a regularly constituted court is established according to laws and procedures already in force in a country. And the Rotanian military commissions are established in accord with the 1980 Act.

E. International standards of due process

1. The standards of due process that can be found in IHL are not specific. They provide general guidance on the rights of the accused and implore states to pursue fair and impartial resolution of cases. For the content of international due process norms, commentators look to the rules and procedures of international (e.g., Nuremberg trials, ICTY and ICTR, International Criminal Court) and national courts.

2. Anonymous Witnesses

   (a). The Nuremberg Charter and Rules of procedure provided explicitly for the right to cross-examine hostile witnesses and to be represented by a defense counsel chosen from a list of predetermined defense attorneys. However, affidavits and depositions were employed extensively to prove guilt, thus neutralizing any significant defense "right" to cross-examine most hostile witnesses.

(b). The ICTY has allowed anonymous witnesses. In Tadic, based on language in its enabling legislation the Trial Chamber granted the prosecution's request to completely obscure the identities of severely traumatized witnesses from the defense. The Chamber looked to the seriousness of the crime suffered by the witnesses, the real risk to their safety without a witness protection program, the importance of the evidence to the case, and the trustworthiness of the witnesses. The ICTY has not granted complete witness anonymity since its ruling in Tadic.

3. Use of Coerced Testimony

(a). The ICTY Statute Article 22(g) provides that the accused has the right "not to be compelled to testify against himself or to confess guilt." In addition the ICTY Rules of Procedure and Evidence require that interrogations by the prosecutor be recorded via audio or video. This allows the judges to observe the accused's demeanor and enhances their ability to determine if statements are being made voluntarily or are coerced in any way.

(b). The Rome Statute Article 55 explicitly guarantees the rights of the accused to be free from self-incrimination and from any form of coercion, threat or duress, torture, cruel, inhuman or degrading treatment. Moreover, Article 69)7) prohibits admission of evidence obtained in violation of internationally recognized human rights if the violation casts substantial doubt on the reliability of the evidence or would damage the integrity of the proceedings.

(c). A and Others vs. Secretary of State for the Home Department (British House of Lords, 2005) (2005 UKHL 71) – Here the issue was whether evidence obtained by torture could be introduced in court, if British authorities were not party to the torture. The Law Lords voted 7-0 that evidence obtained by torture could not be received by a court regardless of the responsible party's identity responsible for the torture. However, by "a slender majority of four to three, the Lords decided that ... English courts will admit evidence where there is a possibility, but not where there is a probability, that it has been obtained by torture." (42 U. Rich. L. Rev. 37, 44 (2007))

4. Choice of Counsel

(a). Every international criminal tribunal, from Nuremberg to the ICC, has provided the accused with the right to present a defense and be represented by his or her choice of legal counsel.

5. Inquiry about source of evidence

(a). The Nuremberg trials allowed the accused, on motion, to examine documentary evidence held by the prosecutors.

(b). Both the ICTY statute and the Rome Statute provide for the accused to examine, or have examined, witnesses against him and to obtain the presence

of witnesses on his behalf. Moreover, the accused is entitled to have all evidence, both incriminatory and exculpatory, presented to him.

6. Conspiracy

(a). According to the U.S. Supreme Court in Hamdan, conspiracy is not traditionally considered a crime in violation of the law of war, and hence would not normally be tried by a military tribunal.

Adova will point to the rules of international tribunals and rulings in other cases addressing standards of due process as proving that these principles embody customary international law and that the Rotanian Commissions violate these most basic standards.

Adova will also argue that the detainees are civilians and thus should not be tried by a Military Commission. UN Human Rights Committee, General Comment 13/21 (trying civilians before military tribunals presents "serious problems as far as the equitable, impartial and independent administration of justice."

Rotania will argue that each international tribunal was developed in response to a specific set of atrocities, and each enjoys the luxuries of time and security because the crimes being tried are not ongoing. Rotania will also argue that it is not bound to follow the rules of the international tribunals or those of any other country; that at most it is bound to follow Common Article 3 and general due process guarantees under IHRL, which it has done.

IV. Adova's Prosecution of Kirgov and Vinitsa

Is Adova's prosecution of former President Kirgov and former Colonel Vinitsa consistent with international law?

A. Standing

Rotania can base jurisdiction on ICJ case law holding that prosecuting a leader in violation of the head of state immunity doctrine is a direct injury to the state and requires no exhaustion of remedies. Belgium v. Congo.

B. Jurisdiction

In order for Adova to prosecute Kirgov or Vinitsa, Adova must have jurisdiction over the person.

1. Customary International Law

There are four other types of jurisdiction under customary international law:

(a). Territorial Principle: A State has jurisdiction over a person when an element of the crime has been committed within its territory.

(b). Protective Principle: The protective principle says that states can exercise jurisdiction when it is necessary to protect vital State interests. Under case law, these include treason, espionage, violation of immigration policies and terrorism.

(c). Passive Personality Principle: Jurisdiction may be predicated on the passive personality principle when a crime is committed outside the territory of the State, and the harm was inflicted against a national of the State by a person who is not a national of the State.

(d). Universal Principle: The universal principle allows prosecution of certain international offenses no matter where they occur or who committed them. The Pinochet cases list torture as a *jus cogens* crime and states that as such, states are justified in taking universal jurisdiction of torture wherever it is committed.

