
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 RESPONDENT

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STATEMENT OF JURISDICTION

Pursuant to the Joint Notification and Compromis concluded on 28 September 2007, including the Corrections and Clarifications agreed to therein, at Chicago, Illinois, United States of America between the Republic of Adova and the State of Rotania (collectively “the Parties”), and in accordance with Article 40(1) of the Statute of the International Court of Justice, the Parties hereby submit to this Court its dispute concerning certain criminal proceedings in Adova and Rotania.

In accordance with Article 2 of the Compromis, the Court is hereby requested to adjudge the dispute in accordance with the rules and principles of international law, including any applicable treaties.

STATEMENT OF FACTS

The dispute centers on Adova's arrest and prosecution of Rotanian General Gommel Vinitza and the issuance of a warrant for the arrest of former Rotanian President Michael Kirgov. Both are charged under Adovan laws implementing the *Convention Against Torture* (CAT) for actions taken in response to a series of violent attacks aimed at the dissolution of the Rotanian state.

Rotania and the Republic of Adova (Applicant) are both democratic states with representative institutions. Each became independent states with the dissolution of the Kingdom of Sybilla in 1970. Both countries are comprised of two distinct ethnic communities: Stovians and Litvians. Stovians constitute approximately 85% of Rotania's population, and Litvians form approximately 10%. The majority of the population of Adova, approximately 75%, is Litvian with a small Stovian minority of approximately 10%.

The majority of Rotania's Litvian population reside in an area called the Upland Plateau. Following independence, a political movement called The Litvian Advancement and Protection Society (LAPS) emerged in this region. It currently has members that serve in Rotania's Parliament and is financially supported by Adova. The General Chairman of LAPS is Samara Penza.

LAPS includes a faction known as the Independent Litvia Solidarity Association (ILSA). ILSA openly espouses the complete secession of the Upland Plateau and some of its members call for its political and economic union with Adova. ILSA includes members who advocate and have engaged in violence. Some international organizations have been critical of LAPS, including Chairman Penza, for deliberately ignoring ILSA's violent elements. Some even claim that ILSA's violent elements would not have survived without Penza's support.

In 2006, ILSA began instigating violent demonstrations, strikes and work stoppages in the Upland Plateau. These activities resulted in several deaths, and economic disruption in the region. Hoping to prevent further violence, the Rotanian government employed military units to help maintain security in the Upland Plateau. ILSA agitators were undeterred by the Rotanian Government's efforts to maintain stability in the Upland Plateau, and continued to provoke violence resulting in additional loss of life.

On 7 January 2007, ILSA's leadership promised "dramatic measures" in the purported cause of Litvian freedom. ILSA's leadership thanked Penza for her endorsement of their efforts in "confronting the oppressors". LAPS did not refute this claim of endorsement. Between 7 January and 19 February 2007, four Stovian cultural and religious sites were destroyed, including one located in the Rotanian capital. ILSA claimed responsibility for three of the attacks,

and the Rotanian Government has evidence linking ILSA to remaining attack. During this campaign of destruction, LAPS General Chairman Penza stood silent.

On the evening of 22 February 2007, ILSA operatives attacked the holiest site of the Stovian faith: the Shrine of the Seven Tabernacles. In addition to the destruction of home of the Holy Icons of the Redeemer, the attack resulted in the deaths of personnel responsible for the maintenance and operation of the Shrine. Some of those killed included the Committee of Elders, charged with the upkeep of the Shrine.

On 24 February 2007, Penza responded to the attack by calling for “increasingly urgent measures to achieve freedom”. The message, was issued from a remote location inside Adova.

In response to the destruction of the Shrine of the Seven Tabernacles, Rotanian President Michael Kirgov declared a period of national mourning. In a televised statement delivered on 2 March 2007, President Kirgov vowed to bring Penza and her associates to justice and announced a series of urgent measures to combat the threat posed by ILSA. These measures included:

- The declaration of a national emergency under Rotania’s *Protection of the State Act* (1980) (“the 1980 Act”), which nationalized military reserves;
- The establishment of a special Military Commission under the 1980 Act to prosecute those responsible for attacks in the Upland Plateau and Shrine; and
- The allocation of certain authority to Colonel Vinita, commander of Rotania’s 373rd Infantry Battalion, to take measures necessary to apprehend those responsible for the attacks.

Acting on his authority, Colonel Vinita began a search for Penza and her associates in the Upland Plateau. Residents in the Upland Plateau indicated that Penza had fled to Adova.

On 7 March 2007, the U.N. Security Council adopted Resolution 2233, which condemned the attacks on Stovian religious sites in Rotania, including the destruction of the Shrine. Under Resolution 2233, Adova was required to search for Penza within its territory, and surrender Penza to Rotania if found. Adova refused to conduct the search or surrender Penza if found.

On 15 March 2007, Colonel Vinita issued a Proclamation outlining the rules of engagement for troops under his command; The Proclamation related specifically to President Kirgov’s directive to apprehend the perpetrators of attacks against Stovian religious and cultural sites. The Proclamation included rules for the interrogation of detained suspects. Suspects connected with the attacks were transferred to the Military Commission. Furthermore, the Proclamation declared a state of armed conflict with LAPS and asserted that

LAPS operatives would not benefit from protections under the Geneva Conventions of 1949.

On 3 April 2007, Colonel Vinitza announced that Rotanian forces had captured Penza and her associates in a small Adovan village near the Rotanian border. Subsequent to their capture, the detainees were transferred to a Rotanian military facility in the country of Merkistan. During questioning, Penza admitted involvement in the planning and financing of the attacks on Stovian religious sites, including the Shrine. Information obtained from Penza's interrogation led to the disruption of an attack planned for Rotania's National Day in May 2007 which would have likely caused significant casualties.

On 26 April 2007, following the escape of one of the LAPS detainees, Penza and her associates were transferred to the Rotanian Military Commission. At the time of her transfer Penza was charged with several criminal offences including arson, murder, and conspiracy. Her associates were also charged with various offences including aiding in a terrorist operation. The detainees were apprised of their rights, and were assigned counsel. Penza's trial is scheduled to commence in May 2008.

Following the announcement of Penza's detention, tensions between Adova and Rotania escalated. In July 2007, Adovan officials arrested Gommel Vinitza, who had since been promoted to the rank of General and retired from the military. Concurrently, Adovan officials issued an international arrest warrant for President Kirgov who, owing to health problems, had resigned the Rotanian Presidency in May 2007. Both men are charged with alleged violations of Adova's law implementing the CAT. Adova's actions further aggravated the situation and ultimately led to an accumulation of troops along the Adova-Rotania border. At the encouragement of the Security Council and the U.N. Secretary General, Adova and Rotania agreed to submit its dispute to this Court.

QUESTIONS PRESENTED

The State of Rotania respectfully asks the Honourable Court:

1. Whether Rotania's apprehension and transfer of Samara Penza and other LAPS members from Adova was consistent with international law;
2. Whether the detention and treatment of Samara Penza and other LAPS members violated Rotania's obligations under international law;
3. Whether the Rotanian Military Commission has jurisdiction to prosecute the LAPS detainees, and its procedures contravene international law; and
4. Whether Adova's exercise of jurisdiction over former President Kirgov and General Vinitza to prosecute them in Adova for crimes committed against Adovan citizens is consistent with international law.

SUMMARY OF PLEADINGS

Rotania was entitled to apprehend and transfer LAPS suspects. The destruction of cultural and religious sites and resulting deaths of religious leaders constituted an armed attack against Rotania, intended to disrupt Rotania's territorial integrity by terrorizing its citizens. As such, Rotania's incursion into Adova's territory was a lawful exercise of Rotania's inherent right of self-defence. It is justified by the seriousness of the attacks and their nexus to Adova, which had allowed LAPS terrorists safe haven within their territory and refused to transfer them to Rotania pursuant to Security Council resolution 2233. Rotania's response to this threat was necessary and proportional. In addition, the transfer of LAPS operatives to Rotania is consistent with international law, as no applicable international humanitarian law (IHL) or human rights law prohibits the transfer of LAPS suspects. During an armed conflict, Rotania's human rights obligations must be interpreted in light of the relevant *lex specialis* of IHL, which only prohibits the forced transfer of civilians. Individuals who launch illegal attacks against civilian targets are not civilians, and are therefore not entitled to these protections.

