

**THE 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)**

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**MEMORIAL FOR THE APPLICANT**  
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2008

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## STATEMENT OF FACTS

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Neighbouring countries Adova and Rotania are populated mainly by two ethnic groups, Stovians and Litvians. Adova's population is primarily Litvian, while Rotania's majority is Stovian. Rotanian Litvians, who make up about 10% of Rotania's population, mainly reside in Rotania's Upland Plateau.

A significant disparity in well-being has persisted between Litvians and Stovians in Rotania. In response, the Rotanian Litvians formed the Litvian Advancement and Protection Society ("LAPS"), a social and civic organization. Adova's government has historically provided financial support for LAPS's educational and charitable projects.

Recently, tensions have increased between Rotanian Litvians and Rotania. LAPS has taken on an increasingly political role. A conservative wing of LAPS, led by Adovan human rights activist Samara Penza, has advocated for change within the Rotanian political system. To date, Litvians hold 6% of the seats in Rotania's Parliament. The Independent Litvian Solidarity Association ("ILSA"), the most political wing of LAPS, variously espouses the creation of an independent state or the establishment of a political-economic union with Adova. Rotania has consistently opposed political autonomy for its Litvians.

In January 2006, ILSA organized labour strikes and protests in the Upland Plateau, disrupting Rotania's coal-mining operations. Rotania dispatched the 373<sup>rd</sup> Infantry Battalion (the "Enforcers"), commanded by Colonel Gommel Vinita, to protect residents from violence related to ILSA's actions. From February to December 2006,

confrontations between protesters and the Enforcers caused the deaths of between 100 and 300 Litvians and injured 750 to 1,200 others.

On 1 January 2007, Penza issued a statement on behalf of LAPS that articulated, in general terms, the Rotanian Litvians' goal of self-determination. A manifesto attributed to ILSA followed this statement, stating that dramatic measures would be taken to ensure Litvian freedom. In four incidents between 7 January and 19 February 2007, Stovian cultural and religious sites in the Upland Plateau were destroyed, incurring property damage, but no deaths. ILSA acknowledged responsibility for three of these incidents. Penza never claimed responsibility on LAPS's behalf.

On 22 February 2007, an official at a Stovian holy site, the Shrine of the Seven Tabernacles, located outside of the Upland Plateau, received a warning from ILSA that no one should remain in the Shrine that night. There was difficulty translating the message, and at approximately 2130 hours, fire destroyed the Shrine, killing 23 people.

Adova's Ambassador responded on 25 February 2007 in a diplomatic note condemning the acts. Adova expressed solidarity with Rotania in the global struggle to combat terrorism.

In response to the attacks, President Michael Kirgov declared a national emergency and invoked the Protection of the State Act of 1980 (the "Act"). Pursuant to the Act, Kirgov established Military Commissions to prosecute those responsible for the attacks. The Commission's rules allow for witnesses to testify anonymously; prohibit accused persons from challenging the admissibility of evidence on grounds that it was derived from coercive interrogations; assign military lawyers to defendants, denying their counsel of choice; and prohibit defendants or their counsel from inquiring into sources of

evidence that is deemed classified for military or security reasons. Amnesty International and Human Rights Watch have both condemned the Military Commissions, finding that these procedures did not meet international standards of due process. Rotania has rejected these conclusions.

Kirgov also announced that Vinitisa and the Enforcers were empowered to take whatever measures necessary to apprehend the perpetrators, so long as these measures were consistent with Rotanian and international law. Vinitisa's troops searched for the perpetrators throughout the Upland Plateau. Unconfirmed information suggested that the alleged perpetrators were in Adova. On 7 March 2007, the Security Council issued Resolution 2233, giving Adova 15 days to apprehend the alleged offenders or to certify that it had conducted a diligent search. The Security Council affirmed Rotania's right to self-defense, and remained seized of the matter. Adova stated that it had no knowledge that the alleged offenders were in its territory. If it did locate them, Adova could not deliver the accused to face trial in Rotania, given the failure of the proposed Military Commission to meet international standards. Rather, Adova would conduct its own prosecutions in accordance with international law.

On 15 March 2007, relying on authority granted by Kirgov, Vinitisa declared Rotania to be in a state of armed conflict with LAPS, whose members were to be considered enemy combatants unprotected by the Geneva Conventions. Vinitisa authorized the interrogation of persons detained on suspicion of participating, or intending to participate in terrorist acts. Authorized interrogation practices included: deprivation of sleep, clothing and food; subjection to extreme heat and cold; forced adoption of stress positions; and prolonged and intense interrogation involving the

infliction of non-lethal pain. Vinitsa's proclamation suggested that such practices did not constitute torture, and were not prohibited by Rotanian law or any international agreement binding on Rotania. Kirgov would not state whether this was official policy, but publicly indicated that if any Rotanian officer acted unlawfully, the matter would be addressed.

On 3 April 2007, Vinitsa stated that Rotania had apprehended Penza and several other LAPS members (the "Adovan detainees") from within Adovan territory at some point in the previous several weeks. The Adovan detainees were held *incommunicado* at Camp Indigo, a Rotanian military base governed by a Status of Forces Agreement in the state of Merkistan. The detainees' location went undisclosed until an Adovan citizen escaped from Camp Indigo on 12 April 2007. The escapee stated that other Adovan citizens, including Penza, were also held at Camp Indigo. He and the other Adovan detainees had been stripped and kept partially clothed, denied adequate food and water, repeatedly hung by the wrists, and subjected to continuous bright light, cold temperatures and loud discordant music. Merkistan's government subsequently demanded that Camp Indigo be closed.

Adova's Prime Minister protested Rotania's intrusion into Adovan territory and the abduction of Adovan citizens. A diplomatic note formally demanded their repatriation. When Rotania failed to respond, Adova recalled its Ambassador and declared Rotania's Ambassador *persona non grata*.

On 26 April 2007, the Adovan detainees were transferred to the Rotanian Military Commission and charged with crimes, including conspiracy, arson, aiding in a terrorist operation, and twenty-two counts of murder in relation to the destruction of the Shrine.

Penza's trial is set for May 2008. Kirgov revealed that the investigation of Penza and the LAPS members permitted the neutralization of a further planned attack on the National Theatre in Rotan.

Kirgov promoted Vinitisa to the rank of General, and Vinitisa retired one week later. Shortly thereafter, Kirgov resigned from office. On 20 July 2007, Vinitisa was taken into custody on Adovan soil for offences related to the *Convention Against Torture* for his role in the abduction and treatment of the Adovan detainees. The indictment named Kirgov as co-conspirator, and Adova filed a request with INTERPOL for an international arrest warrant for Kirgov. Rotania protested both the apprehension of Vinitisa and the issuance of the warrant for Kirgov, claiming that Adova had no legal basis for its exercise of jurisdiction. It further asserted a claim for state immunity.

Due to the increasing tensions generated by these incidents, both countries have dispatched troops to their shared border. After strong urging by the Secretary-General, Adova and Rotania have submitted their dispute to this Court.

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## STATEMENT OF JURISDICTION

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The Republic of Adova and the State of Rotania have agreed to submit, by Special Agreement, the present dispute for final settlement by the International Court of Justice, pursuant to Article 40(1) of the Statute of this Court. Article 36(1) provides that the jurisdiction of this Court comprises all cases which the parties refer to it.

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## SUMMARY OF PLEADINGS

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**I.** Rotania’s military intrusion into Adovan territory violated obligations owed under customary and conventional international law. Absent Adova’s consent, Rotania had no legal basis for exercising enforcement jurisdiction within Adova’s borders. The intrusion was a serious affront to Adova’s sovereignty and territorial integrity, and endangered international peace and security. Security Council Resolution 2233 did not authorize Rotania’s actions. Rotania also did not meet the requirements for self-defense under international law because there was no armed attack and the intrusion was unnecessary. The offences to which Rotania responded cannot be attributed to Adova. Nor is this an exceptional case to which a state of necessity can apply.

The rendition of Adovan citizens also violated prohibitions against transfer to torture and other illegal treatment. These non-derogable obligations bound Rotania in all territories in which it exercised control over Adova’s citizens, including Merkistan. Because Rotania’s express policy was to subject Adovan detainees to torture and other maltreatment at Camp Indigo, Rotania breached its obligations under the International Covenant on Civil and Political Rights (“ICCPR”), the Convention against Torture (“CAT”), and customary law.

**II.** Rotania does not have prescriptive jurisdiction. There is an insufficient connection between the alleged common crimes and Rotania to warrant this exercise of jurisdiction over Adova’s nationals. In the alternative, Rotania may only exercise such jurisdiction where it is exercised reasonably. Rotania’s assertion of extraterritorial prescriptive jurisdiction over these common crimes interferes too greatly with Adova’s

sovereignty for it to be reasonable. Because Rotania lacks prescriptive jurisdiction, Rotania cannot lawfully detain and prosecute Adova's nationals.

**III.** Even if Rotania has valid prescriptive jurisdiction, Rotania's detention, treatment and prosecution of Adova's nationals falls below international minimum standards. Regardless of the nature of the disturbance, Rotania's actions towards Adova's nationals fell below what is required by international law. Rotania violated its obligations to Adova by torturing Adova's nationals and subjecting them to other maltreatment. Rotania also violated its obligations to Adova by detaining Adova's nationals *incommunicado*. Further, the *ad hoc* Military Commissions that Rotania has assigned to prosecute Adova's nationals do not meet international standards of due process because they are not regularly constituted courts with a sufficient degree of independence and impartiality. Rotania's Commissions also violate international law by allowing evidence obtained under coercion to be admitted. Finally, Rotania has breached its obligations to Adova by assigning counsel to Adova's nationals.

