

INTERNATIONAL COURT OF JUSTICE

**THE CASE CONCERNING CERTAIN CRIMINAL PROCEEDINGS IN ADOVA AND
ROTANIA**

THE REPUBLIC OF ADOVA

v.

THE STATE OF ROTANIA

2008

MEMORIAL FOR RESPONDENT

INDEX OF AUTHORITIES.....	V
1. MULTILATERAL TREATIES	V
2.1 UNITED NATIONS SECURITY COUNCIL RESOLUTIONS	VI
2.2 UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS	VI
2.3 OTHER UN DOCUMENTS	VII
3. JUDICIAL AND ARBITRAL DECISIONS	VII
3.1 CASES BEFORE THE INTERNATIONAL COURT OF JUSTICE.....	VII
3.2 CASES BEFORE INTERNATIONAL TRIBUNALS	VIII
3.2.1 <i>International Criminal Tribunal for Rwanda</i>	viii
3.2.2 <i>International Criminal Tribunal for Sierra Leone</i>	viii
3.2.3 <i>International Criminal Tribunal for Former Yugoslavia</i>	ix
3.3 CASES BEFORE OTHER INTERNATIONAL BODIES	IX
3.4 ARBITRAL AWARDS	XI
4. TREATISES, DIGESTS AND BOOKS.....	XI
5. LEGAL ARTICLES.....	XIII
6. DOMESTIC CASE LAW	XV
A. ROTANIA WAS ENTITLED UNDER INTERNATIONAL LAW TO APPREHEND AND RENDER SAMARA PENZA AND OTHER LAPS MEMBERS FROM ADOVA.....	28
1. THE APPREHENSION OF SAMARA PENZA AND OTHER LAPS MEMBERS IN ADOVA WAS A LAWFUL INTERVENTION IN LIGHT OF ADOVA’S REFUSAL TO COMPLY WITH UNSC RESOLUTION 2233	28
2. IN ANY EVENT, THE APPREHENSION OF SAMARA PENZA AND OTHER LAPS MEMBERS IN ADOVA CONSTITUTES A LEGITIMATE EXERCISE OF ROTANIA'S INHERENT RIGHT OF SELF-DEFENSE	30
2.1 <i>The attacks by LAPS on the territory of Rotania constitute an armed attack</i>	30
2.2 <i>Rotania was entitled to act in self-defense against LAPS</i>	32

2.3 <i>In any event, Rotania’s intervention was lawful because Adova was substantially involved in the armed attack by LAPS</i>	33
2.4 <i>The intervention by Rotania was necessary and proportionate</i>	35
B. SAMARA PENZA AND OTHER LAPS MEMBERS WERE AT ALL TIMES DETAINED AND TREATED IN A MANNER CONSISTENT WITH INTERNATIONAL LAW	36
1. THE DETENTION AND TREATMENT OF SAMARA PENZA AND OTHER LAPS MEMBERS WAS CONSISTENT WITH HUMAN RIGHTS.....	36
1.1 <i>There is no indication that Rotanian officials carried out, consented or acquiesced in torture or cruel, inhuman or degrading treatment</i>	36
1.2 <i>The detention and treatment of Samara Penza and other LAPS members did not amount to cruel, inhuman or degrading treatment</i>	38
1.3 <i>The detention and treatment of Samara Penza and other LAPS members did not amount to torture</i>	40
2. THE DETENTION AND TREATMENT OF SAMARA PENZA AND OTHER LAPS MEMBERS WAS CONSISTENT WITH INTERNATIONAL HUMANITARIAN LAW (HEREINAFTER IHL)	42
2.1 <i>In the present case, the Geneva Conventions (hereinafter GCs) are not applicable</i>	43
2.2 <i>In any event, Rotania at all times respected the terms of Common Article 3 GCs</i>	45
C. IN ANY EVENT, ROTANIA’S PROSECUTION OF SAMARA PENZA AND THE OTHER LAPS MEMBERS BEFORE ITS MILITARY COMMISSION FOR ACTS COMMITTED AGAINST ROTANIAN CITIZENS AND AGAINST ROTANIAN RELIGIOUS AND CULTURAL INSTITUTIONS IS CONSISTENT WITH INTERNATIONAL LAW	46
1. ROTANIA HAS JURISDICTION OVER SAMARA PENZA AND OTHER LAPS MEMBERS BASED ON THE TERRITORIALITY PRINCIPLE	46
2. MILITARY COMMISSIONS ESTABLISHED UNDER THE 1980 ACT ARE REGULARLY CONSTITUTED COURTS OF LAW	47
3. MILITARY COMMISSIONS ESTABLISHED UNDER THE 1980 ACT MEET INTERNATIONAL STANDARDS OF FAIR TRIAL	49

3.2 <i>Rotania's Prosecution of Samara Penza and other LAPS members is consistent with Fair Trial standards of Human Rights Law</i>	49
3.2.1 Rotania's Military Commission respects the rights of a fair trial under article 14 ICCPR	49
3.2.2 In the alternative, Rotania lawfully derogated from article 14 ICCPR provisions	53
3.3 <i>Rotania's Prosecution of Samara Penza and other LAPS members is consistent with fair trial standards of international humanitarian law</i>	55
D. ADOVA'S EXERCISE OF JURISDICTION OVER PRESIDENT KIRGOV AND GENERAL VINITSA IS IN VIOLATION OF INTERNATIONAL LAW	56
1. ADOVA DOES NOT HAVE JURISDICTION TO PROSECUTE PRESIDENT KIRGOV OR GENERAL VINITSA	57
1.1 <i>Adova has no jurisdiction to prosecute President Kirgov or General Vinitsa under CAT</i>	57
1.2 <i>Adova has no jurisdiction over President Kirgov or General Vinitsa, since prosecution is manifestly unfounded</i>	59
2. IN ANY EVENT, PRESIDENT KIRGOV AND GENERAL VINITSA ARE IMMUNE FROM PROSECUTION IN ADOVA	61
CONCLUSION AND PRAYER FOR RELIEF	66

INDEX OF AUTHORITIES

1. MULTILATERAL TREATIES

Charter of the United Nations, 15 U.N.C.I.O. 335.....	1
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UNTS 85.....	9, 12, 27
Convention on the Rights and Duties of States (1933), 165 LNTS 19.....	14
Convention for the Protection of Human Rights and Fundamental Freedoms (1950), 213 U.N.T.S. 221	24
Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949), 75 U.N.T.S. 135.....	14, 16, 18, 25
Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949), 75 U.N.T.S. 287.....	14, 16, 18, 25
International Covenant on Civil and Political Rights (1966), 999 U.N.T.S. 171.....	20, 23, 24
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977) 1125 U.N.T.S. 3.....	14
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (1977) 1125 U.N.T.S. 609	26

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 33 4

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2.1 United Nations Security Council Resolutions

S.C. Res. 241, U.N.Doc. S/RES/241 (1967) 5

S.C. Res. 405, U.N.Doc. S/RES/405 (1977) 5

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S.C. Res. 507, U.N.Doc. S/RES/507 (1982) 5

S.C. Res. 1368, U.N.Doc. S/RES/1368 (2001)..... 5, 6

S.C. Res. 1373, U.N.Doc. S/RES/1373 (2001)..... 5, 6

2.2 United Nations General Assembly Resolutions

Declaration On Measures To Eliminate International Terrorism, Annex to G.A. Res. 49/60, P4
(1994).....6

Declaration On Principles of International Law Concerning Friendly Relations And Co-operation
Among States In Accordance With The Charter Of The United Nations, Annex to G.A. Res.
2625(XXV) (1970).....1, 6, 15

Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514
(XV) (1960).....16

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Annex to G.A. 3452(XXX) (1975).....	12
Definition of Aggression, Annex to G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, 143, U.N.Doc. A/9631 (1974).....	6
G.A. Res. 56/1, U.N. GAOR, 56th Sess., 1st mtg. U.N. Doc. A/Res/56/1 (2001).....	6

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In Larger Freedom: towards development, security and human rights for all, U.N. GAOR, 59th Sess., U.N. Doc. A/59/2005 (2005).....	3
UN Doc. E/CN.4/SR.110 (2 June 1949).....	18
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Sixth session of the Commission on Human Rights, U.N. Doc. E/CN.4/SR.157 (17 April 1950).....	20
Statute of the International Criminal Tribunal for the Former Yugoslavia, Annex to U.N.S.C. Res. 827, U.N.Doc. S/RES/827 (1993).....	22

3. JUDICIAL AND ARBITRAL DECISIONS

3.1 Cases before the International Court of Justice

Arrest Warrant of 11 April 2000 (Congo v. Belgium), 2002 I.C.J. 3 (Feb. 14).....	28, 32, 34
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Corfu Channel (U.K. v Albania), 1949 I.C.J. 4 (Apr. 9).....	6
Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), Advisory Opinion, 1971 I.C.J. 22, (June 21).....	1, 2
Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).....	3, 7
Military and Paramilitary Activities (Nicaragua v U.S.), 1986 I.C.J. 14 (June 27).....	4, 6, 7
Oil Platforms (Iran v. U.S), 2003 I.C.J. 161 (Nov. 6).....	4, 7
Western Sahara, Advisory Opinion, 1975 I.C.J. 12.....	16

3.2 Cases before International Tribunals

3.2.1 International Criminal Tribunal for Rwanda

Prosecutor v Barayagwiza, ICTR Case No. ICTR-97-19-T, Decision on Defense Counsel Motion to Withdraw (2 November 2000), available at http://www.ictr.org	20
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3.2.2 International Criminal Tribunal for Sierra Leone

Prosecutor v. Sesay, Kallon and Gbao, SCSL Case No. SCSL-04-15-AR73, Decision on Appeal Against Decision on Withdrawal of Counsel (23 November 2004), available at http://www.scs-sl.org	20
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3.2.3 *International Criminal Tribunal for Former Yugoslavia*

Milosevic v Prosecutor, ICTY Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel (1 November 2004), available at http://www.un.org/icty	20
Prosecutor v. Blaskic, ICTY Case No. IT-95-14-PT, Subpoena, (29 July, 12 August & 29 October 1997), 110 ILR 607.....	32
Prosecutor v. Dusko Tadic, ICTY Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 Aug. 1995), available at http://www.un.org/icty	22

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Birindwa and Tshisekedi v. Zaire, Comm.Nos. 241 &242/1987, HRC 1990 Report, Annex IX.....	13
Bouton v. Uruguay, Comm.No. 371/1978, HRC 1981 Report, Annex IV.....	13
Croissant v Germany, 237 Eur.Ct.H.R (Ser. B)(1993).....	20
Fox, Campbell & Hartley v. United Kingdom, 13 Eur. Ct. H. R. (Ser. A) (1990).....	28
Human Rights Committee, General Comment 5, (Article 4), U.N.Doc. HRI/GEN/1/Rev.1 (1994).....	23

