INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE 2008 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

THE CASE CONCERNING CERTAIN CRIMINAL PROCEEDINGS IN ADOVA AND ROTANIA

THE REPUBLIC OF ADOVA
(APPLICANT)

v.

THE STATE OF ROTANIA
(RESPONDENT)

MEMORIAL FOR THE APPLICANT

2008

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STATEMENT OF JURISDICTION

The Republic of Adova ("Adova") and State of Rotania ("Rotania") have submitted by Special Agreement their differences concerning certain criminal proceedings in Adova and Rotania, and transmitted a copy thereof to the Registrar of the International Court of Justice ("I.C.J.") pursuant to article 40(1) of the Statute of the I.C.J. ("Statute"). Therefore, Adova and Rotania have accepted the jurisdiction of the I.C.J. pursuant to Article 36(1) of the Statute.

QUESTIONS PRESENTED

I.

Whether the apprehension and rendition of Samara Penza and other Adovan citizens was a violation of Adova's sovereignty and in contravention of International Law.

II.

Whether the subsequent detention and treatment of Samara Penza and other Adovan citizens violated International Law.

III.

Whether 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.

IV.

Whether 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.

STATEMENT OF FACTS

DISSOLUTION OF SYBILLA

In 1970, the Kingdom of Sybilla, following pre-set internal provincial borders, dissolved into two independent nations: the Republic of Adova, and the State of Rotania.

The Stovians and the Litvians are two ethnic groups with distinct languages, religions, and cultures. The Adovan population is 75% Litvian and 10% Stovian, and the Rotanian population, 85% Stovian and 10% Litvian.

THE UPLAND PLATEAU

Most Litvians in Rotania live in the Upland Plateau, considered as the center of their culture. In Rotania, Litvians in the Upland Plateau generally have lower per capita income, literacy rate, and life expectancy compared to Stovians. A social and civic organization, called the Litvian Advancement and Protection Society (LAPS), emerged among these Litvians.

THE LAPS

As of 2005, the LAPS has had three factions, including a conservative wing and the more radical Independent Litvia Solidarity Association (ILSA) wing of LAPS, which sought the creation of an independent Litvian State, or integration with Adova. On at least eight occasions, the Rotanian parliament had adopted resolutions denying any political autonomy to the Upland Plateau. LAPS has received financial assistance from the government of Adova, which it has claimed to use exclusively for charitable and educational projects.

SAMARA PENZA

Since 1985, the General Chairman of LAPS has been Samara Penza, a national of Adova. Some media sources have reported that Penza has prevented the radical elements from steering LAPS into a more violent direction. Penza has garnered recognition from international

organizations and has received awards for weaving the LAPS factions into "a peaceful, constructive, and positive force for change."

In January 2006, dissatisfied with the progress of their political goals, the ILSA organized workers' strikes and protests throughout the Upland Plateau.

GOMMEL VINITSA AND THE 373RD BATTALION

In February 2006, to address these uprisings, the Rotanian government ordered the 373rd Battalion to make its presence more visible. The Battalion was commanded by Colonel Vinitsa. ILSA spokesmen posited that the 373rd Battalion only sought to protect the economic interests of the mines' Stovian owners.

There were six disturbances in the Upland Plateau between February and December 2006, which led to 100 to 300 dead, and 750 to 1,200 injured Litvians.

PENZA'S PUBLIC STATEMENT AND ILSA'S RECOGNITION

On 1 January 2007, Penza issued a public statement, calling on Litvians to achieve liberty, to "right historical wrongs that stand in the way of progress."

In response, the ILSA published a manifesto to "take dramatic measures" to consummate the Litvians' "love of freedom." They vowed to avoid bloodshed and respect basic rights.

ATTACKS IN THE UPLAND PLATEAU

On 7 January 2007 the principal Stovian Church of the Upland Plateau was set ablaze, as well as other Stovian buildings in Rotania. ILSA leadership acknowledged that its members carried out the operations.

DESTRUCTION OF THE SHRINE OF THE SEVEN TABERNACLES

In Zima, the Shrine of the Seven Tabernacles is overseen by a Committee of Thirty Elders. Since January 2007, the 373rd Infantry Battalion has been stationed nearby. During the

afternoon of 22 February, the Chairman of the Committee received a message warning that no one should be near the Shrine that evening, starting at 2100 hours. The Chairman of the Committee sent a message to the Ministry of Justice of Rotania, but did not get a response. At approximately 21:30, the Shrine was completely destroyed. All seven committee members and 15 Shrine staff died. Penza thereafter condemned the loss of civilian lives and the use of civilians as human shields. The Adovan ambassador condemned the attacks and reiterated Adova's resolve to combat terrorism.

KIRGOV'S RESPONSE

In response, President Kirgov of Rotania implemented a three-point plan. First, he declared a national emergency under the 1980 Act, and nationalized the military reserves. Second, he established a Military Commission to prosecute those responsible for the attacks. Third, he announced that Vinitsa and the 373rd Battalion could take necessary measures to apprehend the perpetrators, provided they were lawful. The Military Commissions allowed for anonymous testimonies and did not permit challenges against evidence derived from coercive interrogations. Defendants were given military lawyers, and could not choose their own counsel. Inquiries into classified information were likewise disallowed.

SC RESOLUTION 2233

On 7 March, the UN Security Council issued Resolution 2233, compelling Adova to search for Penza and the other LAPS members in its territory and surrender them to Rotania for prosecution. Adova, in its statement in the Security Council deliberations, refused in good conscience to surrender Penza and the other LAPS members to the Rotanian Military Commission which purportedly did not meet minimum standards of due process. Resolution

2233 recognized Rotania's inherent right to self-defense, but permanent member Delta refused to acknowledge it as an endorsement to use force.

APPREHENSION AND RENDITION

The Battalion apprehended Penza and 12 of their closest operatives within Adovan territory. She was held in custody and was questioned, where she confessed to her involvement in the attacks against Rotania. The Prime Minister of Adova condemned Rotania's violation of Adova's sovereignty without legal process, and demanded that Rotania disclose the location of the detainees and return them to Adova.

ZORAN MAKAR'S STATEMENT

Camp Indigo is a Rotanian military training facility in Merkistan, a country east of Rotania, governed by a bilateral Status of Forces Agreement. Zoran Makar, who claimed Adovan citizenship, reported being detained in Camp Indigo along with Penza and other LAPS members. He reported being deprived of food and water, being subject to hanging by the wrists, and exposure to continuous bright light, uncomfortably cold cell temperatures, and loud discordant music.

On 13 April, shortly after sunrise, six Merkistani policemen entered Camp Indigo and saw 20 disoriented and confused individuals in varying states of undress. When the officers returned at 5 p.m., they saw no signs of these persons. The next day, the Government of Merkistan demanded Rotania to close Camp Indigo.

PENDING MILITARY COMMISSION TRIAL

On 26 April, Penza and the other LAPS members were transferred to the Military Commission. Penza was charged with conspiracy, arson, and twenty-two counts of murder. She

was scheduled to be tried on May 2008. The others were charged with aiding a terrorist operation.

VINITSA'S AND KIRGOV'S RETIREMENT AND ARREST

Vinitsa, after being promoted to General, retired from the military and was appointed as professor in the law of war and to a position in the Rotanian Advisory Council on International Law. Kirgov resigned from his presidency after undergoing heart surgery.

On 20 July, the Adovan police arrested Vinitsa in its territory for violating Adovan statutes implementing the Torture Convention, as military commander and legal adviser. Moreover, an international warrant was filed for the arrest of Kirgov, as co-conspirator. The Adovan Foreign Minister announced that both Vinitsa and Kirgov were liable for violating Adova's territorial integrity and for grossly maltreating Adovan nationals without due process of law.

SUBMISSION BEFORE THE INTERNATIONAL COURT OF JUSTICE ("I.C.J.")

After suspending trade relations and dispatching troops along their shared border, both parties submitted to the ICJ's *ad hoc* jurisdiction to adjudicate this conflict – Adova as Applicant, and Rotania as Respondent.

SUMMARY OF PLEADINGS

Despite the emergence of equally important International Law norms in the fight against terrorism, the fundamental rules on the consent of States in respect of any intrusion into its territory and the protection of human rights continue to be inviolable.

The State of Rotania ("Respondent") violated the sovereignty and territorial integrity of the Republic of Adova ("Applicant") by sending military operatives into the latter's territory in order to abduct and render Samara Penza and other Adovan nationals ("Penza and the Others").

