

International Court of Justice

2008

Case concerning certain criminal proceedings in Adova and Rotania

The Republic of Adova

v.

The State of Rotania

Memorial for the Applicant

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SUCH CONCLUSION IS NECESSARY IF THE CAT IS TO REMAIN A VIABLE TREATY, BECAUSE PURSUANT TO THE CAT, IN ORDER TO CONSTITUTE TORTURE, AN ACT MUST BE COMMITTED “BY OR WITH THE ACQUIESCENCE OF A PUBLIC OFFICIAL.” IT FOLLOWS FROM THAT, THAT MOST OF THE DEFENDANTS IN TORTURE CASES WILL BE STATE OFFICIALS. CONSEQUENTLY, IF SUCH STATE OFFICIALS WERE ABLE TO CLAIM IMMUNITY FOR ACTS OF TORTURE, THE CAT WOULD BE PRACTICALLY INAPPLICABLE TO THE MAIN CULPRITS OF THE ACTS OF TORTURE. SUCH RESULT IS EVIDENTLY INAPPOSITE, BECAUSE IT WOULD SIGNIFICANTLY COMPROMISE THE PURPOSES OF THE CONVENTION, ONE OF WHICH IS TO ENSURE THAT “A TORTURER DOES NOT ESCAPE THE CONSEQUENCES OF HIS ACT.” THUS, STATE OFFICIALS FROM CAT SIGNATORIES CANNOT CLAIM IMMUNITY *RATIONE MATERIAE* FOR ACTS OF TORTURE. AS A RESULT, BECAUSE ROTANIA IS A PARTY TO CAT, MR. KIRGOV AND MR. VINITSA CANNOT CLAIM IMMUNITY *RATIONE MATERIAE* FOR THE ALLEGED ACTS OF TORTURE THAT THEY ACQUIESCED IN.29

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STATEMENT OF JURISDICTION

The Republic of Adova and Republic of Rotania have agreed to submit the present controversy for final resolution by the International Court of Justice by Special Agreement pursuant to Article 40, paragraph 1 of the Statute of this Court. In accordance with Article 36, the jurisdiction of the Court comprises all cases that the parties refer to it.

QUESTIONS PRESENTED BEFORE THE COURT

The Republic of Adova respectfully asks this Court adjudge and declare whether:

- I. Respondent have violated Adova's sovereignty by apprehending and rendering Samara Penza and other Adovan citizens given that Respondent's actions were not authorized by the UN Security Council and the circumstances of this case did not warrant a lawful exercise of self defense measures *vis-à-vis* Adova;
- II. Respondent's detention and treatment of Samara Penza and other Adovan citizens violated international law given that Respondent did not respect the provisions of humanitarian law and in any event Adovan detainees were subjected to torture and cruel and inhuman treatment;
- III. Respondent have violated international law by prosecuting Samara Penza and other Adovan citizens given that the Respondent did not have jurisdiction to prosecute them and the proceedings before its Military Commission do not meet the standards of fair trial; and
- IV. Adova acted in accordance with international law by exercising jurisdiction over Michael Kirgov and Gommel Vinitza to prosecute them for crimes committed against Samara Penza and other Adovan citizens, given that Adova had a lawful basis to exercise jurisdiction and the above Rotanian officials are not immune from prosecution.

STATEMENT OF FACTS

Since the dissolution of the Kingdom of Sybilla into the States of Adova and Rotania in 1970, their peoples have lived in peace, despite the ethnic diversity. Regrettably, statistics show vast disparities between the quality of life of the Litvian minority and the Stovian majority living in Rotania.

Shortly after Rotania's creation, the Litvian Advancement and Protection Society (LAPS), emerged in the Upland Plateau, the region with the highest concentration of ethnic Litvians and the cradle of Litvian culture. For over 30 years, LAPS encouraged social and civic initiatives, such as the study of the Litvian culture and supported hospitals, schools and old-age homes for the Litvian community. In the past, LAPS has reported Adovan financial support for these charitable and educational projects.

Since 1985, the generally praised Ms. Samara Penza has been the General Chairman of this support organization. For her 'peaceful, constructive and positive force for change', she was awarded the Global Institute for Human Rights' highest prize and achieved widespread recognition among NGOs.

Despite the Litvian minority's participation, through elected LAPS representatives, in the democratic institutions of the State of Rotania, their aspirations for political autonomy have consistently been rejected by the overwhelming Stovian majority.

This stonewalling incited the Independent Litvian Solidarity Association (ILSA), a militant wing of LAPS, to undertake civil actions such as strikes and demonstrations. Subsequently, the 373rd Infantry Battalion, nicknamed 'the Enforcers', took up positions at workplaces and public

gatherings. This battalion was under command of Colonel Vinitza, a member of various Stovian nationalist organizations.

Throughout 2006, up to 300 Litvians died and around 1200 were injured at disturbances where members of the 373rd discharged weapons. Unfortunately, the Rotanian government declined to provide information to establish responsibility for this lethal violence.

On 1 January 2007, Ms. Samara Penza lamented the Litvian's dire human rights situation in a public statement, published in major Rotanian newspapers the next day. She called upon everyone supporter of peace to show dedication to the Litvian cause. In response, ILSA announced that it saw her statement as an endorsement of their more radical views.

On 7 January, a Stovian church in the Upland Plateau burned down, fortunately, no-one was injured. Throughout the month of January, several arsons were reported, three of which were claimed by ILSA. None of these resulted in loss of life.

On 22 February, a fire, in which 23 people were caught, consumed the Shrine of the Seven Tabernacles, a Stovian site of worship. Earlier that day, a warning had been delivered, urging to vacate the premises. This was not considered until 8.00 PM. Eventually, the government and the military were contacted, but of no avail.

On 24 February, Samara Penza issued a statement in which she extended sincere condolences on behalf of LAPS and condemned the loss of life.

On 2 March, Rotanian President Kirgov declared a national emergency. The President authorized Colonel Vinitza to take any measures necessary to apprehend the perpetrators. Additionally, President Kirgov sanctioned the establishment of a military commission to prosecute those

responsible for the attacks. The military commission's rules of procedure allow witnesses to testify anonymously; deny coercion as a ground for challenging the admissibility of evidence; deny defendants to retain counsel of their own choosing and allow certain sources of evidence to be inaccessible to the defendant for unspecified "military" or "security" reasons.

Mid-March, Colonel Vinitza, invoking the presidential authority, proclaimed the rules of engagement in the Upland Plateau. Vinitza authorized his soldiers to engage in practices including deprivation of sleep, clothing and food, subjection to the extremes of heat and cold, and interrogation techniques involving infliction of non-lethal pain.

On 7 March, the UN Security Council adopted Resolution 2233. The resolution, called on Adova to cooperate in the apprehension of any suspects of the attacks on its territory. Adova was asked to certify within 15 days that it had conducted a diligent search.

On 3 April 2007, Colonel Vinitza told the press that already several weeks ago his forces had captured Samara Penza and a dozen other LAPS members on the territory of Adova and that they were held at an undisclosed location in a third state.

Consequently, the Prime Minister of Adova was appalled at the violation of Adova's sovereignty by Rotanian armed forces. He requested Rotania to reveal the location of the detainees in order to allow access to delegates from the Red Cross and insisted on the prompt return of Adovan citizens. Rotania did not respond.

On 12 April, Mr. Zoran Makar, claiming to be Adovan citizen and LAPS member, appeared at the police station near Camp Indigo, a Rotanian military base in Merkistan.

Mr. Makar reported that he had escaped from the Camp, where he and other Adovan citizens, including Samara Penza, had been held for over three weeks. He further claimed that he and other prisoners had been stripped, were provided inadequate food and water, were subject to intermittent hanging by the wrist from chains and were exposed to continuous bright light, uncomfortably cold cell temperatures and loud discordant music.

A medical examination of Mr. Makar revealed corresponding conditions of malnourishment, sleep-deprivation and bruises around his wrists.

The following morning, Merkistani policemen entered Camp Indigo and found approximately 20 disoriented and confused detainees in varying states of undress. Because of translation problems, the police decided to come back later that day with interpreters. When they subsequently returned at 5 p.m., the detainees had disappeared.

In response to this disturbing story, the Adovan government sent a diplomatic note to Rotania, formally complaining Rotania's violation of Adovan territory and its kidnapping and mistreatment of Adovan citizens. It accordingly petitioned for the immediate repatriation of their citizens. Rotania refused to respond and the 373rd Infantry Battalion handed over its detainees to the Rotanian Military Commission.

On 1 May, President Kirgov reaffirmed the trials before the military commission and promoted Colonel Vinitza. Now General, Mr. Vinitza retired one week later and became a member of the Foreign Ministry's Advisory Council on International Law.

On 17 May, President Kirgov, under increasing political pressure, stepped down for reasons of personal health.

On 20 July, General Vinitza was found in Adova and taken into custody. He was charged with offences under Adovan statutes implementing the Torture Convention, in connection with the apprehension and treatment of Samara Penza and others, in his capacities both as military commander and legal adviser to the President. The Adovan Attorney General also indicted former President Kirgov as a co-conspirator and requested an international warrant from INTERPOL.