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Human Rights Committee, General Comment 32, Right to equality before courts and tribunals and to fair trial(Article 14), U.N.Doc. CCPR/C/GC/32 (2007).....	18, 19
Ireland v. United Kingdom, 25 Eur.Ct.H.R. (Ser.A) (1978).....	9, 10, 11, 12, 13
Jorge Landinelli v. Uruguay, Comm. No. 34/1978, U.N.Doc. CCPR/C/OP/1 (1984).....	24
Kamma v. the Netherlands, App.No.4771/71, 1 Eur. Comm'n H.R. Dec. & Rep. 4 (1974).....	10
Lawless case, App.No. 332/57, (1960-1961) Eur. Ct. H. R. (Ser.B) (Report of the Commission).....	24
Moldovan and others v. Romania (No.2), Eur. Ct. H. R. Apps.No.41138/98, 64320/01 (2005).....	10
Nachova v. Bulgaria, App. Nos. 43577/98 and 43579/98 (Eur. Ct. H.R. July 6, 2005) (Grand Chamber).....	9
Ramirez Sanchez v. France, Eur. Ct. H. R. App.No.59450/00 (1996).....	11
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Terrorist Threat to the Americas, OAS RC.24/Res.1/01 P1, OEA/Ser.F/II.24 (Sept. 21, 2001)	5
The Greek Case, 1969 Y. B. Eur. Conv. on H.R. 12 (Eur. Comm'n H. R.).....	11

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(1994).....28

Velasquez Rodriguez Case, 1988 Inter-Am. Ct. H. R. (ser. C) No. 4 (July 29, 1988).....34

3.4 Arbitral awards

Island of Las Palmas Arbitration (US v. Netherlands) 2 U.N. Rep. Int'l. Awards 829 (Perm. Ct.
Arb. 1928)..... 1, 17

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ANNA-LENA SVESSEON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES
OF EXCEPTION
(1998).....24

ANTONIO CASSESE, INTERNATIONAL LAW (2nd ed. 2005).....15, 32

CHRISTOPHER GREENWOOD, *The Law of War (International Humanitarian Law)*, in
INTERNATIONAL LAW (Malcolm D. Evans ed., 2006).....14

CHANAKA WICKREMASHINGE, *Immunities Enjoyed by Officials of States and International
Organizations*, in INTERNATIONAL LAW 397 (Malcolm Evans ed., 2nd ed.
2006).....7

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officials: The Blaskic case*, in 'MAN'S INHUMANITY TO MAN': ESSAYS IN INTERNATIONAL LAW IN

HONOUR OF ANTONIO CASSESE (Lai Chand Vohrah et al. eds. 2003).....	130
HAZEL FOX QC, THE INTERNATIONAL COURT OF JUSTICE'S TREATMENT OF ACTS OF THE STATE, AND IN PARTICULAR THE ATTRIBUTION OF ACTS OF INDIVIDUALS TO THE STATE, IN LIBER AMICORUM JUDGE SHIGERU ODA (Nisuke Ando et al. eds. 2000).....	31
HAZEL FOX QC, THE LAW OF STATE IMMUNITY (2004).....	31
ICRC COMMENTARY TO THE GENEVA CONVENTION.....	25
IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW (6th ed. 2003).....	18, 32
MALCOLM SHAW, INTERNATIONAL LAW (2006).....	17
JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL.I (2005).....	19
J.HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE (1988).....	9
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ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1992).....	1

ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1994).....	63
SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY (1989).....	15
THEODOR MERON, HUMAN RIGHTS IN INTERNATIONAL STRIFE (1987).....	24
VAUGHAN LOWE, <i>Jurisdiction</i> , in INTERNATIONAL LAW (Malcolm D. Evans ed., 2006).....	17
YITIHA SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW (2004).....	30, 32
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Lt. Col. R. Peter Masterson, <i>The Defense Function: The Role of the U.S. Army Trial Defense Service</i> , 1 ARMY LAW (March 2001).....	87
Major Joshua E. Kastenber, <i>The Right to Assistance of Counsel in Military and War Crimes Tribunals</i> , 14 IND. INT'L & COMP. L. REV. 175 (2003)	21
M.Cherif Bassiouni, <i>Commentary on the Draft Convention for the Prevention and Suppression of Torture of the International Association of Penal Law</i> , 48 REVUE INTERNATIONALE DE DROIT PENAL 282 (1978).....	12
M.Cherif Bassiouni, <i>Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions</i> , 3 DUKE J.COMP.&INT'LL. 235 (1993).....	20
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Mizushima Tomonori, <i>The Individual as a Beneficiary of State Immunity: Problems of the attribution of ultra vires conduct</i> 29 DENV. J. INT'L L. & POL'Y 261 (2001).....	31
Oscar Schachter, <i>International Law: The Right of States to use Armed Force</i> , 82 MICH. L. REV. 1620 (1984).....	7
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Sean D. Murphy, <i>Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter</i> , 43 HARV. INT'L L.J. 41 (2002).....	5
Timothy Kearley, <i>Regulation of Preventive and Preemptive Force in the United Nations Charter : A Search for Original Intent</i> , 3 WYO. L. REV. 663 (2003).....	5
Vincent-Joel Proulx, <i>Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?</i> , 23 BERKELEY J. INT'L L. 615 (2006).....	5
Whomersley, <i>Some Reflections on the Immunity of Individuals for Official Acts</i> , 41 INT'L & COMP.L.Q. 848 (1992).....	31
Yoram Dinstein, <i>Diplomatic Immunity from Jurisdiction racione materiae</i> , 15 INT'L & COMP. L. Q. 76 (1966).....	32
6. DOMESTIC CASE LAW	
Claim against Empire of Iran, 45 I.L.R. 57 (Bundesverfassungsgericht 1963).....	33
Compania Naviera Vascongado v. Christina SS [1938] QB 335.....	17, 32
Chung Chi Cheung v. The King, Judicial Committee of the Privy Council [1939] A.C. 160.....	32
Duke of Brunswick v. King of Hanover, 2 H.L.Cas. 1 (1848).....	33

Ex parte Pinochet Ugarte (No. 3) [2000] 1 A.C. 147.....	30
Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).....	19, 25
Holland v Lampen-Wolfe [2000] 1 WLR 1573.....	30
Horn v. Mitchell, US Marshall, 232 Fed. 819 (1st Cir. 1916).....	32
In Re P (No.2) [1998] 1 FLR 1027.....	31
In re Gilbert, 13 Ann. Dig. 86 (Braz. Sup. Fed. Ct. 1944).....	32
Israel H.C. 5100/94, Public Committee Against Torture in Israel et al. v. State of Israel et al., (1999) Israel Law Reports HCJ 5100/94.....	13, 21
Jaffe v. Miller (1993) 13 O.R. (3d) 745 (Ontario).....	33, 34
Jarvie and Another v. The Magistrates' Court of Victoria, 1994 V.R. 84.....	22
Johnson v Turner, 21 ILR 103 (Philippine Supreme Court, 26 April 1954).....	32
Kendall v. Kingdom of Saudi Arabia, 65 Adm. 885. (S.D.N.Y. 1965).....	33
Macleod Case (20 November 1854), 83 McNair's Law Officers Opinions vol. II.....	32
Nelson v. Saudi Arabia, 923 F.2d.1528 (11th Cir. 1991).....	33
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R. v. Taylor 1994 Crim.App. 17.....	22
Scordalos, Cass. 7 Feb. 1944, 1944 Journal des Tribunaux Mixtes No. 3308, 2 (Egypt).....	32
The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).....	17, 30
Wacker v. Bisson, 348 F.2d 602, 606 (5th Cir. 1965).....	32
Waltier v. Thomson, 189 F. Supp. 319 (S.D.N.Y. 1960).....	32
X v. Head of Scotland Yard, Bundesgerichtshof, 26 September 1978, [1979] Neue Juristische Wochenschrift 1101.....	31
Zoernsch v. Waldock [1964] 2 Q.B. 352.....	31

STATEMENT OF JURISDICTION

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

- I. Rotania violated international law by apprehending and rendering Samara Penza and other LAPS members from Adova in a situation where Rotania was authorized to do so by the UN Security Council and in any event the above actions constitute a lawful self defense measures.
- II. Rotania's detention and treatment of Adovan citizens was in accordance with international law since humanitarian law is not applicable in this case and Rotania observed the applicable standards of human rights law;
- III. Rotania's prosecution of Samara Penza and other LAPS members before Military Commission was compliant with international law given that Rotania lawfully exercised jurisdiction and the proceedings before the Military Commission are in accordance with the standards of fair trial; and
- IV. Applicant violated international law by exercising jurisdiction over Michael Kirgov and Gommel Vinitza in a situation where Applicant did not have lawful jurisdictional basis and in any event Rotanian officials are immune from prosecution.

STATEMENT OF FACTS

In 1970, the Kingdom of Sybilla dissolved into two states: the Republic of Adova (Applicant) and the State of Rotania (Respondent). Rotania is populated by two ethnic groups: 85% Stovians and 10% Litvians. Most Litvian Rotanians have historically lived in the Upland Plateau, a district making up 20% of Rotania's territory.

Shortly after the dissolution of Sybilla, a movement emerged calling itself the Litvian Advancement and Protection Society (“LAPS”). Since its founding, LAPS has received substantial financial assistance from the government of Adova. Press accounts suggest that Adovan government aid made up approximately 45% of LAPS’ budget in 2004. The most radical wing of LAPS is the Independent Litvia Solidarity Association (“ILSA”), which openly espouses the complete secession of the Upland Plateau from Rotania by violent means.

Since 1985, the General Chairman of LAPS has been Ms. Penza, who herself is an Adovan national. International organizations have suggested that Ms. Penza systematically turned a blind eye to the more violent fringes of LAPS in the years 1995-2005. They claim ILSA would have withered and died without her encouragement. On 1 January 2007, Ms. Penza issued a statement proclaiming to pursue ‘liberty’, ‘no matter the cost, and no matter the sacrifice.’ Immediately afterwards, ILSA released a manifesto congratulating their leader Ms. Penza and announcing the taking of dramatic measures.

On 7 January 2007, the principal Stovian Church of the Upland Plateau was set ablaze. ILSA confirmed its responsibility for the arson. Similar attacks were committed on Stovian cultural and religious sites in the Upland Plateau on 20 January and 10 February. In both cases, ILSA leadership acknowledged that its members carried out the operations. On 19 February, there was a fire of unknown origin in the House of Stovian Culture in the capital city of Rotan. Nearby, a carton of ILSA leaflets was found, making reference to an attempt to "bring the struggle for Litvian freedom to the belly of the beast."