Respondent cannot justify this use of force by invoking its right of self-defense because there was no armed attack attributable to Applicant and the requirements of self-defense have not been met. Neither can Respondent justify its act as a countermeasure because Applicant committed no prior breach of any of its obligations to Respondent. Respondent's conceivable argument that the principle of *aut dedere aut judicare* was breached is negated by the fact that no international crime triggering universal jurisdiction was committed in this case.

Terrorism is not a customary international crime. Even assuming terrorism is such a crime, the absence of specific intent to spread terror here shows that no such crime has been committed. In any event, Applicant's genuine intent to investigate, and if warranted, prosecute Penza and the Others was precluded by Respondent's unlawful abduction. Neither does International Humanitarian Law justify the abduction of Penza and the Others because no armed conflict exists in this case. Even assuming that there is, Penza and the Others are civilians not subject to attack under the Geneva Conventions.

Further, the detention and treatment of Penza and the Others violate International Human Rights Law. In the first place, the detention of Penza and the Others, which exceeded more than three weeks before a case was filed against them, was clearly arbitrary. Also, the 'extraordinary'

techniques authorized and executed by Rotanian authorities — including the deprivation of food and clothing, and subjecting the detainees to harsh artificial environments — constituted torture and cruel, inhuman and degrading treatment. Neither a state of emergency nor an armed conflict can justify non-compliance with these absolute prohibitions.

Assuming an armed conflict existed, regardless of status, Penza and the Others were not accorded the minimum protections under International Humanitarian Law. Respondent cannot attest that they were *unlawful combatants* because no such status validly exists under the Geneva Conventions.

The prosecution of Penza and the Others before the Rotanian Military Commission violates international fair trial standards. It withholds from an accused right to confront witnesses face to face, allows the exclusion of evidence obtained through torture, and the deprives him of the right to choose counsel. Neither was the Commission independent, being constituted by the former President as commander-in-chief and being under the control of the military, which is part of the executive.

Respondent cannot justify its acts as a derogation of its International Human Rights Law obligations because it failed to comply with the rules therefor—there was no public emergency threatening the life of the nation and the derogations were also disproportionate and unnecessary. The derogation was also unnecessarily prolonged, even after Rotania itself declared that the "reign of terror was over."

Moreover, the exercise of jurisdiction over Penza and Others to prosecute them cannot be justified under the *male captus bene detentus* doctrine which is not a customary rule. Even assuming its validity, resort to the *male captus* principle is permitted only in the absence of any protest by the State whose territorial integrity has been violated.

Finally, Applicant has title to exercise jurisdiction over former President Kirgov and retired General Vinitsa for the international crime of torture pursuant to three bases of jurisdiction: universal—for committing an international crime; protective—for committing acts against Applicant's vital interests; and passive personality—for violating the rights of Adovan nationals. Kirgov and Vinitsa are not entitled to immunity *ratione materiae* because their criminal acts cannot be deemed official acts done in their capacity as representatives of Respondent.

PLEADINGS AND AUTHORITIES

I. THE APPREHENSION AND RENDITION OF SAMARA PENZA AND OTHER ADOVAN CITIZENS ("COLLECTIVELY, PENZA AND THE OTHERS") VIOLATED THE REPUBLIC OF ADOVA'S ("APPLICANT") SOVEREIGNTY AND INTERNATIONAL LAW.

Despite the emergence of equally important norms in International Law, the fundamental rule on the consent[1] of States in respect of any intrusion into its territory[2] and the protection of human rights continue to be inviolable.[3] As will be shown, the State of Rotania's ("Respondent") surreptitious rendition of Penza and the Others violated Applicant's sovereignty and International Law.

A. RESPONDENT VIOLATED APPLICANT'S SOVEREIGNTY.

As the incursion of the Rotanian Military Troops into Applicant's territory was without the latter's consent [Compromis ("C.") 31], Respondent violated Applicant's sovereignty guaranteed under the United Nations ("UN") Charter and Customary International Law.

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[1] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625(XXV), GAOR, 25th Sess., Supp.No. 28, at 121, U.N. Doc.A/8082 (1970)[hereinafter Declaration on Principles in International Law]; BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298 (2003); SHAW, INTERNATIONAL LAW 572 (2003); HENKIN, INTERNATIONAL LAW CASES AND MATERIALS ch.12 (1993); SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE ch.12 (1993); HIGGINS, PROBLEMS AND PROCESS ch.4 (1994).

[2] U.N. CHARTER art.2(4); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp.No. 14, at 12, U.N. Doc.A/6220 (1965); Declaration on Principles in International Law, G.A. Res. 2625(XXV); 1 OPPENHEIM, INTERNATIONAL LAW 334 (Jennings & Watts, eds., 1999).

[3] European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 312 U.N.T.S. 221 [hereinafter ECHR]; International Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226; Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror,* 75 GEO. WASH. L.REV. 1201 (2007).

1. Respondent is guilty of intervention.

Principle 3 of the 1970 Declaration on Principles in International Law[4] prohibits any State from intervening, directly or indirectly, for any reason whatever in the internal or external affairs of another State.[5] The extraterritorial abduction[6] of an alleged criminal is therefore illegal[7] as a State's right to exercise its criminal jurisdiction is limited to its own territory,[8] and exceptionally to another State's territory with the latter's *ad hoc* consent or prior consent pursuant to a treaty.[9] In this case, Applicant has neither given its *ad hoc* consent nor signed a treaty encapsulating such consent. Accordingly, Respondent's apprehension and rendition of Penza and the Others violated the duty of non-intervention.

2. Respondent's incursion into Applicant's territory amounts to an unlawful use of force.

Article 2(4) of the UN Charter requires States to refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner

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[4] Declaration on Principles in International Law, G.A. Res. 2625(XXV).

[5] G.A. Res. ES-6/2, U.N. GAOR, 6th Emerg.Sp.Sess., Supp.No. 1, at 2, U.N. Doc.A/RES/E-6/ (1980); G.A. Res. 38/7, U.N. GAOR, 38th Sess., Supp.No. 47, at 19, U.N. Doc.A/RES/38/7 (1983); Reisman, *The Resistance in Afghanistan is Engaged in a War of National Liberation,* 81 A.J.I.L. 906 (1987); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser.A) No. 10.

[6] Sadat, *supra* note 3, at 1216.

[7] Attorney-General v. Eichmann, 36 I.L.R. 5 (1961); United States v. Alvarez-Machain, 504 U.S. 655. 902 (1992); Regina v. Horseferry Road Magistrate's Court, ex parte Bennett, [1994] 1 A.C. 42.

[8] HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 299 (2004); *Lotus*, 1927 P.C.I.J. (Ser.A) No.10; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §431 (1987); DAMROSCH, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1177 (2001).

[9] *Articles on State Responsibility*, G.A. Res. 56/83, art.20, U.N. GAOR, 56th Sess., Annex, Agenda Item 162 at 3, U.N. Doc.A/RES/56/83 (2001); 1 OPPENHEIM, *supra* note 2, at 435.

inconsistent with the Purposes of the United Nations.[10] Such Article covers any and all[11] uses of, or threats to use, force against the territorial integrity or political independence of States not only by means of visible armed attacks but inconceivable attacks short of *actual* armed attacks.[12] As exceptions to such prohibition, States may use force in self-defense when an armed attack occurs[13] while the Security Council may authorize such use of force.[14] However, such exceptions cannot be invoked in this case.

a. *Respondent's incursion was not a valid exercise of the right to self-defense.*

i. <u>There was no armed attack.</u>

Article 51 of the UN Charter expressly requires the occurrence of an armed attack as a condition for the exercise of self-defense.[15] In defining an armed attack in the *Nicaragua* case, the ICJ relied on the UN General Assembly's Definition of Aggression[16] which defines an "armed attack" as the sending by or on behalf of a State of armed bands, groups, irregulars or

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[10] U.N. CHARTER art.2(4).

[11] WALLACE, INTERNATIONAL LAW 249 (1997).

[12] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶103.

[13] *Id.*; DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 175 (2005); BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 231-80 (1963); SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 661-78 (1994); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 263.

[14] U.N. CHARTER arts.43-48; FLECK, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 1 (1999).

[15] JESSUP, MODERN LAW OF NATIONS 164-67 (1948); Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4; *Nicaragua*, 1986 I.C.J. at 14.

[16] G.A. Res 3314(XXIX), U.N. GAOR, 29th Sess., Supp.No. 31, art.3(g), U.N. Doc.A/9631 (1974).

mercenaries, which carry out acts of armed force against another State of *such gravity as to amount* to an actual armed attack conducted by regular forces.[17] In this case, the acts purportedly committed by the Independent Litvian Solidarity Association ("ILSA") failed to meet this standard as they merely involved lawless violence of arson and unintentional killing of 15 individuals in the Shrine of the Seven Tabernacles ("Shrine").