The detention and treatment of LAPS detainees was consistent with international law. LAPS detainees are akin to saboteurs and other unlawful combatants who have traditionally been dealt with harshly and summarily. Rotania has nonetheless granted these detainees the rights outlined in Common Article 3 of the Geneva Conventions, as it believes that all individuals, no matter how horrendous their actions, are entitled to these rights. Given the unlawful actions of LAPS detainees and the unique threat they pose, Rotania is entitled to detain them without allowing them external communications. Moreover, Rotania's interrogation techniques did not constitute torture, as they did not and were not intended to cause severe pain and suffering. They also did not constitute cruel, inhuman or degrading treatment, as they did not humiliate or undermine the personal dignity of detainees, but rather aimed to disorient and confuse them in order to facilitate interrogations.

The prosecution of LAPS members before the Rotanian Military Commission is consistent with international law. Even if Rotania's apprehension and transfer of the suspects was illegal, its courts can still exercise jurisdiction over them, given the character and severity of the alleged crimes. In addition, the treatment of Adovan nationals during their transfer is not of the shocking and outrageous character necessary to deny the Military Commission jurisdiction. The LAPS attacks constituted a public emergency that threatened the life of the nation, which allowed Rotania to derogate from the provisions of the *International Covenant on Civil and Political Rights*. As measures taken in response to the emergency, the procedures of the Military Commissions are

proportionate and non-discriminatory. Furthermore, these procedures do not violate IHL, as they conform to the requirements of Common Article 3 of the *Geneva Conventions*. Finally, customary law does not provide a minimum standard of procedural protection. Even if it does, the accused have a customary obligation to exhaust all local remedies, and Rotania has a customary right Rotania to derogate from any obligations during a public emergency.

Adova's exercise of jurisdiction over President Kirgov and General Vinitza is unlawful at international law, both on substantive and procedural grounds. Since there is no real or substantial link between the alleged crimes and Adovan territory, Adova's exercise of jurisdiction over former President Kirgov and General Vinitza is unfounded. There is no *prima facie* case against President Kirgov for conspiracy to commit torture based on any of the indirect grounds of criminal responsibility recognized at international law. Furthermore, Adova unlawfully exercised universal jurisdiction *in absentia*. Yet, even if Adova can successfully demonstrate a substantive basis for jurisdiction over one or both accused, the doctrine of State immunity bars its exercise. This principle of customary international law extends to State officials, like President Kirgov and General Vinitza, rendering them immune from the jurisdiction of foreign courts for acts taken in an official capacity. Neither State practice nor the Convention Against Torture permits an exemption from State immunity in circumstances analogous to the present case. Finally, there is no conflict between the substantive *jus cogens* prohibition of torture and the procedural principle of customary international law of State immunity.

PLEADINGS

I. Rotania's Apprehension and Rendition of Samara Penza and Other LAPS Terrorists From Adova Was Lawful

A. Rotania's apprehension of LAPS members was a lawful act of self-defence under the U.N. Charter

The U.N. Charter recognizes the inherent right of self-defence enjoyed by all States.¹ A state must satisfy two criteria in order to engage in acts of self-defence on the territory of another state. First, there must be an act or series of acts of sufficient gravity that they may be characterized as an armed attack.² Second, the armed attack must have a sufficient nexus to the state upon which the act of self-defence will be carried out.³

1. The destruction of Stovian cultural and religious sites and resulting loss of life constitute armed attacks

Destruction of property and loss of life have been recognized as constituting an armed attack at international law.⁴ The effects of an act of violence, including the reaction of the victim state and the international community are relevant in determining whether an armed attack has occurred.⁵ Conversely, the type of weapon or mode of attack is irrelevant in establishing a right of self-defence.⁶

1. See U.N. Charter, art. 51; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, [1986] I.C.J. Rep. 14 at para. 195 [Nicaragua]; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226 at para. 38 [Nuclear Weapons].

2. See *Case Concerning United States Diplomatic and Consular Staff in Tehran (Iran v. United States of America)*, [1980] I.C.J. Rep. 3 at para. 57 [Hostages]. See also Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd ed. (New York: Cambridge University Press, 2000) at 176.

3. See *Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda)* (2006), 45 I.L.M. 271 at para. 146; Bruno Simma, ed. *The Charter of the United Nations: A Commentary*, 2nd ed. (New York: Oxford University Press, 2002) at 82.

4. See *Hostages*, *supra* note 2 at paras. 14, 57, 64. Cf. *Juan Carlos Abella v. Argentina* (1997), Inter-Am. Comm. H.R. No. 55/97, at para. 155 *Annual Report of the Inter-American Commission on Human Rights: 1997*, OEA/Ser.L/V/II.97/Doc. 7 271.

5. See Sean D. Murphy, "Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter" (2002) 43 Harv. Int'l L.J. 41 at 47-51 [Murphy, "Terrorism"]. Cf. *Letter dated 2001/10/07 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/2001/946 (2001).

6. See *Nuclear Weapons*, *supra* note 1 at paras. 38-39. Cf. SC Res. 1368 (2001), UN SCOR, 2001, UN Doc. S/INF/57, 71.

Multiple religious sites, including the Shrine of the Seven Tabernacles, have been destroyed, resulting in loss of life.⁷ International law attaches particular gravity to the destruction of cultural and religious property.⁸ Furthermore, in the aftermath of the destruction of the Shrine, the Rotanian Government declared a state of national emergency, and the U.N. Security Council, which has primary responsibility for maintaining international peace and security⁹, adopted Resolution 2233. This resolution expressed alarm at the “**deadly attacks**” directed against Rotania, recognized the threat to Rotanian unity as a result of the “**attacks**”, and affirmed Rotania’s ongoing right of self-defence.¹⁰

The cumulative effect of the destruction of property, Rotania’s reaction, and the condemnation of the international community evidences the gravity of these attacks and justifies their characterization as armed attacks.¹¹

2. There exists a sufficient nexus between the attacks on Rotanian cultural and religious sites and Aдова to justify Rotania’s act of self-defence

Article 51 of the U.N. Charter does not require that an armed attack be perpetrated by a State in order to justify an act of self-defence on the territory of another State.¹² This is logical, given the serious threat posed by non-state actors.¹³ If a State provides indirect assistance, or allows its territory to be used as a safe-haven by non-state actors who perpetrate armed attacks, a victim State is justified in engaging in acts of self-defence on the territory of that State.¹⁴ Aдова was complicit in the armed attacks against Rotania and helped sustain the “serious and imminent threat” posed by LAPS. Resolution 2233 expressed

7. Compromis at paras. 18-21.

8. See *Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2, Judgment (26 February 2001) at para. 206 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Kordic*]. See also *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, 249 U.N.T.S 215.

9. See Report of the Rapporteur of Committee III/3 to Commission III on Chapter VIII, Section B in *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, vol. 12 (London: United Nations Information Organizations, 1945-1955); Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law* (Cambridge: Kluwer Law, 1996) at 95-96.

10. Compromis Appendix I.

11. Cf. Murphy, “Terrorism”, *supra* note 5; *Hostages*, *supra* note 2 at paras. 14, 57, 64

12. See *Armed Activities*, *supra* note 3 at 358 para. 28 (Kooijmans, J., separate opinion); Dinstein *supra* note 2 at 215-16.

13. See *Armed Activities*, *ibid.* at 358 paras. 29-31. See also Sean D. Murphy, “Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* From the ICJ?” (2005) 99 A.J.I.L. 62; Ruth Wedgwood, “Responding to Terrorism: The Strikes Against bin Laden” (1994) 24 Yale J. Int’l L. 559 at 564-65.