Even if the situation in Rotania is merely an internal disturbance, Rotania cannot, nor has it validly derogated from its obligations under the ICCPR and the CAT. Rotania cannot derogate from its obligations not to torture or subject persons to maltreatment. This right requires Rotania not to derogate from other rights that ensure the protection of this peremptory norm. Rotania's derogation is also not proportional to the situation in Rotania. Further, Rotania failed to notify the international community of its intentions to derogate and is bound by all of its obligations until it does so. Finally, Rotania cannot rely on its alleged derogation because the emergency situation in Rotania has ended.

Rotania's human rights and humanitarian obligations bound Rotania in all territories in which it exercised control over Adova's citizens, including Merkistan.

**IV.** Adova was obligated by the CAT to exercise jurisdiction over Gommel Vinitza when he was discovered in Adova. It was further permitted by that instrument to issue an arrest warrant for Michael Kirgov. Alternatively, state practice affirms that torture is a serious international crime over which all states are entitled to exercise jurisdiction. Torture is an offence against humankind which cannot go unpunished. The customary principle of universal jurisdiction therefore permitted Adova to exercise jurisdiction over the alleged offenders.

Gommel Vinitza and Michael Kirgov are not entitled to functional immunity from Adova's lawful exercise of jurisdiction. The CAT requires official involvement as an element of torture. By necessary implication, the obligation to prosecute torture can only be satisfied if functional immunity is precluded. The CAT thus creates an exception to functional immunity. In the alternative, customary international law exempts immunity for serious international crimes such as torture. These customary and treaty exceptions are affirmed by state practice. Immunity thus does not bar Adova's lawful exercise of jurisdiction.

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## QUESTIONS PRESENTED

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Adova requests that this Court adjudge and declare that:

1. the apprehension and rendition of Samara Penza and other Adovan citizens was a violation of Adova's sovereignty and in contravention of international law;
2. the detention and treatment of Samara Penza and other Adovan citizens violated international law;
3. Rotania's prosecution of the detained Adovan citizens before the Rotanian Military Commission, including Samara Penza's prosecution for conspiracy, arson, murder, and aiding in a terrorist operation, violates international law; and
4. Adova's exercise of jurisdiction over Michael Kirgov and Gommel Vinita to prosecute them in Adova for crimes committed against Samara Penza and other Adovan citizens is consistent with international law.

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## PLEADINGS

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### **I. Rotania's apprehension and rendition of Adova's nationals violated obligations owed to Adova.**

#### ***A. Rotania's abduction of Adova's nationals from Adova violated Adova's sovereignty in contravention of international law.***

##### **1. Rotania was not entitled to exercise enforcement jurisdiction within Adovan territory.**

Under international law, states have “plenary” authority to prescribe and enforce laws within their territory.<sup>1</sup> The extraterritorial exercise of a state’s “enforcement” jurisdiction,<sup>2</sup> conversely, is strictly limited. States cannot enforce their laws within another state’s territory without the latter’s consent.<sup>3</sup> To do so violates both customary<sup>4</sup> and conventional<sup>5</sup> international law. Forcible abductions of persons from a foreign state by another state constitute an unlawful exercise of extraterritorial enforcement

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<sup>1</sup> Hugh M. Kindred *et al.*, eds., *International Law, Chiefly as Interpreted and Applied in Canada*, 7<sup>th</sup> Ed. (2006) at 547 [Kindred]; Ian Brownlie, *Principles of International Law*, 6<sup>th</sup> Ed. (2003) at 297, 299 [Brownlie].

<sup>2</sup> Kindred, *supra* note 1 at 547; Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Ed. (1997) at 452-453 [Shaw].

<sup>3</sup> *S.S. Lotus (France v. Turkey)* (1927) P.C.I.J. (Ser. A.) No. 10 at 18-19 [Lotus]; Kindred, *ibid.* at 547; Shaw, *ibid.* at 452-453; Brownlie, *supra* note 1 at 306.

<sup>4</sup> Lotus, *ibid.*; Kindred, *supra* note 1 at 547; Shaw, *ibid.* at 452-453; Brownlie, *supra* note 1 at 306.

<sup>5</sup> *Charter of the United Nations*, art. 2(4) [Charter]; F.A. Mann, “Reflections on the Prosecution of Persons Abducted in Breach of International Law” in *International Law At A Time of Perplexity*, Yoram Dinstein, ed. (1989) 407-421, at 421 [Mann].

jurisdiction and violate the former state's sovereignty and territorial integrity.<sup>6</sup> Such actions are internationally wrongful acts giving rise to state responsibility.<sup>7</sup> Further, they are inimical to the reciprocal respect for sovereignty upon which international order depends. Abductions threaten peace by inviting retaliation.<sup>8</sup> Thus, the United Nations Security Council has stressed that abductions violate sovereignty and "endanger international peace and security."<sup>9</sup>

In this case, Rotania's armed forces invaded Adova and abducted Adova's nationals.<sup>10</sup> Rotania did not attempt to obtain Adova's consent. Adova's Prime Minister vigorously protested the violation of Adova's sovereignty and the illegal process to which its nationals were subjected.<sup>11</sup> Adova thus did not consent to Rotania's acts. Rotania therefore owed Adova an international obligation to refrain from invading Adovan territory. In breaching this duty, Rotania risked inciting armed conflict between the two states.<sup>12</sup> The abduction violated international law, constituting a serious breach of

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<sup>6</sup> Kindred, *supra* note 1 at 598; Shaw, *supra* note 2 at 478; Michael Glennon, "State-sponsored Abduction: A Comment on *United States v. Alvarez-Machain*" (1992) 86 A.J.I.L. 746 at 746-747 [Glennon]; Robert J. Currie, "Abducted Fugitives before the International Criminal Court: Problems and Prospects" (2007) 18 Crim. L. F. 349 at 353-354; Ian Fisher & Elisabetta Povoledo, Italy Seeks Indictments of C.I.A. Operatives in Egyptian's Abduction, N.Y. Times, Dec. 6, 2006, at A12.

<sup>7</sup> Kindred, *supra* note 1 at 598; Brownlie, *supra* note 1 at 320; Mann, *supra* note 5 at 421.

<sup>8</sup> Glennon, *supra* note 6 at 754; *Question Relating to the Case of Adolph Eichmann*, SC Res. 138 (1960), UN SCOR, U.N. Doc. S/4349, (1960) [Eichmann Resolution]

<sup>9</sup> Eichmann Resolution, *ibid*; Charter, *supra* note 5, art. 2(3).

<sup>10</sup> Compromis, para. 31.

<sup>11</sup> Compromis, paras. 32, 35.

<sup>12</sup> Compromis, para. 43.

Adova's sovereignty and territorial integrity, and threatened regional peace and security. This Court should therefore hold Rotania responsible for its violations, and order Rotania to bring the illegal situation to an end by returning the Adovan detainees.

2. Security Council Resolution 2233 did not authorize the abduction of Adova's nationals.

This Court should reject any claim that Resolution 2233<sup>13</sup> authorized Rotania's wrongful acts. Adova would be bound by any Security Council decision authorizing state action<sup>14</sup> that might otherwise breach the customary<sup>15</sup> and conventional<sup>16</sup> prohibition against the use of force. However, Resolution 2233 did not authorize Rotania's actions here.

In order to determine the legal effect of a Security Council resolution, regard must be had "to [its terms], the discussion leading to it, [and] the Charter provisions invoked".<sup>17</sup> The plain language of Resolution 2233 did not authorize Rotania to violate Adova's territorial integrity and sovereignty. Rather, it merely affirmed Rotania's right to

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<sup>13</sup> Compromis, Appendix I.

<sup>14</sup> Charter, *supra* note 5, arts. 24, 25, 39-42; Leslie Green, *The Contemporary Law of Armed Conflict*, 2<sup>nd</sup> Ed. (2000) at 336; Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (2005) at 30 [Gazzini]; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Rep. 16 at para. 116 [Namibia Case].

<sup>15</sup> *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.)*, [1986] I.C.J. Rep. 14, at paras. 188, 191 [Nicaragua Case].

<sup>16</sup> Charter, *supra* note 5, arts. 2(3), (4).

<sup>17</sup> Namibia Case, *supra* note 15 at para. 114.

self-defense.<sup>18</sup> This right exists at customary<sup>19</sup> and conventional<sup>20</sup> international law. It does not depend on affirmation by the Security Council. The affirmation of a pre-existing right does not authorize any Rotanian action.

The Security Council consciously eschewed authorizing Rotanian action. The Security Council has previously authorized member states to “use all necessary means” to enforce its decisions.<sup>21</sup> In the present case, a draft clause authorizing Rotania to use “all necessary means” to apprehend LAPS members was considered, but rejected.<sup>22</sup> Thus, the Security Council’s clear intention was not to allow Rotania to violate Adova’s sovereignty. As such, this Court should find that Resolution 2233 did not authorize any Rotanian action.