Rotania sent a diplomatic note to Adova demanding that General Vinitza be released and the arrest warrant for Kirgov annulled.

On 21 July, the Adovan Foreign Minister responded stating that General Vinitza and former President Kirgov are liable for their criminal acts committed on Adovan soil and against Adovan citizens. The Adovan Foreign Minister demanded that Rotania repatriated the Adovan nationals, so Adova could conduct its own investigation according to law.

Unable to solve the dispute, Adova and Rotania agreed to submit this case to the International Court of Justice on 23 August 2007.

SUMMARY OF PLEADINGS

The Republic of Adova submits before this High court that the Republic of Rotania violated Adova's sovereignty by apprehending and rendering Samara Penza and other Adovan citizens. Secondly, it is Adova's position that the subsequent detention and treatment of Adovan citizens by Respondent violated international law. In addition, Adova claims that the prosecution of Adovan citizens before a Military Commission in Rotania was contrary to international law. Finally, it is submitted that Adova acted in accordance with international law by exercising jurisdiction over Michael Kirgov and Gommel Vinitza for crimes committed against Samara Penza and other Adovan citizens.

As regards violation of Adova's sovereignty by the Respondent, Adova maintains that Rotania acted contrary to international law as its incursion into Adova was not authorized by the United Nations Security Council Resolution 2233. Moreover, Adova claims that in the circumstances of this case Respondent cannot invoke the doctrine of self defense to justify its incursion into Adova, because, since ILSA's actions did not reach the threshold of an armed attack, Rotania cannot claim that it acted in self defense in response to an armed attack. In any event, the actions of ILSA cannot be attributed to Adova so as to make it responsible for the latter, because Adova did not exercise effective control over that organization. Finally, Adova submits that it did not aid or abet ILSA so as justify Rotania's self defense measures against it.

In connection with Respondent's detention and treatment of Samara Penza and other Adovan citizens Adova submits that Rotania violated the Geneva Conventions and its Additional Protocol I, which are applicable in this case, because the struggle between Rotania and LAPS

amounts to an international armed conflict or at the very least non international armed conflict. Adova maintains that as regards Adovan detainees Respondent did not accord the minimum standards of treatment that these international treaties guarantee to military personnel and civilians. Moreover, Adova argues that the detention and treatment of Adovan citizens by Respondent violated international human rights law, in particular the International Covenant on Civil and Political Rights and the Convention Against Torture, because the detainees, while in Respondent's custody, were subjected to torture, or at the very least cruel and inhuman treatment.

In respect of Respondent's prosecution of Samara Penza and other Adovan citizen before the Military Commission Adova argues that Rotania violated international law by failing to respect fair trial standards. It is Adova's position that the standards of international humanitarian law and international human rights law apply in any kind of armed conflict. Adova submits that the prosecution of Adovan citizens before Rotanian Military Commission violates fair trial standards, because (i) this commission is not an independent, impartial and regularly constituted tribunal, (ii) defendants cannot choose their counsel, and (iii) defendants, in contrast to the prosecutor, cannot challenge the admissibility of unlawful evidence or look into classified evidence and consequently, are denied equality of arms.

Finally, as regards Adova's exercise of jurisdiction over Michael Kirgov and Gommel Vinitza, Adova maintains that it respected international law. Firstly, Adova argues that Convention Against Torture obliged it to exercise jurisdiction over the above Rotanian officials, since both of them were complicit in torture of Adovan citizens. Additionally, Adova maintains that its

exercise of jurisdiction was authorized by the Geneva Conventions, which are applicable because the conflict in the present case is an international armed conflict and because Kirgov and Vinitsa are both responsible for grave breaches of the above treaties. Furthermore, Adova submits that Michael Kirgov and Gommel Vinitsa are not entitled to immunity for their acts, since international customary law does not recognize immunity for state officials if those officials are implicated in the most serious crimes such as torture and war crimes.

VII. PLEADINGS

A. THE APPREHENSION AND RENDITION OF SAMARA PENZA AND OTHER ADOVAN CITIZENS WAS A VIOLATION OF ADOVA'S SOVEREIGNTY AND IN CONTRAVENTION OF INTERNATIONAL LAW

Respect for the territorial sovereignty of States is an essential foundation of international relations.¹ This principle comprises a prohibition binding upon all UN members not to use armed force against the sovereignty, territorial integrity or political independence of another State.² Therefore, the armed forces of a State may not enter into another State's territory, except when authorized by the UN Security Council (hereinafter UNSC), pursuant to Article 42 UN Charter, or when that State is lawfully exercising its inherent right of self-defense, in accordance with Article 51 UN Charter.

In the case at bar, Adova submits that none of these exceptions is applicable. UNSC Resolution 2233 did not authorize Rotania's incursion into Adova's territory. Furthermore, in the circumstances of this case Rotania may not invoke self-defense to justify its violation of Adova's territorial sovereignty. Therefore, Rotania's military incursion into Adova's territory to abduct Samara Penza and other Adovan citizens violated international law.

1. Resolution 2233 did not authorize Rotania to infringe on Adova's sovereignty because the Resolution does not contain an explicit or implicit authorization for such infringement.

¹ Corfu Channel (UK v. Albania), 1949 I.C.J., 22; Island of Las Palmas Arbitration (US v. Neth.) 2 U.N.Rep.Int'l.Awards 829 (Perm.Ct.Arb. 1928); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. §188-190 [hereinafter Nicaragua case]; Friendly Relations Declaration, G.A.Res.2625 (XXV), 121, U.N.Doc. A/1883 (1970).

² Definition of Aggression, G.A.Res.3314, 143, U.N.Doc. A/9631 (1974).

A State may use force if authorized by the UNSC pursuant to Article 42 UN Charter.³ Nevertheless, it is important to keep in mind that the main purpose of the UN is to maintain international peace and security.⁴ Use of force directly contradicts the above objectives of the UN system. For that reason, when the UNSC has authorized the use of force in the past, it has done so in explicit and unambiguous terms, and only as a measure of last resort, when other means of restoring international peace failed.⁵ Therefore, UNSC Resolutions dealing with threats to international peace should be interpreted restrictively, in the absence of clear and explicit authorization to use force. Nowhere in Resolution 2233 can such an unambiguous authorization to use force be found. The simple affirmation of Rotania's right to self-defense in Resolution 2233 did not give Rotania any new rights, additional to those contained in the UN Charter. Indeed, such reference only meant that Rotania could undertake self-defense measures, if the requirements of Article 51 were met, which however was not the case, as will be demonstrated below.

However, if this Court were to find that the UNSC may implicitly authorize the use of force, it is Adova's position that no such implicit powers have been granted to Rotania.

It is a well established rule of interpretation, originally forged in the law of treaties, that when interpreting a legal text, attention may be paid to its context, including the preparatory works that led to its adoption.⁶ The verbatim record reflecting the discussions that led to the adoption of Resolution 2233 confirms that the UNSC did not intend to authorize Rotania's forceful incursion into Adova. Indeed, during those discussions a suggestion to include a clause "authorizing all

³ U.N. Charter, Art. 42.

⁴ *Id.* art. 1.

⁵ S.C.Res. 83, U.N.Doc.S/1511 (1950); S.C.Res. 678, U.N.Doc.S/RES/678 (1990).

⁶ Vienna Convention Law of Treaties, Art. 31-32; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J., §111-115.

necessary means to apprehend the leaders of LAPS who are present in the territory of Adova” was rejected from the final draft resolution at the insistence of the majority of the permanent UNSC’s members.⁷ Furthermore, the verbatim record shows that some of those members consented to Resolution 2233 in the understanding that it did not include an authorization to use force or violate any nation’s territorial integrity.⁸

Therefore, since Resolution 2233 does not either explicitly or implicitly authorize Rotania to infringe on Adova’s territorial sovereignty, the Respondent may not rely on this act of the UNSC to justify the illegal abduction of Samara Penza and other Adovan citizens in Adovan territory.

2. Rotania did not have a right of self-defense vis-à-vis Adova

Adova recognizes that under international law, a State may exercise its right of self-defense. However, this right may only be used in response to an armed attack⁹ attributable to a State.¹⁰ In the case at bar, ILSA’s actions do not reach the threshold of an armed attack as established by this Court. Furthermore, ILSA’s actions are not attributable to Adova since Adova did not aid or abet ILSA, and ILSA did not act under the control of Adova. Thus, Rotania did not have the right to undertake self-defense measures against Adova.

2.1 The acts of ILSA did not reach the threshold of an armed attack

In order to constitute an armed attack, an act or series of acts have to reach the threshold of the “most grave” form of the use of force.¹¹ Recently, this Court has shed some light on what should

⁷ Compromis, Appendix II.

⁸ Compromis, Appendix II, Statement of Gamma and Delta.

⁹ U.N. Charter, Art. 51; Nicaragua case, §§195-211; Legality of the threat or use of nuclear weapons, Advisory Opinion, 1996 I.C.J. §38.

¹⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. §139 [hereinafter Wall case]; Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. §§146, 147.