Since time immemorial, the holiest site of Stovian religion has been the Shrine of the Seven Tabernacles, located 100 kilometres outside the Upland Plateau. During the late afternoon of 22 February 2007, the Chairman of the Committee that oversees the shrine received a warning written in Litvian, which was not understood until 8:00 p.m. At approximately 9:30 p.m. an enormous fire consumed the Shrine within a quarter of an hour, killing seven Committee members and 15 staff members. In addition, one badly burned body was found, dressed in military camouflage incorporating colors and devices associated with ILSA. A surviving staff member photographed the beginning of the fire and its aftermath. One of these photographs showed several men, dressed in camouflage, who appeared to be carrying large and heavy containers.

Since 1 January 2007, Ms. Penza had remained withdrawn at an undisclosed location. On 24 February 2007, she issued a statement from an unspecified location in Adova acknowledging the deaths of the 15 staff members, calling them martyrs for the Litvian cause and heartily endorsing LAPS taking "increasingly urgent measures".

On 25 February 2007 Rotania summoned its Adovan Ambassador, to inquire whether the apparent presence of Ms. Penza on Adovan soil should be interpreted as official Adovan support for terrorist attacks in Rotania. Immediately, a formal diplomatic response was delivered by the Ambassador confirming the resolve of Adova to play its part in the worldwide struggle against terrorism.

On 2 March 2007, Rotania's President Michael Kirgov declared a national emergency and authorized the establishment of a special Military Commission to prosecute those responsible for the attacks. Furthermore, President Kirgov empowered the commander of the 373rd Infantry battalion, Colonel Vinita, to take all measures consistent with international law to apprehend the perpetrators. Eventually, no one was found, but numerous reports were received from local people, stating that all perpetrators would be in Adova.

On 7 March the UN Security Council adopted Resolution 2233, which condemned the attacks in Rotania, acknowledged the serious and immanent threat to Rotania's unity, and called on Adova to determine whether Ms. Penza and other suspects were present on its territory, and if so, to

apprehend and immediately surrender them to Rotania for trial. Also, Adova was requested, that if the suspects were not found in Adova, to certify to the President of the UN Security Council within fifteen days of the date of the Resolution that it conducted a diligent search. During the discussion leading up to the vote of Resolution 2233, Adova declared that it would refuse, as a matter of principle, to make this certification.

On 3 April, Colonel Vinitza announced that his men had apprehended Ms. Penza and other suspected LAPS members just inside Adova and that Ms. Penza had confessed to her involvement in terrorist attacks in Rotania. Moreover, Samara Penza had also revealed details of future attacks within Rotania, which would have resulted in terrible loss of life. The Colonel also stated that the detainees were at all times treated in a manner consistent with international law. Later that month, Ms. Penza and 14 others were transferred to the custody of the Military Commission. Ms. Penza was charged with conspiracy, arson, and twenty-two counts of murder. Various charges were levelled against the others, including aiding in a terrorist operation.

On 1 May 2007, President Kirgov announced that Colonel Vinitza and his men had learned from Ms. Penza and other suspects about the stockpiling of flammable materials in preparation for a planned arson attack on the capital's National Theater during the National Day Celebration on 14 May. The materials were located and neutralized. In recognition, Colonel Vinitza was promoted to the rank of General. Having reached the mandatory retirement age, he became a member of the Rotanian Foreign Ministry's Advisory Council on International Law. In late May, due to his bad health, President Kirgov was succeeded by Vice President Pavel Basli.

On 20 July, Adovan police apprehended General Vinita in the Adovan city of Metropolis. He was charged with offences in connection with the apprehension and treatment of Samara Penza and other LAPS members, in his capacities both as a military commander and as a legal adviser to the President. The indictment of General Vinita also named former President Kirgov as a co-conspirator, and a warrant for his arrest had been issued. Also, a formal request was filed with INTERPOL for an international warrant for the former President.

The government of Rotania immediately protested in a diplomatic note to Adova, pointing out that Adova had no legitimate basis to exercise criminal jurisdiction over General Vinita or former President Kirgov.

In early August, Adova suspended its trade relations with Rotania and dispatched troops to the vicinity of the Rotanian border. At the conclusion of an emergency session of the UN Security Council, the Secretary-General issued a statement in which he strongly urged both countries to avoid the need for Council action to authorize further measures, by instead submitting their dispute to the International Court of Justice ("ICJ") for adjudication. On 23 August 2007, both agreed to do so, and on 28 September 2007 the *compromis* was submitted to the ICJ as a stipulation of the facts and issues to be adjudicated by the ICJ under its *ad hoc* jurisdiction.

SUMMARY OF PLEADINGS

I. Rotania submits that its incursion into Adova to apprehend Samara Penza and other members of LAPS was not a breach of international law because it was authorized by UN Security Council Resolution 2233. Even if the Court should find that Resolution 2233 did not authorize Respondent's actions, Rotania maintains that the incursion was a lawful measure exercised pursuant of its inherent right of self defense. Self defense was justified in the circumstances of this case, because Rotania was a target of an armed attack perpetrated by LAPS, and thus Rotania was entitled to take actions necessary to alleviate that threat. In any event, Rotania submits that Adova harboured members of LAPS and thus Rotania's actions *vis-a-vis* Adova were justified.

II. Rotania claims that Samara Penza and other LAPS members were at all times detained and treated in respect of international law because Rotania afforded these individuals the treatment required by human rights law. In particular, Samara Penza and other LAPS members were not tortured or subjected to inhumane, cruel or degrading punishment and in any event Rotanian officials did not authorize or acquiesced in any of the acts which may have violated international law. Furthermore, Rotania submits that the Geneva Conventions and its Additional Protocol I are not applicable in this case because the struggle between Rotania and LAPS is a non-international armed conflict. Finally, Rotania maintains that even if the Court would find the present conflict to be international, Samara Penza and other LAPS members were at all times treated consistently with international humanitarian law.

III. Rotania's argues that it has jurisdiction, pursuant to the territoriality principle to prosecute Samara Penza and other LAPS members. Moreover, the prosecution of Adovan detainees before Military Commission did not violate international law because the latter is regularly constituted court of law. With regards to procedural rules applicable to the Military Commission, Rotania maintains that they are consistent with the fair trial standards embodied in Art. 14 of the International Covenant on Civil and Political Rights. Alternatively, should this Court find that the proceedings before Military Commission do not meet the fair trial standards, Rotania submits that it has lawfully derogated from those standards on the basis of public emergency that threatened Rotania's life as a nation. Finally, it is Rotania's position that the proceedings in question are consistent with the fair trial standards of international humanitarian law.

IV. Rotania submits that Applicant's exercise of jurisdiction over Michael Kirgov and Gommel Vinitza was in contravention of international law. It is Rotania's position that Convention Against Torture, on which Adova relies, is not applicable in the present case because no acts of torture were committed. Thus, Adova's claim of jurisdiction on that basis is unlawful. Moreover, Rotania maintains that Adova's attempt to prosecute Rotanian officials is unlawful because it is manifestly unfounded, since in the case at bar there is no evidence that would create a reasonable suspicion that Michael Kirgov and Gommel Vinitza committed the offences they are charged with. In any event, Rotania submits that Michael Kirgov and Gommel Vinitza are immune from prosecution in Adova because at all relevant times they acted in their official

capacity, and thus their acts should be regarded as acts of state for which they cannot be criminally responsible.

A. ROTANIA WAS ENTITLED UNDER INTERNATIONAL LAW TO APPREHEND AND RENDER SAMARA PENZA AND OTHER LAPS MEMBERS FROM ADOVA

Rotania recognizes that States are obliged to respect each other's sovereignty.¹ Nonetheless, under international law, the United Nations Security Council (hereinafter UNSC), acting under Chapter VII, has the right to authorize forceful intervention in the territory of a member State. Furthermore, States may use force against other States when acting in self-defense in response to an armed attack. In the case at hand Rotania's incursion into Adovan territory to arrest Samara Penza and other terrorist was authorized by UNSC Resolution 2233 and, in any event, constitutes a legitimate exercise of Rotania's inherent right of self-defense.

1. The apprehension of Samara Penza and other LAPS members in Adova was a lawful intervention in light of Adova's refusal to comply with UNSC Resolution 2233

A breach of State's sovereignty can be lawfully authorized by the UNSC acting under Chapter VII to maintain international peace and security.² UN member States are bound to accept and carry out such decisions.³ In the present case, UNSC Resolution 2233, enacted under Chapter VII, called upon Adova to search, apprehend and immediately surrender Samara Penza and other

¹ Declaration On Principles of International Law Concerning Friendly Relations And Co-operation Among States In Accordance With The Charter Of The United Nations, Annex to G.A. Res. 2625(XXV) (1970); Island of Las Palmas Arbitration (US v. Neth.) 2 U.N.Rep.Int'l.Awards 829 (Perm.Ct. Arb.1928), 838; R. Jennings & A. Watts, OPPENHEIM'S INTERNATIONAL LAW 339 (R. Jennings & A. Watts eds., 9th ed. 1992).

² U.N. CHARTER art. 42; Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), Advisory Opinion, 1971 I.C.J. 22, §§112-115.

³ U.N. Charter art. 25.

LAPS leaders to Rotania.⁴ Furthermore, if the perpetrators were not found, the UNSC ordered Adova to certify within 15 days to the President of the UNSC that it conducted a diligent search.⁵ Adova breached this obligation, as it unequivocally stated through its highest official that it did not intend to comply with the requirements of UNSC Resolution 2233.⁶

It is the position of Rotania that through Resolution 2233 the UNSC authorized Rotania to intervene in Adova, should Adova fail to comply with the UNSC's instructions. This Court should analyse Resolution 2233 having regard to the terms of it, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining its legal consequences.⁷

Because the UNSC requested that Adova immediately surrender the leadership of LAPS to Rotania or make the requested certification, Rotania became the principal beneficiary to Adova's duties under Resolution 2233. Moreover, by acknowledging the serious and imminent threat to the unity of Rotania posed by the LAPS attacks,⁸ and by setting a clear deadline for the

⁴ Compromis, Appendix I.

⁵ *Id.*

⁶ Compromis, Appendix II, Statement of Adova.

⁷ Namibia Advisory Opinion, *supra* note 2, §114.