3. Rotania’s illegal actions were not legitimate acts of self-defense.

In order to justify its wrongful conduct as an act of self-defense, Rotania must show that it acted within the “strict confines” of Article 51 of the Charter and customary international law.<sup>23</sup> Substantively, Rotania must prove that it was the victim of an “armed

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<sup>18</sup> Compromis, Appendix I.

<sup>19</sup> Nicaragua Case, *supra* note 15 at para. 176; Shaw, *supra* note 2 at 788-789.

<sup>20</sup> Charter, *supra* note 5, art. 51.

<sup>21</sup> SC Res. 678 (1990) UN SCOR, U.N. Doc. S/RES/678 (1990), at operative para. 2; Gazzini, *supra* note 14 at 30, 43-44.

<sup>22</sup> Compromis, Appendix II, statement of President [Zeta].

<sup>23</sup> *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)* (2005), 45 ILM 271 at para. 148 [Congo Case].

attack” at international law.<sup>24</sup> It must show that its acts were a necessary and proportional response to an armed attack,<sup>25</sup> and that the attack was attributable to Adova.<sup>26</sup>

Procedurally, states must report acts of self-defense to the Security Council.<sup>27</sup> Failure to report defensive acts is evidence that the claimant state did not perceive itself to be acting in self-defense.<sup>28</sup> The fact that Rotania did not report its conduct to the Security Council, while not determinative, weighs against any good faith claim to a belief that it acted in self-defense.

i. ILSA’s alleged crimes were not “armed attacks”.

Rotania was not the victim of an armed attack. “Armed attacks” must be distinguished from other “less grave forms” of the use of force.<sup>29</sup> An armed attack consists of “action by regular armed forces across an international border” or action by other irregular forces “sent by or on behalf of a State” to “carry out acts of sufficient gravity as to amount to ... an actual armed attack conducted by regular forces.”<sup>30</sup> Therefore, an “armed attack” requires violence of a scale and effect comparable to an attack by a regular military force.

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<sup>24</sup> Nicaragua Case, *supra* note 15 at para. 195; *Case Concerning Oil Platforms (Iran v. U.S.)* (2003), 42 ILM 1334 at paras. 51, 57 [Oil Platforms Case].

<sup>25</sup> Nicaragua Case, *supra* note 15 at para. 176; Oil Platforms Case, *ibid.* at para. 51.

<sup>26</sup> Oil Platforms Case, *ibid.* at para. 57.

<sup>27</sup> Charter, *supra* note 5, art. 51.

<sup>28</sup> Nicaragua Case, *supra* note 15 at para. 200; Yoram Dinstein, *War, Aggression and Self-defence* (1994) at 211 [Dinstein].

<sup>29</sup> Nicaragua Case, *ibid.* at para. 191.

<sup>30</sup> Nicaragua Case, *ibid.* at para. 195.

The crimes ILSA is alleged to have committed do not approach this level. The alleged offences are three acts of arson resulting in no loss of life, and one act resulting in 23 deaths.<sup>31</sup> This does not resemble any definition of “armed attack” recognized by international law. The use of force against another sovereign state to respond to domestic crimes is not only unlawful, but anathematic to international peace and security. Absent any armed attack, this Court must reject the notion that Rotania acted in self-defense.

ii. Rotania’s wrongful conduct was unnecessary.

Self-defense must be a necessary response to an imminent attack.<sup>32</sup> In order to prove necessity, Rotania must show that the attack required an immediate reaction.<sup>33</sup> This requirement implies that “no alternative means of redress is available” short of the use of force.<sup>34</sup> State practice allows some temporal leeway, but there must nevertheless be a “temporal link” between the attack and the response.<sup>35</sup>

In this case, Rotania’s response was unnecessary. The violence at issue had ceased after 22 February 2007.<sup>36</sup> While it is unclear precisely when Rotania invaded

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<sup>31</sup> Compromis, para. 21.

<sup>32</sup> Shaw, *supra* note 2 at 787; Nicaragua Case, *supra* note 15 at para. 176; Oil Platforms Case, *supra* note 24 at paras. 44, 51; *The Caroline (U.K. v. U.S.)* (1837), 2 Moore 409 [The Caroline]; Gazzini, *supra* note 14 at 146.

<sup>33</sup> *The Caroline*, *ibid*; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (2004) at 149-150 [Gardam].

<sup>34</sup> Dinstein, *supra* note 28 at 202.

<sup>35</sup> Gardam, *supra* note 33 at 150, 152.

<sup>36</sup> Compromis, para. 21.

Adova, at least a month had elapsed since the final incident.<sup>37</sup> Rotania suffered no violence during this period. The Security Council remained seized of the matter, and could have authorized Rotania to take action that it deemed necessary. It took no such decision. Further recourse to the Security Council and other peaceful options remained available. Rotania's response was unnecessary in these circumstances.

- iii. Rotania cannot justify breaching obligations owed to Adova because ILSA's alleged offences cannot be imputed to Adova.

The offences to which Rotania employed counter-force cannot be attributed to Adova. A state must exercise a sufficient degree of control over private individuals in order to impute their acts to the state.<sup>38</sup> The required degree of control has been referred to as "effective"<sup>39</sup> or "overall"<sup>40</sup> control. Alternatively, a state may adopt or endorse the individuals' conduct as its own.<sup>41</sup>

There is no evidence that ILSA is an organ of Adova's government. Nor is there evidence that ILSA acted under Adova's control. Adova's past financial support for

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<sup>37</sup> Compromis, para. 31.

<sup>38</sup> Nicaragua Case, *supra* note 15 at para. 115; *Prosecutor v. Tadic*, (1999) Case No. IT-94-1 (ICTY, Appeals Chamber) at para. 145 [Tadic]; International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56<sup>th</sup> Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) chp. IVE.1, Article 8 [Draft Articles]; Kindred, *supra* note 1 at 652.

<sup>39</sup> Nicaragua Case, *supra* note 15 at para. 115.

<sup>40</sup> Tadic, *supra* note 38 at para. 145.

<sup>41</sup> *U.S. Diplomatic and Consular Staff in Tehran Case (U.S. v. Iran)*, [1980] I.C.J. Rep. 3 at paras. 73-74; Draft Articles, *supra* note 38, art. 11.

LAPS's peaceful activities<sup>42</sup> does not meet any threshold of control required under international law. A controlling state must participate in the planning and supervision of military operations.<sup>43</sup> Indeed, this Court declined to find sufficient control even where a state had planned operations and selected military targets for an insurgent group.<sup>44</sup> Adova has strongly condemned the violence and its perpetrators.<sup>45</sup> The offences to which Rotania responded with counter-force thus cannot be imputed to Adova. This Court should accordingly reject self-defense as justification for Rotania's breach of international obligations owed to Adova.

4. Rotania's violations of international legal duties owed to Adova were not justified by a state of necessity.

A state of necessity may justify an internationally wrongful act.<sup>46</sup> However, necessity will be accepted only in exceptional circumstances, provided that "certain strictly defined conditions" are met.<sup>47</sup> These include that: (1) the wrongful act was related to an "essential interest"; (2) the interest was threatened by "grave and imminent peril"; (3) the act was the "only means" of protecting the interest; and, (4) the act did not

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<sup>42</sup> Compromis, para. 7.

<sup>43</sup> Tadic, *supra* note 38 at para. 145; Nicaragua Case, *supra* note 15 at para. 115.

<sup>44</sup> Nicaragua Case, *ibid.*

<sup>45</sup> Compromis, para. 24.

<sup>46</sup> *Case Concerning the Gabičikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7, at para. 51 [Gabičikovo-Nagymaros]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, [2004] I.C.J. Rep. 1 at para. 140 [Palestinian Wall].

<sup>47</sup> Draft Articles, *supra* note 38, art. 25; Gabičikovo-Nagymaros, *ibid.* at paras. 51, 52; Palestinian Wall, *ibid.* at para. 140.

“seriously impair an essential interest” of the state owed the international obligation which was breached.<sup>48</sup>

Rotania has not met these conditions. It undoubtedly has an “essential interest” in the protection of its nationals. Thus the first requirement is satisfied. Rotania did not face imminent peril, thus precluding the second requirement. This Court has held that imminence “goes far beyond the concept of ‘possibility.’”<sup>49</sup> While further crimes may have been possible, there is no evidence that, at the time Rotania committed the wrongful acts, there was any imminent threat. Rotania also had clear alternatives to the invasion and abductions, including exercising diplomatic means and enhanced domestic crime prevention efforts. The wrongful acts were thus not the only means of protecting Rotania’s interest. Like Rotania, Adova had an essential interest in the protection of its nationals, and in its territorial integrity and sovereignty. Thus, in regard to the fourth requirement, the abductions and invasion seriously impaired both Adova’s interest in protecting its nationals, and in maintaining its sovereignty and territorial integrity. Rotania’s failure to meet any one of these conditions is fatal to any claim to a state of necessity. This Court should therefore reject necessity as a basis upon which Rotania can avoid responsibility.

***B. Rotania’s apprehension and rendition of Adova’s nationals violated international human rights law.***

1. Rotania violated conventional and customary prohibitions on transfer to torture and cruel, inhuman and degrading punishment.

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<sup>48</sup> Draft Articles, *ibid.*; Gabiçıkovo-Nagymaros, *ibid.* at para. 52.