¹¹ Oil Platforms (Iran v. U.S.), 2003 I.C.J. §§186-187, §§191-192; Nicaragua case §§101, 103.

be considered an armed attack: the Court concluded that a series of military attacks aimed at civilian and military targets, involving the use of fire arms, mines and missiles and resulting in dozens of casualties did not amount to a “most grave” form of the use of force, and that therefore they did not constitute an armed attack. Moreover, this Court held that even if these separate incidents were hypothetically attributable to a single State, then still they did not reach such level of gravity as to be considered an armed attack.¹²

Adova sincerely regrets the violent events that occurred in Rotania. However, it is Adova’s position that these incidents fall far short from the level of gravity that is required for an action to be considered an armed attack under Article 51 UN Charter. The actions carried out by ILSA between 7 January and 24 February 2007 were primarily aimed at causing property damage and they did not involve the use of firearms or any other form of mechanical or advanced weapons.¹³ During these disturbances not a single bullet was shot.¹⁴ Thus, in the present case, the arson attacks by ILSA can neither individually nor in combination amount to the “most grave” form of use of force as to constitute an armed attack.

2.2 In addition, no armed attack is attributable to Adova.

For a State, in order to exercise its right of self-defense in response to an armed attack, this armed attack has to be attributable to a State.¹⁵ An armed attack can be attributed to a State if it was committed by State organs, or if the State was substantially involved through persons acting on the instructions of, or under the control of that State.¹⁶ In the instant case, there is no evidence that Adovan State organs were involved in the attacks. Furthermore, ILSA’s attacks can in no

¹² *Id.*, §§186-187, 191-192.

¹³ *Compromis* §§18-21.

¹⁴ *Id.*

¹⁵ *Wall case*, §139; *Nicaragua case*, §195; O. SCHACHTER, *THE LAWFUL USE OF FORCE BY A STATE AGAINST TERRORISTS IN ANOTHER COUNTRY*, in H.H. HAN, *TERRORISM & POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL* 243, 249 (Oceana 1993).

¹⁶ *Nicaragua case*, §195.

manner be attributed to the Republic of Adova, because Adova did not aid or abet ILSA, nor did Adova have effective control over its operations.

2.2.1 Adova did not aid or abet in ILSA's operations

An armed attack can be attributed to a State, if the State is substantially involved in the activities of armed groups, which carry out armed attacks against another State.¹⁷ Although in the jurisprudence of this Court no clear definition of “substantial involvement” has been produced, it incorporates acts such as intentionally aiding and abetting, or “harboring” armed groups.¹⁸

Nothing in the *Compromis* suggests that Adova supported ILSA or that the Adovan government was actively involved in sheltering Samara Penza and other LAPS members present in Adova. Adova not only did not support ILSA's actions but it emphatically condemned them.¹⁹ Although Adova provided financial assistance to LAPS as a social and civic organization,²⁰ Adova never provided any form of direct assistance to ILSA, the radical wing of LAPS and the one allegedly responsible for the arsons in Rotania. Moreover, there is no indication in the *Compromis* that Adova continued supporting LAPS after 2004, when ILSA embarked on a process of further radicalization towards more aggressive means.

¹⁷ Definition of Aggression, *supra* note 2.

¹⁸ International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, art. 2.3(d) U.N.Doc.A/51/10 (1996); C. GRAY, *THE USE OF FORCE AND THE INTERNATIONAL LEGAL ORDER*, IN *INTERNATIONAL LAW* 600 (ed. M.D. Evans 2003).

¹⁹ *Compromis* §24.

²⁰ *Id.* §5.

2.2.2 Additionally, no armed attack was committed by persons acting on the instructions of, or under the direction or control of Adova

A State can also lawfully exercise its right of self-defense, in a situation where an armed attack is committed by private parties, but that attack nevertheless is imputable to a State.²¹ This is only the case when State control over the parties is such that the parties can be perceived as acting on behalf of that State.²² According to this Court, an armed attack by private persons can be imputed to a State, if that State exercised effective control over the operations of those private persons.²³ This Court held that financial, logistical and intelligence support, military training and the provision of arms could not by itself amount to effective control in the absence of evidence that a State actually directed or enforced the perpetration of criminal acts by the private parties.²⁴ In the case at bar, there is no evidence that Adova had any influence on either LAPS' or ILSA's agendas, activities or allocation of the funds. Thus, Adova was not involved in LAPS operations to such an extent as to exercise effective control over ILSA. Consequently, ILSA's actions are not imputable to Adova.

B. THE SUBSEQUENT DETENTION AND TREATMENT OF SAMARA PENZA AND OTHER ADOVAN CITIZENS VIOLATED INTERNATIONAL LAW

Adova submits that the detention and treatment of Adovan citizens by Rotania violated international law. Adova will establish that Rotania breached international humanitarian law (hereinafter IHL), since the struggle between Rotania and LAPS amounts to an international or at the least a non-international armed conflict. Moreover, the detention and treatment violated

²¹ Nicaragua case, §116; International Law Commission, Draft Articles of State of Responsibility for Internationally Wrongful Acts, art. 8, G.A. 56th Sess., Supp. No. 10 (A/56/10) [hereinafter DASR].

²² Nicaragua case, §166.

²³ *Id.* §115; DASR, Art.8.

²⁴ Nicaragua case, §§108-115; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn.&Herz. v. Serb.&Mont.), 2007 I.C.J. §§391-393.

human rights (hereinafter HR) law, in particular the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT) to which both Adova and Rotania are party.

1. The treatment of Samara Penza and other Adovan citizens violated IHL

1.1 The armed conflict between LAPS and Rotania is an international armed conflict or in any event a non-international armed conflict

The Geneva Conventions (hereinafter GCs) and its Additional Protocol I (hereinafter AP I) to which both States are a party, are applicable in armed conflicts of an international nature.²⁵

Conflicts are considered to be international when meeting the standards of Common Article 2 GCs or those of Article 1(4) AP I. Pursuant to the latter, the rules governing an international armed conflict apply in case of an armed struggle of peoples exercising their right of self-determination.

This right is guaranteed by international law and can be invoked when fighting alien occupation,²⁶ meaning the forced control of a State over a dominated people within its borders.²⁷

In the case at bar, Adova submits that the Litvian people in Rotania struggles for self-determination in reaction to their oppression, constituting an alien occupation in the Upland Plateau by Rotania. The Upland Plateau is the heart of Litvian culture²⁸, but is occupied by Rotania, which is subjugating the Litvians. The dire situation of Litvians in the Upland Plateau is exemplified by significant disparities in literacy, income and life expectancy compared to

²⁵ GCs, Common Article 2; AP I, Art. 1(3)-(4).

²⁶ I.C.C.P.R., Art. 1; AP I, Art. 1(4); G.A.Res.2625(XXV), 123-124, U.N.Doc. A/RES/2625(XXV); G.A.Res.3103, §3, U.N.Doc. A/9030.

²⁷ D. Schindler, *The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols*, 163 RECUEIL DES COURS 117, 138 (1979-II); ICRC Commentary, Art. 1(4)AP I, p.54.

²⁸ Compromis §2.

Stovians.²⁹ Litvians in Rotania have been severely disadvantaged due to the fact that principal means of economic development are in the hands of Stovian owners.³⁰ On multiple occasions, Litvian social initiatives aiming at correcting these injustices have been violently suppressed by the Rotanian armed forces, resulting in the killing of between 100 and 300 Litvians, and the injuring of around 1200.³¹ Moreover, Litvians have repeatedly been frustrated in their attempts to alleviate their deploring situation through democratic means.³² In the light of the above, Litvians felt obliged to resort to forceful means, to defend their right of self-determination.³³ Hence, since this armed conflict arises from the exercise of self-determination, the GCs and AP I applies.³⁴

In any event, if this honorable Court does not consider the conflict to be international, Adova submits that the conflict is non-international. In the present case, Rotania has recognized that it was in a state of armed conflict with LAPS.³⁵ Consequently, if the armed conflict with LAPS cannot be deemed international, it necessarily must be non-international. Therefore, Rotania is obliged to at least respect the standards of Common Article 3 GCs, which lays down minimum standards applicable in all armed conflicts.³⁶

²⁹ Compromis §4.

³⁰ Compromis §13.

³¹ Compromis §15.

³² Compromis §§8, 12.

³³ Compromis §§16-17.

³⁴ AP I, Art. 1(4).

³⁵ Compromis, Appendix III, §1.

³⁶ Nicaragua case, §220.

1.2 Rotania violated the GCs and AP I by failing to provide Samara Penza and other Adovan citizens with the protection required under IHL

1.2.1 Rotania failed to afford to Samara Penza and other Adovan citizens the treatment required for Prisoners of War required by the GCs

If the conflict is international in nature, the GCs and AP I accord protection to Prisoners of War (hereinafter PoWs). Pursuant to Article 44 AP I, PoWs are combatants who fall into the power of the adverse party. A combatant is any member of the regular armed forces and all organized armed groups and units under a responsible command.³⁷

PoWs only lose their status if they do not distinguish themselves from the civilian population in situations where this was possible or if they do not carry their arms openly.³⁸ In such case they shall still benefit from protection equivalent in all respects to that accorded to PoWs.³⁹ In any event, whenever a person who has taken part in hostilities claims PoW status or appears to be entitled to such status, he shall be presumed to be a PoW and will thus benefit from the same protection until a competent tribunal determines otherwise.⁴⁰

In the instant case, the perpetrators of the arson attacks have been recognized by Rotania to be combatants in the armed conflict between LAPS and Rotania.⁴¹ In order to prevent further attacks, Rotania searched for the commanders of LAPS⁴² and once found, prosecuted them.⁴³ Hereby, Rotania acknowledged the command structure of LAPS. Moreover, LAPS combatants distinguished themselves from the civilian population during the attacks by wearing distinctive

³⁷ AP I, Art. 43.