⁸ Compromis, Appendix I.

certification,⁹ the UNSC recognized Rotania's fundamental interest in Adova's swift compliance with Resolution 2233. It is for this reason that the UNSC made express reference to Rotania's right of self-defense.¹⁰ Therefore, Rotania submits that Resolution 2233 authorized Rotania to unilaterally address the imminent threat to its unity, should Adova refuse to carry out its obligations. Rotania's position is supported by the statements of two permanent members of the UNSC, who clearly affirmed that the purpose of Resolution 2233 was to give Adova "one last chance to comply with its obligations" and that if it "fail[ed] to do so without delay... Rotania [would] have every right to take matters into its own hands"¹¹

Thus, by apprehending and rendering Samara Penza and other LAPS leaders, Rotania merely exercised the right that was invested upon it by Resolution 2233 to address the imminent and serious threat posed to its unity by these criminals.

2. In any event, the apprehension of Samara Penza and other LAPS members in Adova constitutes a legitimate exercise of Rotania's inherent right of self-defense

2.1 The attacks by LAPS on the territory of Rotania constitute an armed attack

Pursuant to Article 51 UN Charter, States have an inherent right of self-defense in response to an armed attack. The inherent right of self-defense of States is not restricted to actual attacks. States also have the right to act in anticipatory self-defense in order to avert the threat of an imminent

⁹ *Id*

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¹⁰ *Id.*

¹¹ Compromis, Appendix II, Statements of The President, Alpha and Beta

attack.¹² This Court has previously held that for violent attacks to be an “armed attack” within the meaning of article 51 UN Charter, these must qualify either in itself, or taken cumulatively, as a “most grave” form of the use of force.¹³ LAPS actions were of such nature as to reach the above threshold of an armed attack. Namely, in a series of attacks, LAPS brutally destroyed several of Rotania's most sacred religious sites and cultural symbols – including the holiest place of Stovian religion, the Shrine of the Seven Tabernacles. Moreover, in doing so LAPS murdered innocent civilians – including 7 Stovian religious leaders.¹⁴ As the perpetrators have repeatedly admitted, these deadly actions were aimed at destroying the unity of the State of Rotania.¹⁵ Furthermore, as was confirmed by the UNSC in Resolution 2233, LAPS planned to continue its series of deadly attacks in Rotania, until its demands for the secession of the Upland Plateau

¹² Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, §105; United Nations Secretary-General's High-level Panel on Threats, Challenges and Change: 'A More Secure World: Our Shared Responsibility' U.N. GAOR, 59th Sess., §189, U.N. Doc. A/59/565; In Larger Freedom: towards development, security and human rights for all, U.N. GAOR, 59th Sess., §124, U.N. Doc. A/59/2005 (2005); D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187-92 (1958).

¹³ Oil Platforms (Iran v. U.S), 2003 I.C.J. 161, §51 & 64; Military and Paramilitary Activities (Nicar. v U.S.), 1986 I.C.J. 14, §191.

¹⁴ Compromis, §§18, 19 & 21.

¹⁵ Compromis, §§16, 17 & 23.

were met.¹⁶ Hence, in addition to the attacks that were already committed, Rotania faced an imminent threat of additional attacks.

2.2 Rotania was entitled to act in self-defense against LAPS

The fact that the attacks were directly perpetrated by non-State actors does not prevent Rotania from exercising its right of self-defense. It is a well established rule of treaty interpretation that treaties must be interpreted in accordance with the ordinary meaning of their terms, and attention may be paid to its context, including the *travaux préparatoires* that led to its adoption.¹⁷ Article 51 UN Charter provides no basis for reading into its text a restriction on who the attacker must be.¹⁸ Moreover, the *travaux préparatoires* of the UN Charter show that any limiting language as to whom the attacker ought to be, was expressly left out in order to broaden the scope of the right of self-defense permitted under Article 51.¹⁹ On multiple occasions, the UNSC has used the term “armed attack” or “armed aggression” in relation to private acts.²⁰ For these reasons and

¹⁶ Compromis, Appendix I.

¹⁷ Vienna Convention on the Law of Treaties, Art. 31-32.

¹⁸ S.D. Murphy, *Agora: I.C.J. Advisory Opinion on the construction of a wall in the occupied Palestinian territory: self-defense and the Israeli Wall Advisory Opinion: an ipse dixit from the I.C.J.?*, 99 AM. J. INT'L L. 62 (2005), 64.

¹⁹ T. Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent* 3 WYO. L. REV. 663 (2003), 693, 695-97, 699-701.

²⁰ S.C. Res. 241, U.N.Doc. S/RES/241 (1967); S.C. Res. 405, U.N.Doc. S/RES/405 (1977); S.C. Res. 496, U.N.Doc. S/RES/496 (1981); S.C. Res. 507, U.N.Doc. S/RES/507 (1982).

particularly after the 9/11 attacks, the international community has overwhelmingly supported the right of States to defend themselves against attacks perpetrated by private groups or non-State actors.²¹

2.3 In any event, Rotania's intervention was lawful because Adova was substantially involved in the armed attack by LAPS

Under international law, a State's substantial involvement in the acts of a private armed group against another State, qualifies as a form of "indirect aggression".²² Such substantial involvement includes logistical and financial support.²³ Since its founding, LAPS has received substantial financial assistance from the Adovan government, reportedly amounting to 45% of total LAPS budget in 2004.²⁴

²¹ S.C. Res. 1368, U.N.Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N.Doc. S/RES/1373 (2001); Statement on Collective Self-Defense, 2001 N.A.C. (Sept. 12); Terrorist Threat to the Americas, OAS RC.24/Res.1/01 P1, OEA/Ser.F/II.24 (Sept. 21, 2001); V.-J. Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615 (2006), 638; C. Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 S.D. INT'L L.J. 7 (2003), 16-17; S.D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter*, 43 HARV. INT'L L.J. 41 (2002), 49-50.

²² Definition of Aggression, Annex to G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, 143, U.N.Doc. A/9631 (1974), art. 3(g).

²³ Nicaragua Case, *supra* note 13, (dissenting opinions of Judges Schwebel, §166 & Jennings, §§543-544).

²⁴ Compromis. §7.

Moreover, States have a positive obligation to protect other States from attacks conducted by private individuals from their territory.²⁵ As a result, States must refrain from aiding, supporting or harboring the perpetrators, organizers and sponsors of terrorist attacks.²⁶ Adova breached this obligation by publicly declaring its intention not to comply with the UNSC's demand for the immediate extradition of Samara Penza and other LAPS leaders, and by refusing to even cooperate in the search for these perpetrators²⁷ – thus shielding these terrorists from Rotanian justice and confirming the reports indicating that Adova may be permitting the organization's leader Samara Penza to operate from a location in the territory of Adova.²⁸ As acknowledged by a member of the UNSC, “Adova shares some responsibility for these actions” as it has provided LAPS with financial and material support, and a sanctuary for its terrorist leaders.²⁹ Indeed, if a State is unwilling to assert control over a terrorist organisation located in its territory, the State which is a victim of the terrorist attacks is, as a last resort, permitted to act in self-defense against

²⁵ Corfu Channel (U.K. v Albania), 1949 I.C.J. 4, 22.

²⁶ Friendly Relations Declaration, *supra* note 1; Declaration On Measures To Eliminate International Terrorism, Annex to G.A. Res. 49/60, P4 (1994); G.A. Res. 56/1, U.N. GAOR, 56th Sess., 1st mtg. U.N. Doc. A/Res/56/1 (2001); S.C. Res. 1368, U.N.Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N.Doc. S/RES/1373 (2001).

²⁷ Compromis, Appendix II.

²⁸ Compromis, Appendix I.

²⁹ Compromis, Appendix II, Statement of Beta.

the terrorist organisation in the State in which it is located.³⁰ Thus, Rotania's intervention was lawful, since Adova was substantially involved in the armed attack by LAPS.

2.4 The intervention by Rotania was necessary and proportionate

According to this Court, customary international law requires that the exercise of the right to self-defense be necessary and proportionate.³¹ Necessity implies that no other peaceful means are at hand.³² Proportionality points at the fact that self-defense must correspond in scope to the necessity provoking it.³³ In the following paragraphs, Rotania will demonstrate that it had no viable choice other than the apprehension of Samara Penza and other LAPS members. Further, it will be explained that Rotania's intervention was proportionate in the light of necessity that provoked its actions.

In the instant case, Adova declared it would not comply with Resolution 2233.³⁴ Therefore, the threat to the security of Rotania would not disappear, unless the perpetrators were captured. The

³⁰ E. Wilmshurst, Chatham House, *Principles of International Law on the Use of Force by States in Self-Defence*, 55 INT'L & COMP. L.Q. 963 (2006), 970.

³¹ Nicaragua Case, *supra* note 13, §176; Nuclear Weapons Advisory Opinion, *supra* note 12, §141; Oil Platforms, *supra* note 13, §43.

³² Oscar Schachter, *International Law: The Right of States to use Armed Force*, 82 Mich. L. Rev. 1620 (1984), 1635.

³³ *Id.*, 1637-1338.

³⁴ Compromis §31 & Appendix II, Statement of Adova.

imminence of the threat made rapid and concise action necessary. Because of the unwillingness of Adova to act and the requisite urgency, Rotania's only available recourse was to apprehend Samara Penza and other LAPS members.

The apprehension of LAPS leadership was done in the least intrusive manner possible. A small group of soldiers entered 25 km into Adova and apprehended the suspected terrorists.³⁵ The action did not cause any casualties or property damage. In light of the threat to Rotania's security posed by LAPS leadership, it cannot be argued that the short intervention in Adova was out of proportion. By taking this limited measure, further Rotanian civilian casualties were avoided. For these reasons, Rotania's intervention was proportionate.

B. SAMARA PENZA AND OTHER LAPS MEMBERS WERE AT ALL TIMES DETAINED AND TREATED IN A MANNER CONSISTENT WITH INTERNATIONAL LAW

As will be demonstrated, Samara Penza and the other LAPS members were at all times detained and treated in a manner consistent with both human rights and international humanitarian law.

1. The detention and treatment of Samara Penza and other LAPS members was consistent with Human Rights

1.1 There is no indication that Rotanian officials carried out, consented or acquiesced in torture or cruel, inhuman or degrading treatment

For mistreatment to constitute torture or cruel, inhuman or degrading treatment under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

³⁵ Compromis, §31.