<sup>49</sup> Gabiçıkovo-Nagymaros, *ibid.* at para. 54.

Rotania is bound by conventional international law which strictly prohibits torture and other cruel, inhuman or degrading treatment.<sup>50</sup> This obligation applies whenever a state has custody or control over an individual, regardless of whether this occurs outside the state's territory.<sup>51</sup> Moreover, these conventions also expressly<sup>52</sup> or implicitly<sup>53</sup> prohibit transferring individuals under a state's control to another jurisdiction to face torture and other illegal treatment. State parties are prohibited from transferring an individual to any territory where there are "substantial grounds" or "actual evidence of a real risk" that the transferee will be subjected to torture or cruel, inhuman or degrading punishment.<sup>54</sup> These prohibitions are non-derogable.<sup>55</sup> Moreover, the *jus cogens* norm of

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<sup>50</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 7 (entered into force 23 March 1976) [ICCPR]; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 [CAT], art. 2(1).

<sup>51</sup> UN Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) at para. 10 [General Comment 31]. Palestinian Wall, *supra* note 46 at para. 111; David Weissbrodt & Amy Bergquist, "Extraordinary Rendition: A Human Rights Analysis" (2006) 19 Harv. Hum. Rts. J. 123 at 133 [Weissbrodt, "Rights"].

<sup>52</sup> CAT, *supra* note 50, art. 3(1). Weissbrodt, "Rights", *ibid*, at 143.

<sup>53</sup> Joan Fitzpatrick, "Rendition and Transfer in the War against Terror" (2002-2003) 25 Loy. L.A. Int'l & Comp. L. Rev. 457 at 477; Margaret Satterthwaite, "Rendered Meaningless: Extraordinary Rendition and the Rule of Law" (2006) New York University Public Law and Legal Theory Working Papers, Paper 43 at 19; Weissbrodt, "Rights", *ibid*, at 135; General Comment 31, *supra* note 51 at para. 10.

<sup>54</sup> Weissbrodt, "Rights", *ibid*, at 133-134; *Prosecutor v. Furundžija* (1998) Case No. IT-95-17/1-T (ICTY, Trial Chamber) at para. 144 [Furundžija]; General Comment 31, *ibid*, at para. 12.

<sup>55</sup> CAT, *supra* note 50 Article 2(2); ICCPR, *supra* note 50, art. 4(2); UN Human Rights Committee, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) at para. 7 [General Comment 29].

*pacta sunt servanda* requires that every state carry out its obligations in good faith.<sup>56</sup> Covert rendition of a person to a foreign jurisdiction suggests that the rendering state is attempting in bad faith to circumvent its obligations, thus breaching both the *pacta sunt servanda* obligation and the prohibition against torture.<sup>57</sup>

Moreover, customary international law prohibits torture as a *jus cogens* norm<sup>58</sup> that is non-derogable in any event. It is an *erga omnes* obligation, owed by and to all states in the international community.<sup>59</sup> Thus, with respect to the offence of torture, the International Criminal Tribunal for Yugoslavia has stated that “no legal loopholes have been left.”<sup>60</sup> Rotania therefore was under a concurrent customary obligation not to transfer Adova’s nationals to face torture.

- i. Rotania knowingly transferred Adova’s nationals to face torture and other cruel, inhuman and degrading punishment in violation of international law.

Rotania was obligated under international law to ensure that the abducted Adovan nationals were not subjected to torture or other cruel, inhuman or degrading punishment.

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<sup>56</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980), Article 26 [Vienna Convention]; Kindred, *supra* note 1 at 112; David Weissbrodt & Amy Bergquist, “Extraordinary Rendition and the Torture Convention” (2005-2006) 46 Va. J. Int’l L. 585 at 614-615 [Weissbrodt, “Torture”].

<sup>57</sup> Weissbrodt, “Torture”, *ibid*, at 614-615.

<sup>58</sup> Kindred, *supra* note 1 at 112; Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2007) at 84 [Cryer]; *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, [1999] (U.K. H.L) 2 All E.R. 97 at 114, 159-164 [Pinochet]; Furundžija, *supra* note 54 at para. 153; *Prosecutor v. Delalic et al.* (1998) Case No. IT-96-21-T (ICTY, Trial Chamber), at para. 454 [Delalic].

<sup>59</sup> Furundžija, *supra* note 54 at paras. 152-153; General Comment 31, *supra* note 51 at para. 2.

<sup>60</sup> Furundžija, *supra* note 54 at para. 146.

Rotania is in grave breach of these most fundamental obligations. It is submitted that the detainees were subjected to torture at Camp Indigo, as this was Rotania's express policy.<sup>61</sup> This was territory over which Rotania exercised control under a Status of Forces Agreement.<sup>62</sup> Rotania was obligated to either refrain from transferring the detainees, or to ensure that they were humanely treated. Its failure to do so requires that this Court find that Rotania breached international obligations it owed to Adova and to the international community.

**II. Rotania does not have extraterritorial prescriptive jurisdiction over the alleged crimes committed by Adova's nationals.**

It is submitted that recognition of what animates the debate over state jurisdiction is more important than a formalistic application of what little law exists on the issue. In disputes over extraterritorial prescriptive jurisdiction, the critical issue is the relationship between sovereign states and the degree of intervention into another state's affairs permitted by international law.<sup>63</sup> For a state to assume extraterritorial jurisdiction over a crime it is necessary: (1) "that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction" and (2) "that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed".<sup>64</sup>

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<sup>61</sup> Compromis, Appendix III.

<sup>62</sup> Compromis, para. 30.

<sup>63</sup> Brownlie, *supra* note 1 at 297-98, 308-09; F.A. Mann, "The Doctrine of Jurisdiction in International Law" in 111 Hague *Recueil* (1964, I) 9 at 9-10; Restatement (Third) of the Foreign Relations Law of the United States at para. 403 [Restatement].

<sup>64</sup> Brownlie, *ibid.* at 308-09.

***A. Rotania does not have a sufficient connection to assert extraterritorial prescriptive jurisdiction.***

Only two uncontroversial bases exist upon which a state can assert a sufficient connection for prescriptive jurisdiction: territoriality and nationality.<sup>65</sup> The competence to exercise jurisdiction over a territory is inherent in sovereignty itself and is one of sovereignty's distinguishing characteristics.<sup>66</sup> States also have a sovereign interest in regulating the conduct of their nationals both at home and abroad.<sup>67</sup>

The protective principle should be rejected by this Court as a foundation for Rotania's assumption of jurisdiction over Adova's nationals. The protective principle has been narrowly circumscribed to provide states with jurisdiction only over specific political, economic and immigration offences endangering the security of the state.<sup>68</sup> Conspiracy, simple murder and arson<sup>69</sup> are crimes that have not historically fallen under this head. Even acts of terrorism have not provided a basis for extraterritorial jurisdiction where they are component parts of common crimes.<sup>70</sup> For this Court to accept the protective principle as a basis for a connection between Rotania and the crimes allegedly

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<sup>65</sup> *Ibid.*; *Woodpulp Cases*, Report for the Hearing in the European Court of Justice, 96 I.L.R. 148 at 169; Judgment, 96 I.L.R. 193 at para. 18.

<sup>66</sup> *Island of Palmas Case* (1928), 2 RIAA 829 at 838.

<sup>67</sup> *Supra* note 65; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) at 76 [Prosecuting].

<sup>68</sup> Brownlie, *supra* note 1 at 302-03; Prosecuting, *ibid.* at 77; Restatement, *supra* note 63 at para. 403, com. (f); *Nusselein v. Belgian State*, 17 I.L.R. (1950), no. 35; *Public Prosecutor v. L.*, 18 I.L.R. (1951), no. 48; *Re van den Plas*, 22 I.L.R. (1955) at 205; *Rocha et al. v. U.S.*, 228 F. 2d 545 (1961).

<sup>69</sup> *Compromis*, para. 37, 38.

<sup>70</sup> *Italian South Tyrol Terrorism case*, 71 I.L.R. at 242ff.

committed by Adova's nationals would exceed the accepted scope of this head of jurisdiction.

There is some small connection between the alleged offences and Rotania. Elements of the crimes were committed on both Adovan and Rotanian territory. There is, however, no connection between Adova's nationals and Rotania. Adova has a sovereign interest in regulating the conduct of its nationals. Rotania's limited territorial connection to some elements of the alleged crimes is not a sufficient basis for asserting extraterritorial prescriptive jurisdiction.

***B. Rotania's assertion of extraterritorial prescriptive jurisdiction interferes too greatly with Adova's sovereignty.***

Even if it could successfully be maintained that there is a genuine connection between Rotania and the alleged crimes, Rotania's assertion of extraterritorial prescriptive jurisdiction over common crimes represents a significant intervention into Adova's domestic affairs that outweighs whatever connection exists with Rotania. Rotania's legislative intrusion into Adova is part of a series of illegal acts, including Rotania's military intrusion into Adova,<sup>71</sup> which have interfered profoundly with Adova's sovereignty.

This Court should therefore reject the legality of Rotania's assertion of prescriptive jurisdiction over these common crimes. Rotania's detention and prosecution of Adovan nationals on the basis of this illegal assertion is also unlawful, having its basis in an illegal assertion of prescriptive jurisdiction. In order to remedy this breach, this Court should declare Rotania's assumption of jurisdiction over both the crimes and

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<sup>71</sup> Compromis, para. 31.