³⁸ *Id.*, Art. 44(3).

³⁹ *Id.*, Art. 44(4).

⁴⁰ GC III, Art. 5; AP I, Art. 45.

⁴¹ Compromis, Appendix §1.

⁴² Compromis §27.

⁴³ Compromis §37.

camouflage suits with insignia associated with ILSA and by carrying their arms openly.⁴⁴ Therefore, once LAPS combatants fell into the power of Rotania, they were entitled to PoW status and the protection guaranteed by GC III. At least, they are entitled to this protection, since they must be presumed to be PoWs.

Article 13 GC III requires PoWs to be treated humanely at all times. Moreover they may never be exposed to any form of physical or mental coercion and when they refuse to answer during interrogation, they cannot be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.⁴⁵ Furthermore, PoWs cannot be subject to close confinement.⁴⁶ They must be provided with sufficient food and clothing.⁴⁷ For women prisoners of war, separate conveniences must be provided.⁴⁸

As evidenced by the testimony of Zoran Makar, one of the PoWs held in detention along with Samara Penza and other LAPS members in Camp Indigo, the treatment in the camp breached Rotania's obligations towards captured PoWs. This treatment included deprivation of food and water, hanging by the wrists from chains resulting in bruises, being stripped and deprived of clothes, sleep deprivation by means of continuous bright light, loud discordant music and uncomfortable cold cell temperatures.⁴⁹ Makar's testimony has been corroborated by his medical examination and findings of Merkistani police during their visit in the camp.⁵⁰ From this it is clear that Rotania's treatment of Adovan detainees comes not at all near the protection granted to PoWs

⁴⁴ Compromis §21; Clarification 4.

⁴⁵ GC III, Art. 17.

⁴⁶ *Id.*, Art. 21.

⁴⁷ *Id.*, Art. 25-27.

⁴⁸ *Id.*, Art. 29.

⁴⁹ Compromis §33.

⁵⁰ Compromis §§33-34.

1.2.2 In the alternative, Rotania breached the GCs by not affording Samara Penza and other Adovan citizens the protection owed to civilians

If this Court would consider that captured members of resistance movements cannot reasonably be presumed to be PoWs, they must be considered to be civilians, protected within the meaning of GC IV if the conflict is international in nature. Indeed, this convention applies to those who find themselves in the hands of a Party to the conflict, including those nationals of a neutral State without normal diplomatic representation in the detaining State.⁵¹ As, in the case at hand, Adova has no diplomatic representation in Rotania,⁵² their nationals are not excluded from the protection under GC IV. This protection entails an obligation to treat them humanely with respect for their persons and honor; moreover, civilians are protected against all acts or threats of violence and insults.⁵³ It is explicitly prohibited to exercise physical or mental coercion against them, in particular to obtain information.⁵⁴ A belligerent party may not take any measure that causes physical suffering to people in their hands.⁵⁵ In the alternative, in case of a non-international armed conflict, Common Article 3 GCs prohibits inhuman treatment.

As demonstrated above, the detainees in the present case physically suffered from the inhuman treatment in Camp Indigo. Moreover, Samara Penza has been interrogated by soldiers who were authorized to use several types of coercive interrogation techniques, including the infliction of non-lethal pain,⁵⁶ until she had provided information.⁵⁷ For all these reasons, the detention and treatment of Samara Penza and other LAPS members violated IHL.

⁵¹ GC IV, Art. 4; ICRC Commentary Art. 4 GC IV, p.50.

⁵² Compromis §36.

⁵³ GC IV, Art. 27.

⁵⁴ *Id.*, Art. 31.

⁵⁵ *Id.*, Art. 32.

⁵⁶ Compromis, Appendix III, §4.

⁵⁷ Compromis §31.

2. The detention and treatment of Samara Penza and other Adovan citizens violated international HR law

Adova submits that international HR law applies irrespective of the existence of an armed conflict.⁵⁸ As will be established in this section, Rotania arbitrarily arrest and detained the Adovan citizens and subjected them to torture or at the very least to cruel and inhuman treatment, in violation of the CAT and the ICCPR, to which both Rotania and Adova are parties.

2.1 Samara Penza and other Adovan citizens are arbitrarily arrested and detained by Rotania

Pursuant to article 9(1) ICCPR, no-one shall be deprived of his/her liberty except in accordance with a procedure established by law. Since the act of abduction in foreign territory itself constitutes an arbitrary arrest,⁵⁹ Rotania violated this provision in the instant case by abducting Samara Penza and other Adovan citizens from their home country.⁶⁰

2.2 The treatment of Samara Penza and other Adovan citizens by Rotania amounts to torture

Under the CAT, torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person to obtain information or confession, to punish, intimidate or coerce, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a person acting in an official capacity.⁶¹ The prohibition of torture has widely been recognized as non-derogable⁶². Adova submits that confinement of prisoners in

⁵⁸ G.A.Res. 2675(XXV), §1, U.N.Doc. A/8028 (1970).

⁵⁹ Casariego v. Uruguay, Comm.No. 56/1979, 92, §11 U.N. Doc. CCPR/C/OP/1 (1984); U.S. v. Toscanino 500 F.2d 267, 277-278 (1974).

⁶⁰ Compromis §31.

⁶¹ C.A.T. (1984), Art. 1.

⁶² C.A.T., Art. 1; I.C.C.P.R., Art. 7; E.C.H.R., Art. 3; I.A.C.H.R., Art. 5(2) ; A.C.H.P.R., Art. 5; Arab Charter on Human Rights, Artt. 4(c), 13(a). Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte(No. 3), 1 AC 147, 198 (2000) [hereinafter Pinochet-III]; Filartiga v. Pena-Irala 630 F.2d 876; Furundzija case, 121 ILR 213, 260-2; Al-Adsani v. UK, 2001-XI Eur.Ct.H.R. §61; THIRD US RESTATEMENT OF

very painful conditions, exposition to loud music and extremely uncomfortable temperatures for prolonged periods, and deprivation of sleep for prolonged periods constitute torture when practised together or in combination with other cruel, inhuman or degrading treatment.⁶³

In the present case, the treatment authorized by Colonel Vinitza includes such techniques.⁶⁴ From the testimony of Zoran Makar, it is clear that the authorized techniques have been used in combination with other cruel, inhuman and degrading treatment. Namely, for the duration of several weeks, he was subjected to a combination of exposure to extremes of cold, deprivation of food, short of starvation, deprivation of sleep, exposure to loud discordant music and other cruel treatment.⁶⁵ As a result, apart from visible physical injuries, he was mentally completely disoriented.⁶⁶

All these techniques practised together, for an extended period of several weeks amount to torture. Given that Samara Penza and other LAPS members were subjected to the above treatment⁶⁷, which was authorized by Rotania's officials⁶⁸ and took place in a military base controlled by Rotania, Rotania violated international HR law.

2.3 In any event, the treatment of Samara Penza and other Adovan citizens by Rotania amounts to cruel, inhuman or degrading treatment

Pursuant to Article 2 ICCPR and Article 16 CAT, a Party has the obligation to ensure humane and non-degrading treatment to all persons in the territory under its jurisdiction. Adova submits

FOREIGN RELATIONS LAW 161ff (St Paul) (1987-II); T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, (Oxford, 1989); J.H. BURGERS AND H. DANIELIUS, THE U.N. CONVENTION AGAINST TORTURE , 12 (Martinus Nijhoff Publishers 1988).

⁶³ Committee Against Torture, *Concluding Observations concerning Israel*, §257, U.N.Doc. No.A/52/44(Supp.) (1997).

⁶⁴ Compromis, Appendix III, §4.

⁶⁵ Compromis §33.

⁶⁶ Compromis §33.

⁶⁷ Compromis §34; Clarification 5.

⁶⁸ Compromis, Appendix III, §4.

that Rotania breached its obligations under both of these treaties since Adovan detainees were subjected to and cruel, inhuman and degrading treatment

The difference between torture and cruel, inhuman or degrading treatment is one of intensity.⁶⁹

Acts of torture necessarily constitute cruel, inhuman and degrading treatment.⁷⁰ The

determination of cruel, inhuman or degrading treatment must be decided in the light of all the circumstances of the case.⁷¹ As demonstrated above, the treatment of Zoran Makar and other

LAPS members constitutes torture. *A fortiori*, this treatment is cruel, inhuman and degrading.

Consequently it is in violation of international HR law.