2. Torture Convention

(a). Article 5 of the Torture Convention states:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate.
>
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

(b). Article 8(4) of the Torture Convention states that crimes of torture "shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1."

Adova will argue that it has jurisdiction to prosecute Kirgov and Vinista because the victims are citizens, who were abducted within the territory of Adova. Adova will further claim that jurisdiction over crimes of torture is universal.

Rotania will argue that Adova does not have jurisdiction because the alleged torture, which is the focus of the accusations, took place outside the territory of Adova. Rotania will

further note that there is no vital State interest to protect, and that jurisdiction cannot be predicated on the citizenship of the victims on its own. Rotania will reject the contention that, with the exception of piracy, there are no crimes over which there is universal jurisdiction. ICJ, Belgium v. Congo.

Adova will argue that they have jurisdiction over Vinitsa and Kirgov based on Article 5 of the Torture Convention, which grants jurisdiction over alleged offenders present in the territory of a State Party, or where the victim is a national of a State Party. Adova will argue that Adovan nationals (Penza and the others) were harmed by Vinitsa and Kirgov, and that Vinitsa was present in Adova at the time of his capture, thereby allowing Adova to exercise jurisdiction over them.

Rotania will argue that Article 5 of the Torture Convention does not confer jurisdiction; that it instead merely requires Party states to take measures to establish jurisdiction over cases of torture committed against nationals or by offenders present in the territory.

Rotania will alternatively argue that Article 5 does not apply since the acts in question at most amounted to only cruel, inhuman, and degrading treatment, which is not covered by Article 5, and for which there is no similar "jurisdictional" provision in the Torture Convention.

Adova will argue that a reading of Article 8(4) under the jurisdictional framework of Article 5 calls for offences of torture committed in one state to be regarded as having taken place in the state of which the victim is a national for purposes of extradition. Thus, Adova will argue that under the Torture Convention, Rotania should extradite Kirgov so that Adova may prosecute Kirgov in its national courts.

C. Head of State Immunity

1. Head of State Immunity Generally

(a). The Head of State immunity doctrine has long been recognized under international law. Under this doctrine, Heads of State are immune from prosecution for acts done while in office to ensure that "leaders are free to perform their governmental duties without being subject to detention, arrest, or embarrassment in a foreign country's legal system." United States of America v. Noriega, U.S., 1990.

(b). There are two types of immunity: *ratione materiae* and *ratione personae*.

(1) *Ratione materiae* immunity attaches only to acts committed in a person's official capacity or for acts of state, and it continues forever (*i.e.,* it extends past the official's period of office).

(2) *Ratione personae* immunity is a complete immunity attaching to the person of the Head of State or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the

benefit of the state. This immunity does not extend beyond the official's period of office.

(c). Article 7 of the ICTY statute specifically states that a person's official capacity does not preclude them from being prosecuted for crimes such as torture. This doctrine is also in Article 6(2) of the ICTR Statute and Article 7 of International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind (1996).

(d). U.N. General Assembly Resolution 3074 on the Principles of International Co-operation on Persons Guilty of War Crimes and Crimes Against Humanity (1973) states that in accordance with article 1 of the Declaration on Territorial Asylum (1967), States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.

(e). The prohibition against torture and the lack of immunity for committing torture is arguably a jus cogens norm.

Rotania will argue that the Belgian Arrest Warrant case supports their claim that Kirgov is immune from Adova's prosecution. In this case, the ICJ recognized the firmly established customary doctrine that Heads of State and Heads of Government enjoy immunity from civil and criminal jurisdiction in other States.

Adova will argue that the Belgian Arrest Warrant case involved a warrant issued for the presently serving Minister for Foreign Affairs, and thus, that the case only applies to sitting heads of state. Since Kirgov is no longer a sitting Head of State, Adova will argue that he is no longer protected by the doctrine of immunity *ratione personae*.

Adova will note that in the Belgian Arrest Warrant Case, the ICJ states in dicta that the Head of State immunity doctrine does not bar all prosecutions. Thus, Adova will argue that in these circumstances, Adova may prosecute since the acts were international crimes committed against Adovan citizens.

Adova will note that in the Pinochet cases, the House of Lords found that Pinochet, as a former Head of State, had no Head of State immunity for the crime of torture. The Law Lords first determined that immunity for a sitting Head of State is absolute and inviolable(*ratione personae*), but immunity for a former Head of State is limited to his official acts done while he was in office (*ratione materiae*). They then determined that after a State has become party to the Torture Convention, that State has adopted the position that torture or the implementation of a torture regime cannot be considered an official act by a representative of that State. Thus, the Law Lords concluded that parties to the Torture Convention have effectively surrendered any claim of immunity for former state officials who are accused of committing acts of torture, because their acts cannot be classified in the limited category of official actions done while in office to which Head of State immunity attaches forever.

Adova will argue that that the prohibition against torture is a jus cogens norm and thus is a crime for which there can be no immunity.

Rotania will counter with the argument that the alleged acts amount at most to cruel, inhuman, and degrading treatment, not torture. Rotania will argue that a state's waiver of immunity for former heads via the Torture Convention does not extend to CID, which is minimally addressed by the Torture Convention and exempted from many of its provisions.