Adova's nationals illegal and order that Rotania repatriate Adova's nationals immediately.<sup>72</sup>

**III. Regardless of the nature of the disturbance, Rotania has not met the minimum standard in its detention, treatment and prosecution of Adova's nationals required by international law.**

Both international humanitarian and human rights law provide numerous guarantees for detainees, before and during their detention as well as throughout the trial process. These rights are not mutually exclusive, nor does human rights law only begin when the need for humanitarian law ends. Both apply to states during periods of armed conflict.<sup>73</sup> Only human rights law applies to states in times of peace by virtue of the explicit provisions of conventional humanitarian law.<sup>74</sup> Yet even then the law developed with respect to each area is not discrete: abstractions in human rights law are made concrete through references to rights protected by humanitarian law.<sup>75</sup> This reciprocal relationship is equally true of humanitarian law.<sup>76</sup>

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<sup>72</sup> *Supra* note 64.

<sup>73</sup> *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J. Rep. 226 at 240; *Palestinian Wall*, *supra* note 46 at para. 106.

<sup>74</sup> *1949 Geneva Conventions*, (1950) 75 U.N.T.S. 31, 85, 135 and 287, arts. 2 and 3 [CA]; *Protocol I to the Geneva Conventions*, (1977) 1125 U.N.T.S. 3, arts. 1(3), (4) [PI]; *Protocol II to the Geneva Conventions*, (1977) 1125 U.N.T.S. 609, art. 1 [PII].

<sup>75</sup> ICCPR, *supra* note 50, arts. 4(1), 5(2); General Comment 29, *supra* note 55 at para. 16; *Summary Records of the Sixth Session*, UNHRC, U.N. Doc. E/CN. 4/SR. 196 (1950) Mr. Beaulieu (France), Ms. Roosevelt (USA), at paras. 20, 21 and 23 [*Sixth Session*].

<sup>76</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (2005) at 299-306 [Customary IHL]; Françoise Hampson, "Other areas of customary law in relation to the Study" in Elizabeth Wilmshurst & Susan Breau, eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 50 at 58-73; Lindsay Moir, *The Law of Internal*

The mutual reinforcement and applicability of international humanitarian and human rights law means that, with respect to detainee rights, it is only relevant to characterize an emergency situation as either an armed conflict or as merely an internal disturbance in circumstances where a treaty or customary rule provides for a higher level of treatment than that afforded by the minimum standard, such as prisoner of war status.<sup>77</sup> At a minimum, international law prohibits torture and cruel or inhuman treatment<sup>78</sup> and enforced disappearances.<sup>79</sup> International law also provides that no one may be convicted or sentenced except pursuant to a fair trial affording all essential judicial guarantees.<sup>80</sup>

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*Armed Conflict*, (2002) at 193-231; Theodor Meron, “The Humanization of Humanitarian Law” (2000) 94 *AJIL* 239.

<sup>77</sup> 1949 *Geneva Convention*, (1950) 75 U.N.T.S. 135 [GCIII].

<sup>78</sup> CA 3, *supra* note 74; 1949 *Geneva Convention*, (1950) 75 U.N.T.S. 31, art. 12(2) [GCI]; 1949 *Geneva Convention*, (1950) 75 U.N.T.S. 85, art. 12(2) [GCII]; GCIII, *ibid.*, arts. 17(4), 87(3), and 89; 1949 *Geneva Convention*, (1950) 75 U.N.T.S. 287, art. 32 [GCIV]; PI, *supra* note 74, art. 75(2); PII, *supra* note 74, art. 4(2); Customary IHL, *ibid.* at 306-08, 315-19; ICCPR, *supra* note 50, arts. 7, 10; CAT, *supra* note 50; *Standard minimum rules for the treatment of prisoners*, ESC Res. 663 C (XXIV), UN ESCOR, 1957; *Standard minimum rules for the treatment of prisoners*, ESC Res.2076 (LXII), UN ESCOR, 1977; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res. 43/173, UN GAOR, 76<sup>th</sup> Plen. Sess., (1988) [*Body of Principles*]; Jaime Oraa, *Human Rights in States of Emergency in International Law*, (1992) at 96 [Emergency].

<sup>79</sup> GCIII, *ibid.*, arts. 122, 123, 125; GCIV, *ibid.*, arts. 136, 140, 142, 143; Customary IHL, *ibid.* at 340-41; Francoise Hampson, “Fundamental Guarantees” in Elizabeth Wilmshurst & Susan Breau, eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 282 at 294-95; ICCPR, *ibid.*, art. 9; Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. Doc. CAT/C/USA/CO/2 (2006) at paras. 16-17; *Declaration on the Protection of All Persons Against Enforced Disappearance*, GA Res. 47/133, UN GAOR (1992) [*Enforced Disappearances*]; *Body of Principles*, *ibid.* at § 4, 11, 12, 16, 19, 20, 29, 34, 37; Restatement, *supra* note 63 at para. 702(c).

<sup>80</sup> CA 3, *ibid.*; GCI, *ibid.*, art. 49(4); GCII, *ibid.*, art. 50(4); GCIII, *ibid.*, arts. 102-08; GCIV, *ibid.*, arts. 5, 66-75; PI, *ibid.*, arts. 71(1), 75(4); PII, *supra* note 74, art. 6(2);

The scope and content of these guarantees will be considered in more detail in what follows.

It is submitted that this Court does not need to rely on any higher standard under either area of law to declare Rotania's detention, treatment and prosecution of Adova's nationals to be a violation of Rotania's obligations to Adova. Rotania's violation of the common minimum standard is sufficient to demonstrate that Rotania's obligations to Adova have not been met. In light of this violation, this Court should declare Rotania's conduct illegal and order the repatriation of Adova's nationals.

***A. Rotania violated the international minimum standard in its treatment of Adova's nationals.***

For the Court's convenience, the rights afforded to detainees by this minimum standard have been divided into two categories: 1. those obligations breached as a result of Rotania's detention and treatment of Adova's nationals; and 2. those obligations breached by way of Rotania's prosecution of Adova's nationals.

1. Rotania's detention and treatment of Adova's nationals breached Rotania's obligations to Adova.
  - i. Rotania has violated its obligation not to torture Adova's nationals.

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Customary IHL, *ibid.* at 352-71; ICCPR, *ibid.*, arts. 14-15; *Basic Principles on the Independence of the Judiciary*, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, GA resolutions 40/32 of 11/29/1985 and 40/146 of 12/13/1985, UN GAOR, 40th Session, Supp. no.53, UN Doc. A/40/53 [Independence]; *Basic Principles on the Role of Lawyers*, 8<sup>th</sup> Un Congress on the Prevention of Crime and Treatment of Offenders, Havana, U.N. Doc. A/CONF.144/28/Rev.1 (1990) [Lawyers].

International law prohibits the use of torture<sup>81</sup> even in times of emergency or war.<sup>82</sup> Indeed, the prohibition of torture is a *jus cogens* norm.<sup>83</sup> For imposing state responsibility, the definition of torture most widely accepted<sup>84</sup> is that drawn from the *CAT*.<sup>85</sup> To fall under this definition, it must be established that: (1) a Rotanian official acted in a manner that caused Adova's nationals to experience "severe pain or suffering, whether physical or mental" and that (2) Rotanian officials performed the act for the purpose of obtaining information or a confession from Adova's nationals or for the purpose of punishing Adova's nationals for an act they or a third party committed or were suspected of having committed.

Rotania's treatment of Adova's nationals amounted to torture. Rotanian agents stripped Adova's nationals and left them partially clothed, provided them with inadequate food and water, exposed them to continuous bright light and uncomfortably cold cell temperatures, tormented them with loud, discordant music and hung them by their wrists from chains.<sup>86</sup> These activities clearly caused Adova's nationals severe pain and

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<sup>81</sup> *Supra* note 78.

<sup>82</sup> *1949 Geneva Conventions*, *supra* note 74; ICCPR, *ibid.*, art. 4(2); CAT, *ibid.*, art. 2(2).

<sup>83</sup> *Supra* note 58.

<sup>84</sup> *Prosecutor v. Kunarac et al.* (2002), IT-96-23&23/1 (ICTY, Appeals Chamber) at paras. 146-147; *Prosecutor v. Kvočka et al* (2005)., IT-98-30/1 (ICTY, Appeals Chamber) at para. 284.

<sup>85</sup> CAT, *supra* note 50, art. 1.

<sup>86</sup> *Compromis*, paras. 33, 34.

suffering, both as individual acts and through their infliction in concert.<sup>87</sup> All of this was done by Rotania to extract information or confessions from Adova's nationals regarding alleged criminal activities.<sup>88</sup> This Court cannot condone Rotania's torture of Adova's nationals.

In the alternative, Rotania's shocking treatment of Adova's nationals amounts to cruel and inhuman treatment. Cruel and inhuman treatment is also prohibited by international law.<sup>89</sup> This protection is non-derogable.<sup>90</sup> "[S]erious mental or physical suffering or injury or ... a serious attack on human dignity" constitutes cruel and inhuman treatment.<sup>91</sup> Even if Rotania's treatment is not torture, Rotania at least violated its obligations not to treat Adova's nationals with cruelty throughout their detention.