C. ROTANIA'S PROSECUTION OF THE DETAINED ADOVAN CITIZENS BEFORE THE ROTANIAN MILITARY COMMISSION, INCLUDING SAMARA PENZA'S PROSECUTION FOR CONSPIRACY, ARSON, AND MURDER, VIOLATES INTERNATIONAL LAW

Adova submits that a criminal prosecution must respect fair trial standards. Both the standards of IHL and international HR law apply as protection of persons in any kind of armed conflict.⁷²

According to Adova, these standards are fundamental guarantees and thus underogable.

Furthermore, Adova submits that the prosecution of Adovan citizens before Rotanian Military Commission violates fair trial standards, since (i) this commission is not an independent, impartial and regularly constituted tribunal, (ii) defendants cannot choose their counsel, and (iii)

⁶⁹ Tomasi v France, 15 Eur.H.R.Rep.1, §41-42 (1993); Ireland v. United Kingdom, 25 Eur.Ct.H.R. (Ser.A) §167 (1978).

⁷⁰ No. 3321/67 Denmark v. Greece, No. 3322/67 Norway v. Greece, No. 3323/67 Sweden v. Greece, No. 3344/67 Netherlands v. Greece, 12 Y.B.Eur.Conv.on H.R. 186 (1969); N.S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 76-78 (Oxford-Clarendon Press, 2d ed. 1999).

⁷¹ Moldovan and others v. Romania (No.2), Eur.Ct.H.R. Apps.No.41138/98, 64320/01, §100 (2005)(<http://www.echr.coe.int/eng>); Tyrer v. United Kingdom, 26 Eur.Ct.H.R. §30; Ireland v. United Kingdom, *o.c.*, §162.

⁷² Wall case, §106.

defendants, in contrast to the prosecutor, cannot challenge the admissibility of unlawful evidence or look into classified evidence and consequently, are denied equality of arms.

1. International law imposes fair trial standards for the prosecution of the detained Adovan citizens

Adova submits that both IHL and HR law impose minimum guarantees for a fair trial. With regards to IHL, the GCs and AP I, in case of an international armed conflict, impose as a minimum for a fair trial a regularly constituted court,⁷³ the right to retain a counsel of own choosing,⁷⁴ the prohibition to compel someone to testify against himself/herself,⁷⁵ and the right to examine witnesses.⁷⁶ These minimum standards are also applicable in case of a non-international armed conflict pursuant to Common Article 3 GCs as supplemented by Article 6 AP II,⁷⁷ and interpreted by the statutes of several international courts and tribunals dealing *inter alia* with crimes committed in non-international armed conflicts,⁷⁸ a large number of national legislation,⁷⁹ official statements⁸⁰ and other practice.⁸¹

⁷³ AP I, Art. 75(4).

⁷⁴ GC III, Art. 105.

⁷⁵ AP I, Art. 75(4)(f).

⁷⁶ GC III, Artt. 96, 106; GC IV, Art. 72; AP I, Art. 75(4)(e).

⁷⁷ ICRC Commentary, Art. 6 AP II, p.1396; Inter-Am.C.H.R. Report on Terrorism and Human Rights, Inter-Am.C.H.R., OEA/Ser.L/II.116, doc. 5 rev. 1 corr., §§245, 247, 257-259, 261 (2002) [hereinafter Inter-Am.C.H.R. Report on Terrorism and Human Rights].

⁷⁸ I.C.C. Statute (1998), Artt. 67(1)(d),(e),(f); I.C.T.Y. Statute (1993), Artt. 21(4)(b),(e),(g); I.C.T.R. Statute (1994), Artt. 17(3), 20(4)(e),(g).

⁷⁹ Australia, *ICC(Consequential Amendments) Act* (2002), Schedule 1, §§268.31, 268.76; Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e); Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Art. 1(3)(5); Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Artt. 154(1), 156; Cambodia, *Law on the Khmer Rouge Trial* (2001), Art. 6; Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1), (4); Colombia, *Penal Code* (2000), Art. 149; Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Art. 4; Ethiopia, *Penal Code* (1957), Art. 292; Germany, *Law Introducing the International Crimes Code* (2002), Art. 1 §8(1)(7); Netherlands, *International Crimes Act* (2003), Art. 6(1)(d); Nicaragua, *Draft Penal Code* (1999), Art. 462; Spain, *Penal Code* (1995), Art. 611(3); Thailand, *Prisoners of War Act* (1955), Sections 16, 18; UK, *ICC Act* (2001), Sections 50(1), 51(1), 58(1); US, *War Crimes Act as amended* (1996), Section 2441(c).

⁸⁰ Belgium, Statement at the CDDH, in OFFICIAL RECORDS, Vol. VIII, CDDH/I/SR.33, 323, §41 (1975); Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, Sixth Annual American Red Cross-

With regards to HR law, although Article 14 ICCPR is not listed as a non-derogable provision in Article 4, Rotania cannot be said to have lawfully derogated from it in the present case. States wishing to derogate, must immediately inform the other State parties through the UN Secretary-General of the provisions it has derogated from, and of the reasons for such measures.⁸² Such a notice is an essential requirement under the ICCPR, and not a mere formality.⁸³ As shown by the preparatory works to this convention, derogation is a matter of the gravest concern about which the State parties have the right to be notified.⁸⁴ Abundant case-law demonstrates that even if a government notifies the UN Secretary-General, but does so without specific justification or without detailed certification of the provisions it derogates from, that government remains liable for its violations of the ICCPR.⁸⁵

Rotania did not comply with this requirement, since it has not issued any notice to the UN informing about any derogation from the due process guarantees enshrined in Article 14 ICCPR or any other provision of this covenant.⁸⁶ Therefore, Rotania is precluded from claiming any lawful derogation and as a consequence, it is bound to fully respect international standards of due process in relation to Samara Penza and other Adovan citizens.

Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *in* AMERICAN JOURNAL OF INTERNATIONAL LAW AND POLICY 427-428, 430-431(1987-II).

⁸¹ Deng Xiaoping, Instruction on Implementing the Works of Land Reform and Consolidation of the Party, in SELECTED WORKS OF DENG XIAOPING 122 (The People's Press, Beijing 1948-1).

⁸² I.C.C.P.R., Art. 4(3).

⁸³ H.R. Committee, *General Comment 29, States of Emergency(article 4 I.C.C.P.R.)*, §17 U.N.Doc. CCPR/C/21/Rev.1/Add.11(2001) [hereinafter General Comment 29].

⁸⁴ The Secretary-General, *Annotations on the Text of the Draft International Covenants on Human Rights*, §47 U.N.Doc.S/1955/10, A/2929(July 1, 1955).

⁸⁵ Wall case, §127; Fals Borda v. Colombia, Comm.No.46/1979, 139, §13.2, U.N.Doc. CCPR/C/OP/1 (1985); Landinelli v. Uruguay, Comm.No.34/1978, 65-66, §8.3, UN Doc. CCPR/C/OP/1 (1984).

⁸⁶ Compromis, Clarifications §2.

2. Rotania's prosecution of the detained Adovan civilians before its Military Commission violates fair trial standards

2.1 Rotania's military commission is not an independent, impartial or regularly constituted tribunal

Adovan citizens must be heard by an independent, impartial and regularly constituted court. As Adova has earlier submitted this case involves an international armed conflict. Hence, IHL requires that Samara Penza and other Adovan Citizens are tried as PoWs by a military or a civil court.⁸⁷ Such court must offer the same procedures as for members of armed forces of the Detaining Power,⁸⁸ and the same guarantees as in a normal military procedure.⁸⁹ Since, in the case at bar, Rotanian Military Commission has never before been established – even not for trying soldiers involved in the killings between February and December 2006⁹⁰ – it is highly unlikely that the Adovan PoWs are offered the same procedure as would have been given to Rotanian soldiers, even for the most serious crimes.

Furthermore, in any event, PoWs must be heard by an independent and impartial tribunal, which entails enjoying the minimum guarantees of Article 105 GC III.⁹¹ As will be demonstrated below, Rotanian Military Commission's rules of procedure breaches this obligation by not providing the fundamental guarantees, such as choice of counsel and the equality of arms. Therefore, the Rotanian Military Commission does not comply with the independence and impartiality requirement.

⁸⁷ GC III, Art. 84.

⁸⁸ *Id.*, Art. 102.

⁸⁹ *Hamdan v. Rumsfeld*, 548 U.S. __ (slip op., 53) (2006); *Hamdan v. Rumsfeld*, *in re* Guantanamo detainee cases, 355 F. Supp. 2d 443 (D.D.C. 2005).

⁹⁰ *Compromis* §15.

⁹¹ GC III, Art. 84.

Furthermore IHL requires that either in international⁹² or in a non-international conflict,⁹³ civilians are tried by a regularly constituted court and not by special military tribunals, especially not for ordinary crimes, unrelated to violations of the laws of armed conflict.⁹⁴ This conclusion is supported by the ICRC Commentary to Article 66 GC IV,⁹⁵ as supplemented by HR case-law.⁹⁶ Therefore, even if this Court determined that Samara Penza and other Adovan citizens are civilians instead of PoWs or that there are civilians amongst them, Rotania's prosecution of these civilians before its Military Commission would infringe IHL.