Further, Article 51 of the Charter requires Members which exercise their right to self-defense to *immediately report* to the Security Council measures taken for the latter to determine the legality of the use of force.[18] Failure to comply with such requirement is indicative that the State itself was not convinced that it was acting in self-defense.[19] Accordingly, the absence of an armed attack coupled with Respondent's failure to report (Clarifications 2) the same negates Respondent's claim of self-defense.

ii. Assuming that there was an armed attack, it was not imputable to Applicant.

(1) Applicant did not control the acts of ILSA or Penza and the Others.

In *Nicaragua*, the ICJ recognized "effective control" as the standard for attributing to a State the acts of a non-state armed group,[20] which standard was reaffirmed in the recent cases of *Congo v. Uganda*[21] and *Bosnia & Herzegovina v. Serbia & Montenegro.*[22] According to the ICJ,

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[17] *Nicaragua*, 1986 I.C.J. at 194-95.

[18] U.N. CHARTER art.51; *Nicaragua*, 1986 I.C.J. at ¶¶121-22.

[19] U.N. CHARTER art.51; GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 100 (2004); *Nicaragua*, 1986 I.C.J. at ¶¶121-22.

[20] *Nicaragua,* 1986 I.C.J. at ¶¶102-03.

[21] 2005 I.C.J. 116, ¶147.

[22] 2007 I.C.J. 91, ¶¶377-415.

effective control may be inferred from the fact that the leaders of the group were selected by the State, and from other factors such as the "organization, training, and equipping of the force, planning of operations, the choosing of targets, and the operational support provided to such group by the State."[23] Here, Applicant merely provided financial support to LAPS — not even directly to ILSA (C.7). Assuming that ILSA benefited from such financing, the ruling in *Nicaragua* is clear that assistance "in the form of provision of weapons or logistical or other support"[24] — *while constituting use of force* — will not suffice to attribute an armed attack to a State.

Seemingly, *Prosecutor v. Tadić*[25] provided a lower threshold — a State must wield "overall control" over the group not only by equipping and financing the group but also by coordinating or helping in the general planning of its military activity. However, as Applicant neither coordinated nor planned the attacks, Applicant may not be held liable for ILSA's acts under the standard in *Tadić*.

(2) Applicant did not acknowledge and adopt ILSA's acts.

Under Article 11 of General Assembly Resolution 56/83, an initially private conduct becomes an act of the State only if, and to the extent, that the State acknowledges *and* adopts the conduct as its own.[26] Article 11 was meticulously crafted in order to prevent any attribution based on mere complicity to, or endorsement of, a past act. This is evident from the

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[23] *Nicaragua,* 1986 I.C.J. at ¶103.

[24] *Id.*

[25] Prosecutor v. Tadić, Case No.IT-94-1-A, ¶131 (1999).

[26] CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 121 (2002).

Commentary of the International Law Commission as Article 11 is a codification of what various tribunals have done in the past, particularly in the *Lighthouses Arbitration*[27] and *Diplomatic and Consular Staff in Tehran*[28] where it was held that that the seal of governmental approval to the acts involved *and* the decision to perpetuate them translated the *continuing* breach of the private group into the acts of Greece and Iran. In this case, no such seal and decision were given by Applicant which, in fact, expressly undertook to prosecute the offenders, if necessary (C.42).

b. *Respondent cannot hide under the cloak of Security Council Resolution No. 2233 ("Resolution 2233").*

i. <u>The language of Resolution 2233 betrays Respondent's claim.</u>

The Security Council through Chapter VII of the UN Charter has the sole authority to determine when a threat to, or breach of, the peace has occurred[29] and the authority to order the use of force against a State.[30] The clear language of the resolution is in itself determinative as to whether any such authorization is given.[31] In this case, the language of Resolution 2233 lacks a clear authorization for Respondent, or any State for that matter, to resort to the use of force.[32]

ii. <u>Even assuming that Resolution 2233 sanctions the use of force against Applicant, any use of force under such resolution is unlawful.</u>

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[27] 12 R.I.A.A. 155, 198 (1956).

[28] 1980 I.C.J. 3.

[29] U.N. CHARTER art.39.

[30] CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 215 (1994).

[31] Legal Consequences for States of the Continued Presence of South African Namibia (South West Africa) Notwithstanding S.C. Resolution 276, Advisory Opinion, 1971 I.C.J. 16.

[32] Byers, *Terrorism, the Use of Force and International Law after 11 September,* 51 I.C.L.Q. 401 ¶14 (2002).

The Security Council is required to clearly specify the extent, nature, and objective of the military action as any broad and indeterminate language provides States the opportunity to use force limitlessly.[33] Absent such clear specification,[34] the use of force by any State pursuant thereto would be invalid.[35] Here, other than a statement in Resolution 2233 that affirms Respondent's right to self-defense,[36] the Security Council did not determine the extent of the exercise of such right. Accordingly, Respondent's use of force pursuant to Resolution 2233 was invalid.

3. Neither could Respondent justify its acts as a countermeasure.

An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce the latter to comply with its international obligations.[37] As will be shown in Part I(B), Applicant did not commit a prior breach of its international obligations.

More importantly, a legitimate countermeasure may not involve the use of force unless the same is exercised by virtue of the right to self-defense.[38] As Respondent was not faced with

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[33] DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 269 (2004); SAROOSHI, THE UN SECURITY COUNCIL AND THE DELEGATION OF ITS CHAPTER VII POWERS 156 (1999).

[34] *See e.g.* S.C. Res. 731, U.N. SCOR, 47th Sess., U.N. Doc.S/RES/731 (1992); S.C. Res. 748, U.N. SCOR, 47th Sess., U.N. Doc.S/RES/748 (1992); S.C. Res. 883, U.N. SCOR, 48th Sess., U.N. Doc.S/RES/883 (1993).

[35] SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 751 (2002).

[36] S.C. Res. 2233, 6000th mtg., U.N. Doc.S/RES/2233 (2007)[Compromis Appendix ("C.A.") I]

[37] Naulilaa, 2 R.I.A.A 1011, 1025-026 (1930); Air Services Agreement of 27 March 1946 (U.S. v. Fr.), 18 R.I.A.A. 416 (1979); CRAWFORD, *supra* note 26, at 168.

[38] DINSTEIN, *supra* note 13, at 222.

any armed attack, the abduction of Penza and the Others by Respondent's Military Troops constituted an unlawful countermeasure. [39]

B. APPLICANT DID NOT HARBOR ANY INTERNATIONAL CRIMINAL.

1. The principle of *aut dedere aut judicare* does not apply as no crime triggering universal jurisdiction was committed.

The customary principle of *aut dedere aut judicare*[40] requires States to prosecute or surrender individuals suspected of having committed crimes triggering universal jurisdiction. As will be explained, no such crimes were committed in this case.

a. *No terrorist act was committed.*

The inconsistency of State Practice illustrates that no single definition of terrorism exists.[41] Absent a clear definition of terrorism,[42] ILSA members could not have committed such crime.

Assuming however that a crime of terrorism exists, no terrorist act was committed. In *Prosecutor v. Galić,*[43] the International Criminal Tribunal for Yugoslavia ("ICTY") identified the 'specific intent' to spread 'terror' as the *mens rea* of terrorism. The absence of casualties in the first incidents reveals that ILSA endeavored to commit the acts where few people could be

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[39] *Id.* at 45; Cysne, 2 R.I.A.A. 1035, 1052 (1930).

[40] BASSIOUNI & WISE, *AUT DEDERE AUT JUDICARE*: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 3 (1995); BANTEKAS & NASH, INTERNATIONAL CRIMINAL LAW 91 (2007).

[41] Qadir, *The Concept of International Terrorism: An Interim Study of South Asia*, *in* ROUND TABLE 333-39 (2001); Franck, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 A.J.I.L. 69 (1974).

[42] Koufa, *Specific Human Rights Issues: New Priorities, In Particular Terrorism*, Additional Progress Report, ¶44, U.N. Doc.E/CN.4/Sub.2/2003/WP.18 (2003).

[43] Case No.IT-98-29-A, ¶104 (2006).

harmed (C.18). In fact, the attack against the Shrine was even preceded with a warning to the Committee of Elders (C.19). These events serve to indicate the absence of any specific intent to spread terror.

b. *No crime against humanity was committed.*

The customary definition of crimes against humanity[44] does not include destruction of property. While such definition includes murder, "intent to kill" is required to elevate killings into crimes against humanity.[45] Here, the death of civilians was not intended as the main intent behind the attack was merely to burn the sites (C.18) and any death was merely collateral damage.

c. *ILSA's acts do not constitute a grave breach of the Geneva Conventions.*

Grave breaches of the Geneva Conventions are considered war crimes.[46] These include willful killing of civilians,[47] wanton destruction of civilian property,[48] and other violations of the laws and conduct of war.[49] In this case, no such killing was willful as ILSA itself declared that it will try to "avoid bloodshed" (C.17) and not destruction of property was wanton but was, on the contrary, merely politically inspired (C.18).