2. Torture Exception to Head of State Doctrine

   (a). Commentators argue and courts have found that the Head of State Doctrine does not apply to acts that violate the Torture Convention.

   (b). Both states are signatories to the Torture Convention. The Torture Convention applies to "public officials," including heads of state.

   (c). Article 2 of the Torture Convention states that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture."

   (d). Article 5 of the Torture Convention states that State parties shall take measures to establish jurisdiction over crimes of torture when the alleged offender is a national of that State.

Rotania will argue that Kirgov had Head of State immunity for the acts that he performed and ordered while he was President of Rotania.

Adova will rely on the last of the Pinochet Cases, in which the House of Lords concluded that Pinochet had no immunity from prosecution for the crime of torture because of an implicit waiver of Head of State immunity in the Torture Convention. Article 2, Torture Convention.

Rotania will counter that there is no specific article of the Torture Convention that explicitly prohibits or waives this immunity. Rotania will point out that the House of Lords in the Pinochet case examined the fact that in other instances when a convention meant to exclude the immunity of the Head of State, it was specifically stated.

Rotania will further argue that under the Torture Convention the Head of State immunity doctrine is trumped only in the case of prosecutions for torture, but not prosecutions for cruel, inhuman, or degrading treatment. Rotania will make the factual argument that the treatment of the detainees does not rise to the level of torture and is at worst cruel, inhuman, and degrading.

D. Command Responsibility

1. The modern doctrine of command responsibility holds commanders responsible for crimes committed by subordinate members and other persons subject to the

commander's control. Responsibility exists when the commander has failed to prevent or punish subordinates for their unlawful actions.

2. The prevailing rule is that military commanders are liable for acts committed by subordinates if the commander knew, or had information which should have enabled the commander to conclude based on circumstances at the time, that a subordinate was committing a breach of international law, and that the commander did not take all steps within his or her power to prevent that breach. In re Yamashita, U.S., 1949. This is evidenced in Article 7(3) of the ICTY Statute, which states that if the commander knew or should have known, then they are responsible for the acts of their subordinate. Further, this standard was also adopted by Article 28 of the ICC Statute and Article 6(3) of the ICTR Statute. This level of responsibility was also indicated in Article 86(2) of Additional Protocol I to the Geneva Conventions.

3. Kirgov's Command Responsibility

Rotania will argue that Kirgov did not order the interrogation and therefore did not have command responsibility. Instead, he only gave authorization to Vinitsa to do only that which was consistent with international law. He also did not order the Battalion to cross the border. Kirgov did not have reason to know that Vinitsa was going to torture the Adovans.

Adova will argue that Kirgov was took command responsibility through his May 1 speech where he praised Vinitsa for his work and promoted him to the rank of General. Adova will also point out Rotania's obligation to prevent and punish acts of torture, which Rotania failed to met when it did not investigate or punish Vinitsa and the interrogators. Instead, he rewarded Vinitsa with the promotion. Further, Adova will argue that Kirgov should have known that it was possible Vinitsa would use torture or inhuman treatment to get confessions out of individuals he considered terrorists.

4. Vinitsa's Command Responsibility

Adova will note that Vinitsa was a uniformed member of the Rotanian military and the commanding officer of the 373rd at the time of Penza's apprehension and interrogation. Adova will also argue that paragraph 4 of Vinitsa's March 15 Proclamation (listing authorized interrogation techniques) explicitly authorized behaviors inconsistent with generally accepted principles of international law. Adova will characterize this authorization as a command which proves direct command responsibility. Alternatively, Adova will argue that it may prosecute Vinitsa as commander under the principle of universal jurisdiction.

Rotania will argue that the acts at issue are subject to Protocol II to the Geneva Conventions, which are silent on the issue of command responsibility (if the court accepts that Camp Indigo is "Rotanian territory"). Rotania will argue that the appropriate forum for an investigation and prosecution, if any, is a Rotanian court-martial or other domestic criminal court.

Adova will rebut that Kirgov's actions and Vinitsa's statement in his March 15 proclamation indicate that Vinitsa will not be investigated or subject to criminal liability within Rotania.

E. Vinitsa – Responsibility as a Military Lawyer

It is a generally accepted practice that a lawyer may not knowingly advise a client to violate the law. American Bar Association, Model Rules of Professional Conduct, Rule 1.2(d) (2007); Solicitors' Code of Conduct (U.K), Rule 2.01(1)(a) (2007).

Arguments in this area are particularly policy-oriented, as there has been little treatment by international courts since the Nuremberg tribunals as to the liability of lawyers (particularly military lawyers) for international crimes. Agents for the applicant and respondent will need to advocate their positions almost entirely on policy grounds.

Adova will argue that Col. Vinitsa was aware of the illegality of the practices he advised President Kirgov to adopt. Adova will argue that Vinitsa "can no more escape . . . responsibility by virtue of [his] judicial robes than the general by his uniform." Opening Statement of Prosecution in the Nazi Judges Cases (Justice Cases). Adova will also note that while Vinitsa may have focused on Rotania's explicit treaty obligations, he completely ignored developments in customary international law, and may point to the Nuremberg conviction of Franz Schlegelberger, the Third Reich's Minister of Justice. United States v. Alstoetter (The Nazi Judges Cases) (1951).