14. See *Armed Activities*, *ibid.* at 358 para. 31; Dinstein, *supra* note 2 at 215-216; Simma, *supra* note 3 at 802. Cf. *Corfu Channel (United Kingdom v. Albania)*, Merits, [1949] I.C.J. Rep. 4 at 22.

great concern about reports that Adova had provided assistance and safe-habour to LAPS.¹⁵ Despite its legal obligations under Resolution 2233, Adova refused to arrest and extradite LAPS members to Rotania.¹⁶ This created the necessary nexus to justify Rotania's act of self-defence on Adovan territory.

B. Rotania's apprehension of LAPS members was a lawful act of self-defence at customary international law

Acts taken in self-defence must meet the customary legal requirements of necessity and proportionality.¹⁷ The necessity requirement of turns on the existence of alternative means of meeting the threat posed by an armed attack¹⁸ and the period of time between the armed attack and the act of self-defence.¹⁹ To be considered proportional, a response must be limited to what is sufficient to secure the defender's rights and ensure its security, including the restoration of security in the wake of terrorist attacks.²⁰ An evaluation of proportionality analyzes the reasonableness of an act of self-defence.²¹

Rotania's act of self-defence meets the requirement of necessity. Before resorting to force, Rotania sought assistance in apprehending LAPS suspects from both Adova²² and the Security Council,²³ all to no avail. Faced with an ongoing and imminent threat, and a recalcitrant neighbour flouting its international obligations, Rotania took the steps necessary to neutralize the LAPS threat. Furthermore, Rotania took action almost immediately upon learning the whereabouts of the LAPS members.²⁴

In contrast to the wanton destruction and attendant loss of life perpetrated by LAPS, Rotania's act of self-defence was measured and reasonable. It effectively neutralized the threat posed by LAPS in the wake of its armed

15. See SC Res. 1373(2001), U.N. SCOR, 2001, UN Doc. S/INF/57, 291 at para. 2. Cf. SC Res. 1526(2004), U.N. SCOR, 2004, UN Doc. S/INF/59, 95 at para. 1(b)-(c).

16. See Compromis Appendix III (Statement of Adova).

17. See *Nuclear Weapons*, *supra* note 1 at para. 41.

18. See Dinstein, *supra* note 2 at 183. See also Judith Gardam, *Necessity, Proportionality and the Use of Force By States* (New York, Cambridge University Press, 2004) at 148-49.

19. See *Nicaragua*, *supra* note 1 at para. 237; Myres M. McDougal & Florentino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (Dordrecht: Martinus Nijhoff, 1994) at 222-24. See also Dinstein, *ibid.* at 184; Oscar Schachter, "The Right of States to Use Armed Force" (1984) 83 Mich. L. Rev. 1626 at 1635.

20. See *Nicaragua*, *supra* note 1 at para. 237;

21. See Dinstein, *supra* note 2 at 147.

22. Compromis at para. 24.

23. *Ibid.* at para. 28.

24. *Ibid.* at paras. 27, 31.

attacks against Rotania, and was limited to the apprehension of the perpetrators of those armed attacks.

C. The transfer of LAPS members to Camp Indigo did not violate international law

While Rotania's act of self-defence occurred in the broader context of a declared armed conflict between Rotania and LAPS,²⁵ it did not fall within the scope of application of the Geneva Conventions²⁶ and their Optional Protocols.²⁷ Therefore, the transfer of the suspected LAPS terrorists apprehended by Rotania is governed by customary IHL. Nothing in customary IHL prohibits the transfer of non-civilian detainees.

1. The conflict in Rotania is outside the scope of application of the Geneva Conventions and Optional Protocols I and II

The Geneva Conventions apply principally to international armed conflicts.²⁸ As LAPS is not a High Contracting Party to the Geneva Conventions, they are inapplicable.²⁹

Protocol I extends protections to combatants engaged in struggles of national liberation or self-determination.³⁰ Litivians in the Upland Plateau are neither a colonised people, nor subject to alien occupation. External self-determination (i.e. secession), highly controversial at international law, is limited to extreme cases where a minority population is denied meaningful participation in political institutions and is the victim of systemic discrimination.³¹ The right of self-determination must also be balanced against the right of states to protect

25. *Ibid.* Appendix III at para. 1.

26. *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 75 U.N.T.S. 135, art. 2 [GC III]. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 75 U.N.T.S. 287, art. 2 [GC IV].

27. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, 1125 U.N.T.S. 609, art. 1 ["Protocol I"]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, June 8, 1977, 1125 U.N.T.S. 609, art. 1 ["Protocol II"].

28. GC III, *supra* note 26, art. 2. See also Sean D. Murphy, "Evolving Geneva Convention Paradigms in the 'War on Terrorism': Applying the Core Rules to the Release of Persons Deemed 'Unprivileged Combatants'" (2007) 75 *Geo. Wash. L. Rev.* 1105 at 1113.

29. GC III, *ibid.*

30. Protocol I, *supra* note 27, art. 1(4).

31. See Simma, *supra* note 3 at 57. See also *Reference Re Secession of Quebec*, [1988] 2 S.C.R. 217 at para. 126-130 (Can.) [*Secession of Quebec*]; *Loizidou v. Turkey*, no. 40/1993/435/514 [1996] VI E.C.H.R. 2216 at 2241 (Wildhaber, J., concurring); See generally Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995).

their territorial integrity as enshrined in the U.N. Charter and various international instruments.³²

Litvians in Rotania enjoy full legal rights and are represented in national institutions.³³ While Litvians may not be as economically successful as other Rotanians, they are not oppressed and do not have a right to external self-determination.³⁴ The conflict in Rotania is therefore not a struggle for self-determination as defined in Protocol I.

Protocol II is applicable where the belligerents in a civil war are sufficiently organized, and exercise control over some territory.³⁵ LAPS has never exercised control over any territory in Rotania.³⁶ The fact that the LAPS leadership fled shortly after the outbreak of attacks against Stovian cultural and religious sites demonstrates their lack of territorial control.

2. Alternatively, international humanitarian law does not prohibit the transfer of non-civilians

It is a well-settled principle of international law that, absent an express prohibition, states are free to conduct their affairs as they see fit.³⁷ IHL prohibits only the forced transfer of **civilian populations**.³⁸ Nothing in the Geneva Conventions, Optional Protocols I or II, or customary IHL prohibits the transfer of non-civilians. This approach is logical in the context of an act of self-defence. It would be incongruous for Rotania to have a lawful right to enter Adova, apprehend the source of the imminent threat posed to Rotania (i.e. LAPS), but be prohibited from securing that threat outside of Adova.³⁹

32. See e.g. *Declaration on the Principles of International Law Concerning Friendly Relations and Co-Operation Among States In Accordance With the Charter of the United Nations*, GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc A/8028 (1970) 121 at 123-24.

33. Compromis at paras. 3, 6.

34. See *Secession of Quebec*, *supra* note 31 at para. 126.

35. See Protocol II, *supra* note 27, art. 1(1).

36. Compromis at paras. 12-15.

37. See *Case of the S.S. "Lotus" (France v. Turkey)* (1927), P.C.I.J. (Ser. A) No. 10 at 18-19 [*Lotus*].

38. GC IV, *supra* note 26, art. 49; Protocol I, *supra* note 27, art. 85(4)(a); Protocol II, *supra* note 27, art. 17.

39. See Jordan J. Paust, "After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims" (1993) 67 St. John's L. Rev. 551 at 566; Michael J. Glennon, "State Sponsored Abduction: A Comment on Alvarz-Machain" (1992) 86 A.J.I.L. 749 at 749.

II. THE LAPS DETAINEES WERE TREATED IN A MANNER CONSISTENT WITH INTERNATIONAL LAW

A. Adova's Claim on behalf of the LAPS detainees is premature

Under customary international law, “*the complainant must carry his case to the highest available local court before invoking the diplomatic intervention of his Government.*”⁴⁰ Tribunal decisions⁴¹ and multinational instruments⁴² recognize this principle, which is based on fundamental concepts of territorial sovereignty and equality.⁴³ Until Adovan nationals have exhausted the remedies available under Rotanian law, Adova cannot bring a claim against Rotania at international law.