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[44] Rome Statute of the International Criminal Court, 1998, art.8(2)(a), 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[45] Prosecutor v. Delalić, Case No.IT-96-21-T, ¶439 (1998).

[46] Rome Statute, art.8(2)(a).

[47] *Id.* art.8(2)(e)(i).

[48] *Id.* art.8(2)(e)(iv).

[49] *Id*. art.8(2)(e).

2. Assuming that such crimes were committed, Penza and the Others did not participate therein.

a. *No superior-subordinate relationship exists between Penza and ILSA.*

A superior-subordinate relationship requires the superior to exercise a responsible position, (whether political or military, entitling him to give orders to, or punish, his subordinates.[50] To establish responsibility, however, they must enjoy direct and effective command and control over their subordinates,[51] and the material ability to order an attack.[52]

Here, Penza is the General Chairman of the LAPS, not ILSA. Although she has a certain level of influence over all the factions of the LAPS, this influence fails to establish her 'material ability' to specifically order the taking of military-like actions against Respondent. Notably, ILSA has a distinct leadership (C.17, 19) and their invocation of Penza as their "fearless leader" (C.17) is a symbolic affectation for a widely-recognized leader (C.9, 10) of the Litvian cause. Consequently, no superior-subordinate relationship exists between Penza and ILSA.

b. *Penza and the Others are not guilty of instigation.*

A person is guilty of instigation if he orders, solicits or induces the commission of a crime.[53] As no superior-subordinate relationship herein exists, any orders to commit a crime by Penza cannot be implied.[54] The act of soliciting or inducing imply commanding, authorizing,

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[50] Prosecutor v. Kajelijeli, Case No.ICTR-99-44-T, ¶774 (2003); Bantekas, *The Contemporary Law of Superior Responsibility*, 93 A.J.I.L. 574 (1999).

[51] Prosecutor v. Strugar, Case No.IT-01-42-T, ¶360 (2005).

[52] Prosecutor v. Naletilić & Martinović, Case No.IT-98-34-T, ¶76 (2003); WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 130 (2005).

[53] Rome Statute, art.25(3)(b).

[54] Prosecutor v. Akayesu, Case No.ICTR-96-4-T, ¶483 (1998).

urging or affecting, causing or influencing a course of conduct by persuasion or reasoning.[55] Here, the declarations of Penza were merely expressions of political support for Litvian independence (C.16, 23) and not a confession of guilt,[56] while no fact in the *Compromis* shows any soliciting or inducing by the Others.

3. Assuming further that Penza and the Others participated in such crimes, Respondent did not violate the principle of *aut dedere aut judicare*.

a. *Applicant validly refused to surrender Penza and the Others to Respondent.*

i. The rights of Penza and the Others to fair trial would be, and was indeed violated.

It is illegal[57] to surrender a person to another State where there is a real risk that his human rights, including his right to fair trial,[58] would be violated. Here, former President Kirgov declared that all persons charged with the attacks will be tried under the Military Commission (C.25) which, as will be shown in Part III, deprives an accused the "minimum standards" of due process (C.26).

ii. There was risk of torture.

Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"),[59] imposes upon States the obligation not to "expel, return

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[55] Eser, *Individual Criminal Responsibility, in* 1 CASSESE, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 796 (2002).

[56] *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb.& Mont.), 2007 I.C.J. 91, ¶378.

[57] Dugard, *Reconciling Extradition with Human Rights,* 92 A.J.I.L. 187 (1998).

[58] Universal Declaration of Human Rights, G.A. Res. 217A(III), art.10, U.N. Doc.A/810, at 71 (1948)[hereinafter UDHR]; ICCPR, art.14.

("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[60] Here, the validity of Applicant's refusal to surrender Penza and the Others was based on retired General Vinitsa's Proclamation authorizing the use of *extraordinary* techniques, which will be proved in Part II(B)(1) as constituting torture, in the interrogation of the persons charged with terrorist offenses (C.A.III ¶3).

b. *Applicant is willing to prosecute Penza and the Others.*

While any State may exercise enforcement jurisdiction over crimes triggering universal jurisdiction,[61] the State where the offender is found retains the primary jurisdiction to do so.[62] The custodial State must be given a chance to show its serious intention to prosecute the offenders in accordance with the presumption of good faith.[63] In this case, Respondent's precipitate haste precluded Applicant from exercising such jurisdiction. In fact, less than a month from the adoption of Resolution 2233, Penza was already abducted by the Rotanian Military despite Applicant's Prime Minister's declaration that Applicant will conduct its own investigation and legal proceeding (C.A.II).

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[59] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

[60] G.A. Res. 39/46, U.N. GAOR, 39th Sess., art.3, U.N. Doc.A/RES/39/46 (1984); *see also* U.N. Model Treaty on Extradition, art.3(f), G.A. Res. 45/116, U.N. Doc.A/RES/45/116 (1990).

[61] DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 100 (2005); Scharf, *Application of Treaty-based Universal Jurisdiction to Nationals of Non-Party States,* 35 NEW ENG. L.REV. 363 (2001).

[62] Kolb, *The Exercise of Criminal Jurisdiction over International Terrorists, in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 250 (Bianchi ed., 2004).

[63] *Id.* at 262; Certain German Interests in Polish Upper Silesia*,* 1926 P.C.I.J. (Ser.A) No.7, at 30.

C. RESPONDENT CANNOT JUSTIFY ITS ACT UNDER THE LAWS OF WAR.

1. No armed conflict exists.

In *Tadić*, the ICTY held that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups, or between such groups within a State, but not where the conflict involves mere isolated and sporadic attacks of violence.[64] In this case, the attacks were committed with significant intervals in between — as much as 13 days — proving the sporadic nature of the attacks (C.18). Further, a geographical mapping of the attacks reveals no consistency in the targets, involving public places in Rotan and the Upland Plateau.

Applicant is aware that the Inter-American Commission in *Abella v. Argentina*[65] has seemingly lowered the threshold to "carefully planned, coordinated and executed armed attack against a quintessential military objective." However, even under this standard, it cannot be said that an armed conflict existed as the religious and cultural sites were not quintessential military objectives because they would not offer any military advantage to Respondent.

2. Assuming that an armed conflict exists, the capture of Penza and the Others is unlawful.

If Respondent insists that it is engaged in an armed conflict with ILSA, then Applicant is quick to add that this armed conflict is an internationalized *non-international* armed conflict pursuant to Article 1(4) of Additional Protocol I to the Geneva Conventions ("AP I") which

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[64] *Tadić*, Case No.IT-94-1-A, at ¶70.

[65] Case 11.137, Report No. 5/97, Inter-Am.C.H.R., OEA/Ser.L/V/II.98(1998).

includes wars of national liberation.[66] Such wars are usually linked with the principle of self-determination which is the right of all peoples to freely determine "without external interference, their political status and to pursue their economic, social, and cultural development."[67] Here, the armed conflict is with the Litvians who have a distinct identity and inhabit a specific region (C.2) and were subjected to a pattern of systematic political or economic discrimination (C.4) by Respondent, who rejected their reasonable proposal for autonomy (C.8).[68]

a. *Penza and the Others are protected persons.*

As civilians are not members of the armed forces,[69] they cannot be the object of a military attack unless they take direct part in hostilities.[70] Pursuant to the Geneva Conventions and AP I, Penza and the Others — being civilians — are not legitimate military targets and are therefore immune from attack and capture.

b. *Assuming that Penza and the Others are not civilians, such enforcement measures cannot go beyond the enforcing State's territory.*

Military operations of the parties to a conflict shall only be carried out in the area of war.[71] Hence, military operations shall not be carried out in the territories of other States not

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[66] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, art.1(4), 1125 U.N.T.S. 3 [hereinafter AP I].

[67] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514(XV), U.N. GAOR, 15th Sess., Supp.No. 16, at 66, U.N. Doc.A/4684(1961).

[68] Schacter, *Sovereignty–Then and Now, in* ESSAYS IN HONOR OF WANG TIEYA 684 (Mcdonald ed., 1993); KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 37 (2002).

[69] AP I, art.50(1).