Rotania will argue that Vinitsa advised nothing that was inconsistent with Rotania's treaty obligations or customary international law. If pressed, Rotania will rely on the fact that Vinitsa's advice touched on unsettled areas of law, and thus he cannot be subject to criminal liability for giving advice to commit illegal acts. Rotania will argue that while Vinitsa's statements may have been overbroad and against the spirit of the conventions, none of them flatly contravene the conventions and as such are simply advocacy.

F. Unclean Hands Doctrine

Since Adova is seeking an equitable remedy (repatriation of Vinitsa), the unclean hands doctrine is applicable.

The ICJ and domestic courts have held that one seeking an equitable remedy cannot come to the court with unclean hands, and if the petitioner's unlawful conduct prompted or contributed to the respondent's unlawful act, than the petitioner is not entitled to relief.

Adova can claim that Rotania is barred from complaining of the arrest of Vinitsa because the State authorized his crime and rewarded him rather than punished him afterwards, prompting Adova to undertake its own prosecution of him.

APPENDICES

Appendix A: People and Places

373rd Infantry Battalion: A Rotanian military unit. Nicknamed "the Enforcers." Commanded by Colonel Gommel Vinitsa. Responsible for the maintenance of security (including that of the Shrine of the Seven Tabernacles) in the Upland Plateau. Involved in the investigation of ILSA activities, as authorized by President Vinitsa. Responsible for the apprehension of Samara Penza and her subsequent transfer to the Rotanian Military Commission.

Adova, Republic of: Applicant in this case. Predominantly Litvian. Financially supports LAPS, which champions the Litvian cause and has been associated with attacks on Stovian sites in Rotania. Home state of various leaders of LAPS, including individuals arrested and detained by Rotania. Arrested former Rotanian military leader Gommel Vinitsa and issued an arrest warrant for the former Rotanian President Michael Kirgov, in reaction to Rotania's treatment of its detained citizens.

Camp Indigo: A Rotanian military installation located in the state of Merkistan. Governed by a bilateral Status of Forces Agreement between Rotanian and Merkistan. Site of the alleged abuses of Samara Penza and her compatriots.

Committee of Thirty Elders: Caretakers of the Shrine of the Seven Tabernacles. Seven members of the Committee were killed in a fire on 22 April 2007, which utterly consumed the Shrine.

ILSA (Independent Litvia Solidarity Association): Radical wing of LAPS. Advocates for the complete secession of the Upland Plateau from Rotania. Claims responsibility for various attacks on Stovian sites in Rotania.

Kirgov, Michael: Former President of Rotania. Acting president during attacks on Stovian sites in Rotania. Adopted three step plan in response to attacks: declaring state of emergency, establishing Military Commission, and authorizing 373rd Battalion to take necessary measures to apprehend perpetrators. Currently facing arrest warrant issued by Adova for charges of torture in connection with apprehension of Penza and other LAPS members.

LAPS (Litvian Advancement and Protection Society): Social and political organization dedicated to the promotion of Litvian-minority interests in Rotania. Chaired by Samara Penza. Represented in the Rotanian Parliament by twelve of its members.

Litvians: A cultural/ethnic group possessing its own language and religion. Minority ethnic group in Rotania. Majority ethnic group in Adova.

Makar, Zoran: An alleged Adovan citizen and member of LAPS. Appeared on 12 April 2007 at a Merkistani police station near Camp Indigo, claiming to have escaped from the Camp. Allegedly a fellow detainee of Samara Penza. First to report the abuses alleged to have occurred against detainees by Rotanian officials at Camp Indigo.

Merkistan, State of: A state 750 km east of Rotania. Site of Camp Indigo. Demanded the immediate closure of Camp Indigo after discovery of injured detainees, including Zoran Makar.

Penza, Samara: National of Adova and the General Chairman of LAPS. Currently in the custody of the Rotanian Military Commission, charged with conspiracy, arson, murder and aiding in a terrorist operation, in connection with the attacks on Stovian sites in Rotania.

Rotania, State of: Respondent in this case. Site where various attacks against Stovian cultural and religious sites have taken place in the name of the Litvian cause. Responsible for the apprehension, interrogation and detention of suspected leaders and perpetrators of the attacks. Authorized creation of special Military Commission.

Rotanian Military Commission: Rotanian tribunal created by executive order of President Kirgov, with special rules of judicial procedure laid out by the Protection of the State Act of 1980 which authorizes its formation.

Shrine of the Seven Tabernacles: The holiest site of the Stovian religion and the repository of the most sacred icons of the Stovian faith, located in the Rotanian village of Zima, approximately 100 kilometers from the Upland Plateau. Destroyed by an arson attack on 22 April 2007, in which 22 clergy and staff were killed.

Stovians: A cultural/ethnic group possessing its own language and religion. Majority ethnic group in Rotania. Minority ethnic group in Adova.

Sybilla, Kingdom of: Dissolved in 1970. Consisted of the combined geographic areas of Adova and Rotania.

Upland Plateau: A district of Rotania and home to most of the Litvian minority of Rotania. Considered to be the center of Litvian culture.

Vinitsa, Gommel: Retired General of the Rotanian Military. Served as Colonel and commanding officer of the 373rd Battalion during attacks on Stovian sites in Rotania. Responsible for apprehension of Penza and other LAPS members. Currently in custody of Adovan authorities facing charges of torture in connection with apprehension of Penza and other LAPS members.