- ii. Rotania violated its obligations by 'disappearing' Adova's nationals.

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<sup>87</sup> Committee Against Torture, Concluding observations of the Committee against Torture: Israel, UN GAOR, 52d Sess., Supp. No. 44, U.N. Doc. A/52/44 (1997) at paras. 253-260; *Torres Ramirez v. Uruguay*, Com. 4/1977, UN Human Rights Committee, U.N. Doc. A/35/40, Annex VIII (1980) at paras. 2, 18; *Conteris v. Uruguay*, Com. 139/1983, UN Human Rights Committee, U.N. Doc. A/40/40, Annex XI (1985) at paras. 1.4, 10; *Arzuada Gilboa v. Uruguay*, Com. 147/1983, UN Human Rights Committee, A/41/40, Annex VIII (1985) at para. 13.2; *Sendic Antonaccio v. Uruguay*, Com. 63/1979, UN Human Rights Committee, A/37/40, Annex VIII (1981) at paras. 2.4, 20; UN Human Rights Committee, General Comment 20, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001); *Aksoy v. Turkey* (1996), 26 Rep. 1996-VI 2260 at para. 64 [Aksoy]; Delalic, *supra* note 58 at paras. 463-467.

<sup>88</sup> Compromis, para. 38.

<sup>89</sup> ICCPR, *supra* note 50, art. 7.

<sup>90</sup> *Ibid.*, art. 4(2).

<sup>91</sup> Delalic, *supra* note 58 at ara. 551.

The prohibition of enforced disappearances is a rule of international law.<sup>92</sup> Enforced disappearances “imply violations of human rights such as the right to life, freedom and personal safety, the right not to be subjected to torture or cruel, inhuman or degrading treatment, the right not to be arbitrarily arrested or detained, and the right to a just and public trial.”<sup>93</sup> *Incommunicado* detention, of the kind Rotania imposed on Adova’s nationals, is considered one of the main factors historically to have facilitated torture.<sup>94</sup> Even authorities that have accepted the necessity of enforced disappearances in some limited circumstances have asserted that detainees should only be held *incommunicado* for a period far shorter<sup>95</sup> than the (minimum) ten days that Rotania held Adova’s nationals in secret.<sup>96</sup> Rotania’s rendition of Adova’s nationals to Merkistan<sup>97</sup> makes it even less likely that they could effectively challenge their treatment and is a further sign of Rotania’s bad faith.<sup>98</sup>

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<sup>92</sup> *Supra* note 79.

<sup>93</sup> 24<sup>th</sup> International Conference of the Red Cross and Red Crescent, Manila 1981, Resolution II.

<sup>94</sup> Emergency, *supra* note 78 at 109; Customary IHL, *supra* note 76 at 340.

<sup>95</sup> UN Human Rights Committee, General Comment 8, *Compilation of General Comments*, 16<sup>th</sup> Sess., HRI/GEN/1/Rev.1 (1994) at para. 2; *Stephens v. Jamaica*, Com. 373/1989, UN Human Rights Committee, U.N. Doc. A/49/40, Annex VIII (1995) at para. 9.6; *Grant v. Jamaica*, Com. 597/1994, UN Human Rights Committee, U.N. Doc. A/51/40, Annex VIII (1996) at para. 8.2; *De Jong, Baljet and Van den Brink v. Netherlands* (1984), 77 E.C.H.R. (Ser. A) 3 at paras. 51-53; *Brogan et al. v. United Kingdom* (1988), 145-B E.C.H.R. (Ser. A) 11 at para. 59.

<sup>96</sup> *Compromis*, paras. 31, 34.

<sup>97</sup> *Compromis*, paras. 30, 31, 33.

<sup>98</sup> *Lopez Burgos v. Uruguay*, Com. 52/1979, UN Human Rights Committee, U.N. Doc. CCPR3C/13/D/52/1979 (1981) at para. 13 [Burgos].

2. Rotania's failure to provide Adova's nationals with minimum due process guarantees breached Rotania's obligations to Adova.

- i. Rotania violated its obligations by failing to provide Adova's nationals with a trial by an independent, impartial and regularly constituted court.

International law requires that only a regularly constituted court may try a person.<sup>99</sup> This right implies a court that is both independent and impartial.<sup>100</sup> *Ad hoc* tribunals should not try detainees where the ordinary courts are operating normally.<sup>101</sup> While military personnel should be tried by military courts (where those provide essential guarantees of independence and impartiality),<sup>102</sup> civilians should never be so tried.<sup>103</sup>

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<sup>99</sup> CA 3, *supra* note 74; PI, *supra* note 74, art. 75; PII, *supra* note 74, art. 6(2); Nicaragua *supra* note 15 at para. 218; ICCPR, *supra* note 50, art. 14(1); Independence, *supra* note 80 at para. 5.

<sup>100</sup> GCIII, *supra* note 77, art. 84; PII, *supra* note 74, art. 6(2); PI, *ibid.*; ICCPR, *ibid.*; *Universal Declaration on Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 at art. 10 [Declaration]; Independence, *ibid.* at paras. 1, 2, 11-14; UN Human Rights Committee, General Comment 13, *Compilation of General Comments*, 21<sup>st</sup> Sess. HRI/GEN/1/Rev.1 (1994) at para. 4 [General Comment 13]; UN Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32 (2007) [General Comment 32].

<sup>101</sup> General Comment 13, *ibid.*

<sup>102</sup> GCIII, *supra* note 77, art. 84.

<sup>103</sup> GCIV, *supra* note 78, art. 66; UN Human Rights Committee, Concluding Observations: Slovakia, CCPR/79/Add.79, 60<sup>th</sup> Sess.(1997) at para. 20; UN Human Rights Committee, Concluding Observations: Chile, CCPR/C/79/Add.104, 65<sup>th</sup> Sess. (1999) at para. 9; UN Human Rights Committee, Concluding Observations: Poland, CCPR/C/79/ADD.110, 66<sup>th</sup> Sess. (1999) at para. 21; UN Human Rights Committee, Concluding Observations: Cameroon, CCPR/C/79/Add.116, 67<sup>th</sup> Sess. (1999) at para. 21; UN Human Rights Committee, Concluding Observations: Kuwait, CCPR/CO/69/KWT, 69<sup>th</sup> Session (2000) at para. 10; UN Human Rights Committee, Concluding Observations: Syria, CCPR/CO/71/SYR, 71<sup>st</sup> Sess. (2001) at para. 17; UN Human Rights Committee, Concluding Observations: Uzbekistan, CCPR/CO/71/UZB, 71<sup>st</sup> Sess. (2001) at para. 15;

Rotania's use of military commissions is entirely unnecessary. Rotanian officials affirm that the state of emergency in Rotania has ended.<sup>104</sup> Even if Rotania has jurisdiction to prosecute, there is no reason that Rotania could not prosecute Adova's nationals in their ordinary civilian courts.

The use of extraordinary courts-martial is especially worrying in the present case because of President Kirgov's statements concerning the accused.<sup>105</sup> The Rotanian President has sent a clear message to these *ad hoc* commissions that he believes the accused to be guilty. These temporary courts are not sufficiently structurally independent<sup>106</sup> to ignore such a powerful statement made by the official whose order constituted their existence.<sup>107</sup> This places another international norm in serious jeopardy: the presumption of innocence.<sup>108</sup>

- ii. Rotania violated its obligations to Adova by denying Adova's nationals the assistance of counsel of their own choice.

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African Commission on Human and Peoples' Rights, *Media Rights Agenda v. Nigeria*, Com. 224/98 at paras. 61-62.

<sup>104</sup> Compromis, paras. 31, 37.

<sup>105</sup> Compromis, para. 38.

<sup>106</sup> *Ciraklar v. Turkey* (1998), 94 E.C.H.R. 1998-VII 3059 at para. 38.

<sup>107</sup> Compromis, paras. 25, 38.

<sup>108</sup> PI, *supra* note 74, art. 75(4)(d); PII, *supra* note 74, art. 6(2)(d); Customary IHL, *supra* note 76 at 357-58; ICCPR, *supra* note 50, art. 14(2); Declaration, *supra* note 100, art. 11; Body of Principles, *supra* note 78, Principle 36; General Comment 29, *supra* note 55 at para. 11.

The accused must be able to raise a meaningful defense.<sup>109</sup> This includes the right of an accused to counsel of her choice.<sup>110</sup> This right cannot be departed from entirely. Rotania explored no alternatives, such as providing the detainees with a choice between specially vetted counsel. Instead, Rotanian military lawyers are assigned to the Adovan defendants without the detainees' input.<sup>111</sup> Forcing Adova's nationals to accept Rotania's choice of counsel is a breach of Rotania's international obligations to Adova.

iii. Rotania violated its obligations by authorizing trials of Adova's nationals in which the law of evidence does not meet international standards.