[70] *Id.*

[71] 2 OPPENHEIM, INTERNATIONAL LAW 236-44 (1952); FLECK, *supra* note 14, at 51.

parties to the conflict.[72] The presence of Penza and the Others in Applicant's territory did not extend the area of war as no hostilities occurred in the place where they were captured. Accordingly, Respondent's incursion into Applicant's territory violated the laws and customs of war.

II. THE SUBSEQUENT DETENTION AND TREATMENT OF PENZA AND THE OTHERS VIOLATED INTERNATIONAL LAW.

As the commission of the most horrific crime[73] cannot justify the deprivation[74] of the rights of the offender, whether under International Human Rights Law or International Humanitarian Law, the detention and treatment of Penza and the other Adovan citizens violated International Law.

A. THE DETENTION OF PENZA AND THE OTHERS WAS ARBITRARY.

Under the International Covenant on Civil and Political Rights ("ICCPR"), no one shall be subjected to arbitrary deprivation of liberty.[75] Any person detained must be brought *promptly* before a judge or other judicial officer for the prosecution of alleged offenses.[76] The term "promptly" means within a few days.[77] Here, the detention of Penza and the Others lasted for more than three weeks (C.31, 33, 37) without any charges filed against them in the courts of law.

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[72] FLECK, *supra* note 14, at 218, 494.

[73] Tomasi v. France, App.No. 12850/87, 15 E.H.R.R. 1 (1992).

[74] Loayza Tamayo v. Peru, 1997 Inter-Am.Ct. H.R. (ser.C) No. 33, at ¶57 (1997).

[75] ICCPR, art.9(1).

[76] *Id.* art. 9(3).

[77] H.R. Comm., General Comment 8, ¶2, U.N. Doc.HRI/GEN/1/Rev.1 at 8 (1994).

Accordingly, their continued detention violated their right against arbitrary deprivation of liberty under the ICCPR.[78]

B. RESPONDENT'S INTERROGATION TECHNIQUES CONSITUTE TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT OR PUNISHMENT.

Acts of torture and cruel, inhuman or degrading treatment or punishment are prohibited.[79] Due to its non-derogable nature, the prohibition against torture has been elevated to a *jus cogens*[80] norm and *erga omnes*[81] obligation. Hence, neither a state of war nor any public emergency,[82] and not even the commission of terrorism,[83] may be used as a justification for torture.

1. Respondent violated CAT.

a. *Respondent committed torture.*

Under Article 1 of the CAT, torture is defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him information or a confession, punishing him for an act he is suspected of having committed, or intimidating or coercing him, or for any reason based on

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[78] ICCPR, art.9.

[79] CAT; UDHR, pmbl.¶1; ICCPR, pmbl.¶1; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452 (XXX), U.N. GAOR, 30th Sess., U.N. Doc.A/10034 (1975); Convention Relative to the Treatment of Prisoners of War, 1949, arts.3, 17, 87, 130, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War, 1949, arts.3, 32, 147, 75 U.N.T.S. 287.

[80] *First Report of the UN Special Rapporteur on Torture*, U.N. Doc.E/CN.4/1986/15, ¶3 (1986); Prosecutor v. Furundžija, Case No.IT-95-17/1-T (1999).

[81] BRODY & RATNER, THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 238 (2000); *See also* Barcelona Traction, Light & Power Co., Ltd., 1970 I.C.J. 3.

[82] CAT, art.2; ICCPR, arts.4, 7.

[83] Chahal v. United Kingdom, App.No. 22414/93, 23 E.H.R.R. 413, ¶79 (1996).

> discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[84]

As will be explained, Respondent's treatment of Penza and Others falls within the above definition.

i. Respondent authorized the infliction of physical and mental pain and suffering.

Respondent, through former President Kirgov, empowered the 373rd Infantry Battalion and its commander, then Colonel Vinitsa, to take the measures they deemed necessary to apprehend Penza and her "band of terrorists" (C.25). Colonel Vinitsa, in turn, issued a Proclamation (C.A.III.4) authorizing the Enforcers to engage in the following practices with respect to persons suspected of having participated in terrorist acts: deprivation of sleep, clothing, and food; subjection to extremes of heat and cold; forced adoption of stress positions; and interrogation techniques (C.A.III).

ii. The interrogation techniques employed were calculated to achieve certain purposes prohibited under the CAT.

Rotanian authorities inflicted pain and suffering to extract a confession from Penza and the Others. The extraordinary techniques (C.AIII.5) were deliberately employed in the interrogation of Penza and the Others detained on suspicion that they participated in terrorist acts (C.AIII.4). In fact, both retired General Vinitsa and former President Kirgov, in statements respectively given at a press conference (C.31) and at a special session of Parliament (C.38), have categorically admitted that they questioned Penza and as a result, were able to extract confessions regarding her involvement in the alleged terrorist activities. Adamant to convict the

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[84] CAT, art.1.

perpetrators of terrorist attacks, Respondent hastily accused Penza and the Others with barely any proof linking them to the acts of terrorism.

iii. The infliction of severe mental and physical pain on Penza and the Others was intentional.

Torture is conditioned upon the intent to cause pain and suffering.[85] In this case, the authorities subjected Penza and the other LAPS members to suffering pursuant to the authority granted by Colonel Vinitsa (C.AIII.4). Such prior authorization coupled with their actual execution militates against Respondent's denial of intent to cause suffering.

iv. The suffering of Penza and the Others was not pursuant to a lawful sanction.

An exception from the definition of torture is "pain or suffering arising from, inherent in or incidental to lawful sanctions."[86] This exception however does *not* only require that a law is promulgated to authorize the pain or suffering,[87] but such law and its enforcement must not be arbitrary.[88] In this connection, State Practice demonstrates that the following interrogation techniques, which Respondent likewise used, are arbitrary and illegal: deprivation of sleep, food, and clothing; intermittent hanging from the wrists, stress positions, exposure to cold temperature, continuous bright light; and loud discordant music.[89] Thus, by no means can Respondent justify its acts as lawful under International Law.

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[85] *Id.*

[86] *Id.*

[87] Dinstein, *Right to Life, Physical Integrity and Liberty*, in THE INTERNATIONAL BILL OF RIGHTS 130 (Henkin ed., 1981).

[88] JOSEPH, ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY 308 (2004).

b. *Respondent's acts were cruel, inhuman or degrading.*

The classification of treatment as cruel, inhuman or degrading is often a matter of severity, intensity, and the totality of the circumstances.[90] To illustrate, detention for at least two weeks coupled with substandard conditions amounts to cruel, inhuman or degrading treatment.[91] In this case, Penza and the Others were detained for three weeks and were exposed to interrogation techniques that have been held in various cases to constitute cruel, inhuman or degrading treatment: inadequate food and water,[92] intermittent hanging by the wrists from chains,[93] exposure to continuous bright light, sleep deprivation,[94] uncomfortably cold cell temperatures and loud discordant music[95] (C.33). The vast jurisprudence holding the same techniques used herein to be cruel, inhuman and degrading clearly indicate Respondent's violation of the CAT.

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[89] Rodley, *Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment,* U.N. Doc.E/CN.4/1996/Add.1 (1996).

[90] *Upholding the Rule of Law: A Special Issue of The Record*, 59 N.Y. RECORD OF THE ASSOCIATION OF THE BAR 200 (2004).

[91] *See* Inquiry under Article 20: Committee Against Torture, Findings Concerning Peru, ¶35, U.N. Doc.A/56/44 (2001).

[92] H.R. Comm., *Concluding Observations concerning Germany*, ¶167, U.N. Doc.A/48/44 (1993); H.R. Comm., *Concluding Observations concerning New Zealand*, ¶175, U.N. Doc.A/53/44 (1998).

[93] H.R. Comm., *Concluding Observations of the Human Rights Committee on Israel,* U.N. Doc.CCPR/C/79/Add.93 (1998).

[94] *Id.*; *Concluding Observations concerning Republic of Korea*, ¶56, U.N. Doc.A/52/44 (1996); *Upholding the Rule of Law*, *supra* note 90, at 188.

[95] Ireland v. United Kingdom, 2 E.H.R.R. 25, ¶167 (1978).

Another form of prohibited treatment under this article is enforced disappearance, an aggravated form of detention where one is not necessarily in solitary confinement, but is denied access to family, friends, and counsel.[96] In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours[97] and enforced disappearance of at least five days has been considered cruel, inhuman or degrading treatment prohibited by Article 16 of the CAT.[98] In detaining Penza and the Others at a secret location (C.31) without their families being notified of their place of detention or state of health, Respondent violated the CAT.