Appendix B: Timeline

1970	Sybilla dissolves into Adova and Rotania. LAPS movement emerges among the Litvians of the Upland Plateau. ¶1
Jan 2006	ILSA begins to take more measures in open defiance of the government, including strikes and protest throughout the Upland Plateau. ¶12
Feb 2006	Rotania's 373rd Infantry Battalion makes presence far more visible in Upland Plateau, appearing at mine entrances and public gatherings. ¶13
Feb-Dec 2006	Six disturbances occur in the Upland Plateau in which members of the 373rd Infantry Battalion discharged their weapons. Litvian casualties. ¶15
1 Jan 2007	Samara Penza issues public statement associating LAPS with a self-determination movement. ¶16
	Asahi Shimbun prints manifesto by ILSA claiming endorsement by Penza and announcing that dramatic measures will be taken. ¶17
1 Jan – 24 Feb 2007	Penza remains withdrawn at an undisclosed location offering no comment on violence attributed to ILSA. ¶18
7 Jan 2007	Principal Stovian Church of the Upland Plateau is set ablaze. No injuries. ¶18
8 Jan 2007	Leaflets bearing ILSA insignia distributed claiming responsibility for church attack. ILSA later confirms responsibility for Stovian Church arson. ¶18
Jan 2007	373rd Infantry Battalion stations a squadron near Shrine of the Seven Tabernacles in Zima. ¶19
20 Jan 2007	Second attack on Stovian cultural and religious site in Upland Plateau. Acknowledged by ILSA. Property loss, no loss of life. ¶18
10 Feb 2007	Third attack on Stovian cultural and religious site in Upland Plateau. Acknowledged by ILSA. Property loss, no loss of life. ¶18
19 Feb 2007	Fire of unknown origin in the House of Stovian Culture in Adova City. Not acknowledged by ILSA. Property loss, no loss of life. ¶18
20 Feb 2007	ILSA leaflets found suggesting future attack. ¶18
22 Feb 2007	Late afternoon. Message delivered from ILSA to the Chairman of the Committee of Thirty Elders, warning of an ILSA demonstration and urging that no one be near the Shrine in the evening starting at 2100 hours. ¶19

	Chairman convenes Committee and sends urgent message to Rotanian Ministry of Justice and central command of 373rd. No response received. ¶20
	9:00pm. Seven members of the Committee take position in Shrine. ¶20
	9:30pm. Enormous fire consumes Shrine, completely destroying the Shrine and killing all seven Committee members, 15 security staff and groundskeepers. One unidentified burned body found in military camouflage. ¶21
23 Feb 2007	Rotanian President declares seven days of national mourning. ¶22
24 Feb 2007	Penza issues statement on behalf of LAPS, expressing condolences for the loss of the deaths of 15 innocent workers, but heartily endorsing the increasingly urgent measures to achieve Litvian freedom. ¶23
25 Feb 2007	Rotanian Foreign Minister summons Adovan Ambassador to inquire whether apparent presence of Penza in Adova should be interpreted as official Adovan support for what he called "terrorist attacks." ¶24
	Adovan Ambassador sends diplomatic communication to Rotanian Minister, condemning acts resulting in civilian deaths and confirming its resolve against terrorism. ¶24
2 Mar 2007	President Kirgov announces three point plan: (1) nationalizing military reserves, (2) establishing Military Commission, and (3) empowering 373rd to take necessary measures. Col. Vinitsa initiates massive hunt for Penza and other ILSA leaders in Upland Plateau. No one found. ¶25
7 Mar 2007	UN Security Council Resolution 2233 adopted, condemning attacks and calling on Adova to cooperate. ¶28
15 Mar 2007	Colonel Vinitsa issues Proclamation announcing his rules of engagement. ¶29
3 Apr 2007	Colonel Vinitsa announces that Penza is in custody, that she had been detained, confessed to her involvement in attacks, and revealed details of future planned attacks. ¶31
4 Apr 2007	Adovan Prime Minister holds press conference to express outrage and to demand return of Penza and others. ¶32
12Apr 2007	Zoran Makar, member of LAPS, appears at Camp Indigo in Merkistan, reporting his detention, torture, and escape. ¶33

13 Apr 2007	Shortly after sunrise. Merkistani policemen demand access to Camp Indigo and observe prisoners in distress speaking Litvian language. ¶34
	5pm. Merkistani policeman return and find no sign of the prisoners. ¶34
14 Apr 2007	Merkistan delivers note verbale to Rotanian Ambassador demanding closure of Camp Indigo. Rotania does not protest. ¶35
15 Apr 2007	Adova sends diplomatic note, protesting the violation of its territory and demanding repatriation of Penza and others. Request unanswered. ¶36
	Adova recalls Ambassador to Rotania, declaring him persona non grata. ¶36
26 Apr 2007	373rd Infantry Battalion transfers Penza and the other LAPS members detainees to Rotanian Military Commission in Rotania. Penza and others charged. ¶37
1 May 2007	President Kirgov appears before Parliament, announcing (1) prosecution of Penza and others before Commission, (2) Penza's confession, and (3) prevention of a planned attack by ILSA. Vinitsa promoted to General. ¶38
8 May 2007	Vinitsa retires from military and becomes professor and foreign ministry advisor. ¶38
17 May 2007	President Kirgov resigns from office. Vice President assumes presidency. ¶39
20 Jul 2007	Adovan national police raid Stovian restaurant in Adova and take Gommel Vinitsa into custody. Vinitsa charged in capacity as military commander and legal advisor. Former President Kirgov charged as co-conspirator, warrant issued, request made with INTERPOL. ¶40
	Rotania immediately issues diplomatic note to Adova, demanding Vinitsa's release and claiming that Adova has no legitimate basis for exercising criminal jurisdiction over the two. ¶41
21 Jul 2007	Adovan Foreign Minister responds, stating that Kirgov and Vinitsa are criminally liable, and protesting the prosecution of Penza. ¶42
Early Aug 2007	Adova and Rotania suspend trade relations and dispatch troops to border. ¶43
Aug 2007	UN Secretary-General urges countries to resolve situation peacefully and submit dispute to the ICJ for adjudication. Adova and Rotania agree to submit matter to ICJ. ¶43