(hereinafter CAT), it must be clearly linked to public officials, in the sense that while acting in an official capacity,³⁶ they carry out the treatment or consent or acquiesce with it.³⁷ Because the finding that a Contracting Party is guilty to torture, or of cruel, inhuman or degrading treatment carries a certain stigma, it is required that the occurrence is beyond reasonable doubt.³⁸

In the case at bar, there is no indication that Rotanian officials engaged in any form of mistreatment against Samara Penza or other LAPS members. Quite the contrary, President Kirgov and General Vinitza explicitly ordered their men not to engage in any treatment inconsistent with international law. Furthermore, President Kirgov publicly assured that misconduct would be addressed promptly and surely.³⁹

In the case at bar, the only account of alleged mistreatment comes from Zoran Makar, who himself is a member of LAPS, a terrorist organization that aims to destroy the unity of Rotania.

³⁶ J.H. Burgers & H. Danelius, *The United Nations Convention Against Torture* 119 & 149 (1988).

³⁷ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [Hereinafter C.A.T.], Art. 1 & 16.

³⁸ *Nachova v. Bulgaria*, App. Nos. 43577/98 & 43579/98, 42 Eur.H.R.Rep. 933 (2006) (Eur. Ct. H.R. Grand Chamber), §147; *Ireland v. United Kingdom*, 25 Eur.Ct.H.R. (Ser.A), §161.

³⁹ *Compromis*, §§25, 31, 44, Appendix III.

In contrast, the European Commission of Human Rights – in a similar case – considered the evidence of one hundred witnesses in order to establish proof beyond reasonable doubt.⁴⁰

Moreover, when the Merkestani police inspected Camp Indigo, a place where according to Zoran Makar prisoners were continuously subjected to torture and other inhuman treatment, they came across 20 individuals in varying states of undress, but they found no irregularities except for the perception of muffled cries and the fact that these individuals seemed to be disoriented and confused – the cause of which was never determined.⁴¹ Based on this single report, it is impossible to conclude that it is beyond reasonable doubt that torture or cruel, inhuman or degrading treatment took place in Camp Indigo, let alone that Rotanian authorities engaged in such practices.

1.2 The detention and treatment of Samara Penza and other LAPS members did not amount to cruel, inhuman or degrading treatment

Under international law, the concept of cruel, inhuman or degrading treatment is considered on a case by case basis.⁴² Ill-treatment must attain a minimum level of severity if it is to constitute cruel, inhuman or degrading treatment. The assessment of this minimum depends on all the

⁴⁰ Ireland v. United Kingdom, *supra* note 38, §161.

⁴¹ Compromis, §34.

⁴² Moldovan and others v. Romania (No.2), Eur.Ct.H.R. Apps.No.41138/98, 64320/01 (<http://www.echr.coe.int>), §100; Ireland v. United Kingdom, *supra* note 38, §162.

circumstances of the case, such as the duration of the treatment and its physical or mental effects.⁴³

If it is impossible to determine the degree of compulsion and the exact duration of coercive techniques accompanying interrogation, such as forcing prisoners to do certain exercises or placing them in various strenuous positions, it cannot be concluded that cruel, inhuman or degrading treatment took place – even when the interrogation itself lasted throughout day and night.⁴⁴ Also, roughness during police interrogation which may take the form of slaps and blows of the hand on the head or face does not constitute cruel, inhuman or degrading treatment.⁴⁵

In the present case, certain interrogation techniques, such as prolonged interrogation and stress positions, were mentioned in the proclamation of General Vinitza,⁴⁶ but this does not suffice to prove that these techniques were used during Samra Penza's and other LAPS members' detention. There is no indication that they were ill-treated. However, even if those perpetrators of terrorist attacks had to adopt strenuous positions or were subject to prolonged interrogation, then

⁴³ Ramirez Sanchez v. France, Eur. Ct. H.R. App.No.59450/00 (<http://www.echr.coe.int>), §117; Ireland v. United Kingdom, *supra* note 38, §162.

⁴⁴ Kamma v. the Netherlands, App.No.4771/71, 1 Eur.Comm'n H.R. Dec.&Rep. 4, 928-30, 946; Ireland v. United Kingdom, *supra* note 38, §125, 181.

⁴⁵ The Greek Case, 1969 Y.B.Eur.Conv. on H.R. 12 (Eur.Comm'n H.R.), 501.

⁴⁶ Compromis, Appendix III.

still it is impossible to judge on the degree of compulsion or the exact duration of the treatment. Therefore, it is impossible to conclude that Samara Penza and other LAPS members were treated in violation of international law, regardless of the use of the practices mentioned by General Vinitza.

1.3 The detention and treatment of Samara Penza and other LAPS members did not amount to torture

Apart from official involvement, CAT imposes the following requirements for certain conduct to be considered torture: (i) severe pain or suffering (ii) intentionally inflicted (iii) for such purposes as obtaining information, punishment, coercion or intimidation.⁴⁷ Torture is an “aggravated and deliberate” form of cruel, inhuman or degrading treatment.⁴⁸ Consequently, in order to constitute torture, a treatment must result in a particular intensity of suffering. Human rights bodies have determined that torture must consist in a deliberate treatment, which causes very serious and cruel suffering.⁴⁹ Hence, torture only exists when the treatment is egregious in itself.⁵⁰ In other words, torture is meant to refer only to particularly atrocious acts. Consequently,

⁴⁷ C.A.T., Art. 1(1).

⁴⁸ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Annex to G.A. 3452(XXX) (1975), Art. 1.

⁴⁹ Ireland v. United Kingdom, *supra* note 38, §167.

⁵⁰ M.C. Bassiouni, *Commentary on the Draft Convention for the Prevention and Suppression of Torture of the International Association of Penal Law*, 48 *Revue Internationale de Droit Penal* 282 (1978), 282-94.

CAT explicitly excludes pain or suffering arising from, inherent in or incidental to lawful sanctions.⁵¹

Rotania submits that at no point during the detention of the perpetrators of the attacks, these conditions could have been fulfilled. Even severe beatings and medical evidence of “massive” injuries were held not to constitute torture.⁵² Furthermore, the Human Rights Committee concluded that long interrogation sessions with the suspect standing up and blindfolded, threatened with torture, did not amount to torture.⁵³ Other forms of prolonged and intense interrogations, resulting in the lack of sleep, the use of ruses and incentives and restraining a prisoner for security imperatives were also not condemned.⁵⁴ Moreover, the Committee further found in a case where the purposive element was missing, that the deprivation of all food and liquid resulting in very severe suffering did not constitute torture.⁵⁵

⁵¹ C.A.T., Art. 1(1).

⁵² Ireland v. United Kingdom, *supra* note 38, §111 &174.

⁵³ Bouton v. Uruguay, Comm.No. 371/1978, HRC 1981 Report, Annex IV, §2, 3 &13.

⁵⁴ Israel H.C. 5100/94, Public Committee Against Torture in Israel et al. v. State of Israel et al., (1999) Israel Law Reports HCJ 5100/94, 26-29.

⁵⁵ Birindwa and Tshisekedi v. Zaire, Comm.Nos. 241 &242/1987, HRC 1990 Report, Annex IX.I, §13(b).

Even if in the present case, Samara Penza and other LAPS members were subjected to the interrogation techniques mentioned in General Vinitza's proclamation, then still would they not result in the severe suffering that is required for torture – considering President Kirgov's and General Vinitza's clear veto on treatment inconsistent with international law, and because the said techniques do not reach the high threshold of severity.

2. The detention and treatment of Samara Penza and other LAPS members was consistent with international humanitarian law (hereinafter IHL)

As was established in Claim A, the terrorist attacks of LAPS were armed attacks against Rotania for the purposes of Article 51 UN Charter, and Rotania was entitled to respond to those attacks by way of self-defense. However, if a State acts in self-defense against a terrorist attack, this does not imply that it is engaged in an international armed conflict with a terrorist organization.⁵⁶

Rotania submits that LAPS is no more than an underground terrorist movement whose recourse to violence is criminal – and that consequently IHL does not apply to the circumstances of this case.

⁵⁶ C. Greenwood, *The Law of War (International Humanitarian Law)*, in *International Law* 783, 787 (M.D. Evans ed., 2006).

2.1 In the present case, the Geneva Conventions (hereinafter GCs) are not applicable

For the GCs to apply, an international armed conflict must exist between States parties to the Conventions.⁵⁷ Clearly, this condition is inexistent in the case at bar, since LAPS has none of the attributes of Statehood, namely: territory, population and government.⁵⁸

Additionally, the GCs apply to international armed conflicts in which peoples are fighting against colonial domination, alien occupation and racist regimes in the exercise or their right of self-determination.⁵⁹ The terrorist attacks of LAPS do not arise from such a struggle for self-determination. Rotania is a representative democracy in which the Litvian Rotanians – which are physically indistinguishable from their fellow countrymen – enjoy full political rights, elect their representatives and get elected for public offices.⁶⁰ Rotania's borders follow old Sybillan internal provincial borders, established long before Rotania's independence.⁶¹ Thus, there is no colonial domination, no alien occupation and no racist regime that oppresses the Litvian population of Rotania.

⁵⁷ GCs, Common Art. 2.

⁵⁸ Convention on the Rights and Duties of States, Art. 1.

⁵⁹ AP I, Art. 1(4)

⁶⁰ Compromis, §6 & Clarifications, §3.

⁶¹ Compromis, §1.

Moreover, the right of self-determination, as set out in the GCs, is selective and limited. It refrains from granting self-determination to ethnic groups not constituting a racial group and to national, religious, cultural, linguistic minorities.⁶² These minorities have no right to secession or independence.⁶³ Indiscriminately granting the right of self-determination to all ethnic groups would pose a serious threat to peace and bring about the fragmentation of States in a myriad of entities unable to survive.⁶⁴

Furthermore, the right to self-determination cannot be construed as authorizing the dismemberment of the territorial integrity or political unity of an existing sovereign State with a government representing the whole country.⁶⁵ Such attempt would be incompatible with the

⁶² A. Cassese, *International Law* 63 (2nd ed. 2005).

⁶³ R. Higgins, *Problems and Process: International Law and How We Use It* 124 (1994).

⁶⁴ E. Roosevelt, *The Universal Validity of Man's Right to Self-Determination*, 27 *Dept.St.Bul.* (8 december 1952), 919.

⁶⁵ Friendly Relations Declaration, *supra* note 1.

purposes and principles of the UN Charter.⁶⁶ Contrary to this principle, LAPS publicly aims at disrupting the national unity and territorial integrity of Rotania.⁶⁷

In any event, this Court held that self-determination requires a free and genuine expression of the will of the peoples concerned,⁶⁸ acting with full knowledge of the change of their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.⁶⁹ LAPS cannot be considered as representative of the Litvian minority within Rotania, merely based on its own pretenses. Nowhere in the *Compromis* is it shown that the Litvian Rotanian community genuinely expressed a wish for self-determination.

For these reasons, no international armed conflict exists that would give rise to the application of the GCs.