2. Respondent violated the ICCPR.

Article 7 of the ICCPR states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[99] Interpreting this provision, the Human Rights Committee did not find it necessary to establish sharp distinctions between the different types of treatment or to enumerate a list of prohibited acts.[100] In most cases, the Committee has simply determined whether or not a State committed a breach of Article 7.[101] As with the CAT, the use

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[96] JOSEPH, *supra* note 88, at 253. *See also* Laureano v. Peru, Comm.540/1993, U.N. Doc.CCPR/C/56/D/540/1993 (1996); Shaw v. Jamaica, Comm.704/1996, U.N. Doc.CCPR/C/62/D/704/1996 (1998).

[97] H.R. Comm., *Report of the Special Rapporteur on Torture,* ¶26(g), U.N. Doc.E/CN.4/2003/68 (2002).

[98] *Concluding Observations on Spain*, U.N. Doc.A/58/44, §61 (1997).

[99] ICCPR, art. 7.

[100] H.R. Comm., General Comment 20: Article 7, ¶4, U.N. Doc.HRI/GEN/1/Rev.1 at 30 (1994).

[101] 4 JOSEPH, SEEKING REMEDIES FOR TORTURE VICTIMS: A HANDBOOK ON THE INDIVIDUAL COMPLAINTS PROCEDURES OF THE UN TREATY BODIES 158 (2006).

of such techniques as deprivation of sleep,[102] inadequate food and water,[103] and hanging by the wrists from chains have been determined to constitute prohibited treatment under Article 7. Hence, Respondent's use of these techniques also violates the ICCPR.

In addition to the prohibition under Article 7, Article 10 of the ICCPR requires that all persons deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person.[104] This provision has been elevated to a *jus cogens* norm not subject to any derogation.[105] Moreover, *Gilboa v. Uruguay*[106] pronounced that enforced disappearance for fifteen days already constituted a breach of Article 10(1) of the ICCPR. In this case, Respondent's detention of Penza and the other Adovan citizens in a secret location for more than three weeks clearly violates the ICCPR.

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[102] Lopez Burgos v. Uruguay, Comm.52/1979, U.N. Doc.CCPR/C/I3/D/52/1979 (1981); Ireland v. United Kingdom, 2 E.H.R.R. at ¶167; Aksoy v. Turkey, App.No.21987/93, 23 E.H.R.R. 553 (1996).

[103] NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 129 (1993). *See also* Ireland v. United Kingdom, 2 E.H.R.R. at ¶167; Brown v. Jamaica, Comm.775/1997, U.N. Doc.CCPR/C/65/D/775/1997 (1999); Muteba v. Zaire, Comm.124/1982, Supp.No. 40, U.N. Doc.A/39/40 (1984); Miango Muiyo v. Zaire, Comm.194/1985, U.N. Doc.CCPR/C/OP/2 (1990).

[104] ICCPR, art.10(1).

[105] H.R. Comm., General Comment 29: States of Emergency (Article 4), ¶11, U.N. Doc.CCPR/C/21/Rev.1/Add.11 (2001).

[106] Comm.147/1983, ¶14, U.N. Doc.CCPR/C/OP/2 (1990).

C. ON THE ASSUMPTION THAT AN ARMED CONFLICT EXISTS, RESPONDENT'S DETENTION AND TREATMENT OF PENZA AND THE OTHERS IS UNLAWFUL.

Under the regime of International Humanitarian Law, torture, or cruel, inhuman or degrading treatment or punishment during any armed conflict is likewise prohibited[107] regardless of any State of alleged necessity.

1. Whether they are classified as civilians, combatants or unprivileged combatants, Penza and the Others were not accorded the minimum standards guaranteed to *detained persons* in criminal proceedings.

Under AP I, the physical or mental health and integrity of *persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty* as a result of an internationalized non-international armed conflict shall not be endangered by any unjustified act or omission.[108] Any willful act or omission that seriously endangers the physical or mental health or integrity of any person is a breach of AP I.[109]

Minimum standards regarding the conditions of detention must be complied with, regardless of a State party's level of development,[110] such as adequate sanitary facilities, decent clothing, adequate provision of food, and hygiene facilities.[111] The basic food rations need to be sufficient in quantity as to keep detainees in good health and to prevent loss of weight or the

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[107] *Nicaragua*, 1986 I.C.J. at ¶218.

[108] AP I, art.11(1).

[109] *Id.* art.11(4).

[110] Mukong v. Cameroon, Comm.458/1991, U.N. Doc.CCPR/C/51/D/458/1991 (1994).

[111] *Id.* at ¶9.3*;* H.R. Comm., General Comment 21: Article 10*,* ¶5, U.N. Doc.HRI/GEN/1/Rev.1 at 33 (1994); Standard Minimum Rules for the Treatment of Prisoners, First UN Congress on the Prevention of Crime and the Treatment of Offenders, prelim. observations, rules 10, 12, 17, 19, 20, 21, E.S.C. Res. 2076, U.N. ESCOR, 62d Sess., Supp.No. 1, at 35, U.N. Doc.E/5988 (1977)[hereinafter SMRTP].

development of nutritional deficiencies.[112] That such standards were not observed by Respondent is apparent from Makar's testimony itself (C.33) and his medical examination which revealed that he was *malnourished* and *sleep-deprived*, with bruising around his wrists (C.33).

2. The declaration of retired General Vinitsa that Penza and the Others are enemy combatants has no basis in International Law.

The term "enemy combatant" is not recognized in International Law.[113] The sole practice of the U.S. is not supported by a majority of States and has been criticized by many.[114] As due process guarantees should be respected regardless of the categorization of individuals in domestic law,[115] a detaining power is not permitted to deny the basic humanitarian protections to those considered as "enemy combatants".[116] Accordingly, Respondent cannot justify its acts in accordance with the pursuit of enemy combatants.

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

A. THE PROSECUTION BY THE ROTANIAN MILITARY COMMISSION VIOLATES INTERNATIONAL HUMAN RIGHTS STANDARDS FOR DUE PROCESS.

Article 14 of the ICCPR guarantees fair trial before an independent and impartial tribunal. Pursuant to this Article, the trial of civilians before military commissions is almost

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[112] GC III, art.26(1).

[113] INTERNATIONAL BAR ASSOCIATION TASK FORCE ON INTERNATIONAL TERRORISM, INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES 112 (2003)[hereinafter IBA ON TERRORISM].

[114] DUFFY, *supra* note 61, at 397, 401.

[115] IBA ON TERRORISM, *supra* note 113, at113.

[116] *Id.*

unanimously considered a violation of said Article because military commissions are not independent[117] and employ exceptional proceedings that violate fair trial procedures. [118]

1. The Rotanian Military Commission violates the rule on independent and impartial tribunal.

The right to an independent and impartial tribunal is an absolute right not subject to any exception.[119] Based on extensive State practice[120] and *Opinio Juris,*[121] the trial of civilians before military commissions has been regarded with disfavor as it does not meet the standard of independence and impartiality,[122] owing largely to lack of autonomy of the military from the executive department.[123]

Here, the independence of the Rotanian Military Commission is seriously undermined as it was constituted by the former President himself (C.25), who is also the commander-in-chief of

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[117] *Polay Campos*, Comm.577/1994, U.N. Doc.CCPR/C/61/D/577/1994 (1998).

[118] H.R. Comm., General Comment No.13: Equality Before the Law (Article 14), U.N. Doc.HRI/GEN/1/Rev.6 (2003).

[119] Gonzales del Rio v. Peru, Comm.263/1987, U.N. Doc.CCPR/C/46/263/1987 (1992); H.R. Comm, *supra* note 105, at ¶16.

[120] Oviedo v. Paraguay, Case 12.013, Report No.88/99, OEA/Ser.L/V/II.106 doc.3 rev.¶30 (1999); Inter-Am.C.H.R., *First Report on the Situation of Human Rights in Chile*, OAS Doc.OEA/Ser.L/V/II.34 doc. 21 (1974); Inter-Am.C.H.R., *Reports on the Situation of Human Rights in the Republic of Colombia*, OAS Doc.OEA/Ser/L/V/II.53 doc.22 (1981); Findlay v. United Kingdom, App.No. 2107/93, 24 E.H.R.R. 221, ¶¶74-77 (1997); Cyprus v. Turkey, App.No. 25781/94, 2001-IV Eur.Ct.H.R. (2001).

[121] H.R. Comm., *Report of the Working Group on Arbitrary Detention*, ¶80, U.N. Doc.E.CN/4/1999/63 (1998); Joinet, *Issue on the Administration of Justice through Military Tribunals and other Exceptional Jurisdiction*, U.N. Doc.E/CN.4/Sub.2/2002/4 (2002).