B. Rotania's rights and obligations with respect to the LAPS detainees are governed by international humanitarian law

As discussed above, the armed conflict in Rotania was not within the scope of application of the Geneva Conventions and was therefore governed by customary IHL. Adova and Rotania are also bound by the *International Covenant on Civil and Political Rights* (ICCPR).⁴⁴ However, during an armed conflict, a state's obligations under human rights law (i.e. ICCPR) are limited by applicable IHL.

1. The *lex specialis* of international humanitarian law takes precedence over the *lex generalis* of human rights law

Human rights law is a general, or *lex generalis*, regime that guarantees the rights of individuals in their everyday interaction with the state.⁴⁵ Conversely,

40. Lord McNair, *International Law Opinions*, vol. II (Cambridge: Cambridge University Press, 1956) at 312. See also See Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003) at at 501; Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005) at 100.

41. See *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)* (1939), P.C.I.J. (Ser. A/B) No. 76 at para. 18; *Ambatielos case (Greece v. UK)* (1956), XII R.I.A.A. 83; *Interhandel case (Switzerland v. USA)*, [1959] I.C.J. Rep. 6 at 26-29.

42. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 41(c) [ICCPR]; *American Convention on Human Rights*, 18 July 1978, 1144 U.N.T.S. 123, art. 46(1)(a); *Convention for the Protection of Human Rights and Fundamental Freedoms*, 18 May 1954, 213 U.N.T.S. 222, art. 35(1) [*European Convention*].

43. See Alwyn V. Freeman, *The International Responsibility of State for Denial of Justice* (London: Longmans, Green and Co. Ltd., 1938) at 416-17.

44. Compromis at para. 44.

45. Heike Krieger, “A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study” (2006) 11 J. Confl. & Sec. L. 265 at 266.

IHL is a highly specialized, or *lex specialis*, regime that governs the use of force by states during armed conflicts. When possible, *lex specialis* and *lex generalis* regimes should be interpreted harmoniously.⁴⁶ However, priority should be given to the more specific of the two.⁴⁷ *Lex specialis* is preferred because it will often “take better account of the particular features of the context in which it is to be applied than any applicable general law.”⁴⁸ The armed conflict initiated by LAPS creates unique security challenges for Rotania and threatens the safety of Rotanian civilians. Human rights law is not designed for these circumstances. Therefore, Rotania’s obligations must be interpreted with reference to the *lex specialis* of IHL.

2. During an armed conflict, human rights law applies only to civilians

The distinction between civilians and combatants is fundamental to IHL.⁴⁹ A harmonious reading of the applicable human rights law and IHL would preserve human rights protection for civilians. However, LAPS members have illegally taken up arms against Rotania.⁵⁰ They seek to shatter Rotania’s territorial integrity by terrorising its civilian population. Although LAPS members continue to enjoy certain fundamental rights, those rights are outlined by IHL, not the *lex generalis* of human rights law.

This interpretation of the relationship between human rights law and IHL is consistent with General Assembly resolutions and previous decisions of this Court. The General Assembly has invoked human rights law to protect **civilians** during armed conflict in resolutions that were cited favourably by the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁵¹ When this Court has addressed the relationship between IHL and human rights law, it has been concerned with protecting civilians.⁵² The Court’s jurisprudence has not held that combatants benefit from the full panoply of human rights.

46. International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, 2006, UN Doc. A/CN.4/L.682 at para. 4 [Fragmentation].

47. *Ibid.* at para. 408.

48. *Ibid.* at para. 409.

49. Ingrid Detter, *The Law of War*, 2d ed. (Cambridge: Cambridge University Press, 2000) at 135.

50. Compromis at paras. 18-21.

51. See *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para 110-11 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) citing *Respect For Human Rights in Armed Conflict*, GA Res. 2444(XXIII), UN GAOR, 23rd Sess., Supp. No. 18, UN Doc. A/7218 (1968). See also *Basic principles for the protection of civilian populations in armed conflicts*, GA Res. 2675(XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970).

52. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at para. 43; *Nuclear Weapons*, *supra* note 1 at para. 25.

C. Under applicable international humanitarian law, the LAPS detainees may be held incommunicado

1. The LAPS Detainees are unlawful combatants

Individuals who illegally launch armed attacks have been referred to variously as, “banditti, jayhawkers, guerrillas, or... unauthorized marauders.”⁵³ They traditionally enjoyed few rights and were tried and convicted summarily.⁵⁴ During the American Civil War, unlawful combatants were, “treated summarily as highway robbers or pirates.”⁵⁵ LAPS’ attacks in Rotania violate the fundamental precepts of IHL, which stress the distinction between military and civilian targets in order to protect civilians.⁵⁶ LAPS detainees, rightly described as international outlaws,⁵⁷ are unlawful combatants.

2. Unlawful combatants may be detained and held *incommunicado*

It is a longstanding precept of IHL that individuals unlawfully taking part in hostilities may be detained.⁵⁸ The Geneva Conventions foresee situations where unlawful combatants, such as spies and saboteurs, forfeit their communication rights.⁵⁹ Such treatment is justified because secrecy is crucial to effectively combat the threat posed by such individuals.⁶⁰ Given their tactics and aims, LAPS detainees have rightly been labelled saboteurs.⁶¹ Although the armed conflict in Rotania is not within the scope of application of the Geneva Conventions, the same considerations apply equally with respect to combating terrorist organizations such as LAPS. Had the detainees received visitors or communicated with the outside world, they may have shared information which could help others in planning attacks or avoiding capture.

53. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) at 17 (Thomas J., dissenting) [*Hamdan*].

54. See Detter, *supra* note 49 at 148. See also Richard R. Baxter, “So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs” (1951) 28 *Brit. Y.B. Int’l L.* 323.

55. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, General Orders No. 100 (24 April 1863), art. 82 reproduced in Dietrich Shindler & Jiri Toman, eds., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, (Boston: Martinus Nijhoff Publishers, 2004) 3.

56. *Cf.* Detter, *supra* note 49 at 160.

57. *Compromis* at para. 31.

58. See *Ex parte Quirin*, 317 U.S. 1 at paras. 13, 14 (1942).

59. GC IV, *supra* note 26, art. 5.

60. See Jean S. Pictet, ed., *The Geneva Conventions of 12 August 1949, Commentary to Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee for the Red Cross, 1952) at 52-53.

61. *Compromis* at para. 15.

D. The detention and treatment of LAPS detainees was consistent with customary international humanitarian law

IHL recognizes that all persons in custody are entitled to the rights outlined in Common Article 3 of the Geneva Conventions. These rules are part of customary IHL and reflect, “elementary considerations of humanity.”⁶² Common Article 3 torture and cruel, humiliating and degrading treatment and humiliating and degrading treatment.⁶³ The treatment of LAPS detainees was consistent with these requirements.

1. The treatment of the LAPS detainees was not torture

Adova and Rotania are both bound by the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),⁶⁴ which is non-derogable. The definition of torture contained in the CAT, and accepted as customary IHL⁶⁵, is comprised of a number of elements, notably causing extreme pain or suffering.⁶⁶ This “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”⁶⁷ This definition stigmatizes “deliberate inhuman treatment causing very serious and cruel suffering” and therefore creates a very high threshold.⁶⁸

Forms of ill-treatment that have been found to amount to torture under various international instruments include: electric shocks,⁶⁹ pulling out of finger nails, beatings on the soles of the feet, suspension by the arms while these are

62. *Nicaragua*, *supra* note 1 at para. 218.

63. GC III, *supra* note 26, art. 3(1).

64. 10 December 1984, 1465 U.N.T.S. 85 [CAT]; Compromis at para. 44.