2.2 In any event, Rotania at all times respected the terms of Common Article 3 GCs

Should the circumstances of this case constitute a non-international armed conflict, Common Article 3 GCs provides a series of minimum guarantees for protecting those who are not taking

⁶⁶ Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV) (1960), §6.

⁶⁷ *Compromis*, §§6, 16-19, 23.

⁶⁸ *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, §55.

⁶⁹ *Id.*, §57.

an active part in the hostilities,⁷⁰ such as persons captured in the conflict. It prohibits torture, cruel, humiliating and degrading treatment. As was established under point 1 of this Claim, Rotania at all times treated Samara Penza and other LAPS members consistent with the provisions of this article – neither committing torture, nor cruel, nor humiliating, nor degrading treatment.

C. IN ANY EVENT, ROTANIA’S PROSECUTION OF SAMARA PENZA AND THE OTHER LAPS MEMBERS BEFORE ITS MILITARY COMMISSION FOR ACTS COMMITTED AGAINST ROTANIAN CITIZENS AND AGAINST ROTANIAN RELIGIOUS AND CULTURAL INSTITUTIONS IS CONSISTENT WITH INTERNATIONAL LAW

As will be established, Rotania’s prosecution of Samara Penza and the other LAPS members is consistent with international law, because Rotania has jurisdiction and its Military Commission is a regularly constituted court that meets the international standards of fair trial.

1. Rotania has jurisdiction over Samara Penza and other LAPS members based on the territoriality principle

As a corollary of its territorial sovereignty,⁷¹ a State has jurisdiction to prosecute for offences committed upon its soil.⁷² In the case at bar, the LAPS terrorist attacks were all committed on

⁷⁰ GCs, Common Art. 3.

⁷¹ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), 136; *Island of Las Palmas Arbitration*, *supra* note 1, §8, 9; *Compania Naviera Vascongado v. Christina SS* [1938] QB 335, 358; *Bankovic v. Belgium*, Admissibility, App.No.52207/99, 2001-XII Eur.Ct.H.R. 333, §63, 67, 71.

⁷² I. Brownlie, *Principles of International Law* 299 (6th ed. 2003); M. Shaw, *International Law* 579 (5th ed. 2003); V. Lowe, *Jurisdiction, in International Law* 335, 342 (M.D. Evans ed., 2006).

Rotanian territory.⁷³ Moreover, Resolution 2233 called upon Adova to surrender Samara Penza and other LAPS members to Rotania for trial,⁷⁴ thereby acknowledging Rotania's right to exercise jurisdiction pursuant to the territorial principle. Hence, Rotania has jurisdiction over Samara Penza and other LAPS members.

2. Military Commissions established under the 1980 Act are regularly constituted courts of law

Rotania submits that the establishment of its Military Commission under the Protection of the State Act (1980 Act) conforms to international law. Noting the existence, in many countries, of military or special courts which try civilians, the Human Rights Committee expressed that the International Covenant on Civil and Political Rights (Hereinafter ICCPR) does not prohibit such categories of courts.⁷⁵ The preparatory works of ICCPR show that the possibility to set up new courts under special circumstances was expressly left open, because otherwise the covenant would be too rigid and preclude the possibility of making adjustments when necessary.⁷⁶

⁷³ Compromis, §§18 & 21.

⁷⁴ Compromis, Appendix I.

⁷⁵ Human Rights Committee, General Comment 32, Right to equality before courts and tribunals and to fair trial (Article 14), U.N.Doc. CCPR/C/GC/32 (2007), §22.

⁷⁶ U.N. Doc. E/CN.4/SR.110 (2 June 1949), 3 &4.

As was established under Claim B, in the present case no international armed conflict exists that would give rise to the application of the GCs. However, should the circumstances of this case constitute a non-international armed conflict, then Common Article 3 GCs requires persons to be tried "by a regularly constituted court."⁷⁷ It is Rotania's position that even if Common Article 3 GCs applies Rotania's Military Commissions comply with the regularity-constituted-court requirement. Indeed, while the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning.⁷⁸ One of the Red Cross' own treatises defines "regularly constituted court" to mean "established and organized in accordance with the laws and procedures already in force in a country."⁷⁹

In the present case, Rotania's Military Commission was established and organized in accordance with the 1980 Act, which was already in force long before the conflict began.⁸⁰ Consequently, these rules are not ad hoc rules specially enacted to try Samara Penza and other LAPS members. Hence, Rotania's Military Commission is a regularly constituted court of law.

⁷⁷ GCs, Common Art. 3(1)(d).

⁷⁸ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), 2796.

⁷⁹ J.-M. Henckaerts & L. Doswald-Beck, ICRC, Customary International Humanitarian Law Vol.I 355 (2005).

⁸⁰ *Compromis*, §§25 & 26.

3. Military Commissions established under the 1980 Act meet international standards of fair trial

3.2 Rotania's Prosecution of Samara Penza and other LAPS members is consistent with Fair Trial standards of Human Rights Law

3.2.1 Rotania's Military Commission respects the rights of a fair trial under article 14 ICCPR

Article 14 ICCPR aims at ensuring the proper administration of justice,⁸¹ and requires to this end that the equality before competent, independent and impartial courts and tribunals be guaranteed.⁸² Rotania submits that this equality is guaranteed before its Military Commission, since Samara Penza and the other LAPS members can exercise their defense effectively.

Pursuant to Article 14 ICCPR, a lawyer has to be assigned to a defendant where the interests of justice so require.⁸³ The preparatory works elucidate that the words "interests of justice" were inserted into the covenant to serve as a qualification for the assignment of a lawyer.⁸⁴ As a result, international criminal tribunals have sometimes assigned a lawyer even against the will of the

⁸¹ Human Rights Committee, General Comment 32, *supra* note 75, §2.

⁸² I.C.C.P.R., Art. 14(1).

⁸³ I.C.C.P.R., Art. 14(3)(d).

⁸⁴ Sixth session of the Commission on Human Rights, U.N. Doc. E/CN.4/SR.157 (17 April 1950), 5, §18, 20.

defendant because, in some cases, “the interests of justice” dictate that the defendant must be represented by an experienced lawyer in order to ensure a fair trial.⁸⁵

Indeed, a competent and experienced lawyer assists not only the defendant, but also the court, by ensuring that all possible defenses and legal issues are fully argued, and that the trial is efficient.⁸⁶ In this vein, it is preferable that defendants before a military commission are represented by a military lawyer of the prosecuting State, since such lawyers are familiar with the ethics and the working of that military commission.⁸⁷ Accordingly, Rotania assigns competent military lawyers to the defendants in order to make sure that the prosecution respects the defendant's rights.

Furthermore, Rotania submits that a proper administration of justice does not necessarily require that defendants be allowed to challenge the admissibility of evidence on the grounds that it was derived from coercive interrogation. Aspects of coercion are inherent to most interrogations and

⁸⁵ Prosecutor v Barayagwiza, ICTR Case No. ICTR-97-19-T, Decision on Defense Counsel Motion to Withdraw (2 November 2000) (<http://www.ictr.org>); Milosevic v Prosecutor, ICTY Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel (1 November 2004) (<http://www.un.org/icty>); Prosecutor v. Sesay, Kallon and Gbao, SCSL Case No. SCSL-04-15-AR73, Decision on Appeal Against Decision on Withdrawal of Counsel (23 November 2004) (<http://www.sc-sl.org>); Croissant v Germany, 237 Eur.Ct.H.R (Ser.B), §29.

⁸⁶ M.C. Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DukeJ.Comp.&Int'lL. 235 (1993), 283; Human Rights Watch, *The Iraqi High Tribunal and Representation of the Accused*, 1 Human Rights Watch Briefing Paper (February 2006), 4.

⁸⁷ J.E. Kastenberg, *The Right to Assistance of Counsel in Military and War Crimes Tribunals*, 14 Ind. Int'l & Comp. L. Rev. 175 (2003), 220; P. Masterson, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, 1 Army Law (March 2001), 1.

are, just like ruses, allowed if not amounting to torture or cruel, inhuman or degrading treatment.⁸⁸

In the case at bar, nothing in the *Compromis* leads to a certain conclusion that the evidence against Samara Penza and other LAPS members was obtained through coercive means, or that such evidence will certainly be used during their trial. Moreover, Rotania categorically renounces torture and interrogation techniques forbidden under international law.⁸⁹ In the light of these elements, the most plausible interpretation of the 1980 Act is that the admissibility of evidence cannot be challenged solely on the grounds that it was derived from normal coercion, not amounting to torture or other forbidden interrogation techniques. Also, this does not imply that the judge may not exclude such evidence, where it would be in the interest of justice.

In addition, in certain circumstances the use of anonymous witnesses does not violate the principles of fair trial.⁹⁰ The notion of “fair trial” means not only fair treatment to the defendant but also to the prosecution, witnesses and victims. Thus, the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the

⁸⁸ Israel H.C. 5100/94, *supra* note 54, 21 & 23.

⁸⁹ *Compromis*, §25, 29 &44; Appendix III.

⁹⁰ *Prosecutor v. Dusko Tadic*, ICTY Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 Aug. 1995) (<http://www.un.org/icty>); Statute of the International Criminal Tribunal for the Former Yugoslavia, Annex to S.C. Res. 827, U.N.Doc. S/RES/827 (1993), Art. 22.

witness.⁹¹ In most of the cases where courts allow the anonymous testimony of the witness, the reason for such decision was the fear for safety of the witness or her or his family.⁹²

In the instant case, the defendants are leaders of a group that proved to be capable of organizing deadly attacks anywhere on the territory of Rotania, and that did not hesitate to take the lives of innocent civilians to achieve its purposes.⁹³ Taking that into account, it is very likely that the life of the witnesses testifying against LAPS leadership would be in serious danger. That in turn could discourage witnesses from testifying and impede the trial. Therefore, it is in the interest of the fair trial that witnesses are allowed to testify anonymously against Samara Penza and other LAPS leaders. A similar rationale applies to the fact that defendants or their counsel cannot inquire into the sources of classified information, in order to prevent any further endangerment of Rotania and its citizens.

⁹¹ Jarvie and Another v. The Magistrates' Court of Victoria, 1994 V.R. 84, 88.

⁹² R. v. Taylor 1994 Crim.App. 17; Prosecutor v. Dusko Tadic, ICTY Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 Aug. 1995) (<http://www.un.org/icty>); Statute of the International Criminal Tribunal for the Former Yugoslavia, Annex to S.C. Res. 827, U.N.Doc. S/RES/827 (1993), Art. 22.

⁹³ Compromis, §§9 & 18-21.