Appendix C: Basic Materials

The following is a list of Basic Materials that were provided to teams as a starting point for research. Teams are encouraged to conduct their own research beyond the sources listed below. Teams are also warned that inclusion of any particular text in the Basic Materials does not entail that the content of the text reflects current prevailing theory or practice or that it is necessarily applicable to the facts of the Compromis.

First Batch

Statute of the International Court of Justice (ICJ Statute)

Charter of the United Nations, 26 June 1945 (UN Charter)

Vienna Convention on the Law of Treaties, 23 May 1969 (VCLT)

Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (Third Geneva Convention)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Fourth Geneva Convention)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Protocol I)

Protocol Additional to the Geneva Convetions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (Protocol II)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (Torture Convention)

International Covenant on Civil and Political Rights, 16 December 1966 (ICCPR)

U.N. General Assembly Resolution 49/60

U.N. General Assembly Resolution 59/191

U.N. Security Council Resolution 1368, including the Meeting Record

U.N. Security Council Resolution 1373, including the Meeting Record

U.N. Security Council Resolution 1526, including the Meeting Record

U.N. Security Council Resolution 1566, including the Meeting Record

U.N. Security Council Resolution 1617, including the Meeting Record

Second Batch

Nicaragua v. United States Of America, Case Concerning The Military And Paramilitary Activities In And Against Nicaragua, Judgment on the Merits, International Court of Justice (June 27, 1986),

Democratic Republic of the Congo v. Belgium, Arrest Warrant of 11 April 2000, International Court of Justice (Feb. 14, 2002)

The Israel Wall Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, International Court of Justice (July 9, 2004)

Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (Oct. 2, 1995),

Prosecutor v. Nikolic, Case No. IT-94-2-AR73 , Decision on Interlocutory Appeal Concerning Legality of Arrest, ICTY Appeals Chamber (June 5, 2003)

Abella v. Argentina, Case No. 11.137, Inter-American Commission on Human Rights (Nov. 18, 1997)

United States v. Alstoetter (The Justice Cases), Nuremberg Tribunal (1948)

Regina v. Bartle and others ex parte Pinochet Ugarte , Regina v. Evans and others ex parte Pinochet Ugarte (No 3), United Kingdom House of Lords (Mar. 24, 1999)

Rasul v. Bush, United States Supreme Court , 542 U.S. 466, 124 S.Ct. 2686 (June 28, 2004)

Hamdan v. Rumsfeld, United States Supreme Court, 126 S. Ct. 2749 (June 29, 2006)

Draft Comprehensive U.N. Convention against International Terrorism, 12 Aug. 2005

Michael Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 36 Case Western Reserve Journal of International Law 359 (2004)

Leila Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 George Washington Law Review 1200 (2007)

Jordan Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Columbia Journal of Transnational Law 811 (2005)

Appendix D: Introduction to International Law

This section is an introduction to public international law for judges who might not have professional experience or training in the field. There are important distinctions between international law and most domestic legal systems. The most significant for the moot judge is the rigid definition of what sources of law are acceptable before the Court.

A. General

The conduct and rules of the International Court of Justice (ICJ) are governed by the Statute of the Court. Under Article 38(1) of the ICJ Statute, the ICJ may consider the following sources of international law in order to decide disputes before it:

(a) treaties or conventions to which the contesting States are parties;

(b) international custom, as evidence of a general practice accepted as law;

(c) general principles of law recognized by civilized nations;

(d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Commentators disagree as to whether these sources are listed in order of importance.

Judges from common-law systems should note the status of precedent. Article 59 of the ICJ Statute states that decisions of the Court are binding *only on the parties to the case*, and are without formal effect as precedent. In practice, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(1)(d). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those evaluations in later decisions.

Resolutions of the United Nations General Assembly are not, of themselves, binding upon the Court. Although Resolutions may be evidence of customary international law, the General Assembly is not analogous to a domestic legislature.

B. Treaties

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty. Rules regarding treaty procedure and interpretation are defined in the Vienna Convention on the Law of Treaties.

Article 26 of the VCLT sets out the fundamental principle relating to treaties, *pacta sunt servanda*, which provides, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Once a State becomes a party to a treaty, it is bound by that treaty.