[122] Incal v. Turkey, App.No. 22678/93, 449 E.H.R.R. 316, 323 (2000); Goldman & Orentlicher, *When Justice Goes to War, Prosecuting Persons before Military Commissions*, 25 HARV.J.L. & PUB. POL'Y 653, 659-660 (2002).

[123] DUFFY, *supra* note 61, at 423.

the military(C.29). Hence, the Rotanian Military Commission must inhibit itself from prosecuting Penza and the Others because it is not an independent and impartial tribunal.

2. The Rotanian Military Commission violates the right to a fair trial.

a. *The rules of the Military Commission violate the right regarding confrontation of witness and production of evidence.*

Pursuant to Article 14(3)(e) of the ICCPR, an accused is entitled to the examination of witnesses and production of evidence. Both rights guarantee fair trial by giving the accused an "equality of arms."[124] In *Peart v. Jamaica*,[125] the Human Rights Committee held that the right to examine and obtain the attendance of a witness was violated when the prosecution refused to give the accused a copy of a witness' statement. In the present case, the Rotanian Military Commission totally allows witnesses to testify under conditions of anonymity and denies the accused the right to inquire into the sources of evidence (C.26).

b. *The rules of the Military Commission violate the rules against the admissibility of evidence derived from coercive interrogation.*

Evidence obtained through torture and other inhuman treatment should not be admitted into evidence in any proceeding.[126] Pursuant to Article 14(3)(g) of the ICCPR, evidence derived from compulsory interrogation of the accused violates his right against self-incrimination.[127] Accordingly, statements made out of torture and other cruel or inhumane treatment[128] must be

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[124] Parkanyi v. Hungary, Comm.410/90, U.N. Doc.CCPR/C/45/D/410/1990 (1992).

[125] Peart v. Jamaica, Comm. Nos.464/1991 & 482/1991, U.N. Doc.CCPR/C/54/D/464/1991 & 482/1991 (1995).

[126] CAT, art.15.

[127] ICCPR, arts.14 (3)(g), 7, 10; JOSEPH, *supra* note 88, at 449.

[128] JOSEPH, *supra* note 88, at 450.

excluded from the evidence.[129] By allowing evidence derived from coercive interrogation, (C.26) the Rotanian Military Commission violated the ICCPR.

c. *The Rotanian Military Commission violates the right to counsel of one's own choice.*

A person accused of a criminal charge is entitled to defend himself through legal counsel of his own choosing,[130] and to communicate to such chosen counsel.[131] An accused should not be forced to accept an assigned legal counsel,[132] but must be given the right to choose his own.[133] Rotanian Military Commission Rules violates this guaranteed right because it assigns a military counsel (C.26) and does not afford the accused a counsel of his own choice.

3. The declaration of national emergency under the Protection of the State Act is not a valid derogation under the ICCPR.

States are allowed to derogate from obligations enunciated under the ICCPR on the basis that they face a "public emergency threatening the life of the nation."[134] However, such

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[129] H.R. Comm., *Concluding Observations on Romania*, U.N. Doc.CCPR/C/79/Add.111 (1999); Griffin v. California, 380 U.S. 609 (1965).

[130] ICCPR, art.14(3)(d); ECHR, art.6 (3); American Convention on Human Rights, 1969, art.21(4)(d), 1144 U.N.T.S. 123 [hereinafter ACHR]; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art.7(3), U.N. Doc.S/RES/827 (1993)[hereinafter ICTY Statute].

[131] ICCPR, art.13 (3)(b).

[132] Kelly v. Jamaica, Comm.235/87, U.N. Doc.CCPR/C/41/D/253/1987 (1991); Lopez Burgos v. Uruguay, Comm.52/1979, U.N. Doc.CCPR/C/13/D/1979 (1981).

[133] Estrella v. Uruguay, Comm.74/80, U.N. Doc.CCPR/C/OP/2 (1990).

[134] ICCPR, art. 4; DUFFY, *supra* note 61, at 393.

derogation must satisfy certain conditions.[135] As will be shown, Respondent failed to comply with these conditions.

a. *There is no public emergency threatening the life of the nation.*

Not every disturbance justifies derogation, but only those public emergencies threatening the life of a nation.[136] Such standard is intentionally high in order to prevent States from invoking states of emergency as an alibi to justify impermissible restrictions on human rights.[137] Here, the measures implemented by Respondent are not warranted by the exigencies of the actual situation. As previously established in Part I(B)(1)(a), the attacks against Respondent are not terrorist acts which produced a state of terror. Neither were the attacks protracted or sustained as to imperil the life of Respondent as a nation as shown in Part I(C)(1).

Assuming any such threat to the life of the nation existed, the same has ceased to exist as retired General Vinitsa himself stated in an official press conference that "the reign of terror is over" (C.31). This statement is corroborated by former President Kirgov who claimed that all of the suspects were already in custody and were already neutralized (C.38). Hence, by such admission, there is no longer any exigency that would justify any derogation of the ICCPR.

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[135] DUFFY, *supra* note 61, at 393.

[136] ICCPR, art.4; ECHR, art.15; ACHR, art.27(1).

[137] H.R. Comm., *Concluding Observations on Syrian Arab Republic*, ¶6, U.N. Doc.CCPR/CO/71/SYR (2001); H.R. Comm., *Concluding Observations on Egypt*, ¶6, U.N. Doc.CCPR/CO/76/EGY (2002).

b. *The derogation measures are not proportionate and necessary.*

Based on the principle of proportionality, it is fundamental for any ICCPR derogation to be limited to the extent strictly required by the exigencies of the situation.[138] Hence, the measure for derogation must neither be more severe nor more prolonged than necessary.[139] When applied to this case, any derogation measure would have been proportionate and necessary if security risks are increased due to Respondent's grant of the rights normally granted to an accused in a regular trial, *i.e.* right to a chosen counsel.[140] As no such increase of security risks is present, Respondent's acts are not proportionate and necessary.

B. THE EXERCISE OF JURISDICTION BY THE ROTANIAN MILITARY COMMISSION OVER PENZA AND OTHER ADOVAN NATIONALS SUBSEQUENT TO THEIR UNLAWFUL ARREST AND RENDITION CANNOT BE JUSTIFIED UNDER THE MALE CAPTUS BENE DETENTUS ("MALE CAPTUS") DOCTRINE.

1. The *male captus* doctrine is not customary.

While the *male captus* doctrine is supported by some State practice,[141] there is also sufficient State practice to the contrary.[142] Where the practices of States are characterized with so much fluctuation, discrepancy and contradiction, it is impossible to discern a uniform usage

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[138] H.R. Comm., *supra* note 105.

[139] DUFFY, *supra* note 61, at 293.

[140] Al-Nashif v. Bulgaria, App.No. 50963/00 (unreported) ¶123 (2002), *cited in* DUFFY, *supra* note 61, at 393; H.R. Comm., *supra* note 93, at ¶21.

[141] *Eichmann*, 36 I.L.R. at ¶42; Frisbie v. Collins, 342 U.S. 510 (1952); United States ex el Lujan v. Gengler, 510 F.2d 62 (1975); United States v. Alvarez-Machain, 504 U.S. 655 (1992).

[142] State v. Ebrahim, 21 I.L.M. 888; United States v. Toscanino, 500 F.2d 267 (1974); United States v. Verdugo-Urquidez 939 F.2d 1341 (1990); Connelly v. Director of Public Prosecutions, A.C. 1254 (1964); Bennett v. Horseferry Road Magistrates' Court, 3 All E.R. 138 (1993).

accepted as law,[143] such as the flip-flopping decisions on the extent and validity of the *male captus* doctrine. [144] Moreover, *Opinio Juris* is lacking in the application of the *male captus* doctrine as it is applied merely in deference to the executive branch of the Government.[145] Accordingly, the *male captus* doctrine has not attained customary status.

2. Assuming that the *male captus* doctrine is customary, it is still not applicable.

Resort to the *male captus* principle is permitted only in the absence of any protest by the State whose territorial integrity has been violated. In *Ker v. Illinois*,[146] the defendant, who was facing charges of larceny, was kidnapped in Peru by an American envoy. The U.S. Supreme Court held that where a refugee is apprehended by kidnapping or other irregular means, the right to set up as defense the unlawful manner by which he was brought to a court belongs "to the Government from whose territory he was wrongfully taken."[147] This was affirmed in *Eichmann*[148] where the question on jurisdiction over Eichmann was resolved by the waiver of

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[143] Asylum (Colom. v. Peru), 1950 I.C.J. 266.

[144] *See* Prosecutor v, Nikolić, Case No.IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, ¶30 (2003).

[145] Borelli, *The Rendition of Terrorist Suspects to the United States: Human Rights and the Limits of International Cooperation*, *in* ENFORCING INTERNATIONAL NORMS AGAINST TERRORISM 331, 354 (Bianchi ed., 2004).