In the further alternative, should this Court conclude that IHL is not applicable at all to this case, Samara Penza and the other Adovans detained by Rotania would enjoy the protection of HR law, including Article 14 ICCPR. Indeed, HR bodies have determined that civilians should benefit from an independent and impartial tribunal and that a court does not comply with this requirement if it is not free from all exterior influence, especially from the executive.⁹⁷ Therefore, a court is not independent or impartial, when it is not possible to clearly distinguish the functions and competencies of the judiciary and the executive, or when the latter is able to control or direct the former.⁹⁸ Because members of the armed forces owe allegiance to the

⁹² AP I, Art. 75 AP I.

⁹³ GCs, Common Art. 3.

⁹⁴ *Hamdan v. Rumsfeld* 548 U.S. ___ (slip op, 32-34) (2006) (Stevens, J.); *Quirin*, 317 U.S., 28-29; W. Winthrop, *Military Law and Precedents*, 838 (rev. 2d ed. Washington G.P.O. 1920) (1886).

⁹⁵ ICRC Commentary Art. 66 GC IV, p.340.

⁹⁶ *Civil Liberties Organisation and Others v. Nigeria*, Afr.Ci.H.P.R., Comm.No.218/98, §§15-16 (2001); *Malawi African Association and Others v. Mauritania*, Comm. No. 54/91, §98 (2000); *Centre For Free Speech v. Nigeria*, Afr.Ci.H.P.R., Comm. No. 206/97, §§15-16 (1999); *Constitutional Rights Project v. Nigeria*, Afr.Ci.H.P.R., Comm. No.60/91, §8 (1995); *Ergin v. Turkey* (N^o6), Eur.Ct.H.R., §§41-49 (2006), <http://www.echr.coe.int/eng/>; *Ciraklar v. Turkey*, 1998-VII Eur.Ct.H.R., §39; *Incal v. Turkey*, 1998-IV Eur.Ct.H.R., §§68,72; *Belilos v. Switzerland*, Series A.132 Eur.Ct.H.R., 29 §64 (1988); *Findlay v. United Kingdom*, 1997-I Eur.Ct.H.R., 282, §76 (1997); *Bahamonde v. Equatorial Guinea*, Comm.No. 468/1991, §9.4, U.N.Doc. CCPR/C/49/D/468/1991 (1993); *Raquel Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 §V(B)(3)(c) (1996); *Salinas v. Peru*, Case 11.084, Report No. 27/94, Inter-Am.C.H.R., OEA/Ser.L/V/II.88 rev.1 Doc. 9 §V(3) (1995).

⁹⁷ *Id.*

⁹⁸ *Oló Bahamonde v. Equatorial Guinea*, *l.c.*

executive power of a State, the trial by military courts constitutes a violation of the right to be tried by an independent and impartial tribunal.⁹⁹

Rotania's Military Commission is an emergency court, administered by military personnel and with military judges set up for just fifteen civilians.¹⁰⁰ Therefore, this particular tribunal is not free from governmental influence and thus it is not independent or impartial.

Concluding, since Rotanian Military Commission is not regularly constituted under IHL and fails to meet IHL and HR standards of independency and impartiality, Rotania violates its obligations under international law.

2.2 Rotania's Military Commission denies the right to retain counsel of own choosing in contravention of international law

Both under IHL¹⁰¹ and HR law,¹⁰² defendants have the right to choose their own counsel. HR case-law has held that this requirement means that an accused cannot be forced to accept a government's choice of lawyer.¹⁰³

Concerning IHL, whereas the right to choose counsel already constituted a precondition for a fair trial before the drafting of GCs,¹⁰⁴ these conventions now explicitly include this right¹⁰⁵. As considered by HR case-law¹⁰⁶ and national legislation¹⁰⁷ to be a part of the indispensable

⁹⁹ Civil Liberties Organisation and Others v. Nigeria, *l.c.*; Malawi African Association and Others v. Mauritania, *l.c.*; Media Rights Agenda v. Nigeria, Afr.Ci.H.P.R., Comm.No.224/98, §§60-62 (2000); Öcalan v. Turkey, 2005-IV Eur.Ct.H.R., §§112-118; Case of Cyprus v. Turkey, 2001-IV Eur.Ct.H.R., §§358-359; H.R. Committee, *Concluding observations on Kuwait*, §10, U.N.Doc. CCPR/CO/69/KWT (2000).

¹⁰⁰ Compromis §25-26.

¹⁰¹ GC III, Art. 105

¹⁰² I.C.C.P.R., Art. 14(3)(b)

¹⁰³ Burgos v. Uruguay, Comm.No. R.2/52, 176, §§2.4,13, U.N.Doc. Supp.No.40(A/36/40) (1981); Estrella v. Uruguay, Comm.No.74/1980, 93, §8.6,10, U.N.Doc. CCPR/C/OP/2 (1983); Civil Liberties Organisation and Others v. Nigeria (218/98), *o.c.*, §§27-31.

¹⁰⁴ *In re Yamashita*, 327 U.S. 1, 5 (1946); *Ward v. Texas*, 316 U.S. 547, 555 (1942); *Isayama case*, VI L.R.T.W.C. 60, 65 (U.S. Military Commission Shanghai 1946); *U.S. v. Alstötter and others*, VI L.R.T.W.C. 1, 32 (Military Tribunal Nuremberg 1947)

¹⁰⁵ GC III, Art. 105; GC IV, art. 72

¹⁰⁶ *See supra* note 103

principles of regular judicial procedure, Common Article 3(1)(d) GCs includes the right to choose counsel. Since Common Article 3 GCs constitutes a minimum yardstick for both an international and an internal armed conflict,¹⁰⁸ the right to choose counsel is seen as indispensable in both types of armed conflict.

In the instant case, Rotania's Military Commission's rules of procedure explicitly deny the accused the choice of counsel by imposing a government-appointed military lawyer.¹⁰⁹ Thus, Rotania violates international law by denying the right to retain counsel of own choosing.

2.3 Rotania's Military Commission violates does not provide equality of arms to the defense in contravention of international law

2.3.1 Rotania's Military Commission does not provide equality of arms to the defense by allowing inculpatory evidence obtained under coercion

In the instant case, Rotanian Military Commission's rules of procedure explicitly deny the right to challenge the admissibility of evidence on the grounds that it was derived from coercive interrogations.¹¹⁰ As Adova will demonstrate, this is in clear contravention with HR law and IHL.

Concerning HR law, Article 14 (3)(g) ICCPR explicitly states that no-one can be compelled to testify against himself/herself. This prohibition is absolute¹¹¹ and must be seen in relation to the

¹⁰⁷ See *supra* note 79

¹⁰⁸ Nicaragua case, §218

¹⁰⁹ Compromis §26

¹¹⁰ Compromis §26

¹¹¹ Ward v. Texas, 316 U.S. 547, 549 (1942); General Comment 29, §§11, 16; Inter-Am.C.H.R. Report on Terrorism and Human Rights, §§245, 247

HR prohibition of cruel, inhuman or degrading treatment.¹¹² Allowing such evidence is illegal, since HR law explicitly prohibits it to be admitted in any proceedings.¹¹³ Since, the Rotanian Military Commission's rules of procedure allow such evidence, even without giving defendant the possibility to challenge it,¹¹⁴ the prosecution by the Rotanian Military Commission violates HR law.

Concerning IHL, since the conflict between Rotania and LAPS must be qualified as an international armed conflict, Rotania has breached Article 75(4)(f) AP I, stipulating that no-one shall be compelled to testify against himself/herself, which relates to the prohibition of coercive interrogation in IHL.¹¹⁵ If this Court would however consider the conflict as non-international, Rotania still violates Common Article 3, as clarified by Article 6 AP II,¹¹⁶ reiterating the prohibition to compel someone to testify against himself/herself of Article 14(3)(g) ICCPR.¹¹⁷

Concluding, both IHL and HR law consider evidence obtained under coercion to be in violation with the prohibition to compel someone to testify against himself/herself. Therefore, allowing such evidence violates both IHL and HR.¹¹⁸ Since, the Rotanian Military Commission's rules of procedure allow evidence, obtained under coercion, even without giving defendant the possibility to challenge it,¹¹⁹ Rotania has breached HR law and IHL.

¹¹² H.R. Committee, *General Comment 32(Article 14 I.C.C.P.R.)*, §41, CCPR/C/GC/32 (2007) [hereinafter General Comment 32]; *Shukurova v. Tajikistan*, Comm.No.1044/2002, §§8.2-8.3, U.N.Doc.CCPR/C/86/D/1044/2002 (2006); *Berry v. Jamaica*, Comm.No.330/1988, §11.7, U.N.Doc.CCPR/C/50/D/330/1988 (1994)

¹¹³ C.A.T., Art. 15; General Comment 32, §41; International Commission of Jurists, *The Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, Principle 7 (http://www.icj.org/news.php?id_article=3503?en)(2004) [hereinafter Berlin Declaration]; *Singarasa v. Sri Lanka*, Comm.No.1033/2001, §7.4, U.N.Doc.CCPR/C/81/D/1033/2001 (2004); *Kelly v. Jamaica*, Comm.No.253/1987, 60, §7.4, U.N.Doc.CCPR/C/41/D/253/1987 (1991).