Article 34 of the VCLT adds that a treaty does not create rights or obligations for State that are not parties to the treaty. However, even if a State is not party to a treaty, the treaty may

serve as evidence of customary international law. Article 38 of the VCLT recognizes this "back-door" means by which a treaty may become binding on non-parties. The ICJ has also recognized this possibility in the F.R.G. v. Denmark, North Sea Continental Shelf Cases, 1969. Judges should be aware, however, that situations arise where some provisions of a treaty – for example, many provisions of the International Covenant on Civil and Political Rights -- may reflect or codify customary international law, while other parts do not.

C. Customary International Law

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has binding force of law because the community of States treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a State whether or not it has affirmatively assented to that rule.

In order to prove that a given rule has become a rule of customary international law, one must prove two elements: widespread state practice and *opinio juris* – the mutual conviction that the recurrence (of state practice) is the result of a compulsory rule.

"State practice" is the objective element, and simply means a sufficient number of states behaving in a regular and repeated manner consistent with the customary norm. Evidence of State practice may include a codifying treaty, if a sufficient number of States sign, ratify, and accede. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create "regional customary international law" or whether the practice of particularly affected states, *e.g.* in the area of space law, can create custom that binds other states, although the ICJ has acknowledged the possibility.

Opinio juris is the psychological or subjective element of customary international law. It requires that the State action in question be taken out of a sense of legal obligation, as opposed to mere expediency. Put another way, *opinio juris*, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it." MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

Customary international law is shown by reference to treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations. Each of these items might be employed as evidence of State practice, *opinio juris*, or both.

In the North Sea Continental Shelf Cases, the ICJ stated that the party asserting a rule of customary international law bears the burden of proving it meets both requirements.

D. General Principles of Law

The third source of international law consists of "general principles of law." Such principles are gap-filler provisions, utilized by the ICJ in reference to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature (e.g., burden of proof and admissibility of evidence). Many others, such as waiver, estoppel, unclean hands, necessity, and *force majeure,* may sound familiar to a common-law practitioner as equitable doctrines. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited general principles of international law.

It is important to note, however, that "equity" in this sense is a source of international law, brought before the court under Article 38(1)(c) of the Statute of the ICJ. It is an *inter legem* (within the case) application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono* (that is, to simply decide the case based upon a balancing of the equities), a separate matter treated under Article 38(2) of the Statute.

E. Decisions and Publicists

The final source of international law is judicial decisions and teachings of scholars. This category is described as "a subsidiary means of finding the law." Judicial decisions and scholarly writings are, in essence, research aids for the Court, used for example to support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they address international law directly or demonstrate a general principle.

"Teachings" refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published article constitutes an Article 38(1)(d) "teaching." However, the provision is expressly limited to teachings of "the most highly qualified publicists." For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. Within the context of a specific field, there are additional scholars who would be regarded as "highly qualified publicists."

F. Burdens of Proof

In the Corfu Channel Case, the ICJ set out the burdens of proof applicable to cases before it. The Applicant normally carries the burden of proof with respect to factual allegations contained in its claim by a preponderance of the evidence. The burden falls on the Respondent with respect to factual allegations contained in a cross-claim. U.K. v. Albania, 1949.

Appendix E: Suggested Questions

International Law Generally

1. Is there any priority or hierarchy of the sources of international law mentioned in Art. 38 of the ICJ Statute?

2. What is customary international law? What are the elements of customary international law?

3. When asserting a state's obligation under customary international law:

   A. Where can we find evidence of relevant State practice?

   B. What is *opinio juris*? How is it proven?

4. Is the ICJ bound by its prior decisions?

5. What are *travaux preparatoires*? When are the records of the drafting and negotiations of a treaty relevant?

6. What specific remedies is the Applicant/Respondent seeking? Is the ICJ permitted by its Statute to grant those remedies?

7. What is the basis of standing for the party seeking relief?

8. What is the standard of proof with respect to this issue? Which party bears the burden of proof?

9. If this Court determines that the lack of factual certainty allows multiple, conflicting inferences, what should this Court do then?

10. If a State has conflicting obligations under two treaties (or under a treaty on the one hand and customary international law on the other), which obligation controls? What principles does the Court use to determine which obligation controls?

Apprehension of the LAPS members

1. Is LAPS a terrorist organization? If so, what legal consequence does this label have?

2. Since there is an absence of a universal definition of terrorism, is it appropriate to use any? Is there a "freedom fighter" exception to the definition of terrorist?

3. Does the right to self-determination take precedence over the international community's interests in combating terrorism?

4. Do Litvians have a right to commit acts of violence in their fight for self-determination? Is LAPS entitled to represent the Litvian population in this struggle?

5. Can LAPS be considered an organ of the Adova government?

6. How can Rotania prove Adova's responsibility given that government organs and officials were not directly involved in the attacks?

7. (To Rotania) Why was the attack directed only against LAPS members and not against Adovan military facilities? Was this action designed to prevent further support by Adova to LAPS?

8. Has the ICJ ever legitimized states to take self-defensive action against private actors?

9. Does Security Council Resolution 2233 implicitly authorize Rotania's military action against Adova?

10. Does Adova's failure to comply with Security Council resolution 2233 legitimize military action?

11. (To Rotania) Why didn't Rotania wait for a Security Council Resolution specifically confirming the state of necessity and authorizing the use of force?

12. (To Adova) Did Adova investigate the involvement of Penza and other Adovan citizens in the LAPS attacks in Rotania? How does a failure to investigate affect the analysis?