[146] Ker v. Illinois, 119 U.S. 436 (1886).

[147] *Id.*

[148] *Eichmann*, 36 I.L.R. at ¶47.

Argentina of its claims, including the return of the accused.[149] Only after such waiver did Israel proceed to exercise jurisdiction to bring the accused to trial.[150]

In this case, Applicant never waived its claim and had constantly protested the violation of its territorial integrity. In fact, Applicant expressed its outrage in the clearest possible terms during a press conference (C.32) and even sent a diplomatic note to Respondent formally protesting the violation of its territory, the kidnapping and mistreatment of its citizens, and demanding their immediate repatriation (C.36). Accordingly, Respondent must refrain from exercising jurisdiction to prosecute Penza and the Others as Applicant is protesting Respondent's illegal rendition of Penza and the other Adovans.

IV. APPLICANT'S EXERCISE OF JURISDICTION OVER FORMER PRESIDENT KIRGOV AND RETIRED GENERAL VINITSA TO PROSECUTE THEM IN APPLICANT FOR CRIMES COMMITTED AGAINST PENZA AND THE OTHERS IS CONSISTENT WITH INTERNATIONAL LAW.

A. GENERAL VINITSA AND PRESIDENT KIRGOV ARE PERSONALLY LIABLE FOR TORTURE.

In his Proclamation (C.A.III), then Colonel Vinitsa authorized interrogation techniques which resulted in torture as shown in PartII(B)(1)(a)(i). In turn, President Vinitsa did nothing to stop the acts that subsequently followed from such Proclamation despite the fact that he had control over the military as President and commander-in-chief (C.29). Therefore, retired General Vinitsa is liable for ordering torturous acts,[151] while both of them are liable for violating the CAT[152] and for the acts of their subordinates through command responsibility.[153]

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[149] *Id*. at ¶ 50.

[150] *Id.*

[151] ICTY Statute, art.7(1); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art.6(1), U.N. SCOR, 49th Sess, U.N. Doc.S/RES/955 (1994)[hereinafter ICTR Statute].

B. APPLICANT IS JUSTIFIED IN PROSECUTING FORMER PRESIDENT KIRGOV AND RETIRED GENERAL VINITSA BASED ON ESTABLISHED INTERNATIONAL LAW PRINCIPLES ON JURISDICTION.

1. Applicant has jurisdiction pursuant to the universality principle.

Under Customary International Law, universal jurisdiction[154] entitles each and every State to have jurisdiction and try the offense.[155] It is triggered by the commission of crimes that are particularly offensive to the international community as a whole such as torture.[156] As probable cause exists for the charge of torture,[157] Applicant is justified in exercising jurisdiction to prosecute retired General Vinitsa and former President Kirgov.

2. Applicant has jurisdiction pursuant to the protective principle.

The protective principle justifies the exercise of jurisdiction over persons whose acts are directed against the vital interests of the State even though committed abroad.[158] To illustrate, Israel exercised jurisdiction to prosecute Eichmann because its "vital interests" were endangered by Eichmann's order to kill Jewish citizens of Israel.[159] In *In Re Urios,*[160] French authorities

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[152] CAT, art.4.

[153] Prosecutor v. Delalić, Case No.IT- 96-21-T, ¶386 (1998).

[154] CAT, arts.4, 5, 9; R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, 2 All E.R. 97 (1999).

[155] SHAW, *supra* note 1, at 592.

[156] *Id*. at 593.

[157] *See* discussion *supra* Part II(B).

[158] Harvard Research, *Draft Convention on Jurisdiction with Respect to Crime*, 29 A.J.I.L. SUPP. 480, 519 (1935); United States v. Yunis, 681 F.Supp. 896 (1988).

[159] *Eichmann*, 36 I.L.R. at 277.

[160] 1 A.D. 107 (1920).

convicted a Spanish National of espionage while he was in Spain during the First World War. Similarly, Applicant is fully justified in exercising jurisdiction to prosecute retired General Vinitsa and former President Kirgov whose "gross mistreatment of [Applicant's] nationals without due process or any process of law offends all Adovans to their core" (C.42), even if these acts were committed outside Applicant's territory.

3. Applicant has jurisdiction pursuant to the passive personality principle.

A State may exercise criminal jurisdiction over a person for his acts that are harmful to its nationals.[161] Applying this principle in *U.S. v. Yunis,* where several American nationals were on the hijacked flight, the Court held that the passive personality principle is an appropriate basis for jurisdiction.[162] Retired General Vinitsa and former President Kirgov who ordered or tolerated the kidnapping, torture and gross mistreatment of Adovan citizens rightfully gives Applicant jurisdiction to prosecute them.

C. THE RULES ON IMMUNITY DO NOT PROHIBIT APPLICANT FROM EXERCISING JURISDICTION.

1. Retired General Vinitsa and former President Kirgov are not State Officials enjoying immunity *ratione personae.*

Customary International Law accords immunity *ratione personae* to incumbent Ministers of Foreign Affairs to ensure the effective performance of their function on behalf of their respective States.[163] However, retired General Vinitsa does not enjoy immunity *ratione*

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[161] CAT, art.5(1)(c); BANTEKAS & NASH, *supra* note 40, at 81; Arrest Warrant of April 11, 2000 (Dem.Rep.Congo v. Belg.), 2002 I.C.J. 3, ¶¶16, 47.

[162] 681 F.Supp. 896, 902 (1988).

[163] *Arrest Warrant*, 2002 I.C.J. at ¶54; DIXON & MCCORQUODALE, CASES AND MATERIALS ON INTERNATIONAL LAW 318-319 (2003).

personae as he is not a Minister of Foreign Affairs but is merely a member of the Advisory Council on International Law to the Rotanian Foreign Ministry. (C.38)

A sitting Head of State enjoys immunity *ratione personae* and is completely immune from jurisdiction of national courts of other States.[164] Kirgov already resigned from office and was succeeded by Pavel Basli as the new President of Rotania (C.39). Hence, former President Kirgov is no longer entitled to immunity *ratione personae.*

2. Vinitsa and Kirgov are not entitled to immunity *ratione materiae* because the acts complained of are not State functions.

Former Heads of State[165] and military commanders[166] are entitled immunity *ratione materiae only* in relation their official acts done during the term of their office. In contrast to immunity *ratione personae* which is absolute, immunity *ratione materiae* is limited and covers only official acts.[167] Hence, immunity *ratione materiae* is not a bar to the prosecution of international crimes before national courts.[168]

In this case, former President Kirgov and retired General Vinitsa are liable for acts of torture and cruel, inhuman and degrading treatment. As held in *Pinochet*, the *jus cogens* status of the prohibition against torture overrides immunity *ratione materiae* enjoyed by a former head of State for acts performed in the course of official functions.[169] Similarly, immunity *ratione*

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[164] *Arrest Warrant*, 2002 I.C.J. at ¶24; *Bow Street*, 2 All E.R. at 97.

[165] *Bow Street*, 2 All E.R. at 97; BROWNLIE, *supra* note 1, at 575.

[166] *Bow Street,* 2 All E.R. at 97.

[167] *Id.*

[168] Cassese, *When May Senior State Officials Be Tried For International Crimes? Some Comments on The Congo v. Belgium Case*, 13 E.J.I.L. 853, 870 (2002).

materiae is not a bar to the prosecution of crimes amounting to cruel, inhuman and degrading treatment because such acts are considered international crimes.[170] Accordingly, former President Kirgov and retired General Vinitsa are not entitled to immunity *ratione materiae* for their criminal acts.

CONCLUSION AND PRAYER FOR RELIEF

Applicant requests that the ICJ adjudge and declare that:

(a) The apprehension and rendition of Penza and the Others was a violation of Applicant's sovereignty and International Law;

(b) The subsequent detention and treatment of Penza and the Others violated International Law;

(c) Respondent's prosecution of the detained Adovan citizens before the Rotanian Military Commission, including Penza's prosecution for conspiracy, arson, and murder, violates International Law; and

(d) Applicant's exercise of jurisdiction over former President Kirgov and retired General Vinitsa to prosecute them in Applicant for crimes committed against Penza and the Others is consistent with International Law.

Respectfully submitted,

AGENTS OF APPLICANT

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[169] FOX, THE LAW OF STATE IMMUNITY 528 (2002).

[170] Prosecutor v. Blaskić, Case No.IT-95-14-T, at ¶41 (2000); *Furundžija*, Case No.IT-95-17/1-T, at ¶140; CASSESE, INTERNATIONAL CRIMINAL LAW 267 (2003).

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