3.2.2 In the alternative, Rotania lawfully derogated from article 14 ICCPR provisions

When a public emergency which threatens the life of a nation arises, and this emergency is officially proclaimed, a State may derogate from certain rights of ICCPR,⁹⁴ including Article 14 ICCPR.⁹⁵ Also, the measures derogating from ICCPR must be limited to the extent strictly required by the exigencies of the situation,⁹⁶ reflecting the principle of proportionality.⁹⁷

In the present case, Rotania fulfilled these conditions for derogation. A public emergency was caused by terrorist attacks of LAPS, posing a serious and imminent threat to the unity of Rotania as recognized by the UNSC.⁹⁸ Furthermore, this emergency was officially proclaimed in a televised address, in accordance with Rotanian domestic law.⁹⁹ Also, the Military Commission established under the emergency are merely aimed at prosecuting those responsible for the

⁹⁴ I.C.C.P.R., Art. 4(1); Human Rights Committee, General Comment 5, (Article 4), U.N.Doc. HRI/GEN/1/Rev.1 (1994), 5, §1.

⁹⁵ I.C.C.P.R., Art. 4(2).

⁹⁶ I.C.C.P.R., Art. 4(1).

⁹⁷ Human Rights Committee, General Comment 29, States of Emergency (Article 4), U.N.Doc. CCPR/C/21/Rev.1/Add.11 (2001), §4.

⁹⁸ Compromis, Appendix I.

⁹⁹ Compromis, §§25 & 26.

attacks,¹⁰⁰ and its rules only include a potential derogation from a limited number of 14 ICCPR provisions concerning witnesses, evidence and choice of counsel.¹⁰¹ Thus, the derogation does not overstep the boundaries of proportionality.

The fact that Rotania didn't submit an international notification pursuant to article 4(3) ICCPR does not affect the validity of the Rotanian Military Commission. Neither the text of the covenant, nor its preparatory works suggest that a sanction should be attached to the non-compliance with the notice of derogation.¹⁰² Furthermore, the Human Rights Committee acknowledged that the substantive right to take derogatory measures may not depend on a formal notification,¹⁰³ which was endorsed by various commentators.¹⁰⁴ In similar vein, the European Commission of Human Rights, commenting on an analogous provision of ECHR,¹⁰⁵ stated that a defective communication of derogation does not mean that a State is estopped from invoking its

¹⁰⁰ Compromis, §25.

¹⁰¹ I.C.C.P.R., arts. 14(1), 14(3)(d) & 14(3)(e).

¹⁰² S.R. Chowdhury, *Rule of Law in a State of Emergency* 96 (1989); A.-L. Svesson-McCarthy, *The International Law of Human Rights and States of Exception* 695 (1998).

¹⁰³ *Jorge Landinelli v. Uruguay*, Comm. No. 34/1978, U.N.Doc. CCPR/C/OP/I (1984), 65, §8.3.

¹⁰⁴ T. Meron, *Human Rights in International Strife* 53 (1987); M. Nowak, *CCCPR Commentary* 92, 105 (2005).

¹⁰⁵ E.C.H.R., Art. 18(3).

right to derogate.¹⁰⁶ This leads to the conclusion that notification is not of a substantive nature but merely a procedural element in the derogation process, the legal consequences of which cannot result in the nullification of an otherwise lawful derogation.

3.3 Rotania's Prosecution of Samara Penza and other LAPS members is consistent with fair trial standards of international humanitarian law

Should the circumstances of this case constitute a non-international armed conflict, then common Article 3 GCs compels courts to afford defendants "all the judicial guarantees which are recognized as indispensable by civilized peoples".¹⁰⁷ The requirements of this article are general ones, crafted to accommodate a wide variety of legal systems, and therefore tolerate a great degree of flexibility in trying criminals captured during armed conflict.¹⁰⁸ However, the sole purpose of the provision is to prohibit summary justice. There is nothing in it to prevent suspects from being safely detained, and it leaves intact the right of the State to prosecute, sentence and punish according to the law.¹⁰⁹

¹⁰⁶ Lawless case, App.No. 332/57, (1960-1961) Eur.Ct.H.R. (Ser.B) (Report of the Commission), 72, §§78 & 80; A.-L. Svesson-McCarthy, *supra* note 102, 713 (1998).

¹⁰⁷ GCs, Common Art. 3(1)(d).

¹⁰⁸ Hamdan v. Rumsfeld, *supra* note 78, 2798.

¹⁰⁹ ICRC Commentary, Common Art. 3 GCIV, 39.

Exactly which judicial guarantees are recognized as indispensable by civilized peoples, is spelled out in Article 6(2) Additional Protocol II GCs (AP II),¹¹⁰ which sets out (i) the right to be informed about the offence and to defend oneself, (ii) the principles of individual responsibility, (iii) of non-retroactivity, (iv) of presumption of innocence, (v) the right to be present at the trial, (vi) and the right not to be compelled to testify against oneself or to confess guilt.¹¹¹

In the present case, the rules for Rotania's Military Commission do not collide with these judicial guarantees. The abovementioned rights and principles of Article 6(2) AP II do not address the issue of anonymous witnesses or the modalities of evidence and choice of counsel. Therefore, the rules for Rotania's Military Commission are consistent with the safeguards of Article 6 AP II.

For these reasons, Rotania's prosecution of Samara Penza and other LAPS members before its Military Commission is consistent with international law.

D. ADOVA'S EXERCISE OF JURISDICTION OVER PRESIDENT KIRGOV AND GENERAL VINITSA IS IN VIOLATION OF INTERNATIONAL LAW

The acts of arrest of General Vinitsa and the issuance of an arrest warrant for President Kirgov were unlawful because, as will be demonstrated, Adova cannot exercise jurisdiction, and in any event General Vinitsa and President Kirgov are immune from prosecution.

¹¹⁰ ICRC Commentary, Art. 75 AP I, 878, §3084; ICRC Commentary, Art. 6 AP II, 1396, §4597.

¹¹¹ AP II, Art. 6(2).

1. Adova does not have jurisdiction to prosecute President Kirgov or General Vinitza

Rotania submits that a State cannot exercise jurisdiction over nationals of other States, in the absence of a jurisdictional basis for prosecution.¹¹² In the present case, Adova asserted jurisdiction over President Kirgov and General Vinitza on the basis of CAT. However, CAT only establishes jurisdiction for acts of torture.¹¹³ Rotania submits that Adova cannot assert jurisdiction on basis of CAT, since, as established in Claim B, no acts of torture were committed. In any event, should this Court find that the treatment of Adovan detainees might constitute torture, there was no reasonable basis to claim jurisdiction because there is no indication that President Vinitza or General Kirgov were involved in acts of torture.

1.1 Adova has no jurisdiction to prosecute President Kirgov or General Vinitza under CAT

On 20 July 2007, the Adovan Attorney General announced that General Vinitza had been arrested and charged with offences under Adovan statutes implementing CAT.¹¹⁴ The charges against General Vinitza were brought in connection with the apprehension and treatment of

¹¹² L.F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1089-1090 (L.F. Damrosch et al. eds., 4th ed. 2001).

¹¹³ C.A.T., Arts. 4(4) & 5(1).

¹¹⁴ Compromis, §40

LAPS members.¹¹⁵ Therefore, Adova asserted jurisdiction over General Vinitisa exclusively on the basis of CAT provisions.

Pursuant to Article 5 CAT, a State can exercise jurisdiction over nationals of another State only in cases where such persons allegedly committed, or were complicit in acts of torture. However, as previously demonstrated in claim B, the treatment of Adovan detainees was at all times consistent with international law and did not amount to torture. Therefore, General Vinitisa could not commit or be complicit in acts of torture. Consequently, Adova cannot claim jurisdiction on the basis of CAT provisions.

Furthermore, Rotania submits that the issuance of an international arrest warrant (“Red Notice”) for President Kirgov, with an indictment calling the President a conspirator of General Vinitisa,¹¹⁶ is similarly in contravention of international law because it lacks jurisdictional basis. An international warrant – even without the link to a Red Notice – must be seen as an exercise of jurisdiction, since it demonstrates the willingness and the ability to act and may as such be perceived as a threat to do so at a moment of the issuing State’s choosing.¹¹⁷ One can consider an

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 3 (separate opinion of Judges Higgins, Kooijmans and Buergenthal, §69).

international warrant as “analogous to the locking-on of radar to an aircraft.”¹¹⁸ In the case at bar, Adova executed such a “locking-on of radar”. As there is no lawful foundation to prosecute General Vinitza under the CAT, *a fortiori* there is no foundation for the prosecution of his alleged co-conspirator, President Kirgov. Thus, Adova had no jurisdiction to prosecute him.

1.2 Adova has no jurisdiction over President Kirgov or General Vinitza, since prosecution is manifestly unfounded

Pursuant to article 9(1) ICCPR no one can be subjected to arbitrary arrest or detention. An arrest is arbitrary when prosecution is based on an unwarranted claim.¹¹⁹ Without reasonable suspicion of a violation of norms on the basis of which a State asserts jurisdiction, no lawful prosecution can take place.¹²⁰ Reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.¹²¹

In the case at bar, the Adovan Attorney General arrested and charged General Vinitza with offenses under Adovan statutes implementing the Torture Convention, in connection with the

¹¹⁸ *Id.*

¹¹⁹ *Womah Mukong v. Cameroon*, Comm.No. 458/1991, U.N.Doc. CCPR/C/51/D/458/1991 (1994), § 9.8.

¹²⁰ *Id.*; *Fox, Campbell & Hartley v. United Kingdom*, 13 Eur.Ct.H.R. (Ser.A), §161.

¹²¹ *Fox, Campbell & Hartley v. United Kingdom*, *supra* note 120, §161.

apprehension and treatment of members of LAPS.¹²² However, as will be demonstrated in the following paragraphs, an objective observer could not reasonably suspect that General Vinitisa had any connection with the alleged mistreatment of LAPS detainees.

The only indication supporting the allegation that Adovan detainees were tortured in Merkistan is the testimony of a member of a terrorist organization, which was officially condemned by the UNSC.¹²³ Nevertheless, even if one acknowledges that testimony, despite its doubtful veracity, still there is no sign in the *Compromis* that General Vinitisa was in any way involved in the events that took place in Merkistan. Moreover, although Rotania admits that General Vinitisa issued a proclamation which authorized certain coarse interrogation techniques¹²⁴, the text of proclamation explicitly limited its application to the territory of the Upland Plateau for which General Vinitisa was responsible.¹²⁵ Yet, there is not a single account of any improper treatment in the Upland Plateau. Consequently, there are no facts that could create a reasonable suspicion that General Vinitisa committed an international crime. Thus, his arrest was arbitrary.