13. Can the interpretation of Security Council resolution 2233 be informed by the content of the verbatim records? When is it possible to resort to the *travaux preparatiores* to interpret an international instrument? Should we not first rely on the practice of Security Council?

14. (To Adova) Given Adova's support of LAPS, were there any other viable options that Rotania could have taken to protect its citizens from future LAPS attacks?

15. Who should bear the burden of proof on the question of Adova's responsibility for the acts of LAPS?

<u>Detention and Treatment of the LAPS Members</u>

1. Should the Court apply International Humanitarian Law (IHL) or International Human Rights Law (IHRL) to determine whether Penza and the other LAPS members were detained and treated in a manner consistent with international law?

2. Do the violent interactions between the Rotanian military and ILSA since February 2006 amount to an armed conflict? Why or why not?

3. If we find that an armed conflict exists, was it non-international or international? Does your answer change how the Court evaluates Rotania's treatment of the detainees?

4. Are there certain protections that Rotania must provide to the detainees regardless of whether these circumstances were armed conflict or mere internal disturbances? Are there certain protections that Rotania must provide to the detainees regardless of whether these circumstances were international or non-international?

5. What protections are afforded to the detainees under IHL?

6. Is there any merit to the idea that a person who fails to follow the rules of international law should not be permitted its protections?

7. What is the detainees' status under IHL? Were they civilians, POWs, or something else?

8. Can the detainees be classified as civilians despite their involvement in hostilities? How does their membership in a group involved in hostilities preceding their detainment affect their status? How does their involvement in hostilities affect their treatment?

9. Does IHL permit detainment of individuals?

10. Does IHL permit a state to engage in harsh interrogation tactics of detainees, including hanging the detainees from chains and depriving them of clothing and sleep?

11. Was Camp Indigo under Rotanian jurisdiction?

12. Is the presence of a Status of Forces Agreement between Merkistan and Rotania significant?

13. How should the Court define the phrase "severe pain or suffering" when interpreting Article 1 of the Torture Convention?

14. What is the principle difference between torture and cruel, inhuman and degrading treatment? What factors should the Court consider when deciding which acts are torture and which are cruel, inhuman and degrading treatment?

15. Why is it important that Colonel Vinitsa had knowledge of the interrogations at Camp Indigo?

16. Does it matter if the injuries to Makar or the other LAPS members at Camp Indigo are permanent?

17. What is the significance of Penza's confession during interrogation?

18. Is it important that the interrogation of Penza and other LAPS members might have prevented future attacks?

19. Is necessity ever a valid defense for torture? For cruel, inhuman and degrading treatment?

Rotania's Prosecution of the LAPS Members

1. What is the basis for standing here? Are the Applicants making this claim on their own behalf (direct harm), or are they making a claim on behalf of their nationals, the detainees?

2. What evidence of state practice or *opinion juris* supports or refutes the claim that international law no longer favors the doctrine of *mala captus bene detentus*?

3. (To Adova) Why should Adova's interest in preserving its territorial sovereignty outweigh Rotania's interest in prosecuting terrorism?

4. (To Rotania) Why should Rotania's interest in prosecuting alleged acts of terrorism outweigh Adova's interest in preserving its territorial sovereignty?

5. Isn't the issue of the violation of Adova's territorial sovereignty separate from the issue of Rotania's proper exercise of jurisdiction over the detainees?

6. How much weight should this court give to the alleged mistreatment of the detainees in determining whether Rotania's exercise of jurisdiction is consistent with international law?

7. Can severe mistreatment of the accused strip a court of its jurisdiction?

8. What body of law governs Rotania's prosecution of the detainees, International Human Rights Law (IHRL) or International Humanitarian Law (IHL)? Why?

9. What are the basic due process rights guaranteed to all persons under IHL and IHRL?

10. Does the Rotanian Military Commission uphold the due process rights recognized by the International Covenant on Civil and Political Rights (ICCPR) and Common Article 3 of the Geneva Conventions?

11. What is required for Rotania to validly derogate from its obligations under the ICCPR? Has Rotania satisfied these requirements?

12. How can we consider the Rotanian Military Commission to be "regularly constituted" if they were created solely in response to the terrorist actions of LAPS?

Adova's Prosecution of Kirgov and Vinista

1. What type(s) of jurisdiction is Adova asserting?

2. Does the basis for Adova's jurisdiction over Vinista and Kirgov differ? Should it?

3. Do acts of torture give rise to universal jurisdiction? What about cruel, inhuman, and degrading treatment?

4. How does the Torture Convention play into the jurisdictional argument?

5. Does jurisdiction exist under the Torture Convention if the alleged mistreatment is determined to be merely cruel, inhuman, and degrading?

6. Are Adova and Rotania signatories to any treaty or convention that would make President Kirgov liable for the alleged mistreatment under a theory of command responsibility?

7. How can this court determine state liability under a theory of command responsibility?

8. Does respondent have standing to claim Head of State immunity?

9. What is the difference between immunity *rationae personae* and immunity *ratione materiae*?

10. How does the Torture Convention play into the Head of State Immunity argument?

11. Why should a national case, the Pinochet case, be considered by this court in making it's decision?

12. Is Colonel Vinitsa, in his capacity as a lawyer, responsible for the acts alleged to have been committed based on the legal advice he gave?