65. See *Prosecutor v. Zejnil Delalic et al.*, IT-96-21-T, Judgement (16 November 1998) at para. 459 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

66. CAT, *supra* note 64, art. 1(1)

67. *Ibid.*, art. 1(1)

68. Julie Lantrip, “Torture and Cruel, Inhuman and degrading treatment in the Jurisprudence of the Inter-American Court of Human Rights” (1999) 5 ILSA J. Int’l & Comp L. 5; See also *Askoy v. Turkey* (1996), 6 E.C.H.R. (Ser. A) 2260; *Ireland v. United Kingdom* (1978), 25 E.C.H.R. (Ser. A) 1 at para. 167 [Ireland]; S. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other forms of Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus, Nijhoff Publishers, 1988) at 117.

69. See *Cakici v. Turkey*, no. 23657/94, [1999] IV E.H.C.R. 583; *Dikme v. Turkey*, no. 20869/92, [2000] VIII E.C.H.R. 223; *Akkoc v. Turkey*, nos. 22947/93, 22948/93, [2000] X E.C.H.R. 389.

ted behind the back, severe beatings, rape⁷⁰ and mock executions.⁷¹ These actions are unspeakably cruel, an affront to humanitarian values and an international crime. Conversely, the combined use of stress positions, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink, when accompanied physical beatings has not been found to "occasion suffering of the particular intensity and cruelty implied by the word torture so understood."⁷²

The interrogation techniques used at Camp Indigo are outlined in the Vinitsa Proclamation of 15 March 2007 (Proclamation).⁷³ These techniques are not torture because they aim to disorient and confuse, not to cause severe pain or suffering.

2. The treatment of the LAPS Detainees was not cruel, inhuman, or degrading

The prohibition on cruel, inhuman, and degrading treatment aims to preserve human dignity and prevent individuals "from being brought down to the level of animals."⁷⁴ Inhuman treatment is an intentional act that "causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."⁷⁵ The definition of "cruel" is equivalent to that of "inhumane."⁷⁶

The treatment of the LAPS detainees was not designed to cause them serious pain or suffering or to attack their human dignity. The techniques outlined in the Proclamation are not akin to the cases cited in *Delalic* where individuals were beaten, spat upon, and forced to stand naked in front of an open window.⁷⁷ The interrogations did not involve such wanton, sadistic cruelty, or the blatant disregard for personal dignity that are characteristic of the acts prohibited by the CAT and IHL.

70. See *Aydin v. Turkey* (1997), 50 E.C.H.R. (Ser. A) 1866. See also *Fernando and Raquel Mejia v. Peru* (1996), Inter-Am. Comm. H.R. No. 5/96, *Annual Report of the Inter-American Commission on Human Rights: 1996*, OEA/Ser.L/V/II.91 Doc. 7 157.

71. See Commission on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report of the Social Rapporteur*, UN ESCOR, 1986, UN Doc. E/CN.4/1986/15, at para. 119.

72. *Ireland*, *supra* note 68 at para. 167.

73. *Compromis* Appendix III.

74. *Delalic*, *supra* note 65 at para. 521.

75. *Ibid.* at para 543.

76. *Ibid.* at para. 551.

77. *Tamasi v. France* (1993), 13 E.H.R.R. 1 at para. 115.

III. THE PROPOSED PROSECUTION OF THE LAPS DETAINEES BEFORE THE ROTANIAN MILITARY COMMISSION IS CONSISTENT WITH INTERNATIONAL LAW

A. *The Rotanian Military Commission's exercise of jurisdiction over the LAPS detainees is lawful*

1. Rotania legally apprehended and transferred the LAPS detainees

Should this Court find the ICCPR applicable to this dispute, Rotania's apprehension of the LAPS detainees was still lawful. The ICCPR prohibits arbitrary arrest and detention, except where authorized by law.⁷⁸ As argued above (*Supra* Section I(A-B)), Rotania's apprehension of the LAPS detainees was a justified act of self-defence. This act of self-defence is the legal basis for the arrest of the LAPS detainees, and therefore justifies Rotania's jurisdiction over them.⁷⁹

2. Rotania's treatment of the LAPS detainees does not warrant removing the jurisdiction of the Military Commission

In some cases, courts have refused jurisdiction where "to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity."⁸⁰ However, a court will only invoke this doctrine where the violation is "of a most shocking and outrageous character," limited to "torture, brutality and similar outrageous conduct."⁸¹ Cases where jurisdiction will be set aside are exceptional because in most situations, "the remedy of setting aside jurisdiction, will...be disproportionate."⁸²

As discussed above, Rotania's apprehension and treatment of the LAPS detainees was restrained and justified in the circumstances; they do **not** meet the abuse of process test to refuse jurisdiction.

78. ICCPR, *supra* note 42, art. 9(1).

79. See *Prosecutor v. Nikolic*, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest (June 5, 2003) at para. 21 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) [*Nikolic*].

80. *Jean-Basco Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Decision (3 November 1999) at para. 74 (International Criminal Tribunal for Rwanda, Appeals Chamber).

81. *United States ex rel. Lujan v. Gengler*, 510 F. 2d 62 (2d. Cir. 1975) at 65. See also *Prosecutor vs. Slavko Dokmanovic*, IT-95-13a-PT, Decision on the Motion for Release by the Accused (22 October 1997) at para. 114 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

82. *Nikolic*, *supra* note 79 at para. 30. See also *Kajelijeli v. The Prosecutor*, ICTR-98-44A-A, Judgement (23 May 2005) at para. 206 (International Criminal Tribunal for Rwanda, Appeals Chamber).

3. Alternatively, the crimes alleged against the LAPS Detainees are sufficiently severe to justify Rotania's assertion of jurisdiction.

Even if the court finds that Rotania's transfer of the LAPS detainees was unlawful, Rotania can still claim jurisdiction based on the nature of the crimes. Where a suspect has been charged with "crimes of a universal character... publicly condemned by the civilized world,"⁸³ courts have set aside concerns about jurisdiction raised by an illegal apprehension.⁸⁴ The damage caused by crimes such as genocide, crimes against humanity and war crimes, "is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation."⁸⁵

LAPS' malicious terrorist attacks targeted religious and cultural sites, resulting in the death of innocent civilians. These are gross violations of the basic precepts of customary IHL and therefore war crimes.⁸⁶ Even outside the context of armed conflict, such acts have been described at the peacetime equivalent of war crimes.⁸⁷ Given the gravity of the crimes, the Rotanian Military Commission (RMC) can maintain jurisdiction over the LAPS detainees.

B. Alternatively, Rotania derogated from its obligations under the International Covenant on Civil and Political Rights

Article 4 of the ICCPR allows state parties to derogate from their obligations under the Covenant. The language of Article 15 of the European Convention on Human Rights is virtually identical to Article 4 of the ICCPR.⁸⁸ As a result, the decisions of the European Court of Human Rights (ECHR) provide useful authority in interpreting Article 4 of the ICCPR.⁸⁹ In assessing whether a derogation is valid, the ECHR has recognized that "national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope

83. *People of Israel v. Eichmann* (1962), 36 I.L.R. 306 (Supreme Court of Israel) at 377.

84. See *Nikolic*, *supra* note 80 at para. 24; *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie* (1983), 78 I.L.R. 130 (Cour de Cassation).

85. *Nikolic*, *ibid.* at para. 26.

86. See e.g. *Kordic*, *supra* note 8.

87. See Michael Scharf, "Defining Terrorism as the Peace-Time Equivalent of War Crimes: Problems and Prospects" 36 Case W. Res. J. Int'l L. 359 at 363-69.

88. *European Convention*, *supra* note 42, art. 15.