Lax standards of admissibility encourage torture by authorizing *ex post facto* the temptation of state officials to obtain evidence against an accused or third party through prohibited means.<sup>112</sup> In order to safeguard against this, it is a rule of international law that evidence obtained as the consequence of torture or cruel and inhuman treatment should be inadmissible for any purpose.<sup>113</sup> This principle also corresponds, and is provided

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<sup>109</sup> GCI, *supra* note 78, art. 49(4); GCII, *supra* note 78, art. 50(4); GCIII, *supra* note 77, arts. 84(2), 96(4); GCIV, *supra* note 78, arts. 72(1), 123(1); PI, *ibid.*, art. 75(4)(a); PII, *ibid.*, art. 6(2)(a); ICCPR, *ibid.*, art. 14(3); Declaration, *ibid.*

<sup>110</sup> Customary IHL, *supra* note 76 at 360-361; ICCPR, *ibid.*; Lawyers, *supra* note 80 at para. 1; *Viana Acosta v. Uruguay*, Com. 110/1981, UN Human Rights Committee, U.N. Doc. A/39/40, Annex XI (1984) at paras. 13.2, 15; *Saldias de Lopez v. Uruguay*, Com. 52/1979, UN Human Rights Committee, U.N. Doc. CCPR/C/OP/1 (1984) at para. 13; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Com. 218/98 at para. 28.

<sup>111</sup> *Compromis*, para. 26.

<sup>112</sup> International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (Geneva, 1983) [States of Emergency] at 462.

<sup>113</sup> CAT, *supra* note 50, art. 15.

further protection by the rule of international law that detainees should not be compelled to make statements, especially confessions of guilt.<sup>114</sup> It is clear that Rotania obtained “confessions” from Penza and other Adovan nationals by subjecting them to torture or cruel and inhuman treatment.<sup>115</sup> This is exacerbated by the disproportionate decision by Rotania to allow prosecution witnesses to testify in anonymity and to withhold critical evidence from the Adovan defendants.<sup>116</sup> The fact that Adova’s nationals cannot challenge the admissibility of coerced evidence is a breach of Rotania’s obligations to Adova.

***B. Rotania did not, nor could it derogate from international human rights law.***

It may be objected in the present case that there is a fundamental difference between international humanitarian and human rights law because there is no corollary in the former to the derogation clause contained in the latter.<sup>117</sup> On its face, the *ICCPR* characterizes some rights as expressly non-derogable, while others may be derogated from in states of emergency so long as any derogation is strictly proportional.<sup>118</sup> If an absolute distinction between derogable and non-derogable rights were accepted, it would mean that humanitarian and human rights law could not be reconciled into a minimum

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<sup>114</sup> GCIII, *supra* note 77, art. 99; PI, *supra* note 74, art. 75(4)(f); PII, *supra* note 74, art. 6(2)(f); ICCPR, *supra* note 50, art. 14(3)(g); Body of Principles, *supra* note 78, Principle 21.

<sup>115</sup> *Compromis*, paras. 33, 34.

<sup>116</sup> *Ibid.*, para. 26. ICCPR, *supra* note 50, art. 14(3); *Kostovski v, Netherlands* (1989), 166 E.C.H.R. (Ser. A) 3 at para. 41.

<sup>117</sup> ICCPR, *ibid.*, art. 4.

<sup>118</sup> *Ibid.*, art. 4(1); Emergency, *supra* note 78 at 140-70.

standard except with respect to those rights that are also expressly non-derogable in human rights law. In practice, however, the situation is legally more complex than this simple binary relationship suggests. In the present case, Rotania could not, nor did it derogate from its obligations to Adova in its detention, treatment and prosecution of Adova's nationals. As such, there is no justification for Rotania's violation of its obligations to Adova regardless of the nature of the disturbance.

1. Rotania's obligation not to torture Adova's nationals is non-derogable.

Rotania's obligation not to torture Adova's nationals is non-derogable in the *ICCPR*.<sup>119</sup> This obligation is also not subject to any limitation under the *CAT*.<sup>120</sup> The protection of these non-derogable rights requires that other rights that are characterized as derogable, such as judicial guarantees and other due process rights, not be departed from lest the protection against torture become hollow.<sup>121</sup> As such, any rights that Rotania allegedly derogated from that are necessary for the protection of Adova's nationals from torture also cannot be the subject of derogation.

2. Even if Rotania could derogate, Rotania's derogation from its obligations to Adova's nationals was disproportionate.

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<sup>119</sup> *Compromis*, para. 33.

<sup>120</sup> *CAT*, *supra* note 50, art. 2.

<sup>121</sup> General Comment 29, *supra* note 55 at paras. 13-15; General Comment 32, *supra* note 100; *Habeas Corpus in Emergency Situations* (1987), Inter-Am. Ct. H.R. (Ser. A) No. 8, at para. 35; *Judicial Guarantees in States of Emergency* (1987), Inter-Am. Ct. H.R. (Ser. A.) No. 9, at para. 41.

In practice there can almost never be a justification for departing entirely from judicial guarantees and due process rights.<sup>122</sup> The essential rights must remain, even if they are modified for the circumstances of the emergency situation.<sup>123</sup> These minimum due process rights are also those protected by humanitarian law in times of international armed conflict. It is difficult, even impossible to imagine a scenario that would place the state's security in greater jeopardy than war would, thus allowing a state to justify departing from these minimum standards in peacetime.<sup>124</sup> Certainly, the present emergency in Rotania involving alleged acts of common arson and murder<sup>125</sup> does not pose a greater risk to the state than would an international armed conflict. As such, there is no excuse for Rotania to depart from fundamental guarantees in its detention, treatment and prosecution of Adova's nationals.

3. Rotania cannot rely on derogation because Rotania failed to notify Adova of the derogation.

Even if derogation from certain rights were possible under the convention, Rotania cannot rely on this exception to its obligations under the *ICCPR* because it has

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<sup>122</sup> General Comment 29, *ibid.* at para. 16; *Sixth Session, supra* note 75; Emergency, *supra* note 78 at 106-24; *Body of Principles, supra* note 79, Scope; Enforced Disappearances, *supra* note 79, arts. 1, 7, 9; States of Emergency, *supra* note 112; International Law Association, *Minimum Standards of Human Rights Norms in a State of Emergency*, Report of the Committee of the Enforcement of Human Rights Law to the 61<sup>st</sup> Conference, Paris, 1984 (London, 1986) at 56-96.

<sup>123</sup> *Lawless v. Ireland* (1961), 3 E.C.H.R. (Ser. A) 26 at para. 37; *Ireland v. United Kingdom* (1978), 25 E.C.H.R. (Ser. A) 4 at paras. 218-19; Aksoy, *supra* note 87 at para. 83.

<sup>124</sup> General Comment 29, *supra* note 51 at 16.

<sup>125</sup> Compromis, paras. 37, 38.

failed altogether to abide by the prescribed notification procedure.<sup>126</sup> These requirements are strictly interpreted<sup>127</sup> and Rotania continues to be bound by the whole *ICCPR* until the international community receives notification of its derogation.<sup>128</sup> Adherence to the notification requirement represents the major way that the international community monitors obligations arising from the *ICCPR*.<sup>129</sup> This avoids arbitrary state conduct and prevents *ex post facto* ratification of unlawful derogations that render the convention meaningless.<sup>130</sup> Adova must be informed of Rotania's intentions to maintain the international rule of law. This Court should therefore reject the validity of Rotania's alleged derogation because of Rotania's failure to provide notice to Adova and the international community.

4. Rotania cannot rely on any derogation in its treatment of Adova's nationals because the emergency has ended.

Rotania cannot rely on the declared state of emergency<sup>131</sup> to derogate from its obligations under the *ICCPR*. Derogation is limited to the temporal scope of the emergency.<sup>132</sup> By the admissions of Rotanian officials that emergency has ended.<sup>133</sup>

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<sup>126</sup> *ICCPR*, *supra* note 50, art. 4(3).

<sup>127</sup> *Weinberger Weisz v. Uruguay*, Com. 28/1978, UN Human Rights Committee, U.N. Doc. A/36/40, Annex IX (1980) at para. 14; *Landinelli v. Uruguay*, Com. R.8/34, UN Human Rights Committee, U.N. Doc. A/36/40 (1978) at para. 8.3.

<sup>128</sup> *Camargo v. Columbia*, Com. 45/1979, UN Human Rights Committee, U.N.Doc. A/37/40, Annex XI (1982) at para. 12.2; Emergency, *supra* note 78 at 64ff.

<sup>129</sup> Emergency, *ibid.* at 58-59; *Sixth Session*, *supra* note 75 at 10.

<sup>130</sup> Emergency, *ibid.*

<sup>131</sup> Compromis, para. 25.

<sup>132</sup> Emergency, *supra* note 78 at 27-28.

There is therefore no justification whatsoever for Rotania having departed from the international minimum standard in its detention, treatment and prosecution of Adova's nationals.

***C. Rotania was bound by international human rights law in its treatment of Adova's nationals even though some of Rotania's abuses occurred outside of Rotanian territory.***

Human rights law applies to state agents in areas where the state exercises effective control even if the area is not within a state's municipal territory.<sup>134</sup> This includes Rotania's military base, Camp Indigo, located in Merkistan, over which Rotania exercises effective control under a Status of Forces Agreement.<sup>135</sup> This Court's recent jurisprudence also extends the application of international human rights law to the activities of a state's military forces even absent effective control over a territory.<sup>136</sup> It is also generally recognized that a state is bound by international human rights law in its treatment of persons under its control,<sup>137</sup> which includes in this case Adova's nationals.<sup>138</sup> Rotania cannot evade its human rights obligations to Adova simply by rendering Adova's nationals outside of Rotania's municipal territory.

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<sup>133</sup> Compromis, paras. 31, 37.