¹¹⁴ Compromis §26

¹¹⁵ ICRC Commentary, Art. 75(4)(e) API, pp.874-875

¹¹⁶ ICRC Commentary, Art. 6 AP II, p.1396; ICRC Commentary, Art. 75(4)(e) AP I, p.874-875

¹¹⁷ ICRC Commentary, Art. 6(2)(f) AP II, p.1400; ICRC Commentary, Art. 75(4)(f) AP I, p.883

¹¹⁸ Berlin declaration, *l.c.*

¹¹⁹ Compromis §26

2.3.2 Rotania's Military Commission does not provide equality of arms to the defence by denying them the right to examine evidence

In the case at bar, Rotania's Military Commission's rules of procedure explicitly deny to defendants and even to their appointed military counsel the possibility to inquire into the sources of evidence.¹²⁰ Adova submits that this is in violation of defendants' right to be treated equally vis-à-vis the prosecutor.

Concerning HR law, Article 14 ICCPR guarantees equality before courts. This right contains that defendants must be treated equally to the prosecutor.¹²¹ This implies that defendants and prosecutor must have equal access to sources of evidence,¹²² such as witnesses.¹²³ Since, in the case at bar, only the defendant and his/her counsel are denied such access,¹²⁴ Rotania violates HR law.

Concerning IHL, if the conflict between Rotania and LAPS is considered as an international armed conflict, Rotania has breached Article 75(4)(g) AP I, which stipulates that the accused shall have the right to examine the witnesses against him under the same conditions as witnesses against him. Furthermore, defendants must have equal access to all evidence, including classified documents.¹²⁵ Since HR law considers this right as absolutely indispensable, it is a fundamental guarantee that has to be complied with at any time by anyone.¹²⁶ As this right is considered as

¹²⁰ Compromis §26

¹²¹ General Comment 32, §13

¹²² H.R. Committee, *Concluding observations: Canada*, §13, CCPR/C/CAN/CO/5 (2005); General Comment 32, §33

¹²³ I.C.C.P.R., Art. 14(3)(e); *Jansen-Gielen v. The Netherlands*, Comm.No.846/1999, §8.2, U.N.Doc. A/56/40(vol.2) (Annex X) (2001); *Äärelä and Näkkäläjärvi v. Finland*, Comm.No.779/1997, §7.4, CCPR/C/73/D/779/1997 (1997)

¹²⁴ Compromis §26

¹²⁵ Office of the Judge Advocate Gen., U.S. Army, *United States v. Kato*, (August 2, 1949) in *Reviews of Yokohama Class B and C War Crimes Trials by the U.S. Eighth Army Judge Advocate, 1946-1949*, 24, microformed on Microfilm Publ'n M1112, Roll 5(1980) (Nat'l Archives & Records Serv.) (Frames 936-952)

¹²⁶ General Comment 29, §11, 16; Inter-Am.C.H.R. Report on Terrorism and Human Rights, §§245, 247; General Comment 32, §38-39

absolutely indispensable for a fair trial, it falls within the scope of Common Article 3, and thus also applies in case of a non-international armed conflict.¹²⁷

Concluding, both IHL and HR consider barring the defendant to inquire into the sources of evidence illegal, when it is possible for the prosecutor to do so. Since, in the instant case, Rotania's Military Commission's procedural rules impose this inequality, the prosecution by this Commission violates international law.

D. ADOVA'S EXERCISE OF JURISDICTION OVER MICHAEL KIRGOV AND GOMMEL VINITSA TO PROSECUTE THEM IN ADOVA FOR CRIMES COMMITTED AGAINST SAMARA PENZA AND OTHER ADOVAN CITIZENS IS CONSISTENT WITH INTERNATIONAL LAW

Adova submits that its exercise of criminal jurisdiction over President Kirgov and Gommel Vinitisa was lawful because it was authorized by the CAT. As the following sections will establish, Michael Kirgov and Gommel Vinitisa are criminally responsible for acts of torture. Therefore, Adova was obliged by international law to arrest and prosecute them. Moreover, Kirgov and Vinitisa are not immune from prosecution in Adova because international law does not recognize immunity for the grave offences they committed.

¹²⁷ GCs, Common Art. 3

1. Adova's exercise of jurisdiction over General Vinitza and President Kirgov is consistent with international law

1.1 Adova has criminal jurisdiction on the basis of CAT

1.1.1 States parties to CAT can exercise criminal jurisdiction over persons who are complicit in torture

The CAT, to which both Adova and Rotania are party, criminalizes not only acts of torture by State officials, but also complicity therein.¹²⁸ A State official will be an accomplice if he knows or should have known about acts of torture and failed to prevent it.¹²⁹ Moreover, pursuant to the CAT, a State shall exercise jurisdiction over the alleged offender if he is found in its territory.¹³⁰ Jurisdiction may also be exercised when the victim is a national of the State.¹³¹ Finally, if the alleged offender is in a State party's territory, that State is obliged to take him into custody.¹³²

1.1.2 Gommel Vinitza and Michael Kirgov are complicit in torture

Adova submits that both Gommel Vinitza and Michael Kirgov are complicit in torture of Adovan citizens. As established above, the treatment of Samara Penza and other Adovan citizens held in Camp Indigo constitutes torture.¹³³ Because, as will be shown, both Gommel Vinitza and Michael Kirgov knew or should have known that torture was being committed and failed to respond to it, they are criminally liable as accomplices.

¹²⁸ C.A.T., Art. 4(1).

¹²⁹ International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, *o.c.*, Commentary on article 6, §5; Prosecutor v. Limaj et al., Case No. IT-03-66-T, Judgment, §523-529, I.C.T.Y.(2005); Committee against Torture, Dzemajl v. Yugoslavia, Comm.No. 161/2000), §9.2, CAT/C/29/D/161/2000 (1999)

¹³⁰ C.A.T., Art. 5(2).

¹³¹ *Id.*, Art. 5(1)(c).

¹³² *Id.*, Art. 6(1).

¹³³ See *supra*, Claim B, 20003.2.1

Firstly, Mr. Vinitsa's complicity is derived from the fact that he must have known that his soldiers were engaging in torture, because he explicitly authorized it. In his proclamation of 15 March 2007, Mr. Vinitsa authorized his men to use interrogation methods which Adova has proven to amount to torture.¹³⁴ There is also evidence suggesting that these techniques were used vis-à-vis Samara Penza by Vinitsa's soldiers. The facts of the case indicate that Vinitsa's men were at all times in control of Adovan detainees – they captured them¹³⁵, transported them to and from a secret location¹³⁶, and finally they “closely interrogated” Samara Penza.¹³⁷ In relation to the latter, Zoran Makar, who had been detained along with Samara Penza,¹³⁸ testified about torture techniques used against the detainees at Camp Indigo.¹³⁹ His testimony was further substantiated by the findings of Merkistani police when investigating the Camp.¹⁴⁰ All of these facts taken together indicate that Mr. Vinitsa authorized torture and he must have known that it was used in interrogation of Adovan detainees, which makes him complicit in torture. Consequently, as soon as he was found on its territory, Adova had the obligation pursuant to Article 6(1) CAT to take Mr. Vinitsa into custody.

Secondly, concerning Michael Kirgov, he empowered Mr. Vinitsa to use all measures in order to apprehend those responsible for the attacks in Rotania.¹⁴¹ Hereupon, Mr. Vinitsa announced in his proclamation that based on that grant of power he authorized his soldiers to use the interrogation techniques discussed above.¹⁴² When Mr. Kirgov was asked whether the proclamation reflected official policy he refused to comment, but stated that he would address

¹³⁴ *Id.*

¹³⁵ Compromis §31

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Compromis, Clarification 5

¹³⁹ Compromis §33

¹⁴⁰ Compromis §44

¹⁴¹ Compromis §25

¹⁴² Compromis §29; Compromis, Appendix III

any unlawful acts promptly and surely.¹⁴³ Yet he never took any action. On top of that, Mr. Kirgov promoted Colonel Vinitza to the rank of General for his actions in relation to the abduction and detention of Samara Penza and other LAPS members.¹⁴⁴ The promotion alone proves that he remained in sympathy with the objectives of that action and supportive of those who participated and the means they used.¹⁴⁵ Thus Mr. Kirgov, knowing what measures were authorized during interrogations, failed to stop his subordinate Mr. Vinitza from implementing them. As the measures used by Mr. Vinitza and his men included torture, Mr. Kirgov is complicit in that crime. Since among the victims of torture were Adovan nationals, Adova can exercise jurisdiction over those complicit in torture, pursuant to Article 5(1)c CAT. Thus Adova can lawfully exercise jurisdiction over Michael Kirgov.

2. Former President Kirgov and General Vinitza are not immune from prosecution in Adova.

2.1 Former President Kirgov and General Vinitza are not immune from prosecution in Adova because customary international law does not recognize immunity for acts of torture and war crimes.