89. See L.C. Green, "Derogation of Human Rights in Emergency Situations" (1978) 16 Can Y.B. of Int'l L. 92 at 102.

of derogation necessary to avert it.”⁹⁰ As a result, it has allowed authorities “a wide margin of appreciation,”⁹¹ a level of deference that is reflected in the decisions of some national courts.⁹²

The ICCPR requires that governments establish four elements to justify derogation. The State must show that there was a “public emergency that threaten[ed] the life of the nation,” that it only took measures that were strictly required by the exigencies of the situation, that the measures taken were not discriminatory, and that it informed the other parties of its derogation.⁹³

1. The LAPS attacks constituted a public emergency that threatened the life of the nation

The ECHR has generally considered terrorist attacks to be public emergencies. In *Lawless v. Ireland*, several factors contributed to this finding: the existence of a secret army using violence to attain its ends, the steady and alarming increase in terrorist activities, and the fact that this army was operating outside of State territory, which jeopardized Ireland’s relations with its neighbour.⁹⁴ In *Ireland v. United Kingdom*, the inability of the criminal courts to restore order, the widespread intimidation of the population, and the potential for escape across the border were sufficient find a public emergency.⁹⁵

Beginning in 2006, LAPS instigated a number of riots and strikes in the Upland Plateau. This escalated to a series of armed attacks against cultural and religious sites throughout Rotania, and threats of further attacks.⁹⁶ LAPS’ actions have wrought havoc in the Upland Plateau, caused economic disruption, intimidated the Rotanian population, and killed innocent civilians. This is a public emergency.

90. *Ireland*, *supra* note 68 at 78-9 [Emphasis added].

91. *Ibid.*; See also *Lawless v. Ireland* (1961), 3 E.C.H.R. 25 [*Lawless*]; *Brannigan and McBride v. U.K.* (1993), 258 E.C.H.R. 34 [*Brannigan*].

92. See *Fort Frances Pulp and Power [Paper] Co. v. Manitoba Free Press Co.*, [1923] A.C. 695 at 706; *Hamilton v. Kentucky Distillers & Warehouse Co.*, 251 U.S. 146 (1919).

93. ICCPR, *supra* note 42, art. 4(1).

94. *Supra* note 93 at 56.

95. *Report of the European Commission on Human Rights (Ireland v. U.K.)* (1978), 23-1 E.C.H.R. (Ser. B) 8 at 75-86.

96. *Compromis* at paras. 15-23

2. Rotania's response to the LAPS attacks was required by the exigencies of the situation

The second stage analysis of derogation involves a consideration of the proportionality and duration of the derogation,⁹⁷ in light of the "margin of appreciation" allowed to governments. In *Lawless* and *Brannigan and McBride*, the ECHR deferred to the government's assessment that detention without trial was necessary to respond to and investigate terrorist crimes.⁹⁸ In *Ireland*, the court found that administrative detention and coercive interrogations were justifiable.⁹⁹

The procedures of the RMC are necessary to protect the security of the Rotanian people. They limit access to sensitive witnesses and information, ensure that the trials do not facilitate future terrorist attacks, and balance the rights of accused with Rotania's duty to bring to justice those who would threaten the rights of their citizens.

3. Rotania's response to the LAPS attacks was not discriminatory

The 1980 Act establishing the RMC is general in application, and the detainees are both Rotanian and Adivan citizens. The policies address the threat posed by LAPS and do not target any specific racial or ethnic group.

4. Rotania gave sufficient notification of its derogation

The fourth requirement in derogating from the ICCPR requires that the State inform the other parties of its derogation.¹⁰⁰ The U.N. Human Rights Committee (HRC) has held that "the substantive right to take derogatory measures may not depend on a formal notification being made."¹⁰¹ Similarly, the ECHR has only required "some formal and public act or derogation, such as declaration of martial law or state of emergency."¹⁰² In a number cases the ECHR has excused a States's failure to provide formal notification, and

97. Mohamed M. El Zeidy, "The ECHR and States of Emergency: Article 15 – A Domestic Power of Derogation from Human Rights Obligations," (2003) 4 *San Diego Int'l L.J.* 277 at 286.

98. *Lawless*, *supra* note 91; *Brannigan*, *supra* note 92.

99. *Supra* note 69 at 82.

100. ICCPR, *supra* note 42, art. 4(3).

101. Human Rights Committee, *Jorge Landinelli Silva v. Uruguay*, Communication No. R.8/34 (30 May 1978), UN GAOR, 36th Sess., Supp. No. 40, UN Doc. A/36/40 (1981) 130 at para. 8.3.. See also Human Rights Committee, *William Torres Ramirez v. Uruguay*, Communication No. 4/1977 (13 February 1977), UN GAOR, Supp. No. 40, UN Doc. A/35/40 (1980) 121 at para. 17.

102. *Cyprus v. Turkey* (1976), 4 E.H.R.R. 482 at 556.

proceeded nonetheless to evaluate the necessity and proportionality of the derogations.¹⁰³

Rotania fulfilled its notification obligation by proclaiming a national emergency and publicly invoked the 1980 Act to address the threat posed by LAPS.¹⁰⁴ This is reinforced by the UN Security Council's denunciation of the actions of LAPS as a threat to "international peace and security in the region" and affirmed Rotania's right to self-defence.¹⁰⁵

C. Rotania's prosecution of the LAPS detainees does not violate the Geneva Conventions

Since the LAPS detainees are unlawful combatants under customary IHL (*Supra* Section II(A)), their procedural rights are limited to those outlined in Common Article 3.¹⁰⁶ Under Common Article 3 a defendant may only be condemned by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."¹⁰⁷ These rules, which are mirrored in customary IHL, require that the court be "established and organized in accordance with the laws and procedures already in force in a country."¹⁰⁸ They protect individuals from trial by *ad hoc* tribunals or summary procedures.¹⁰⁹ The RMC was established by an act of Parliament,¹¹⁰ and complies with Common Article 3.

D. Rotania's prosecution of the LAPS detainees complies with customary human rights law

1. Customary international law guarantees only equality of treatment before to foreign nationals before local courts

International law guarantees an alien equality of treatment under local law.¹¹¹ This "national standard" protects against discriminatory treatment of

103. See *Ibid.*; Christoph Schreuer, "Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights," (1982) 9 Yale J. World Pub. Ord. 113 at 120; *Lawless, supra* note 91 at 61-62.

104. *Compromis* at para. 25.

105. *Compromis* Appendix I.

106. GC III, *supra* note 26, art. 3(1).

107. *Ibid.* at art. 3(1)(d).

108. Jean-Marie Henkaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) at 355.

109. *Hamdan, supra* note 53 at 69.

110. *Compromis* at para. 25.

111. See Brownlie, *supra* note 40 at 501-2; *Canevaro Case (Italy v. Peru)* (1912), 6 A.J.L.L. 746 at

foreign nationals in the judicial system, but otherwise allows the municipal courts to exercise jurisdiction. This is a reflection of the principles of territorial sovereignty and equality, and recognizes that individual States are in the best position to assess the measures that are required in a given situation.¹¹² The national standard has the widespread support of states, who oppose an “international minimum standard” that would afford greater rights to foreign nationals than to their citizens.¹¹³ In addition, the U.N. General Assembly endorsed this view in the 1974 resolution on *Permanent Sovereignty over Natural Resources*.¹¹⁴ The 1980 Act applies equally to all persons, regardless of nationality, so Rotania has complied with the national standard.

2. Customary law allows for derogations from procedural guarantees in situations of national emergency

Should this Court find procedural rights at customary international law applicable, States may derogate from them in response to acts of terrorism. All human rights instruments allow for derogation in times of public emergency.¹¹⁵ These provisions reflect nearly universal practice under municipal law.¹¹⁶ Therefore, any procedural rights at customary international law applicable to the RMC should be subject to the same derogation.

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

A. Adova cannot ground its exercise of jurisdiction on territoriality

The territorial basis for jurisdiction requires a real or substantial link between the alleged crimes and the forum State.¹¹⁷ This test is based on an examination of the activities constituting the offense.¹¹⁸ In the present case, there is no real or substantial link between the elements of the crime of torture

751 (The Permanent Court of Arbitration at the Hague); *Cadenhead case*, Claim No. 37 (1914), 8 A.J.I.L. 663 at 664-5 (American and British Claims Arbitration Tribunal).

112. Brownlie, *Ibid.*

113. See Freeman, *supra* note 43 at 632 citing Moreno Quintana, *Derecho Internacional Publico* (Buenos Aires: Libreria del Colegio, 1950) at 170.