<sup>134</sup> *Bankovic and others v. Belgium and 16 other members of NATO*, 52207/99, Admissibility Decision of 12 December 2001, (2002) 41 *ILM* 517 at para. 71.

<sup>135</sup> Compromis, para. 30.

<sup>136</sup> *Palestinian Wall*, *supra* note 46 at para. 111; *Congo Case*, *supra* note 23 at 217, 220.

<sup>137</sup> *Palestinian Wall*, *ibid.*; General Comment 31, *supra* note 51 at para. 10; *Burgos*, *supra* note 98 at para. 12.1ff; *Fundamental Guarantees*, *supra* note 78 at 286.

<sup>138</sup> Compromis, paras. 30, 31, 33.

**IV. Adova's exercise of jurisdiction over Kirgov and Vinitza for torture complies with international law.**

***A. Adova can exercise jurisdiction over Vinitza and Kirgov for the crime of torture.***

**1. Adova was required by the CAT to exercise its jurisdiction over Vinitza.**

Adova was obligated to apprehend Vinitza. Parties to the CAT must exercise jurisdiction over torture offences when the accused is present in the state's territory.<sup>139</sup> Where a state is satisfied that an alleged offender is in its territory, it must prosecute or extradite the offender.<sup>140</sup>

Vinitza's decree authorized practices which meet the definition of torture under the CAT.<sup>141</sup> On his order, torture and other illegal treatment became state policy. These illegal practices were carried out.<sup>142</sup> Under the CAT, officials who order torture must be "made criminally responsible."<sup>143</sup> Thus, when Vinitza was apprehended, Adova was obligated to either prosecute or extradite him. Rotania has indicated that it would not accept Vinitza's extradition.<sup>144</sup> As such, Adova is bound to prosecute Vinitza in order to fulfill its international obligations.

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<sup>139</sup> CAT, *supra* note 50, art. 5(2).

<sup>140</sup> CAT, *supra* note 50, arts. 6(1). 7(1).

<sup>141</sup> Compromis, para. 29, Appendix III; CAT, *ibid.*, art. 1.

<sup>142</sup> Compromis, para. 33.

<sup>143</sup> Sir Nigel Rodley & Matt Pollard, "Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (2006) 2 E.H.R.L.R. 115 at 123 [Rodley]; CAT, *supra* note 50, art. 4(1).

<sup>144</sup> Compromis, para. 41.

2. Adova's exercise of jurisdiction over Kirgov was permitted by the CAT.

States parties to the CAT whose nationals are tortured may exercise jurisdiction over the offender.<sup>145</sup> Adova was therefore entitled to exercise jurisdiction over any person alleged to be complicit in the torture of Adova's nationals.

President Kirgov, like Vinitisa, was complicit in the torture of Adova's nationals. Kirgov authorized Vinitisa to take all measures deemed necessary to apprehend the alleged offenders.<sup>146</sup> "Acquiescence" and "consent", including "tacit consent", each forms a sufficient basis for individual liability under the CAT.<sup>147</sup> As Commander-in-Chief of Rotania's military and head of government, Kirgov publicly assured that any unlawful acts would be addressed "promptly and surely."<sup>148</sup> Yet Kirgov did not disavow Vinitisa's order. Instead, he adopted it as official policy, promoting Vinitisa for acts prohibited by the CAT.<sup>149</sup> Under these circumstances, this Court should find that Adova was entitled to issue a warrant for Kirgov's arrest.

3. Adova's exercise of jurisdiction over Kirgov and Vinitisa was permitted under the principle of universal jurisdiction.

All states are entitled under customary international law to prosecute and punish "international crimes", regardless of where the crime was committed, on the basis of

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<sup>145</sup> CAT, *supra* note 50, art. 5(1)(c).

<sup>146</sup> Compromis, para. 25.

<sup>147</sup> Rodley, *supra* note 143 at 123; Committee against Torture, Conclusions and Recommendations on Azerbaijan, U.N. Doc. CAT/C/CR/30/1 (2003) at para. 5(b).

<sup>148</sup> Compromis, para. 29.

<sup>149</sup> Compromis, para. 38.

universal jurisdiction.<sup>150</sup> Torture has long been recognized as an “international crime” of *jus cogens* status under customary international law, imposing individual liability on offenders.<sup>151</sup> State practice affirms the existence of this principle.<sup>152</sup> For the reasons noted above, this Court should find that Adova can prosecute Vinitsa and Kirgov on the additional basis of its universal jurisdiction over torture offences.

***B. State immunity does not bar Adova from exercising jurisdiction over Vinitsa and Kirgov.***

1. Functional immunity is inapplicable in this case by necessary implication of the CAT.

Functional immunity, or immunity *ratione materiae*, attaches to official acts carried out by state agents.<sup>153</sup> Since it attaches only to official acts, not to the official, the immunity continues when the official leaves office.<sup>154</sup> Under the CAT, however, a crucial element of the offence of torture is “official involvement.”<sup>155</sup> Thus, by definition, torture

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<sup>150</sup> Kindred, *supra* note 1 at 559; Brownlie, *supra* note 1 at 564; Antonio Cassese, “When May Senior State Officials be Tried for International Crimes? Some Comments on the *Belgium v. Congo Case*” (2002) 13:4 E.J.I.L. 853 at 859 [Cassese].

<sup>151</sup> Kindred, *supra* note 1 at 112; Cryer, *supra* note 58 at 84; Pinochet, *supra* note 58 at 114; Furundžia, *supra* note 54 at paras. 153, 156.

<sup>152</sup> *In re Yamashita* (1945) 327 U.S. 1 (U.S. S.C.) [Yamashita]; *Attorney-General of Israel v. Eichmann*, Israel, (1962) 36 I.L.R. 277 (Supreme Court) at 287, 299-304 [Eichmann]; *Barbie*, France, Cour de Cassation (1983) 78 I.L.R. 125 at 128-131 [Barbie]; Pinochet, *supra* note 58 at 159-164, 118-189.

<sup>153</sup> Pinochet, *ibid.* at 112; Cryer, *supra* note 58 at 423.

<sup>154</sup> Cryer, *ibid.* at 424; Kindred, *supra* note 1 at 290; Pinochet, *ibid.* at 112-119.

<sup>155</sup> Cryer, *ibid.* at 431; CAT, *supra* note 50, art. 1(1).

must be considered an official act.<sup>156</sup> The application of functional immunity to torture would preclude the obligation to criminalize torture under the CAT.<sup>157</sup>

Therefore, “the CAT must, by necessary implication, have removed the immunity which would ordinarily attach to an act of official or governmental character.”<sup>158</sup> The British House of Lords has noted “that international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the CAT conditions were satisfied and, at the same time, require immunity to be granted to those properly charged.”<sup>159</sup> Thus, the CAT creates an “express exception” to any functional immunity.<sup>160</sup> Any other interpretation would lead to the absurd result that no state agent could ever be held liable for torture under the CAT. This would subvert the international community’s express intention to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”.<sup>161</sup>

2. In the alternative, there is a customary exception to functional immunity for the international crime of torture.

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<sup>156</sup> *Jones v. Minister of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, [2007] 1 All E.R. 113 (U.K. H.L.), at paras. 19, 71, 81 [Jones]; Cryer, *ibid.* at 431.

<sup>157</sup> Cryer, *ibid.*; Rodley, *supra* note 142 at 136.

<sup>158</sup> Jones, *supra* note 156 at paras. 80, 81. Pinochet, *supra* note 58 at 114-115, 169, 190; Cryer, *ibid.*

<sup>159</sup> Jones, *ibid.* at para. 19.

<sup>160</sup> Jones, *ibid.* at para. 81.

<sup>161</sup> CAT, *supra* note 50, Preamble.

Under customary international law, there is an exception to functional immunity for serious international crimes such as torture.<sup>162</sup> This exception is clearly affirmed by state practice, as evidenced by domestic jurisprudence and decisions of international tribunals.<sup>163</sup> For the reasons noted above, Vinitsa and Kirgov are accused by Adova of committing torture, an international crime. As such, this Court should also reject as a matter of customary international law, any claim they may have for functional immunity.

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<sup>162</sup> Rodley, *supra* note 143 at 136; Cassese, *supra* note 148 at 870-873; Marina Spinedi, “State Responsibility v. Individual Responsibility for International Crimes” (2002) 13:4 E.J.I.L. 895 at 895-899; Steffen Wirth, “Immunity for Core Crimes? The ICJ’s Judgment in the Congo v Belgium Case” (2002) 13:4 E.J.I.L. 877 at 884-889.

<sup>163</sup> Eichmann, *supra* note 152; Yamashita, *supra* note 152 at 13-17; Barbie, *supra* note 152 at 128-131; Furundžia, *supra* note 54 at para. 140; Pinochet, *supra* note 58 at 152, 163, 179.

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## CONCLUSION AND PRAYER FOR RELIEF

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For the foregoing reasons, Adova respectfully requests this Honourable Court to adjudge and declare:

- (a) Rotania's apprehension and rendition of Adova's nationals illegal under international law;
- (b) Rotania's detention, treatment and prosecution of Adova's nationals illegal under international law;
- (c) Adova's exercise of jurisdiction over Kirgov and Vinitisa to prosecute them for crimes committed against Adova's nationals is consistent with international law.