Customary international law recognizes two categories of immunity: immunity *ratione personae* and immunity *ratione materiae*.¹⁴⁶ Immunity *ratione personae* is a personal immunity, as it attaches to incumbent heads of State and high ranking State officials, and protects them from

¹⁴³ Compromis §29

¹⁴⁴ Compromis §38

¹⁴⁵ Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, §441, Trial Chamber, I.C.T.Y.(2005)

¹⁴⁶ M. Delmas-Marty, La responsabilité pénale en échec (prescription, amnistie, immunités), in JURIDICTIONS NATIONALES ET CRIMES INTERNATIONAUX 613, 638 (A. Cassese & M. Delmas-Marty eds., Presses Universitaires de France, 2002)

prosecution abroad.¹⁴⁷ Immunity *ratione materiae* is a functional immunity as it protects State officials from prosecution abroad for acts committed on behalf of the State when they were in office.¹⁴⁸ In the case at hand neither Mr. Vinita, nor Mr. Kirgov can invoke immunity *ratione personae*. Mr. Vinita has never enjoyed this immunity because he never held the position of head of State or foreign minister, while Mr. Kirgov is no longer the head of State of Rotania.¹⁴⁹ Furthermore, they cannot invoke immunity *ratione materiae*, because, as will be demonstrated below, customary international law does not recognize immunity *ratione materiae* for perpetrators of grave international offenses, such as torture and war crimes.¹⁵⁰

Such an exception to customary law of immunity is evidenced by a widespread and virtually uniform State practice and is supported by *opinio juris*, as required by the case-law of this Court.¹⁵¹ The State practice recognizing individual liability of former State officials for international crimes encompasses numerous international documents including the Charter of the Nuremberg Trials, which in Article 7 provided that “the official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.”¹⁵² The above principle was reconfirmed by the United Nations¹⁵³, and by the International Law Commission.¹⁵⁴ Similar

¹⁴⁷ Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), 2002 I.C.J., §54 [hereinafter Arrest Warrant case]

¹⁴⁸ *Id.*, §53

¹⁴⁹ Compromis §39

¹⁵⁰ A. Watts, *The Legal position in International Law of Heads of State, Heads of Government and Foreign Ministers*, 247 RECUEIL DES COURS 13, 84 (1994)

¹⁵¹ North Sea Continental Shelf (Germany v. Denmark, Germany v. Netherlands), 1969 I.C.J. §77; Nicaragua case, §184.

¹⁵² Nuremberg Charter (1945), Art.7, 59.

¹⁵³ G.A.Res. 95, 188, U.N.Doc. A/6 (1946)

¹⁵⁴ International Law Commission, Draft Code of Offences Against the Peace and Security of Mankind (1988), *o.c.*, Art. 11.

provisions were also embodied in numerous other documents establishing international criminal tribunals.¹⁵⁵ Moreover, such a rule was recognized by various national courts.¹⁵⁶

Furthermore, this widely applied rule is also evidenced by *opinio juris*. The rule was confirmed in the observations of the US government representative to the Nuremberg trials.¹⁵⁷ Other States expressly admitted in their submissions to this Court the existence of a principle of international criminal law, whereby the official status of a State agent cannot exonerate him from individual responsibility for certain crimes committed while in office.¹⁵⁸ In addition, the international community recognized the applicability of the above principle through UNSC resolutions,¹⁵⁹ and other UN documents.¹⁶⁰ Finally, national Military Manuals expressly provide that the fact that a person who has committed an international crime was acting as a government official does not constitute an available defense.¹⁶¹

Therefore, as established in the above paragraphs, customary international law permits prosecution of former State officials for acts of torture and war crimes. Given that former President Kirgov and General Vinita, as demonstrated in Part 1.1 of this claim, were

¹⁵⁵ Charter of the International Military Tribunal for the Far East, T.I.A.S. No.1589 (1946), Art. 6; I.C.T.Y. Statute (1993), Art. 7(2); I.C.T.R. Statute (1994), Art. 6(2); I.C.C. Rome Statute (1998), Art. 27(1).

¹⁵⁶ Pinochet-III, 197-199(Lord Browne-Wilkinson), 239-248(Lord Hope of Craighead), 265-267(Lord Saville of Newdigate), 269, 279(Lord Millet), 289-292(Lord Phillips of Worth Matravers); Fédération nationale des déportés et internés résistants et patriotes and others v. Barbie , 78 ILR 125, 130 (Fr.Cass.crim. 1983); Priebke case, Tribunal Supremo Militare, in 36 Rivista di diritto internazionale 193-199 (1953); S.Ct. 40/61 Attorney General of Israel v Eichmann, Supreme [1962] I.L.R. 36 277, §9; Prosecutor/Bouterse, Gerechtshof [Hof] [court of appeal], Amsterdam, 20 November 2000, LJN AA8395 (Neth.); EXTRADICIÓN RICARDO MIGUEL CAVALLO, Suprema Corte de Justicia de la Nación, Amparo en Revisión 140/2002, [http://www.scjn.gob.mx/Asuntos/2003/CAVALLOENGROSE\(X\)2.pdf](http://www.scjn.gob.mx/Asuntos/2003/CAVALLOENGROSE(X)2.pdf) (2003); *In re Yamashita*, 327 U.S. 1, 35-36 (1946).

¹⁵⁷ J.R. JACKSON, *Report to the President by Mr. Justice Jackson*, in INTERNATIONAL CONFERENCE ON MILITARY TRIALS, 46-47 (London 1945).

¹⁵⁸ Arrest Warrant case, Mémoire du République Democratique du Congo of 15 May 2001, 39, §60; Arrest Warrant case, Counter Memorial of the Kingdom of Belgium of 28 September 2001, 132, §3.5.13

¹⁵⁹ S.C.Res. 670, §13, U.N.Doc. S/RES/670 (1990); S.C.Res. 771, §1, U.N.Doc. S/RES/711 (1992); S.C.Res. 787, §7, U.N. Doc. S/RES/787 (1992)

¹⁶⁰ The Secretary-General, *Report of the Secretary-General on the Establishment of the I.C.T.Y.*, §55, U.N.doc. S/25704 (1993)

¹⁶¹ U.S. Department of the Army, Field Manual, The Law of Land Warfare (July 1956), §510; British Manual, The Law of War on Land (1958), §632

accomplices in acts of torture and cruel and inhuman treatment, they are not immune from prosecution in Adova for such alleged offences.

2.2. In any event, former President Kirgov and General Vinitza are not immune from prosecution for violations of CAT.

Former heads of State and State officials cannot claim immunity *ratione materiae* for acts of torture, when the State on which behalf they allegedly acted is a party to the CAT.¹⁶² The CAT requires its signatories to enact laws which outlaw torture¹⁶³, and obliges them to assume jurisdiction and prosecute perpetrators of acts of torture.¹⁶⁴ Thus, if a State is a party to the CAT, then torture in that State is illegal, and consequently, its officials cannot claim that they acted of behalf of the State when they authorized acts of torture.¹⁶⁵

Such conclusion is necessary if the CAT is to remain a viable treaty, because pursuant to the CAT, in order to constitute torture, an act must be committed “by or with the acquiescence of a public official.”¹⁶⁶ It follows from that, that most of the defendants in torture cases will be State officials.¹⁶⁷ Consequently, if such State officials were able to claim immunity for acts of torture, the CAT would be practically inapplicable to the main culprits of the acts of torture. Such result is evidently inapposite, because it would significantly compromise the purposes of the Convention, one of which is to ensure that “a torturer does not escape the consequences of his act.”¹⁶⁸ Thus, State officials from CAT signatories cannot claim immunity *ratione materiae* for

¹⁶² Pinochet-III, 248

¹⁶³ C.A.T., Art. 2.

¹⁶⁴ *Id.*, Art 5.1, Art 6.1

¹⁶⁵ Pinochet-III, 277-278; H. KELSEN, GENERAL THEORY OF LAW AND STATE (1945), 359

¹⁶⁶ C.A.T., Art. 1(1).

¹⁶⁷ Pinochet-III, 277-278

¹⁶⁸ J. H. BURGERS AND H. DANIELIUS, THE U.N. CONVENTION AGAINST TORTURE, 131 (Martinus Nijhoff Publishers 1988).

acts of torture.¹⁶⁹ As a result, because Rotania is a party to CAT, Mr. Kirgov and Mr. Vinita cannot claim immunity *ratione materiae* for the alleged acts of torture that they acquiesced in.

¹⁶⁹ Pinochet-III, 277-278

VIII. CONCLUSION AND PRAYER FOR RELIEF

Therefore, Adova requests the Court to adjudge and declare that:

- (a) The apprehension and rendition of Samara Penza and other Adovan citizens was a violation of Adova's sovereignty and in contravention of international law;
- (b) The subsequent detention and treatment of Samara Penza and other Adovan citizens violated international law;
- (c) Rotania's prosecution of the detained Adovan citizens before the Rotanian Military Commission, including Samara Penza's prosecution for conspiracy, arson, and murder, violates international law; and
- (d) Adova's exercise of jurisdiction over Michael Kirgov and Gommel Vinita to prosecute them in Adova for crimes committed against Samara Penza and other Adovan citizens is consistent with international law.