114. *Permanent Sovereignty over Natural Resources*, GA Res. 3171 (XXVIII), UN GAOR, 28th Sess., UN Doc. No. A/RES/3171 (1974) 52.

115. Schreuer, *supra* note 103 at 115-16. See e.g., *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. No. A/810 (1948) 71, art. 29(2).

116. Venkat Iyer, “States of Emergency – Moderating their Effects on Human Rights,” (1999) 22 *Dalhousie L. J.* 125 at 129.

117. See *Lotus*, *supra* note 37 at 18; Brownlie, *supra* note 40 at 299.

118. *R. v. Libman*, [1985] 2 S.C.R. 178 at 213.

and Adovan territory. There is no evidence that any of the detained LAPS members were tortured in Adova. The allegations in question relate solely to facts that transpired at Camp Indigo, which is located in Merkistan.¹¹⁹

B. Adova cannot ground its exercise of jurisdiction on universality

Universal jurisdiction has a limited application under international law. As President Guillaume explained in the *Arrest Warrant Case*, a State may only exercise universal jurisdiction in cases of piracy and if provided for by convention, as long as the accused is present on its territory.¹²⁰ The CAT only authorizes universal jurisdiction for torture, not cruel inhuman or degrading treatment.¹²¹ Furthermore, neither the CAT¹²² nor the Geneva Conventions¹²³ permit the exercise of universal jurisdiction *in absentia*.

Even if Adova establishes a *prima facie* case of cruel, inhuman or degrading treatment, Adova's exercise of universal jurisdiction is unlawful, since the CAT only permits this measure in cases of torture. As President Kirgov was not on Adovan territory when the Attorney General named him in the indictment and issued a warrant for his arrest, Adova unlawfully exercised universal jurisdiction *in absentia*.¹²⁴

C. A prima facie case for conspiracy does not exist against President Kirgov

International law does not limit individual criminal responsibility to the perpetrator of a crime.¹²⁵ Complicity and participation in torture are considered criminal violations.¹²⁶ The presentation of an indictment for such crimes requires the determination that a *prima facie* case exists.¹²⁷

119. Compromis at para. 30.

120. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, [2002] I.C.J. Rep. 3 at 43-44 (Guillaume, President, Separate Opinion) [*Arrest Warrant Case*].

121. CAT, *supra* note 64, arts. 5, 16.

122. *Arrest Warrant Case*, *supra* note 120 at 39-40

123. *Ibid.* at 44.

124. Compromis at para. 40.

125. See *Report of the Secretary General Pursuant to paragraph 2 of Security Council Resolution 808 (Statute of the International Criminal Tribunal for the Former Yugoslavia)*, UN SCOR, 1993, UN Doc. S/25704 and Add.1, 827, art. 7(1) [ICTY Statute]; SC Res. 955(1994), UN SCOR, 1994, Annex, UN Doc. S/Res/955, art. 6(1) [ICTR Statute]; *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90, art. 25(3).

126. CAT, *supra* note 64, art. 4.

127. See ICTY Statute, *supra* note 125, art. 18(4); ICTR Statute, *supra* note 125, art. 17(4).

1. President Kirgov did not aid or abet in the commission of torture

The requisite *actus reus* and *mens rea* for aiding and abetting require that the accused “assist[s] in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.”¹²⁸

There is no evidence to suggest that President Kirgov did anything to encourage the perpetration of the alleged crimes. In fact, President Kirgov was careful not to sanction any measures by the Enforcers that were contrary to international law.¹²⁹ Furthermore, there is no evidence that President Kirgov knew torture would be committed at Camp Indigo. He received assurances from his principal legal advisor that the practices authorized by the Proclamation were in conformity with international law.¹³⁰ Consequently, Adova’s conspiracy charge against President Kirgov cannot be grounded on aiding and abetting.

2. President Kirgov had neither the effective control nor the *mens rea* required for command responsibility

There are three elements of command responsibility: the existence of a superior-subordinate relationship,¹³¹ actual or imputed knowledge of the superior that crimes were or are about to be committed by his or her subordinates,¹³² and failure of the superior to prevent or punish violations of international criminal law. Command responsibility applies to both military and civilian superiors.¹³³ A sufficient superior-subordinate relationship exists if the accused’s control was such that they could have prevented or punished the crimes in question.¹³⁴

Although President Kirgov was the Commander-in-Chief of the Rotanian Military, he had no effective control over any of the facts in question. The necessary effective control was also absent in his civilian capacity. Since President Kirgov was not involved in the operations at Camp Indigo, there was nothing he could have done to prevent the alleged crimes. As the facts do not establish a *prima facie* case against President Kirgov, Adova is unjustified in exercising criminal jurisdiction over him.

128. *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, Judgement (10 December 1998) at para. 257 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Furundzija*].

129. *Compromis* at para. 25.

130. *Compromis* at para. 14, Appendix III.

131. *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-A, Judgement (3 July 2002) at para. 51 (International Criminal Tribunal for Rwanda, Appeal Chamber) [*Bagilishema*].

132. *Prosecutor v. Zdravko Mucic (Celebici Camp Case)*, IT-96-21, Judgement (20 February 2001) at para. 223 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber).

133. *Bagilishema*, *supra* note 131.

134. *Ibid.* at para. 53.

D. President Kirgov and General Vinitza are immune from the jurisdiction of Adovan Courts

1. President Kirgov and General Vinitza enjoy immunity *ratione materiae*

The doctrine of State immunity is a fundamental principle of international law pursuant to which no State may be subjected to the jurisdiction of another State.¹³⁵ In *The Schooner Exchange v. McFaddon*, the U.S. Supreme Court held that the doctrine of State immunity is based on the dignity, equality, and independence of sovereign states.¹³⁶ This principle was upheld by the House of Lords in *Duke of Brunswick v. The King of Hanover*: “a foreign sovereign... cannot be made responsible here for an act done in his sovereign character in his own country”.¹³⁷

State immunity is the basis for immunity *ratione materiae*, or functional immunity, which applies to a broad class of officials who carry out duties on behalf of the State.¹³⁸ In the absence of immunity *ratione materiae*, the doctrine of State immunity could be circumvented by subjecting State officials to foreign jurisdiction.¹³⁹ Municipal legislation also supports the extension of State immunity to officials.¹⁴⁰ Immunity *ratione materiae* persists after the official’s retirement.¹⁴¹ Therefore, no individual criminal or civil liability may be imposed where functional immunity exists.¹⁴²

Immunity *ratione materiae* bars Adova’s jurisdiction over both President Kirgov and General Vinitza. President Kirgov’s actions following the attack on the Shrine of the Seven Tabernacles were taken in his capacity as President and authorized by the laws of Rotania.¹⁴³ General Vinitza’s actions were taken

135. J.-Maurice Arbour & Geneviève Parent, *Droit international public*, 5th ed. (Cowansville: Les Éditions Yvon Blais, Inc., 2006) at 331.

136. W. Cranch, *Reports of Cases Argued and Adjudged by the Supreme Court of the United States*, vol. VII (New York: Banks Law Publishing, 1911) at 135.

137. (1848) 2 H.L. Cas. 1. *Accord Buttes Gas & Oil Co. v. Hammer* [1982] A.C. 888.

138. Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: New York, 2007) at 443.

139. Steffen Wirth, “Immunity from Core Crime? The ICJ’s Judgement in the Congo v. Belgium Case” (2002) 13 E.J.I.L. 877 at 882; *Jaffe v. Miller*, (1993), 13 O.R. (3d) 745 (Ont. C.A.).

140. *State Immunity Act 1978* (U.K.), 2000, c. 33, s. 14; *State Immunity Act*, R.S.C. 1985, c. S-18, s. 2; *European Convention on State Immunity*, 16 May 1972, Eur. T. S. 74, art. 11.

141. *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No. 3), [1999] 2 All E.R. 97 at 119 [*Pinochet*].

142. Antonio Cassese, “When My Senior State Officials be Charged with International Crimes?” (2002) 13 E.J.I.L. 853 at 863.