¹²² *Compromis*, § 40.

¹²³ *Compromis*, § 33; Appendix I.

¹²⁴ *Compromis*, Appendix III.

¹²⁵ *Id.*

As regards President Kirgov, a formal request for his arrest was issued.¹²⁶ The Adovan Attorney General based this request on the indictment of President Kirgov as a co-conspirator of General Vinitza.¹²⁷ Since, as established above, there can be no reasonable suspicion that General Vinitza committed an international crime; there cannot be reasonable suspicion that President Kirgov was his co-conspirator. An eventual arrest of President Kirgov would therefore be arbitrary.

2. In any event, President Kirgov and General Vinitza are immune from prosecution in Adova

It is a basic principle of international law that a sovereign State cannot adjudicate on the conduct of another State.¹²⁸ This principle of State immunity is derived from the principle of equality of States and the fact that equals cannot exercise authority over each other.¹²⁹ Accordingly it is generally accepted that a State enjoys absolute immunity from the criminal proceedings of

¹²⁶ Compromis, §40.

¹²⁷ *Id.*

¹²⁸ *Ex parte Pinochet Ugarte* (No. 3) [2000] 1 A.C. 147, 201.

¹²⁹ *The Schooner Exchange v. McFaddon*, *supra* note 71, 116; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588; R. JENNINGS & A. WATTS, *supra* note 1, 341; Y. SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW 93 (2004).

another State's courts,¹³⁰ because otherwise States would be able to apply their criminal law to regulate the public governmental activity of other States.¹³¹

Since a State can only act through individuals, immunity attributed to a sovereign State is also attributable to actions of individuals acting on behalf of that State¹³² – if not, State immunity would be illusory,¹³³ and officials would lack the sufficient protection to carry out their functions.¹³⁴

¹³⁰ H. Fox, *Some aspects of immunity from criminal jurisdiction of the State and its officials: The Blaskic case*, in 'MAN'S INHUMANITY TO MAN': ESSAYS IN INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 297 (L.C. Vohrah et al. eds. 2003); Hazel Fox, *The International Court of Justice's Treatment of Acts of the State, and in Particular the Attribution of Acts of Individuals to the State*, in LIBER AMICORUM JUDGE SHIGERU ODA 47 (N. Ando et al. eds. 2000).

¹³¹ H. FOX, THE LAW OF STATE IMMUNITY 506 (2004).

¹³² *Propend Finance Pty Ltd. v. Sing*, 111 ILR 611 (C.A. 1997), 669; *X v. Head of Scotland Yard*, Bundesgerichtshof, 26 September 1978, [1979] Neue Juristische Wochenschrift 1101.

¹³³ *Zoersch v. Waldock* [1964] 2 Q.B. 352 (Lord Justice of Appeal Diplock); J.C. Barker, *State Immunity, Diplomatic Immunity, and Act of State: A Triple Protection Against Legal Action*, 47 INT'L&COMP.L.Q. 950 (1998), 955.

¹³⁴ C.A. Whomersley, *Some Reflections on the Immunity of Individuals for Official Acts*, 41 Int'l&Comp.L.Q. 848 (1992), 849; M. Tomonori, *The Individual as a Beneficiary of State Immunity: Problems of the attribution of ultra vires conduct* 29 DENV.J.INT'L&POL'Y 261 (2001), 274.

Therefore, officials who act on behalf of the State are immune from prosecution in foreign countries.¹³⁵ They cannot suffer the consequence of wrongful acts which are not attributable to them personally but to the State on whose behalf they act, in other words they enjoy "functional immunity" (or immunity *ratione materiae*). This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.¹³⁶

Furthermore, because they relate to the nature of the act in question, a former State official can claim the benefit of such immunity *ratione materiae* for all his official acts performed whilst in office, even after he has left office¹³⁷ – as was confirmed by this Court in its *Arrest Warrant*

¹³⁵ *In Re P (No.2)* [1998] 1 FLR 1027, 1034-35, 114 ILR 485(C.A. 1998).

¹³⁶ Macleod Case (20 November 1854), 83 McNair's Law Officers Opinions vol. II, 221-30; R. Jennings, *The Caroline and McLeod Cases*, 32 AM J.Int'l L. 82 (1938); *Compania Naviera Vascongado v. Christina SS*, *supra* note 71, 335; *Chung Chi Cheung v. The King*, Judicial Committee of the Privy Council [1939] A.C. 160; *Horn v. Mitchell*, US Marshall, 232 Fed. 819 (1st Cir. 1916); *In re Gilbert*, 13 Ann. Dig. 86 (Braz.Sup.Fed.Ct. 1944); *Scordalos*, Cass. 7 Feb. 1944 1944 Journal des Tribunaux Mixtes No. 3308, 2 (Egypt); *Johnson v Turner*, 21 ILR 103 (Philippine Supreme Court, 26 April 1954); *Rahimtoola v Nizam of Hyderabad* [1958] A.C. 379; *Waltier v. Thomson*, 189 F. Supp. 319 (S.D.N.Y. 1960); *Wacker v. Bisson*, 348 F.2d 602, 606 (5th Cir. 1965); *Prosecutor v. Blaskic*, ICTY Case No. IT-95-14-PT, Subpoena, (29 July, 12 August & 29 October 1997), 110 ILR 607, 707.

¹³⁷ A. Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 Eur. J. Int. Law. 853 (2002), 862-863; Y. Dinstein, *Diplomatic Immunity from Jurisdiction ratione materiae*, 15 INT'L & COMP. L.Q. 76 (1966), 78 & 86; M. Bothe, *Die strafrechtliche Immunität fremder Staatsorgane*, 31 ZEIT. AUSL. ÖFF. RECHT VÖLK 246 (1971); I. BROWNIE, *supra* note 72, 361-362; A. CASSESE, INTERNATIONAL LAW 93-96 (2nd ed. 2005); Y. SIMBEYE, *supra* note 129, 123; C. Wickremashinge, *Immunities Enjoyed by Officials of States and International Organizations*, in INTERNATIONAL LAW 397 (M.D. Evans ed., 2nd ed. 2006).

judgment.¹³⁸ Consequently, a foreign court may only try a former State official for acts undertaken in a "private capacity" while in office – provided that such a court has jurisdiction.¹³⁹ Thus, the critical test is whether the alleged conduct was an ostensible exercise of the Official's public authority or was a private act.

In the present case, Adova charged General Vinitza in connection with the apprehension and treatment of Samara Penza and other LAPS members, in his capacities both as a military commander and as a legal adviser to the President – President Kirgov being charged as a co-conspirator.¹⁴⁰ These acts had as a purpose the capture and trial of the perpetrators of terrorist attacks on Rotania,¹⁴¹ which posed a serious and imminent threat to the unity of the State of Rotania,¹⁴² and the prevention of further loss of civilian life.¹⁴³ Military and police actions, such

¹³⁸ Arrest Warrant Case, *supra* note 117, §§51 & 61.

¹³⁹ *Id.*, §61.

¹⁴⁰ Compromis, §40.

¹⁴¹ Compromis, §§24 & 25.

¹⁴² Compromis, Appendix I, §3.

¹⁴³ Compromis, §38.

as these, are considered as the paradigm case of the exercise of sovereign power.¹⁴⁴ The fact that the acts could be *ultra vires* acts does not affect their official nature for the purpose of immunity, because they were performed in ostensible exercise of public authority.¹⁴⁵ Even wholly illegal acts can still be public acts.¹⁴⁶

Rotania submits that the only issue in the instant claim is the jurisdiction of the Adovan national courts, not the legitimacy of General Vinitza's or President Kirgov's acts. Immunity subsists irrespective of whether the acts are illegal or unauthorized according to internal law or contrary to international law, since the whole purpose of State immunity is to prevent such issues being litigated in a foreign national court unless the State consents by treaty or otherwise. Rotania asserts its national immunity and sole jurisdiction over the illegal acts. Such immunity guarantees the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.¹⁴⁷

¹⁴⁴ Claim against Empire of Iran, 45 I.L.R. 57 (Bundesverfassungsgericht 1963); Duke of Brunswick v. King of Hanover, 2 H.L.Cas. 1 (1848); Nelson v. Saudi Arabia, 923 F.2d.1528 (11th Cir. 1991); Kendall v. Kingdom of Saudi Arabia, 65 Adm. 885. (S.D.N.Y. 1965).

¹⁴⁵ Republic of Philippines v. Marcos, 806 F.2d 344, (2th Cir. 1986); Jaffe v. Miller (1993) 13 O.R. (3d) 745 (Ontario).

¹⁴⁶ Velasquez Rodriguez Case, 1988 Inter-Am.Ct.H.R.(ser.C) No. 4 (July 29, 1988), §172.

¹⁴⁷ Arrest Warrant Case, *supra* note 117, (separate opinion of Judges Higgins, Kooijmans and Buergenthal, §73-75).

The acts of General Vinitsa and President Kirgov thus being undertaken in their official capacity and in furtherance of Rotania's most vital State interests, both General Vinitsa and President Kirgov are immune from prosecution by national courts of Adova.

Rotania emphasizes, however, that the immunity from jurisdiction enjoyed by General Vinitsa and President Kirgov does not mean that they enjoy impunity in respect of any crimes they might have committed. Their immunities under international law do not represent a bar to criminal prosecution by Rotanian courts.¹⁴⁸ Secondly, they would cease to enjoy immunity from Adovan jurisdiction if Rotania, in the future, would decide to waive that immunity.¹⁴⁹ Functional immunity is for the benefit of the State, not the individual, and only the State may choose to waive it.¹⁵⁰

Hence, President Kirgov and General Vinitsa are immune from prosecution in Adova.

CONCLUSION AND PRAYER FOR RELIEF

Therefore, it may please the Court to adjudge and declare:

I.- That Rotania was entitled under international law to apprehend and render Samara Penza and the other LAPS members from Adova;

¹⁴⁸ Arrest Warrant Case, *supra* note 117, §61.

¹⁴⁹ *Id*; Jaffe v. Miller (1993) 13 O.R. (3d) 745.

¹⁵⁰ Jaffe v. Miller (1993) 13 O.R. (3d) 745.

II.- That Samara Penza and the other LAPS members were at all times detained and treated in a manner consistent with international law;

III.- That in any event, Rotania's prosecution of Samara Penza and the other LAPS members before its Military Commissions for acts committed against Rotanian citizens and against Rotanian religious and cultural institutions is consistent with international law;

IV.- That Adova's exercise of jurisdiction over President Kirgov and General Vinitza is in violation of international law.

In respectful submission before the International Court of Justice.

The State of Rotania