143. *Compromis* at para. 25.

under the authority conferred upon him by President Kirgov and pursuant to the Proclamation. It cannot be said that General Vinitsa's actions exceed his lawful authority because he was officially commended for the operations he led against LAPS.¹⁴⁴ Immunity persists even though both accused have retired.

2. There is no exemption from State immunity for torture

The vast majority of municipal decisions involving claims of torture against a foreign State or its officials have been barred by State immunity. In *Saudi Arabia v. Nelson*, which involved allegations of unlawful arrest, imprisonment, and torture against the Saudi government, the U.S. Supreme Court held that no exemption under U.S. law exists for this type of claim: “[h]owever monstrous such abuse undoubtedly may be, a foreign state’s exercise of [police] power has long been understood...as peculiarly sovereign in nature.”¹⁴⁵ Other U.S. decisions confirm that an official of a foreign State may claim immunity for acts of torture if they were officially authorized or permitted by the law of their State.¹⁴⁶ The English Court of Appeal has also upheld State immunity in the context of torture allegations, holding that violations of international law do not amount to an implied waiver of immunity.¹⁴⁷ In the few instances where a municipal court has waived immunity to prosecute a State official for torture, the crimes in question were on a massive and systematic scale, often connected to genocide.¹⁴⁸

Even if Adova had a *prima facie* case of torture, State practice indicates that State immunity would still apply. The alleged acts of torture were an exercise of State power, carried out pursuant to the laws of Rotania, specifically the 1980 Act and the Proclamation.¹⁴⁹ The limited scale of the facts in question does not prevent this Court from concluding that they amounted to torture on substantive grounds. However, it certainly indicates that the present case is much more analogous to those municipal cases that have upheld the procedural bar of State immunity than those that have occasionally permitted a municipal court to assert criminal jurisdiction over a foreign State official.

144. Compromis at para. 38.

145. 507 U.S. 349 at 361 (1993).

146. *Xuncax v. Gramajo*, 886 F.Supp. 167 at 175 (D. Mass. 1995); *Cabiri v. Baffour Assasie-Gyimah* 92 F.Supp. 1189 at 1190 (S.D.N.Y. 1996). See also *Princz v. Federal Republic of Germany* 26 F.3d 1160 (D.C. Cir. 1994).

147. *Al Adsani v. Government of Kuwait* (1996), 107 I.L.R. 536 (Eng. C.A.).

148. See e.g. *Pinochet*, *supra* note 141; *Eichmann*, *supra* note 83; *R. v. Finta*, [1994] 1 S.C.R. 701.

149. Compromis at para. 25, Appendix III.

3. The *Convention Against Torture* does not authorize lifting State immunity

State immunity can only be waived expressly.¹⁵⁰ Accordingly, the *Convention Against Genocide* explicitly lifts State immunity, affirming that any person who violates the Convention shall be punished “whether they are constitutionally responsible rulers, public officials or private individuals”.¹⁵¹ The CAT, however, is silent on the issue of State immunity. According to the U.S. 9th Circuit Court of Appeals, a State does not waive its right to immunity by signing the CAT.¹⁵² Likewise, the U.S. Supreme Court has held that merely signing an international agreement that is silent on State immunity does not constitute an implied waiver of immunity.¹⁵³ There is also no evidence that the drafters of the CAT intended to fundamentally alter the law of State immunity.¹⁵⁴

In such circumstances, human rights regimes must be interpreted in harmony with other rules of international law, including state immunity.¹⁵⁵ The European Court of Human Rights has adopted this approach in its assessment of the interaction between State immunity and the European Convention on Human Rights.¹⁵⁶ Such a harmonious interpretation must recognize that a claim of State immunity is compatible with the terms of the CAT, notwithstanding the official character of torture. State parties to the CAT may still prosecute foreign State officials, but only if the violations are committed outside the authority conferred upon them by the laws of their State. However, when State officials violate the CAT pursuant to the laws of their State, they are insulated from foreign jurisdiction by immunity *ratione materiae*.

Since the charges against both President Kirgov and General Vinita relate to acts taken within their lawful authority as State officials of Rotania, Adova may not use the provisions of the CAT to pierce their immunity *ratione materiae*.

150. Robert Jennings & Arthur Watts, *Oppenheim's International Law*, 9th ed. (London: Longman, 1992) at 351-355.

151. *Convention on the Repression and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, art. 4.

152. *In Re Estate of Ferdinand Marcos*, 94 F.3d 539 at 548 (9th Cir. 1996).

153. *Argentine Republic v. Amerada Hess*, 488 U.S. 429 at 439.

154. *Pinochet*, *supra* note 141, at 127 (Lord Goff, dissenting).

155. *Fragmentation*, *supra* note 46 at 85-86.

156. See *McElhinney v. Ireland*, no. 31253/96, [2001] XI E.C.H.R. 37 at para. 36; see also *Al-Adsani v. the United Kingdom*, no. 35763/97, [2001] XI E.C.H.R. 79 at 100.

4. There is no conflict between the *jus cogens* prohibition of torture and the customary international law of State immunity

Although the prohibition of torture is a *jus cogens*¹⁵⁷ norm and the principle of State immunity is customary international law,¹⁵⁸ both laws can coexist since the former is substantive and the latter is procedural. In other words, State immunity does not provide an unlawful exception to a *jus cogens* norm, it merely limits the forums that may enforce it.¹⁵⁹ In *Bouzari v. Iran*¹⁶⁰ and *Jones v. Saudi Arabia*¹⁶¹, both cases involving allegations of torture against foreign states, the courts concluded that the actions were barred by State immunity while recognizing that the prohibition of torture is *jus cogens*. Finally, the ILC has indicated that the potential of “*jus cogens* to invalidate the inferior norm does not mean that *jus cogens* would provide automatic access to justice irrespective of procedural obstacles for punishing individuals or, for example, concerning relief in civil matters”.¹⁶²

Should this Court conclude that President Kirgov and General Vinitza committed torture, a decision to extend State immunity would not be tantamount to allowing them to violate a *jus cogens* norm with impunity. Rather, this court would condemn their actions, but conclude that an Adovan court is not the appropriate forum to prosecute them. Such a holding would leave ample room for the accused to face justice before a Rotainian court or an international tribunal, which is not bound by the law of State immunity.¹⁶³ Furthermore, it would be consistent with this Court’s jurisprudence, which recognizes that, “a court of one State may try a former [official] of another State in respect of acts committed...during [their] period of office in a private capacity.¹⁶⁴ However, acts committed in public capacity, such as those in question, cannot come before a foreign court due to the operation of State immunity.

157. See *Furundzija*, *supra* note 128 at para. 153

158. See Andrea Bianchi, “Ferrini v. Federal Republic of Germany” (2005) 99 A.J.I.L. 242 at 242.

159. See Hazel Fox, *The Law of State Immunity* (Oxford: Oxford University Press, 2002) at pp. 523-25; Lee M. Caplan, “State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory” (2003) 97 A.J.I.L. 741 at 771.

160. [2004] O.J. No. 2800 (Ont. C.A.).

161. [2005] 2 W.L.R. 808.

162. *Fragmentation*, *supra* note 46 at 187.

163. *Arrest Warrant Case*, *supra* note 120 at para. 61

164. *Ibid.*

CONCLUSION AND PRAYER FOR RELIEF

For the forgoing reasons, the State of Rotania respectfully requests this Honourable Court to adjudge and declare as follows:

1. That Rotania's arrest and rendition of Samara Penza and other LAPS members from Adova was internationally lawful;
2. That the detention of Samara Penza and other LAPS members was consistent with international law;
3. That the Rotanian Military Commission may proceed with the prosecution of Samara Penza and other LAPS members for acts committed against Rotanian citizens, and religious and cultural institutions; and
4. That Adova's purported exercise of jurisdiction over former President Kirgov and General Vinitza is in violation of international law.

All of which is Respectfully Submitted
This 14th day of January, 2008,
Team 346R (Counsel for the Respondent)